

**OPENING OF THE LEGAL YEAR 2023, 13 JANUARY 2023 @ MIRI, SARAWAK
SPEECH BY ROGER CHIN, PRESIDENT OF THE SABAH LAW SOCIETY (SLS)**

It is a privilege to be here at today's Opening of the Legal Year. As a new legal year begins, my mind turns to the enduring success of our legal system over the decades, with judicial independence and the rule of law at its heart.

Indeed, Judges 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. 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.

In many ways, a Judges role is right at the frontline, where the law meets policy and policy meets the law. There will be tensions at times, which can be difficult to resolve. Those observing, who aren't privy to all the issues, are naturally and understandably tempted to come to hard and fast conclusions. When it comes to lawyers, it is right and proper for practitioners to make the strongest cases possible and do their utmost for their clients within the confines of the law. Sometimes a lawyer will find the argument they advance to be at odds with the government of the day – but it should be a strength of our democracy underpinned by the rule of law that such debates can and should occur.

Malaysian Judicial Renaissance

In 2022, the Malaysian Judiciary continued the Malaysian judicial renaissance trajectory under the helm of Tun Tengku Maimun, heralding the triumphant return to Malaysia's glory days of judicial excellence.

In recent years, the Federal Court in the seminal cases of *Semenyih Jaya* in 2017 and *Indira Gandhi* in 2018 both held that the 1988 amendments to Article 121 of the Federal Constitution to remove judicial power from Judges did not have the desired effect.

Instead, these two judgments of the Federal Court had effectively held that such powers had always remained vested in the superior courts since Merdeka Day in spite of the amendment to the Article. This is known as the basic structure doctrine which essentially holds that the Federal Constitution's basic structure includes judicial

powers such as judicial review, the principles of separation of powers, rule of law, protection of minorities. Parliament cannot remove such features by amending the Constitution.

The Federal Constitution's Article 121(1) vests judicial power exclusively in the civil courts. Judicial powers — including judicial review or the review of public authorities' actions and decisions — cannot be removed from the civil courts, and cannot be given to any other body who do not have the same level of constitutional protection as civil Judges to safeguard their independence.

Crucially, the Indira Gandhi case also held that Article 121(1A), which says civil courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Shariah Courts, does not remove the civil courts' jurisdiction to interpret the Constitution or laws even when the matter is related to Islamic law. There, the Hindu mother succeeded in obtaining a Federal Court ruling that quashed her ex-husband's unilateral conversion of their three children to Islam without her knowledge or consent. The case cleared up the confusion by declaring that unilateral conversions of children to Islam are unlawful.

In this resurgence, the Malaysian Judiciary can finally release itself from the shackles of the 1988 amendment to Article 121 and be paralysed with indecision no more including where matters involve Islamic law.

Notwithstanding the Federal Court's decisions, the icing on the cake would surely be the repealing of the 1988 amendments to Article 121 in the Federal Constitution by the Malaysian Government to affirm and announce to the world that judicial power remains with the judiciary in Malaysia.

Tun Tengku Maimun continues to nurture and harness this judicial revitalisation and nowhere more evident of this revitalisation was the manner in which she presided over the final appeal of ex-prime minister Dato' Sri Najib Tun Razak at the Federal Court. The Malaysian judiciary has rediscovered its voice and had another coming of age.

Tun Tengku Maimun decisively and firmly handled and decided on several legal moves by Najib's team of lawyers culminating in the five-member bench led by her affirming Dato' Sri Najib's 12-year jail sentence for misappropriating millions of dollars from a

company linked to state fund 1Malaysia Development Berhad (1MDB), thus becoming the country's first ex-prime minister to be jailed.

In a speech which Tun Tengku Maimun made in 2021 at the Australia Indonesia Partnership for Justice webinar, she said the task of a judge was onerous and it was reflected in the oath that Judges took, namely to bear true faith and allegiance to Malaysia and to preserve, protect and defend the Constitution.

She added that the Malaysian community hoped that she would restore the judiciary to its past glory and that she would put in place righteous Judges to adjudicate cases at hand.

All these she has done and their effect will strengthen the rule of law in Malaysia to no end.

Judicial Interference

The nation was awash by news reports recently expressing calls by political figures for interference of the Prime Minister in the judicial process – some have even gone as far as demanding for direct interference to the Federal Court concerning the case of former Prime Minister, Dato' Sri Najib Razak, and for a change of the current Attorney General and/or personnel within the office of the Chief Justice of Malaysia.

It is deeply disturbing that such calls to interfere in the judicial process, or to replace the current Attorney General and/or personnel within the office of the Chief Justice of Malaysia, are made in blatant disregard of the principle of separation of powers and the entrenched constitutional democracy of Malaysia. Malaysia is a country that values the separation of powers between the Executive, Legislative and Judicial branches, as this provides checks and balances against one another.

The primary duty of the Attorney General is to uphold the integrity of the justice system within his powers under the Federal Constitution, and the primary duty of the Judiciary is to interpret and give effect to the law. At the heart of the Judiciary is the independence of Judges to exercise their powers without any intrusion from individuals, entities, or political parties. It is the Judiciary that bears the responsibility of resolving disputes fairly in accordance with prevailing laws, not heeding to the requests of politicians or anyone else.

It bears reminding that the fundamental concepts of judicial independence and separation of powers between the three pillars of governance – the Legislative, Executive and Judiciary - are basic hallmarks of any functioning democracy. These principles are integral to maintaining the rule of law.

Political interference in any case – especially one of tremendous public interest - directly encroaches upon the functions and duties of the Attorney General and the court. The unconstitutionality of such alleged behaviour will result in a grievous erosion of justice and will cast aspersions on the integrity of the Attorney General and the Judiciary.

SLS condemns any act of politicians seeking for an intervention by the Prime Minister in an ongoing matter before the Judiciary at all material points. It is pertinent to note that there have been instances in the past where politicians have been admonished, some even charged for such actions to interfere as these actions are considered abuse of power and a misfeasance of public duties.

The acts of politicians in recent history openly discussing calls for interfering with the Judiciary in legal actions erodes faith in the Judiciary and are deeply damaging to the rule of law in Malaysia. This sort of behaviour is tantamount to an attack on the independence of the Judiciary. Politicians should not be making scurrilous remarks which only serve to perpetuate misgivings and suspicion amongst the people towards our Judiciary. The time has come for politicians to understand their roles in perpetuating and strengthening the rule of law including the doctrine of separation of powers instead of turning Malaysia into a legal pariah where rule of law is not sacrosanct whenever they utter unjustifiable statements.

We must never forget that it is the courts that we turn to for justice as it is the last bastion of hope and final line of legal recourse available. The courts are beholden to no one but the law, and it is the duties of the Judges to dispense justice in a manner that is in accordance with the law, and not to individuals or political parties.

In the face of relentless attacks on the judiciary, SLS took the unprecedented step and with over a hundred Sabah lawyers, peacefully assembled and participated in the Walk for Justice from the Damai Community Hall to the Kota Kinabalu Courthouse on 17 June 2022 in solidarity with the planned peaceful march to Parliament by our brothers and sisters in the law in Peninsular Malaysia to support, defend and uphold, shoulder to shoulder, the justice system. This was a first for SLS and marked as well the first

time a non-political assembly was held in Sabah proving that an assembly can be peacefully held and SLS extends its gratitude to the Police and relevant authorities for their co-operation. SLS as a stakeholder in the justice system is obliged to work together with all interested parties to strengthen judicial independence and will not hesitate to stand by and defend our institutions against unwarranted criticism. Justice can never be cowed and the rule of law will always prevail.

Malaysia Agreement 1963 (MA63) and the Malaysia Act 1963 Advances

It is heartening to note that of late, the commitment to fulfil MA63, the bedrock of the foundation of Malaysia by Malaya, Singapore, Sabah and Sarawak has gathered pace resulting in recent announcements of plans for the Sabah state to regulate its own electricity and gas supply by setting up the Sabah Energy Commission (SEC).

Beginning with electricity supply, on 3 October 2022, the Renewable Energy (Amendment) Bill 2022 and the Sustainable Energy Development Authority (Amendment) Bill 2022 were passed by the Dewan Rakyat.

Amendments to the Renewable Energy Act 2011 (Act 725) and the Sustainable Energy Development Authority Act 2011 (Act 726) inserts a new subsection in the two Acts giving the federal minister the power to suspend any provision in the two Acts in different parts of Malaysia and thus paving the way for Sabah to regain regulatory control over its own electricity supply with the setting up of SEC so that electricity supply regulatory authority can be transferred from the Federal Government to the State.

For gas supply in Sabah, the Federal Government has announced its decision to transfer the regulatory power over gas supply to Sabah with the date for the transfer to be made after getting the consent of the Yang di-Pertuan Agong.

Upon the King's consent, the Sabah State Assembly will convene a special sitting to approve and gazette the Sabah State Bills for gas supply and SEC will take over all regulatory power for onshore gas supply (regasification, transmission, distribution, use of gas by private licensees and retail) in Sabah with immediate effect.

As laudatory as the State Government's pursuit to take control of and manage the State's oil and gas resources and take steps forward in realising the MA63 are, it should be noted that the Federal Government had unilaterally revoked the delegation of power to pass laws in the Federal List in 1984. That delegation was made in 1962 after

the Inter-Governmental Committee meeting and before the signing of MA63. Since the unilateral revocation, electricity and gas supply remains with Federal Government until today, in breach of MA63.

In fact, the Federal Cabinet in 2016-17 had agreed to rectify this and restore the delegation to regulate in 1962. The present push for devolution would not have been necessary if only State rights were vigilantly guarded jealously in the past including taking necessary court actions where needed and especially when such State rights were dealt with slipshod. Power, once obtained, is never relinquished easily and this obviously has been the case here for some 50 years.

This brings us naturally to issues in relation to various laws such as the Continental Shelf Act 1966, the Petroleum Mining Act 1966, the Petroleum Development Act 1974 (PDA), the Exclusive Economic Zone Act 1984 and the Territorial Sea Act 2012 (TSA).

The TSA is a law that was passed by Parliament in 2012. Essentially, it outlines the limits of the area of sovereignty of the country and its states from the coastline. This includes the sea, the seabed, and the subsoil, which is the layer of soil underneath the seabed.

In 2011, then prime minister Dato' Sri Najib repealed the emergency proclamations declared by previous Yang di-Pertuan Agongs which made the Continental Sea Act 1966, the Petroleum Mining Act 1966, the PDA and the Exclusive Zone Act 1984 applicable to the Bornean states whilst the Proclamation of Emergency was still in force.

Under the Emergency (Essential Powers) Ordinance No. 7 of 1969, which came into force on Aug 10, 1969, the territorial waters of all states were limited to three nautical miles. Before 1963, the whole continental shelf belonged to Sabah and Sabah had sovereignty over waters up to 12 nautical miles from their shores.

The repeal of the emergency proclamation meant that the territorial waters of states, notably the oil-producing states of Sabah, Sarawak, Kelantan and Terengganu, were no longer capped at three nautical miles.

However, the TSA was then passed, ostensibly to bring Malaysia in line with the Law of the Sea Convention 1982 (LOSC), a multilateral treaty governing oceans.

Prior to Malaysia Day, the Borneo states exercised powers over petroleum found within its extended boundaries — that is the seabed and sub soil which lie beneath the high seas contiguous to the territorial waters of the respective states. With their boundaries maintained by virtue of Article 1(3) of the Federal Constitution, after Malaysia Day, the two states continued to exercise rights over petroleum found within its territories, including those found offshore.

According to Article 1(3) and 2 of the Federal Constitution, the territories of each of the states mentioned in Clause (2) are the territories comprised therein immediately before Malaysia Day and that a law altering the boundaries of a state shall not be passed without the consent of that state (expressed by a law made by the Legislature of that State) and of the Conference of Rulers. This was never done. The constitutionality of the TSA is consequently questionable.

The enforcement of the TSA means that Sabah is potentially denied additional revenue from resources beyond three nautical miles. The economic implications are obvious and Sabah cannot monetise her own resources.

Whilst SLS is aware that the Commercial Collaboration Agreement between the State and Petroliaam Nasional Berhad (PETRONAS) seeks to provide a more equitable share and participation of the valuable oil and gas resources of Sabah, the constitutional and legal rights of the State remain.

Adequate electricity and gas are the lifeblood of development and manufacturing. Without the ability to control and regulate these autonomously, Sabah will always find it difficult to attract investments, especially Foreign Direct Investments, into the State and resolution by determining the constitutionality of the TSA could result in the Sabah being able to licence/permit and therefore regulate offshore oil and gas activities above and beyond just devolution of powers. Additionally, whilst the PDA and the ensuing agreement between the State and PETRONAS to provide 5% cash payment to the State in return for the ownership and rights over petroleum whether offshore on onshore have long been the subject of cynical scrutiny by Sabahans including the constitutionality of the same, moving forward in conjunction with the resolution of the issue of the TSA, it would also be necessary to ensure that the oil and gas resources of Sabah are shared in a fair and transparent manner for the benefit of the State which is unfortunately resource rich but still one of the poorest in Malaysia as stated in the World Bank Report 2022. Ultimately, ownership of resources by the State and not merely given regulatory powers should be the aim.

All in all, the advances made good progress towards redemption of rights that were repealed or had not been enforced in letter or spirit under MA63. However more needs to be done and amongst these are:

- (i) Appointment of Judicial Commissioners and sufficient representation of Borneo Judges in the Appellate Courts;
- (ii) Elevation of the Native Courts of Sabah to be on par with Syariah Courts; and
- (iii) Recognition of Advocates who have been admitted to the High Court in Sabah and Sarawak joining the judicial and legal services commission where such Advocates have been admitted to the Commonwealth Supreme Court or High Court pursuant to Section 4 of the Advocates Ordinance (Sabah Cap. 2).

Appointment of Judicial Commissioners and the need to maintain sufficient Sabah and Sarawak representation in the Appellate Courts

SLS fully supports the call by Yang Dipertuan Besar of Negeri Sembilan Tuanku Muhriz Ibni Almarhum Tuanku Munawir in his opening speech at the second day of the 260th Conference of Rulers at Istana Negara for the appointment of the four members of the Judicial Appointments Commission (JAC) to be made by SLS, Advocates Association of Sarawak, Bar Council and the Parliament Committee of Selection instead of by the Prime Minister.

However, SLS reiterate its call for the return of the eroded authority and rights of the State of Sabah and Sarawak by restoring the power of the respective governors to appoint judicial commissioners provided for in the Federal Constitution prior to 1994.

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.

However, 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 was passed in 1994 without the consent of the respective State Government and thus 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 Sabah and Sarawak 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 courts of Sabah and Sarawak.

This is yet another example of State rights lost and the indifference if not disrespect shown by the Federal Government to such guaranteed constitutional entitlements. 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 the 1994 amendments.

Beyond that, in order to ensure sufficient representation of Sabah and Sarawak Judges in the Court of Appeal and the Federal Court, the minimum number of Sabah and Sarawak Judges in the Appellate Courts should also be fixed. To fill these positions, separate pools consisting of only Judges from Sabah and Sarawak each should be chosen from to determine suitability to fill any vacancies. If Sabah and Sarawak Judges were to be lumped together with Peninsular Malaysia Judges and one of the criteria for promotion is seniority, one can see how the sheer number of the latter would mean that there would nearly always be more senior Judges from there to be elevated, leaving the number of Sabah and Sarawak Judges at the Appellate Courts at a minimum. This affirmative action would also go a long way to 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.

Elevation of the Native Courts of Sabah to be on par with Syariah Courts

Under the Federal Constitution, Native Customary Law and the Native Court are state matters regulated by state legislation as provided for under the Ninth Schedule (Article 74, 77) Legislative Lists, List IIA-Supplement to State List for the States of Sabah and Sarawak.

Assistance is required from all relevant stakeholders to uplift the Native Courts in Sabah to be on par with the Syariah Courts which would go a very long way to restoring the spirit of MA63. Native Courts and Syariah Courts are of the same status constitutionally and neither is subservient to the other and accordingly, the Native Courts' jurisdiction cannot be made to exclude any cause or matter within the jurisdiction of the Syariah Courts. Any State laws purporting to do so could prove unconstitutional.

In this respect, SLS would like to thank the Yayasan Bantuan Guaman Kebangsaan (YBGK) to, in principle, agreeing to cover the provision of free legal representation to Native Court of Appeal parties in cases of breach of native customary law under the Native Courts (Native Customary Laws) Rules 1995 starting in 2023.

Recognition of Advocates who have been admitted to the High Court in Sabah and Sarawak joining the judicial and legal services commission where such Advocates have been admitted to the Commonwealth Supreme Court or High Court pursuant to Section 4 of the Advocates Ordinance (Sabah Cap. 2)

The Advocates Ordinance (Sabah Cap. 2) recognises multiple routes of eligibility to be admitted as an Advocate in Sabah:

- (i) having graduated from a Malaysian public university;
- (ii) having undertaken and passed the Certificate in Legal Practice;
- (iii) being a member of the Bar of England; or
- (iv) by virtue of having been admitted to practise as a legal practitioner by a Supreme Court or High Court within the Commonwealth territory [Section 4 of the Advocates Ordinance];

There are a number of graduates from the Australian or New Zealand Universities who have subsequently undertaken the requisite post graduate course to enable them to be admitted to the Bar of either Australia or New Zealand who therefore satisfy the criteria as stated in section 4 of the Advocates Ordinance to be admitted as an Advocate in Sabah.

Such Advocates having been admitted to a Commonwealth Bar such as Australia or New Zealand therefore do not need to sit for the Certificate in Legal Practice to be admitted as an Advocate in Sabah.

The criteria for an application to positions in the Judicial and Legal Services Commission however do not recognise the eligibility for such Advocates who have been admitted to a Commonwealth Bar such as Australia or New Zealand as it is specified that such positions are only available for those who are in possession of a degree from a Malaysian public university or have a Certificate in Legal Practice. Presumably the aforesaid pre-requisites are required in order to be consistent with the definition of a “qualified person” pursuant to the Legal Profession Act 1976.

Unfortunately, this may deny suitable advocates from both Sabah and Sarawak who do not have the Certificate in Legal Practice from applying to join the Judicial and Legal Services Commission.

Furthermore, the criteria applicable to be appointed to the superior courts in Malaysia do not require such candidates to be in possession of a Malaysian public university degree or a Certificate in Legal Practice but need only be recognised as Advocates of the High Court in Sabah and Sarawak.

SLS hope that this anomaly be reconciled so as to enable Advocates from both Sabah and Sarawak to be eligible to join the Judicial and Legal Services Commission notwithstanding that they do not possess the Certificate in Legal Practice.

Public Interest Litigation

We live in extraordinary times where the Constitution is now more than ever requiring the courts to step in to interpret. 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 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.

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.

In 2022, SLS commenced an action against the Federal Government by way of Judicial Review proceeding for certiorari to quash that Second Review Order in so far it contravenes the specific provisions of the Federal constitution, more particularly Article 112C and 112D read together with the Tenth Schedule Part IV thereof.

SLS is of view that under Article 112D (3) it is incumbent upon the Federal Government to hold a Second Review in 1974. The Federal Government failed or neglected to hold that Second Review in clear contravention of the express provisions of the Federal constitution. This contravention is to the detriment of the people of State of Sabah.

The Second Review now published in the recent Federal Gazette on 20 April 2022 is only in respect of years 2022 to 2026. It has failed to address the lost years from 1974 to 2021.

By failing to hold that review for periods from 1974 to 2021 the people of Sabah have lost the benefit of the 40% entitlement as of right under the Federal Constitution. This right and entitlement is sacrosanct as enshrined in the constitution foundation documents and indeed the Constitution itself.

SLS' action is for the preservation of the Constitutional Rights of the people of Sabah.

Like clockwork, the Attorney General Chambers defended the action and amongst others, raised the issue of SLS' lack of locus standi, submitting a regressive and restrictive version of locus standi to the court.

Public interest litigation is a branch of administrative law which involves judicial review of administrative actions and has a pivotal role to play in an administrative state particularly in the promotion of good governance.

Initiated by citizens and interested parties who may not be directly affected by the administrative acts, such public interest litigants are often frowned upon by the executive.

The evolution of public interest litigation in Paragraph 1 Schedule for the Courts of Judicature Act 1964 (the provision of remedies for enforcement of fundamental rights), is affected by the differences of judicial attitude in giving an interpretation on the issue of standing under Order 53 rule 2 (4) of the Rules of Court 2012. On one hand, some Judges take a strict and narrow approach on the interpretation of the issue of standing. On the other hand, some Judges take a more liberal, broad and less rigid approach toward interpretation of the issue of standing. This scenario has uncertainty for public interest litigation in Paragraph 1.

Public interest litigation plays a critical role to maintain the rule of law and enhance access to justice for disadvantaged groups under public law. Consequently, the court should relax further the rules on locus standi in public law to permit any public or interested party acting bona fide with a view to vindicating the cause of justice to make application on behalf of others or a particular class of people, if that other person or class of people cannot come to court to get relief for some reason. It is a grave lacuna in the system of public law if public interest litigation is prevented by limited rules of locus standi.

The Attorney General of Malaysia is the principal and main legal advisor to the Government of Malaysia. He or she is also the protector of the public interest.

The irony is there is a conflict between the role of an Attorney General as the protector of the public interest and his loyalty to the legislative and executive agencies of the State. The question that begs to be asked is what happens when the Attorney General for whatever reason does not protect the public interest or even raises it? What happens when parties directly affected do not initiate actions for reasons best known to them? Surely a very liberal locus standi law on locus standi in Malaysia would go a long way to rectify this and permit access to justice particularly when real livelihoods are often affected, directly or indirectly.

The Time Has Come for A Freedom of Information Act

Events in Malaysia in the past year has revealed the necessity for a Freedom of Information Act to finally be enacted to allow democratic shoots to grow. Access to information helps the public make public authorities accountable for their actions and allows public debate to be better informed and more productive and will assist in public interest litigation. Access to official information can also improve public confidence and trust if government and public sector bodies are seen as being open.

Freedom of information (FOI) is fundamentally a right given to the people to request information from the government. It also encompasses the obligation of government agencies to publish information on a routine basis. International and regional legal instruments recognise FOI as a fundamental right in a democratic society.

In Malaysia, despite having FOI enactments in Selangor and Penang, the federal legislature has yet to attempt bringing FOI motion to be tabled before the Parliament.

At the Federal level, no specific statute on FOI has been passed so far. The current framework of the information system is tightly regulated by the Official Secrets Act 1972 (OSA). This statute generally exempts all classified information from disclosure for any purpose (however noble the intention is) unless the proper authority declassifies the said information. The OSA was modelled after the English legislation and was first introduced to combat any attempt by civil servants to indulge in spying and espionage. However, the amendment to the OSA in 1986 widens the statute's scope in criminalising all types of communication of official secrets.

The departure of the Malaysian OSA from the original spirit of the English legislation is glaring. In the United Kingdom (UK), the offence of unauthorised disclosure under Section 2 requires the prosecution to prove the certain ingredients. In contrast, the Malaysian OSA applies indiscriminately to anyone who is involved along the chain of communication of classified information.

The Malaysian OSA does not consider the damaging implication of the disclosure to attract criminal liability under the Act. The Act covers all types of disclosure of any classified document, no matter how trivial or unrelated it is with national security, defence or crime prevention. Furthermore, Section 8 of the Malaysian OSA creates a strict liability offence; hence the malicious intent of the accused is immaterial. In addition to that, Section 16 (3) of the Malaysian OSA makes a statutory presumption that unless otherwise proved, it shall be presumed that unlawful communication of classified information is made for the purpose prejudicial to the national interest. This is not consonant with the general notion of criminal justice, which imposes the prosecution the burden to prove that the communication is damaging to the national interest.

The Malaysian OSA also contains Executive intervention in the form of a certificate under Section 16A. This section provides that a certification by a Minister or public

officer in charge certifying certain information as official secret shall be conclusive evidence of that fact and shall not be questioned in any court. The bar of judicial review by Section 16A may lead to the arbitrary use of the provision hence due to the absence of any check and balance mechanism on the Executive discretion. On the contrary, in the UK, a Ministerial certificate is subject to judicial review.

The arguments in support of FOI are many:

Openness and transparency: First and foremost, FOI fosters openness and transparency in the government. Secrecy in public affairs can only be curtailed by oversight of the people. FOI enables the public to develop a clearer image of what is happening inside the government. Transparency and openness only strengthen accountability and enhance the credibility of the political and economic system. If poor performance, inefficacy, dishonesty and duplicity are readily exposed and rooted out by public oversight, this will rekindle the faith in the government. Besides, it also improves the public sector's professionalism and the capacity of the officers to develop, analyse, articulate and implement policies that stand up to public scrutiny.

Deterrent of corruption and vices of power: Corrupt behaviour often occurs behind closed doors. Without public scrutiny on public institutions, corruption generally lags behind the radar of the anti-corruption enforcement agency and the public alike. Under normal conditions where rules and procedures are honestly complied with, official secrecy will be a minor nuisance to the citizens. However, when the system ceases to follow norms to the extent that every official file is marked as 'confidential' and 'top secret', this secrecy becomes the cloak for irregular, unauthorised or male fide acts of the government. FOI legislation would expose corruption in the government. Making government information and practices open to public inspection should give everyone equal access to government spending, procedures and contracts.

Executive Accountability: FOI can compel public officials to discharge their functions and apply their discretion within the legal limits conferred by the law. In the discharge of general duties, the exercise of discretion is an integral part of the legal system. Nonetheless, when the criterion to apply this discretion is unknown to the public, discretionary power is prone to abuse.

The time has come for this nation of ours to install navigational aids such as a FOI Act to warn of dangerous areas ahead and ensure Malaysia's future as a democratic jurisdiction.

Borneo International Centre for Arbitration and Mediation (BICAM)

Lastly, as foreshadowed in the Opening of the Legal Year in 2020 at Kuching, SLS is proud to announce that the Borneo International Centre for Arbitration and Mediation (BICAM), now in the midst of renovations, will finally be opened and launched in the first few months of this year. BICAM is an independent international arbitration and mediation centre set up with the objective of providing quality and cost-efficient arbitration and mediation services for users in Malaysia and around the world, especially to the region, including Nusantara and BIMP-EAGA.

BICAM is presently funded by the Sabah State Government with foresight to enhance Foreign Direct Investment (FDI) by providing a centre to resolve international commercial disputes. This will be the very first dispute resolution centre set up with the backing and funding by a state and shows Sabah's resoluteness in encouraging and welcoming FDI. Examples of successful centres such as the Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre and the role they play in attracting FDI is well known.

As the founding member of BICAM, SLS would like to invite Sarawak State Govt and the Advocates Association of Sarawak to support and be part of the centre so as to be a truly East Malaysian dispute resolution centre of our own and we envisage a centre also being established in Sarawak whereby arbitrations in Sarawak will be done there and the Sarawak arbitration/mediation counsels and arbitrators/mediators can then keep income generated from such proceedings within Sarawak.

This is more so important in the light of the Federal Court's decision *Masenang Sdn Bhd v Sabanilam Enterprise Sdn Bhd* where the Federal Court held that the courts of first instance of the place specified as the seat of arbitration in Malaysia has exclusive supervisory jurisdiction over arbitrations seated in that place, including any award arising from such proceedings. It is not difficult to imagine a scenario where two parties entered into a construction agreement in Sabah and the project site is in Sabah but the place of arbitration (and therefore normally the seat of arbitration) stated in the agreement is in Kuala Lumpur and because of this, have to do the arbitration in Kuala Lumpur and after the arbitration, engage lawyers in Peninsular Malaysia to enforce/set aside the award there.

BICAM will continue the good work of SLS in providing the mediation services under Pusat Mediasi COVID-19 (PMC-19) wherein Sabah undertook the greatest number of

mediations by far as compared to any other state or territory in Malaysia combined and all with a 100% success rate. BICAM intends to engage with the Courts on how BICAM can assist, for example providing the court mediation services and when appropriate, BICAM can provide arbitration services to litigants in lieu of going through the full judicial process to free up Courts' time so that they can focus on judging.

In conclusion, allow me to recite a short pantun:

Di awal Persekutuan, indahny percakapan,
Janji manis sentiasa diberi,
Apa digendong telah banyak dilepaskan,
Akhirnya mengemis di kemudian hari,

Pemimpin bukan penglipur lara,
Janji yang lama haruslah dilaksanakan,
Tiada guna penyelesaian sementara,
Solusi kekal, itu yang kami dambakan,

Jangan leka di dalam rimba,
Jika tak mahu diterkam Pak Belang,
Hak negeri Borneo sentiasa kami jaga
Agar kesilapan lalu tidak berulang

Thank you for listening and I wish everyone here the very best wishes for the legal year ahead, a happy new year, good health and good fortune.