

KEYNOTE SPEECH

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“Access To Justice Through Legal Aid: Insights from The Bench”

SALUTATIONS

**YAB Tun Raus Sharif
Former Chief Justice of Malaysia
Co-Founder of Yayasan Tan Sri Profesor Ahmad Ibrahim**

**YBhg Tan Sri Dato Seri Zulkefli Ahmad Makinuddin
Former President of the Court of Appeal
Co-Founder of Yayasan Tan Sri Profesor Ahmad Ibrahim**

**YBhg Dato’ Mary Lim Thiam Suan
Director AIAC**

**YBhg Tan Sri Sharizat Abdul Jalil
Former Minister of Women, Family and Community Development
Chairman of the Yayasan Tan Sri Profesor Ahmad Ibrahim Board of
Trustees**

My brother and sister Judges of the Federal Court, Court of Appeal and High Court,

Distinguished guests, ladies and gentlemen,

Assalamualaikum warahmatullahi wabarakatuh and a very good morning.

INTRODUCTION

[1] First and foremost, I would like to thank Yayasan Tan Sri Profesor Ahmad Ibrahim (‘the Yayasan) for the opportunity to address the Malaysian Law Students Legal Aid Convention 2024.

[2] Legal aid in Malaysia is conventionally viewed as the responsibility of practising lawyers or pupils-in-chambers. Law students represent a large and energetic thinking force and yet their role in respect of legal aid is rarely discussed. The Yayasan must receive my highest commendation for bringing law students into this important fold by organising this convention. Yayasan’s effort demonstrates its transformative commitment to enhancing legal awareness and nurturing the next generation of legal leaders.

[3] The theme of the Convention is “Justice Unbound: Empowering Law Students for Legal Aid.” It is indeed a privilege and an honour for me to speak on the vital concept of Access to Justice Through Legal Aid, particularly to the bright young minds that represent the future of our nation’s legal profession.

THE ROLE OF LEGAL AID IN ENHANCING ACCESS TO JUSTICE

[4] Justice, as a cornerstone of our society, must be universally accessible. It is not, and cannot be a privilege reserved solely for the elite, wealthy and powerful. Justice and the Rule of Law transcend beyond socio-economic status. After all, and in line with the fundamental notion of equality before the law, justice lies in its ability to provide fair and equal treatment to all.

[5] Having said that, and while access to justice is a fundamental right, it does not come cheaply. Most barriers to ensuring equal access to justice are not always found within the walls of our courts or the pages of our legal statutes. Rather, they often reside within the intricate and, at times, harsh socio-economic realities faced by those less fortunate. While our courts stand as bastions of impartiality, ready to serve all who seek justice, we must acknowledge that not everyone possesses the financial means to secure the legal representation they need to present their case effectively before an impartial arbiter.

[6] Over recent decades, income and wealth inequality has risen markedly across the world. The United Nations Commission on Legal Empowerment of the Poor estimates that 85% of the population of 179 developing nations are not protected by the law.¹ This translates to approximately 4.1 billion of the world's poor, lacking effective recourse to justice. The striking correlation between the wealth gap and the justice

¹ Report of the United Nations Commission on Legal Empowerment of the Poor, 'Making the Law Work for Everyone' Volume I (2008) at page 90.

gap has led to the assertion that the opposite of poverty is not wealth, but justice.²

[7] The disparity in access to justice between rich and poor litigants severely undermines public confidence in the courts. A justice system accessible only to a privileged few erodes the legitimacy of an institution built on its foundational value of fairness. True equality before the law in this sense can only be realised if there is reasonable access to the law for all.

[8] Inaccessibility to justice, which is frequently termed the “justice gap”, encompasses three principal dimensions.³

[9] The first is the physical gap, which refers to the geographical distance between communities and institutions of justice. This gap is particularly prominent in rural or remote areas, where access to justice is limited due to the absence of judicial infrastructure.

[10] The second is the resource gap, which pertains to the high costs associated with legal proceedings that deter low-income individuals from pursuing legal remedies. This economic disparity often renders justice inaccessible to the poorest members of society, leaving them vulnerable to exploitation and unable to defend their rights.

[11] The third is the literacy gap, referring to a lack of knowledge and understanding of legal rights and procedures, especially among

² ‘The Opposite of Poverty is Not Wealth. It’s Justice’ (*H.E. Butt Foundation*, 2023) <<https://hebfdn.org/echoes/the-opposite-of-poverty-is-not-wealth-its-justice/>> accessed 28 July 2024.

³ Speech delivered by the Honourable the Chief Justice of the Supreme Court of Singapore, Sundaresh Menon, at the 36th Annual Lecture of the School of International Arbitration in Dispute Resolution, ‘Gateway to Justice: The Centrality of Procedure in the Pursuit of Justice’ (30 November 2021).

marginalised communities with low levels of education. This gap impedes individuals from seeking justice as they may not know where to turn for help or how to advocate for their rights.

[12] Legal aid plays an instrumental role in bridging all three dimensions of the justice gap. It ensures that no individual is excluded from the protection of the law due to geographical, economic or educational barriers. In other words, access to legal aid translates into access to justice for the poor, the marginalised and the disadvantaged. Legal aid thus functions as a cornerstone of a fair, humane and efficient justice system that is grounded on the Rule of Law.

[13] The indispensable role of legal aid has been consistently recognised by international instruments.⁴ The relevant United Nations principle comprehensively defines “legal aid” to include legal advice, assistance and representation that is provided at no cost for those without sufficient means or when the interests of justice so require, as well as legal education, access to legal information and services provided through alternative dispute resolution mechanisms and restorative justice processes. Remarkably, the said principles expressly acknowledge and encourage the contribution of law students in delivering legal aid.⁵

[14] Legal aid is so universal that its provision is not only a legal necessity but also a moral imperative. From an Islamic standpoint for

⁴ See for instance: United Nations General Assembly adopted the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems which underscores the global consensus on the importance of legal aid as a vital component of a fair and accessible justice system.

⁵ United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 14 and Guideline 16.

example, Islamic law and principles place highly the core principles of justice, compassion and social responsibility. In this context, Surah An-Nisa, Verse 135 of the Qur'an underscores the need to stand firmly for justice so as to ensure that it is not skewed in favour of the wealthy or against the poor.⁶

THE CONSTITUTIONAL AND LEGAL FRAMEWORK FOR LEGAL AID

[15] The starting point for legal aid in Malaysia is Article 8(1) of the Federal Constitution which mandates that all persons are equal before the law and are entitled to equal protection.

[16] Also relevant is Article 5(1) of the Federal Constitution which states that no person shall be deprived of his life or personal liberty save in accordance with law. The right to life and liberty is inextricably linked to the right to legal representation more so in criminal cases. A person charged with an offence carrying the death penalty has his life at stake, while a person facing a charge punishable with imprisonment is at risk of losing his liberty and livelihood. It is paramount that such individuals are accorded the right to legal representation. This right is enshrined in Article 5(3) of the Federal Constitution, which provides that a person who is arrested shall be allowed to consult and be defended by a legal practitioner of his choice.

[17] The right of an accused to legal representation inherently includes the right to competent legal representation. The quality of legal services

⁶ Al-Qur'an (Surah An-Nisa, 4:135) "O you who have believed, be persistently standing firm in justice, witnesses for Allah, even if it be against yourselves or parents and relatives. Whether one is rich or poor, Allah is more worthy of both. So follow not [personal] inclination, lest you not be just. And if you distort [your testimony] or refuse [to give it], then indeed Allah is ever, of what you do, aware."

rendered to a legal aid client must never be compromised due to the lower remuneration rates involved. It is imperative for lawyers to devote their full attention and effort to representing their legal aid clients. A lawyer must prepare for a legal aid case with the same diligence and meticulousness as they would for any other case, and defend the rights and interests of the client with equal vigour.

[18] Ineffective legal representation may lead to grave miscarriages of justice, especially in death penalty cases, where the quality of legal representation can quite literally mean the difference between life and death. A good example is the case of *Yahya Hussein Mohsen Abdulrab v Public Prosecutor*,⁷ where an accused who was convicted of a drug trafficking charge and sentenced to death by the High Court was later acquitted by the Federal Court on the grounds that the flagrant incompetence of his trial counsel had violated his constitutional right to a fair trial, resulting in a miscarriage of justice to the accused.

[19] Of equal import is the provision of legal aid to low-income individuals grappling with civil legal issues, such as divorce, custody of children, unfair dismissal and tenancy disputes. Such challenges can profoundly impact an individual's fundamental rights and well-being. Without legal aid, those lacking financial resources may struggle to manage the complexities of civil law, resulting in unjust outcomes and aggravating social inequality.

[20] In Malaysia, both State and non-State institutions, including the Bar, play complementary roles in the provision of legal aid. The Government

⁷ *Yahya Hussein Mohsen Abdulrab v Public Prosecutor* [2021] 5 MLJ 811 (FC).

provides legal aid services through its Legal Aid Department ('LAD') in accordance with the Legal Aid Act 1971. These services encompass legal advice, litigation services in relation to civil, criminal and Syariah cases, mediation services for civil and Syariah matters, and legal companion services for child victims of sexual abuse. The legal aid services offered by the LAD are targeted at low-income groups among Malaysian citizens.

[21] The Bar Council, on the other hand, administers legal aid through its Legal Aid Centre ('LAC') pursuant to the Legal Profession Act 1976. Unlike the Government's LAD, the LAC provides legal advice, representation and intervention in civil and criminal matters to both Malaysian citizens and non-citizens, including migrant workers and refugees in Malaysia.

[22] Among the initiatives conducted by the LAC is the Dock Brief Programme, which offers free legal representation to accused persons in criminal proceedings who cannot afford to engage lawyers. Via this programme, pupils-in-chambers assist by offering mitigation pleas on behalf of the accused persons in the Subordinate Courts. This programme not only provides essential legal assistance to impecunious individuals, but also enhances the capabilities of budding lawyers on handling cases on the ground.

[23] To complement the existing legal aid schemes under the Government's LAD and the Bar Council's LAC, as well as to address the worrying trend of the lack of legal representation for accused persons in criminal cases, the Government, in 2011, established the National Legal Aid Foundation ('NLAF'). The NLAF is a state-funded legal aid scheme administered by the Bar Council. It provides legal representation and

consultation to Malaysian citizens at every stage of a criminal case, including arrest, remand, bail application, trial and appeal, (for criminal offences carrying the death penalty, its services only cover arrest and remand stage). The establishment of the NLAF has been hailed as a significant breakthrough in the development of legal aid schemes in Malaysia, paving the way for more robust public-private partnerships in the future provision of legal aid.

[24] A mere acknowledgement of the right to legal aid as a fundamental right is pointless if such right is not actively promoted. The police should facilitate access of the accused persons to legal aid, and should not stand in the way of this right. Similarly, prosecutors should take appropriate action where investigative and detention authorities have denied the accused access to legal aid, and consider this factor in deciding whether to use evidence obtained in breach of the accused's rights.

[25] It is also the role of the Judiciary in protecting this fundamental right and in setting an example for the rest of the justice system to follow. A strong and firm stance of the Judiciary on legal aid would encourage a culture of compliance by the other actors of the justice system.

[26] Additionally, Judges are in a position to give force to the rights of the accused by addressing any breaches thereof with appropriate remedies as embodied in Principle 9 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. This principle obligates that effective remedies and safeguards be given to protect such access to legal aid.

[27] The courts have indeed played a pivotal role in ensuring the effective implementation of the NLAFF scheme. The Judiciary has proactively issued guidelines for the courts to adhere to in support of the NLAFF scheme, especially during remand proceedings.⁸ These guidelines require the court to inform unrepresented suspects of their right to obtain legal aid from the NLAFF.

[28] Another legal aid scheme is the court-assigned counsel scheme which is administered by The Office of the Chief Registrar of the Federal Court of Malaysia. This scheme provides free legal advice and representation for any individual charged with an offence punishable by the death penalty.⁹ Established by the British before the Second World War, this scheme is the earliest legal aid programme in our country. It guarantees the right to legal representation for accused persons facing the most severe form of punishment.

[29] In 2022, the Chief Registrar's Office announced a substantial increase in the fees payable to court-assigned counsel handling trials and appeals in death penalty cases. It is our sincere hope that this raise will encourage more skilled and experienced counsel to participate in the scheme, thereby enhancing the integrity and fairness of the judicial process in capital punishment cases.

⁸ *Arahan Amalan Ketua Hakim Negara Bil. 11 Tahun 2021 (Pengendalian Prosiding Permohonan Reman di Bawah Seksyen 117 Kanun Tatacara Jenayah); Pekeliling Pejabat Ketua Pendaftar Bil. 2 Tahun 2012 (Garis Panduan Reman Dan Pengendalian Kes-Kes Jenayah Selaras Dengan Penubuhan Yayasan Bantuan Guaman Kebangsaan).*

⁹ *Pekeliling Ketua Pendaftar Bil. 1 Tahun 2022 (Garis Panduan Berhubung Peguam Lantikan Mahkamah).*

THE ROLE OF LAW STUDENTS IN PROMOTING LEGAL AID

[30] The provision of legal aid by the Government, the Bar Council and the courts is complemented and reinforced by the legal aid services offered by our academic institutions. In recent years, a growing number of public and private universities in Malaysia have established legal aid clinics that provide free legal consultation and advice to members of the public who cannot afford professional legal services. This integration of a clinical component into the law school programme is known as clinical legal education or 'CLE'.

[31] University legal aid clinics provide law students with the invaluable opportunity to deliver legal services to the public under professional supervision. These clinics create a learning environment where students can identify, research and apply legal knowledge in a setting that closely mirrors actual practice. It allows students to deepen their substantive knowledge of the law and develop essential professional competencies while working with actual clients. Where the clinic cannot offer direct assistance, students can refer clients to other organisations that may be able to help. These clinics not only enhance access to justice for underserved and underprivileged individuals, but also ultimately nurture the growth of a more skilled, empathetic and socially conscious legal profession.

[32] The role of academic institutions in fostering student involvement in legal aid initiatives cannot be understated. As aptly noted by the American jurist, Deborah L Rhode, "Legal education plays an important role in socializing the next generation of lawyers, Judges, and public policymakers. As gatekeepers to the profession, law schools have a

unique opportunity and obligation to make access to justice a more central social priority.”¹⁰

[33] To this end, our universities must strive to integrate clinical legal education as a mandatory component of the law school curriculum. This approach has been implemented in other jurisdictions, such as the United States¹¹, and Singapore¹² where students are required to complete a clinical programme and perform pro bono work, respectively.

[34] An often-overlooked aspect of legal aid where law students can make a significant impact is in advancing legal literacy. A lack of legal literacy not only manifests in an inadequate understanding of the law and the workings of the legal system but, more fundamentally, in an absence of awareness of the legal dimensions of various situations. In other words, individuals who lack legal literacy may fail to recognise that the issues they encounter are legal problems, viewing them instead as personal or social problems, or merely bad luck. This misconception often leads to a failure to seek legal assistance. In this sense, access to justice is closely intertwined with a basic level of legal literacy.¹³

[35] Law students can help bridge the legal literacy gap by engaging in outreach activities that educate the public on understanding and navigating the legal system. The current generation of law students are capable of disseminating legal information to a much broader audience by

¹⁰ Deborah L Rhode, ‘Access to Justice’ 193 (2004).

¹¹ The American Bar Association Standards and Rules of Procedure for Approval of Law Schools, Standard 303.

¹² ‘Pro Bono Programme’ (*Singapore Institute of Legal Education*, 15 October 2019) <<https://www.sile.edu.sg/pro-bono-programme>> accessed 7 August 2024.

¹³ Speech delivered by the Honourable the Chief Justice of the Supreme Court of Singapore, Sundaresh Menon, at the Negotiation and Conflict Management Group (NCMG) ADR Conference 2019, ‘Technology and the Changing Face of Justice’ (14 November 2019).

leveraging their social media proficiency. They can use their knowledge to raise awareness about legal rights, liabilities and responsibilities, as well as about alternative means of conflict resolution. In this context, it is crucial for law students to understand that access to justice does not only mean access to the courts, but also includes consensual outcomes that are acceptable to the parties, outside the court system.

[36] A notable student-led outreach programme is the Street Law project, where law students educate community groups about legal issues pertinent to them. Originally developed in the United States, this initiative has in recent years gained traction in law schools across our country. The Street Law project not only enhances public awareness of legal rights and responsibilities, but also holds potential as a catalyst for social change. In post-apartheid South Africa, for instance, Street Law has played a significant role in bridging racial divides by facilitating dialogue between black and white school children on pressing societal issues.¹⁴ This illustrates how legal literacy can be a powerful tool for social transformation and demonstrates the capacity of law students to advance the understanding of fundamental civil rights.

[37] Beyond promoting legal literacy, law students can also support litigants in person by acting as McKenzie friends. A McKenzie friend is a person permitted by the court to attend as a friend of a litigant in person to a court hearing. They may take notes, quietly make suggestions and give advice, but cannot take part in the proceedings as an advocate. In the recent decision of *Saral Kerussnan v Hospital Pantai Indah Sdn Bhd*

¹⁴ Richard Grimes, David McQuoid-Mason, Ed O'Brien and Judy Zimmer, 'Street Law and Social Justice Education' in Frank S Bloch (ed) *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford University Press, 2010).

& *Ors*,¹⁵ the High Court recognised and adopted the ‘McKenzie friend’ principle. The court held that a litigant in person who is not eligible for legal aid and unable to afford to engage counsel should be allowed to use a McKenzie friend. The court noted that the assistance of a McKenzie friend will help expedite the progress of a case and ensure that a just and correct decision is reached by the court. This decision paves the way for law students to provide legal aid during court proceedings, albeit in a limited capacity, without having to wait until they become qualified lawyers.

[38] Additionally, it is imperative for law students to explore innovative solutions to bridge the gaps in access to justice. Legal technology holds the potential to fundamentally transform how legal aid is delivered. By harnessing the power of technology, law students can develop more efficient systems for managing cases, disseminating legal information and connecting clients with essential resources. Online platforms, apps and digital tools can enhance the accessibility and affordability of legal services, especially for those underserved by the current system. For example, law students at the Georgetown University Law Centre in the US have built web-based applications that help individuals in identifying and understanding their legal problems and evaluating their legal options.¹⁶ Such innovations are crucial in reshaping the legal aid landscape and broadening access to justice for all.

[39] Law students should never underestimate the profound impact they can make through legal aid work. A compelling example is the case of Dwaine George, whose conviction was overturned by the English Court of

¹⁵ [2024] 2 MLRH 623 (HC).

¹⁶ Tanina Rostain, Roger Skalbeck and Kevin G Mulcahy, ‘Thinking like a Lawyer, Designing Like an Architect: Preparing Students for the 21st Century Practice’ (2013) 88 *Chicago-Kent Law Review* 743.

Appeal in December 2014, largely due to the efforts of law students from the Cardiff University Innocence Project.¹⁷ Convicted of murder and sentenced to life imprisonment in 2002, George spent twelve years in prison while steadfastly maintaining his innocence. In overturning his conviction, the Court of Appeal praised the “diligent” work of the Cardiff law students who uncovered evidence that rendered his conviction unsafe.¹⁸ In 2018, students from the Cardiff University Innocence Project similarly succeeded in overturning yet another wrongful conviction.¹⁹ These cases illustrate how the dedicated involvement of law students in legal aid work can have a transformative effect on the lives of individuals who otherwise lack access to legal representation.

CONCLUSION

[40] In closing, I urge all law students to remain steadfast in their commitment to legal aid. Seek out opportunities to volunteer, learn and advocate for those who cannot do so for themselves. Remember that the measure of a successful legal career is not just in the accolades and financial rewards you receive, but in the positive impact you have on the lives of others. As future lawyers, Judges and policymakers, you have the power to shape the course of justice in our country.

Thank you and I wish you a fruitful conference.

¹⁷ Alexandra Topping, ‘Murder conviction overturned thanks to Cardiff law students’ (*The Guardian*, 9 December 2014) <<https://www.theguardian.com/uk-news/2014/dec/09/dwaine-george-murder-conviction-overturned-cardiff-university-innocence-project>> accessed 7 August 2024.

¹⁸ *R v George* [2014] EWCA Crim 2507 at para [54].

¹⁹ Victoria Ward, ‘Law students hailed by Judges after overturning care worker’s sexual assault conviction’ (*The Telegraph*, 21 December 2018) <<https://www.telegraph.co.uk/news/2018/12/21/innocence-project-victory-students-help-overturn-sex-attack/>> accessed 7 August 2024.