

OPENING OF THE LEGAL YEAR 2023

ADDRESS BY GURVIR SINGH SANDHU

PRESIDENT OF THE ADVOCATES ASSOCIATION OF SARAWAK

13th JANUARY 2023 @ MIRI

Salutations:

The Right Honourable Tun Tengku Maimun binti Tuan Mat, the Chief Justice of Malaysia;

The Honourable Tun Md Raus Sharif, Former Chief Justice of Malaysia and member of the Judicial Appointment Commission;

The Right Honourable Tan Sri Datuk Amar Abang Iskandar bin Abang Hashim, Chief Judge of Sabah and Sarawak and acting President Court of Appeal

The Honourable Dato' Mohamad Zabidin Mohd Diah, Federal Court Judge (also covering the duties of the Chief Judge of Malaya);

Honourable Members of the Judicial Appointments Commission;

Honourable Judges of the Federal Court, Court of Appeal, High Court and Judicial Commissioners;

The Honourable Deputy Minister in the Prime Minister's Department (Law and Institutional Reforms);

The Honourable Solicitor General I of Malaysia;

The Honourable State Attorney General of Sabah and the Honourable Deputy State Attorney General of Sarawak;

President of the Sabah Law Society;

Representative from the Malaysian Bar and Law Society of Brunei Darussalam;

Mayor of Miri;

Heads and Representatives of the Federal and State Departments, International Organisations and Agencies, Judicial and Legal Officers, Members of the Bar, members of the Media and Legal Publishers,

Distinguished guests

Ladies and Gentlemen.

Introduction

1. A very warm welcome I bid to all whom have taken valuable time to be with us here in Miri Sarawak on occasion of the Opening of the Legal Year (OLY) of the High Court of Sabah and Sarawak. As the “tuai rumah”, it is apt that I am given the opportunity to address My Ladies and My Lords first to extend our welcome and commendations to our guests.

There are few pleasures enjoyed by the President of the Advocates Association of Sarawak (**AAS**), and to be upstanding here today to address My Ladies and My Lords is definitely one of them. This is especially so on the occasion of the Opening of Legal Year 2023 being held this year in Miri. It is, for me as a local Mirian, a very familiar place to be in, as an advocate primarily practicing in Miri, I am profoundly familiar with this court house, and especially, this court room where the resident judge, Yang Arif Dean Wayne Daly presides. The last OLY was held here in 2018, in my view, it is quite apt for the Opening of Legal Year to return in its usual format right here in Miri, as we feel that had set the benchmark for such events in 2018. Since then, we have noted that each OLY has come to be grander than the previous years.

And for this year, we hope it will be no less.

2. At this juncture, it would be remiss of me if I did not highlight the tremendous efforts and the working relationship the Association has with the Sarawak Judiciary, which cultivated to a successful OLY. Allow me to convey the Associations sincere appreciation towards, the PMTSS Tuan Nixon Kennedy Kumbong, PMRENSSS Puan Dayang Ellyn, Pengarah Mahkamah Sarawak Tuan Steve Ritikos and their committee for working very hard to ensure that this OLY is nothing less than a success. To the Advocates Association of Sarawak (Miri Branch) under the Chairman Mr Lee Jin Wen and his committee – nothing less than the best was expected from you, and I pleased to see that your committee’s hard work has come to fruition. We must also record our gratitude to Yang Arif Dean Wayne Daly – for being available to us at all times and whom has indulged us with his advice and guidance.

I will be the first person to admit that the preparations for the OLY were not always smooth sailing, nonetheless, we celebrate the fact that we are able to make decisions with consensus to achieve the common goals of the OLY – this of course is a virtue of a mature relationship we enjoy with the Sarawak Judiciary.

3. We have arrived in the year 2023. ‘Learn from yesterday, live for today, hope for tomorrow.’¹ While we direct our attention towards the future that lies ahead of us, we must recognize the difficult past that we had endured, a past where we have lived with the Covid-19 pandemic. In the span of the past 2 years and despite the crippling lockdowns and restrictions, we celebrate the fact that the courts had not halt the wheels of justice.

¹ Albert Einstein

The pandemic has affected our lives in unprecedented ways, however, there was some silver lining as the pandemic did bring about conducive changes by way of acceptance of technology to the way we practice law. An example of this is the latest system of the e-Kehakiman Sabah and Sarawak (eKSS) Project for Video Conferencing Module called V-COSS presently used in courts and the continued use of online platforms for the purposes of proceeding with cases remotely.

We must pay tribute towards the Judiciary, the court staffs, advocates and other stakeholders whom have embraced the positive changes made to legal practice, ultimately ensuring that the wheel of justice continues to spin unencumbered by the circumstances faced globally.

My Ladies and My Lords,

Malaysia Agreement 1963 (“MA63”)

4. Upon the advent of the Dewan Rakyat giving recognition to the MA63 under the definition of the “the Federation”, Articles 1(2) and Article 160(2) of the Federal Constitution have been amended and now gives express recognition to the Malaysia Agreement 1963 in the Federal Constitution. Since then, while we acknowledge that there has been some positive steps taken by the government, the Association associates itself with the view that we can do more to remedy the fissures of the terms of the Malaysia Agreement 1963. Of particular interest to the Association are the following amendments which ought to be made to the Federal Constitution or relevant Acts in order to bring the same more in line with the Malaysia Agreement 1963:-

- a). Amendments to Article 46(1) of the Federal Constitution to reflect the position envisaged in the Malaysia Agreement 1963 that not one territory would have a two-thirds (2/3) majority in the Dewan Rakyat. With the present composition of the Dewan Rakyat having 222 elected members and Sabah and Sarawak having only 56 seats;
 - b). Amendments to the Court of Judicature Act 1964 to reflect the position that there should be a Judge with Borneo judicial experience sitting on the appellate panel hearing appeals which originate from Sabah and Sarawak – as a reflection of Chapter 3 of the Inter-Governmental Committee (IGC) Report 1962 read together with Article 8 of the Malaysia Agreement 1963; and
 - c). Amendments to Article 122AB of the Federal Constitution to restore the powers of the Head of State (TYT) of Sabah and Sarawak to appoint Judicial Commissioners – which is to correct the position reflected under Section 16(3) of the Malaysia Agreement 1963.
5. As of late, there have been reports suggesting that Sarawak should compromise on certain rights under the MA63, rights which includes Sarawak's autonomy over immigration matters. The Association notes with much relief that the State Government through the YAB Premier had taken the position that Sarawak **will not compromise** with it comes to the autonomies granted to the State as enshrined in the Malaysia Agreement 1963, especially relating to the state's control over immigration. By this, the exclusive right of audience for Sarawak Advocates would be well preserved in tandem with Section 8 of the Advocates Ordinance (Sarawak Cap. 110) and Article 161B of the Federal Constitution.

Sarawak should not yield on any terms assured under the Malaysia Agreement 1963.

My Ladies and My Lords,

The Rule of Law

6. The rule of law in Malaysia is guaranteed in the Federal Constitution as well as Federal and State Laws. There is little doubt that fundamental to the rule of law, is independence of the judiciary and its institutions. Judicial independence is particularly of such importance as a free society exists only so long as it is governed by the rule of law – the rule which binds the governors and the governed, administered impartially and treating equally all those who seek its remedies.² Therefore, the rule of law is a fundamental principle that ought to concern not just lawyers but also every citizen as it is so fundamental to our lives. The principle that Malaysia is a ‘government of laws and not of men’ should be embedded within all of layers of society.

The success of the judicial and legal system in Malaysia hinges very much on judicial independence and the rule of law at its heart.

7. The term “rule of law” covers a number of important principles which resolves around judicial independence, access to justice and legal representation. I will highlight a few points which require some attention in this address.
8. On the issue of judicial independence, we celebrate the fact that the Judiciary independence is guaranteed under Part IX of the Federal

² The Hon Sir Gerard Brennan, AC KBE, The Australian Judicial Conference, 1996

Constitution which incorporates several safeguards to enhance judicial integrity and judicial independence. Such safeguards are constitutionally provided to stop interference from the Executive or Legislature. Of specific interest is Article 127 of the Federal Constitution which stipulates that the conduct of a Judge of the Federal Court, Court of Appeal or a High Court shall not be discussed in either House of Parliament except on a substantive motion, and shall not be discussed in the Legislative Assembly of any State.³

9. Judicial independence is often misunderstood as something that is for the benefit of the judge - it is not. It is the public's guarantee that a judge will be impartial. Judicial independence protects individuals and the community. The protection of judicial independence is enforced so that the public will know they were dealt with fairly, that they received a fair trial, and a fair hearing from a judge insulated from any improper outside influence, and by a judge who was bound only by his or her oath of office - which is to render justice according to law.⁴

To efficiently meet its objective, judicial independence must also protect judges. This role, to a great extent, is played by Judges themselves, and it is a role played not out of self-interest, but as an obligation to the public, which has entrusted them with decision-making power and to whom they are ultimately accountable to maintain the public's confidence in the judiciary and its institutions.

10. Another aspect of judicial independence is judicial immunity. In the performance of the judicial functions, all judges are immune from the law of torts and crime by the following provisions of law:-

³ See Article 127 of the Federal Constitution (Part IX)

⁴ Canadian Judicial Council, 2016

- a). Section 6(3) of the Government Proceedings Act 1956 which provides that no proceedings shall lie against the Government by virtue of Section 5 in respect of anything one or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has connection with the execution of judicial process;
- b). Section 14 of the Courts of Judicature Act 1964 which provides that no Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty;
- c). Section 11(1) The Defamation Act 1957 (Revised 1983) provides absolute privilege on reports of judicial proceedings including pleadings, judgments, sentences or findings; and
- d). Article 122AB(1) of the Federal Constitution also provides immunities for Judicial Commissioners.

11. At present, the prevailing obstacle to achieve improved judicial independence hinges upon the necessary amendments which are required to be made upon the Judicial Appointments Commission Act 2009 and the Federal Constitution. In order to maintain clear separation of powers between the Legislative, the Judiciary and the Executive, the Advocates Association of Sarawak takes the position that the following amendments to the act has to be seriously looked into by the Government:-

- a). Amendments to Section 27 of the Judicial Appointments Commission Act 2009 which provides the Prime Minister with the privilege of requesting for additional names for consideration with respect to vacancies to the officers of the top four Judges, Federal Court and Court of Appeal;
- b). Amendments to Article 122B of the Federal Constitution to remove the privilege of the Prime Minister in advising the Yang di-pertua Agong on appointment of Judges to the Federal Court, Court of Appeal and High Court;
- c). Amendments to Section 5(1)(f) of the Judicial Appointments Commission Act 2009 which provides the Prime Minister with the privilege of appointing four eminent persons to the Judicial Appointment Commission comprising of nine members; and
- d). to improve the composition of the Judicial Appointment Commission upon representation of stakeholders which include the respective bar associations in Malaysia and the Attorney General, and the composition of such commission should be reflective of the Malaysian Society.

My Ladies and My Lords,

- 12. On the issue of access to justice, the association takes the position that the citizen has to have effective access to the laws and to the courts.

In regards to access to the laws, the publication of decisions of the courts made available to the public for free definitely fulfills this requirement.

Citizens can only get justice if there they are able to find out relatively easily what their rights and duties are. If there is any scope for improvement, it would be for the Attorney General's chambers to publish all relevant laws applicable in Malaysia upon its websites and make such laws available for easy access to all.

13. In regards to access to courts, generally, the courts in Sarawak is operating in an efficient manner wherein cases do proceed as scheduled and timeously. Although there were some disruptions caused by the lockdown owing to the Covid-19 pandemic, the courts have taken steps to ensure that cases are not left idling in court, such steps which includes proceeding with cases using remote communication platforms or technology. This initiative has since been codified through the amendments made under Rules of Court (Amendment) 2020 and corresponding amendments to the Courts of Judicature Act, the Subordinate Courts and the Subordinate Courts Rules.
14. The Association also wishes to highlight that even during the peak of the Covid-19 pandemic at a time of crippling lockdowns, the Sarawak Judiciary was still actively hearing cases involving offences under the Movement Control Oder (MCO). One example of this was the commendable actions of Yang Arif Dean Wayne Daly, when Yang Arif had dutifully made himself available and to travel some 500 over kilometers on road all the way from Miri to Sibü to hear such revision cases taken up by the courts own motion. This shows that despite what was happening globally, the wheels of justice continued to spin, enabling the citizen access to much needed justice.

My Ladies and My Lords,

15. The physical aspect of access to courts requires that the court houses in Sarawak be adequately maintained and adequately equipped to accommodate all layers of the society, which include the disabled or the elderly. We note that at present, the only court house in Sarawak installed with a lift facility, is here in Miri. There is an obvious need for this situation to be improved to create a more conducive environment for the elderly and disabled in the court houses in Sarawak.

Another issue I am constrained to highlight is that it is imperative for the courts to efficiently and timely maintain the court facilities. This will assist to circumvent any breakdown of facilities - an example of this is the prevailing situation faced by the users (which include the hundred over staff working thereat) of Mahkamah Kuching, where the air-conditioning system of the court house have been down since July 2022. The Pengarah Mahkamah Sarawak, Tuan Steve Ritikos have been working tirelessly with the Association's Kuching Branch to find way to mitigate the situation, and a contractor has since been appointed to change the faulty chiller system. However, we note that such works will only be completed in August 2023. I note with despair the conditions faced by stakeholders and users of the court house in Kuching, as I am informed that despite the Association's Kuching Branch having installed two industrial fans in every court room, the conditions remain unbearable as there is very poor ventilation. I sincerely hope that more urgent actions can be taken to alleviate his issue, and I do hope that Yang Berhormat Tuan Ramkarpal Singh A/L Karpal Singh, the Deputy Minister in the Prime Ministers Department (Law and Institutional Reforms), who is in attendance today, would take heed of the issues faced by us.

16. The Advocates Association of Sarawak welcomes the government's decision, relayed by the then Minister in the Prime Minister's Department (Parliament and Law) Dato Sri Dr Wan Junaidi Tuanku Jaafar that four new court houses have been proposed to be built in Limbang, Sri Aman, Mukah and Kapit. This is definitely a step in the right direction to grant access to justice to the citizens living outside the big towns and cities in Sarawak.

My Ladies and My Lords,

17. On the matter of access to legal representation, I am pleased to record that the practice of advocates is spread throughout the large lands that make up Sarawak. From the north in Lawas, to the South in Kuching, members of public would not face difficulty in finding suitable lawyers to provide them legal representation. I am pleased also to update that the AAS through its members have been playing an active role in fulfilling its social responsibility in providing access to legal representation to the part of the society which requires assistance. In this regards, I note as follows:

a). **YBGK**

The AAS have been actively conducting YBGK training sessions to equip advocates with the necessary skills required for providing legal representation under YBGK.

We have also noted that there has been an increase in advocates taking up YBGK cases throughout Sarawak, and we look forward to equip more advocates to take up trials and appeals in the near future.

The yearly operating expenses of YBGK is around RM12 million a year. However, with much disappointment, I record that despite the

operating fund request of RM12.8 million made by the YBGK headquarters for 2023, the Government only approved RM5.5million, and this sum is supposed to be shared among all lawyers in Malaysia.

What is clear here is that despite the attempts made by advocates to attend to YBGK cases and to ensure that all levels of the society has legal representation, it is the government whom has indirectly created a hurdle by underfunding YBGK.

b). **Assigned Counsel**

The AAS under each of its four branches have been working together with the Sarawak Judiciary to set up a list of advocates whom are qualified to take up assign counsel cases in the High Court. At present there are 65 lawyers on his list who fulfil the requirements put forth by the judiciary to take up capital punishment cases.

I am pleased to note that our members have taken up all requests for assigned counsel and there are no accused persons being unrepresented

c). **CSR**

The AAS has always believed in contributing to society. With this in mind AAS has in the past carried out various outreach programmes. However due to the various Movement Control Orders (MCO) imposed by the government as a result of the global COVID 19 pandemic, this has not been possible. AAS is committed together with various stakeholders, in continuing with these outreach programmes now that we are in endemic stage.

The byproduct of such programmes is the opportunity created for the interior folks to have access to justice through obtaining legal representation/advice. The AAS shall continue its efforts on this front and have scheduled more programs in the near future. We look forward to having My Lady and My Lords to join us during such programs.

My Ladies and My Lords,

18. For an issue which requires attention, the Association raises with concern the lack of access to justice for children, especially children in rural areas. We urge the relevant stakeholders to carry out amendments to the Sexual Offences to Children Act (SOACA) to ensure that children are not criminalised in the zeal of the Public Prosecutor carrying out their duties.

Further, there is only one special court dealing with sexual offences against children which is located in Kuching. To ensure that there is access to justice for all children especially children who live in the interior, it is only fit that existing courts in all districts must be equipped with video link facilities to ensure the protection of vulnerable witnesses especially children.

It is also crucial for all stakeholders dealing with children especially DPPs Judges and Interpreters, to be given specialised trainings. It is time to create specialists in this area.

My Ladies and My Lords,

Proposed Amendments to the Federal Constitution

19. During the Opening of Legal Year 2023 ceremony held at the Putrajaya International Convention Centre, the Attorney General, during his address to the bench, announced that there are plans to propose for the Bahasa Malaysia translation of the Federal Constitution to be made formal via Article 160B of the Federal Constitution. The Advocates Association of Sarawak views such plans with much concern as the association was never consulted over such intentions. Nonetheless, in order to avoid any ambiguity, the Association associates itself with the position that such proposals should not be made. The current format of the Federal Constitution have been tried and tested in the Courts of Law, where there are landmark cases decided mainly upon interpretation of singular words.

English is widely used in commonwealth countries, therefore, one is able to draw upon decided cases of other commonwealth countries as legal precedent to assist to determine any ambiguity over the Federal Constitution. However, due to the lack of jurisprudence in the national language as Malaysia is the only country using Bahasa Malaysia, one would not have such similar privileges.

Another significant point is that a number of other agreements like the Federation of Malaya Independence Act 1957 and of particularly interest to Sarawak, the Malaysia Agreement 1963 the Inter-Governmental Committee (IGC) Report 1962, are all written in English. There is a foreseeable situation that the courts in Malaysia will be flooded with considerable constitutional crises over such plans.

The Association notes that in a recent press release, the YAB Premier had taken the position that the State Government shall continue to use English as its official language alongside with the national language. We take solace upon the position that the Federal Constitution cannot be amended in such a manner as proposed by the Attorney General in view of Article 161(3) of the Federal Constitution which requires the consent of Sabah and Sarawak before such amendments are made to the Federal Constitution.

My Ladies and My Lords,

20. At the same Opening of Legal Year 2023 ceremony held at the Putrajaya International Convention Centre, the President of the Bar Council, Ms Karen Cheah Yee Lynn during her address to the bench, highlighted a number of issues and proposed amendments to laws which require urgent attention - the Advocates Association of Sarawak associates itself with the proposals made by the President of the Bar Council.

My Ladies and My Lords,

Conclusion

21. To our members – it is right and proper for legal practitioners to make the strongest cases possible and do their utmost for their clients – always within the confines of the law. We must always remember that we owe our first duty to the courts.

To the courts, I reaffirm the Association's pledge of our members to do their duty, to assist the Court with diligence and integrity, for the enhancement of legal practice and services in Sarawak.

On behalf of the Advocates Association of Sarawak, we extend to Your Ladyships and Your Lordships, and all present here today warm wishes and prayers for good health, continuing wisdom, strength and fortitude for the year ahead.

My Ladies and My Lords, I am much obliged.

Gurvir Singh Sandhu

President of the Advocates Association of Sarawak

13th January 2023