

Speech by A G Kalidas, President, Malaysian Bar, at the Opening of the Legal Year 2022 (Palace of Justice, Putrajaya, 14 Jan 2022)

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

The Right Honourable the Chief Justice of the Supreme Court of Indonesia, Professor Dr. Muhammad Syarifuddin, SH, MH;

The Right Honourable the Chief Justice of the Supreme Court of the Philippines, Alexander G Gesmundo;

The Right Honourable the Chief Justice of the Supreme Court of Singapore, Sundaresh Menon;

The Right Honourable the Deputy Chief Justice of the Constitutional Court of Indonesia, Aswanto;

Former Chief Justices of Malaysia, Tun Zaki bin Tun Azmi, Tun Arifin bin Zakaria and Tun Raus Sharif;

The Honourable Minister, YB Dato Sri Dr Haji Wan Junaidi bin Tuanku Jaafar, and Deputy Minister, YB Datuk Wira Mas Ermieyati binti Samsudin, in the Prime Minister's Department (Parliament and Law);

The Right Honourable the President of the Court of Appeal, Tan Sri Rohana binti Yusuf;

The Right Honourable the Chief Judge of Malaya, Tan Sri Dato' Sri Azahar bin Mohamed;

The Right Honourable the Chief Judge of Sabah and Sarawak, Tan Sri Dato' Abang Iskandar bin Abang Hashim;

Honourable Judges and Judicial Commissioners;

The Honourable the Attorney General of Malaysia, Tan Sri Idrus bin Harun; Sabah State Attorney-General, Datuk Nor Asiah binti Mohd Yusof; and Sarawak Deputy State Attorney General, Tuan Saferi bin Ali;

The Right Honourable Syariah Chief Judge of Malaysia, Dato' Setia Dr Haji Mohd Na'im bin Haji Mokhtar;

President of the Sabah Law Society, Mr Roger Chin Ken Fong, and President of the Advocates Association of Sarawak, Mr Antonio Sim;

Your Excellencies, distinguished guests, ladies and gentlemen.

1. I have the honour this morning of addressing Your Ladyship and this esteemed gathering on the occasion of the Opening of the Legal Year 2022. It is with pleasure that I do so on behalf of the Malaysian Bar, the Sabah Law Society, and the Advocates Association of Sarawak.

2. The Malaysian Bar is thankful that this august ceremony has resumed after a lapse of a year, due to the COVID-19 pandemic. Even as we reflect on the year that has passed, the Opening of the Legal Year presents us with the opportunity to express our thoughts and visions as we forge ahead into a post-pandemic world — one that carries with it the innovation, flexibility and adaptability, that we have adopted as a result of the pandemic.

My Lady,

Introduction

3. Reference to the past year cannot be spoken of without addressing the immense challenges that the pandemic brought upon us. Global and national authorities, and society at large, had to wrestle with the twin crises of public health and the rule of law.

4. In April 2020, António Guterres, Secretary-General of the United Nations, said, “The best response is one that responds proportionately to immediate threats while protecting human rights and the rule of law.” It is precisely this balance that needs to be struck.

5. This brings to mind the imagery of the scales of justice — Lady Justice is perhaps the most recognisable universal symbol of the legal system. Her balance scales represent the impartiality and obligation of the law for evidence to be considered and weighed equally. Before a decision is made, there is a duty to consider both sides presented.

6. The values that She embodies — that of, balance, justice, law, and order — are that which all of us present here today, seek to uphold. These make up the foundation upon which our institutions rest upon, without which, we would lose our *raison d’etre*; the respective roles that we play in the development of our beloved nation of Malaysia.

7. And it is in times of abrupt change, where there are competing interests and arguments, that the notion of balance and equal consideration must also permeate these discourses. While our institutions share the same values — that of justice, law and order — the positions we hold may differ according to the experience and expertise that we have. Importantly, it is through this diversity, that we can build better — combining our strengths to discharge our common duties and responsibilities.

8. What we have seen throughout the pandemic is the importance of stakeholder consultation and cooperation. Institutions are interdependent and do not operate in silos. Thus, we need meaningful and collaborative approaches. The pandemic has underscored this necessity — there is no room for division and strife when the rights of the people — including that of access to justice, are under threat. The pandemic required us to think outside the box, accept new realities, and foster closer relationships with those we work with.

9. Permit me to now highlight several initiatives between the Bar and the Judiciary, the Government and the Attorney General’s Chambers, respectively, and other noteworthy matters of 2021.

I. Judiciary

Remote Hearings

10. When the pandemic hit, the question that the Bench and Bar grappled with was — *how will cases before Courts continue?* Reaching for its answer was complex and intricate — and it laid somewhere between the adoption of technological tools and the necessity for the rules of natural justice and the fundamental rights of accused and litigants to be upheld.

11. The Bar was involved in numerous consultations with the Courts on these matters, and we thank the Judiciary for considering our feedback. The Malaysian Bar supports, in principle, the implementation of remote hearings — particularly during these extraordinary times when public health concerns remain. We certainly recognise the benefits to adopting digital measures — such as the Court’s e-Filing, e-Review, e-Jamin (e-Bail), e-Bicara (e-Hearing) and e-Appellate systems. Calls to the Bar have also been conducted virtually.

12. As we embrace digital transformation, the Malaysian Bar takes the position that the use of technological means should not have a negative impact on access to justice, and should not be detrimental to the accused or litigant. The right to due process, effective access to legal counsel, as well as the adequacy of remote communication technology, and confidentiality and security of information and data, should be guaranteed at all times.

13. We commend the Judiciary for the steps taken in ensuring that the wheels of justice have continued to turn. As we transition into a post-pandemic era, we have already made leaps and bounds into digital transformation of the justice and legal services for the present, and the future.

14. The Malaysian Bar is involved in the initiative by the Commercial Division of the Kuala Lumpur High Court — the “Court Users Committee on Technology”, CUC-Tech — to enable the Courts to obtain feedback and upgrade procedural and substantive law matters related to technology. Keeping these discussions live is necessary as we must always check ourselves to ensure that the convenience of technology does not compromise the delivery of justice.

Independence of the Judiciary

15. On the matter of the independence of the Judiciary — a remark was made by our former Prime Minister, Tan Sri Dato’ Muhyiddin Yassin, in, no less, a televised address on 4th August 2021,¹ that he had received appeals from individuals to interfere in court matters.

¹ “Muhyiddin: Some want me to interfere in their court cases”, *KiniTV*, 4 August 2021.

16. The Malaysian Bar has always defended the principle of judicial independence and integrity. Judicial independence is sacrosanct, and forms the cornerstone of a fair and impartial Judiciary which is necessary for upholding the rule of law and instilling public confidence. It must not be allowed to be tarnished, and the importance of a Judiciary that is insulated from interference in a democracy, cannot be overstated.

17. It is the responsibility of each of our institutions to ensure that no one is above the law, irrespective of their political or social affiliations. The Malaysian Bar affirms our commitment in protecting and upholding the independence of the Judiciary, including that concerning the conduct of our Members.

Cases

18. Several cases decided by the Courts in 2021 are testament to the institution's role as the final arbiter of the law, ensuring the promise of equal justice. A progressive and current interpretation — as exemplified through the *Undi18*,² *Family Frontiers*,³ and *Taman Rimba*⁴ cases, demonstrate the Court's role in upholding the rights of the people. That the Federal Constitution is a living document; not just for today, but for the future.

19. The Courts represent the last bastion and stronghold of the legal order to ensure access to justice, in addition to functioning as a check and balance to the boundaries of executive power. Thus, the Bar has consistently taken the position that ouster clauses are antithetical to the rule of law. The Judiciary must not be disembodied of its judicial power to determine the legality of executive actions — it does not wear blinkers.

20. We take this opportunity to extend our congratulations to YA Dato' Haji Ghazali bin Haji Cha, YA Dato' Ahmad Zaidi bin Ibrahim, YA Dato' Sri Mariana binti Haji Yahya, YA Datuk See Mee Chun and YA Dato' Hashim bin Hamzah, who were elevated to the Court of Appeal in 2021, as well as to the ten appointed Judicial Commissioners last year. We are confident that they will contribute their utmost to serve the Judiciary and the administration of justice.

21. The Malaysian Bar welcomes our many occasions of collaboration and consultation with the Chief Justice and other Office Bearers of the Judiciary, as well as the Chief Registrar, and Officers of the Court. We will continue to engage with and provide support to the Judiciary on all matters of equal concern.

Access to Justice

22. As articulated by My Lady Chief Justice during the Keynote Address at the "Tuanku Ja'afar Conference and Workshop 2021", ensuring access to justice is a combined responsibility and concerted effort between the three arms of government: the Legislature, Executive, and the Judiciary.

² *Ivan Alexander Ong & Ors v The Prime Minister of Malaysia & Ors* [2021] MLJU 1655.

³ *Suraini Kempe* (President, Persatuan Kebajikan Sokongan Keluarga Selangor & Kuala Lumpur (Family Frontiers)) & *Ors v Kerajaan Malaysia & Ors* [2021] MLJU 1864.

⁴ *Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors* [2021] 3 MLJ 1.

23. The ideals of justice and fairness have been the cherished goal of all developed societies — and access to justice is perhaps the most basic social right of a modern, egalitarian legal system, guaranteeing legal rights for all, as embodied in Articles 5 and 8 of our Federal Constitution.

24. In our efforts to ensure that access to justice continues to be provided throughout these challenging times, the Malaysian Bar is encouraged by the engagements we had with the Government over the past year.

II. Executive

25. Pursuant to a Memorandum of Understanding between the Bar and the Government in November 2020, the COVID-19 Mediation Centre — PMC-19 — was launched, providing the public with access to mediation services for disputes concerning the inability to perform contractual obligations, due to restrictions that were imposed as a result of the pandemic.

26. We had also engaged with the authorities regarding the continued access to legal services during the “Lockdown Period” in mid-2021. The Bar made firm representations that lawyers be allowed to continue providing their services, and be able to effectively represent their clients. As the criminal justice system continues to function, equally, lawyers must be able to do so as well. Further, in the case of our National Legal Aid Foundation — YBGK — lawyers, they are called to represent the accused in Court. Without the YBGK lawyers, these persons will likely go unrepresented as they have no other means to obtain legal representation. The Government was receptive, and judicial and legal services have since been recognised as “essential services”.

27. To support and strengthen the services of the National Legal Aid Foundation, the Malaysian Bar has called for the allocation of additional funds. Compared to the volume, expertise and depth of service that YBGK lawyers provide, they receive very little payment in proportion to the work done, in comparison with other countries. Sufficient funding needs to be provided to the National Legal Aid Foundation for it to continue to function for its intended purposes — that of ensuring equal access to justice for all persons.

Upholding Human Rights

28. The Malaysian Bar views the election of the country to the United Nations Human Rights Council (“UNHRC”) for the 2022–24 term as an opportunity for us to contribute to the development and protection of human rights on the global stage, as well as on the domestic front.

International Concerns

29. We are in support of the Government’s efforts in the defence of universal human rights — such as, calling for the cessation of unrest and violence between Israelis and Palestinians, providing humanitarian aid to the people of Afghanistan, and engaging with the administration of Singapore regarding Nagaenthran K Dharmalingam’s death sentence.

These are matters which the Bar has also voiced our concerns on, and we hope that Malaysia will be able to leverage its position on the UNHRC to alleviate any human rights deficit and humanitarian crisis in the global arena.

Domestic Concerns

- The Bar's Legal Action

30. Back home, a state of Emergency was declared in Malaysia from 11 January to 1 August 2021, and several ordinances were promulgated. This had the effect of reducing constitutional safeguards such as Parliamentary scrutiny and accountability, and ousting the Judiciary from reviewing the validity of the Proclamation and the Emergency Ordinances.

31. While we recognise that the normal functioning of society cannot be maintained during a health crisis, and that some rights and freedoms may be abrogated, the Malaysian Bar takes the stand that the fundamental values of democracy, rule of law and human rights standards must be safeguarded. Thus, the Bar commenced legal action pursuant to the mandate given at our 75th Annual General Meeting. The suit is ongoing and as such I will not speak further on this matter.

- Freedom of Speech and Assembly

32. The Bar also voiced its concerns on a myriad of incidences affecting the rights of the people. We witnessed many instances where freedom of speech and assembly were not championed. Doctors who supported the Code Black and Black Monday solidarity campaign highlighting the plight of contract healthcare workers;⁵ young activists of the #Lawan peaceful assembly⁶ and a member of our Bar Council Monitoring Team present on that day;⁷ employees of an international media agency in pursuit of investigative journalism;⁸ and even Members of Parliament,⁹ were reported to be investigated by the police.

33. Constitutional rights — such as freedom of movement, freedom of speech and freedom of assembly — must be upheld and not sacrificed wantonly by reason of the COVID-19 pandemic. As long as adequate public health measures are employed, citizens must be permitted to express their dissent, as the capacity to voice dissent is a hallmark of a functioning democracy. It allows for intellectual discourse and facilitates the discussion of important socio-political questions. This is integral in ensuring an active civil society and a well-informed public.

34. Institutions — the Bar included — should not be shy of constructive criticism.

⁵ “Press Release | Police Investigation against Doctors and Healthcare Workers in Respect of the Code Black and Black Monday Campaigns”, Malaysian Bar, 16 July 2021.

⁶ “Press Release | Constitutional Freedom of Speech, Assembly and Association Must be Upheld”, Malaysian Bar, 2 August 2021.

⁷ “Press Release | Investigations of the Bar Council’s Monitoring Team”, Malaysian Bar, 6 August 2021.

⁸ “Al Jazeera staff grilled in Malaysia over report on migrant arrests”, *The Star*, 10 July 2020.

⁹ “All those involved in rally on Monday (Aug 2) to be called up, say police”, *The Star*, 2 August 2021.

- Death in Custody and IPCMC

35. The Bar continues to express our concern on the occurrences of death in custody. It is reported that 10 deaths in police custody were recorded from 1 January to 30 September last year.¹⁰

36. Cases of death in custody are a matter of great public concern and warrant the highest priority. While it has been announced¹¹ that the Royal Malaysia Police will set up a special unit to investigate cases of death involving detainees, we continue to urge for the establishment of the Independent Police Complaints and Misconduct Commission — the IPCMC. The current Independent Police Conduct Commission Bill lacks the bite to ensure genuine and independent transparency and accountability in the force. The Royal Malaysia Police should support and welcome the establishment of the IPCMC. It will give the Police the dignity it deserves by addressing the misconduct committed by a few of their members, which brings disrepute to the rest of the Police Force who are steadfastly discharging their duty in the interests of the country.

- Migrant workers

37. Mention must also be made on the plight of migrant workers in Malaysia. There is much that needs to be improved in protecting the rights of the migrant community. During the height of the COVID-19 pandemic, several raids conducted led to the detention of more than 18,000 undocumented migrant workers;¹² migrants were also deported back to Myanmar on navy ships supplied by the Myanmar military, just after the country had undergone a coup.¹³

38. Equality before the law is a right enshrined under Article 8 of the Federal Constitution and applies to all persons in Malaysia, irrespective of nationality or citizenship. Although migrant workers contribute their skills to build a more prosperous economy for our country, they lack the fundamental awareness of the law, and most return home without any redress for the losses they may have suffered.

39. Last month, the Malaysian Bar launched a publication — *A Quick Guide to Migrant Workers' Rights* — in partnership with the Embassy of Switzerland. It aims to provide a succinct overview and promote awareness of the legal issues faced by migrant workers. We hope that access to justice becomes more accessible for them, and that many more Members of the Bar will be encouraged to involve themselves in this area.

40. The stark reality is that the COVID-19 pandemic has thrown into sharp relief the gap between aspirations and reality. It has underscored the necessity that we must work harder, together, as a nation, to mainstream and materialise the human rights ideals that we espouse in our own country, and to encourage others to do the same on the international stage. The Malaysian Bar hopes that Malaysia would finally be able to ratify the remaining core human

¹⁰ “10 deaths in police custody this year until September”, *New Straits Times*, 6 December 2021.

¹¹ “Home minister: Police to set up unit to investigate deaths in custody”, *Malay Mail*, 6 December 2021.

¹² “18,355 PATI ditahan sejak Januari”, *Sinar Harian*, 6 August 2020.

¹³ “Malaysia departs Myanmar nationals despite court order”, *BBC News*, 24 February 2021.

rights treaties during its UNHRC term. We also welcome the Government's commitment to look into legislation concerning anti-hopping and sexual harassment; in formulating these laws, the views of the public and civil society should be given its due consideration. Legislation are instruments in realising justice and must be able to meet the needs of society. The Bar supports the setting up of a Law Commission which will promote well-researched and consultative laws, with the aim of enhancing the rule of law.

My Lady,

- Sustainable Development and Climate Change

41. The devastating floods last month impresses upon us that there is an immediate need for the formulation of comprehensive environmental legislation and a sustainable framework that offers sufficient protection to the people and the environment. The right for human beings to live in a safe, clean, healthy, and sustainable environment, is a fundamental right as enshrined in Article 5 of the Federal Constitution; yet, as a country, we were gravely unprepared for the floods that hit, revealing multiple systemic failures.

42. Moving forward, we must focus on strengthening and democratising legal accountability as a broad-based strategy. The systems, rules, and institutions involved in providing access to justice must be streamlined so that people have meaningful access to justice and are protected and supported throughout the process.

43. Positions of power in public office are undertakings of public responsibility; the dereliction of which will harm people and society. We need to reconnect accountability with the duties and responsibilities that come with these positions. It is only through close cooperation between people and their government, and with proper accountability, can we come up with effective measures to ensure that we are better prepared to weather present and future challenges. We should also approach any excision of permanent reserved forests, conscientiously and vigilantly.

44. As we build back a world after COVID-19, let us build back with the rule of law for a more equitable world. The Memorandum of Understanding on Transformation and Political Stability between the Federal Government and the Pakatan Harapan ("PH") coalition marks a historic moment of bipartisan cooperation, and we hope, paves the way for political stability and meaningful institutional reforms, including Parliamentary reforms, to be implemented.

45. This is the way forward. We owe it to the people and for our nation. The Malaysian Bar equally pledges to do our part — we will continue to work with the government of the day, regardless of political party or persuasion — to uphold democracy and the rule of law, and to strenuously protect and defend the fundamental freedoms and rights of the people.

III. Attorney General's Chambers

46. We have had the pleasure of working with the Attorney General, Yang Berbahagia Tan Sri Idrus bin Harun, and the Attorney General's Chambers, on matters concerning the

legal profession — our proposed amendments to the Legal Profession Act 1976 as well as related rules. We wish to thank the Attorney General and the Chambers for their cooperation and we look forward to our continued synergy in the year ahead.

47. Central tenets of the rule of law — such as transparency — are building blocks which contribute to public trust and confidence. Thus, in cases attracting high public interest where the charge is one that strikes at the heart of faith in the administration and its governance, no matter the personality in question, those who they are associated with, or to which divide or party they belong to, it bodes well for the Attorney General or the AGC to provide reasons to the public when it decides to discontinue to prosecute at any stage. We appreciate that Article 145(3) of the Federal Constitution clothes the Attorney General with wide discretion to institute, conduct or discontinue any proceeding for a criminal offence. However, it is not an absolute or unfettered discretion — as held by the Federal Court in *Sundra Rajoo*.¹⁴

48. Thus, a measured and perceptive approach is needed. Lack of information will unfortunately only lead to, and fuel, unnecessary speculations.

V. The Bar

My Lady,

49. It is internationally recognised¹⁵ that the legal profession plays an indispensable role in society and nation-building, and its independence is essential in the promotion and protection of human rights. It is said, “Lawyers are, with judges and prosecutors, one of the pillars upon which human rights and the rule of law rest.”¹⁶

50. With the challenges brought upon the legal profession due to the pandemic, the Bar Council undertook several initiatives to assist our Members. Allow me to briefly mention a few.

51. Firstly, the sustainability and financial viability of law firms to keep afloat was a matter of concern for us. Thus, we reduced or waived Members’ annual subscription and levies, as well as subsidised their professional indemnity premium. This translates to providing assistance in sum of approximately RM12 million in these two years.

52. Secondly, recognising the importance of well-being in the profession, we entered into a Memorandum of Understanding with the Malaysian Board of Counsellors, whereby Members may seek counselling services from a panel, and up to five sessions will be borne by us. We also launched a mechanism to assist survivors of sexual harassment, known as the “Peer Support Network”, where guidance, advice, and support will be provided to those affected. We hope to expand our collaboration with the Malaysian Board of Counsellors to provide psychological help as well.

¹⁴ *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209.

¹⁵ Para 3.02, Montreal Declaration: Universal Declaration on the Independence of Justice, International Commission of Jurists.

¹⁶ International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No. 1, International Commission of Jurists, 2007.

53. In addition, we approved a new Ruling 14.29 which provides that any act of sexual harassment by an advocate and solicitor or a pupil in a professional capacity, or in a professional setting, amounts to a misconduct under section 94(3) of the Legal Profession Act 1976.

54. Last but certainly not least, in regard to technology and digital adoption. Recognising the potential for innovation in the way lawyers are able to deliver legal services during the pandemic and in post-pandemic times, we approved the concept of virtual offices in August last year.

55. Engagements are also being pursued with the authorities to secure digital grants for law firms. According to the Department of Statistics Malaysia, in 2017, legal activities recorded a total value added of RM4 billion, the second largest contributor in the professional services sector. In addition to contributing to the country's economy, the legal sector functions as one of the main pillars in the dispensation of justice. Efficient justice and legal institutions promote and sustain economic activities as it reduces commercial risks, thus inspiring confidence and attracting foreign direct investment into the country. In tandem with the Government's push towards digital transformation as well as the Judiciary's continuing efforts on this front, support should be provided to law firms to encourage the adoption of legal technology, as has been done in other countries.

Conclusion

My Lady,

56. As a result of the COVID-19 pandemic and the recent floods, these years have been characterised by its immense and unprecedented challenges — one that has worn a very human face, with severe health and socio-economic impact.

57. However, it is in times of crisis and challenge, that the tenacity of humankind will not only persevere, but rise to the occasion. We thus look forward with hope into the new year, better equipped and ready to greet our new normal.

58. I wish to express the appreciation of the Malaysian Bar to YB Dato' Sri Dr Haji Wan Junaidi bin Tuanku Jaafar, Minister in the Prime Minister's Department (Parliament and Law) for YB Dato' Sri's support and engagement with the Bar since taking office in August 2021. We also record our thanks to the former Minister in the Prime Minister's Department (Parliament and Law), YB Datuk Seri Takiyuddin Hassan.

59. My Lady Chief Justice, I wish to end my speech with a traditional pantun:

Slogan duniawi sekitar lebuhraya
Terpampang tegak sepanjang NKVE
Izinkan saya sepatah dua kata
Adat Perlembagaan harus dihormati

Kebun sayur berbagai tanaman
Tanah dibajak benih ditanam
Setiap orang berbeza ragaman
Tahun baru perkasakan azam

Ikan jenahak dimasak kari
Perlu dijamah lebih sepinggan
Arus deras cabaran kontemporari
Disambut hakim dan peguam ilmunan

Dalam laut dapat diukur
Dalam hati tidak terduga
Nukilan ikhlas dari hati yang jujur
Mohon ditegur andai terluka

60. On behalf of the Malaysian Bar, the Sabah Law Society, and the Advocates Association of Sarawak, I wish members of the Judiciary and the Attorney General's Chambers, as well as Members of the Bar, a safe, healthy, and meaningful year ahead.

61. My Lady Chief Justice, I am much obliged.