

KEYNOTE ADDRESS BY
THE RIGHT HONOURABLE THE CHIEF JUSTICE OF MALAYSIA,
TUN TENGKU MAIMUN BINTI TUAN MAT

ON THE OCCASION OF
SELANGOR BAR CIVIL LAW CONFERENCE 2023

“CIVIL LAW AD INFINITUM”

29 – 30 SEPTEMBER 2023

EMPIRE HOTEL, SUBANG JAYA

SALUTATIONS

- (1) My Sister and Brother Judges of the Federal Court, Court of Appeal, High Courts and Judicial Commissioners;
- (2) Mr M K Thas, The Selangor Bar Chairman;
- (3) Tuan Haji Mohamad Ezri bin Haji Abdul Wahab, Vice President of the Malaysian Bar;
- (4) Respected members of the Bar;

Distinguished guests, ladies and gentlemen,

Assalamualaikum warahmatullahi wabarakatuhu and a very good morning.

INTRODUCTION

[1] I would like to begin by expressing my sincerest gratitude to the Chairman of the Selangor Bar, Mr. M K Thas, for according me the honour of delivering this keynote address. I would also like to commend him and the Selangor Bar for successfully convening this Civil Law Conference.

[2] “*Civil Law Ad Infinitum*”, which is the theme of this Conference, very accurately describes the nature of civil law as an ever-growing branch of the law. In fact, one can glean from the conference agenda itself the numerous categories of civil claims and the constantly evolving types of remedies available.

[3] We are joined by many legal experts who, I am sure, have a lot to share regarding the various areas of civil law. As such, I do not attempt to steal their spotlight but I would like to highlight several broader areas that are closer to my constitutional function as a Judge and head of the Judiciary.

[4] The three areas that I would like to speak on are these:

- i) Firstly, the concept of administration of civil justice in Malaysia;
- ii) Secondly, the current state of the justice system in Malaysia, with particular focus on civil justice; and

- iii) Thirdly, some ideas on potential improvements and the way forward.

THE ADMINISTRATION OF CIVIL JUSTICE IN MALAYSIA

[5] As we know, civil law encompasses a vast breadth of areas that may not even be related to one another. This includes tort and contract and further sub-branches such as corporate law, intellectual property, construction, employment, taxation, and even human rights.

[6] In a way different from criminal law and procedure, these laws govern how we live in a civilised society. For instance, contract law governs agreements and how we honour debts and promises. Tort law such as defamation and negligence govern respectively dignity and standards of care.

[7] The administration of civil justice therefore refers to the set of processes and mechanisms employed within a legal system to resolve civil disputes and maintain social order. It involves a well-structured system that aims to ensure fairness, equality, and equal access to justice to all parties involved in a dispute. This system is primarily designed to protect individuals' rights and enforce obligations under civil law. In short, it exists as an enforcement mechanism ensuring that laws are not only applicable as fanciful notions but enforceable ideals.

[8] A system must have its actors. In this regard, the Judiciary holds a very prominent position. The constitutional obligations and functions of the Courts include the interpretation of laws, making findings of fact and

then applying what is interpreted from the law to those facts. The ultimate aim of this process is to provide a remedy to the injured party.

[9] When this process is done correctly, I think it results in an overall stability in the country. In this sense, the Judiciary not only reaffirms legal and societal norms, or standards for individuals, enterprises, and public entities but also plays a pivotal role in underpinning the social and economic fabric of our society. In doing so, the Judiciary's contribution is significant to the societal and economic well-being of the nation.¹

[10] The most fundamental aspect of the administration of justice, whether in a civil or criminal context, is the Rule of Law. The very essence of this concept rests on the notion that "no man is above the law and that all men are equal before the law".²

[11] The Rule of Law also dictates that if rights are to have meaning, they must be enforceable. Correspondingly, it includes according to aggrieved persons avenues to seek adequate remedies to give effect to those rights. The latin maxim *ubi jus ibi remedium* is most apt in that where there is a right, there must be a remedy.

[12] In the administration of justice, courts are to interpret and apply the laws in a way that is certain, consistent, coherent, and with due regard to judicial precedents. Most importantly, judicial decisions must fulfil the needs of justice, fairness, and equity.

¹Genn, Hazel. (2009). *Judging civil justice*. Cambridge University Press, accessed via http://assets.cambridge.org/9780521118941/excerpt/9780521118941_excerpt.pdf.

² *Tony Pua Kiam Wee v Government of Malaysia & Another Appeal* [2020] 1 CLJ 337 (FC).

[13] These concepts can therefore be encapsulated very neatly into the overarching notion of access to justice. Access here does not only mean purely physical access but the right to an effective remedy.

[14] In other words, filing a case and having it brought before a Judge is the least of a litigant's expectation. Often times, in a civil case, the litigant feels that he is wronged in some way. He could be a person who feels that he upheld his part of the bargain only to be told that he will not be paid the agreed amount. She could be a mother who has been denied the right to see her child. They could be individuals whose community is suffering from toxic waste coming from a nearby factory. In all these cases and more, litigants expect their cases to be heard fairly knowing and feeling that not only was their grievance ventilated, but that they were given a remedy that helped them as much as possible to move on with their affairs.

[15] As such, the Rule of Law demands that the justice system is accessible (in every sense of the word), fair, impartial, timely, and responsive. And these principles are achieved when the justice system is independent, and coloured with integrity, honesty, competence, and diligence. Written judgments and reasons, in this regard, ensure transparency and provide either closure to an ongoing dispute or provide the way forward for appeals.

[16] That said, a robust justice system is not only about the Courts. It consists of its various other actors such as the lawyers, litigants and witnesses.

[17] In my view, next to Judges, advocates are a very integral aspect of the Rule of Law. Their duty remains as pertinent today as it has always been which is, first, to the Court and second to his or her client. This concept was very recently and emphatically stated by the Federal Court in the *Taman Rimba* case,³ as follows:

“[559] In order to dispense justice fully and properly, our adversarial system depends entirely on counsel to conduct themselves with candour, courtesy and fairness. Ours is a practice, where counsel owe, a primary duty to the court besides duty to their client.

[560] The duty of counsel to his client is subject to his overriding duty to the court, because it is in the public’s interest that there is ‘a speedy administration of justice’ and thus, a counsel’s duty to the court ‘epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case’...

[561] Our adversarial system can only properly function to administer justice, if there is full disclosure by all parties in their capacities as officers of the court. If the court’s hands are tied to the selective and piecemeal extraction of facts and law, the result is an artificial advancement of our law based on the private interests of a select few at the expense of justice for all.”.

[18] Lawyers, much like judges, must therefore remain unwavering in their adherence to rules and foundational legal principles. All things considered, the independence, impartiality, and integrity of all principal participants, not just judges, are paramount in cultivating and

³ *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829, [559]-[561].

maintaining public trust in the administration of civil justice within Malaysia.

THE CURRENT STATE OF THE CIVIL JUSTICE SYSTEM IN MALAYSIA

[19] In discussing the state of the civil justice system in Malaysia, it is my view that it involves two fundamental aspects. The first is substantive law and the second is procedural law. In the past three years or so, we have seen major developments in both areas. With the advent of the pandemic (from which we are still reeling), we have seen major changes and developments in both those aspects.

[20] Some of these developments include the use of smart contracts and their implications and other major updates in technology. For one, the very tools of our trade are undergoing a complete transformation. Where we once spoke highly of digitalisation, some now consider it a basic norm in a world rapidly transitioning into the realm of Artificial Intelligence (AI). Every now and then we receive news of technology that can simulate human intelligence and how this is being used increasingly to automate decision-making processes.

[21] Let us take AI generative apps for instance. ChatGPT recently took the legal world by storm when it exhibited that it could write relatively simple but coherent emails and letters. If fed further information, one could argue that ChatGPT could even start making or resolving legal arguments.

[22] In addition to the automation of legal process, the boon in technology has also indicated that even physical buildings are not vcompletely necessary. Gone are the days of courtroom chaos caused by stacks of paper documents. In the modern-day courtroom, we no longer pass around physical papers. If we take into account the fact that data is now mostly digital and that computers are capable of doing basic legal thinking, it stands to reason that the entire notion of dispute resolution is starting to evolve to a higher level.

[23] The notion of access to justice has taken a new meaning with the implementation of technology in the administration of civil justice. With the implementation of modern technologies, geographical limitations are no longer barriers to access to justice. Justice can be dispensed over vast distances, beyond the seas and across time zones, making the justice system more accessible, egalitarian, and inclusive.

[24] The Malaysian Judiciary has proactively embraced this shift, undertaking numerous tech-driven initiatives to stay in sync with the ever-evolving technological landscape as can be seen in our technological reforms such as online hearings, screen sharing to avoid the use of bulky documents, AI Sentencing and so on.

[25] As for the more substantive aspect of it, the jurisprudential landscape of civil law is evolving with the advent of the digital age. To illustrate this point, contracts for example are being concluded with just a few clicks and swipes. In the recent civil case emanating from the Canadian courts, the use of the ‘thumbs up’ emoji was held to be a valid

signature constituting an acceptance of the agreement.⁴ I believe this very interesting development will be discussed later in this conference.

[26] With the emergence of disruptive technology, judges are increasingly encountering novel technological evidence coming into their court rooms, whether it be social media evidence, forensic DNA, etc. The legal profession is not spared either, as lawyers are called upon to constantly evolve and adapt, thereby ensuring their legal scholarship remains effective in delivering justice.

[27] On a much more positive note, our civil justice system is witnessing a paradigm shift from the conventional mode of dispute settlement to a more party autonomy-based settlement. Party autonomy has paved the way for the rise of Alternative Dispute Resolution (ADR) methods, which include mediation, negotiation, and arbitration. This alternative mode of settlement provides parties with a platform where they can mutually work towards a resolution, free from rigid court procedures and potentially adversarial courtroom environments.

[28] Speaking of non-adjudicative processes, court-annexed mediation is a form of judicial dispute resolution that is gaining traction in the narratives of the civil justice system in Malaysia. This form of mediation, supervised and facilitated by the courts, provides a hybrid approach to dispute resolution. Court-annexed mediation serves as a unique blend of traditional and modern dispute resolution techniques, offering a tailored approach that aligns with the individual needs and circumstances of the disputing parties.

⁴ *South West Terminal v Achter Land Cattle Ltd* QBG-SC-00046-2022 (King's Bench for Saskatchewan June 8, 2023, per T.J. Keene).

[29] The civil justice system in Malaysia stands presently at a pivotal juncture of evolution, intertwined with challenges and burgeoning opportunities. That begs the question: where are we headed from here?

WAY FORWARD FOR THE CIVIL JUSTICE SYSTEM IN MALAYSIA

[30] In terms of moving forward, if we take what we have learned thus far, the true measure of a competent justice system (including a civil justice system) lies not in the grandeur of its structures, but in its innate ability to adjudicate conflicts swiftly and devoid of unnecessary red tape, exorbitant costs, and protracted timeframes. In this light, a constant re-evaluation and revision of our civil laws is necessary. We must ensure that our laws continue to resonate with the evolving needs of those who seek justice, thus maintaining their relevance and responsiveness.

[31] To illustrate one of many examples, I refer to the 2014 Federal Court decision in the case of *Yam Kong Seng*.⁵ Briefly, the Federal Court held in this case that a short service message (SMS) validly amounted to the acknowledgement of a time-barred debt for the purposes of the Limitation Act 1953. The message was considered as amounting to something in writing whereas the phone number of the sender was accepted as his signature.

[32] In the modern day and age, even SMS, is now no longer as relevant and as highlighted earlier, Canadian courts are already adjudicating on emojis. All the while, other apps are surfacing such as Telegram which in addition to allowing for messaging, has to some

⁵ *Yam Kong Seng & Anor v Yee Weng Kai* [2014] 4 MLJ 478 (FC).

extent evolved into an online market platform allowing vendors and purchasers alike to purchase all manner of items, including contraband, via the use of bots. The entire process remains anonymous and seamless. Yet, our laws are still very much rooted in old legislation from the 1950s that are yet to be amended to cater for more modern developments. Legislation must develop and it must develop quickly.

[33] In this regard, the legal community plays a very significant role on improving our laws. I must commend the Malaysian Bar who has, since the beginning of this year, made at least 60 submissions regarding institutional and law reforms to the Prime Minister's Department (Law and Institutional Reforms). These proposals include reforms to the Contracts Act 1950, amendments to the Competition Act 2010, and enhancements to the National Legal Aid System. I urge the Malaysian Bar to maintain its laudable efforts towards civil law reform in Malaysia.⁶

[34] Having commented on substantive law, I cannot ignore its equally important counterpart of procedural law which regulate access to the courts and secure the legitimacy of our court process.

[35] To keep the Rules of Court constantly updated, the Rules Committee is actively engaged in the review, revision, amendment, and streamlining of procedural laws, with the involvement of all stakeholders. The committee's mission aligns with five key principles that uphold the legal system's structural integrity. The first principle emphasizes the provision of equal access to justice for all. The second principle focuses

⁶ Bar Council Malaysia Circular No. 108/2023, dated 4 April 2023, accessible at https://www.malaysianbar.org.my/cms/upload_files/document/Circular%20No%20108-2023.pdf.

on expediting legal resolutions by promoting swift legal proceedings. The third principle prioritizes cost-effectiveness by ensuring that the costs associated with proceedings are proportionate to a case's complexity, the issues, and the total value of the claim. The fourth principle underscores the efficient utilization of court resources to facilitate seamless proceedings. The fifth and final principle targets the achievement of fair and practical outcomes that are tailored to the specific needs of the involved parties, thereby reflecting a thorough and balanced approach to legal resolution.

[36] In line with these principles, the Rules Committee has made various amendments to modernise our Court processes. For example, the law has been amended to regulate online hearings, and to enable the electronic service of writs and documents.⁷ Further, the importance of mediation has been amplified, as the High Court now possesses the authority to mandate mediation in specific scenarios as per Order 34, rule 2(1A) and (1B). To prevent unnecessarily delay, adjournment procedures have been tightened, placing restrictions on adjournment of pre-trial case management and trials as per Order 34, rule 5 and Order 35, rule 3.

[37] Other impending amendments in the pipeline include, but are not limited to, changes in the amount of legal costs and costs for interlocutory applications at the Subordinate Courts.

[38] Taking a different perspective, harmonizing our civil justice system with international norms is a crucial step towards achieving global

⁷ <https://www.linkedin.com/pulse/simple-breakdown-rules-court-amendment-2020-hew-hoong-liang-nathan->.

compliance. This process involves much more than just aligning statutes; it represents a commitment to uphold the principles of justice, fairness, and equity on the global stage. Admittedly, these proposed reforms are still a small drop in the ocean and may even become obsolete once they are ultimately implemented.

[39] Regardless, I take the view that harmonizing our laws, though it could be a long process, helps facilitate more streamlined cross-border transactions, making it easier for Malaysian entities to engage in international trade and commerce. It simplifies enforcement, ensuring that judgments handed down by our courts are respected and enforced overseas. Finally, it expedites dispute resolution, creating a legal environment where cross-border disputes can be resolved quickly and efficiently. All these factors contribute to creating a civil justice system that is responsive, effective, and globally recognized.

[40] Amendments and legislative reforms aside, it is crucial to recognize that judicial rulings addressing unique and emerging issues play a vital role in shaping precedents and advancing the civil law jurisprudence in Malaysia. The invaluable efforts of skilled lawyers in courtrooms, as well as the significant contributions of academics through their extensive research and insightful publications, are key drivers in propelling the growth of legal scholarship and sparking reforms in the legal domain.

[41] As we strive to enrich our jurisprudence, we can draw upon insights from advancements in other common law jurisdictions. Granted that disputes will be resolved in accordance with our laws and subject to our own Federal Constitution, these jurisdictions' progress can provide

valuable perspectives and solutions for similar legal challenges that surface in our courts. Comparative legal studies have indeed emerged as a powerful tool, ensuring that our legal system stays abreast with global advancements. They help us align our laws with international standards and conventions, fostering a legal environment that is both locally relevant and globally compatible.

[42] In any event, it is crucial to acknowledge that the refinement of the administration of justice in Malaysia is not solely reliant on judges but extends to every participant within the justice system. I reiterate that integrity remains the cornerstone of a robust justice system. I urge everyone to persistently uphold the highest standards of the legal profession and execute your duties with honour, dignity, impartiality, and unwavering resolve, ensuring a justice system that remains steadfast in its principles.

CONCLUSION

[43] In closing, it is heartening to observe that the breadth of topics covered in this conference spans an extensive range of areas. The engagement on ground-breaking issues across various specialised sectors holds great significance for the evolution of civil law in Malaysia. I am certain that the dialogues, presentations, and scholarly exchanges that are to unfold will prove immensely useful to all the participants of this Conference.

[44] Thank you and I wish you a fruitful endeavour.