

WELCOME ADDRESS BY
THE RIGHT HONOURABLE THE CHIEF JUSTICE OF MALAYSIA,
TUN TENGKU MAIMUN BINTI TUAN MAT
SUHAKAM TRAINING WORKSHOP
2 DECEMBER 2020

Salutation

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Director of Raoul Wallenberg Institute's Jakarta Office;

YBhg Dato' Mah Weng Kwai,
Commissioner, Human Rights Commission of Malaysia (Suhakam);

Mr. Roger Chan Weng Keng,
Chairperson, Environment and Climate Change Committee of the Bar
Council of Malaysia;

Honourable Judges, Judicial and Legal Officers and Delegates from
Indonesia, Malaysia, the Philippines and Thailand;

Distinguished guests, ladies and gentlemen,

Assalamualaikum warahmatullahi wabarakatuhu and good morning.

Introduction

[1] May I begin by expressing my sincerest gratitude to the organisers for according me the opportunity to deliver these welcome remarks. It is an honour and a privilege indeed.

[2] I would like to bid a warm welcome to all participants which include honourable judges as well as judicial and legal officers from a number of countries.

[3] I must say that not only is this workshop important but that it is also timely. It concerns a topic close to our hearts and comprises a melange of sub-topics on the various aspects of environmental rights and the role of the Courts. In this regard and perhaps to spark a livelier discussion, may I be permitted to share my thoughts on the subject.

[4] In this address, I will first touch on the importance of environmental rights. Second, the role of the Courts in that respect and third, the importance of collaboration of all parties to ensure their effective protection.

The Right to Environment

[5] The right to a clean environment has been made indelibly clear by the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261. At page 288, the Court of Appeal held as follows:

“... [T]he expression ‘life’ appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. **It includes the right to live in a reasonably healthy and pollution free environment...**”

[Emphasis added]

[6] In other words, the right to life and personal liberty does not mean mere animal existence. As human beings, life means more to us than just simple existence. ‘Life’ encompasses all its various aspects including the right to a clean environment. When we think of the phrase ‘clean environment’, we often confine its meaning to water, air, soil and food. In light of the recent pandemic and the ensuing protective measures taken, where the majority of the populace arguably enjoys most of these basic resources and facilities, it is perhaps time to reassess the right by considering whether it further includes the right to a reasonably disease-free environment.

The Role of the Courts

[7] Rights are but pious platitudes if there is no effective mechanism to enforce them. This is where the role of the Courts matters. They can do this in at least one of three ways. The first lies in the realm of public law, that is, constitutional or administrative law. The second is the civil law route while the third lies in criminal law. While criminal law is also public law, the difference between it and constitutional or administrative law is that criminal law involves actions by the State against the perpetrator while in the case of the other, it is the State who is alleged to be the perpetrator – whether directly or indirectly.

Constitutional and Administrative Law

[8] On the constitutional law aspect, the Courts are empowered by Article 4(1) of the Federal Constitution to strike down any law which is inconsistent with the Federal Constitution most importantly, Article 5(1) which *Tan Tek Seng* has held, guarantees the right to a clean environment. The Courts also have additional powers under paragraph 1 of the Schedule to the Courts of Judicature Act 1964. It simply means that where the Legislature passes law which jeopardises the environment, or where the Executive does an act with the same effect, the Courts will step in to stop them in their tracks and if possible to remedy the situation.

[9] One good example of this, among many others, is the judgment of Zamani Rahim JC (as he then was) in *Awang @ Harun bin Ismail & Ors v Kerajaan Negeri Kedah & Ors* [2010] 4 MLJ 83. In that case, the Court allowed a group of plaintiffs the right to challenge the conduct of the State Government of Kedah and others which removed the status of Gunung Jerai Forest Reserve as a protected water catchment area for development by a private company. The Court observed that there was clear and prima facie evidence of pollution to the water sources in that area and that such degradation was possibly in violation of the plaintiffs' right to a pollution-free environment. The burden was then shifted to the State Government to show why the project was not illegal.

Civil Law

[10] Next, we have civil law – primarily the law of tort. Under this mechanism, aggrieved litigants have the right to sue any other private person (including the State) for private law remedies such as injunctive

relief or monetary compensation for any damage caused to the environment. The biggest problem that exists in this field of law is the principle of locus standi – that is whether the plaintiffs are the right persons to sue. If I may explain.

[11] Recently, with our decisions in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 and *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. So long as litigants have a general interest in the litigation and their rights are somehow affected such that they are not frivolous litigants, they may initiate a claim. That said, the laws of other countries have expanded far beyond that.

[12] In some countries such as the Philippines, New Zealand, India and Ecuador, their courts have gone to such expansive lengths so as to recognise that there is a right to file actions on behalf of non-living objects such as rivers, trees and rocks.¹ In some cases, even unborn children and future generations are granted the right to sue which modern jurists and commentators call ‘intergenerational rights’.

[13] Indeed, the Supreme Court of the Philippines in the celebrated case of *Minors Oposa v Factoran* G.R. No. 101083, sitting *en banc*, held that minor children suing on behalf of themselves and future generations had the necessary locus standi to sue the Filipino Secretary of the Department of Environment and Natural Resources for the excessive grants of timber licences which jeopardised certain forests. I find it necessary to quote Davide Jr. J, as follows:

¹ Lidia Cano Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' Resources 2018, 7, 13; doi:10.3390/resources7010013.

“This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. **We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.** Such a right, as hereinafter expounded, considers the “rhythm and harmony of nature.” Nature means the created world in its entirety.” [Emphasis added]

[14] Thus, it behoves me to say that there is still much room for progress in Malaysia. For a start, we have Practice Direction No. 7 of 2015 which establishes the environmental division at both the Superior and Subordinate Court levels. As such, we have an environmental division in the High Courts in Malaya and in Sabah and Sarawak as well as in the Magistrates’ and Sessions Courts in both jurisdictions. This is the first step administratively speaking to have a specially curated system for a subject which deserves a consideration of its own.

[15] Further, the former Chief Justice Tan Sri Richard Malanjum, spearheaded a substantive amendment to the Rules of Court 2012 to cater to environmental proceedings. He announced in several speeches that the said amendment was in progress. When I took over as Chief Justice, I fully supported and endorsed the idea in principle. However, later on, the Rules Committee which also consists of members of the Bar and the Attorney General’s Chambers advised that such amendments to include specific remedies and the widest possible expansion of standing rules akin to Philippines would be too substantive a provision to be inserted in a subsidiary legislation.

[16] Thus, if at all we intend to develop the law on environment, we must do so when the appropriate case approaches us and when the circumstances of the case such as the facts are ripe for progress. The other, perhaps the more suitable forum to develop the law on environment is through legislative intervention. I shall touch on this shortly.

Criminal Law

[17] The final role Courts can play within the realm of public law is in criminal law. For this, the Judiciary has vide Practice Direction No. 3 of 2012 established specific subordinate courts to hear environmental crimes. We believe that by doing this, environmental crimes can be given the importance they deserve and they would not be lost in the wilderness.

[18] The numbers tell us that environmental crimes cases are increasing exponentially. 3 cases were registered in 2017, 20 cases in 2018, 120 cases in 2019 and 166 cases as at 31 October 2020. In total, we have had 309 cases from 2017 to 2020. I have been informed of late that our environmental courts have been rather slow in disposing of environmental crimes cases. Measures and remedial steps are being taken to ascertain the problems and to address them.

[19] The role the criminal courts play within the context of criminal law is to punish those who harm the environment commensurate with the gravity of their crime. Thus, you could say that central to environmental crimes is the need for a strong deterrent. All perpetrators ought to know that the Courts will not allow the public to suffer such crimes with impunity.

Effective Cooperation

[20] Nonetheless, be it environmental crimes or other types of cases, there is little the Courts can do if cases are not brought before them or if the law itself is meek. This leads me to my final point on effective cooperation.

[21] We are not lacking in legislations on environmental laws. One of the problems we have is that the environmental laws are scattered. We have so many laws and regulations dealing with different subject-matters. We also have many written laws in force on similar subjects and this is further complicated by the demarcation of legislative powers between the Federal and State Governments.² It is said that at one point in time, fines imposable by the Courts were merely a pittance but the legislature has since moved to amend the Environmental Quality Control Act 1974 to allow for the imposition of harsher sentence.³ This shows that in some regard, the role of the Courts is limited.

[22] Here, I would like to emphasise, as I have done time and time again, that this is where the crucial significance of synergy comes to the fore. Recently we were all frustrated by the series of pollution cases occurring in the State of Selangor giving rise to troublesome water disruptions. After apprehending the first round of perpetrators, we were met again with news of another case of factory-related pollution in the same locale. In this

² Ainul Jaria Bt. Maidin, 'Challenges in Implementing and Enforcing Environmental Protection Measures in Malaysia. See: <https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/challenges-in-implementing-and-enforcing-environmental-protection-measures-in-malaysia-by-ainul-jaria-bt-maidin>.

³ Maizatun Mustafa and Nurah Sabahiah Mohamed, 'The Development of Environmental Crime and Sanction in Malaysia' European Scientific Journal September 2015 edition vol.11, No. 25.

regard, I would humbly advise that enforcement agencies need to up their ante and work assiduously. After all, they are the first line of defence that the public relies on in the justice system.

[23] The same is true in respect of the members of the Bar as well. Professor Andrew Harding had this to say in respect of environmental litigation:⁴

“An optimistic view held that litigation is useful as a form of publicity, a delaying tactic and as a method of challenging government and polluters as far as the system would allow, with the chance that, hopefully, a favourable precedent could be set, and at least arguments would not fall by default.”

[24] Professor Harding effectively disclosed both the beautiful and ugly sides of litigation. On the one hand, it may be used as a tool to stymie genuine efforts to protect the environment while on the other hand, the same process could also be used to set useful precedent.

[25] In this regard, I would like to once again reinvigorate the notion of the importance of pro bono litigation. We must remember that ours is an adversarial system. The Courts cannot be entering into the fray so to speak because unlike the Supreme Court of India, the Malaysian Courts do not have such *suo motu* powers. The public, therefore relies foremost on the Bar to assist us in upholding the Rule of Law. The same is true of those in the Legal Service who shoulder the onerous task of advising the Government to take proper measures to protect and preserve the environment.

⁴ Andrew Harding and Azmi Sharom, ‘Chapter 5: Access to Environmental Justice in Malaysia (Kuala Lumpur)’ in Andrew Harding, *Access to Environmental Justice: A Comparative Study* (The Hague, Martinus Nijhoff, 2007), at page 8.

[26] The process therefore starts with those practicing the law to ensure that it is scrupulously followed and where it is not, the Courts are the final bulwark of justice against its destruction. But the Courts cannot decide without regard to the evidence tendered by the prosecution.

[27] As recently as 16 March 2020 (written grounds dated 25 November 2020), the Sessions Court at Sepang acquitted and discharged the accused-company at the close of the prosecution's case on account of improper investigations and a lack of credible evidence. Sessions Court Judge Noorhisham Mohd. Jaafar observed, as follows:⁵

“[141] Before parting, it is deserving of observation the following. Much of the leads, so far as concerns the sustainability of the charges as well as the critical parameter governing the complicity of the Company in the offences would have been derived, had there been a full-blown investigation. Tinged with regret, that was however not the case here. I find that there had been weaknesses and flaws in the investigation, as it appears to be conducted in a slipshod manner or, rather perfunctorily. These circumstances, as a corollary, put the investigation on a slippery slope and hence prejudicial to the Company.

...

[144] ... The evidence against the Company appears to be underwhelming for a realistic prosecution, hinging on nothing more than a conclusory and bare assertion. In the full spectrum of evidence, I am driven to conclude that the prosecution against the Company has no credible evidential backing: it was at best shrouded with speculation and at worst drowned in uncertainty.”.

⁵ *Public Prosecutor v YMF Industries Sdn Bhd* (Summons Case No. BK-63ES-16-04/2019) (25 November 2020).

[28] For the record, the judgment is presently under appeal. Be that as it may, the case highlights the importance of proper investigation for the perpetrators to be brought to justice.

Conclusion

[29] With that, I hope I have helped in setting the foundations for the numerous stimulating discussions that will emerge over the course of this workshop. The fact that we are online is itself a testament to a steady effort to protect the environment. It saves the trees by reducing or eliminating the use of paper and saves the air by reducing carbon fuel emissions. I would once again like to commend the organisers for hosting this event. Thank you and I wish you a successful workshop.