

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 2024 ('OLY 2024')

MONDAY, 15 JANUARY 2024

PUTRAJAYA INTERNATIONAL CONVENTION CENTRE ('PICC')

SALUTATIONS

Brother and Sister Judges, Your Excellencies, distinguished guests, ladies and gentlemen,

Assalamualaikum warahmatullahi wabarakatuhu and a very good morning.

INTRODUCTION

[1] Allow me to take a moment to express my gratitude to each and every one of you for your presence today, on the occasion of the Opening of the Legal Year 2024.

[2] The legal new year brings with it two things. Firstly, it marks new beginnings and journeys. In this regard, I would like to take this opportunity on behalf of the Malaysian Judiciary to congratulate all Judges of the

Federal Court, the Court of Appeal and the High Court including Judicial Commissioners who were appointed in the last year. In particular I would like to congratulate YAA Tan Sri Abang Iskandar bin Abang Hashim on his appointment as the President of the Court of Appeal, as well as YAA Tan Sri Mohamad Zabidin bin Mohd Diah and YAA Tan Sri Abdul Rahman bin Sebli on their appointments as Chief Judges respectively of the High Court in Malaya and of the High Court in Sabah & Sarawak.

[3] The second thing that I think is ushered by the new legal year is remembrance. The celebration of the new year gives us occasion to pause and reflect on all of the chapters that have since closed and to remember those who have completed at least one part of their legal journey. And so, I hope it is not too late to wish a happy retirement to all the Judges who retired in the past year.

[4] As all the recently appointed Judges and Judicial Commissioners can appreciate, and all the recently retired Judges can attest – a Judge’s duty to preserve, protect and defend the Federal Constitution, is a difficult one and one that is carried out with little rest. At all times, all Judges – even retired Judges – remain under the duty to preserve the integrity and image of the Judiciary and those still in service must continue to hear cases impartially, independently and without an inch of fear or favour.

SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE

Forms of Interference

[5] Prior to my appointment as Chief Justice, the Judiciary had been mired in the negative perception that as an institution, we had lost our

independence or that our independence was significantly eroded. These heinous connotations owe their existence in large part to the Judicial Crisis of 1988 – a blemish in our history and from which the bruises and scars still remain.

[6] More recently, I must share with you that people have been coming up to me from all walks of life to tell me that, in their view, the Judiciary has redeemed itself as an independent institution both in substance and in perception. If this is truly the perception of the public and legal profession, then to that I can only say *Alhamdulillah*. While I feel a great sense of gratitude and achievement by these kind comments, I cannot help but recall the two important facets of judicial independence.

[7] The first of these facets is internal judicial independence. The Judicial institution as well as the Judges within it must be free among themselves to make their own decisions based solely on the facts and the law without any other considerations. Apart from their managerial functions, the four senior-most Judges cannot and do not interfere with the decision-making process of any other Judge. If the Judiciary has been remarked or observed as being independent, then perhaps as an institution, we have worked hard to be internally independent not only in fact, but also in perception.

[8] That leaves us with the second and no less integral of its facets: external judicial independence. This category is limitless because it deals with external pressures and influences that can directly impact the Judiciary's actual ability or perceived ability to decide cases. Certain non-exhaustive examples include (i) intimidation of Judges either in the form of threats, physical harm, lies or even public humiliation by for

example, attacking the personal reputation of certain Judges or their family members; (ii) attempting to seek favour with Judges or contacting them directly or indirectly to decide cases in a certain party's favour or against another party; and (iii) manipulative media reports that unfairly paint the impression of a judicial decision meaning more or less than what it actually is.

[9] Those are just some examples of acts that are sometimes intentionally, either directly or indirectly employed, with a view to swaying the cause of justice in a certain direction. These are just a fraction of available examples from a bottomless list of anything that can effectively amount to external judicial interference affecting external judicial independence.

[10] The Judiciary has little to no control over external judicial pressures. In this sense, the Judiciary and those who rely on this institution depend on other parties to act responsibly in sustaining and upholding a continuously fair, independent, impartial and efficient justice system.

[11] Be it internal or external judicial independence, they are both inextricably intertwined with the notion of public confidence in the Judiciary and perhaps I can now move on to state my observations on that.

Public Confidence in the Judiciary

[12] Unlike politicians, Judges do not, and indeed, cannot answer to or be governed by political will or popularity. A Judge is meant to be an independent constitutional arbiter of justice between the State and its subjects (and vice versa) as well as between subjects *inter se*. His or her

loyalties are apparent in a constitutionally-ordained judicial oath taken to protect, preserve and defend the Federal Constitution.

[13] Since Judges do not answer to public opinion, popularity or sentiment by virtue of them being appointed and not elected, Judges then in the truest sense are accorded that independence to make decisions based solely on the facts and the law without any attendant fear of the political or social outcome of their decisions. This then begs the question: where does public confidence fit into this equation?

[14] What I can say is that public confidence and popularity though related, do not mean the same thing. A Judiciary that enjoys popularity, would naturally command significant public confidence. In such a situation, popularity is merely the outcome of strong public confidence.

[15] In my view, public confidence in the Judiciary is the measure and tool by which Judges remain transparent and accountable to the public.

[16] Since we are appointed, the public whom we serve by authority of the Federal Constitution, has no means of voting us out of office so to speak. Public confidence in this sense means that the Judiciary is mindful of the fact that it is the ultimate servant of the Federal Constitution for the benefit of the public. Because we are appointed, the basis of the foundation of our powers is trust and confidence in the process. It therefore continues to generate an impetus for Judges to remain accountable and transparent and this is obvious in our need to write judgments and to abide by case timelines.

[17] Perhaps it is pertinent to highlight that contrary to common belief, Judges truly do not carry much in the form of direct power. Take for example a criminal case. A Judge trying the case and passing a sentence (all things considered) does in effect only make a declaration. This declaration is in the form of a conviction with a resulting sentence. Who ensures the sentence is carried out? Who keeps the sentenced person in jail or enforces the sentence in default of a fine?

[18] I think it is the right time to share with you the apocryphal events surrounding the decision of the United States Supreme Court in the case of *Worcester v Georgia*.¹ It is not the case per se that is the subject of controversy, rather the events that transpired after. Again, even though the events are said to be apocryphal, meaning that their authenticity is doubted, the example itself (real or not), is worthy of reflection.

[19] In *Worcester*, a group of native Americans had challenged the State of Georgia for enacting a law that required the said native Americans to be granted a license before they may be permitted to enter the lands which they called their ancestral home. The Supreme Court presided by Chief Justice John Marshall (delivering the majority judgment) effectively enforced a rule on the sovereignty of the native tribes and held that the Georgian law in question was unconstitutional.

[20] Historically, and again though there is no clear proof to the effect, the then President of the United States, Andrew Jackson, was infamously reported to have remarked against the Supreme Court judgment that: “*Marshall has made his decision, now let him enforce it*”. While the truth

¹ *Worcester v Georgia* 31 U.S. 6 Pet. 515 (1832).

of this statement is suspect, history shows that the Jackson's federal Government did not aid in the enforcement of the *Worcester v Georgia* decision and the President was himself, known to be in favour of expansion of US territory at the expense of the natives. In fact, the Cherokees were eventually forcibly removed from their ancestral lands leading to the unfortunate incident known as the Trail of Tears, which resulted in thousands of tragic deaths.

[21] The unfortunate historical episode that I just described, in my view, exemplifies the notion that Courts are both powerful and powerless at the same time. In the absence of people who can support and carry through judicial decisions, a mere declaration of liability or guilt in itself carries little to no weight.

[22] When we put this into perspective, we will come to appreciate that public confidence in the Judiciary is meant more for the institution than for its individual Judges though the implication of a lack of confidence can also adversely affect a Judge's independence in making a decision, being human beings, for fear of reprisals or in extreme cases, unjust removal. When we consider the occurrence of the 1988 Judicial Crisis and how the then Judiciary was treated with such impunity, the harrowing fears that such events may reoccur haunts to some extent, the halls of justice till today.

[23] When a message is sent that a judicial decision is worth even lesser than the paper it is printed on, it gives the State's subjects a reason to denounce the validity of judicial decisions. In such a situation, the Rule of Law, public order, the respect for authority all enter into a state of chaos.

[24] It is therefore worth remembering that any attempt to externally influence the Judiciary or to undermine public confidence in the Judiciary is an aberration to the Rule of Law.

[25] In this regard, allow me to address certain aspects within which judicial independence stands threatened especially from a public confidence perspective by having regard to certain events that transpired in the past year.

Threats to Public Confidence in the Judiciary

[26] In commenting on threats to the Judiciary, I must first acknowledge that free speech is central to democracy. Genuine comments and criticism act as positive pressure on elected officials to perform, spur the growth of political will, and motivates Judges to remain apprised of recent legal developments as well to keep updated on practical knowledge on various fields.

[27] What remains unacceptable in a democracy as the antithesis of free speech are concepts such as hate speech, uneducated propaganda and fake news. Comments and criticism must be based on some fact and not on lies or ignorance. In the best case, uneducated comments reflect sheer ignorance and in the worst case, they reflect malice.

[28] Allow me to focus on an instance of external interference with the Judiciary, which applies in relation to the judicial role itself especially in the hearing of constitutional cases. In these examples, I will let you make your own assessment on whether these instances reflect either sheer ignorance or worse, malice.

[29] Malaysia is a federation where the primary executive and legislative powers are accorded to the Federal Government. Recently, the Federal Court had the occasion to decide two cases namely, *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323 ('Iki Putra') and *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)* [2022] 2 MLJ 356 ('SIS Forum'). Without commenting on the substance of the two cases I just cited, they dealt essentially with the question of whether the Legislature of the State of Selangor was empowered to pass certain legislation. This is a kind of challenge that is expressly envisioned and catered for by our Federal Constitution.

[30] Unfortunately, these two cases were made out by some parties to be more than what they actually were. These cases had nothing to do with the fact of the pure religion of Islam. They merely sought to reemphasise the clear demarcation of powers between the federation and the States. The legislation in question had purported to accord certain powers to the State that were not supported by the State List and the two cases would have been decided using the same principles, if the State legislation in question had dealt with any other matters not affecting the administration of the religion of Islam or the Syariah Courts.

[31] The comments by certain irresponsible parties are targeted at painting the picture that the Judiciary has an "agenda" or motives to eradicate Islam in this country, or an agenda to remove the Islamic legal system in Malaysia. Apart from manipulating these cases for their own gain, what these parties fail to mention is that by clearly interpreting the Federal Constitution and defining the powers of Parliament and the State Legislatures, the Federal Court ensures the continuous and steady

application of Islamic law in the States because it guarantees that even Parliament cannot erode it.

[32] The comments in relation to the *Iki Putra* and *SIS Forum* decisions are far and wide. In some part these comments unjustifiably question the personal faith of certain Judges or even their motivation for deciding as such. In other respects, such comments incite hatred and ill will among the public against the Judiciary or the fear of perceived distorted outcome of such decisions. In certain other respects, large crowds are mobilised and their presence is used to intimidate the Judges.

[33] The examples indicate how judicial independence is eroded and how public confidence in the Judiciary is impaired. There is another example which relates to how the Judiciary is unjustifiably painted as the villain for the actions or inactions of another body in the justice system.

[34] In particular, in the recent past including last year, the Public Prosecutor made the decision to withdraw criminal charges against certain high-profile individuals. These decisions were not particularly received well by the public but a large part of the blame was put on the Judiciary for making the only available consequential orders upon the withdrawal of such charges.

[35] Under Article 145(3) of the Federal Constitution the Attorney General who is also the Public Prosecutor has the discretion to institute, conduct or discontinue any proceeding for an offence other than before a Syariah Court. When the Public Prosecutor decides to withdraw charges, the Courts only have one of two very limited consequential options. Depending on the facts, these two options are either granting an order of

discharge not amounting to an acquittal popularly called 'DNAA' or a discharge amounting to an acquittal which can be called a 'DAA'. The Courts cannot turn around and insist to the Public Prosecutor that a charge remain. Each of them, the Judiciary and the Public Prosecutor have their own constitutionally-demarcated constitutional functions and both must be adjudged fairly for the exercise of their powers to the exclusion of the other.

[36] And yet, when a charge is withdrawn, the Judge making the only available consequential orders is painted as corrupt, sometimes as incompetent or sometimes both. What the public fails to understand is that the person responsible for that decision is the Public Prosecutor and not the Courts. It is often the Courts that are chastised for such decisions and this erodes public confidence in the judicial system.

SECURING JUDICIAL INDEPENDENCE

[37] Having stated these examples, we must ask: how can we ensure the continued protection and integrity of the justice system, and preserve public confidence in our judicial institution?

[38] Beginning with internal judicial independence, it is my view that a Judge must continue to hear cases without fear or favour and without any motivations, hope of reward or any bias. In particular, I would like to remind myself as well as my Sister and Brother Judges about the crucial significance of *stare decisis* or the doctrine of judicial precedent.

[39] Courts lower in the judicial hierarchy must remember to abide by precedents set by higher Courts. The Federal Court, being the apex

Court, must continue to remember that it cannot depart too easily from precedent especially so if a previously decided authority is questioned not so long after it was decided. The Federal Court cannot afford to be inconsistent as that interferes with the public who organises their affairs upon legal clarity and certainty.

[40] In this regard, the individual opinion of a Judge, so to speak, is irrelevant on account of *stare decisis*. Even if a Judge or Court believes a decision of the higher Court to be wrong, he is under the obligation to abide by it. It would be for the parties to bring that case to the higher court to argue in favour of departing from the previously established precedent if the circumstances so warrant it.

[41] Certain concepts have recently been well-settled into our law. One of these concepts is the doctrine of constitutional supremacy in Article 4(1) which stipulates that certain features of the Federal Constitution are incapable of being destroyed even by constitutional amendment. While Judges are free to express their differing opinions on what those integral features are based on the cases that come up before them, I think it is not open for Judges to dispute the existence of the concept itself.

[42] In this regard, *stare decisis* must not only be observed by Judges but by all officers of the Court. This includes advocates from the Bar and the public service. In recent times, from my own observation in Court, I have noticed a trend from a minority of both such advocates who cite cases without acknowledging that those cases or principles that they have cited have been expressly overruled. Other times, these advocates advance untenable propositions that stem from a selective, dishonest or warped reading of earlier cases.

[43] These violations happen in all sorts of cases but they are particularly glaring when they happen in constitutional cases. In any event, when it does happen, it throws Judges off as certain propositions appear more convincing than they should be because they are articulated selectively yet disingenuously. I think it goes without saying that advocates, especially the senior ones, know that this is not the candour and standard of professional courtesy expected of them and as such, this practice deserves to be called out and must be stopped.

[44] And speaking of seniority, there is a trend in Malaysia like in many commonwealth nations that senior advocates are accorded a greater amount of respect and patience by the Court. While this makes sense and is fair considering that such an advocate has earned his or her trust and reputation with the Bench, I would think that regardless of seniority, all advocates deserve an equal chance in Court.

[45] In any event, leaving aside the minority of advocates who flaunt ethics, I must commend the majority of the better advocates – from the Bar and AGC – who stand by the principles of ethics expected of the legal profession and whose compliance is impeccable.

[46] I would also like to commend all Judges and Judicial Commissioners as they have been hard at work in spite of all trials and tribulations the Judiciary faced in the past year.

[47] That said, Judges are human and are open to humanly pitfalls such as fatigue and saturation. For these reasons, we routinely rotate our Judges such that those hearing civil cases swap to the criminal courts, and so on.

[48] The Judiciary also carries out routine training and refresher courses so that our Judges remain updated on recent and emerging trends. In this regard, the Judiciary would like to especially thank the Minister in the Prime Minister's Department (Law and Institutional Reform), Dato' Sri Azalina Othman Said for her unrelenting support for the long-pending establishment of the Judicial Academy. This Academy, crucially, provides pivotal training to Superior Court Justices, thus enhancing the overall calibre of our judiciary.²

[49] In terms of judicial work, one important area that bears mention is the commercial Courts. In a time where our economy is on the downturn, the commercial Courts have been working hard to ensure that commercial disputes are resolved quickly but fairly. The importance of commercial Courts cannot be overstated because these Courts along with the overall impression of an independent Judiciary boosts investor confidence and trust in the Malaysian Judiciary.

[50] In that respect, a large bulk of our commercial litigation including construction law is centred in the Klang Valley. The Malaysian Judiciary would like to applaud the Government of Malaysia for previously allocating funds to equip particularly the construction court and the Kuala Lumpur Commercial Courts. But, as time progresses, technologies develop and the need for more Judges arises. We would like to humbly invite the Government to consider increasing funding for these Courts – in particular, to entertain the idea of enhancing the structure of such Courts so that they can continue to compete and remain on par with international standards and international commercial Courts.

² <https://www.sinardaily.my/article/210786/malaysia/national/budget-2024-allocations-for-legislativereforms-ensure-peoples-right-to-justice---lawyers>

[51] The Malaysian Judiciary is significantly complemented by our ever-growing Alternative Dispute Resolution ('ADR') scene. These ADR mechanisms significantly help reduce the Judiciary's case load without compromising access to justice. Specifically, I would like to home in to one feature of ADR i.e. mediation.

[52] In view of the burgeoning caseload that is inundating the Malaysian superior and subordinates court, mediation has now become an important medium to cope and deal with these cases. Ideally, hearing of cases via trial must be the last resort.

[53] There are generally two modes of mediation, that is to say, pre-action mediation as well as court annexed mediation which are catered for in the Rules of Court 2012. It is mandatory for all running down cases to undergo mediation. The necessity of other cases to undergo mediation is at the discretion of the Judge depending on his/her views on the suitability thereof.

[54] By virtue of the current volume of cases commenced in the Courts, there is a critical need to now intensify the usage of court annexed mediation. In other words, at case management all Judges must duly consider why each and every case should not be mediated. Unless absolutely unsuitable, I take the position that cases ought to undergo mediation.

[55] Additionally, Judges must also be part of the mediation process sitting as the mediator and should not shy away from the process. This is because Judges are in the best position to persuade parties to resolve their dispute amicably by means of facilitative and/or evaluative mediation.

The Court Annexed Mediation Committee is tasked to oversee the implementation of the same. Unlike other countries such as in England and Wales, there is presently no requirement for parties to undergo mediation prior to commencing an action in the Malaysian courts.

[56] As such, the Judiciary strongly feels that the time has arrived to consider the implementation of pre-action mediation through pre-action mediation protocols. Towards this end, the Court Annexed Mediation Committee is further tasked to study and revert on the same soonest possible. This should include requisite proposals on amendments to the relevant statute and/or rules.

[57] In this vein, I would also like to congratulate the Malaysian Bar for establishing the Malaysian International Mediation Centre (MIMC) which will be launched later this afternoon. This effort signifies the Bar's commitment to mediation and ADR and has the Malaysian Judiciary's full support.

[58] On the topic of internal judicial independence, competency and efficiency, I would like to sincerely believe that the Judiciary is doing its level best to ensure that the high standards expected of us are maintained.

[59] That leaves us with external judicial independence.

External Judicial Independence

[59] Going by the examples I have set earlier, the number of things the Judiciary can do, in the face of attacks, is limited. In this regard, and as

has been stated an innumerable number of times before, the other actors in the justice system play a crucial role.

[60] The Bar Council has of late been very supportive of the Judiciary and the Bar has also played an important role as *amicus curiae* in many important cases that were argued last year. We hope that the Bar can continue to maintain such level of support.

[61] The Attorney General's Chambers or 'AGC' has also been a friend to the Malaysian Judiciary. In particular, the present Attorney General, Datuk Ahmad Terrirudin bin Mohd Salleh was not too long ago, Chief Registrar of the Federal Court. He has, as Attorney General, played a very integral role as a bridge between the Judiciary and the Executive by ensuring that certain fundamental matters such as legal development and budgeting issues are brought to the ears of the Executive. The Judiciary remains ever thankful to the Honourable Attorney General and the AGC under his able leadership.

[62] Having said that, we can understand that unlike the Malaysian Bar at times, the AGC cannot always come out so strongly in support of the Malaysian Judiciary. The reasons for this, as we can acknowledge, are twofold.

[63] The first reason is that the AG is the principal advisor to the YDPA, the Cabinet and all its Ministers. When there is a constitutional crisis or constitutional issue, the AG and AGC will find themselves in a very precarious position of having to defend the Government and advise on the outcome of judicial decisions while at the same time defending the Judicial

institution. It is a daunting task that is easier said than done for anyone who stands in the shoes of the AG.

[64] Secondly, the AGC very often represents the very litigant against which the Malaysian Judiciary acts as a check and balance. Sometimes, the AG being the Public Prosecutor is also directly the litigant in Court.

[65] Nonetheless, I think there is a delicate balance that can be maintained. The AGC can continue to carry out its functions to preserve the integrity of the Judiciary and the overall justice system by taking appropriate penal measures against those who unfairly attack the justice system. For instance, as the guardian of public interest, the AG is arguably the only legal person in the country who can initiate contempt proceedings, against a person if he makes scurrilous comments attacking the Judiciary in respect of decided or presently argued cases.

[66] Apart from that, everyone including the Bar, the AGC, politicians, members of Government and the general public must make every effort to remain informed. Our grounds of judgment are available for public scrutiny and everyone is welcome to make fair comment on them. No person should be allowed to use the Judiciary and the justice system as leverage for their political or non-political attempts.

[67] Recently the Right Honourable the Prime Minister of Malaysia, Dato' Seri Anwar Ibrahim is reported to have reminded politicians not to politicise the issue of the constitutional challenge proceedings and in effect, not to turn the case into something more than what it was.³ This

³ Mohamed Basyir, 'Move to Elevate Syariah Court Status' *New Straits Times* (22 November 2023, Kuala Lumpur, at p. 3.

reminder by the Prime Minister to politicians is welcome and we hope that all persons, politicians and activists can follow this line of thinking. The Judiciary expresses its gratitude to the Prime Minister for making this statement as it effectively serves as a call to respect the independence and integrity of the Courts.

[68] From the standpoint of the Judges, all members of the public alike must learn to draw the line between legitimate criticism of judicial decisions on the one side, and on the other side: engaging in acts or indulging in words that harm the integrity of the judicial institution on a whole.

[69] There will always be, amongst us, the more recalcitrant persons whose nature it is to cause trouble. In respect of these very few people, it is the Judiciary's hope that all actors involved in the justice system can take the necessary legal action, as well as work to educate the public. This hope extends not only in relation to the Bar and the AGC but to all sectors of our public including enforcement bodies, activists and religious institutions.

CONCLUSION

[70] To conclude, I would state that as an institution, the Judiciary shall continue to do its best to protect, preserve and defend the Federal Constitution and adjudicate cases fairly in accordance with justice, and without fear or favour. We hope never to flinch in the face of adversity and all the brickbats thrown at us.

[71] The Judiciary shall remain open to working with all institutions that share these goals of enhancing access to justice and the Rule of Law. And in this regard, we would like to acknowledge all the local and foreign bodies and institutions that engaged with the Judiciary in the last year towards improving legal understanding and competence both at the judicial level specifically and the general level.

[72] I would like to end by thanking each and every Judge, Judicial Commissioner as well as Judicial Officers who have continued to work hard in the last year. This expression of gratitude also extends equally to all support staff including our IT technicians, court clerks, secretaries, security personnel, librarians, assistant registrars, commissioners for oath, cleaners and everyone else I might have unwittingly missed. Each and every one plays an important role.

[73] With that, I wish each and every one of you a very Happy New Year!

Thank you.