OPENING ADDRESS BY THE RT. HON. TUN ARIFIN ZAKARIA
CHIEF JUSTICE OF MALAYSIA
AT THE INTERNATIONAL MALAYSIA LAW CONFERENCE
THE ROYALE CHULAN, KUALA LUMPUR
24 SEPTEMBER 2014 @ 9.30 A.M.

YB Senator Datuk Doris Sophia Ak Brodi,
Deputy President of the Senate;

The Honourable Chief Justice Geoffrey Ma,
Chief Justice of the Court of Final Appeal, Hong Kong;

Yang Amat Arif Tan Sri Dato' Seri Md Raus bin Sharif,
President, Court of Appeal;

YAA Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin,
Chief Judge of Malaya;

YAA Tan Sri Datuk Seri Panglima Richard Malanjum,
Chief Judge of Sabah & Sarawak;

Your Excellencies Ambassadors and High Commissioners;

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

Honourable Judges from various jurisdictions;

Members of the Senate and House of Representatives;

Mr. Christopher Leong,
President, Malaysian Bar;

YBhg. Datuk G.B.B Nandy @ Ganesh,
President, Sabah Law Association;

Mr. Khairil Azmi Bin Mohd. Hasbie,
President, Advocate Association of Sarawak;

Mr Mark Livesey, QC
President Australian Bar Association

Mr. Brendan Navin Siva,
Chairperson IMLC 2014 Organising Committee;

Distinguished Speakers and Guests;

Ladies and Gentlemen,

RESHAPING THE LEGAL PROFESSION AND REFORMING THE LAW

Introduction

As Chief Justice of the host nation for the International Malaysian Law Conference 2014, aptly entitled 'Reshaping the Legal Profession and Reforming the Law', it is both an honour and a privilege to welcome this distinguished international audience as well as fellow Malaysians to this symposium. I should say at once that the theme of this conference embraces a myriad of issues, which I cannot possibly hope to cover in this relatively short opening address. What I will do is to touch on specific themes by way of contribution to the debate on this subject. The theme of the conference is of significance as it signals the need to address the increasing challenges confronting the legal profession, both in Malaysia and internationally, on several fronts.

The lawyer, and indeed the judge of today, is required increasingly to deal with multi-jurisdictional disputes or transactions. Needless to say, the force propelling such powerful change is that of

globalization. The necessity for individual countries to increase or maintain their domestic trade figures, comprises a basic/primary demand for all modern economies. The volume of trade globally in these past decades has increased multi-fold. This is particularly true of this region, as there has been a clear shift towards the Asia-Pacific region in terms of trade and investment since the 2008 global economic crisis. The number of successful multinational corporations/enterprises emanating from the Asia Pacific region has also increased significantly, indicating a clear increase in capital flows towards the region, signifying in turn, a shift from a previously dominant capital flow to the West, to a more balanced capital flow Eastwards. [1] (Malaysia is ranked among the top ten economies with the most business-friendly regulations). This manifold increase in trade has in turn altered the landscape within which our lawyers and the judiciary operate. It is no longer tenable for the lawyer of today to have a purely national focus. Complex transnational transactions require the corporate lawyer of today to advise his international clients on domestic laws and regimes, while being entirely conversant with cross-border perspectives in order to meet the demands of his domestic clients who are investing in foreign jurisdictions. Equally, the dispute resolution lawyer is required to resolve disputes of an international nature in court proceedings, as well as arbitral tribunals, both domestic and foreign. Indeed the legal profession, including the judiciary, is being forced to adapt to the far more rapidly evolving world of trade and investment, which continues to accelerate at an exponential rate. In the face of such

[1] See Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence by Sundaresh Menon, Chief Justice of Singapore, Singapore Journal of Legal Studies [2013] 231-252

growth, it would be imprudent for the profession to fail to recognize the need for transformation. The nature of legal practice is changing, and the change is irreversible.

The Role of the Lawyer in Today's Society

Before considering the nature of these changes, allow me to consider more particularly the role of the lawyer in today's society. A lawyer's role encompasses his duties in relation to his clients, the profession itself, the courts, the state and public interest generally. This is encapsulated in the article "United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies"[2] by the President and Fellows of Harvard College states:-

> *In addition to judges, lawyers are the main actors in a country's legal system and are an important means by which individuals or groups gain access to justice and resolve disputes in a peaceful and transparent fashion. According to the U.N. Basic Principles on the Role of Lawyers ("BPRL"), lawyers play a vital role in "furthering the ends of justice and the public interest. "An independent legal profession comprised of a cadre of* ***well-trained and ethical lawyers*** *can ensure due process and protect fundamental rights by pursuing the necessary remedies when these rights have been infringed upon. Thus, lawyers can facilitate public confidence in the fairness and efficacy of the legal system which is essential not only to the formal and institutional development of the rule of law, but also to instilling the values that make up the informal aspects of the rule of law in a democratic society. Moreover, as members of the broader legal profession as a whole, lawyers can contribute to the law reform process and serve as advocates for judicial sector reform and judicial independence……"*

[2] Harvard Human Rights Journal, Volume Spring 2 ISSN 1057-5

The role of lawyers in the administration of justice must therefore be recognized. The function of the profession is to perform services vital to the well-being of the community. On a daily basis in the functioning of the courts, the legal profession plays a pivotal role.

The concept underlying the role of the lawyer in a democracy such as Malaysia is one we have inherited from the Western world. Perhaps the most often cited role of the legal fraternity in Malaysia is in terms of being vigilant in relation to adherence to the rule of law as guaranteed by the Federal Constitution[3]. This is borne out by the mission statement of the Malaysian Bar- '*Upholding the cause of justice without fear or favour'*. It's role, in monitoring that the rights guaranteed by the Constitution, are duly honoured by the State and its subjects, is well-recognised and documented. Indeed to this end, the citizenry or society as a whole, looks to the members of the legal profession, not only to protect the development of the law, but to safeguard the process of democracy. In so far as society or the public is concerned, therefore, the lawyer does not merely carry out the duties he is professionally trained for, but assumes a special role in safeguarding the sanctity of the legal system and more importantly to uphold the rule of law.

The Judiciary recognizes and acknowledges that it cannot discharge its duties and administer justice without the participation of a competent Bar. As an officer of the court, a lawyer not only represents his clients, but has a special responsibility for the quality

[3] See Inaugral Speech by Y.K. Sabharwal, Chief Justice of India in the Two Day National Summit of Legal Fraternity "Lawyers India -2006" Organised by the Bar Council of India

of justice.[4] This is best expressed by Raja Azlan Shah (as His Highness then was) when he said that:-

> "Integrity is a fundamental requirement of justice. Without integrity there can be no rule of law. It is the responsibility of every lawyers not only to have integrity but to strenuously ensure that the dishonest and corrupt do not have a place in our system of law and justice.[5]"

Maintaining Standards of Conduct and Learning at the Bar

However it is equally important to point to the other aspirations/functions/duties of the Malaysian Bar today, which include improving the standards of conduct and learning amongst members of the legal profession in Malaysia, facilitating the acquisition of legal knowledge amongst practitioners and protecting and assisting the public in all matters pertaining to or ancillary to the law. It therefore cannot be gainsaid that the profession is indeed a noble one. It gives rise to the expectation that all lawyers carry out their duties professionally and competently. It is envisaged that the common standard applicable to most, if not all lawyers is that they are diligent, methodical, systematic and committed to the law and that they present at all times to the courts, arguments which are premised on an objective study and research of the law.

Such a goal requires unremitting efforts on the part of the Bar to inculcate the basic tenets of competent legal practice across the nation. With an increasing influx of law graduates into the field this

---

[4] See Ohio Rules of Professional Conduct

[5] Per Raja Azlan Shah (as HRH then was) in a speech entitled 'The New Millennium : Challenges and Responsibilities given at UKM on 23.8.1997.'

task takes on considerable urgency. The lack of a consistent standard of basic competence amongst the varied members of the profession cannot be denied. This in turn cries out for a clear threshold level to be demarcated for all members of the profession, so as to ensure a minimum level of competence prior to practice. The need for a common professional examination to ensure that standards of competence and ethics are maintained has been evinced and stated over many years, but regrettably, little progress has been made. The repercussions of a less than stringent threshold level to maintain ethics and competence can be dire, particularly for legal professionals themselves. Greater incompetence gives rise to a greater number of malpractice suits the costs of which are borne by the profession itself. There is therefore a real need to implement a mechanism that ensures that basic standards are met. Such a need is best answered by the introduction of a Common Bar Examination. The question often posed is who should conduct this examination. I am of the view that the Common Bar Examination should jointly be conducted by the universities themselves with greater input from the Bar. This is a matter that needs to be explored further by all concerned.

Continuing Legal Education

Another important aspect of competence is the need for continuing legal education. It is generally accepted that the purpose of continuing legal education is to refresh and enhance the skills of lawyers and to keep them updated on important changes to the law. It certainly improves the public image of lawyers. Intrinsic to this goal is the development of both written and oral advocacy. It is a truism that advocacy in the courts require language skills, oral skills,

research skills and analytical skills. This composite body of skills which I term ‘lawyering’ skills are only acquired by study, training, commitment and years of practice. In this connection, allow me to make an observation. I would certainly welcome a high standard of professionalism at the Bar. These lawyers level of preparedness can only be matched with their high water-mark of scrupulous attention to ethics and discipline. Issues of indiscipline, of poor etiquette out of flouting of the rules of practice should be addressed immediately and the recalcitrant should be dealt with. This is critical. The attainment of this goal is particularly important to enable members of the Malaysian legal profession to both acquire and maintain levels of expertise that are equivalent to the best standards globally.

The Judiciary too has recognized and acknowledged the importance of such continuing education. Judges in Malaysia are required to participate in, and attend continuing legal education as the Judiciary has recognized the importance of ensuring that judges keep up with the constantly evolving nature of the law. To this end, the Judicial Academy under the auspices of the Judicial Appointments Commission was established a few years back with the stated aim of enhancing and maintaining standards of competency in varied areas of the law.

Technology

The need to comprehend and utilize technology in the field of law in legal practice, the courts or in a transactional practice cannot be underscored. In so far as the legal profession globally is concerned, it is envisaged by writers such as Richard Susskind that legal

institutions and lawyers are poised to change radically over the next few decades. This is attributable largely to the giant strides in technology. In the near future it is not impossible that we will begin to see virtual courts, businesses based on the internet globally, online document production and even web-based simulated practice. Legal markets will be liberalised, as we in Malaysia have recently acknowledged, which increases the need to meet, as far as possible, international standards of practice in order to remain competitive. This in turn requires a radical change in the mindset of members of the legal profession.

THE TRANSFORMATION OF THE JUDICIARY IN THE 21ST CENTURY

In as much as I have advocated the need for positive change in the legal profession, it must be said that the Judiciary is conscious and cognizant of the need to constantly evolve to meet society's changing needs. As an institution it is subject to continuous public scrutiny. As a public institution constituted to resolve disputes on issues that embrace social, moral, economic and political questions, a major challenge facing the Judiciary is the increasing public demand for judicial accountability.[6]

To address these demands, the Judiciary has, since 2009 embarked on a series of reforms with the goal of improving our delivery system and the quality of justice. It started with the implementation of structural changes to the court system coupled with measures aimed at enhancing judicial performance both on an individual and

[6] See Transforming the Judicial Landscape, Chapter 4, The Malaysian Judiciary (published by the Malaysian Judiciary)

collective basis. The clear goal was to achieve a more transparent, efficient and expeditious delivery system with a concomitant enhancement in the quality of judgments handed down. These structural as well as soft skill changes, have altered the landscape of litigation in this country irrevocably. The use of the e-court systems, the introduction of specialist courts including specialist commercial, environment, admiralty, corruption and most recently the construction courts has proved particularly successful. Both the delivery time, and the quality of judgments handed down in these courts, have been welcomed by the legal fraternity at large. Malaysia today is one of the jurisdictions that is able to assure litigants an expeditious outcome to dispute resolution, given the nine month target time fixed for each case. Coupled with an efficient appellate system that seeks to dispose of appeals, particularly from the specialist courts, within six months of delivery of decision from the court of first instance, a litigant is well able to anticipate and plan his resources to complete dispute resolution within a relatively fixed time frame. The certainty that this affords the public should go a considerable way towards increasing confidence in the efficiency of the court system. All this would not have been possible without the extensive use of technology in the courts from the initial stage of filing through to the trial process, at all levels of the court system throughout the country. The e-Court which was introduced in 2009 comprised of the following components namely, e-filing, a case management system, queue management system and court recording and transcription. The change that was brought about through the use of advanced electronic systems has transformed the litigation landscape in Malaysia.

Quality

As I mentioned earlier together with this increase in efficiency are the continuous efforts of the judiciary to enhance the quality of the judgments that are handed down at all levels of the Court hierarchy. As stated in the World Bank Report of 2011, the judiciary recognizes that the 'low hanging' fruits of an efficient and expeditious delivery system have been procured, while the next step/stage of achieving greater intellectual depth and growth in the development of Malaysian judgments remains a work in progress. One of the key steps taken towards achieving this target includes the establishment of the Judicial Academy which actively provides seminars and courses both within and outside the jurisdiction, to equip judges on the latest developments in the law on a varied number of subjects. The provision of written grounds of judgments accompanying court decisions is strongly encouraged and mandatory when an appeal is filed. Periodic reviews of judgments are undertaken by senior judges to evaluate the levels of competency of individual judges. Coupled with this is the periodic review undertaken of written judgments by the Judicial Appointments Commission in the course of assessing the suitability of candidates for promotion. Once again the Judiciary is cognizant that the delivery of well-written and reasoned judgments plays an important role in gaining public confidence in the justice system.

The Federal Constitution

One of the key areas where the need for well articulated written judgments is required is when the superior Courts interpret and explain the effects of statutory laws and more significantly, the Federal Constitution. Recently we celebrated our 57th year of

Independence, marking the fact that our Constitution came into effect on 31 August 1957. The Constitution in its original form was premised on entrenched English common law principles and followed closely the form of the Indian Constitution. Since then however it has undergone a series of amendments, which have altered its character such that it has become more indigenous in nature. In effecting such change there has been a marked movement away from English common law principles, this being necessitated by the social and political changes in the country since Independence.

Law Reform by Legal Transplant

In this context it is important to bear in mind that our legal system as we know it was modeled largely along the line of the English Legal System. As we Malaysians are all well aware, a pluralist system of law subsisted prior to the reception of English law. Historical sources suggest that this geographical region, as it then was displayed an excellent example of a land of pluralism where diverse cultures subsisted symbiotically in all spheres of life. The system then in place acknowledged, accepted and allowed diversity to flourish. This appears to have extended to the law.

The importation of the English common law system into Malaysia came with the arrival of East India Company in 1786, from there on English law began to take root. Needless to say the importation of a legal system in its entirety into a country with a diversity of legal and cultural traditions, economic enterprises and political structures cannot be expected to perform and

evolve on terms and in a manner entirely consistent with the country of its origin. Indeed it was never expected to. The law was expected to accommodate and meet the needs of its indigenous population in this developing nation. This is a reality particularly when applied to constitutional law or the rule of law. In our multi-racial, multi-religious nation, this is particularly true. The Malaysian Constitution is an amalgam of diverse elements, which in itself is a unique expression of the country's varied history and culture.

The Malaysian value system or philosophy is fittingly encapsulated in our Rukun Negara, more particularly the pledge, which sets out the core principles by which our citizens abide, namely "Belief in God, Loyalty to King and Country, Upholding the Constitution, Rule of Law and Good Behaviour and Morality". In upholding these values, there is often a fundamental tension between protecting the interests of the community at large over the constitutional protection of individual rights. In maintaining these values and the philosophy, which are all important in a multi-racial country, certainly peace and harmony and the stability of the nation stand paramount. Matters running counter to these objectives are restrained.

Article 121 and 121(1A) of the Federal Constitution

Perhaps the amendment that has given rise to the greatest amount of debate, which continues to this day, is Article 121(1A). The said provision, which delineates the separation of the jurisdiction of civil and syariah courts has created considerable controversy. It provides that that the two High Courts referred to in Article 121 '…*shall have*

no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.' While it can be said to delineate and clarify the jurisdictional ambit of the civil and syariah courts, there has been considerable concern to the effect that by substituting the words '*There shall be'* for the words '*Subject to Clause (2) the judicial power of the Federation shall be vested in',* there has been a restriction of judicial power.

The concern about this latter aspect of the impugning or restriction of judicial power has been considered in various cases including **Sugumar Balakrishnan v Pengarah Imigresen negeri Sabah & Anor [1998] 3 MLJ 289** when Gopal Sri Ram said:-

"…. We do not over look the amendment to art 121(1) of the Federal Constitution whereby the words 'judicial power of the Federation' were deleted on 10 June 1998 by Act A704. However in accordance with well established principles of constitutional interpretation the deletion does not have the effect of taking away the judicial power from the High Courts. It follows that the judicial power of the Federation remains where it has always been, namely with the judiciary……"[7]

In the case of the **Public Prosecutor v Kok Wah Kuan [2007] 5 MLJ 174** the Court of Appeal had occasion to consider the effect of the amendment to art. 121. It was held in that context, inter alia, as follows:-

"….However by Act A704, art 121 was amended with effect from 10 June 1988 and the expression judicial power' was deleted. No challenge as to the constitutionality of Act A704 was ever taken before any court. To our

[7] Note that the Federal Court reversed the decision stating that access to justice is not a fundamental right.

minds such a challenge, even if taken would have failed because the amendment did not have the effect of divesting the courts of the judicial power of the Federation. There are two reasons for this. First the amending Act did nothing to vest the judicial power in some arm of the Federation other than the courts. Neither did it provide for the sharing of the judicial power with the Executive or Parliament or both those arms of Government. Second, the marginal note to art 121 was not amended. This clearly expresses the intention of Parliament not to divest the ordinary courts of the judicial power of the Federation and to transfer it or to share it with either the Executive or the Legislature….."

and further on in the judgment:-

"…it is in our judgment beyond argument that the doctrine of separation of powers is very much an integral part of the law of the Federal Constitution……...

Although this decision was reversed by the Federal Court where Abdul Hamid Mohamad PCA (later CJ) dismissed the doctrine of the separation of powers as a mere political doctrine that is not absolute, however, Richard Malanjum, Chief Judge of Sabah and Sarawak while agreeing with decision of the court he had this to say on separation of powers:-

"….The amendment which states that 'the High Courts and inferior courts shall have jurisdiction and powers as may be conferred by or under federal law' should by no means be read to mean that the doctrine of separation of powers and independence of the Judiciary are now no more the basic features of the Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a Federal Act of Parliament and that the courts are now only to perform mechanically to the command or bidding of a Federal law."

The foregoing debate as to the effect of the amendment is answered in large part by reference to the manner in which the courts in Malaysia continue to function, notwithstanding the amendment to Article 121. Judicial review applications, both of administrative action, and to challenge the validity of primary legislation, can and continue to be made regularly. This is important because the power of judicial review also arises from the inherent power of the courts, apart from statutory provisions[8]. It exists even if not conferred by statute. It is implicit in the doctrine of separation of powers and comprises a part of the theory of checks and balances integral to parliamentary democracies. Most recently for example, the Court of Appeal had to deal with a challenge to **section 9(5) of the Peaceful Assembly Act 2011** and proceeded to hold that the section is inconsistent with art 10(2) of the Federal Constitution and ought to be struck out. Without commenting on the accuracy or otherwise of the decision, it is clear that the courts continue to retain their powers of judicial review of primary legislation which in itself makes it clear that no powers have been abrogated or eroded by the amendment in Article 121 (1A).

As for judicial review of administrative or ministerial acts or omissions, the courts in Malaysia are replete with such filings and adjudications on a routine basis, signifying the continued healthy subsistence of judicial independence. This is in direct contradistinction to some other countries where such powers have been abrogated or are in disuse. This year alone up to August, a total of 106 judicial review applications were filed in the courts

[8] See Section 25(2) Courts of Judicature Act 1964 and Para 1 of the Schedule to the CJA which prescribes the additional powers of the High Court

throughout the country. (For the period from January 2012 until August 2014 the number of judicial review applications numbered 1046). It is far from the truth to say that the decisions of our courts have always found favour with the government of the day. This is clear if you care to examine the decisions of the courts in a number of judicial review cases.

What does the Future Hold for the Judiciary?

The Judiciary will continue to take steps to strive to evolve in keeping with the requirements of modern day Malaysia. As I stated earlier, the role of technology is likely to continue to play a key role in altering the manner in which we have traditionally worked and functioned. As is happening even now, time is likely to become a more precious commodity requiring an even more comprehensive and condensed approach to trials, thereby allowing a greater portion of the population to have access to, and ventilate their grievances in a court setting.

In keeping with this overall objective of greater access to justice for a greater proportion of the population, this millennium is also likely to see a surge in alternative methods of resolving disputes including mediation and conciliation. At the heart of our culture after all resides the sentiment that disputes particularly between individuals are best settled without considerable acrimony. Harmony is a key objective in the cultural ethos of this multi racial nation.

Judges will continue to play an important role in construing and deciphering the inevitable increase in statutory legislation that is likely to ensue. Statutes are likely to remain a dominant source of

law in the land. This in turn will promote the growth of Malaysian case-law which is geared to blossom further throughout this millennium.

Our Malaysian case-law as it stands comprises a rich and variegated source of law, taking in views from various countries in the Commonwealth. Over the years the Malaysian courts have to a degree developed their own brand of case law to meet and reflect the needs of our pluralistic society.

Malaysia will continue to seek to amalgamate with the nations of the world in creating a fairer work order and in contributing towards the formation of a coherent system of law that works in the pluralist international legal environment that is developing in the world today[9]. It is more than likely that the courts in this jurisdiction may have to evolve to adjudicate upon more cross-border disputes and transactions in this borderless world. With the opening up of our legal practice, albeit in a restricted way to foreign law firms and foreign lawyers, similarly it is not entirely impossible that the composition of our courts may include more international jurists and equally our judges may contribute their expertise where required in other jurisdictions. In a world of converging global cultures it is important that the Malaysian legal profession asserts its position and contributes positively towards a coherent international body and practice of law.

[9] See Speech by Tun Zaki Tun Azmi at the Singapore Law Academy, 2011 entitled 'The Common Law in Malaysia in the 21st Century"

Turning to the theme of the Conference I must congratulate the organizing body for arranging such a stimulating and appealing list of topics for debate over the course of the next two days. I wish all the participants the very best in ventilating and discussing these matters. Thank you for listening. I now declare the Conference open.

YAA Tun Arifin Bin Zakaria
Chief Justice of Malaysia
24 September 2014