OPENING OF THE LEGAL YEAR 2022
21 JANUARY 2022 @ KOTA KINABALU, SABAH
SPEECH BY ROGER CHIN
PRESIDENT OF THE SABAH LAW SOCIETY

Yang Amat Arif – Yang Amat Arif
Yang Arif – Yang Arif
The Federal Attorney General
The State Attorney General of Sabah
The State Attorney General of Sarawak
Minister in the Prime Minister's Department
Judicial Officers
President of the Advocates Association of Sarawak
Bar Council President
My Lords, My Ladies
My learned friends, distinguished guests, ladies and gentlemen

It is my immense honour to be speaking on behalf of the Sabah Law Society (SLS) on this solemn occasion, especially since it has been 2 years since the last opening of the legal year held in Kuching, Sarawak in 2020.

Covid-19

There are some obvious themes to cover this year. Sometimes it seems as if everything that might be said about the Covid-19 must have been said already. The reality is that the justice system in Malaysia, in common with jurisdictions across the globe, has been forced to adjust, adapt, learn, respond and innovate on almost a weekly basis.

Although today marks the ceremonial opening of the legal year, the reality is that courts run throughout the year. It remains a tradition worth retaining, but we can, and will, change it from time to time. Last year's ceremony was not hosted by the Malaysian judiciary and this year will mark the first to be live streamed. The traditional format is being improved upon.

The contribution of this willingness to change with the needs and times is difficult to quantify and yet it is easy to see just how important it is to the fabric of our society. I think that has been particularly stark during these last 22 months which have, of course, been some of the most difficult that justice systems not just across our nation but across the world have experienced.

This has altered our perception of the court simply as a building. It is not just a physical space. It is a public service. Virtual courts and online services must be viewed as core components of the justice system. They should sit alongside and complement in-person hearings.

I want to take this opportunity to thank the judiciary here, as well as the legal professionals and everyone working in and involved with the system, for everything you have done and continue to do to keep the wheels of justice turning.

Constitution of Malaysia

On the 12 January 2021, the King declared a state of emergency under Article 150(1) of the Malaysian Constitution.

Article 150(1) empowers the King (a constitutional monarch) with authority to proclaim a state of emergency if satisfied that there is a serious threat to "security", "economic life", or "public order". If Parliament is not sitting (as was the case when the pandemic began), the King can rule by decree in derogation of rights enshrined under the constitution. The King's subjective judgments that there is an emergency and how to respond to that emergency are immune from judicial review.

In practice, in keeping with applicable conventions, the King is the formal head of the government whose role is largely ceremonial. He therefore acts on the advice of the Prime Minister who represents the elected majority party in Parliament. However, in a state of emergency, the executive branch accrues immense powers. While such powers should still be subject to democratic constraints, the generally accepted legal position in Malaysia is that Article 150

allows government to suspend the Constitution and to enact ordinances that have the effect of legislation, bypassing usual legislative processes.

However, was the declared emergency constitutional or did several factors combine to pose a serious threat to the prospects of constitutional democracy in Malaysia?

First, the suspension of Parliament and the Constitution meant that the government possessed a de facto unaccountable power. A potentially powerful argument is that whilst Article 150(1) allows for emergency rule, it does not call for the suspension of Parliament. In that instance, Parliament could still convene and therefore the Prime Minister's decision to suspend legislative proceedings is not legally justifiable. Indeed, it could further be argued that the Constitution does not anticipate legally unlimited emergency powers, only proportional time-limited powers.

Judges of the Superior Courts take an oath to discharge their duty to the best of their ability, that they will bear true faith and allegiance to Malaysia and preserve, protect and defend the Constitution. At crucial moments in history, the judiciary must rise up to the occasion to protect and defend the constitution.

Such an oath necessarily means Judges must abandon personal sentiments and views, whether communal, religious or political, in favour of the constitution. It means Judges must uphold the constitution and ensure that all government organs keep within their respective constitutional limits.

It is especially when the Constitution is pushed to its limits is it more so important that the Superior Courts step up to interpret the Constitution bearing in mind the oath taken.

Second, the present situation spotlights latent hierarchical structures within the political culture that place political power in the hands of leaders, not political parties and not in elected representatives. Here, it is worrying that officials now embrace the importance of "Royal decree" and warn citizens not to question the King's pronouncements, including the declaration of emergency. These

warnings are not merely rhetorical. The Malaysian police has proven willing to treat such questioning as reason to investigate citizens for the offence of sedition. These are not necessarily symptoms of the re-emergence of absolute monarchy. Rather, they indicate that entrenched in Malaysian politics is a quasi-feudalistic understanding of authority that favours authoritarian personalities.

SLS was especially troubled to read reports that the then law minister had urged parties not to challenge state Syariah laws.

The SLS takes the firm stand that all parties are entitled to challenge the constitutionality of laws enacted in Malaysia, whether they be State or Federal laws. This is a hallmark of a democracy and the people should not be deterred to seek recourse with the Courts.

The Federal Court had recently held that a Selangor Syariah law was invalid. This decision was by no means an attack on Syariah law. The Federal Constitution was, through that decision, upheld by the Federal Court. The core of the decision is uncontroversial. Matters which are under the Federal List in the Federal Constitution are for Parliament to legislate upon, and matters which are under the State List in the Federal Constitution are for the States to legislate upon. Clearly therefore, any laws enacted by the States in relation to matters contained in the Federal List are invalid. The States simply have no power to legislate in relation to such matters. This is a fairly rudimentary principle and the law minister would – or should – be entirely aware of the same.

The SLS applauds the willingness of the Federal Court to uphold the basic tenets of the Federal Constitution, notwithstanding the potential for misunderstanding by members of the public or politicisation by politicians, who may not appreciate the context of the decision. In the premises, it would be irresponsible for anyone to characterise the decision of the Federal Court as an attack on Syariah law, and go further to discourage similar challenges.

The provisions of the Federal Constitution must be upheld at all times. Although there may be concerns as to perception which should be managed with tact and

diplomacy, ultimately the rule of law and the provisions of the Federal Constitution must always be preserved and upheld.

The SLS encourages public interest litigation and challenges to the constitutionality of any laws passed – whether State or Federal – throughout the country. It is only through challenge that laws can truly be described as 'tried and tested'. If laws are validly passed, no party should fear a challenge to the constitutionality of the same, and nobody should be seen to discourage such challenges.

Momentous Amendments to the Federal Constitution

On 15 December 2021, Parliament approved the Constitution amendment Act reinstating the Borneo States to what it was when the Federal Constitution was first formulated following the Malaysia Agreement 1963 (MA63) and the Malaysia Act 1963, by amending Article 1 (2) while at the same time Article 160 (2) was also amended.

The original Constitutional provisions provided for three separate components to the formation of Malaysia and each of the component formed separate and distinct unit of its own as reflected in the Cobbold Commission's Recommendations.

At this juncture it must also be noted that original Constitutional provision in Article 1 (2) provided as follows:

Article 1 (2) The States of the Federation shall be –

(a) the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor and Terengganu; and

(b) the Borneo States, namely Sabah and Sarawak and

(c) the State of Singapore

(3) The territories of each the States mentioned in Clause (2) are the territories comprised therein immediately before Malaysia Day.

When Singapore left, the Constitution was amended to delete Singapore. However, the Article 1(2) (a) and (b) remained intact. Subsequently, the 1976 Amendment reduced the Borneo States to one of the States of Malaya. The constitutionality of the 1976 Amendment had always been a bone of contention in whether the provisions of Article 159 and 161E was complied with. However, with the present amendment being approved and the original status of the Borneo State being reinstated, the challenge to the 1976 Amendment has become academic.

The Amendment to Article 160 (2) is indeed a long awaited. Whilst the definition of "Malaysia" as set out in the amendment is a mouthful, it nevertheless sets out the historical narration in so far as formation of Malaysia is concerned.

Some may argue that the amendment to Article 1(2) is form over substance. It, nevertheless, has reinstated the original intent and spirit of MA63. This is a rebooting of that very spirit and enthusiasm that prevailed in 1963. It is hoped that we will be able to build on this and revisit, review and re-calibrate the relationship between the Borneo States and the States of Malaya.

The issue of "Equal Partnership" is simply this - it is believed when the British and Malaya first conceived the idea of "Malaysia'" it was based on the position that each of the component parties are to be treated as equal partners. That is, Malaya, Singapore, Sabah and Sarawak are equal in all respects vis-à-vis the formation of Malaysia. It was intended at the very beginning for all these components parties to come together and create a new Nation in the name of Malaysia. However, along the way, both the British and Malaya changed course. Instead of creating a brand new Nation, the Borneo Territories were merely seceded to the Federation of Malaya and there was mere name change from Malaya to Malaysia.

The term "Equal Partners" is intended to be that Malaya with the states within it is to be treated as one unit or a component party while Sabah and Sarawak

each as the other component party. It therefore follows, that Article 1 of Constitution was accordingly amended providing for this distinct and separate partnership.

Wherever the recent Amendments may take Malaysia, it is hoped that original intent and spirit will be preserved and the aspiration and hopes of the people of the Borneo States will be fulfilled and perhaps this is the start.

A case in point would be the long overdue mandatory review of the 40% net revenue sharing formula between Sabah and the Federal Government as enshrined in Articles 112C, 112D and Part IV of the 10th Schedule of the Federal Constitution. This special grant has remained the same for 49 years since 1973 and yet the State of Sabah remains the poorest State within the Federation. Clearly, this constitutional and financial safeguard remains illusory unless otherwise reviewed and revised to reflect and give effect to our most recent constitutional amendment.

Further, Article 160(2) was also amended to redefine the term "the Federation". The present definition says that "the Federation" means the Federation established under the Federation of Malaya Agreement 1957.

The new definition rightly acknowledges both the 1957 and the 1963 Federation Agreements. This recognition is significant because it gives constitutional status to MA63. It will take time to work out the profound implications of this amendment.

All in all, the proposed amendment is a good first step towards redemption of rights that were repealed or had not been enforced in letter or spirit. Amongst these are:

(i) Autonomous administration of the Courts in Sabah and Sarawak; and
(ii) Appointment of Judicial Commissioners.

Before I proceed further, it is absolutely necessary for me to issue a disclaimer. None of the following parts are targeted at any specific individual. Where

positions are mentioned, it is only in reference to the office held and never aimed at a particular person holding that office.

At this juncture, it would be remiss of me not to acknowledge the great work of Datuk Ahmad Terrirudin bin Mohd Salleh, the incumbent Chief Registrar of the Federal Court of Malaysia.

Under Datuk Terrirudin's time in office, an allocation was provided to the High Court in Sabah and Sarawak to ensure the sustainability of the mobile court system so that geographical and physical impediments would be no bar to access to justice to people living in remote corners of Malaysia. Where historically the High Court in Sabah and Sarawak would have to scrounge for funds to carry on this noble cause, the court can now continue to go to such people and maintain the symbolic function and integrity of the court. Datuk Terrirudin further made sure the needed equipment was provided to the mobile court system including securing a lorry to transport the equipment and supplies required for each mobile court visit.

In the past, many of the circuit courts were housed in premises shared with government departments. Datuk Terrirudin put an end to this and made certain the dignity of the court would be preserved by finding stand-alone premises for the circuit courts.

Today, as I look around, I cannot help but be awed by this solemn and yet impressive Opening of the Legal Year in Sabah and Sarawak. All of these can only be realised through the sizeable budget allotted by Datuk Terrirudin. The good work of Datuk Terrirudin cannot be downplayed and for this, the Bar thanks sincerely and places its deepest appreciation on record to Datuk Terrirudin. Credit should always be given where it is due.

Autonomous administration of the Courts in Sabah and Sarawak

When Malaysia was formed, the existence High Court of Borneo was not subsumed into the High Court of Malaya but instead it was allowed to continue its separate existence under the Malaysia Agreement 1963.

Furthermore, Article 161E (2) stipulates that no amendment to the Federal Constitution affecting the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court could be affected without the concurrence of the Yang Di Pertua Negeri of the States of Sabah or Sarawak or each of the states of Sabah and Sarawak concerned.

However, over the years the administrative and supervisory power over all the Subordinates Courts and the High Court officers (including the support staff) had slowly become rested in one person that is the Chief Registrar.

Insofar as Sabah and Sarawak Courts are concerned, administrative power should not be centralised with Palace of Justice (POJ) and should instead be exercised by the Chief Judge of Sabah and Sarawak (CJSS).

Appointment of Judicial Officers and supporting staff

After candidates have applied online for the respective post, the recruitment exercise is actually carried out by the Chief Registrar even though the Registrar of the High Court in Sabah and Sarawak ("Pendaftar Mahkamah Tinggi Sabah Sarawak") ("PMTSS") and Pengarah Mahkamah Mahkamah Sabah ("Pengarah") may sit in the panel of interview.

It is suggested that more powers be given to the CJSS and PMTSS to appoint Judicial Officers and supporting staff.

Financial Management

APPROVAL AND UTILISATION OF FUNDS

Incurring expenditure comes generally under the term "perolehan". It can be classified into "perbelanjaan bekalan am pejabat" and "perbelanjaan kerja- / perkhidmatan".

The Pengarah has the power to approve "Perbelanjaan bekalan am pejabat and "perbelanjaan kerja-kerja / perkhidmatan" for expenses not exceeding RM20,000.00 and he has to justify why the expenditure is to be incurred.

For expenditure between RM20,000.00 but not exceeding RM50,000.00 the approval is done by a committee known as "Committee B" which consists of 3 members. Pengarah is the Chairman of the said Committee while the 2 members (who are senior officers) are appointed by Chief Registrar.

For expenses exceeding RM50,000.00, the Pengarah has to submit at least 3 quotations (in practice at least 5 quotations) to the Chief Registrar based in POJ. It would be approved by a committee comprising of 3 senior officers in POJ. Sometimes the Committee would recommend for tenders to be called for the said supply ("perolehan").

Major expenditure such as renovations, extension of buildings and construction of buildings

If there is a need to incur major expenditure such as renovations, extension of buildings and construction of buildings, the Pengarah (after consulting the CJSS and the Registrar) has to submit to POJ a working paper together with the proposed development plan (which would be prepared by the Public Work Department of Sabah) to the Chief Registrar in POJ. If needed the Chief Registrar will call the Pengarah and other relevant officers for a meeting regarding the proposed major expenditure to be incurred.

If the Chief Registrar and the relevant committee find that the proposed major expenditure is justified, then the working paper and the proposed development plan together with the necessary recommendations / remarks from the Chief Registrar would be submitted to the Prime Minister's Department viz. Bahagian Hal Ehwal Undang-Undang ("BHEUU") to request for funds.

In the event the funds for the proposed major expenditure are approved, it would be implemented by BHEUU.

It is suggested that a separate financial allocation for the Sabah and Sarawak Courts should be given and such allocation should come directly from BHEUU and not through the Chief Registrar's Office and it should be managed and controlled by PMTSS in consultation with CJSS. The benefits of decentralisation

are well known and would ensure faster and accurate decisions on expenditure which are well aware of the needs and actual scenario on the ground.

Appointment of Judicial Commissioners

The amendment to Article 122 included the introduction of five new Articles of 122A, 122AA, 122AB, 122B, and 122C under Part IX of the Constitution and which was passed in 1994.

Article 122AB of the Federal Constitution takes away the power of the respective governors of both Sabah and Sarawak to appoint judicial commissioners.

The new Article 122AB is about the appointment of judicial commissioner for the dispatch of business in the High Court of Malaya, High Court in Sarawak and in Sabah by Agong on the advice of the Prime Minister after consultation with the Chief Justice of the Federal Court. There is no requirement to consult Sabah and Sarawak in the new Article 122AB

The amendment to Article 122 of the Federal Constitution, particularly the introduction of new Article 122AB, should only have been made after the federal government obtained the concurrence of the governors of Sabah and Sarawak.

Article 122AB of the Constitution, which was passed in 1994 without the consent of the respective state government, contravened Article 161E(2)(b) of the Federal Constitution.

Article 161E(2) provides that no amendment be made to the Federal Constitution without the concurrence of the Yang Di Pertua Negeri of Sarawak and Sabah where such amendment affects the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges in the court of Sarawak and Sabah.

The time is nigh to return the eroded authority and rights of the state of Sabah and Sarawak by restoring the position in the Constitution to that before 1994 amendments.

This restoration of power will facilitate Bornean representation in hearing cases filed in Borneo. Judges with Bornean judicial experience are essential in ensuring justice is delivered without fear or favour in cases involving unique Bornean local conditions and customs.

Usage of English as the Language of Justice in Sabah and Sarawak

When Sarawak and Sabah merged with Malaya to form the federation of Malaysia in 1963, they were guaranteed certain rights not enjoyed by other states in the peninsular.

It was agreed in the Cobbold Commission Report that Malay is the national language and that both Malay and English are the official languages without any time limit for Sabah and Sarawak.

The position of the English Language was refined further and agreed upon in MA63, which stated that "Malay is the national language but English language is the official language for a period of 10 years after the formation of Malaysia, until the state legislature provides otherwise".

The use of English and native languages in the two states are enshrined under Article 161 of the Federal Constitution which stipulated that no act of Parliament to terminate or restrict its usage shall come into operation until ten years after Merdeka. However, this can only be enforced when the said Act or relevant provision of it has been approved by an enactment of the legislature of that state.

This provision was originally incorporated as per annexure A to MA63.

English is still the official language during proceedings in the subordinate and high courts because as of today, Sabah has not brought into force any ordinance or enactment in to restrict or terminate the use of English as its official language as the official language of the subordinate and high courts.

In the spirit of MA63, whenever official documents, including Practice Directions, are issued for use in Sabah and Sarawak, such documents should also come with an English version if the original language is Malay.

Official Residence of the Chief Judge of Sabah and Sarawak

In 2019, the federal government moved the Registry of the High Court of Sabah and Sarawak, from Kuching to Kota Kinabalu on a 10-year rotational basis effective 15 November 2019.

SLS at the time had welcomed the decision and was warmed by the recognition of the relationship between Sabah and Sarawak vis-à-vis the High Court. Neither Bornean state has a greater or lesser claim or right to host the Registry of the High Court. It should be remembered that the office of the Registrar of the High Court of Sabah and Sarawak encompasses both the Borneo States.

Any dissatisfaction with the relocation was resolved with reciprocal understanding, respect and consensus between the stakeholders.

SLS had hoped that this is one issue would not divide the legal fraternities of Sabah and Sarawak for there are more fundamental and substantive issues that need to be overcome vis-à-vis the Malaysia Agreement 1963 and the additional rights and special grants under the Federal Constitution. Being on the same page would go a long way to fulfilling these collective aspirations.

Accordingly, SLS noted with some consternation a recent report where it was stated that the federal government was proposing to build an official residence for the Chief Judge of Sabah and Sarawak in Kuching.

As the Registry is presently located at Kota Kinabalu and the location of the Registry is on a 10-year rotational basis, SLS calls on the federal government to also build an official residence in Kota Kinabalu.

In closing, may I once again assure Your Ladyship of the Bar's unwavering support for you and your colleagues in the judiciary. I reaffirm the Sabah Law

Society's continued commitment to sustain efficient and effective administration of justice in all causes coming before your courts.

May I extend to Your Ladyship, Chief Justice, all members of the Judiciary, the Minister for Law and the Attorney-General and State Attorney-General, the Bar's warm wishes and prayers for good health, wisdom, strength, grace and courage for the year ahead that we hope and pray will be better than the last two that preceded us.

In conclusion, allow me to recite a short pantun:

1957 merdekanya Malaya
Sabah dan Sarawak menyusul kemudian
1963 terbentuknya Malaysia
MA63 menjadi ikatan

Perlembagaan Malaysia menjadi rujukan
Peruntukannya adalah panduan asas
Apa gunanya segala pindaan
Jikalau hanya di atas kertas?

Di dalam suatu perkongsian
Berpegang pada janji adalah paling utama
Jiwa dan raga kami sanggup korbankan
Demi hak Sabah dijaga Agar suaranya bergema

Translated:

1957 Malaya gained independence
Sabah and Sarawak followed later
1963 the formation of Malaysia
MA63 becomes the bond

The Malaysian Constitution is the reference
The provisions are a basic guide
What is the point of all the amendments

If only on to remain on paper?

In a partnership
Keeping promises is paramount
Our souls and bodies are willing to sacrifice
For the sake of Sabah's rights, it is protected so that its voice resonates

Thank you.