

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

ON THE OCCASION OF
THE OPENING OF THE LEGAL YEAR 2023

MONDAY, 9 JANUARY 2023
PUTRAJAYA INTERNATIONAL CONVENTION CENTRE (PICC)

SALUTATIONS

- (1) Former Chief Justices of Malaysia:
 - (i) Tun Zaki bin Tun Azmi; and
 - (ii) Tun Md Raus bin Sharif
- (2) The Honourable the Speaker of the Dewan Rakyat, YB Dato' Johari bin Abdul;
- (3) The Right Honourable the Chief Justice of the Constitutional Court of Indonesia, Professor Dr Anwar Usman, S.H., M.H..
- (4) The Right Honourable the Deputy Chief Justice of the Supreme Court of Indonesia for Judicial Matters, Dr Andi Samsan Nganro, S.H., M.H.,

- (5) Right Honourable and Honourable sister and brother Judges and Judicial Commissioners;
- (6) The Honourable Attorney General of Malaysia;
- (7) The Honourable Deputy Minister in the Prime Minister's Department (Law and Institutional Reforms);
- (8) The Honourable Presidents of the Malaysian Bar, the Sabah Law Society and the Advocates' Association of Sarawak;

Your Excellencies, distinguished guests, ladies and gentlemen.

Assalamualaikum warahmatullahi wabarakatuh and a very good morning.

[1] May I express my heartfelt gratitude to all of you for attending this ceremony which marks the beginning of our legal year. Your presence is an expression of your support for the administration of justice.

[2] Before I begin, allow me to first thank the recently retired President of the Court of Appeal, Tan Sri Rohana binti Yusuf and Chief Judge of Malaya, Tan Sri Azahar bin Mohamed for their service to the Judiciary. I wish them both a very happy retirement. Likewise, to all Judges who retired last year. I would also like to congratulate each and every Judge and Judicial Commissioner who was elevated in the past year. I hope that you can keep up the good work.

[3] Speaking of appointments, I am reminded of my own as Chief Justice in May of 2019. I, myself, am set to retire in 2025, insya Allah. It

means that I have served one half of my tenure. As I prepare to deliver the opening of the legal year speech this year, I recall my tenure thus far and the hopes I have for my remaining half. This occasion is thus an important one for the Judiciary, as it provides me with the opportunity to say a few words about the work we undertake and the operation of the law which affects our legal and judicial community.

[4] In this speech, I shall focus on two main areas that pertain to the administration of justice in Malaysia:

- i. firstly, unity in upholding judicial independence and the Rule of Law; and
- ii. secondly, resilience in defending constitutional supremacy.

UNITY IN UPHOLDING JUDICIAL INDEPENDENCE AND THE RULE OF LAW

[5] As any new legal year begins, my thoughts turn to the principles at the heart of our legal system – in particular, judicial independence and the Rule of Law. These are not just ideals, but are the core principles of our judicial and legal system which protect the public from harm and guarantee the principle of equity for all that underpins confidence in our Judiciary. Judicial independence acquires greater significance in times of political, social, and economic upheaval. As the great philosopher Montesquieu once said, “[i]t is necessary from the very nature of things that power should be a check to power.” In this nation, where a keen instinct for justice is woven into the very fabric of our beloved country, it is

important that the law is tested and seen by the people themselves to be serving their greatest good so that domestic legal order is assured.

[6] When I took office, I swore to uphold the Rule of Law and to defend the independence of the judiciary – it is a promise that I take extremely seriously. This important occasion serves as a reminder of the unwavering commitment of the courts to do right fearlessly.

[7] In the past year, the subject of judicial independence in our nation has drawn a fair amount of attention through critical observations and comments made against judgments of the courts and Judges themselves.

[8] In the course of the legal system, cases with overtly political overtones will invariably find their way to the courts. Judges who preside over such cases are frequently subjected to a great deal of intense scrutiny in the media especially social media. The decisions that they make in such cases are almost always criticised by members of various political parties and by members of the general public.

[9] I recognise the constitutional right of every citizen to criticise the Judiciary and to test the correctness of its judgments through due process. Indeed, Judges should be aware of public opinion, but they are not bound by it. Healthy attention and constructive comments towards the Judiciary and its work are always to be welcomed as they help us to reflect on our work, improve to the best of our abilities and competence, and also remind us of the utmost importance of upholding judicial independence to maintain the Rule of Law. Thus, the criticisms that we receive should not result in disharmony between the Judiciary and members of the Bar, any political alliance, or the general public, but rather, it should solidify and

augment our determination to be even more united in upholding the independence of the Judiciary and the Rule of Law.

[10] In this regard, when comments are not based on objective facts and rational arguments, let alone legally reasoned substantiations, but rather on surmises, political stances or improper considerations, they are of no value to the advancement of the Rule of Law nor do they help us to be united in upholding judicial independence.

[11] The acceptance of the courts' judgments by the litigants and by the public at large hinges, in part, upon the transparency with which the courts demonstrate in deciding cases.

[12] Only with transparency in its proceedings may the judiciary be able to earn and keep residual long-term public trust. In my opinion, a key component of transparency is accessibility. Lord Bingham in his book ***The Rule of Law*** cautioned that:

“The length, elaboration and prolixity of some common law judgments... can in themselves have the effect of making the law to some extent inaccessible.”.¹

[13] I would like to use this platform to remind my brother and sister Judges again to ensure that your grounds of judgment are clear, coherent and concise, because the target audience covers every possible sector. It is of utmost importance that our judgments be easily understood by the public as their impact in shaping the law of the nation is long-lasting. Not only that, the judgments we write reflect our competence and diligence in carrying out the duties of our office.

¹ Bingham, Tom, *The Rule of Law*, (UK: Penguin, 2010), at 42-43.

[14] The grounds of judgment written by judges can be accessed online by the public. Such ease of access, I hope, translates into better comprehension of the judicial function. In this regard, I urge members of the public to read judgments in their entirety before forming an opinion and subjecting the Judiciary to any form of vilification.

[15] At the same time, I would reiterate that Judges should make decisions and write judgments premised on the law and not on the notion of wanting to seek popularity. We write to keep the public abreast of the judicial function and not to seek validation from the public or from any other quarters. If a Judge decides a case premised on anything other than the law and/or facts, then he makes a decision that is not sound in law. And in which case, the Judge fails to uphold judicial independence and the Rule of Law.

[16] Last year, attempts to intimidate or otherwise exert improper pressure on Judges presiding over public interest cases are becoming more obvious. These attempts are a direct affront to the Rule of Law and judicial independence. They certainly deserve condemnation and indeed many have spoken out against them in strong terms. It is very mischievous for anyone to try to tarnish the image of the Courts and bring it into disrepute through unfair, biased and often times unenlightened criticism simply because they happen to not like particular decisions.

[17] In matters which appear before it for determination, the Judiciary relies on the legal profession to provide the relevant facts and context before it can perform its adjudicative role. Lawyers therefore have a crucial role to play in maintaining confidence and stability in the legal system. It is imperative for lawyers to cultivate qualities which inspire

confidence and trust, such as integrity, independence, intellectual rigour, a strong sense of public duty and commitment to justice, observance of their duties to the courts, as well as unity in upholding the independence of the Judiciary and the Rule of Law in this country.

[18] Taking our criminal justice system as an example: the courts are not the only ones dispensing justice. The Judiciary is assisted by the prosecution, namely the AG's Chambers, and also by the Bar. Each body has a different but no less important responsibility to maintain the highest professional standards where life and liberty are at stake. Criminal liability will continue to be determined in accordance with the applicable law and the strength of the evidence presented before the court. Those who are proven guilty will be convicted and those not so proven will be acquitted. Convicted accused persons will be meted with punishments that their crimes deserve, no more and no less. This is our job as Judges, and we are determined to discharge our duty without regard to any threats that are made to deter us from it.

[19] The point I am trying to make here, as I have on many occasions before, is that judicial independence will not be compromised so long as cases are decided without fear or favour, without ill-will or motive, without any external or internal pressure and without regard to personalities. As long as every Judge remains committed to these principles, and united in applying these maxims, I am confident that judicial independence will be upheld.

RESILIENCE IN DEFENDING CONSTITUTIONAL SUPREMACY

[20] The justice system involves complex inter-relationships between the three branches of the Government, i.e., the Legislature, the Executive and the Judiciary. This separation of powers is not a mere promulgation of a doctrine. It is clearly embedded and enshrined in the supreme law of the land i.e., our Federal Constitution.

[21] The Judiciary, being a separate entity keeps away from politics and maintains a relationship with the other two bodies on the basis of non-interference, unless their actions or omissions constitute an infringement of the citizens' rights or the Federal Constitution. Such a relationship is one of mutual respect for each other's existence and responsibilities. In this regard, the Judiciary must remain resilient and steadfast in its firm footing as an independent institution that dispenses justice as well as defends the supremacy of our Federal Constitution.

[22] Judges take an oath in which they swear to carry out their responsibilities to the best of their abilities and to protect, preserve and defend the Constitution. Because of this oath, judges are required to cast aside their own feelings and opinions, regardless of whether they are racial, religious, or political – in favour of upholding the Federal Constitution. At key junctures throughout history, it has been the responsibility of the judiciary in its position as an independent institution of the government to protect and defend the constitution, and to rise to the occasion when necessary.

[23] Any self-imposed reluctance, whether conscious or otherwise, to rule against the State when the law so requires or to hold laws passed by the legislature to be unconstitutional must be deleted from the judicial mind. In particular, this means that no political or other personal

considerations of the Judge can be entertained in the judicial decision-making process.

[24] The law is ever evolving. Lords Reed and Hodge, giving the leading judgment in *Test Claimants in the Franked Investment Income Group Litigation v HMRC (No 2)*, recognised that:

“... thinking about the law evolves over time. Developments in judicial thinking, in particular, do not take place in a vacuum. Judgments are the culmination of an evolution of opinion within a wider legal community, to which practitioners, universities, legal journals and the judiciary all contribute. And it is not only judges who are influenced by that evolving body of opinion.”.²

[25] The Courts have dealt with and will continue to face challenging questions of law and principles in many interesting areas. As far as constitutional litigation is concerned, the Court’s judgments will no doubt continue to spur controversial debate. In a free society, such debate is to be expected. Indeed, reasoned debate and even better, well-reasoned legal discourse should be welcomed as they play a constructive role in the development of jurisprudence. That development can only take place gradually with the passage of time. Reasoned debate aside, there should be some consistency in the seminal decisions coming from our Courts, especially the apex Court.

[26] I have had the occasion to state, last year, that to me, there are no liberal or conservative judges, only legally coherent or incoherent judgments.

² [2020] UKSC 47, [178].

[27] The context in which I shared my aforesaid views was based on the fact that Judges in Malaysia are bound by numerous principles and canons. A judge, in applying his or her judicial mind, merely has to follow these principles by applying them fairly to the facts of any given case. A judge who does that is not a 'liberal' judge; just as a judge who does not do that is not a 'conservative' judge.

[28] As for those who believe that judges are 'judicial activists' or 'judicial supremacists' for the reason that the Judiciary has nullified legislation or executive acts, I would like to bring to your attention the notion of Constitutional Supremacy. In this regard, I would like to quote from Tun Suffian who in his book said as follows:³

"If Parliament is not supreme and its laws may be invalidated by the courts, are the courts then supreme? The answer is yes and no – the courts are supreme in some ways but not in others. They are supreme in the sense that they have the right – indeed the duty – to invalidate Acts enacted outside Parliament's power, or Acts that are within Parliament's power but inconsistent with the Constitution. But they are not supreme as regards Acts that are within Parliament's power and are consistent with the Constitution. The court's duty then is quite clear; they must apply the law in those Acts without question, irrespective of their private view and prejudice."

[29] Those are Tun Suffian's words and not mine. In fact, and with respect, I do not completely agree with the learned Tun Suffian. In my humble view, courts or judges are never supreme. At all times, it is the Federal Constitution that reigns supreme and judges are merely its faithful adherents and proponents who ensure that the Federal Constitution

³ Tun Mohamed Suffian Hashim in *An Introduction to the Constitution of Malaysia* (3rd edition, Pacifica Publications, 2007), at page 18.

retains its supreme stature. Where any law or executive act contradicts the Federal Constitution, it is for judges, as the only interpreters of the Federal Constitution – as dictated by constitutional design – to act to enforce its terms. Otherwise, the Federal Constitution is nothing more than a toothless tiger and its pages become nothing more than a repository of pretty words.

[30] It is for this reason that the entire corpus on constitutional law both here in Malaysia and in other parts of the world have in common the idea that a constitution, being a living and organic document cannot be interpreted literally. It must be read as a living document. This does not mean that judges can add their own colour and flavour to its words but that judges must interpret its terms, especially the terms on fundamental liberties, broadly.

[31] Ultimately, judges in this country are appointed and not elected, for a reason. Elected officials usually act based on how the public perceives them with a view to getting re-elected. This is why laws can sometimes take generations to change. Judges on the other hand do not answer to and are not bogged down by political will. Judges decide cases without having to worry about political consequences but should only have regard to what is legally correct which in turn should inspire public confidence in the Judiciary.

[32] In my view, it is better that a judicial decision is unpopular but sound in law and fair on the justice of the case than for it to be popular but decided based on an ulterior motive to meet a certain extraneous objective. The former unpopular decision stands the test of time while the latter crumbles to dust at the earliest opportunity but not before wreaking

havoc along the way. This, history has taught us well and we ought to learn from it rather than foolishly repeat it.

[33] The law has come a long way because of the manner in which cases are now being argued. Lawyers and litigants alike are now placing lesser reliance on foreign and incongruous constitutional principles derived from the United Kingdom or India and are instead placing greater reliance on our own Federal Constitution and our own constitutional jurisprudence. We, as judges too are therefore developing our own thinking on these long-present but newly articulated concepts.

[34] We understand that our role is limited to invalidating legislation or executive acts in appropriate cases and nothing more. Judges cannot and do not trespass into the domain of the executive or the legislative branches of the Government. But, if and when these powerful bodies overstep the powers granted to them by the Federal Constitution, it is for the Judiciary to say so and that is the extent to which the Courts can act. We are purely arbiters and not policymakers nor directors. Simply put, we can invalidate legislation or executive acts using prerogative writs or declarations but we cannot impose our own decisions in place of those of the legislature or the executive. That is the basis of separation of powers.

[35] Some may argue that the Judiciary appears to be stronger than before judging by the nature of the constitutional decisions that have been handed down of late. I would state that the Judiciary has been consistent by applying the newly developing constitutional jurisprudence in line with the spirit and dictates of the Federal Constitution foremost of which is Article 4(1).

[36] The most prominent example of this is ouster clauses. Prior to this, arguments to overcome ouster clauses were premised on English law and the decision of the United Kingdom House of Lords in *Anisminic Ltd v The Foreign Compensation Commission & Another* [1969] 2 AC 147. It was only recently in cases like *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579 that ouster clauses were constitutionally challenged using arguments never before considered and were finally settled by the Federal Court in two decisions rendered last year declaring them unconstitutional.⁴

[37] It is natural that such decisions would affect the executive which relies on ouster clauses and the legislature which enacted them. The easier path for Judges would have been to apply old English administrative law principles to sidestep the question of the constitutional validity of such clauses in the name of ‘conservatism’ – a concept which I have said earlier I do not believe in.

[38] In the context of ouster clauses, the question was simply whether they were valid or not. That was the very limited context in which we could act and decide. We were not allowed, by the limits of our office, to redesign ouster clauses or worry about what would happen if they were invalidated because such questions are not strictly legal or constitutional but of policy. The outcome of the court’s decisions, in light of separation of powers, is a question for the executive and the legislature. This is check and balance and is a mark of a healthy and functioning democracy.

⁴ *Nivesh Nair v Dato’ Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [05(HC)-7-01/2020(W), 25 April 2022] and *Dhinesh Tanaphill v Lembaga Pencegahan Jenayah & Ors* [2022] 1 LNS 583.

[39] On our part, the Malaysian Judiciary shall continue to adjudicate cases of all kinds fairly and in accordance with the Rule of Law. The Judiciary has no intention of meddling in any executive or legislative affairs and the Courts will act strictly and only as the final bastion against injustice as is the herculean task entrusted to us by the Federal Constitution especially by Article 4(1). It must be remembered by all that the Constitution is not self-executing and it is the Judiciary that the Federal Constitution relies on to protect itself and to ensure that it continues to reign supreme. Judges otherwise have no interest in getting involved in what are in fact executive, policy or legislative matters.

REFORMS

[40] I would like to take this opportunity to touch briefly on the Judicial Appointments Commission Act 2009. There has been some debate lately on the composition of the members of the Commission and their modes of appointment.

[41] Central to the administration of justice is the quality of our judges at all levels. It has become an accepted feature of the Malaysian Judiciary and also vital that its judges must be of the highest possible standards. It must remain our stance that only persons of the highest legal and moral calibre are appointed as Judges.

[42] Underlying the approach of the Judicial Appointments Commission in terms of making recommendations is that only candidates of the highest quality should be recommended for appointment. This approach has worked well in the past and remains the right, and indeed the only, approach. It is crucial to judicial independence that the process of judicial

appointments should remain apolitical and free from any form of interference and influence.

[43] We are mindful of the various views shared on these issues and we remain confident that with meaningful and effective engagement between the relevant stakeholders, legislative changes can be worked out and made to improve the workings of the Act.

[44] Throughout the year, the operational requirements and initiatives of the Judiciary have been supported by the Government. Last year I mentioned that the Government has agreed to the establishment of an independent Judicial Academy to cater to the training needs of Superior Court Judges. However, I have been made to understand that there have been some glitches in the works and I hope that this can be seriously looked into so that the independently established Judicial Academy can be materialised as previously approved. It is important to the administration of justice that we have this support and for that the Judiciary is grateful.

CONCLUSION

[45] I must express my gratitude to all Judges, Judicial Commissioners, judicial officers and court staff for working assiduously under adverse circumstances. It is because of our collective effort that our Courts continue to carry out their business in the administration of justice.

[46] Let me also end by thanking all of the Bar, the Attorney General's Chambers and all our stakeholders present here today for working with us to administer justice in trying circumstances over the last few years. It is

common knowledge that last year, the Judiciary was the target of scurrilous attacks during the hearing of certain high-profile cases. We remain grateful to the Bar in particular for issuing reasoned statements in support of the Judiciary. We look forward to your continued support and cooperation.

[47] Once again, I thank each and every one of you for attending and I wish you a happy new year.