

KEYNOTE ADDRESS BY
THE RIGHT HON. TAN SRI DATO' SRI AZAHAR BIN MOHAMED
CHIEF JUDGE OF MALAYA
AT THE
JUDICIAL COLLOQUIUM 2022 ON THE THEME “THE ROLE OF THE
JUDICIARY IN ADVANCING HUMAN RIGHTS THROUGH THE UN
GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (UNGP)
AND THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT
GOALS (SDG)”
31st MARCH 2022
9.15 – 9.45 am

SALUTATIONS

1. YAA Tun Tengku Maimun binti Tuan Mat, Chief Justice of Malaysia,
2. YA Judges of the Federal Court, the Court of Appeal and the High Courts,
3. YA Judicial Commissioners of the High Court,

4. YBhg. Tan Sri Othman bin Hashim, Chairman of the Suruhanjaya Hak Asasi Manusia (**“SUHAKAM”**),
5. SUHAKAM Commissioners,
6. Delegates from the United Nations Development Programme (**“UNDP”**),
7. Judicial Officers, members of the Bar and legal practitioners.

Distinguished guests and participants ladies and gentlemen,

Assalamualaikum w.b.t and a very good morning to all of you.

A. INTRODUCTION

- [1]** It is a very great pleasure and also a privilege to be invited to deliver this keynote address by an organisation whose main function is to protect and promote human rights in Malaysia.
- [2]** Even though SUHAKAM and the Judiciary have a different role and responsibility, we each have a strong commitment to the concept of justice, the rule of law, fundamental rights and the values of democracy.
- [3]** SUHAKAM plays an important role in national dialogue concerning human rights. On behalf of the Malaysian Judiciary, let me thank SUHAKAM for convening this Judicial Colloquium on the theme:

“The Role of the Judiciary in Advancing Human Rights Through the UN Guiding Principles on Business and Human Rights (UNGP) and the 2030 Agenda for Sustainable Development Goals (SDG)”.

- [4] The theme for this Colloquium is most appropriate and timely. As our country strive towards greater economic progress, this Colloquium provides a great opportunity and offers a great deal of scope for all of us to exchange views and knowledge, as well as sharing experience on the protection of human rights in the context of the role of the Judiciary particularly, in promoting the Agenda for Sustainable Development Goals (**“SDG”**). Indeed, this Colloquium will also promote and enhance awareness on human rights and environmental issues, including climate change among the members of the Malaysian Judiciary. I must congratulate SUHAKAM for arranging such a stimulating and appealing list of topics for discussion.
- [5] I personally welcome the opportunity to share my thoughts on this matter.
- [6] As my starting point, let me highlight the United Nation Guiding Principles on Business and Human Rights (**“UNGP”**) and what it entails.
- [7] The UNGP is based on the State’s existing obligations as the primary duty-bearer to respect, protect and fulfil human rights and fundamental freedoms by preventing human rights abuse by businesses. In meeting its duty to protect, the State enforces laws

requiring businesses to respect human rights and guide businesses on how to respect human rights throughout their operations.

- [8] Under the UNGP, all business enterprises have the responsibility to take mandatory human rights due diligence (“mHRDD”). The mHRDD is grounded on companies’ obligation to focus their attention on the most serious human rights risks and identify existing or potential dangers to people with which they are involved in.¹
- [9] Since the risks to human rights may change over time, business enterprises are required under the UNGP to continuously and constantly identify and assess actual or adverse human rights impacts that they may cause and take appropriate actions to tackle the dangers.
- [10] As for sustainability, this is addressed in the 2030 agenda for SDG on which the theme of this Colloquium is grounded upon.
- [11] The concept of sustainable development was described by the Brundtland Commission Report² published in 1987 as the *“development that meets the needs of the present without compromising the ability of future generations to meet their own*

¹ Mandatory Human Rights Due Diligence, <https://www.ohchr.org/EN/Issues/Business/Pages/MandatoryHRDD.aspx>, 25th January 2022.

² **Brundtland Report**, also called *Our Common Future*, publication released in 1987 by the World Commission on Environment and Development (WCED) that introduced the concept of sustainable development and described how it could be achieved. Sponsored by the United Nations (UN) and chaired by Norwegian Prime Minister Gro Harlem Brundtland, the WCED explored the causes of environmental degradation, attempted to understand the interconnections between social equity, economic growth, and environmental problems, and developed policy solutions that integrated all three areas. <https://www.britannica.com/topic/Brundtland-Report>, 25th January 2022.

needs.”³ The description by Brundtland Commission Report emphasizes on two (2) key words, namely ‘needs’ and ‘limitations’. It delineates the eradication of poverty, employing environmental improvements, and social equitability through sustainable economic growth.

- [12] The concept of sustainable development entrenches social, economic and environmental aspects which are inextricably linked to one another.⁴ For example, the right to development is an inalienable human right as enshrined under Article 1 of The Declaration on the Right to Development 1986 and such right has to be practiced in harmony with the environment and cannot be pursued as to substantially damage the environment.
- [13] In line with promoting sustainable development, the United Nation (“UN”) has adopted 17 sustainable goals⁵, aimed to end poverty, protect the planet and ensure peace and prosperity among the global citizens by the year 2030. The SDG is targeted at achieving sustainable development in economic, social and environmental aspects in a balanced and integrated manner.
- [14] Among the 17 goals of SDG, our Colloquium today, according to the concept paper, will be focussing on goals 13 and 16. Goal 13 focuses on taking action to combat climate change and its impact

³ Fitzmaurice, M. (n.d.). *The Principle Of Sustainable Development in International Development Law*. Encyclopedia of Life Support System (EOLSS).

⁴ Nation, U. Transforming our world: the 2030 Agenda for Resolution adopted by the General Assembly on 25th September 2015, Seventieth Session, (2015) (pp. 1-35).

⁵ Nation, U. Transforming our world: the 2030 Agenda for. Resolution adopted by the General Assembly on 25th September 2015, Seventieth Session, (2015) (pp. 1-35).

whereas Goal 16 focuses on promoting 'Peace, Justice and Strong Institution'. These two (2) goals encompass very extensive issues and given the time constraint, in my speech this morning, I have taken the liberty to focus on the role of the Judiciary in promoting sustainability in the context of climate change.

Goal 13: Take Urgent Action to Combat Climate Change and its Impact

- [15] The United Nations Framework on Climate Change defines climate change as *“a modification of the climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere, and which is in addition to natural climate variability observed over comparable time periods”*.⁶
- [16] Climate change raises the risk of unusual and extreme weather. Malaysia is no exception when it comes to extremities in weather conditions and its consequences. We are already seeing the effects. Disasters such as floods and heatwaves are expected to become more frequent and intense. Recently, several states had already faced severe floods due to heavy rainfall, displacing people from their homes, destroying properties and some even claiming their lives.
- [17] Over the last few decades, climate change and the negative consequences thereof have gained increased attention in national and international forums, courts, the mass media and public discourse generally.

⁶ UNFCCC; Dinah Shelton and Alexandre Kiss, Judicial Handbook on Environmental Law, UNEP, 30th June 2004, at page 94.

- [18] On 8th May 1992, the UN General Assembly adopted the United Nations Framework Convention on Climate Change (“**UNFCCC**”) concerning greenhouse warming.⁷ Malaysia signed the UNFCCC on 9th June 1993 and ratified it on 17th July 1994. Subsequently, the Government established a National Steering Committee on Climate Change (“**NSCCC**”) to meet its obligations under the Convention and Malaysia is committed, among others, to prepare Malaysia’s National Communications to the UNFCCC.⁸
- [19] It is important to note that the goal that Malaysia is supporting through this initiative, among others, is relating to Sustainable Development Goals 13 (“**SDG 13**”) in taking urgent action to combat climate change and its impacts.⁹
- [20] Though Malaysia has ratified the UNFCCC back in 1994, to date, Malaysia has no specific legislations on climate change. So far, the legislature approach is to treat climate change issues like any other environmental matters. Some of you may recall that last year, the Minister of Environment and Water has announced that the Ministry has completed the climate change legal framework which will serve as the basis for the country’s Climate Change Bill. The Minister also stated that a review of the National Climate Change Policy will be conducted to take into account the important outcomes of the Paris Agreement on climate change mitigation, the latest development at

⁷ *Ibid.*

⁸ Malaysia Initial National Communication submitted to the UNFCCC, July 2000.

⁹ The Sustainable Development Goals in Malaysia, Singapore and Brunei Darussalam, Climate Action.

domestic and international levels, as well as integration under the United Nations SDGs.¹⁰

- [21] I believe that this development is very much welcomed and will pave way for better governance of climate change issues in Malaysia as well as to serve as a guideline for more effective compliance mechanisms in terms of curbing the effects of climate change.

Distinguished guests, ladies and gentlemen,

Right to Environment

- [22] Generally, when we talk about climate change, it is best that we understand the position of the right to environment under our law.
- [23] In Malaysia, there is no specific provision in the written Federal Constitution which speaks about the recognition or protection for a healthful environment. Our Constitution does not have an explicit provision for the protection or conservation of the environment or climate change.
- [24] It seems that Malaysia's approach to environmental management through policies and legal measures have not evolved from a Constitutional mandate to afford the public a right to clean air, water and environment. More often than not, these measures and actions are more of a reaction to intolerable environmental circumstances.

¹⁰ Sim Leoi, '*Malaysia's latest plans to fight global warming*', The Star, 21th September 2021.

- [25] While the Malaysian Federal Constitution does not specifically provides for the protection of environment, Article 5 of Part II does contain a provision on fundamental liberties, which states that “*no person shall be deprived of his life or personal liberty save in accordance with the law*”. This article does not explicitly deal with environmental rights. However, it is possible for this article to be construed liberally to allow for the right to a healthful environment. Indeed, our judges have dealt with issues pertaining to the right to a clean environment in a more liberal manner.
- [26] Almost 35 years ago, a High Court judge in **Sinuri bin Tubar v. Syarikat East Johor Sawmills Sdn. Bhd [1987] 1 MLJ 315** made an interesting observation, when it was said that “*Human calls for nature do not wait for governments to function. Clean water is a birth right of every human being as much as clean air*”.
- [27] But much more importantly, article 5 of the Federal Constitution that I have mentioned a moment ago has been given a fresh interpretation by the Malaysian Court of Appeal in the case of **Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan [1996] 1 MLJ 261**. In the words of the Court of Appeal, “*The expression ‘life’ incorporates all those facets that are integral part of life itself and those matters which go to form the quality of life ... it includes the right to live in a reasonably healthy and pollution free environment*”. In other words, the Court of Appeal concluded that while our written Constitution does not specifically provide for right to environment, it is implicit in Article 5(1), which guarantees the right to life.

- [28] Such also was the observation made by the Federal Court in **Bato' Bagi & Ors v State Government of Sarawak [2011] 6 MLJ 297** where it was stated that 'life' in Article 5(1) *"incorporates all those facets that are integral part of life itself and those matters which go to form the quality of life..."*.
- [29] In other words, the *"right to life and personal liberty"* recognized in Article 5(1) of the Federal Constitution encompasses all various aspects of life including the right to a clean and healthy environment.

The Role of Judges and Courts in Addressing Climate Change

- [30] Let me now turn specifically to the role of judges and courts in addressing climate change and its impact.
- [31] In the first place, a brief overview of the global status of climate change litigation and the emerging trends in other jurisdictions would be in order. Even though our legal setting can be contrasted with that of other jurisdiction, we must always pay careful attention to what is happening elsewhere in the world. As climate impacts grow, so too does climate litigations. Recent judicial decisions reveal several trends in regards to the purposes of climate change litigation. In a 2017 global review of the status of climate change litigation undertaken by United Nation Environment Programme ("**UNEP**"), five (5) trends were identified. We have so much to learn from these

emerging trends. Therefore, by way of broad overview, I think it is worthwhile that I highlight them here.¹¹

First, holding governments to their legislative and policy commitments. In this category of cases, citizens and non-governmental organizations are suing to hold their governments accountable for climate-related commitments. Many nations have laws or policies addressing aspects of the climate problem, and the Paris Agreement provided for national commitments toward the goal of averting average global warming in excess of 1.5°C and 2°C. Litigants have begun to make use of these codifications in arguments about the adequacy or inadequacy of efforts by national governments to protect individual rights vis-à-vis climate change and its impacts.

Secondly, linking the impacts of resource extraction to climate change and resilience. In many cases, challenges to a project or policy identify linkages between resource extraction and climate-related impacts, both in the form of emissions due to combustion of extracted fossil fuels and in the form of impairments to resiliency and adaptive capacity. Litigants eager for policy to address climate change have begun to challenge environmental review and permitting processes that unduly ignore resource extraction activities' implications for the climate. These challenges seek to make those linkages legally significant and either deserving of consideration or else compelling an alternative approach to natural resource management.

¹¹ See *'The Status of Climate Change Litigation –A Global Review'*, Law Division, UN Environment Programme, 2017.

Thirdly, establishing that particular emissions of greenhouse gases are the proximate cause of particular adverse climate change impacts. Based on scientific understanding of the relationship between emissions and climate change, several cases seek to establish liabilities for corporate entities that generate emissions with full knowledge of those emissions' effects on the global climate. In addition to arguing that climate change-related injuries are proximately caused by particular emitters, the parties seeking relief in each of these cases have proposed various ways for courts to apportion liability for those injuries among named defendants and others.

Fourthly, establishing liability for failure to adapt and the impacts of adaptation. Technical understanding of climate change and the quality of predictions about future temperature and weather patterns are improving. Recognizing that adaptation efforts have not kept pace with these improvements, litigants are bringing claims that seek to assign responsibility where failures to adapt result in foreseeable, material harms. Government-led adaptation measures have also inspired claimants to seek injunctive relief or compensation for alleged injury to their property rights.

And fifthly, applying the public trust doctrine to climate change. Litigants are making arguments for climate action based on the public trust doctrine, which assigns the state responsibility for the integrity of a nation's public trust resources for future generations. Such claims raise questions of individuals' fundamental rights, as

well as concerns about the balance of powers among the judicial, legislative and executive branches or functions of governments.

[32] So, I have given you the global status and the emerging trends of climate change litigation. In recent times, courts are responding to the rising climate change disasters. Governments and business entities are being held liable for greenhouse emissions in court actions filed by civil societies, concerned citizens and even children.

[33] It is against the backdrop of these trends, I move on now to look at the position in our own jurisdiction.

[34] As one of the arms of the Government within our own constitutional and legal framework, our Courts play an important role in addressing climate change and its impact.

[35] I would like to echo the words of the Right Hon. The Chief Justice of Malaysia, Tun Tengku Maimun binti Tuan Mat in Her Ladyship's speech during last year's Webinar on Environmental Law Co-Organised by the Malaysian Judiciary and the Embassy of Sweden in Malaysia. Her Ladyship aptly mentioned:

“[15] ... The Judiciary plays its part in the protection of environmental rights in at least one of two broad spheres. The first is in public law. The public law aspects include judicial review either on a constitutional or administrative law front. These forms of actions can be brought by or against the State.

[36] Here, I want to elaborate further the public law aspect. It cannot be disputed that judicial power is vested in the hands of the Judiciary. A fundamental aspect of judicial power is judicial review. Central to this notion is the judicial control of administrative or ministerial action which our Courts exercise through judicial review. And it is this aspect of judicial power that enables the judiciary to ensure persons in authority act in accordance with law and to hold them accountable if they act unlawfully and fail to observe the law while performing their respective public duties. As stated by Raja Azlan Shah CJ (as His Highness then was) in **Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135; FC**:

“The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before that public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place.”

[37] Our Chief Justice Tun Tengku Maimun binti Tuan Mat in a very recent case of **SIS Forum (Malaysia) v Kerajaan Negeri Selangor and Anor [2022] 3 CLJ 339 (“SIS Forum”)**, in which we sat in a quorum of seven (7), emphasised that judicial review is a core tenet

of the rule of law which is inextricably linked to the notion of constitutional supremacy in a democratic form of government. This is because, according to Her Ladyship, a core feature of the rule of law is the doctrine of separation of powers, a corollary to which is the concept of check and balance. The case of **SIS Forum (supra)** demonstrated how, in accordance with its constitutional responsibility, the Court had undertaken the role of check and balance.

- [38] In resolving legal dispute, our Courts are therefore empowered under Article 4(1) of the Federal Constitution to strike down any law which is inconsistent with the provisions of the Federal Constitution. This supremacy clause ensures legislative and executive compliance with the provisions of the Federal Constitution, in the context of our discussion today, with the right to a clean and healthy environment. Further, the Courts also have additional powers under paragraph 1 of the Schedule to the Courts of Judicature Act 1964 to review and quash decisions made by persons in authority and to fashion any appropriate reliefs.

Distinguished guests, ladies and gentlemen,

- [39] The Malaysian Judiciary's responses to climate change are evolving. It is a new developing area of law. As we have seen, some of the emerging trends in climate change litigations in other jurisdictions that I have pointed out earlier, which focused on enforcing existing domestic environmental legislation and challenging governmental failures in enforcement or non-compliance of policy, are not too alien to the Malaysian Judiciary. Therefore, on the issue of climate change

and its impact where the decisions of persons in authority have caused adverse impacts on the environment, judicial review of the decisions of such persons becomes an important option to an interested concerned citizen in seeking redress and appropriate remedies from the courts. In this context, Malaysia has ratified the Paris Agreement and made a number of commitments to reduce greenhouse gas emissions. In accordance with the principles of judicial review, persons in authority should take into consideration this fundamental factor adequately when making decisions which affect our right to live in a clean, safe and healthy environment.

Distinguished guests, ladies and gentlemen,

The Mechanism and Infrastructure in the Malaysian Judiciary

[40] The Malaysian Judiciary has always been committed in providing access to justice in respect of issues relating to environment with the establishment of Environmental Courts in Sessions Court and Magistrates' Court in 2012. Among the goals of the establishment of the Malaysian Environmental Courts, are to expand and improve access to environmental justice, to provide an expeditious disposal of environment-related cases and to ensure uniformity of decision-making in environmental cases.¹²

[41] Indeed, the establishment of the Environmental Courts seeks to ensure better administration of justice for environmental criminal cases in the Sessions Court and Magistrates' Court, and to monitor

¹² Azahar Mohamed, 'Hazy Days Ahead: Legal Rights Under International and Domestic Laws', Journal of the Malaysian Judiciary, January, 2017, pp 51-52.

and dispose of such cases in a more efficient manner.¹³ In order to achieve this, all the Sessions Courts and Magistrates' Courts have to accord priority to environmental cases by preparing schedule for the hearings including the hearings in Circuit Courts which sit as Environmental Magistrates' Court.¹⁴

- [42] The setting up of the Environmental Courts, I would say, was timely and has, no doubt, marked a significant change in judicial attitude on environmental justice. It underlined the greater awareness and expanded responsiveness of environmental issues and climate change among the Malaysian judges.

Distinguished guests, ladies and gentlemen,

- [43] While judicial process is important, addressing climate change through our courts has its limits and boundaries. There are at least two (2) fundamental reasons for this. First, the administration of justice in Malaysia is based on an adversarial system of law. An adversarial system brings cases to the court with two opposing parties presenting themselves before a neutral and impartial judge who then determine the legal dispute accordingly based on the evidence presented by the competing parties. In accordance with the adversarial system that we practice, it is important to emphasize that in Malaysia, we do not have the practice of *suo motu*. Unlike some other jurisdictions, a Malaysian Court cannot take an action on its own accord, without any application or actions filed by the two opposing parties involved in the dispute. To this, I want to clarify an

¹³ Practice Direction issued by the Chief Registrar, No.3/2012.

¹⁴ *Ibid.*

important point. In the past, the judicial process operated along traditional adversarial principles and left the control of the litigation entirely to the competing parties. Now, from the moment cases are filed in court, with active case management, judges themselves take control of the proceedings to ensure a just, fair and expeditious disposal of cases.

[44] Secondly, it must be kept in mind that litigants who intend to move our Courts must have *locus standi* to bring any environmental or climate change action. A claimant must have a standing to bring the case. In the case of **Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145**, the rule of *locus standi* has been made clearer by the Federal Court. So long as litigants have a real and genuine interest in the litigation and their rights are somehow adversely affected such that they are not frivolous litigants, they may initiate a claim. The rule of *locus standi* have a gate-keeping function which exclude vexatious litigants and unworthy cases. Some would argue that those requirements as disproportionately restrictive in the context of climate change litigation. I would only add one more word here in respect of this issue. Whether a standing rule should be loosened or not, we must, in my opinion, mould our system of law to meet our precise need. It is ultimately a value judgment that each jurisdiction must make.

[45] I leave all these issues on the subject of adversarial system and *locus standi* for your consideration and discussion at this Colloquium.

- [46]** It is with that note, in closing, I would like to make the following points.
- [47]** The Judiciary as the guardian of the Federal Constitution and as an institution that upholds the rule of law, plays an important role in the protection of environmental rights.
- [48]** The Judiciary together with the Legislature and Executive share a significant and equal role and responsibility in addressing climate change and its impact. This is because major policies and legislations are the key framework to accomplish the objective in addressing climate change. With clear policies and legislations, the Judiciary will be able to play an even important role in interpreting and enforcing those laws so as to ensure the rationale of those laws are successfully accomplished.
- [49]** Finally, it leaves me to thank the organizer for giving me the opportunity to share some thoughts with you this morning.
- [50]** I wish all of you a successful colloquium.