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BEYOND PROSECUTION: THE ATTORNEY GENERAL'S ADVISORY ODYSSEY*

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INTRODUCTION

Asalammu alaikum warahmatullahi wabarakatuh and a very good afternoon.

First and foremost, I would like to thank the International Islamic University Malaysia (IIUM) for this esteemed invitation to deliver the 20th Memorial Lecture. It is indeed an honour and a privilege for me to be here this afternoon.

The late Professor Emeritus Tan Sri Dato' Seri Ahmad Mohamed Ibrahim hardly needs any introduction. He led a distinguished legal career having been the Attorney-General of Singapore, a renowned practitioner, a revered ulama', and the chief architect of at least two of the most prestigious law faculties in Malaysia. His profound legal thoughts continue to inspire my current pursuits. May Allah bless his soul and grant him the highest state in the Jannah. *Al-Fatihah.*

On 6th September 2023, I took office as the twelfth Attorney General of Malaysia. For the past 6 months, assuming the role of the Attorney General has been a great responsibility that I have to embrace. Leading the reputable legal institution of the Attorney General's Chambers ("AGC") is also ever-challenging. Albeit not always easy, I continue to assert it is an honour and a privilege.

As you are all aware of, the duties of the Attorney General are enshrined in the Federal Constitution, particularly under Article 145. I believe that, to truly understand and appreciate the duties of the

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** The Honorable, Attorney General of Malaysia.

Attorney General, it is important to learn the historical background of this significant post in the country and legal fraternity.

DEVELOPMENT OF THE OFFICE OF THE ATTORNEY GENERAL

Ladies and Gentlemen,

The office of the Attorney General is a very old office. Its origin as a legal adviser to the Federal Government can be traced back to the establishment of the Government of the Federated Malay States on 1 July 1896. The first Attorney General or better known at that time as the Legal Adviser to the Government of the Federated Malay States was Mr. T.H. Kershaw whose appointment came into force on June 2, 1896.

Later, the function of the Legal Adviser further evolved when the functions of the Public Prosecutor were transferred to him from the Chief Police Officer. The legal adviser was also instructed to represent the Government of the Federated Malay States in civil proceedings.

In 1909, when the Federal Council was established by the Government of the Federated Malay States via agreement dated 20 October 1909 (which in today's context, is equivalent to the Cabinet), the Legal Adviser's role was formally expanded to be involved in any debate of the Federal Council and to assist in the discussion of any legal questions which may arise in the course of its proceedings. However, he was not involved in any voting.

With the establishment of the Malayan Union on 1st April 1946, section 17 of the Malayan Union Order in Council provides that the Attorney General remained engaged in the Malayan Union Legislative Council as an ex-officio member. The first incumbent Attorney General for the Malayan Union was [Sir] Kenneth Kennedy O'Connor KBE MC QC.

During the drafting of the Federation of Malaya Agreement 1948, the title of Attorney General was retained instead of Legal Adviser because the latter did not reflect the status of the Federation of Malaya as a Colony.

During the drafting of the Federal Constitution in 1956, there was a debate on whether the Attorney General should hold a political office or otherwise. However, the Reid Commission in its final recommendations among others, proposed that the Attorney General should not hold any political office, instead, he should give professional and independent legal advice, defend the Government in courts and conduct prosecutions [see paragraph 127 of the Reid Commission Report].

Following that, the Working Party to the Constitutional Proposals for the Federation of Malaya or widely known as the White Paper, agreed to this recommendation and further proposed for the appointment of the Attorney General be made among the members of judicial and legal service and after consultation with the Judicial and Legal Service Commission. Hence, the post of the Attorney General, his appointment and duties are embodied in Article 145 of the Federal Constitution upon Merdeka Day.

Three years later, this provision was amended via clause 26 of the Constitution (Amendment) Act, 1960 [*Act No. 10 of 1960*] which allows for the Yang di-Pertuan Agong upon the advice of the Prime Minister, to appoint a person, who is qualified to be a judge of the Supreme Court, to be the Attorney General. This amendment allows the Attorney General to be appointed from outside the judicial and legal service or from among members of Parliament. Hence, the earlier requirement of an Attorney General to be appointed amongst the member of the Judicial and Legal Service was removed and the requirement for the Yang di-Pertuan Agong to consult the Judicial and Legal Service Commission before appointing the Attorney General was replaced with the advice of the Prime Minister.

Allow me to read the excerpt from the then Prime Minister, Tun Abdul Razak's introductory speech during tabling of the Constitution (Amendment) Bill 1960 which was on 22nd April 1960, explaining the justification for this significant change as follows –

> *"The Government is of the view that with the progress of our country and of our democratic institutions, it may prove desirable at some future date to have an Attorney-General as a member of the Government and a member of this House. It may be convenient, and it may be desirable, for the chief legal adviser to the Government to sit in this House to explain and answer legal matters. Now, this amendment makes it possible, should it prove desirable in the future,*

> *to appoint an Attorney General from outside the judicial and legal service."*

Hence, it is apparent that the 1960's amendment strengthens the office of the Attorney General particularly to enable the appointment of the best and most qualified individual capable of shouldering the responsibilities of this eminent post.

Summing up the history, it could be gathered that the primary purposes of establishing the position of the Attorney General are to serve the country as a legal advisor as well as to hold responsibilities in civil cases (for and against the Federal Government) and criminal litigations.

Having these fused roles, Article 145(2) of the Federal Constitution provides that the Attorney General of Malaysia is the Government's principal legal advisor while Article 145(3) provides for his duties as the Public Prosecutor. This position is similar in the other neighbouring countries such as Singapore, Brunei and Indonesia.

ADVISING THE YANG DI-PERTUAN AGONG OR THE CABINET OR ANY MINISTER

Ladies and Gentlemen,

As the Government's principal legal advisor, it is the Attorney General's duty to advise the Yang di-Pertuan Agong or the Cabinet or any Minister upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him. In the case of *Lim Kit Siang v. United Engineers (M) (No 2) [1988] 1 MLJ 50*, the High Court held –

> *"In Malaysia, the Attorney-General's position is very different from that of his British counterpart. He is a civil servant appointed by His Majesty the Yang Di Pertuan Agong on the advice of the Prime Minister. He is not answerable to anybody, not to any Minister or Ministry, not even to the Prime Minister, not to Parliament and not to the people (in that his is not a political appointment). However, he holds office during the pleasure of the Yang di-Pertuan Agong which in effect means during the pleasure of the Executive.".*

In discharging duties as the principal legal advisor to the monarch, the Cabinet or any Minister, the Attorney General in reality, plays a crucial role in the administration of the country, to ensure legal order. In deliberating any important decisions or policies particularly involving national and public interest, the advice of Attorney General is sought on whether such action or decision runs in accordance to rule of law. In most cases, the Attorney General's services extend to giving comments (*ulasan*) on Cabinet Papers, assisting Ministers in answering Parliamentary questions on legal matters as well as delivering advice to Government Ministries, agencies as well as the Parliament.

Personally, I consider legal advice regarding constitutional law to be one of the most challenging aspects of law. The Attorney-General must ensure that every piece of advice given is consistent with the provisions of the Federal Constitution, being the supreme law of the land and legal principles. In the course of doing so, understanding and mastering all aspects of the Constitution including the legal history is essential since the subject has caught diverse views from many legal scholars.

Allow me to provide a few examples to shed some light on what I just mentioned. Firstly, the process of forming the Government after the general election result entails the exercise of the Sovereign's discretionary power. In this aspect, the Attorney-General is responsible to ensure that the formation of the Government takes its course in legal order. The second instance that I wish to highlight is the exercise of legislative powers by the Federal Government and the States, whereby in most cases, the issues involved are complicated and no longer straightforward. The subject matter which the Federal Government intends to regulate must be studied from various angles before the Attorney General can conclusively advise on whether such intention and future actions are within the legislative competence of the Parliament and do not encroach upon the State's jurisdiction. In addition, a proposed legislation which may affect fundamental liberties needs to be carefully scrutinised and evaluated against constitutional provisions and recent legal principles to prevent potential challenges on its constitutionality which could impede law enforcement.

In essence, it is the Attorney-General's role to ensure that all organs of the Government respect and abide by the provisions of the Federal Constitution. These are just a few examples of many more

constitutional issues that the Attorney General has to put his mind into to deliver prompt and precise legal advice.

As the paramount task is to ensure that any actions and decisions taken by the Government in its day-to-day administration does not transgress the limits of law, it has always been the Attorney General's commitment to provide quality and professional legal advisory services in accordance with the Federal Constitution and the laws of Malaysia.

At times, it may involve giving unpopular advice by informing Ministers the legal constraints to pursue certain policies and legislation. Sometimes, these advices may not be well-received. The Ministers are not bound to follow the legal advice but are required to direct their minds to the implications of their decisions. Ultimately, they are accountable to answer before Parliament. Despite so, the Attorney General holds the devotion to deliver advice with full integrity, making sure the advice is clear and unambiguous within the ambit of legality.

To fulfil the duties, the Attorney General is assisted by the Solicitor Generals and supported by a team of professional, skilled and dedicated legal officers in the Attorney General's Chambers ("AGC"). Besides officers in the headquarters, there are also officers placed as cadre Legal Advisers in the Ministries/Departments/Agencies of the Federal Government to directly assist in all legal matters.

As the head of AGC, I constantly advise my officers to present a united front as Legal Advisers to the Government and the guardians of our nation's democracy.

Providing Legal Opinions, Meetings and Negotiations

Ladies and Gentlemen,

Being a legal advisor also requires the Attorney General to actively participate and provide quality legal opinions (either in writing or orally) in many open discussions and high-level meetings (for instance involving Federal Government and the State Governments) to ensure efficacy of the Federal Government. For example, the Attorney General is appointed as a member of several committees at federal level to give legal advice when necessary, in formulating policies or discourse of particular issues, such as:

a) the Malaysia Agreement 1963 Implementation Action Council (*Majlis Tindakan Pelaksanaan Perjanjian Malaysia 1963*), chaired by YAB Prime Minister;

b) the Malaysia Agreement 1963 Implementation Action Council Technical Committee (*Jawatankuasa Teknikal Majlis Tindakan Pelaksanaan Perjanjian Malaysia 1963*), chaired by YAB Deputy Prime Minister;

c) the Technical Committee for Amendment to Part III of the Second Schedule of the Federal Constitution Relating to Citizenship, chaired by Secretary General of the Ministry of Home Affairs;

d) the National Council of Islamic Religious Affairs (*Majlis Kebangsaan Hal Ehwal Islam Malaysia* (MKI)), chaired by Duli Yang Maha Mulia Sultan Selangor, Sultan Sharafuddin Idris Shah Alhaj; and

e) being a member of any of either House of Parliament's committees by virtue of Article 61(2) of the Federal Constitution.

These tasks demand the Attorney General and his officers to undertake constant legal research, employ critical thinking and problem solutions skills. Alongside above-mentioned advisory duties, the Attorney General (through the AGC) has also always been central in the negotiations and concluding of Government's high impact procurement projects and Public Private-Partnership ("PPP") projects. As the economic driving factors of Malaysia lie amongst others in the infrastructural development initiatives, these projects garner significant attention.

It is noteworthy that the high impact projects and PPP projects that AGC have been actively involved include, the development of public facilities such as Government office buildings, hospitals, public universities, transportation facilities, ICT and highways projects, amongst others, as follows:

a) My Rapid Transit ("MRT");
b) Government Integrated Telecommunication Network (MyGov*net);
c) Next Generation Emergency Services 999 (NG 999);
d) Operating Agreement for Kuala Lumpur International Airport;
e) Operating Agreement for Designated Airports;
f) Rapid Transit System Link ("RTS Link");
g) Express Rail Link (ERL);
h) Damansara-Shah Alam Expressway ("DASH"); and
i) Sungai Besi-Ulu Klang Expressway ("SUKE").

Involvement in the negotiations and vetting relevant legal instruments relating to these projects which, at times, include hybrid models comprising both privatization and conventional components, requires requisite knowledge not only in the legal realms but also in corporate, financial, commercial and technical aspects. More often than not, officers of the AGC are expected to take a proactive approach in shaping legal solutions whilst ensuring the Government's interests are not compromised.

While navigating these complex negotiations, the Attorney General has the unwavering obligation to ensure a balance between innovation, legal prudence, and the broader interests of the nation.

Syariah Matters

Ladies and Gentlemen,

The advisory duties of the Attorney General also extend to issues on federal-state relationships including Syariah matters. Even though Islamic laws and Syariah related matters fall under the jurisdiction of the States (by virtue of Item I, State List of the Ninth Schedule of the Federal Constitution), more often than not, the Attorney General will be referred at federal level to provide legal advice and commentary on matters relating to implementation, enforcement and enactment of Syariah laws, including the exercise of harmonising civil and Syariah

laws to overcome conflict of legal jurisdictions between civil and Syariah courts.

Hence, the AGC conducts the Syariah Community Conferences and Syariah Community Meetings to obtain views, feedbacks and inputs in relation to Syariah-related issues. The conferences and meetings were attended by Syariah and civil law experts from Government departments, Federal and States Islamic authorities, Muftis, Syariah court judges, practitioners, academicians and non-governmental organizations.

The first Syariah Community Conference initiated by the AGC held on 5th December 2005, marked a significant platform for facilitating discussions between civil law and Syariah law experts to discuss issues relating to conversion of one of the parties in a non-Muslim marriage to Islam. The Syariah Community had proposed for amendments to the existing provisions in the Law and Reform (Marriage and Divorce) Act 1976 [*Act 164*]. As a result, the amendments to subsection 3(3) and section 51 of Act 164 in 2018 were made, having the following impacts:

a) opportunity is given to both conflicting parties to resolve their disputes through a forum and the same court is enabled to make orders consequential to the dissolution of the marriage on matters such as maintenance, division of matrimonial assets and custody of children; and

b) when one party to a non-Muslim marriage converts to Islam, it will be a ground to dissolve the marriage. This would enable them to find the best solution in resolving issues of family conflict.

The latest Syariah Community Conference 2023 entitled "*Ke Arah Memantapkan Penguatkuasaan dan Pendakwaan Syariah*" was held on 20th to 22nd of June 2023. This Conference focused on the crucial need to amend several provisions of the Syariah laws in the States, especially Syariah criminal procedure and Syariah evidence laws, to curb Syariah criminal offences published by electronic means including social media. The Syariah Community Meetings to be held by AGC throughout the year aims to coordinate any proposed amendments and facilitate the States to table amendments in their respective State Legislative Assemblies.

International affairs

Ladies and Gentlemen,

As we all know, in the legal fraternity, the scope of legal issues knows no boundaries. Therefore, the advisory duties of the Attorney General also encompass affairs the international arena. I will explain my role and as an Attorney General in providing legal advice on International Law Matters in four categories: Firstly, in International Negotiations, Secondly, in dealing with International Organisations, Thirdly, in handling International Cases, and Fourthly, by leading the legal team which represents the Government of Malaysia in International cases.

International Negotiations

AGC plays a crucial role in the negotiation and conclusion of bilateral as well as multilateral treaties between Malaysia and other foreign countries and international organisations.

The conclusion of the Treaty between Malaysia and the Republic of Indonesia relating to the Delimitation of the Territorial Seas of the Two Countries in the Southernmost Part of Straits of Malacca and the Treaty between Malaysia and the Republic of Indonesia relating to the Delimitation of the Territorial Seas of the Two Countries in the Sulawesi Sea in 2023 is historic as the treaties had been negotiated since the year 2005. AGC had been heavily involved in the negotiations and subsequent conclusion of both treaties.

Currently, AGC is leading the negotiation of the maritime boundary between Malaysia and Singapore, including the maritime area surrounding Batu Puteh and Tuas, in which both countries have agreed for 12 months expedited negotiation. On this front, I have been mandated to co-chair the Joint Malaysia Singapore Joint Technical Committee & Committee for Boundary Delimitation Meeting (Joint MSJTC & CBD Meeting) with my counterpart the Attorney General of Singapore. Meanwhile, the Joint Sub-Committee MSJTC & CBD Meeting is co-chaired by the Solicitor General and her counterpart the Solicitor General of Singapore. As you know, any negotiations concerning borders and maritime boundaries are not only sensitive but complex and intense.

As for the negotiations on trade and investment agreements such as the Free Trade Agreements (FTA) and Investment Guarantee Agreements, it is also as intense as the border and maritime boundary negotiations. The intensity here lies in the technicality of the subject matter which is negotiated between the Parties. It all boils down to dollars and cents and how much liberalisation is achieved by both sides whilst maintaining the autonomy and sovereignty of each State. In these negotiations, our AGC officers as mandated by myself, not only need to be very well versed with the Government's position on the various trade and investment issues but also the legal and technical issues relating to the matter. Even a comma will make a huge difference in interpreting the document. The trade and investment scene is getting more difficult as our more developed partners are trying to introduce non-trade issues like sustainable development, anti-corruption and responsible business conduct. So far, we have helped various Ministries and agencies negotiate and conclude 17 bilateral and regional FTAs and 63 IGAs.

As for international criminal matters, AGC successfully negotiated and signed the Treaty on the International Transfer of Prisoners (ITOP) between the Government of Malaysia and the Government of Brunei Darussalam on 3 August 2023 and has also actively participated in the negotiation of the United Nations draft Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes.

International Organisations

As a member of the United Nations, AGC's continuous participation in the Sixth Committee of the United Nations General Assembly (UNGA) on Legal issue and International Law Commission (ILC) is pertinent because this is where international law is discussed, developed and codified. Active participation by Malaysia would ensure that Malaysia's views and interests are always brought to the forefront. The Sixth Committee is the primary forum for the consideration of various legal questions in the UNGA such as use of force and fundamental rights and it is during these meetings that members of the United Nations (UN) develop model law and agreements that will eventually become international law.

As an advisor to the Duli Yang Maha Mulia Yang di-Pertuan Agong and the Cabinet, the AGC officials, as mandated by me are involved in various significant policy-making Committees with regard to human rights and international organisation matters. We participate in the Human Rights Council (HRC) sessions every year, in the annual session of the Asian-African Legal Consultative Organisation (AALCO), and in the annual International Labour Conference.

International Cases

Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem at ICJ from 19 until 22 February 2024 (ICJ Advisory Opinion - Palestine)

The International Court of Justice (ICJ) held a public hearing on the request for an advisory opinion in respect of the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, from 19 to 26 February 2024 at the Peace Palace in The Hague. Fifty-two (52) States and three (3) international organizations have participated in the oral proceedings before the ICJ.

Malaysia submitted its oral submission at the ICJ on 22 February 2024. The Malaysian delegation was led by YB Minister of Foreign Affairs, and included officers from Ministry of Foreign Affairs (MOFA), representatives from AGC, as well as officers from Embassy of Malaysia in The Hague. This Advisory Opinion is a separate procedure from the Application by South Africa to institute proceedings against Israel, filed before the ICJ on 29 December 2023.

This is the second time that Malaysia participated in the ICJ Advisory Opinion procedure in support of Palestine. Malaysia has always supported Palestine and in 2004, Malaysia participated in the request for the ICJ's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, where the Court found that such action by Israel is contrary to international law.

During the oral hearing on 22 February 2024, Malaysia submitted 3 main points to the ICJ. First is with regard to the Court's jurisdiction and its discretion to respond to the request of the General Assembly. Second, Malaysia's position on the legality of the "policies

and practices" of Israel in the OPT. Third is on the legal consequences that arise for Israel, for all other States, and for the United Nations, respectively, from what Malaysia submits is a flagrant denial of the Palestinian people's right to self-determination.

Apart from my actions on behalf of the Government of Malaysia in domestic fora, my role as the Attorney General includes spearheading actions in international litigation. In every international organisation in which Malaysia is a member, there exist dispute settlement bodies. My role is not only to ensure Malaysia complies with commitments made so as to ensure the sovereignty of the country but also to lead the legal team to battle before such dispute settlement bodies.

I am sure you know this is by no means easy. The action requires the collaborative and concerted effort of multiple agencies including technical and scientific experts as well as legal input from counsel familiar with the international and domestic law surrounding the issue. I am proud to say that so far AGC is instrumental in the preparation of the case from its inception until the final submission. Malaysia has thus far brought 2 cases before the WTO Dispute Settlement Body.

The first was in 1995 against the United States on the issue of Shrimp and shrimp products. The US unilaterally banned the import of shrimps and shrimp products into the US which did not use the Turtle conservation programme that was comparable to the US programme, which was discriminatory against Malaysia. Malaysia, India, Pakistan and Thailand jointly filed suit with the WTO in opposition to the requirement. Initially, the WTO ruled against the United States but after several reviews, the US convinced the WTO compliance body that it has eliminated the discriminatory measures. This is considered a win for Malaysia being a small developing country against the might of a country like the US.

The second case before the WTO DSB was in 2021 where Malaysia brought the EU for discrimination against palm-oil-based biofuels. We are waiting for the decision in that case.

Amongst the challenges in handling such disputes are:

(a) effectively navigating the multifaceted application of three distinct WTO agreements within the context of this dispute necessitating a profound understanding of the intricacies of trade law;

(b) understanding the scientific and technical aspects of the measures concerned in this dispute such as the technology surrounding turtle conservation programmes and excluder devices, biofuel productions and greenhouse gas emissions which are all crucial for effectively presenting arguments to the Panel;

(c) securing solid scientific data and information from experts in the field to support Malaysia's claim;

(d) identifying and preparing expert/independent witnesses to effectively present complex technical information to the Panel;

(e) David and Goliath scenario in which we are up against developed adversaries like the US and the EU on the global stage where both the US and the EU are big users of the WTO Dispute Settlement forum; and

(f) coordination with relevant ministries/agencies to present a strong, clear and compelling case against the responding Party. This was by far the most challenging part of the preparation i.e. to distil complex scientific data and structure it in such a way that makes for a convincing and powerful argument before the Panel.

As with any litigation case, the demanding preparation for trade disputes from its initial stage until the eventual hearing before the Panel, illustrates the tenacious efforts of AGC officers alongside other members of the team in presenting, what we view, to be a strong case before the Panel.

International Arbitration

Goldman Sachs Arbitration

Another example is when leading the legal team in the arbitration case initiated by The Goldman Sachs Group, Inc. under the Arbitration Rules of the London Court of International Arbitration. Due to the confidential nature of these proceedings, I am unable to divulge much information about the proceedings or the nature of the dispute.

The key point to note is that, as with any litigation case involving the Government of Malaysia, the AGC team would be at the forefront, coordinating with relevant ministries/agencies and other members of the team to present a strong, clear, and compelling case for the Government of Malaysia against our opponent.

Ladies and Gentlemen,

Apart from the above-mentioned duties, the Attorney General also exercises functions in relation to international cooperation issues. International cooperation is essential as today's crimes and criminals respect no national boundaries or national sovereignty. The Attorney General of Malaysia's commitment in the global fight against transnational crimes can be seen in his capacity as the Central Authority for Mutual Assistance in Criminal Matters (MLA) for Malaysia.

MLA is the formal process by which States request for and render assistance in the collection of evidence for the purpose of criminal matters, be it for an investigation or criminal proceedings. By virtue of sections 7 and 19 of the Mutual Assistance in Criminal Matters Act 2002 [*Act 621*] (MACMA), the requests for MLA are made and received by the Attorney General.

The human resource of the MLA Central Authority for Malaysia is the International Cooperation Unit (TCU), placed in the AGC. The TCU handles incoming and outgoing requests which are considered under the MACMA, the Mutual Assistance in Criminal Matters Regulations 2003 [*P.U.(A) 194/2003*] and Treaty on Mutual Assistance in Criminal Matters before the same is escalated to the Attorney General for consideration and approval.

The TCU is involved in multilateral and bilateral treaty negotiations on MLA matters on the direction of the Attorney General.

The involvement of TCU pertaining to MLA matters can also be seen in its participation in international platforms that facilitate direct contact and communications with foreign counterparts which the Attorney General may attend as the head of Malaysian delegation from time to time.

Furthermore, the AGC also shows commitment to international cooperation for extradition related matters. Even though the Minister of Home Affairs of Malaysia is the Central Authority for Malaysia in relation to extradition matters, TCU also plays a vital role in the necessary applications before the Malaysian Court for the purpose of the execution of any incoming requests from a foreign State, with the cooperation from the Ministry of Home Affairs and the Royal Malaysia Police. In relation to outgoing requests, TCU is significantly involved in the preparation of such requests to the foreign States. The significant involvement of TCU can also be seen in the negotiation of treaties on extradition matters.

Other duties of a legal character

Ladies and Gentlemen,

In addition to the Attorney General's duties as primary legal advisor to the Government, one must also note that Article 145(2) of the Federal Constitution entails another major responsibility 'to perform such other duties of legal character'. The Federal Constitution does not specify what constitutes 'legal character', nor is it defined in any other written laws.

This attracts broad interpretation, but we have to be mindful that when it concerns constitutional interpretation, the usual canons of constitutional construction apply, and one of the most important rules here is the contextual construction [*Haris Fathillah bin Mohamed Ibrahim & Ors v Tan Sri Dato' Sri Hj Azam bin Baki & Ors [2023] 2 MLJ 296* (Federal Court, Tengku Maimun Chief Justice) at page 310].

Accordingly, it has always been the AGC's view that any legal character duties carried out by the Attorney General revolves around assistance in legal matters essential for governing the country. Among others, the Attorney General has duties to draft legislation as well as exercise law revisions and law reforms, which I will explain henceforth.

Drafting

Ladies and Gentlemen,

The Attorney General plays a crucial role in shaping the laws that govern the country. To support this essential responsibility of the Attorney General, since the 1960s, the AGC, with the expertise of a Parliamentary Draftsman and her assistants, has been instrumental in drafting all legislation that is passed by Parliament and federal subsidiary legislation.

The main is task to ensure that every law drafted is in line with the Federal Constitution and other relevant laws. Every bill presented to Parliament bears the Attorney General's approval, showing not just legal support, but also careful drafting and dedication to the rule of law.

In other words, the Attorney General gives voice to Government policies by translating them into laws. In carrying out this role, the entire drafting process takes charge in ensuring clarity in such laws and examine laws relating to various Government functions to maintain coherence and uphold the country's legal principles.

The task of legislative drafting demands full commitment from the Attorney General to fulfil the Government's objectives with efficiency and legal integrity. Through this dedication, Malaysia has built a legislative framework that promotes justice and fairness, serving as the foundation of Malaysian governance. Some significant milestones of recent laws enacted which are noteworthy include—

(a) Amendments to the Federal Constitution that—

(i) set the minimum voting age at 18 and introduced automatic voter registration (in 2019 via Constitution (Amendment) Act 2019 [*Act A1603*]);

(ii) specified all the constituent States of the Federation by restoring with modifications, the position of Article 1(2) during the formation of Malaysia in 1963, except the reference to Singapore, introduced the definition of 'Malaysia Day', amended the definition of 'the Federation' and amended the definition of 'native' in relation to Sarawak to provide that the races considered to be indigenous to Sarawak are as provided by State law, (in 2022 via Constitution (Amendment) Act 2022

[*Act A1642*];

(iii) provided royal exemptions from the application of Article 119 of the Federal Constitution and any laws relating to registration of electors (in 2022 via Constitution (Amendment) (No. 2) Act 2022 [Act A1654]); and

(iv) introduced provisions relating to anti-party hopping (in 2022 via Constitution (Amendment) (No. 3) Act 2022 [Act A1663]);

(b) abolition of mandatory death penalty which marked a shift from previous sentencing norms (in 2023 via the Abolition of Mandatory Death Penalty Act 2023 [*Act 846*] along with the Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Act 2023 [*Act 847*];

(c) creation of the offence of stalking (in 2023 via Penal Code (Amendment) Act 2023 [*Act A1681*] and the Criminal Procedure Code (Amendment) Act 2023 [*Act A1682*]; and

(d) decriminalizing suicide to treat the person who attempts suicide as a victim rather than as an offender, and to refer the victims to a Government psychiatric hospital for examination (by repealing section 309 of the Penal Code [Act 574] and amending the Mental Health Act 2001 [*Act 615*]).

In 2023 itself, 42 Bills (besides those mentioned above) have been drafted and tabled while 1000 subsidiary legislations have been published in the *Gazette*. Every legislation that underwent drafting process reflects the substantive steps of the Government's policies towards fostering a fairer and more just society. The impact of each legislation to the nation requires ongoing refinement of the legal framework and steadfast dedication of the Attorney General.

Law Revision and Law Reform

Ladies and gentlemen,

Once a legislation is at its formative stage, one should not overlook other important duties of the Attorney General to 'upkeep' the laws. These duties are undertaken by exercising the functions of law revision and law reform, with focus on—

(a) revision of pre-1969 laws;

(b) reprint of laws

(c) extension of Federal laws to Sabah and Sarawak and the Federal Territories;

(d) translation of laws (English texts of pre-1967 laws to the national language)

(e) reviewing archaic and obsolete laws; and

(f) modernizing laws to be in tandem with the changing needs of society.

Led by the Commissioner of Law Revision, the duties of revision and reprint of laws are consistently fulfilled under the Law Revision Act 1968 [*Act 1*].

The exercise of law revision is undertaken with the guidance of the Law Revision Committee appointed by the Honourable Chief Justice. To date, 292 pre-1969 federal laws and 30 subsidiary legislation have been successfully revised and gazetted. Among the notable laws are the revision of the National Land Code [*Act No. 56 of 1965*] to Act 828 and the Pensions Act 1951 [*Ordinance No. 1 of 1951*] to Act 841.

With regard to the function of reprint of laws under Act 1, all amendments will be incorporated and updated into the laws pursuant to coming into operation of the amendments. Under Act 1, the copy of a reprint law that was made in accordance to section 14 shall be deemed to be authoritative text of the law in force. Among the significant recent reprints include the reprint of Federal Constitution in 2020 and Penal Code [*Act 574*] in 2023 which incorporates the amendments relating to abolishment of the mandatory death penalty. The upcoming task is the reprint of the Rules of Court 2012, in collaboration with the Chief

Registrar of Federal Court. All reprint laws facilitate easy reference to the legal fraternity.

The duty of translating laws is pursuant to the mandate under the National Language Act 1963 and 1967 [*Act 32*]. Therefore, the AGC also actively translates laws prior to 1967 which were previously single text laws, into the national language.

At this juncture, it would be beneficial to highlight that reading a translated law by the AGC must be done attentively. This is because a translated text will only be authoritative if it is designated so under Act 32, else it will remain as a mere translation from the AGC.

In the non-prosecutorial domain of the Attorney General's responsibilities, the duty on legislative drafting intertwines with law reform. While the reform process undertakes the crucial task of reviewing laws for the purpose of systematic reform, conducting comprehensive research, consultations and writing proposals, the drafting process translates the proposals into actionable legislation. Over the years, the AGC has embarked on an extraordinary journey of many reform ventures. Among some recent successful projects is the decriminalization of suicide mentioned earlier.

Not forgetting the untended legal archives, AGC also assumes the responsibility to meticulously review the '*undang-undang lapuk*', focusing on laws predating 1969, identify and scrutinize those laws and to align our legal framework in the contemporary context.

DISCHARGING THE FUNCTIONS CONFERRED ON THE ATTORNEY GENERAL BY OR UNDER THE FEDERAL CONSTITUTION OR ANY OTHER WRITTEN LAW

Civil Litigation

Ladies and Gentlemen,

Similar to most other Commonwealth jurisdictions, a Government that exercises the executive authorities of the Crown (the Yang di-Pertuan Agong in Malaysia) is not absolved from civil suits. Any person affected or injured by Government's actions, omissions or decisions can seek redress or remedy in the court of law proceedings against the Government.

Following that, the Attorney General bears the representative role in civil litigations involving the Government or anybody or person performing any functions under the Constitution [see *Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Haji Omar & Ors [1988] 3 MLJ 149* (Supreme Court) at page 150].

Reading Article 145(2) of the Federal Constitution carefully shows that, such role of the Attorney General can be said to have been provided under the duty to discharge all other functions that may be conferred on him by or under the Constitution or any other written law [see *Perbadanan Kemajuan Kraftangan Malaysia v. DW Margaret a/p David Wilson (t/a Kreatif Kraf) [2010] 2 MLJ 713* (Federal Court) at pages 718-720].

The AGC undertakes this task. Some notable representative roles of the Attorney General can be seen as follows:

(a) in civil proceedings including alternative dispute resolution proceedings by or against the Federal or State Government pursuant to sections 21, 22, and 24 of the Government Proceedings Act 1956 [*Act 359*];

(b) at the leave stage in the judicial review process under Order 53 of the Rules of Court 2012);

(c) in civil proceedings by or against public authorities within the meaning of Article 160 of the Federal Constitution;

(d) in civil proceedings by or against public officers within the public services listed in Article 132 of the Federal Constitution;

(e) in recovery actions for costs awarded to the Government;

(f) in taxation proceedings against the Government as a taxing party where costs are to be recovered against the Government;

(g) in the application process for appointments of notaries public pursuant to the Notaries Public Act 1959 [*Act 115*];

(h) in the application process for appointments of notaries public pursuant to the Notaries Public Act 1959 [*Act 115*];

(i) as the protector in public charitable trust.

(j) as the protector in public charitable trust.

As civil litigation in the country burgeons over the years, the number of cases filed against the Government also increased rapidly ranging mostly on public interest cases, high profile and complicated cases. Among some examples of prominent public interest cases conducted in the Attorney General's representative role include:

(a) ***Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors [2014] 4 MLJ 765***

The Attorney General, through Senior Federal Counsel, defended the prohibition imposed by the Minister/public authorities on the usage of the word Allah in a non-Muslim publication, Herald – the Catholic Weekly;

(b) ***National Feedlot Corp ("NFCorp") Sdn Bhd*'s case (unreported)**

The Attorney General / Senior Federal Counsel represented the Government regarding a Government loan granted to the NFCorp and managed to recover approximately RM33.7 million for the unutilised loan sum;

(c) ***Roshini Ochie bt Mohd Melvyn v. Mahkamah Rayuan Syariah Wilayah Persekutuan & 3 Ors*** (Appeal No.08(f)-314-09/2023(W)

The Attorney General / Senior Federal Counsel represented the Shariah Courts and the Government of Malaysia in this case concerning a judicial review application to review the decision of the Shariah Courts that dismissed the Plaintiff's claim to renounce Islam. The Federal Court affirmed that the civil courts cannot review the decision of the Shariah Courts;

(d) ***Datuk Dr Hj Hamid Sultan Abu Backer v. Pengerusi Jawatankuasa Etika Hakim-Hakim & Anor [2021] MLJU 1949***

The Attorney General / Senior Federal Counsel represented the Judges' Ethics Committee in the judicial review concerning two written complaints levelled against the Applicant, a former Court of Appeal Judge, by other judges to the first respondent i.e. the Chairman of the committee;

(e) ***YAB Dato' Dr Zambry Bin Abd Kadir & Ors v. YB Sivakumar A/I Varatharaju Naidu (Attorney General Malaysia,***

Intervener) [2009] 4 MLJU

The Attorney General / Senior Federal Counsel acted as intervener on behalf of the Government regarding the suspension order issued against the then Perak Menteri Besar Datuk Dr Zambry Abd Kadir and all six state executive council members by the State Assembly Speaker, YB Sivakumar;

and, the list of cases in which the Attorney General represents the Government continues, for example—

(f) in the ***Suriani Kempe**'s* case involving applications for citizenship by operation of law for children born overseas to Malaysian mothers and where the fathers are non-Malaysian;

(g) in the ***Clarence Ng**'s* case involving challenge against the Director General of Health's circular directing the implementation of the National Immunisation Program for Teenagers aged 12 to 17;

(h) in ***Ian Chin**'s* case regarding pension rights of former judges and widow/widower(s) of the former judges which are claimed to be affected by the Judges' Remuneration (Amendment) Act 2014 [*Act A1462*]; and

(i) in the ***Syed Iskandar***'s case in which the power of the Yang di-Pertuan Agong to proclaim an emergency was challenged.

These necessitate huge commitments from the Attorney General to ensure equitable dispensation of justice. The Supreme Court in the case of *Government of Malaysia v. Lim Kit Siang [1988] 2 MLJ 12* (at page 20) clearly pointed out that

> "*In a public law litigation, the rule is that the Attorney- General is the guardian of public interest. It is he who will enforce the performance of public duty and the compliance of the law*".

Pardons Board

Ladies and Gentlemen,

The Federal Constitution also mandates that the Attorney General be a member of the Pardons Board constituted for each States and the Pardons Board for the Federal Territories of Kuala Lumpur, Labuan and Putrajaya [by virtue of Article 42(5) and 42(11) of the Federal Constitution]. It is widely known that the Pardons Boards advise respective Rulers / Yang di-Pertuan Agong in exercising their prerogative powers to grant pardons, reprieves and respites as well as to remit, suspend or commute sentences of offenders when all legal remedies have been exhausted.

In carrying out these honourable functions, the Attorney General is usually present personally in the proceedings of the Pardons Board. Nonetheless, Article 42(5) of the Federal Constitution allows legal delegation of his functions as a member of the Board to any other person by instrument in writing. This position has been elaborated by the High Court in the case of *Mohd Khairul Azam Abdul Aziz v. Lembaga Pengampunan Wilayah Persekutuan & Anor [2021] 1 CLJ 94* (at page 99).

It must also be highlighted that the role of the Attorney General is not only limited to being present during the proceedings of the Pardons Board. An even more important role of the Attorney General is to give a written opinion on the pardon. Article 42(9) of the Federal Constitution clearly provides that before tendering their advice on any matter, a Pardons Board shall consider any written opinion which the Attorney General may have delivered thereon. The case of *Mohd Khairul Azam* mentioned above best illustrates the mandatory nature of the Attorney General's written opinion in the process of granting pardons.

CHALLENGES

Ladies and Gentlemen,

Having outlined all the aforementioned duties and responsibilities of the Attorney General beyond prosecutorial role, it is sufficient for me to conclude that "*Heavy is the head that wears the crown*". Despite my relatively short incumbency as the Attorney General, I have truly felt the weight of the responsibilities.

With that, I also exercise prudence, recognizing that all obligations are not free from encumbrances. Recent judicial trends portray that civil proceedings can be initiated against the Attorney General himself for his advice to the Government. This happened in the case of *Khairuddin bin Abu Hassan v. Tan Sri Idris Harun Dalam Kapasiti Sebagai Peguam Negara Malaysia [2021] LNS 858*. In this case the former Attorney General, Tan Sri Idrus Harun was sued, alleging that he failed in his obligations to advise the Yang di-Pertuan Agong and the Prime Minister along with the Cabinet Ministers upon such legal matters, to uphold the Federal Constitution and the rule of law when it was purported that the Prime Minister had ceased to command the confidence of the majority of the members of the House of Representatives.

The action taken was deplorable, but thankfully, the court denied leave for judicial review on grounds among others that the relief sought by the Plaintiff were based on unestablished factual assumption. If the court had entertained the claim and decided otherwise, the legal position would be concerning, as any actions, decisions or omissions by the Attorney General could potentially be amendable for judicial review based on hypothetical questions. Such position would imperil independent advices tendered by the Attorney General to the Government and subject them to judicial scrutiny.

Nevertheless, increase in judicial activism and progressive development of judicial review for the past years have posed significant challenges to the Attorney General in carrying out his duties. A notable decision of the Federal Court in the case *of Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal [2019] 4 CLJ 561* ought to be mentioned here. The Federal Court upheld the decision that the power of Attorney General to give or refuse consent for civil suits relating to trust for public, religious, social or charitable purposes

under section 9(1) of the Government Proceedings Act 1956 [*Act 359*] is amenable to judicial review.

The Federal Court (at pages 588-589) emphasized that the particular Attorney General's power under section 9(1) of Act 359 derives from a statute law, and hence, restrictions and conditions applicable to statutory power cannot be ignored. The power is also not absolute and subject to legal limits because unfettered discretion is contradictory to the rule of law.

With utmost respect to the decision of the Federal Court, I am constantly reminded to take vigilance in exercising all functions conferred upon me under any written law. During my tenure as the Attorney General, I assure my commitment, in the words of our former Attorney General Tan Sri Datuk Haji Abdul Kadir Bin Yusof, "*to act in a professional capacity in strict accordance and in strict compliance with the requirements of the laws which confers these functions*"[1].

Before I end my speech, I would like to thank YBhg. Prof. Dr. Farid Sufian bin Shuaib, IIUM and the organizing committee for inviting me to deliver this speech. Let me end this speech by quoting Lord Denning M.R. in *Attorney-General ex rel. McWhirter v. Independent Broadcasting Authority (1973) 1 Q.B. 629* (at pages 646-647) as follows:

> *"It is settled in our constitutional law that in matters which concern the public at large the Attorney-General is the guardian of the public interest. Although he is a member of the government of the day, it is his duty to represent the public interest with complete objectivity and detachment. He must act independently of any external pressure from whatever quarter it may come. As guardian of the public interest, the Attorney-General has a special duty in regard to the enforcement of the law*."

Wabillahi Ttaufik Walhidayah Wassalamualaikum Warahmatullahi Wabarakatuh.

Thank you.

[1] *The Office of the Attorney General, Malaysia [1977] 2 MLJ xvi* at page xx