

OPENING OF THE LEGAL YEAR 2021
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In 2001, Tan Sri Richard Malanjum, working together with the Sabah Bar members, revived the age-old tradition of Opening of Legal Year in Sandakan. Some 8 years later, the Opening of the Legal Year was revived in Peninsula Malaysia in 2009 during the tenure of Tun Zaki Tun Azmi. Both Openings of the Legal Year have since become important annual events in the Malaysian legal calendar.

An Opening of the Legal Year is not simply a ceremonial occasion, but provides an opportunity for the legal community to take stock, and reflect on matters critical to the administration of justice within our legal system and the rule of law. It is an important occasion for views to be given on legal matters that are of significance to the community. The Bar, as one of the cornerstones of the justice system should and must speak on such matters. The Sabah Law Society (SLS), as one of the guardians of the law, will always speak on these matters as the Sabah Bar plays an important part in the rule of law in Sabah and Malaysia and so it is with much regret SLS will only be able to provide this statement as the Opening of the Legal Year for 2021 will not be held due to circumstances arising out of the Covid-19 pandemic for the first time in 2 decades.

2020 will forever be immortalised as the year marred by Covid-19. As the world watched in dismay at the havoc wreaked by Covid-19, what held us together in Malaysia is the belief that nothing is insurmountable. With characteristic stoicism, the Malaysian justice system plucked itself up and put in place measures to ensure the administration and accessibility to justice did not come to a grinding halt.

Yet, in the midst of all the darkness spewed by Covid-19, the bright light of the rule of law shone like a beacon, guiding Malaysia to safe harbour. On 25 October 2020, his Majesty the Yang Di Pertuan Agong decided there was no need to enforce a state of emergency. This much needed salve at a time when Malaysians were reeling from the blows of the pandemic gave a glimpse to Malaysians what can be achieved if the rule of law, not undermined and with all its institutions and checks and balances intact, prevails above all else.

2020 also saw the appointment of Datuk Abang Iskandar Abang Hashim as the 10th Chief Judge of Sabah and Sarawak. SLS welcomes Yang Arif's appointment and we look forward to continuing the close relationship between Bar and Bench working together in tandem for the betterment of the legal system in Sabah during his tenure at the helm of the High Court in Sabah and Sarawak.

Virtual Hearings

At the onslaught of Covid-19 in Malaysia in March 2020, SLS requested for an urgent meeting with the Courts in Sabah to make arrangements with the Chief Judge of Sabah and Sarawak (CJSS) and other Court officers for the issuance of a Practice Direction for Sabah for the conduct of virtual and video-conferencing hearings in light of the Covid-19 pandemic. These steps were necessary in order to ensure that the wheels of justice would keep turning whilst minimising the risk of spreading the infection between the bench, bar and members of the public.

SLS is grateful to the CJSS and the Sabah Court officers for their proactiveness and cooperation during those difficult times.

SLS is delighted by the recent amendments to the various Rules (Rules of Court, Rules of the Court of Appeal and Rules of the Federal Court) to cater for virtual hearings.

Advocates in Sabah and Sarawak have for many years been conducting virtual hearings via the Video Conferencing facilities made available to them thanks to the initiatives spearheaded by Tan Sri Richard Malanjum and Tan Sri David Wong Dak Wah. These initiatives have greatly benefitted the administration of justice in Sabah, resulting in inter alia greater convenience and lowered costs for parties and advocates alike. The SLS is glad that such initiatives have now been recognised and taken account of by the Palace of Justice.

At a time when many legal practitioners in Malaysia pushed back against the implementation of virtual hearings in Courts, Sabah took the lead and forged ahead with virtual hearings which have now become the norm. SLS sounded the clarion for virtual hearings to be made permanent at a time when many merely wanted it to be transient and only to serve disruptions caused by Covid-19.

Physical hearings will always have their place in the administration of justice. However, we must all accept that virtual hearings are here to stay.

SLS would like to acknowledge and thank the Judiciary for being inclusive and listening to not necessarily the majority but also the voices of the minority in clear vindication that good ideas will always be welcomed and appreciated. SLS would like to further thank the Judiciary for placing weight and consideration on the views expressed by it in drafting the Practice Direction for virtual hearings throughout Malaysia.

Separation of Powers of the Attorney General and the Public Prosecutor

In recent years and especially in 2020, many criminal charges against high profiled individuals were dropped by the Public Prosecutor even as the people tried to make sense of some bewildering decisions to do so.

The roles of the Federal Attorney General (AG) and the Public Prosecutor in Malaysia are merged into one office, even though both roles are fundamentally different in nature. Thus, it is crucial for both roles to be separated to ensure that there is a check and balance in upholding and enhancing the rule of law in Malaysia.

The rationale behind advocating for separation stems from the fact that there may occur a serious conflict of interest, in particular when a case involves an influential political figure in the government. This is the hallmark of a genuine separation of both roles to ensure that justice is not only done, but also seen to be done.

This issue concerning the fusion of the AG and Public Prosecutor's roles was brought to the fore by Justice VC George, then High Court Judge, in *Lim Kit Siang v U.E.M* [1988] 2 MLJ 12 when he made the following remark:

In Malaysia, the AG's position is very different from that of his British counterpart. He is a civil servant appointed by his Majesty the Yang Di Pertuan Agong on the advice of the Prime Minister. He is not answerable to anybody, neither to any Minister nor to any Ministry, not even to the Prime Minister, not to Parliament and to the people (in that his is not a political appointment). However, he holds office during the pleasure of the Yang Di Pertuan Agong which in effect means during the pleasure of the Executive.

Such remark shows a profound contradiction in the role of the AG. On one hand, he is appointed by the Agong on the advice of the Prime Minister, yet he is not answerable to the Prime Minister or Parliament. This therefore means that in principle, the AG has the power to prosecute anyone who is criminally liable, which includes the Prime Minister.

However, on the other hand, the AG only holds office at the pleasure of the Agong which also means that the Prime Minister determines his position. This therefore deprives the AG of independence in the exercise of his duty.

The fused roles of the AG and the Public Prosecutor are provided in Article 145 of the Federal Constitution where it outlines the role and duties of the AG. In this regard, Articles 145 (2) and (3) deserves particular attention:

(2) It shall be the duty of the Attorney General to advise the Yang Di Pertuan Agong or the cabinet or any minister upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Yang Di Pertuan Agong or the Cabinet, and to discharge the functions conferred on him by or under this Constitution or any other written law.

(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

As provided in Article 145, the AG is essentially the legal advisor to the Government and in the exercise of his duty, ensures that the Government acts within the confines of the law. He

is also responsible for the prosecution of individuals that are criminally liable - other than proceedings provided in Article 145 (3).

The role of the AG as the Public Prosecutor is also provided in section 376 (1) of the Criminal Procedure Code which states:

(1) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this code.

The Interpretation Acts 1948 and 1967 further defines the role of the Public Prosecutor:

Public Prosecutor means the Attorney General, and includes (within the scope of his authority) a Deputy Public Prosecutor appointed under any written law relating to criminal procedure and a person authorised by any such law to act as or exercise all or any of the powers of the Public Prosecutor or a Deputy Public Prosecutor;

Article 145 provides the AG with wide discretionary powers that may be exposed to abuse. It seems these powers are absolute and beyond any judicial intervention as held in *Long bin Samat & Ors v Public Prosecutor* (1974) 2 MLJ 152. In this regard, Tun Mohamed Suffian, then Lord President of the Federal Court interpreted the extent of this power:

In our view, this clause [Article 145 (3)] from the supreme law clearly provides the AG wide discretion over the control and discretion of all criminal prosecutions. Not only may he institute and conduct any proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which has decided to discontinue...still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature. Anyone who is dissatisfied with the AG's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

Further, it was held in *Johnson Tan Han Seng v Public Prosecutor* [1977] 2 MLJ 66 that the AG's wide discretionary powers are also not subject to Article 8 which provides a constitutional guarantee of equality before the law and not to be discriminated against by any public authority. In this respect, Tun Suffian had this to say:

The language of this provision is very wide, for it includes the word "discretion" which means liberty of deciding as one thinks fit. In view of the deliberate decision of our constitution-makers to write this provision into our constitution, I do not think that it can be said that it must be read subject to article 8. Rather, in my view, the contrary; article 8 it is that must be read subject to article 145 (3).

As such, it would bode well for Malaysia to look to the practices adopted by the United States of America (US), United Kingdom (UK) and India that subscribes to transparency,

accountability and meritocracy in the separation of the roles of both offices and the appointment of an AG.

The appointment process of the AG in the US provides a good benchmark for Malaysia as the process there represents transparency at its finest. This is so because the Senate confirmation process demonstrates how the different branches of government keep each other in check. The Senate, as an instrument of check and balance, ensures that the AG, a member of the executive branch, is appointed based on merits. Importantly, this takes away the power of the President to choose whoever he pleases to be the AG.

The UK also provides a good example of best practice that can be emulated by Malaysia. In the UK, the AG superintends the Crown Prosecution. This serves several purposes. Firstly, the AG is accountable to parliament as he/she is a member of the Cabinet. This renders him/her answerable to Parliament in respect of the decisions of the DPP ensuring accountability on the DPP's part. Indeed, the AG's power to direct prosecutorial decisions is confined to cases where he/she is satisfied that it is necessary to do so for the purpose of safeguarding national security. In other words, apart from national security, the AG does not have any role in prosecutorial decisions.

Secondly, the law prohibits the AG from being consulted in cases relating to Members of Parliament or ministers, as well as cases relating to political parties or the conduct of elections.

Similarly, in India, the AG's and Public Prosecutor's roles are completely separate and independent. There is no constitutional or legal provision that allows the AG to be a Public Prosecutor, nor does he/she have any power to influence the prosecutorial decisions by central or state government. However, unlike US and UK, the AG is not a member of the Executive.

SLS is conscious that the examples adopted by the above three countries are by no means flawless. In deciding what Malaysia should best subscribe to, we need to realise and recognise the drawbacks of different practices from around the world. The benefit of this is far reaching as it allows us to foresee any potential issues that Malaysia may face. In this regard, and taking the above examples as a reference, the following issues should be explored further:

- i. Should the AG be a Member of Parliament, the Executive and the Cabinet?
- ii. Should the AG's office superintend the Office of the Public Prosecutor?
- iii. Should the AG and the Public Prosecutor's position be secured by tenure?

Whichever path Malaysia chooses to take, the reforms should first begin by amending the constitution, CPC and the Interpretations Act. This is to guarantee that there are two separate and independent offices for both the AG and Public Prosecutor playing different roles. This also serves the purpose of restricting the AG's wide discretionary powers.

The separation of both offices is key to prevent conflict of interest in the form of political interference in prosecutorial decisions. Equally important is for a rigorous appointment process to be imposed in Malaysia (akin to US). Only then can we be assured that transparency, accountability and meritocracy are preserved into the process.

Anti-hopping Law

The hallmark of a mature political systems does not see democratically elected representatives shifting their allegiance, unlike in Sabah or Malaysia as a whole.

Political stability is a crucial prerequisite for the proper functioning of a parliamentary government. The number of defections hit unprecedented levels in 2020 and as recent events have proven, many elected representatives of the people are unable to control their impulses to jump ship, hence there is an urgent need, more so than ever given the current political climate, to adopt anti-defection laws in the country to prevent this type of behaviour.

Anti-defection legislation is not a novel concept. It has already been made into law by the Penang state government under Article 14(A)(1) of the Constitution of the State of Penang (Amendment) Enactment 2012.

The main point of contention against the enactment of such laws is that it would infringe Article 10 of the Federal Constitution, which guarantees freedom of association.

In fact, an earlier anti-hopping law in Sabah was declared unconstitutional by the Supreme Court in 1992.

However, if one looks closely, Article 10(2) provides that legal restrictions on the rights conferred by Article 10(1) may be imposed by Parliament "as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality". Having read the provision in its entirety, it is thus apparent that those rights are not absolute in nature and may be limited by Federal law.

An anti-hopping law is justified on the basis of public order and morality. Public confidence in the democratic process will diminish greatly if this continues to take place. Implementing such laws is imperative, and may not be ultra vires to the Federal Constitution.

SLS urges the Federal government to urgently enact anti-hopping legislation to prevent elected lawmakers from switching parties and to resolve the political malaise besetting Malaysia once and for all.

TYT to Appoint Judicial Commissioners

In last year's Opening of the Legal Year for Sabah and Sarawak in Kuching, the outgoing Chief Judge of Sabah and Sarawak, Tan Sri David Wong Dak Wah, had urged the relevant parties to look into Article 122AB of the Federal Constitution, which takes away the power of the respective governors of both Sabah and Sarawak to appoint 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.

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 Sarawak and Sabah 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.

Judicial service must be separated from legal service

SLS renews the call to relieve the Attorney-General (AG) of administrative control over judicial officers and to place the judicial officers under the administrative control of the chief registrar of the Federal Court.

The present administrative arrangement is untenable as it impinges on the independence of the judicial officers.

To enhance the independence of judicial officers, the judicial service must be separated from the legal service, so that there will be two separate services, namely, the 'Judicial Service' and the 'Legal Service'; and judicial officers should be placed under a separate service commission, instead of the current constitutional arrangement whereby under Article 138 of the Federal Constitution, both the judicial officers and the legal officers (that is to say, officers of the Attorney-General's Chambers such as deputy public prosecutors, federal counsels and senior federal counsels) are all deemed as being under one service and are inter-changeable (between the judicial department and the legal department) in terms of postings, and are all placed under a single service commission, namely, the Judicial and Legal Service Commission.

May we all have a blessed year ahead and be protected from harm and be well and healthy always.

Thank you.

3 January 2021