

RESPONSE BY CHIEF JUDGE - OPENING OF THE LEGAL YEAR

2019 Friday 18 January 2019

May I start of by paying respect to the indigenous people of Sabah and Sarawak, the original owners of the lands.

Chief Justice of Federal Court – Tan Sri Tengku Maimun Binti Tuan Mat

President of the Court of Appeal - Dato' Rohana Binti Yusuf

Chief Judge of the High Court in Malaya - Tan Sri Dato' Sri Azahar Bin Mohamed

Judges of the Federal Court, Court of Appeal, High Court and Judicial Commissioners.

The Speaker of the Sarawak State Assembly – Datuk Amar Mohamad Asfia Awang Nassar.

The Deputy Speaker of the Sarawak State Assembly – Datuk Gerawat Gala.

Mr Martin Tommy – representative of the Minister in the Prime Minister Office, Datuk VK Liew.

Attorney General, Tan Sri Tommy Thomas,

State AG of Sarawak – Datuk Talat Mahmood bin Abdul Rashid

Deputy State AG of Sabah – Datuk Nor Asiah Mohamad Yusof,

Ranbir Singh, President of the Advocates Association of Sarawak

Roger Chin, President of Sabah Law Society

President of Malaysian Bar – Dato’ Abdul Fareed Abdul Gafoor,

President of Law Society of Singapore – Mr Gregory Vijayendran.

President of the Taiwan Bar – Mr Ruey-Cherng Lin

Vice President of Law Society of Hong Kong – Mr Chan Chak Meng.

Members of the Judicial Appointment Commission.

Members of the Bar, Honoured Guests from here and abroad.

Ladies and Gentlemen:

I also recognise the presence of foreign guests from the Australian

High Commission, Embassy of United States, United Nation

Development Program, Hong Kong, Singapore, Brunei and Taiwan

Introduction – First and Last – latitude.

Last Friday, our Chief Justice delivered her first speech in the OLY

in Putrajaya International Convention Centre.

Today, like the Chief Justice who is embarking a new phase of life,

I too will soon be embarking on a new phase of life – I think they call

it “retirement”. So today I shall be delivering my last speech as the

Chief Judge of Sabah and Sarawak.

That being the case, if I may, Chief Justice, be given more latitude

than the usual 15 minutes given to counsel appearing before the

Federal Court as the contents of my submission will invariably veer

into matters which are wholly irrelevant and unnecessary to the issues at hand. To use the phrase of one of former brother, Justice Linton Albert, I could be taking all of you to “Alaska”. With that, I shall now try my utmost best not to take all of you to Alaska but hopefully only to Kota Kinabalu.

Presence of the Federal Court Judges:

Firstly, let me express my gratitude to the CJ for allowing us to invite judges of the Federal Court and the Court of Appeal for this year OLY. This is the first time in our history that we see so many judges from the appellate courts present here today. Due credit also to the Chief Registrar as well in finding the “way and means” to make this happen.

Welcome foreign guests:

I also extend a warm welcome to the foreign guests especially the lawyers from Hong Kong, Taiwan, Singapore and Brunei. Again, I think this is the first time for some of you to be here and hopefully not the last time. Let me guarantee you that you will experience East

Malaysian hospitality like you have never experienced before especially this evening Gala Dinner.

CJ Speech in POJ

Let me from the outset say that I fully agreed the speech given by the Chief Justice last Friday. In particular where the CJ says:

How is the Judiciary to function if the entire institution is perpetually put on trial for allegations which are still under investigation? This is where the element of synergy between the stakeholders in the justice system is crucial. It is important that the Bar, which plays a crucial role in upholding the independence of the Judiciary, does not unwittingly erode public confidence by imputing that the entire Judiciary is tainted until an RCI is held. I therefore call for continuing support from the Bar to ensure that public confidence in the Judiciary is upheld.

If I may add here, when the judiciary is under attack the first line of the defence must come from the bar as the judiciary by convention cannot openly defend itself. The bar must defend the judiciary in a way consistent to the concept of the rule of law and that is until and unless the allegations have been fully investigated and proven,

the bar should not come to any conclusion in any way that the allegations are true. To behave otherwise would in my view turn the concept of the rule of the law upside down.

Bintulu/ Kuching:

Actually, this year the OLY should be in Bintulu – I apologise for that. Some 14 years and the 5 months ago in August 2005, I reported to duty as a judicial commissioner in the Kuching High Court. If I may be forgiven for choosing Kuching for this year OLY as I thought it would be nice and appropriate to finish my career in the judiciary in this beautiful City of Cats. It was to say the least a culture shock for me to transform from a private practitioner to someone on the other side of bench. Traumatic but beautiful as it was, I had a lot of support from the staff and fellow colleagues to see me through. The same goes to the members of the Sarawak Bar, especially the Kuching Bar. Not only were they cooperative, they made me felt welcome from day one with the usual welcoming dinner and lastly a farewell dinner to send me of to Kota Kinabalu. For that I say thank you to all of you from the bottom of my heart.

SAINS

Also, during my three years here, I also had the opportunity to meet the people from SAINS. SAINS as we all know is a Sarawak home grown IT solution company. With them, the East Malaysian Judiciary transformed judiciary landscape from one of manual system to a fully digital system. That journey, which started in 2006 under the leadership of the then CJSS (Tan Sri Richard Malanjum) till now, remains a satisfying and rewarding experience for me in my judicial career. In fact if I were to be asked what the most satisfying part of my judicial career are I had no hesitation in saying that my involvement with the IT Dream Team and SAINS is the most satisfying.

It is undeniable that if not for the cooperation extended to the judiciary during the early years of transformation, we would not have achieved what we have today. We now have an apps for the judiciary of East Malaysia which allows Judges and Lawyers to manage their works.

For the lawyers, they can access their files, file in documents and check on the status of their cases from that apps from anywhere in the world.

For Judges, they are also able to access their files with details as to their status in terms of timelines for finishing their trials, delivery of decisions and grounds.

As Chief Judge the apps have been a powerful management tool where I can instantly access the performance of Judges in terms of pending decisions and grounds. I also approve their application for leaves from this apps where it also shows me the number of leaves which have been taken and the number of pending decision and grounds on that application. Such is the convenience from this application.

For all these, I pay respect to the judicial IT team for their dedication for making all these happen. SAINS of course played a huge part in the journey. To all of you, I say big thank you.

Technology, being what it is, is forever changing and the Judiciary of East Malaysia is aware to this fact and had not rested on our laurels. Today we will later launch another three applications with the sole aim of making "Access to Justice" easier. I shall touch on these three applications later.

MA63:

Of late we have been hearing about this agreement called the Malaysian Agreement 1963 (MA63). This agreement in my considered view though political instrument holds significant to the

working of the Courts in Sabah and Sarawak. Its relevance can be found in Article 26(4) of Chapter 3 of the Report of the Inter-Governmental Committee 1962 which states as follows:

- 4. The domicile of the Supreme Court should be in Kuala Lumpur. Normally at least one of the Judges of the supreme Court should be a Judge with Bornean judicial experience when the Court is hearing a case arising in a Borneo State; and it should normally sit in a Borneo State to hear appeals in cases arising in that State.*

*The importance of such requirement should not be underestimated. I am reminded of the two Sabah cases namely **Borneo Housing Mortgage Finance Berhad v Time Engineering Berhad [1996] 2 CLJ 561** and **Sia Hiong Tee & Ors v Chng Su Kong & Ors [2015]4 MLJ 188**.*

In Borneo Housing, Tan Sri Dato Edgar Joseph FCJ delivered the decision of the Federal Court which quorum was made up of Tan Sri Dato' Mohd Eusoff Chin CJ and Datuk Wira Wan Yahya Pawan Teh FCJ, which included the following fateful words (paraphrasing),

“The system of land tenure in Sabah is not an absolute Torrens system but a modified Torrens system of Land Registration. Unlike the position in Peninsular Malaysia and Sarawak, where there are express provisions conferring indefeasibility of title.....there is no provision in the (Sabah Land) Ordinance conferring indefeasibility of title to or interests in land which is a feature of central importance to the Torrens system of Land Registration”

This case was to seal the notion that the Sabah Land Ordinance (Cap 69) embodies an imperfect Torrens system of land registration which has led to immense continued confusion and uncertainty in the administration of land matters in Sabah.

This case led the unfortunate development of equitable land interests in Sabah arising under the concept of bare trustee and evidenced by way of a Sale and Purchase Agreement, and that such equitable interests may routinely override the priority and legality of registered interests.

In Sia Hiong Tee & Ors v Chng Su Kong & Ors [2015]4 MLJ 188 the Federal Court (panel made up of Arifin Zakaria CJ, Abdul Hamid Embong, Ahmad Maarop, Hasan Lah and Mohamed Apandi FCJJ) applied the now accepted, “modified torrens” system of Sabah and decided that in Sia Hiong Tee & Ors v Chng Su Kong & Ors [2015]4 MLJ 188 the registered landowners registered interests was defeated by the fact that the power of attorney which was used to transfer the registered ownership to them was fraudulent.

The final outcome of fate of the parties in these cases pale in comparison by the law which has developed in relation to the interpretation of the Sabah Land Ordinance. In the Sia case, there was detailed discussion on section 88 of the Sabah Land Ordinance which states simply (paraphrasing),

Section 88 - No new title and no dealing with, claim to or interest in any land except land shall be valid until it has been registered in accordance with the provisions of this part”.

The learned Justices opined that the absence of the word “indefeasible” in section 88 fatally distinguished the Sabah Land

Ordinance from the National Land Code (section 240) and the Sarawak Land Code (Cap 81) (section 31).

This development is must unfortunate and unnecessary. A man who chooses to call himself Abdul instead of Encik Abdul does not in any way reduces his recognition, effectiveness or functionality as a male. Just because the word “indefeasible” was not included in section 88 does not and should not dilute the substance and functionality of section 88 which in effect says, “registration is everything”.

Uncertainty is bred from the term “modified torrens” system. Does this mean registered interests are not sacrosanct? If it is not torrens then what is it? Does it mean that the system of equitable interests and the concept of bare trustees which were developed from the “modified torrens system” (which is not provided in the land legislation and hence no system of notice or registration of such interests or of search) can routinely override registered interest? It is not difficult to see the uncertainty these cases have caused to matters relating to interests in Land in Sabah.

There were no Borneo judges in the panels deciding the above two landmark cases. I would like to think that had there been some input with Sabah judicial experience the unfortunate decisions would or could have been different. The ramification is terrifying in that the existence of the land office as a depository of land registration is rendered redundant as the law as it stands now makes the registration as not paramount as it does not confer indefeasibility on a registered land owner. This ramification also pervades the banking and business community. Registration of the bank charge some twenty years ago may be rendered void if it is discovered that the land had been transferred fraudulently. With respect, the Lordship had paid scant attention to high court judgements written by myself and the then Former Chief Justice Tan Sri Richard Malanjum where we have held that Section 88 is the provision in the Sabah Land Ordinance which confers indefeasibility on registered land owners and that was how we perceived it when we were practicing lawyers. As also by the conveyancing practitioners.

Of course the law as it stands now does not require the Chief Justice to empanel a member of the appellate court of possessing Borneo judicial experience. Speaking personally, it is my hope that one day this will be changed.

That said we are fortunate and grateful that the Chief Justice has seen fit to continue the practice of her predecessor in requiring the presence of the judge of Borneo judicial experience in an appellate panel.

Another matter is Article 122AB of the Constitution which was passed in 1994 without the consent of the respective State Governments, thus contravened Article 161E(2)(b) of the Federal Constitution. I urge the relevant stakeholders to look into this. This amendment took away the power of the respective TYT's power to appoint judicial commissioners. The rationale of this provision was to ensure that there are Judges of Borneo Judicial experience in the various State Superior Courts to deal with matters peculiar to respective States.

With that I now move to the area of this year OLY theme.

Justice and Beyond

In line with the theme for this legal year – Justice and Beyond – we will be launching three new applications, namely, AI for sentencing, Self-Representing Litigants Apps and the Social Media website for

the East Malaysian Courts. The emergence of AI in Industrial Revolution 4.0 cannot be ignored by both the judiciary and the legal profession. Ignoring is in fact not an option. In fact it is not something in the future, it is more like “the future is here”. In this regard, the judiciary of Sabah and Sarawak had taken the first step in embracing AI in getting the machine to determine the appropriate sentences for certain criminal offences. In embracing AI, we are fully aware that the use of AI does not breach the rule of law. We will disclose the algorithm in which the machine operates. The use of the AI machine will only act as a guideline to the judicial officers in coming to his/her decisions. We can envisage one day in the not too distance future that there will be kiosk in the lobby of the court premises for an accused and his lawyer to predict what kind of sentence the court may pass if he pleaded guilty. When use appropriately AI will increase efficiency of a process and raise the quality and consistency of our decisions.

The legal profession too cannot ignore the emergence of AI. There are in existence machine which can predict an outcome of the dispute. What they do is simply put in all the Judgments of the courts and create an application which algorithm or formula which can understand and diagnose the dispute and then provide a solution to the dispute. This is happening in the United States and

Australia where practitioners use this machine as a tool to negotiate a settlement prior to going to litigation.

With recent and dramatic advances in the capacities of machine we are now beginning to see artificial intelligence tools come into their own. This matters for our judiciary and the legal profession, not only because the courts are embedded in an increasingly AI-rich world, but also AI tools are beginning to enter the courthouse doors, leading to important questions like: Who is liable when AI tool leads a doctor to wrong diagnosis? Who is liable when the AI tool in a crypto currency trading platform malfunction leading to losses by the platform operator? See (B2C2 Ltd And Quoine Pte Ltd [2019] SGHC(I) 03). How do defamation laws apply to AI-generated speech? What ground rules should be in place as we use AI tools to assist sentencing? What do hyper realistic fake videos mean for the rule of evidence?

In the University of New South Wales there is in existence where law students are required to learn technology and use them to solve problems in the delivery of legal services. I am also happy to see that there was a student from University of Malaya attending the colloquium yesterday and enlightening the audience how they are

using and learning technology to create application with an aim to promote the concept of “access to justice”.

In my mind there is no doubt that a lawyer with both technical and legal knowledge would be more marketable than one without technical. My advice to the legal profession is to start embracing the emergence of AI.

CSR:

In term of CSR, the Courts of Sabah and Sarawak will continue to go into the rural area of these two States to enfranchise those who deserve to be so. We are grateful and thankful that the Chief Justice has partaken in one of our mobile court program in Kampong Golong, Sandakan. We are proud of the fact that our Chief Justice has taken the extra step to go to the ground – turun padang – and find out for herself why this mobile project must continue to exist and enhanced as “access to justice” is very important part of the Malaysian Judiciary framework.

With that I now conclude my address by wishing everyone a happy New Year and also for those celebrating Chinese New Year Gong Xi Fatt Chai.

I now launch the three new applications.