

**KEYNOTE ADDRESS BY
THE RIGHT HONOURABLE THE CHIEF JUSTICE OF MALAYSIA,
TUN TENGKU MAIMUN BINTI TUAN MAT**

ON THE OCCASION OF

ESG NATIONAL CONFERENCE 2024

“The Ethico-Legal Landscape, Impact & Opportunities”

AT

HOTEL VERTICAL, BANGSAR SOUTH

19 JUNE 2024

SALUTATIONS

- (1) Brother and sister Judges;
- (2) Madam Rostina Gaus,
Director of Current Law Journal (CLJ);
- (3) Mr. Mohd Ezri bin Abdul Wahab,
President of the Malaysian Bar;
- (4) Members of the legal profession;

Distinguished guests; ladies and gentlemen,

Assalamualaikum warahmatullahi wabarakatuhu and a very good morning.

INTRODUCTION

[1] It is a distinct pleasure and honour of mine to receive the invitation from CLJ to deliver the keynote address on the occasion of the ESG National Conference 2024.

[2] The legal profession is steeped in tradition and a large part of it is grounded on ethics. The theme, '*The Ethico-Legal Landscape, Impact & Opportunities*' is timely and encapsulates the intricate intersections of ethics and law within the context of this conference i.e. sustainable development. More specific to me, the theme highlights the sacrosanct duties of the Judiciary in upholding the independence of the Judiciary, the Rule of Law and the doctrine of separation of powers.

[3] The concept of ESG first made headway¹ in a report prepared by the United Nations Environment Programme Finance Initiative.² The report, which recognised the severe environmental and social impact of markets' reluctance to embrace sustainability, promulgated the urgent need to account for and integrate ESG governance into market, investment and boardroom considerations for a long-term value creation.

[4] ESG principles align closely with the core values espoused in Islam. ESG values form an integral part of the *Maqāṣid al-Sharī'ah* (the objectives of Islamic law), which seeks to achieve the socio-economic goals of Islam such as justice and fairness, common good and benefit, equitable distribution of income, wealth through values and ethics, and

¹ Elizabeth Pollman, 'The Making and Meaning of ESG' (2022) *U of Penn*, Inst for Law & Econ Research Paper No. 22-23 at page 10.

² 'The Materiality of Social, Environmental and Corporate Governance Issues to Equity Pricing' (*Report commissioned by the UNEP Asset Management Working Group*, June 2004).

general human well-being.³ By embracing ESG principles, corporations can actively contribute to the fulfilment of the broader objectives of Islam, all the while upholding ethical standards in governance and business practices.

[5] As we are all familiar, the term ESG is an abbreviation of its three pillars comprising the core aspects of sustainable development namely: 'Environmental', 'Social' and 'Governance'. The theme of the conference is very wide, so I will limit this speech to matters that are most pertinent to the Judiciary and its constitutional role.

The First Pillar – Environmental

[6] The first pillar, Environment, pertains to an organization's impact on the planet, encompassing considerations such as environmental conservation, sustainable resource management, and climate action.

[7] The Judiciary's role in adjudicating environmental disputes and promoting legal frameworks for environmental protection speaks directly to the Judiciary's substantive role in respect of this pillar. The Judiciary addresses these matters substantively in one of two ways. The first is through public law and this is manifest in either administrative and constitutional law, or in criminal law. The other method is via civil law. In either situation, because our system of law is adversarial, the Judiciary's position in this is more reactive and resolution-based than it is proactive.

³ Beebee Salma Sairally, 'Integrating Environmental, Social and Governance (ESG) Factors in Islamic Finance: Towards the Realisation of *Maqāṣid al-Sharī'ah*' (2015) 7 *ISRA International Journal of Islamic Finance* 145 at page 152.

[8] In the context of civil cases, it enables any person to sue any other person or corporation for a violation of his or her legal rights whether they be grounded on negligence or nuisance.

[9] In a criminal law context, since 2012, the Judiciary has established specific Sessions Courts for environmental cases. The Sessions Courts judges hear cases with ongoing training to mitigate harm to the environment and to mete out appropriate punishments to offenders of the environment.⁴ In fact, just last year, the Johor Bahru Sessions Court fined a company RM 320,000.00 for causing pollution through the illegal disposal of toxic waste in Sungai Kim Kim in 2019.⁵ The incident had affected the health of more than 2,000 people and caused 111 schools in Pasir Gudang to close. In arriving at its decision, the Court reasoned that the penalty imposed on the company should fulfil the purpose of the law which is to prevent and control environmental pollution, and that harsh punishment should serve as a deterrent to future offenders.

[10] In the realm of public law, ESG-related litigation refers to litigation which is directed at the State and has indirect effects on companies and individuals. Such litigation takes the form of judicial review proceedings. There are two aspects of judicial review, namely, constitutional judicial review and administrative judicial review.⁶ The source of this power is Article 4(1) of the Federal Constitution which allows the Courts to strike down laws that are inconsistent with the Federal Constitution to the extent of their inconsistency. And in the attempt to consider the validity of

⁴ Practice Direction No. 3 of 2012.

⁵ *Pendakwa Raya v P Tech Resources Sdn Bhd* [2024] MLJU 164.

⁶ *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)* [2022] 2 MLJ 356.

legislation, the Courts have also adopted certain canons of interpretation that give maximum effect to the enumerated guarantee of fundamental liberties.

[11] In a case where it is not the constitutional validity of the law that is challenged but its application, the Courts have also not backed away from holding the other arms of Government accountable. In a relatively recent Federal Court case known as *Taman Rimba Kiara*,⁷ the Federal Court accorded locus standi the broadest possible construction to allow all and any persons who were at risk of denial of their enjoyment of a park, to enforce compliance of local planning laws against the local authority who had departed from such planning laws.

[12] There is undeniably, no direct mention of the right to a clean or sustainable environment in our Federal Constitution, but it is the Judiciary that has read such a right into the right to life and personal liberty guaranteed by Article 5(1) of the Federal Constitution. In particular, the Court of Appeal in *Tan Tek Seng*, very pertinently remarked “[t]hat the 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.”⁸

⁷ *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829.

⁸ *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, at p. 288.

[13] In other jurisdictions, the Courts have not been hesitant to enforce compliance with the State domestic and international obligations to abide by environmental and climate change laws. In one case, the Supreme Court of Netherlands upheld the Hague Court of Appeal's ruling that the Netherlands is legally obliged to reduce its GHG emissions by 25% by the end of 2020.⁹ This is by virtue of the United Nations Framework Convention on Climate Change ('UNFCCC').

[14] The Brazilian Supreme Court too has held that the Brazilian Government had a constitutional duty to disburse payments from the nation's Climate Fund to mitigate climate change and prevent the regression of environmental protection.¹⁰ This was in accordance with Brazil's commitment to the Paris Agreement.

[15] Malaysia is a party to the UNFCCC and the Paris Agreement and pursuant to this, Malaysia has committed to reduce its GHG emissions by 45% by 2030.¹¹ In his speech delivered in the Opening of the Legal Year this year, the Honourable Attorney General had informed us that the Attorney General's Chambers ('AGC') is currently drafting the **National Climate Change Bill** (which is scheduled to be tabled in Parliament in 2025).¹² This move would codify Malaysia's commitments under the Paris Agreement into law, laying the groundwork for efforts to challenge Governmental action on climate before the Courts.

⁹ *The State of the Netherlands v Urgenda Foundation*, The Supreme Court of the Netherlands, Case 19/00135, 20 December 2019.

¹⁰ *PSB et al v Brazil (on Climate Fund)*, The Federal Supreme Court of Brazil, ADPF 708, 1 July 2022.

¹¹ 'Malaysia's Update of its First Nationally Determined Contribution' (UNFCCC, July 2021).

¹² Speech by the Attorney General of Malaysia, YBhg Datuk Ahmad Terrirudin Bin Mohd Salleh on the occasion of the Opening of the Legal Year 2024 on 15 January 2024, at page 29.

The Second Pillar – Social

[16] The second pillar, Social, encompasses an organization's impact on people, including its workforce, consumers, and the broader community in which it operates. The Judiciary's role in upholding labour rights, promoting fair treatment, addressing and adjudicating matters on social welfare and justice, safeguarding human rights and ensuring equitable access to legal remedies for all members of society are therefore directly relevant.

[17] There are numerous employment and consumer laws in place that seek to protect the rights of workers and consumers in the context of social justice and in their roles as the movers of the economy.

[18] In the landmark case of *Crystal Crown Hotel*,¹³ the Federal Court ruled that hotel owners cannot utilise an employee's service charge to satisfy their statutory obligation to pay minimum wage. In arriving at its decision, the Federal Court emphasised that the minimum wage legislation in question, being a social legislation, must be construed holistically and purposively to meet the object prescribed by Parliament, which is to protect vulnerable groups of employees. It followed that the minimum wage stipulated under the law was to be achieved without derogation from other entitlements or benefits enjoyed by hotel employees.

[19] Judicial decisions have been rendered not just to protect Malaysians but even foreign workers. In *Fice Fransina Nenobais*, the Court of Appeal

¹³ *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2021] 3 MLJ 466 (FC).

in affirming the High Court's decision, allowed a migrant worker to sue her employer for unpaid wages even though the migrant did not have a legal permit to work in Malaysia.¹⁴ This decision demonstrates that Malaysian Courts will uphold the rights enshrined in the law for all workers including migrant workers, documented or otherwise, and will not allow employers to escape paying fair wages. It opens the doors to greater protections for employees and stricter requirements for businesses in the future. I think it also clarifies the ethical dilemma of whether a labourer, having done honest work, should not be denied the fruits of his or her labour simply because of the validity of their migrant status.

[20] The two cases I have referred to, of course, pertain to labour laws. But that does not mean that the work of the Courts in the context of social justice is limited to just those areas namely employment. The fundamental liberties of Malaysians in a social context are far broader than that.

[21] The Federal Constitution guarantees expressly and impliedly all manner of fundamental liberties. The Courts have on numerous occasions upheld these rights. These include the constitutional right to privacy as well as the rights to free speech and expression,¹⁵ gender

¹⁴ *Fice Fransina Nenobais v Lee Hee Chooi* [2020] 7 CLJ 416 (HC); Wong Keat Ching and Farah Nabihah Sofian, 'The Voices of the Exploited: Undocumented Migrant Workers' Right to File a Claim in Labour Court' (*Zul Rafique & Partners*, 28 October 2022) <<https://www.zulrafique.com.my/article-sample.php?id=2028>> accessed 28 March 2024.

¹⁵ *Muhamad Juzaili bin Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors* [2015] 3 MLJ 513 (COA). Please note that while the decision of the Court of Appeal was reversed by the Federal Court on procedural grounds in *State Government of Negeri Sembilan & Ors v Muhammad Juzaili bin Mohd Khamis & Ors* [2015] 6 MLJ 736, the the Court of Appeal's decision on the merits received no adverse comment from the apex Court. Subsequently however, the Federal Court overruled its own decision in the *Juzaili* case in *Gin Poh Holdings Sdn Bhd v The Government of the State of Penang & Ors* [2018] 3 MLJ 417, at [33].

equality,¹⁶ and even the most fundamental aspect of a citizen's identity: the right to acquire citizenship.¹⁷

The Third Pillar – Governance

[22] The third and final pillar relates to the transparent and effective governance of an organization. The 'Governance' element of ESG focuses on the transparency, accountability and ethical behaviour of corporations, encompassing broad aspects including anti-bribery and anti-money laundering measures, compliance with competition and data privacy laws, and the conduct of the board in overseeing the company's strategy and risk management.

[23] A bulk of the compliance efforts in this regard are governed primarily by legislation and guidelines. For example, the Central Bank of Malaysia has issued extensive guidelines on anti-money laundering.¹⁸ Another example is the Malaysian Code on Corporate Governance 2021 ('MCCG'). It was issued by the Securities Commission Malaysia and is one of the main regulatory instruments on Malaysia's corporate governance practices. The MCCG provides that effective board leadership and oversight require the integration of ESG considerations in corporate strategy, governance and decision-making. Notably, the MCCG recognises that many institutional investors consider integration of ESG

¹⁶ *Lai Hen Beng v Public Prosecutor* [2024] 1 MLJ 225.

¹⁷ *CCH & Anor (on behalf of themselves and as litigation representatives of one CYM, a child) v Pendaftar Besar bagi Kelahiran dan Kematian, Malaysia* [2022] 1 MLJ 71.

¹⁸ See e.g.: Bank Negara's guideline issued on 5.2.2024 entitled: 'Anti-Money Laundering, Countering Financing of Terrorism, Countering Proliferation Financing and Targeted Financial Sanctions for Designated Non-Financial Businesses and Professions (DNFBPs) and Non-Bank Financial Institutions (NBFIs) (AML/CFT/CPF and TFS for DNFBPs and NBFIs)' available at <<https://amlcft.bnm.gov.my/documents/6312201/13444269/pd-AMLCFTCPF-TFS-DNFBI-NBFI-Feb2024.pdf>>.

factors in their investment decision-making process as part of their fiduciary responsibility. Several have committed to using their votes to hold boards and senior management accountable for the management and oversight of sustainability.

[24] The Judiciary adjudicate cases relating to corporate governance practices to ensure transparency, accountability, and ethical conduct within businesses. Other cases include corporate fraud, misconduct, and breaches of fiduciary duty. By upholding legal standards for governance, the judiciary helps to promote integrity and trust in the corporate sector. Recent so-called high-profile cases affirmatively demonstrate that no matter the person's rank or status in society, if they are guilty of corrupt practices, they will have to answer to the full brunt of the law.¹⁹

[25] That said, in practice, the role of our Courts in addressing ESG considerations within the framework of company law may be limited.²⁰ Where the judicial role truly shines is the depth of its judgments that can help improve the interpretation of existing laws and regulations. For instance, the Commonwealth Climate and Law Initiative has envisaged that "*the Malaysian courts would likely step in to align the law with modern circumstances by expressly endorsing climate change as a key consideration for determining if a director was carrying out his duties under statute and common law to act in the best interests of the company*".²¹

¹⁹ *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor and other appeals (No 1)* [2022] 5 MLJ 85 (Federal Court).

²⁰ Luh Luh Lan and Walter Wan, 'ESG and Director's Duties: Defining and Advancing the Interests of the Company' (*ECGI Working Paper Series in Law*, Working Paper 737/2023, March 2024).

²¹ 'Primer on Climate Change: Directors' Duties and Disclosure Obligations' (*Commonwealth Climate and Law Initiative*, June 2021) at page 82.

[26] While judicial decisions carry significant weight in this aspect of ESG, the fact remains that the judicial role is not as prominent as primary legislation and regulations. The Judiciary can adopt a broad interpretation to improve the law in this context but it cannot act beyond its adversarial role. In this regard, it is important that enforcement bodies must continue to perform their roles as well.

Impact and Opportunities

[27] Having set out in brief the notions of ESG and the role of the Judiciary, I would now address its Impact and Opportunities briefly, – from a judicial standpoint.

[28] ESG-related litigation is expected to increase in the coming years.²² Our Courts will be tasked with adjudicating a wide range of disputes, including cases involving environmental harm, violations of fundamental rights including labour rights, shareholder activism and corporate governance failures. In response to this trend, the Judiciary will play a pivotal role in shaping the legal landscape by upholding the judicial independence, separation of powers, and Rule of Law, surrounding the ESG issues.

[29] The Courts would also anticipate the issue of the applicability of foreign ESG laws within the Malaysian jurisdiction as there are Malaysian subsidiaries of foreign companies that must deal with the laws of their parent foreign company, laws of other countries that apply when a

²² '2023 Annual Litigation Trends Survey' (*Norton Rose Fulbright*, 18 January 2023) at page 4.

Malaysian company intends to export to that country and the supply chain responsibility laws.

[30] In this regard, the Judiciary's role extends beyond merely holding corporations accountable for misconduct or negligence related to ESG matters. Through constitutional and administrative judicial review, we also serve as a critical check on governmental actions to continuously ensure alignment with ESG standards and upholding the Rule of Law. Judicial decisions in ESG-related cases can set important legal precedents that shape future legal interpretations and practices. Landmark rulings may establish standards for environmental protection, corporate social responsibility, and ethical governance, influencing behaviour across industries and sectors.

[31] However, in an adversarial system such as ours, the Courts can only advance ESG jurisprudence if an appropriate case approaches us and when the circumstances of the case, such as the facts, are ripe for progress. The other, perhaps more suitable avenue to develop ESG laws, is through legislative intervention.

[32] This is where the crucial significance of synergy comes to the fore. There must be a collaborative effort among the Executive, the Legislature and the Judiciary in order to establish a robust judicial system surrounding the ESG framework that effectively addresses the contemporary societal challenges confronting our nation.

[33] Whether we speak of the 'E', 'S' or 'G' in ESG, what remains a constant feature is that the mechanism of check and balance imbibed in the judicial structure remains paramount. This is of course achieved by

upholding the twin concepts of separation of powers and judicial independence.

[34] As stated earlier, Article 4(1) of the Federal Constitution proclaims the Federal Constitution supreme and empowers the Courts to strike down laws that are inconsistent with the Federal Constitution to the extent of the inconsistency. In consequence, and reading Article 4(1) with Article 121 of the Federal Constitution, the Judiciary also possesses supervisory powers over all forms of administrative and legislative action. From a judicial standpoint therefore, in order for ESG to have any meaningful impact and opportunities to remain relevant, the Judiciary must be able to perform its duties to the fullest.

[35] When it comes to the Judiciary as a whole, administrative and financial support from the other two arms of government ensure that our processes can continue to function unimpeded. Also, judicial decisions must be respected. Holding protests and inciting anger among crowds do not assist in preserving public confidence in the Judiciary. In this regard, the Judiciary would like to express its gratitude to the Government led by YAB Dato' Sri Anwar Ibrahim for its continuous support.

[36] On our part, we will continue to decide cases without fear or favour, ethically, and in accordance with the facts of the case and the law.

CONCLUSION

[37] To sum up, the world is evolving at a rapid pace. I concur with the views that in order for us to grow safely and steadily, it must be done sustainably. The topics and theme of this august conference are broad

and I am sure that the distinguished speakers will be able to shed better light than I have.

[38] With that, I wish you a fruitful conference.

Thank you.