

## Opening of the Legal Year Speech 2023

Yang Amat Arif Tun Tengku Maimun binti Tuan Mat, Ketua Hakim Negara;

Yang Amat Arif Tan Sri Datuk Amar Abang Iskandar bin Abang Hashim, yang menjalankan Kuasa-Kuasa dan Tugas-Tugas Presiden Mahkamah Rayuan; dan juga merangkap Hakim Besar Sabah dan Sarawak;

Yang Amat Arif Dato' Mohamad Zabidin bin Mohd Diah, yang menjalankan Kuasa-Kuasa dan Tugas-Tugas Hakim Besar Malaya;

Yang Berbahagia Tan Sri Idrus bin Harun, Peguam Negara Malaysia;

Yang Arif Hakim-Hakim dan Pesuruhjaya-Pesuruhjaya Kehakiman;

Ahli-ahli dari Perkhidmatan Kehakiman dan Perundangan;

Pegawai-pegawai Jabatan Peguam Negara; dan

Para peguam dari Semenanjung, Sabah dan Sarawak;

Yang Amat Arif,

Izinkan saya memulakan prosiding pada pagi ini dengan sekerat pantun

Kuih talam dalam takung  
Kuih keria tepung melekat  
Bulat air kerana pembentuk  
Bulat manusia kerana muafakat

Pantun ini mencerminkan harapan Badan Peguam Malaysia untuk bermuafakat bersama Badan Kehakiman dan Jabatan Peguam Negara dalam menegakkan keadilan dalam negara demi kepentingan kedaulatan undang-undang.

Yang Amat Arif, saya dengan rendah diri memohon izin untuk meneruskan ucapan saya dalam Bahasa Inggeris.

My Lady,

### **A. Introduction**

1. I have the honour and privilege this morning of addressing Your Ladyship and this esteemed gathering on the occasion of the Opening of the Legal Year 2023. It is with pleasure that I do so on behalf of the Malaysian Bar, the Advocates' Association of Sarawak and the Sabah Law Society.
2. My learned friends Gurvir Singh Sandhu and Roger Chin are present as Presidents of the Advocates' Association of Sarawak and the Sabah Law Society respectively.

Honourable Speaker of Dewan Rakyat  
the

3. I am also delighted to acknowledge the presence of the Deputy Minister in the Prime Minister's Department in charge of Law and Institutional Reform, members of the diplomatic corps and members of the judiciary from foreign jurisdictions.

4. Present this morning are our esteemed colleagues from foreign bars, law societies and law associations. My Lady, permit me to introduce them:

Ms Melissa Pang  
President of LAWASIA

Ms Dagmar Yu  
President of Taiwan Bar Association

Ms Yu-Lan HUANG  
Vice President of Taiwan Bar Association

Mr Jason WU  
Board Director of Taiwan Bar Association

Mr Amirali Nasir  
Vice-President of Law Society of Hong Kong

Dr Christian Lemke  
Vice-President of German Federal Bar

Ms Swetlana Schaworonkowa  
Senior Legal Advisor of German Federal Bar

Mr Derek Chan  
Vice Chairman of Hong Kong Bar Association

Ms Lisa Sam  
Vice President of The Law Society of Singapore

Tunku Farik Bin Tunku Ismail  
Jurisdictional Council Member For Malaysia, Inter-Pacific Bar Association  
(IPBA)

Steven Thiru, VP of CLA for Australasia

5. We are most appreciative of your attendance this morning.

### **Reflections on Challenges faced in 2022**

6. My Lady, the annual Opening of the Legal Year gives us the opportunity to acknowledge and reflect on the importance of the rule of law.

7. Whatever one's beliefs or motives, the rule of law and all that it represents must be respected by all, whether the Government or the public or sections of it. The rule of law is there to protect our rights and to help achieve the objective of any community, as it guides us to respect rights and to respect the rights of others. There can be no compromise as far as the rule of law is



concerned. It operates all the time, not just part of the time. The rule of law is an end in itself and stands alone as the most important institution contributing to the success of a nation, wellbeing of its citizens and the future of the country.

8. At the cusp of this new legal year, we greet 2023 with optimism and hope in a new era of Malaysian politics, with aspirations for law and policy reforms, strengthening of institutions and bridging of social dynamics.
9. 2022 was a year of milestones. We worked our way at the start of 2022 in a state of inertia after a turbulent 2021 in which we struggled with an onslaught of prolonged political turmoil, the COVID-19 pandemic, the various forms of lockdowns and nationwide state of Emergency. Just as the pandemic eased in 2022 when we entered into the endemic stage, we were stunned to hear of the invasion of Ukraine on 24 February 2022.
10. In the preceding year, across the board we have seen an erosion of trust in the system. We were confronted with issues and events pertaining to an acute threat to the independence of the judiciary, freedom of assembly, freedom of expression, an unexpected general elections, rising racial and religious extremism leading to heightened tensions, constitutional crisis in the form of a hung Parliament, and of course continuing deaths in custody and widespread devastation caused by climate change including the tragedy of the Batang Kali landslide. These are but to name a few.
11. My Lady, permit me to address some of the events in the preceding year and the aspirations of the Malaysian Bar in facing these events moving forward.

## **B. Executive Branch**

### **I. Environmental Destruction and Devastation**

12. Our nation continues to face the unabashed might of mother nature, our fellow states along the East Coast have once again suffered terrible flooding and destruction, and the devastating Batang Kali landslide serve as stark reminders to those in power to be more vigilant and impose more stringent rules and requirements in building more resilient townships and cities.
13. The Malaysian Bar remember those who have needlessly lost their lives.
14. The Malaysian Bar understands that these are very difficult and challenging times and that the public may have numerous legal questions about their rights arising from the effects of the flood. Recognising this need, the Malaysian Bar through its National Legal Aid Committee, and with the assistance of the Courts, will provide Disaster Legal Assistance to the public.<sup>1</sup>
15. Members of the Bar at our Bar Council Legal Aid Centres will provide legal advice and assistance to those affected. The service will be free of charge

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<sup>1</sup> 24.12.2021: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-disaster-legal-assistance-to-the-public>



and open to all Malaysians and non-Malaysians; a means test is not required. We will assist all people who are affected and in need.

## II. Institutional Reforms & Human Rights

16. The Malaysian Bar as a long-time advocate and fellow stakeholder in the administration of justice has continually worked alongside and together with the government of the day in effecting institutional, law and policy reforms in furtherance of our rule of law mandate.
17. GE14 presented the Malaysian Bar an opportunity to submit more than 60 working papers to initiate progress in working towards a matured and truly democratic nation. The results of GE15 last November has presented the Malaysian Bar the same opportunity and I am happy to report today that the Malaysian Bar is currently working on an extensive list of 65 reforms which we hope to submit to the government in the imminent future.
18. These reforms span across parliamentary reforms, election commission reforms, reforms to the Judiciary and the Judicial Appointments Commission, reforms to the Attorney-General's Chambers, specifically the separation of the role of the Public Prosecutor and the Attorney General as advisor to the government of the day, reforms to the police and enforcement agencies, and a whole host of other legal issues or specific legislation.
19. An overarching theme of the Malaysian Bar's various proposals for institutional reforms is premised on the issue of human rights, as captured in the Universal Declaration of Human Rights, or "**UDHR**". The Malaysian Bar has consistently propagated and championed human rights for all, as baseline requirements for the subsistence of an individual within our nation's borders.
  - (a) *Rights of Children*
20. A prime example of such rights are the rights afforded to children. These rights are further set out in the United Nations' Convention on the Rights of the Child ("**UNCRC**"), of which Malaysia is a signatory.
21. Article 3 of the UNCRC stipulates that in all actions concerning children, including in courts of law, the best interests of the child shall be a primary consideration. In this regard, the Malaysian Bar continues to be disappointed and dismayed with the lack of protection and consideration offered to one of the most vulnerable groups of our society, namely our children, our future. We continue to hear of stories of young girls who are punished instead of being protected and afforded their rights to pursue statutory rape charges, but are instead married off in underage marriages to their predators.
22. There was also the case of the 15-year-old girl in Terengganu being charged under section 302 of the Penal Code for the murder of her newly born baby.<sup>2</sup> The Bar spoke out vehemently against this in light of her age, and the

<sup>2</sup> <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-legal-protection-should-be-afforded-to-children-in-conflict-with-the-law>



availability of a lighter alternative charge under which she could have been charged.

23. Children in conflict with the law are uniquely vulnerable due to their tender age and are likely to find the experience of legal proceedings baffling and a source of anxiety. There is a need for children to be able to participate in legal proceedings in a meaningful and safe manner, and they should be given access to justice and support when needed. Similarly, protections afforded to children under the Child Act 2001, including the treatment of children whilst under detention, should be strictly adhered to by the authorities.
24. There was also the majority decision of the Court of Appeal in 2022 in finding that citizenship cannot automatically be granted to children born overseas to Malaysian mothers with foreign spouses, further perpetuating Malaysia's gender-discriminatory citizenship laws denying women the equal right, as their male counterparts, to confer citizenship on their overseas-born children.<sup>3</sup>
25. This Court of Appeal majority decision overturned the landmark High Court decision of *Suriani Kempe & Ors v Government of Malaysia & Ors* made on 9 September 2021, which was considered a victory and a ray of hope for Malaysian mothers who had fought tirelessly for their children to be granted Malaysian citizenship, and which ordered the issuance of citizenship documents to impacted children.
26. The rationale behind the reversal of the significant High Court decision was an explication of the Second Schedule of Part II, Section 1(b) of the Federal Constitution where the word "father" in the section, refers to the child's biological father **only**, and cannot be extended to include the mother, nor can it mean "parents". Respectfully, such an interpretation is regressive and antiquated. It harks back to a time of gender discrimination — where women were considered unequal to their male counterparts. Such views have no place in the 21<sup>st</sup> century.
27. The Malaysian Bar echoes the sentiments of the dissenting judge, that the view that only fathers can confer citizenship, is inequitable and discriminatory. The majority interpretation by the Court of Appeal violates Article 8 — the equality provision of the Federal Constitution — and effectively stating that a mother's lineage is secondary to a father's.
28. It is the Malaysian Bar's position that laws should be interpreted harmoniously and viewed holistically, because only through a harmonious interpretation of the laws, can it prevent any repugnant consequence between the provisions in the Federal Constitution. While there appears on the face of it inconsistencies in the law, such provisions should be construed in a manner in which justice can be best served, and only then is there a true practice of the rule of law, not rule by law.

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<sup>3</sup> 9.8.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-discrimination-and-double-standards-when-women-are-denied-right-to-confer-citizenship-on-their-children>



29. Unequal gender laws impede the empowerment of women and negatively affect their participation in society. In this scenario, it is not just the women who are affected — it is the children as well. The consequential far-reaching impact on the denial of Malaysian citizenship for these children will cause the children to be denied access to a whole range of social institutions and legal rights, including education, healthcare, employment opportunities, and other types of fundamental rights, such as access to justice.
  30. The Malaysian Bar calls on those in positions of authority to uphold and protect the rights of women and children, and ensure that gender equality is achieved.
- (b) *Refugees and Asylum-Seekers*<sup>4</sup>
31. Another vulnerable group of our society are the refugees and asylum-seekers. There are nearly 200,000 documented refugees and asylum-seekers within our borders, a nation without an effective legal framework in place to legitimise and protect refugees. Consequently, refugees in Malaysia struggle to obtain basic necessities and are not afforded critical legal protection, respect and dignity. They are not legally allowed to work, making them vulnerable to exploitation — their children cannot go to school, they face challenges in accessing healthcare, among others.
  32. The Malaysian Bar continues its call for the Malaysian Government to ratify the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees, both of which are instruments of international law that set out the rights of refugees, and to implement them domestically to properly address the plight of refugees and asylum-seekers in Malaysia.
  33. It bears reminding that refugees and asylum-seekers are people who have been forced to leave their home countries due to dire circumstances such as persecution and discrimination. These people should therefore be afforded protection, dignity, and respect. With this in mind, the Malaysian Bar was deeply despaired and concerned with reports of rioting in April 2022 that resulted in the escape of more than 500 Rohingyas from an immigration detention depot in Sungai Bakap. It is even more heart-wrenching to note that six of the escapees, including two children, died while attempting to cross the highway.
  34. Many of the Rohingyas at the depot are refugees and asylum-seekers who had been detained indefinitely in Malaysia since 2020.<sup>2</sup> The cause of the riot and the escape was reportedly due to overcrowding at the depot.<sup>3</sup> The dire plight of the Rohingyas raises several points of concern, and if the detention of these Rohingyas was in fact indefinite as reported, it is inhumane and oppressive, and is hardly an effective migration management tool.

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<sup>4</sup> 22.4.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-riots-at-immigration-depot-a-wake-up-call-on-the-need-to-afford-dignity-to-refugees>



35. Humanity — a crucial element in dealing with refugees and asylum-seekers — is completely missing in this nation, whilst detention centres are currently treated as mere regulatory compliance.
36. In this context, we note several things. Firstly, some of the Rohingyas who were detained at the depot were children. Any form of detention, whether definite or indefinite, can be traumatising for children and have negative long-lasting effects on their health and development. According to the United Nations Children's Fund ("**UNICEF**"), children held in detention are at a risk from suffering depression and post-traumatic stress disorder ("**PTSD**"). The United Nations Special Rapporteur on Torture has observed that immigration detention for children, even for a short period of time, may constitute a form of cruel, inhuman, or degrading treatment of migrant children.<sup>4</sup> The intersectionality of the rights of these refugee children must be recognised and be granted protection as such.
37. Secondly, while Malaysia has vowed not to deport refugees or asylum-seekers who are registered with the United Nations High Commissioner for Refugees ("**UNHCR**") according to the customary international law principle of non-refoulement,<sup>5</sup> it is disappointing to note that Pakistani journalist Syed Fawad Ali Shah was deported to Pakistan in August 2022.<sup>6</sup> Fawad, who was in exile in Malaysia for more than 10 years, holds a refugee card issued by the UNHCR, had sought asylum in Malaysia for alleged persecution in Pakistan over articles published in several English dailies there related to alleged government corruption.
38. In light of these events, the Malaysian Bar urges for the establishment of an independent investigating body to look into the matters surrounding the incident at the Sungai Bakap depot and the deportation of Fawad. Proper stakeholder engagement with agencies to include the Human Rights Commission of Malaysia ("**SUHAKAM**"), the Malaysian Bar, as well as civil society organisations should be initiated. A participatory approach inclusive of various institutions will serve to promote transparency and accountability in the investigation.
39. What we need to do as a responsible and conscionable country is to take a long, hard look at our treatment of refugees and asylum-seekers, as human beings, and to make conscious changes. As a responsible member of the international community, we owe a deep obligation to those who cross our borders to ensure that they are not abused and exploited.

(c) *Workers, Migrants, Forced Labour*

40. Another vulnerable group of our society are the migrants or migrant workers, including also undocumented workers, of which many may end up in forced labour. With Malaysia having been recognised in the past as the largest migrant-receiving country in Southeast Asia, migrant workers contribute significantly to the economy and development of Malaysia. As a host country, it is our incumbent duty to ensure that all workers, both domestic and foreign, are safe from exploitation and forced labour. This duty demands for



proper legislative amendments which must then be followed by effective enforcement.

41. The Malaysian Bar reiterates our call for the Ministry of Human Resources Malaysia to accept labour complaints from undocumented workers, who are at greater risk of forced labour, as they are not accorded access to justice due to their irregular status.
42. There must be continued efforts in ensuring that our position against forced labour rings loud and clear internationally and nationally. Malaysia's ratification of the International Labour Organization ("**ILO**")'s Forced Labour Convention, known as Protocol 29 ("**P29**") and launching of the National Action Plan on Forced Labour ("**NAPFL**") (2021-2025) over the last two years is a testament of our country's determination to resolve and end forced labour.

(d) *Convicts on Death Row – Death Penalty*

43. Another vulnerable group of our society that deserve baseline protection are the convicts currently on death row. The Malaysian Bar therefore welcomed the announcement that the mandatory death penalty has been done away with in respect of 11 offences carrying such sentences, with the discretion as to sentencing returning to the unfettered domain of the Judiciary.<sup>5</sup>
44. Nevertheless, the fact that the death penalty continues to be on our books is a blight on our nation as it is an extreme, abhorrent and inhumane punishment. The Malaysian Bar is of the view that the death penalty is cruel and degrading and breaches two essential rights, namely the right to life and the right to live free from torture, as provided by the UDHR, and Article 5(1) of the Federal Constitution, which shuns the arbitrary deprivation of life.
45. In an advanced society, our focus should be on rehabilitation and restoration, because very little is achieved in having the death penalty except to satisfy the need for retribution. The irreversible, irreparable and non-deterrent nature of the death penalty should in and of itself be sufficient to abolish the death penalty for all crimes without delay.
46. At present, there is a moratorium on the execution of death row inmates. The Malaysian Bar calls upon the Government to work with the Pardons Board to ensure that the more than 1,300 convicted persons currently on death row are also spared the death penalty, rather than to allow these convicts from lingering in prison with no hope or future in sight, especially in the face of the moratorium, which by itself is an inhumane way of treating convicts on death row without possibility of release. As we progress in our democratic development in our country, we must shift away from killing people in the name of "justice".

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<sup>5</sup> <https://www.freemalaysiatoday.com/category/nation/2023/01/03/saifuddin-confirms-pakistani-journalist-deported/>



47. We remember also the Malaysians currently on death row in Singapore.<sup>6</sup> 2022 saw the execution of Malaysians Nagaenthran Dharmalingam and Kalwant Singh executed on charges of drug trafficking. The Malaysian Bar held a candlelight vigil on 26 April 2022 ahead of his scheduled execution in Singapore the following day.

(e) *Persons Subject to Preventive Detention*

48. Another vulnerable group of our society are those that are subjected to the unfettered "detention without trial" or preventive detention. With provisions for preventive detention in various domestic legislation, the denial of such detained persons to be brought before a magistrate or heard, and in some instances to have legal representation is a serious blemish on our maturing democracy.
49. The Malaysian Bar therefore welcomed the expiration of the effective period of subsection 4(5) of the Security Offences (Special Measures) Act 2012, or "**SOSMA**", which meant that after 31 July 2022, the police no longer have the power to detain a suspect up to 28 days for investigations without being brought before a magistrate to be remanded under subsection 4(5) of SOSMA.
50. This is a step in the right direction as Article 5(4) of the Federal Constitution requires any person arrested to be brought before a magistrate within 24 hours and not be further detained in custody without the magistrate's authority.
51. The Malaysian Bar has always been of the view that existing laws clothes our law enforcement agency with ample statutory basis and authority to confront such activities without having to resort to preventive detention laws, which are draconian.
52. Malaysia, being a member of the United Nations Human Rights Council for the 2022-24 term, should take this opportunity to uphold its commitment to the protection of human rights by repealing SOSMA and other preventive detention laws such as the Prevention of Terrorism Act 2015 ("**POTA**") and Prevention of Crime Act 1959 ("**POCA**").
53. Human rights and national security are not mutually exclusive, nor are they in conflict with each other. Instead, they are interrelated and complementary.<sup>7</sup>

(f) *Persons Detained in Custody – Deaths in Custody / IPCC*

54. Over the past many years, Malaysians have been needlessly burdened with the disturbing phenomenon of deaths in police custody. These persons who are taken into police custody should also be seen as a class of vulnerable

<sup>6</sup> 14.2.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-halt-the-executions-of-pausi-jefridin-and-roslan-bakar-in-singapore>

<sup>7</sup> 25.3.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-repeal-sosma-in-its-entirety>



persons in our society. Those in custody should be afforded dignity, security, and safety.

55. As a nation, we are deeply dismayed by the unabated spate of deaths that appear to have no end in sight all over the country. Questions regarding the integrity and transparency of the police force, and the manner in which they treat detainees and their families continue to haunt the hallowed halls of the administration of justice.<sup>8</sup> There needs to be increased scrutiny into the practices of our criminal justice system.
56. The Malaysian Bar is hopeful that the Death in Custody Investigations Unit set up by the police force's Integrity and Standards Compliance Department in early 2022<sup>10</sup> will be able to provide satisfactory answers. The police force owes it to the families of the deceased to seek out the truth and to establish trust and confidence in the public whom they are tasked to serve.
57. Each and every death in custody should be investigated via an inquiry or inquest, as mandated under section 334 of the Criminal Procedure Code. The act of depriving someone of his/her liberty is one of the most significant powers available to the State, and it must be imposed with respect for the rule of law. Deaths in custody — whether due to natural causes or not — must therefore be thoroughly investigated.
58. The Malaysian Bar had previously asserted the need for an Independent Police Complaints and Misconduct Commission, or "IPCMC" to function as an independent oversight body to investigate complaints involving police officers. The IPCMC is to be sufficiently equipped with disciplinary authority to ensure that justice is properly meted out.
59. However, the Malaysian Bar notes the recent announcement made by the Minister of Home Affairs, where he stated that the Independent Police Conduct Commission, or "IPCC" Act which was passed in the Dewan Rakyat earlier this year would come into force in June 2023. We are disheartened by the Government's plan to forge ahead with the Act, especially when the Malaysian Bar has consistently expressed grave concerns relating to the shortcomings of the IPCC Act.
60. The police exercise a wide array of powers — ranging from the right to arrest; the right to use force, seize property, and to search private premises; just to name a few. These are all draconian measures that must be justified, and they demand a high standard of integrity and competence from those executing them. The public has a right to expect that the police will act with utmost fairness when dealing with the community they serve. It is therefore only right that there should be an independent oversight body to preside over the police force, one of our country's most important public services. External scrutiny is a hallmark of any democratic police force and one that is accountable, transparent, and responsive to the needs of the public.

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<sup>8</sup> 7.2.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-when-will-deaths-in-custody-end->



61. The IPCC Act in its current form fails to live up to our expectations of a more transparent and better regulated police force. One of the main differences between the IPCMC and the IPCC is that under the IPCC, the Commission cannot act against police officers who have committed wrongdoing, but can only recommend proposed action to the Police Force Commission or other relevant authorities. It is a toothless piece of legislation that does not effectively achieve the intended objective.
62. The IPCC Act is a step backward and instead, one that entrenches impunity and turns a blind eye to the very real problems that the institution faces. Our newly minted Government that has repeatedly emphasised the importance of good governance should reconsider its position in allowing the IPCC Act to be brought into force until effective amendments are made, including granting disciplinary powers to IPCC, prior to its implementation.

### **C. The Attorney General's Chambers**

#### **I. Prosecution / Enforcement**

63. Permit me now to move on to the next area of reform advocated by the Malaysian Bar, namely the complete separation of the role of the Public Prosecutor and the Attorney General.
64. As we are all well aware, there arises an inherent conflict of interest in taking on both the roles of the Public Prosecutor and the Attorney General as currently provided in our constitution when a member of the Executive or those closely linked to the government of the day are being criminally investigated.
65. The division in responsibility between the Attorney General qua advisor to the government of the day, and the Attorney General qua Public Prosecutor will allow for transparency and accountability.
66. This immense authority wielded by the Attorney General are pursuant to powers are granted under Article 145(3) of the Federal Constitution, which provides the Attorney General with the prosecutorial discretion to institute any proceedings for an offence. It is therefore our view that the separation of powers between the Attorney General and that of the Public Prosecutor would promote and strengthen the rule of law, and bode well in eyes of the public as regards the integrity of the institution.

#### **II. Access to Justice – YBGK**

My Lady, I would like to say a few words about the Yayasan Bantuan Guaman Kebangsaan also known as the National Legal Aid Foundation or "YBGK", which is chaired by the Honourable Attorney General.

YBGK began its operations in April 2012 and has since assisted 222,361 Malaysians as at November 2022. YBGK lawyers, made up of members of the Malaysian Bar, has tirelessly contributed its efforts in representing



Malaysians and provided access to justice since the inception of YBGK and handled approximately 1.7 million cases ranging from cases involving arrests, remands, mitigation and bail, trials and appeals.

Access to justice is the hallmark of a strong presence of the rule of the law in the country. The Bar therefore seeks to continue its efforts to facilitate provision of access to justice by lending the assistance of our Members to Malaysians, with the hope that such access be extended to non-citizens. Our call is for the programme to be further expanded.

It is the duty and responsibility of the Government as the governing machinery to ensure that access to justice remains strong and present, and while the Bar is an important stakeholder in facilitating this process for the nation, we urge sufficient resources are made available for this programme to continue to be a success.

#### **D. Legislative Branch**

##### **I. Political Stability**

67. The 14<sup>th</sup> General Elections in 2018 saw a new type of politics unfold in Malaysia. In 2018 for the first time in our young nation's history, we saw a change in the ruling coalition. Since then, we have witnessed leadership challenges which gave us three Prime Ministers within a span of three years before the 15<sup>th</sup> General Elections held in November last year. In the course of the period since 2018, the Malaysian Bar has been vocal about the reforms required in the political sphere, including reforms to anti-hopping laws and political financing laws.

##### *(a) Anti-Hopping Law*

68. 2022 saw reforms to the anti-hopping law by way of a constitutional amendment. The Constitution (Amendment) (No. 3) Act 2022 amended Articles 10, 48, and 160, and introduced a new Article 49A and Section 7A of the Eighth Schedule of the Federal Constitution.

69. The Malaysian Bar has continuously called for an anti-defection law to be put in place for more than a decade. The idea is to nurture the growing maturity in the country as a democratic nation and restore the public's faith in the political and governmental system, so that there is certainty and transparency in Parliament. Party-hopping has become a common political phenomenon in the Malaysian political scene over the last three decades.

70. We were heartened with the constitutional amendments made to implement anti-hopping law in our nation. However, the recent constitutional amendments were designed to meet straightforward challenges known to Malaysians in the political scene at the time. The Malaysian Bar had presented various concerns to the Minister in the Prime Minister's Department in charge of Parliament and Law prior to the introduction of these amendments, amongst them were the possible abuses that could arise on purported resignations and expulsions.



71. Since GE15, we have seen creative ways in which politicians to circumvent the current frame of anti-hopping law. We are now faced with an entirely new conundrum with far more complex issues such as those hopping from within a coalition of parties at one spectrum to a coalition of parties of the other end of spectrum. The recent events unfolding in Sabah are clear examples of such new issues emerging before us.
  72. In this premise, we advocate legislative amendments be made to address the complexity of new situations brought to the forefront after GE15 - to clarify and to counter possible abuse, so as to create a credible democratic process and a stable government.
- (b) *Political Financing Laws*<sup>9</sup>
73. No strides have been made at all as regards political financing law reforms.
  74. The Malaysian Bar has always called for the enactment of political financing laws. There is clearly a dire need for good governance and transparency in our country relating to activities carried out by political parties and politicians, especially in the process of handling political funds. The lack of a legislative framework in Malaysia has created an ecosystem ripe for corruption, cronyism, conflict of interest, and abuse of power, all of which have been difficult to curb.
  75. Save for the pre-Merdeka legislation of the Election Offences Act 1954, which is clearly outdated, there is currently no legislative framework in Malaysia to cope with the sophistication of how political financing is carried out.
  76. Political parties are governed by the Societies Act 1966, where their financial accounts are submitted to the Registrar of Societies. The Societies Act 1966 however, does not require these political parties to reveal their sources of funding. This could muddy the way in which funds are being obtained and used, due to the lack of disclosure requirements.
  77. George Sanatayana said "Those who do not learn from past mistakes, are condemned to repeat it." Recent history and court cases have shown that a political financing mechanism is imperative to comprehensively address issues on how political parties, politicians, and campaigns are financed through a cohesive and transparent machinery. While it is recognised that access to funding by political parties and politicians for the purpose of election is necessary, we must never overlook and certainly must learn from recent past events, that disclosure of source of monies and the manner how they are channelled and utilised, must be properly regulated with the view of being fully accountable to members of the public.
  78. The continued delay in enacting political financing laws will have a deleterious effect on the confidence of Malaysians in the system of governance. The absence of laws to properly regulate the monies that go towards campaigns

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<sup>9</sup> 5.8.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-enact-political-financing-laws-without-any-delay>



and candidates could potentially lead to widespread corruption in the highest echelons of our political system; and corruption is like cancer, with the propensity to corrode and undermine the rule of law and accountability in our society.

#### **E. Judicial Branch**

79. The past year for the Judiciary has been a trying one. The various decisions made by the Courts in the cases relating to the kleptocracy scandal have drawn both accolades and brickbats from the public. The brickbats have been heavy, and there have been direct attacks on the independence of the Judiciary.

#### **III. MACC Investigation into a Sitting Judge**

80. First came the attack on the independence of the Judiciary with the public announcement by the Malaysian Anti-Corruption Commission or "**MACC**", of the commencement of an investigation into a sitting Judge of the Court of Appeal and disclosing the name of the Judge for all to know – all on the strength of a blog post by a fugitive blogger.<sup>10</sup>
81. The MACC investigation and publicly announcing the name of the sitting Judge undermined the independence of the Judiciary and negatively impacted confidence of the public in the Judge and the institution. The Malaysian Bar is of the view that there are sufficient mechanisms in place to approach this issue, while preserving the integrity of the Judiciary. Pending the determination in such an issue, any attempts by irresponsible parties can be seen as stabbing public confidence in the Judiciary. Article 125 of the Federal Constitution provides a specific pathway that allows for complaints of judicial misconduct to be addressed in a manner that ensures continued public confidence in the Judiciary.
82. The Malaysian Bar fully recognises that all Judges must have the proper space to discharge their judicial duties in a manner apparent to all, and that the judicial process and decisions are independent, and free of any interference or intimidation.
83. Any attempts to cast aspersions on the integrity of the Judiciary and sitting Judges should be curbed immediately, failing which Judges' decisions made whilst being subject of investigations by the enforcement authorities, would be perceived as having a lack of independence or under the control of the Executives. We do not wish for the Judiciary to be compelled to take steps to ensure that they do not antagonise the Executives as this would be a disservice to the rule of law and the doctrine of separation of powers.
84. Without that necessary confidence instilled in the Judiciary as an institution, the system of administration of justice cannot command the respect and acceptance which are essential to its effective operation in our administration

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<sup>10</sup> 24.4.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-the-malaysian-bar-stands-with-and-supports-malaysian-judges-who-are-independent-and-with-integrity-respect-and-uphold-the-integrity-of-the-judiciary-as-an-integral-institution-in-the-administration-of-justice>



of justice. The Malaysian Bar fully supports the efforts of Your Ladyship in maintaining the independence of the Judiciary.

85. The Malaysian Bar wishes to add that we recognise the Judiciary is defenceless to criticisms or wild allegations made by irresponsible parties, and therefore not in any position to take steps to protect itself by involving itself in a trial by media or any form of public controversy, and as such there is a need for the Malaysian Bar to stand up and step up to protect the dignity and integrity of the Judiciary.

#### IV. Scurrilous Remarks by Politicians

86. Public criticism of judges by politicians is untenable as it subliminally erodes the trust of the rakyat towards the institution mandated to dispense justice and to uphold the rule of law. Judges are beholden to no one but the law — not to politicians or any form of external interference — and criticisms by politicians towards judges for their own purposes is unconscionable and must be avoided at all costs.<sup>11</sup>
87. In August 2022, prior to GE15, statements made by two high profile politicians, alleging that the Federal Court's decision to deny the former Prime Minister's motion to adduce additional evidence in the case, was clearly mischievous and designed to undermine judicial integrity.
88. The Malaysian Bar had issued a press release observing that politicians should not be making scurrilous remarks trying to win in the court of public opinion - as it is tantamount to an attack on the independence of the Judiciary and the rule of law. It is evident that the purpose of such statements is aimed at perpetuating distrust and suspicion amongst the rakyat towards our Judiciary in the handling of the case. It is not the place for politicians to sow discord amongst the rakyat by releasing statements that could potentially tarnish the reputation of the judicial system in the eyes of the public and are deeply damaging to the rule of law in Malaysia.<sup>12</sup>
89. We must all be mindful that it is the Courts that we turn to for justice, as they are the last bastion of hope and final line of legal recourse available. The Courts are beholden to no one but the law, and it is the duty of judges to dispense justice in a manner that is in accordance with the law, and not in accordance with the wishes of individuals or political parties.

#### V. Law Reforms to Preserve Independence of the Judiciary

90. The Malaysian Bar has always advocated for reforms to further strengthen the Judiciary and promote its independence. In context, the Malaysian Bar had since 2018 submitted a comprehensive paper to the Institutional Reforms Committee which called for a review of the Judicial Appointments

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<sup>11</sup> 19.8.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-politicians-should-refrain-from-making-comments-that-could-tarnish-public-opinion-about-the-judiciary->

<sup>12</sup> 29.8.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/joint-press-release-interference-with-the-judicial-process-and-demands-of-change-of-attorney-general-during-his-fixed-tenure-is-preposterous-and-an-abuse-of-power>



Commission Act 2009 ("**JAC Act**"). This initiative has had a history even prior to 2018, as the Malaysian Bar has always had concerns relating to the process of the appointment of judges, which should always be free from the influence of the Executive, because the underlying purpose behind the establishment of a JAC is to maintain the separation between the Legislative, Judiciary, and Executive to ensure transparency at all levels.

91. As such, the recent call for JAC reforms is timely indeed. The Malaysian Bar renews our call for amendments to the JAC Act, where the review of provisions on representation of the stakeholders should be done by legal practitioners and the Attorney General, and that eminent persons under section 5 of the JAC Act be selected through a set of criteria suitable for Malaysians across divides, for the good of the Judiciary and our country.<sup>13</sup>
92. The Malaysian Bar reiterates yet again that the powers of the Prime Minister in the judicial selection and appointment process under the JAC Act be removed or limited, so as to ensure independence of the JAC to run its own affairs. These reforms would be necessary to uphold the independence of the Judiciary.
93. It is therefore imperative that the government of the day that says it is resolute in good governance, continues the way forward by having the political will to make the requisite amendments to the JAC Act and Article 122B of the Federal Constitution to establish an independent judiciary, for the sake of a proper democratic system within our country.
94. Over and above these criteria, the Malaysian Bar has continuously advocated that the overall composition of the JAC should reflect diversity and inclusivity, and as far as possible, mirror the demography of the general population in every aspect. This means an inclusion of the wide spectrum of Malaysia's rich multicultural and multireligious population, and a reflection of a good balance of various backgrounds, genders and professional practice areas. If the composition of the JAC is reflective of our Malaysian society, it would enhance public confidence and acceptance of the decisions made by the Judiciary because these judges would essentially be representing and making decisions affecting the lives of all Malaysians.
95. The Malaysian Bar further advocates for the introduction of a new regime in the way Judges are being remunerated. There is a pressing need to establish a Judges Remuneration Tribunal to make revisions to the salaries and allowances of Judges as the current structure is not ideal since it is at the will of the Executive and Legislature. Setting the right levels of salaries will ensure that the bench attracts and retains the very best of the nation's talent, and at the same time preserve the independence of the Judiciary. Professor Martin Friedland in his Report to the Canadian Judicial Court said:

"There is, of course, a close connection between judicial salaries and judicial independence....if a judge's salary is dependent on the whim of the government, the judge will not have the independence we desire in our

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<sup>13</sup> 1.12.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-reforms-to-laws-necessary-to-preserve-independence-of-the-judiciary>



judiciary. If salaries could be arbitrarily raised or lowered in individual cases, or even collectively, the government would have a strong measure of control over the judiciary.”

96. It is therefore hoped that the government will address this serious issue urgently.
97. Another important reform which the Malaysian Bar believes will strengthen the Judiciary and retain the nation’s talent is to increase the age of retirement of Judges, to 70. The current age of retirement for Judges stands at 65 under Article 125 of the Federal Constitution. Many jurisdictions across the globe have set the retirement age at 70 years old, and in some countries, there are proposals for the retirement age to be increased to 75 or even 80. The Malaysian Bar urges the Government to make constitutional amendments to give effect to this important reform.

## **F. The Malaysian Bar**

98. Hand in hand with the Judiciary, the last year has been a testing one for the Malaysian Bar.

### **I. Violation of the Fundamental Liberty to Assemble**

99. Further to the events in April 2022 by MACC detailing the attack on the independence of the Judiciary, the Malaysian Bar held an Extraordinary General Meeting on 27 May 2022 where we passed a resolution to assemble peacefully and walk in lawful protest against attempts to assault the integrity of the Judiciary, interfere with the independence of the Judiciary, and breaches of the fundamental principle of separation of powers.
100. The Walk for Judicial Independence was slated to take place on 17 June 2022 with the purpose of handing over a memorandum in relation to judicial independence to the Prime Minister or his representative. However, the procession to Parliament was wrongfully prevented by the actions of the Royal Malaysia Police who barricaded Members and pupils within the car park area of Padang Merbok.<sup>14</sup>
101. The police turned out in full, if not excessive force — together with the Light Strike Force in full riot control gear to prevent Members of the Malaysian Bar from walking to Parliament in the event that we were able to penetrate through the barricades and/or the human chain of police officers at both entrances leading out of the car park. The obstructionist actions by PDRM became a bootless errand, as the then Deputy Minister in the Prime Minister’s Department (Parliament and Law), being the designated representative of the Prime Minister, made her way to the assembly at the Padang Merbok car park to receive the Malaysian Bar’s memorandum.

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<sup>14</sup> 24.6.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-the-walk-for-judicial-independence-how-the-police-had-failed->

6.7.2022: Circular No. 201/2022



102. Notwithstanding this, the Malaysian Bar laments that despite the hard-fought progress in the law in the last decade with respect to freedom of assembly under Article 10 of the Federal Constitution and the Peaceful Assembly Act 2012 ("PAA 2012"), it is evident that the police still do not understand and worse still, regressed in this instance, to a pre-PAA 2012 era of authoritarianism and curtailment of fundamental freedoms and civil liberties.
103. The Malaysian Bar condemns, in no uncertain terms, the manner in which the Police had obstructed the Walk. The police had failed in their role to ensure that Members of the Malaysian Bar were able to exercise their constitutional right to peacefully assemble and walk, as guaranteed in the Federal Constitution. Instead of facilitating the Walk and ensuring the safety of the participants, the police did the converse to frustrate the rights of citizens. The actions of the police have set a bad example for the citizenry, as it conveys the message that citizens are not free to exercise their constitutional rights even when they comply with the law, and that a law enforcement agency can and will act with impunity, just because they are in a position of power to do so.
104. The Malaysian Bar cannot countenance this transgression from the Police.
105. After the Walk, on 24 June 2022, the President of the Malaysian Bar, the Chief Executive Officer of the Bar Council Secretariat, and a Bar Council Member, were issued notices under section 111 Criminal Procedure Code or "**CPC**" to attend the Dang Wangi Police Station to provide statements for the purposes of PDRM's investigation into the Walk. On 8 July 2022, the Secretary of the Malaysian Bar was served with a similar notice. All four members declined to give any statements to PDRM.<sup>15</sup>
106. In response to the authoritarian, and disproportionate attitude exhibited by the Police, the President and Secretary of the Malaysian Bar, the CEO and a Bar Council member on 19 September 2022 collectively filed a Judicial Review application in the High Court of Malaya in Kuala Lumpur against the Chief of Police, Officer in Charge of the Dang Wangi Police District, Government of Malaysia and others (collectively known as "Defendants") challenging the validity of notices issued under section 111 of the CPC against the four members.
107. Upon service of the Judicial Review application on the Defendants on 20 September 2022, the Officer in Charge of the Dang Wangi Police District quickly issued letters 6 days later stating that their investigation papers were referred to the Attorney General's Chambers and the decision given was "NFA", or "No Further Action." Since the matter was then rendered academic in light of the Police's decision not to further pursue the case, the aforesaid Judicial Review application was discontinued by the Malaysian Bar on 13 October 2022.

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<sup>15</sup> 15.12.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-update-on-the-malaysian-bar-s-actions-after-the-walk-for-judicial-independence>



108. Notwithstanding this turn of event, the Malaysian Bar's pursuit of justice continues. We maintain our position that the actions of the Police were wrongful and reprehensible. The Malaysian Bar has thus initiated a separate legal proceeding against the Officer in Charge of the Dang Wangi Police District, the Inspector General of Police, the Ministry of Home Affairs, the Government of Malaysia, and one other defendant for, among others, breach of statutory duty and/or breach of the PAA 2012, violation of our constitutional rights under Articles 5, 8, 9 and 10 of the Federal Constitution, false imprisonment, and misfeasance in public office.
109. Without delving into extensive details regarding the lawsuit that was filed, the Malaysian Bar takes the view that the Police's flagrant disregard for the constitutional rights of the participants of the Walk, including the use of disproportionate force towards the participants and malicious intent to frustrate and restrain them from fully participating in the Walk, is wholly unacceptable and cannot be condoned.
110. In connection to this, the Malaysian Bar would like to take this opportunity to extend its gratitude to Lawasia and the Commonwealth Lawyers Association for sending observers to the Walk and coming up with a report detailing the incident.

## II. Suit by Messrs Zaid Ibrahim Suflan T H Liew & Partners

111. Further to scurrilous remarks made by politicians in relation to the various decisions relating to the kleptocracy scandal, the Malaysian Bar, and in particular the President, came under fire for a statement issued "Abuse of Process Brings Disrepute to Our Justice System" issued on 19 August 2022.
112. A letter of demand dated 26 August 2022 was issued, and on 30 September 2022 a claim filed by Messrs Zaid Ibrahim Suflan T H Liew & Partners representing three of their partners, against the Malaysian Bar and the President. The Bar is in the midst of defending the same.
113. The Malaysian Bar has always expressed and will continue to express its concerns on matters of public interest — the administration of justice, and the standards of the legal profession in the country. The Malaysian Bar will continue its duty and efforts uninfluenced by fear or favour, and will not cower from any act of intimidation.<sup>16</sup>
114. The Malaysian Bar remains steadfast in its role as a guardian of the administration of justice and will not be muzzled, especially when vocalising the truth and upholding the cause of justice.<sup>17</sup>

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<sup>16</sup> 5.9.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-the-bar-council-unanimously-stands-by-the-president-of-the-malaysian-bar-and-her-press-release-on-abuse-of-process-dated-19-august-2022>

<sup>17</sup> 1.11.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-the-malaysian-bar-was-justified-to-have-exercised-caution-on-participating-in-the-special-task-force-in-view-of-declassification-and-legal-suit-filed>



### III. Politicisation of the Malaysian Bar

115. The Bar has always been very clear in its rule of law mandate, and its fidelity to it. The Malaysian Bar has never been partial to any political party or individual positions.
116. Last year saw the Bar being used unscrupulously and mistakenly by political persons to sway the conversations of the day. In particular, reference is made to the Bar's refusal to participate in the Special Task Force or "**STF**" to Review Allegations made in the former Attorney General, Tan Sri Tommy Thomas' memoir entitled "My Story: Justice in the Wilderness".
117. The Malaysian Bar had since February 2022 taken issue with the legitimacy of the STF and declined to participate in the exercise. The STF was established by the Executive, thereby raising the issue of partiality and whether it can be truly independent. The Malaysian Bar refused to participate in the STF as explained in our letter responding to the request made, as it purported to delve into the veracity and accuracy of contents of the memoirs, which of course the Malaysian Bar had no direct or personal knowledge of.
118. Due to the opacity of the terms of reference, and the possibility that the Malaysian Bar may be hauled inadvertently as a witness in what was foreseeable then as probable and conceivable court proceedings to be commenced as a result of any outcome the STF would take, the Malaysian Bar declined to participate in the STF so as to obviate the likelihood of being utilised as a tool of any political manoeuvrings.
119. The Malaysian Bar reiterates its apolitical and non-partisan stance at all material times — our commitment is only to the rule of law and to the proper administration of justice in our country, uninfluenced by fear or favour.<sup>18</sup>
126. Judicial Review against Minister of Human Resources ("MOHR") and Human Resource Development Corporation ("HRD Corp")

The Pembangunan Sumber Manusia Berhad (Amendment of First Schedule) Order 2021 ("2021 Order"), which amended and replaced the First Schedule of the PSMB Act to include legal profession, came into effect on 1 Mar 2021.

I wish to report that on 24 Jan 2022, the Malaysian Bar applied for leave to commence judicial review against the said expansion with a view of excluding the legal profession. The High Court dismissed its application on 16 Aug 2022, and the Malaysian Bar filed an appeal to the Court of Appeal on 29 Aug 2022.

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<sup>18</sup> 25.10.2022: <https://www.malaysianbar.org.my/article/news/press-statements/press-statements/press-release-strengthening-institutions-for-a-better-malaysia-is-declassifying-the-report-of-the-special-task-force-on-tommy-thomas-s-memoir-an-abuse-of-power->



Stay applications against MOHR and HRD Corp have also been filed on 7 Oct 2022, and an interim stay against MOHR has been granted on 18 Oct 2022, pending the disposal of the case.

127. Judicial Review against the Registrar of Titles, Johor; Land Administrators (in the State of Johor); and Pengarah Tanah dan Galian, Johor

My Lady, the Malaysian Bar had also filed an application for leave to apply for judicial review on 15 Sept 2022, against Registrar of Titles, Johor, Land Administrators (in the State of Johor) and Pengarah Tanah dan Galian Johor, respectively, in relation to the implementation of "Tatacara Penggunaan Akuan Penyerahan Dokumen Pentadbiran Tanah Johor" relating to the manner in which presentation for registration of instruments of dealings and other documents are to be made, at the land registries throughout the State of Johor.

On 13 Dec 2022, leave was granted for the Malaysian Bar to apply for judicial review. The Court further granted an interim stay of the implementation of the system pending the filing and disposal of the judicial review application.

**128. Status on the LPA amendments**

We wish to thank the Attorney General's Chambers for their cooperation and assistance with the Amendment Bill to the Legal Profession Act 1976. Throughout the year under review, we have been working on finalising the wordings of the Amendment Bill, as well as the Explanatory Statement and the Cabinet Memorandum.

The Bar Council continues to strive to push forward amendments, including those necessary in relation to Limited Liability Law Partnerships which is of great significance to members as this allows the profession to implement a model that has been available for 10 years since the Limited Liability Partnerships Act 2012 was implemented and believe it will have a positive impact in the way legal partnerships can operate and function.

We hope to engage the Minister in charge of Law and Institutional Reforms to have the amendment Bill tabled at Parliament urgently.

**G. Conclusion**

My Lady,

129. In closing, the plethora of issues and events faced over the past year as we transition out of the COVID-19 pandemic, remind us all that at the heart of everything we do, as partners in the administration of justice here in Malaysia, our utmost priority must and should always be the interests of the people that reside within our borders. The *rakyat* are the lifeblood of our system and we should never forget that everyone here gathered does



what we do in effecting justice and serving the *rakyat* to whom we are accountable.

130. In my speech thus far My Lady, I have traversed issues and events that we at the Malaysian Bar hope and endeavour to see progress in, in this year ahead of us. In giving effect to such reforms, the solution we see is for us all to come together, mend bridges for the *rakyat*, and to strengthen the bridges not just between the participants in the administration of justice but also between the "system" and the *rakyat* whom we serve.
131. The key to a matured and successful democratic nation is for all of us here present to stand shoulder-to-shoulder and strengthen that bridge.
132. My Lady, permit me to conclude with some pantun.

Gagah mematuk ayam serama  
Sambil memagut daun pegaga  
Perpaduan dipupuk sekian lama  
Jangan dikeruh air di telaga

Gunung bernama jajaran titiwangsa  
Tegak kukuh dalam wawasan  
Perpaduan jalinan berbilang bangsa  
Ibarat tenunan tekat warisan

Cendawan tumbuh tepian jalanan  
Bunga tumbuh di sudut anjung  
Perpaduan dipupuk berturutan keturunan  
Bumi dipijak langit dijunjung

Pergi ke muara mencari kepah  
Jual seraga di pasar tani  
Apa gunanya kita berpecah  
Mari lah kita bersatu hati

On behalf of the Malaysian Bar, Advocates' Association of Sarawak and the Sabah Law Association, I wish members of the Judiciary and the Attorney General's Chambers, as well as Members of the Bar, a healthy, fruitful, successful and peaceful year ahead.

/end