OPENING ADDRESS BY

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

ON THE OCCASION OF

THE SELANGOR BAR LAW CONFERENCE 2024

'*SUI GENERIS*'

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GLENMARIE HOTEL & GOLF RESORT, SHAH ALAM

SALUTATIONS

(1) My Brother and Sister Judges;

(2) Mr. Mohd Ezri Abdul Wahab,
President of the Malaysian Bar;

(3) Mr M K Thas, The Selangor Bar Chairman;

(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 thanking the Selangor Bar, in particular, Chairman Mr. M K Thas, for inviting me to deliver this opening address.

[2] The past conference focussed on more specific areas of the law. Upon my perusal of the agenda, it appears that this year's conference focusses on nearly every aspect of the law. It includes all manner of litigation such as civil and corporate litigation, family law, and various aspects of criminal law. I must also commend the Selangor Bar for addressing unique areas of the law such as aviation law and certain areas that require pressing attention including the law on anti-corruption and human trafficking.

[3] The Selangor Bar has done an admirable job of securing eminent speakers who are most qualified to share their knowledge, wisdom and experience in their respective fields. And so, I think it is best that I retain my practice of not trespassing into their respective domains.

[4] In this regard, and for the purposes of this keynote address, I would like to narrow down my speech to the following two topics, that is to say, the importance of:

(1) the right of access to justice; and

(2) advocacy and the role of lawyers in the justice system.

[5] I believe that these two topics underpin all aspects of litigation and the Rule of Law irrespective of the field of law.

ACCESS TO JUSTICE

[6] Perhaps the two most important provisions of the Federal Constitution ('FC') that constitute the foundation of all other fundamental liberties are the rights enshrined in Articles 5(1) and 8(1).[1] According to the former, no person shall be deprived of life or personal liberty save in accordance with the law. And according to the latter, all persons are equal before the law and are entitled to the equal protection of the law.

[7] The right of access to justice presupposes that under the auspices of the FC, each and every one of us is entitled to the best quality of life that we can afford and if in the event that there is an incursion or disruption of those rights, that one has at their disposal an efficient, effective and adequate means of seeking redress. As such, the right of access to justice does not merely refer to physical "access" but it more wholesomely includes the remedies that are available and capable of righting the wrong suffered.

[8] What this means is that access to justice manifests on two fronts. The first is its more tangible definition that relates to direct access to the Courts or to the very least an impartial and independent dispute resolution mechanism. The second relates to the grant of effective and meaningful remedies by those arbiters.

[9] In relation to the first aspect, modernity has made the Courts easier to approach by virtue of the existence of e-filing and virtual Courts. Distance is significantly reduced and lesser resources are used. Further,

[1] See: *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 (FC), at [9]; and *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 (FC), at [4].

recent procedural yet tenuous rules such as *locus standi* have been relaxed such that almost any person from all walks of life can initiate an action to protect an aggrieved or perceptibly aggrieved right.

[10] In this regard, I refer to the recent majority decision of the Federal Court in *Nik Elin* that re-emphasises the principle that a person who is seemingly affected by unconstitutional legislation may initiate an action to challenge such a purportedly invalid law.[2] Another recent decision of the Federal Court in *Taman Rimba*[3] also relaxed the longstanding staunch *locus standi* rule established in *Lim Kit Siang*,[4] by favouring the approach of allowing litigants to pursue public law action which in that case related to town and country planning in relation to a park enjoyed by many members of the public.

[11] It is my view that these decisions insofar as they relate to procedural law have taken the right approach bearing in mind the following observations of the Supreme Court of India in *The State of Punjab v Shamlal Murari*:[5]

> "We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the hand-maid and not the mistress, a lubricant, not a resistant in the administration of justice.".

[12] Of course, in accessing the justice system, its actors play an important role. In a case where someone is arrested or detained, Article

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[2] *Nik Elin Zurina bt Nik Abdul Rashid & Anor v Kerajaan Negeri Kelantan* [2024] 2 MLJ 150 (FC).

[3] See generally: *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829 (FC).

[4] *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 (SC).

[5] *The State of Punjab v Shamlal Murari & Anor* [1976] 1 SCC 719, at [8].

5(3) of the FC guarantees that each person shall have the right to legal representation. And thus, seeing as how the right to a lawyer is so crucially entrenched in the FC, the importance of an advocate's role cannot be overstated. I will deal with this later but at this point, suffice it to say that insofar as the right of access to justice is concerned, lawyers are a prominent feature that bridges the justice gap. This is also true in many civil cases where a person's financial status, reputation, or family rights is concerned.

[13] As for the other aspect of the right to access to justice namely the right to an effective remedy, I have often favoured the words of the two authors Garth and Cappelleti, who said:[6]

> "Indeed, the right of effective access is increasingly recognized being of paramount importance among the new individual and social rights, since the possession of rights is meaningless without mechanisms for their effective vindication.".

[14] And thus, while it is imperative to mount a strong case supported by facts and the law, the ultimate reason to mount that case is to right a wrong. The remedy issued at the end of it therefore carries more weight if not all the weight of the win.

[15] Again, legal representation as a concept takes centre stage because as the person taken to be well-versed not just with the facts, the advocate must also advocate the best remedy. The Courts must then also, in all cases, mould the appropriate relief. The failure of an advocate

[6] Bryan Garth and Mauro Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' [1978] 27 Buffalo Law Review 181, at pages 184-185.

to do his or her job is so crushing that lawyers must at all times maintain indemnity insurance before they can practice. In a criminal context, a conviction may even be overturned owing to an accused person's own advocate's flagrant incompetence.[7]

[16] It is also in this light that recent judicial authorities have reemphasised the crucial importance of all aspects of the rights of access to justice by reference to Articles 4(1) and 121(1) of the FC.[8] In specific relation to ouster clauses, the apex Court has more than clarified that such clauses are invalid not only to the extent that they debar any form of review, but also to the extent that they prevent the grant of effective and appropriate remedies.[9]

[17] Having considered all these notions, the value and importance of access to justice can be summarised thus. In the context of a civil case, filing a case or in a criminal matter. being represented per se, is the least of a litigant's expectations.

[18] At its best, in all manner of cases, 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 in life.

[19] As such, the Rule of Law demands that the justice system is accessible (in every sense of the word), fair, impartial, timely, and

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

[8] See generally: *Ketheeswaran a/l Kanagaratnam & Anor v Public Prosecutor* [2024] 1 MLJ 851 (FC); *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356; *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323; and *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)* [2022] 2 MLJ 356.

[9] *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579, at [471] and [599].

responsive. And these principles are achieved when the justice system is independent, where judges conduct themselves with integrity, honesty, competence, and diligence.

[20] In order for the Courts and Judges to fully dispense justice, effective counsel is paramount. And not only does this refer to doing the bare duties of presenting the facts and the law in a transparent and ethical manner, but also effectively advocating for or against a case.

[21] This brings me to the next topic of this address, that is to say, the importance of advocacy and the role of lawyers.

ADVOCACY AND THE ROLE OF LAWYERS

[22] To be clear, there are two interrelated concepts at play. The first is the role of lawyers generally in all aspects of the legal profession. The second is narrower and deals with the functions and duties of an advocate in litigation before independent adjudicatory bodies including the Courts. My purpose is to draw particular attention to the latter aspect, meaning, the importance of advocacy and how the role of a lawyer impacts the justice system.

[23] As I have stated on numerous occasions, Judges must decide cases based purely on the law and facts before them. They ought not to take into account other extraneous considerations. But both the beauty and downside of the legal profession is that both facts and law are nearly always open to interpretation. Statutes and constitutional provisions can be interpreted differently depending on which of the canons of construction apply while facts are prone to assumptions, inferences and

presumptions. Advocacy is the tool which narrows that grey area in favour of a just and legally coherent decision.

[24] In this regard, the legal profession is replete with ethics. From an advocate's dress code to the courtesies of seeking adjournments, we also have the more critical ethical obligations such as an advocate's duties to the Court, his client and in many cases, even to the public. I do not intend to expand on these values too much as they are continuously mentioned on numerous occasions and in fact the ethics course is a mandatory precondition to being called to the Bar.

[25] It is enough for me to say that arguably the most important of all is the advocate's duties to the Court. I take the position that if an advocate prioritises these duties as the foremost of their duties, their duties to his client and the public should in an ordinary case be met. This means citing cases with a proper understanding of the law, not intentionally misleading the Court with overruled propositions and fully and frankly disclosing all the relevant facts including facts unfavourable to his client.

[26] The importance of these duties cannot be overemphasised and, in this regard, I would like to quote the following passages from the *Taman Rimba* case,[10] 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.

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

> [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'…
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> [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.".

[27] Putting things another way, an advocate cannot lose sight of the forest for the trees. The effort taken to win one case to the detriment of the law has an impact far larger than can be imagined for the development of the law as we know and understand it.

[28] I would, at this juncture, like to cite some practical examples where I think it illustrates the importance of advocacy vis-à-vis access to justice and the overall wellbeing of the law. And also, the role of the lawyer and the interplay between his or her duties to the Court and client.

[29] In this analysis, I would like in particular to refer to two decisions of the Federal Court that drew significant public interest and concern. The first is the decision in *Ang Ming Lee*,[11] while the second is the decision in *CCH*.[12]

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[11] *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 (FC).

[12] *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71 (FC).

[30] *Ang Ming Lee* concerned among other things the validity of extensions of time granted to developers in respect of their construction deadlines defined by their statutory contracts with their purchasers. As you are aware it has been held in numerous cases including *Ang Ming Lee*, that housing law is considered protectionist and as such, the Courts try and accord an interpretation that most favours purchasers. The approach taken by the Federal Court in *Ang Ming Lee* was therefore nothing new.

[31] Materially, what happened in that case was that the relevant legislation directly empowered the Minister to extend time of the statutory completion period of housing sale and purchase contracts ('EOT applications'). However, a regulation was issued stating that the Controller of housing had the first instance power to consider such EOT applications and that the decision of the Controller was appealable to the Minister. This was clearly not aligned with the parent Act that only accorded such powers directly to the Minister.

[32] This was accordingly the line of argument adopted. The purchasers' – who contested these EOTs – argued that the regulation was *ultra vires* the parent housing legislation on the basis that the statute only empowered the Minister to grant an extension of time, and not the Controller. It was further argued that the Controller, not having been accorded such powers, was not entitled to consider such applications and any such extensions so granted were invalid.

[33] The Federal Court upheld trite law on the interrelation between subsidiary and parent legislation. The trite administrative principle dictates that subsidiary legislation cannot accord powers greater or above

the parent Act. It was on this basis that the Federal Court decided that the regulation was *ultra vires* the parent Act. The natural consequence of this was that the EOTs that were granted to the developers were found to be invalid. In other words, the developers did not in effect have any extensions in their favour and they accordingly exceeded their statutory construction deadlines. They therefore were required to pay liquidated ascertained damages ('LAD') to the purchasers.

[34] While the Federal Court was primarily guided by counsel for both the purchasers and developers, watching briefs were also present. The final decision that was rendered was made solely and purely on the law and facts before the Court in the face of numerous arguments made by parties on the deleterious effects such a decision might have on the housing industry.

[35] I can say a number of things regarding this. For one, after the decision, there did not appear to be any action by Parliament to "rectify" the lacuna in the law to allow the Controller to hear and determine EOT applications in the manner done in *Ang Ming Lee*.

[36] Secondly, if it all a crisis ensued in the housing industry post-decision, that crisis ensued not as a result of the decision of the Federal Court but because of the inherent deficiencies in the law. It is not for the Courts to condone illegality or to improve the law. If trite statutory principles point in the direction of invalidity, the Courts cannot lose sight of the invalidity for a presupposed larger purpose. It would breed uncertainty and chaos in our legal system and be an affront to the Rule of Law.

[37] That said, it is specifically this crisis that draws my attention. By crisis here, I am referring to the situation that happened post-*Ang Ming Lee* wherein purchasers started suing developers for EOTs as a result of their own EOTs becoming invalid having been granted by Controllers. Many developers who diligently complied with the regulations in place at that time were forced to make good on damages that were incurred because they followed a legal regime that was subsequently declared *ultra vires*.

[38] This crisis was recognised and resolved most recently by the Federal Court in *Obata-Ambak*.[13] In this case, the Federal Court had to consider the plight of developers who had obtained EOTs from Controllers pre-*Ang Ming Lee* but who were sued for damages post-*Ang Ming Lee*.

[39] In arriving at its decision, the Federal Court was clear that it was not departing from *Ang Ming Lee* insofar as the Controller's lack of powers is concerned.[14] The developers who were affected by the decision post-*Ang Ming Lee* for EOTs obtained prior to the said decision were allowed to rely on the Second Actor Theory. Hence, even though their EOTs were effectively invalid, they were insulated from that outcome because they had followed the law that had later been declared invalid.

[40] Most interestingly, the Federal Court went a step further and rules as a matter of policy that *Ang Ming Lee* ought not to have retrospective effect and in so ruling, effectively read the doctrine of prospective overruling into *Ang Ming Lee*.

[13] *Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and other appeals* [2024] MLJU 1902 (FC).
[14] *Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and other appeals* [2024] MLJU 1902, [133].

[41] I do not wish to dwell at length on the jurisprudence behind prospective ruling – a principle that is well-entrenched in our legal jurisprudence. Suffice it to say that my understanding is this. Ordinarily, a judgement issued by a Court applies retrospectively to the parties in the case and to the law. However, in certain cases, the apex Court can declare its decision to have prospective effect meaning the legal effects of the decision will affect everyone other than the parties prospectively.

[42] What is interesting to note is that none of the parties involved in the *Ang Ming Lee* suit including the watching briefs had guided the Court on prospective overruling. No one raised the fact that such a ruling could or ought to have been made. While the Court is taken to know the law, it remains the duty of counsel nonetheless to raise pertinent legal principles considering that ours is an adversarial system. Assuming this crucial point was raised, and prospective overruling was declared, the entire saga leading up to *Obata-Ambak* might never even have occurred.

[43] This therefore goes to show that every step of the proceedings, from the time the case is filed to the day it is decided in open Court (especially so by the apex Court) advocates must forever remain vigilant that their arguments on the facts of one case can have far-reaching implications on the public and future cases. They may even become the foundation for future cases. For that reason, I think you can appreciate that advocacy bears significant impact not only on the parties but the law as a whole.

[44] Can there however be a situation where advocates only consider the impact of their case for a larger public benefit to the exclusion or detriment of his own client? This would present a situation that is to the

reverse of *Ang Ming Lee* and I think this would be an appropriate time to shift your attention to the second case in my example: *CCH*.

[45] *CCH* was a constitutional challenge by a child who was denied citizenship by the National Registration Department ('NRD'). On the facts, the child was abandoned as a newborn and there was absolutely no record of the nationalities of his birth parents. Many years after the child's birth, the child was adopted by his Malaysian adoptive parents. The basis of denying the child citizenship was that the identities of the biological parents could not be identified. Counsel for the child essentially argued, right from the High Court up to the Federal Court, that the term 'parents' as employed in the relevant part of the FC could be read liberally to include 'adoptive parents'.

[46] However, based on prior judicial precedents, the High Court and the Court of Appeal could not accept the child's line of argument. These Courts concurrently disagreed that 'parents' could be construed so broadly as including 'adoptive parents'. Given the decision of the courts below, the leave questions before the Federal Court concerned the interpretation of the FC and whether 'parents' includes 'adoptive parents'. You will however notice that none of the leave questions were answered by the Federal Court because "*the peculiar facts and circumstances of this case [did] not call for such deliberation*".[15]

[47] The unique facts and circumstances in *CCH* were that the child was actually found exposed at a particular location and the identify of his birth mother was unknown. This unrebutted fact alone invoked a presumption

[15] *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71 (FC), at [39].

in the FC that the child was born to a mother permanently resident at the place of the child's birth and accordingly, the presumption fulfilled the requirements of citizenship which were such that the child had to be born within the Federation to at least a mother who was permanently resident in the Federation.

[48] In those circumstances, the question of whether the child was subsequently adopted by Malaysian adoptive parents was rendered moot. In fact, in light of the facts of the case, the arguments on the leave questions were futile for the reason that it had no bearing on the facts.

[49] This is where the overzealousness of advocacy can be seen. In an attempt to make a case for other unrelated adopted children in this country to gain citizenship, the question of whether the litigant in *CCH* himself was entitled to citizenship was put second to the larger cause. This is obvious from the fact that the argument on the presumption was not raised in the High Court and the Court of Appeal. Had it been raised there, perhaps the litigant would not have to wait so long to acquire citizenship.

[50] Indeed, as I recall, the question on the application of the presumption was put to counsel for the child in the course of oral argument on the leave questions in the Federal Court. Counsel admitted that such a presumption was applicable on the facts and there was no tenable response from the other side to this argument either.

[51] While one can appreciate that the child in *CCH* was adopted, the clear applicability of the presumption to the child rendered the fact of his adoption immaterial to his case for citizenship. This is because he would, by that presumption be entitled to citizenship whether or not he was

adopted. His case was not therefore the right case to march forward the cause of adopted children seeking citizenship on the basis of adoption.

[52] This in my view illustrates the pitfalls of advocacy and could also be viewed as not upholding counsel's duty to the Court or even his client. After all, how could the High Court and the Court of Appeal be faulted for not considering the application of the presumption to the child when the nature of the case put before them was something entirely different from what was actually decided by the Federal Court.

[53] At this point, perhaps you can appreciate how *Ang Ming Lee* and *CCH* respectively represent the two extreme ends of how advocates can lose sight of a case.

[54] The former case represents an internal victory for the litigants but the outcome of the decision detrimentally affected an entire industry. Perhaps this could have been overcome if parties were minded to guide the Court on the doctrine of prospective overruling. The case is an example of short-sightedness in advocacy and the duties of an advocate.

[55] On the other hand, *CCH* represents long-sightedness. Here, justice for the litigant appeared to have been missed. After all, as noted in *CCH*,[16] the right to citizenship is so inextricably linked to the right to life and personal liberty. In public litigation, "test cases" are normal and often welcome but one must not sacrifice the litigant for the greater good.

[16] *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71 (FC), at [46]

[56] If you have not done so already, I would invite each and every one of you to also read the three cases I referenced earlier, namely: *Ang Ming Lee*, *Obata-Ambak*, and *CCH*. Perhaps you might come to the same conclusion as I have or perhaps you can form additional conclusions of your own.

[57] And thus, the next time you prepare for a case, it would bode you well to consider all aspects of the case. In upholding your duties to the Court and to your client, no matter the subject-matter of the case and no matter how big or small the claim, you will have, in large part, upheld both those duties if you have considered every possible aspect of the case from its direct short-term outcome and its long-term impacts.

[58] By all means, remain adversarial but not at the expense of justice.

CONCLUSION

[59] As mentioned earlier, this conference encompasses a wide array of topics in perhaps almost every aspect of the law. The learned speakers would undoubtedly share their experience and wisdom on these respective areas.

[60] My address today is on two matters integral and foundational to all areas of the law. It is my hope that in sharing my views with you, you will consider applying them in your practice so that we – the Bar and the Bench – can work together (as we always have) to uphold the Rule of Law and justice to the highest standard possible.

Thank you.