

Protection of Marginalised Minorities under the Constitution¹

by Dato' Seri Mohd Hishamudin Yunus

A basic principle of constitutional law that many would be familiar with is supremacy of the Federal Constitution. This principle stipulates that no one institution is supreme, not even Parliament. Only the Federal Constitution, being the highest law of the land, is supreme. It binds both state and federal governments, including the Executive branch. In other words, the organs of government must operate in accordance with what is prescribed or empowered by the Federal Constitution; they must not transgress any constitutional provisions.

While “marginalised minorities” is not defined in the Constitution, *Fowler's Dictionary of Modern English Usage* sheds some light in this regard. The word “marginalised” originates from “marginal”, and carries a sociological meaning of “isolated from or not conforming to the dominant society or culture”.² In other words, it means “belonging to a minority group”. But this phrase carries a very broad definition. Very often, “marginalised minorities” can also refer to the lower classes in the socioeconomic hierarchy, who have low education and low income. In Malaysia, the term includes the disabled, the Orang Asli, the indigenous people of Sabah and Sarawak, migrant workers, refugees and transgenders.

In the light of recent events and judicial decisions that have affected the indigenous people of Malaysia, it would be beneficial to zoom in on this specific group. When we look at recent decisions by the court, there are good and “not-so-good” ones. The author applauds the decision of

the High Court in Kota Bharu in ordering the Kelantan government to gazette 9,300ha of land as Orang Asli reserve within six months.³ Mr Lim Heng Seng⁴ and Ms Tan Hooi Ping,⁵ counsel who represented the Orang Asli in that case, should be commended. Both are also alumni of Universiti Malaya's Faculty of Law.

On the other hand, with respect, the author strongly disagrees with the majority decision of the Federal Court in *TR Sandah Tabau*,⁶ in which the Ibans of Sarawak were denied their native customary rights to claim virgin forests as their territorial domain and communal forest reserves.

Defining ‘indigenous people’

Although there is no universal definition of “indigenous people”, the United Nations has adopted a working definition that identifies the common characteristics of indigenous people, including historical continuity since before pre-colonial societies, their non-dominant or marginalised situation, and the presence of customary, social and political institutions.⁷ Based on this working definition, the indigenous people in Malaysia would then include the aborigines or Orang Asli of Peninsular Malaysia and the natives of Sabah and Sarawak.

The Federal Constitution does recognise these three categories of indigenous people.

Article 160 defines an “aborigine” merely as “an aborigine of the Malay Peninsula”, commonly known as Orang Asli. Section 3 of the Aboriginal Peoples Act 1954 (APA), however, provides a substantive definition. It essentially defines an Orang Asli as a person whose parents are both aborigines, or one parent is or was a member of an aboriginal ethnic group. The population of Orang Asli in Peninsular Malaysia is estimated to be 0.6% of the country's population; that is to say, about 178,197 people.⁸

1 Adapted from a presentation delivered at the University of Malaya's Constitutional Law Lecture Series

2 Jeremy Butterfield, *Fowler's Dictionary of Modern English Usage* (Oxford University Press, 4th Ed, 2015)

3 High Court of Kota Bharu Case No 25-7-11; Sira Habibu, “Kota Baru High Court rules Pos Belatim is native customary land” *The Star Online* (23 April 2017) <<https://www.thestar.com.my/news/nation/2017/04/23/kota-baru-high-court-rules-pos-belatim-is-native-customary-land/>>

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6 *Director of Forest, Sarawak & Anor v TR Sandah Tabau* [2017] 3 CLJ 1

7 Martinez Cobo Study, E/CN.4/Sub.2/1986/7/Add.4, para 379

8 Vincent Tan, “Getting to know indigenous Malaysians”, *The Star Online* (9 August 2016) <<https://www.thestar.com.my/metro/community/2016/08/09/getting-to-know-indigenous-msians-facts-at-a-glance-glimpse-into-the-lives-of-selangors-two-main-ora/>>

In *Sagong Tasi*,⁹ a large tract of Temuan inhabited land was appropriated for the construction of a highway leading to the Kuala Lumpur International Airport. The Temuans made a claim for compensation under the Land Acquisition Act 1960. A challenge was made against the members of the Temuan tribe as to their status as Orang Asli. The Selangor state government argued that the Temuan were no longer Orang Asli because they did not continue to practise the culture. The High Court held that the Temuan people met the definition of “Orang Asli” because the community was still governed by a traditional council known as the “Lembaga Adat”. This traditional council still governs their marriage, communal activities, social conduct and dispute resolution. The Temuan are still governed by their own laws and customs. The High Court held that they did not lose their status as Orang Asli merely because they speak other languages apart from the Temuan language, or because they cultivate cash crops instead of traditional ones. The court did not take such a simplistic view and, in the author’s opinion, was right in its decision.

Article 161A(6)(b) of the Federal Constitution provides that for a person to be considered a native of Sabah, he must be, firstly, a citizen of Malaysia; secondly, the child or grandchild of a person of a race indigenous to Sabah; and, thirdly, was born either in Sabah or to a father domiciled in Sabah.

As for the natives of Sarawak, there are about 28 indigenous groups listed in clause (6) of Art 161A. Altogether, they make up about 71.2% of the total Sarawakian population.¹⁰ These indigenous groups include the Iban (largest ethnic group in Sarawak, comprising 30% of the total population), the Bidayuh and the Melanau.

The drafters of the Federal Constitution identified the indigenous people in Sabah and Sarawak as “natives”, and preferred to name indigenous people in the peninsula as the “aborigines” or “Orang Asli”.

Challenges and struggles of indigenous people

The indigenous communities must contend with a plethora of challenges and difficulties. Some issues, especially those related to Orang Asli, are saddening. The author is convinced that there has been a historical discrimination against the Orang Asli, who are the ancestors of many present-day Malays.

The term “Orang Asli” means the “original people” or “first people”. Historically, they are the original and tribal inhabitants of Peninsular Malaysia, believed to have entered this land about 5,000 years ago.¹¹ They come from diverse backgrounds and speak different languages. Based on geographical presence, they are divided into three groups

- Negrito: Also known as Semangs, they reside in the northern peninsular region.
- Senoi: Tribes who reside in the central part of Peninsular Malaysia.
- Proto-Malay: Aboriginal Malays who reside in the southern part of Peninsular Malaysia.

According to a scholar, the Malays have historically regarded the Orang Asli as subordinate and inferior people.¹² There is evidence in Malay socio-history to suggest that the derogatory term “Sakai” was used to describe the Orang Asli as a group of people who were subjected to corvée labour (unpaid labour). In the

9 *Sagong Tasi v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591

10 Report of the National Inquiry into the Land Rights of Indigenous Peoples, Human Rights Commission of Malaysia (SUHAKAM), 2013 at p 15, para 2.18

11 T Masron, F Masami & N Ismail, “Orang Asli in Peninsular Malaysia: Population, Spatial Distribution and Socio- Economic Condition” <http://www.ritsumei.ac.jp/acd/re/k-rsc/hss/book/pdf/vol06_07.pdf> (accessed 4 April 2017)

12 Nicholas Dodge, “The Malay-Aborigine Nexus under Malay Rule” (1981) *Bijdragen Tot de Taal-, Land und Volkenkunde* 1

traditional Malay world, those Malays claimed themselves to be superior to the Orang Asli and thus fit to rule over the latter.

In the 19th century, British intervention in the Malay states further exacerbated Malay preconceptions towards the Orang Asli. The British dealt with the Malay Sultans in their colonial expansion. They considered Malays to be the dominant and superior society, assuming them to be the only indigenous people, and the Orang Asli were the Malays' dependants. The government at that time positioned the Orang Asli as people who needed to follow the Malay development path in order to be successful. This ethnocentric view of the Orang Asli eventually translated into governmental policies affecting Orang Asli.

For example, in the 1960s, there was a policy with the objective of integrating the Orang Asli with the Malay section of the society. In the endeavour to convert the Orang Asli to Islam as part of the integration effort to protect Orang Asli rights, there was little emphasis on empowering them through effective consultation and giving them the right to determine their own development priorities.

The policy behind extensive state control over the Orang Asli was aimed towards absorbing them into the Malay community. However, as a consequence of this policy, the Orang Asli are gradually losing their own unique identity as indigenous peoples. Their religious beliefs relating to the existence of spirits in objects (animism) are looked down upon, and their religion as an aspect of their cultural identity is under threat. According to findings by an anthropologist,¹³ the Orang Asli have been robbed of their identities as their culture is mocked and considered primitive by the mainstream population.

Poverty is another major issue. The poverty rate within the Orang Asli community is 76.9%, out of which 35.2% are classified as "hardcore poor". They are economically disadvantaged. Other difficulties include lack of healthcare facilities and education for the indigenous communities across Malaysia. The Orang Asli have endured dispossession, marginalisation and discrimination in preserving and developing their continued existence as indigenous people in accordance with their own cultural practices, social institutions and legal systems.

In his article "Protection of the Indigenous Peoples of Sabah and Sarawak", Professor Andrew Harding noted that:

"Indigenous peoples as a whole suffer disproportionately from preventable diseases, have higher infant and maternal mortality rates, are poorly provided with basic services and utilities, and have lower levels of education... the great majority continue to suffer widespread and persistent poverty, high rates of illiteracy, and limited access to medical care."¹⁴

It bears mention that Malaysia voted in favour of the United Nations Declaration on the Rights of Indigenous People (UNDRIP), both at the Human Rights Council and at the General Assembly, with no reservations. UNDRIP contains extensive provisions for the recognition and protection of indigenous lands, territories and resources.

Although UNDRIP is stated to be non-binding, there is still a moral obligation and genuine expectation for the Malaysian government to pursue the standards as stipulated. However, as one academic commented on our government's commitment to UNDRIP:

13 Professor Alberto Gomes, "The Orang Asli of Malaysia" (2004) IAS Newsletter #35 <https://iias.asia/sites/default/files/IIAS_NL35_10.pdf> (accessed 4 April 2017)

14 Andrew Harding & James Chin (eds), *50 Years of Malaysia: Federalism Revisited* (Marshall Cavendish, 2014) at 186

“It is evident that the rights contained in the UNDRIP have not been sufficiently incorporated into the law and policies affecting Orang Asli and their lands and resources. Priorities for national development, particularly those affecting Orang Asli, continue to be introduced and implemented without effective cooperation and consultation with the Orang Asli in an effort to push Orang Asli into the mainstream economy.”¹⁵

It is the author’s earnest hope that the Malaysian government will pay more attention and provide further assistance to the indigenous community in the light of the challenges and struggles that they are facing. The government should not be only paying attention to the indigenous community before a general election.

Federal Constitution, aborigines and natives of Sabah and Sarawak

As fellow Malaysians, the Orang Asli and natives in Sabah and Sarawak are entitled to all the constitutional protections as enshrined in Part II of our Federal Constitution, which provides for fundamental liberties and rights. In fact, according to the Constitution, Malays and natives of Sabah and Sarawak are given preferential treatment.

Article 153 of the Constitution obliges the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak. This “special position” includes reservations of positions in the public service, scholarships, and other educational and training privileges and licences for operation of business required by federal law. However, “Orang Asli” is not mentioned here in these provisions; which means that, sadly, they do not enjoy equivalent constitutional rights and protections as the Malays and natives of Sabah and Sarawak.

Article 89 provides for Malay reservations, while Art 161A(5) provides for the reservation of land and for preferential treatment of alienation of land for the natives of Sabah and Sarawak.

Malays and natives of Sabah and Sarawak enjoy constitutional protection against laws that affect their customs, as found in Art 76(2) and 150(6A). Meanwhile, Art 3(1) and 76(2) cumulatively provide constitutional protection for the religion of Islam, the religion of all Malays. Furthermore, Art 152 provides that the Malay language is the national language. We can see that on each and every aspect, the Malays have been accorded special privileges. However, the Orang Asli have no mandatory constitutional protection with respect to their languages, laws, traditions, customs and institutions.

The Orang Asli have been acknowledged by the United Nations as the indigenous people of Peninsular Malaysia. Despite their indigeneity, they are positioned as a marginalised community with inadequate rights while the Malays are afforded “indigenous” status and special privileges. Our Parliamentarians should amend the Constitution in order to afford Orang Asli constitutional protections similar to those enjoyed by the Malays and the natives of Sabah and Sarawak.

Article 8(5)(c) permits the federal government to legislate for “the protection, well-being or advancement” of the Orang Asli, “including the reservation of land” or “reservation to Orang Asli of a reasonable proportion of suitable positions in the public service” without offending Art 8(1), which provides for equality. Essentially, Art 8(5)(c) empowers the federal government to discriminate positively for the welfare of the Orang Asli and also to legislate for their protection. Although this Article does not expressly oblige the federal government to safeguard the position of the Orang Asli, it shows an implicit intention

15 Yogeswaran Subramaniam, “Ethnicity, Indigeneity and Indigenous Rights: The ‘Orang Asli’ Experience” (2015) 15(1) QUT Law Review <<http://www.austlii.edu.au/au/journals/QUTLawRw/2015/6.pdf>> (accessed 4 April 2017)

of the Constitution to protect them. It is also an overt recognition of the position of the Orang Asli in the current constitutional arrangement.

Item 16 of the Federal List in the 9th Schedule of the Federal Constitution empowers Parliament to legislate on the “welfare of the aborigines”. However, federal legislation enacted to protect the welfare of the Orang Asli, such as the APA, carries a lesser weight compared to an express mandatory protection guaranteed by the Federal Constitution.

The APA is the principal statute governing the administration and rights of the Orang Asli. The preamble states that it is an Act for the protection, well-being and advancement of the Orang Asli.

The courts must interpret provisions of the APA in a broad and liberal manner. This is because the APA is no ordinary piece of legislation. It acquires a status much higher than ordinary legislation but not as supreme as the Constitution. This proposition was enunciated in *Kerajaan Negeri Selangor v Sagong Tasi*,¹⁶ in which Justice Gopal Sri Ram held that the APA is “fundamentally a human rights statute”, and that “it acquires a quasi-constitutional status giving it pre-eminence over ordinary legislation”.

According to the learned judge, the APA is a piece of human rights legislation that must be interpreted broadly and purposively in order for Orang Asli rights to be capable of enforcement in a court of law and to allow justice to be done. Judges are required to recognise the special nature and purpose of the APA, and interpret the provisions in a liberal manner, which always advance the broad purposes of the Act and allows for enhancement of Orang Asli rights. This quasi-constitutional status allows the courts to effectively act as a check and balance, to limit administrative actions by the governments which may curtail Orang Asli rights.

Indigenous people and their land

Although the federal government has the power to carry out land acquisition for the welfare of Orang Asli, it has yet to undertake such action. On the contrary, from time to time, we hear of Orang Asli lands being acquired for development.

One of the most serious challenges today is the logging activity that continues unabated within their traditional land. This was the reason why the Temiar Orang Asli in Kelantan set up a blockade last year — to protest against loggers carrying out deforestation of ancestral land.

In Sabah and Sarawak, similarly, the lands of the vulnerable indigenous communities have been affected by development. There are more than 100 claims related to native land pending in the courts of Sarawak alone. According to statistics from the Human Rights Commission of Malaysia (SUHAKAM), complaints lodged in Sabah and Sarawak mainly involve land disputes, specifically encroachment on indigenous lands.

All land claims by natives and the Orang Asli cannot be considered only from the standpoint of ownership of the lands by the indigenous people. The forest is their home, food factory and pharmacy. As rightly pointed out in *Agi Anak Bungkong*:¹⁷

“... such claims should be looked at differently, namely, that the natives are part of the land as are the trees, mountains, hills, animals, fishes and rivers... The fruits on the wild trees, the fishes in the river, the wild boars and other animals on the land are their food for survival.”

Hence, in a land claim by indigenous people, their constitutional rights to property (Art 13), to profess their religion (Art 11) and to livelihood (Art 5) might all be at stake.

¹⁶ [2005] 6 MLJ 289 (CA)

¹⁷ *Agi Anak Bungkong v Ladang Sawit Bintulu Sdn Bhd* [2010] 1 LNS 114 per David Wong J

In *Director-General of Environment Quality v Kajing Tubek*,¹⁸ also known as the “Bakun Dam case”, some 10,000 natives of Sarawak were not given a chance to be heard before the Environmental Impact Assessment (EIA) report was approved. The High Court held, firstly, that the natives had *locus standi* to bring the action against the Director-General of Environment; and, secondly, that the Environmental Quality Order 1995 was invalid as the natives were denied the opportunity to be heard before the EIA report was approved.

The Court of Appeal, however, in reversing the decision of the High Court, effectively held that the 10,000 natives had no substantive *locus standi* to challenge the EIA for a dam that would flood their traditional land and deprive them of their livelihood. On the question of *locus standi*, the court acknowledged the natives’ right to livelihood, but held that the deprivation of life was done in accordance with the law of Sarawak and therefore the requirements of Art 5(1) of the Constitution were satisfied.

With respect, the author is unable to agree with this view of the Court of Appeal. Article 5(1) states that there shall be no deprivation of life and liberty save in accordance with law. “Law” in Art 5(1) must include and incorporate fundamental rules of natural justice and procedural fairness (see *Re Tan Boon Liat*¹⁹). The fundamental rules of natural justice are the rule against bias (*nemo iudex in causa sua*) and the right to be heard (*audi alteram partem*).

The Court of Appeal, in applying the relevant Sarawak law, had deprived the Sarawak natives of their right to be heard, a fundamental rule of natural justice, when it effectively ruled that the EIA report can be approved first, and then if the public has any ideas, they can submit these later. In the author’s opinion, the Art 5(1) requirement cannot be said to have been satisfied when the “law” in question effectively denied the natives their right to be heard.

While agreeing with the High Court, the author is of the view that Art 5 demands that the first EIA report be held invalid and that the whole process of environmental impact assessment must be done again without excluding the right to comment by the 10,000 natives, when their right to life is clearly deprived. To argue otherwise would render the Art 5 protection merely illusory.

Native land rights are a proprietary interest protected by Art 13, which provides for right to property. In *Adong bin Kuwau*,²⁰ 53,000 acres of ancestral lands belonging to the Jakun tribe in Johor were alienated to Singapore for the construction of a dam. In a demonstration of judicial activism, the High Court gave a wide interpretation to “property” in Art 13, and held that constitutional right to property and adequate compensation for its deprivation is applicable to indigenous land rights.

In his judgment, Mokhtar Sidin J (as his Lordship then was) held:

“Of late, aboriginal peoples’ land rights — or generally what is internationally known as native peoples’ rights — has gained much recognition after the Second World War... these native peoples’ traditional land rights are now firmly entrenched in countries that had and/or are still practising the Torrens land law ... where special status have been enacted or tribunals set up in order for natives to claim a right over their traditional lands.”

This legal position was also affirmed in *Government of Selangor v Sagong Tasi*,²¹ where the Court of Appeal, through the bold and inspiring judgment of Justice Gopal Sri Ram, went further and held that the Orang Asli have not just usufructuary rights but also “customary community title” at common law, and that their property is constitutionally protected.

18 [1997] 3 MLJ 23

19 *Re Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri* [1977] 1 LNS 110

20 *Adong bin Kuwau v Government of Johor* [1997] 1 MLJ 418

21 [2005] 4 CLJ 169

Those same principles were extended to the indigenous people of Sabah and Sarawak in *Superintendent of Lands and Survey Miri Division and Anor v Madeli bin Salleh*.²² The Federal Court also acknowledged that the government's title is subject to any native rights over such land.

In 2011, in *Andawan bin Ansapi v PP*,²³ six natives were convicted of criminal trespass when they cultivated rice padi in a forest reserve. The Kota Kinabalu High Court overturned the conviction on the basis that the natives were exercising their customary land rights, and that those rights were guaranteed by the right to life under Art 5(1) of the Federal Constitution.

The major blow: Federal Court's judgment in *TR Sandah*

In 2016, the Federal Court in *TR Sandah* delivered a major blow to the native customary rights (NCR) of the indigenous Dayak people. The question before the court was whether native customs of *pemakai menoa* and *pulau galau* enabled the respondents to claim valid NCR over the land in question.

Pemakai menoa is the right to forage the forest for their life support; for example, gathering medicine, wood and food from time to time. *Pulau* is within *pemakai* area, and it is where the natives have cleared the forest and settled.

At both the High Court and the Court of Appeal (in which the author was the presiding judge), the respondents were declared the rightful owners of the NCR land, including *pemakai menoa* and *pulau galau*. The timber company was held to have unlawfully encroached into the NCR land after the state government issued a timber licence to the company.

However, at the Federal Court, in the majority decision written by Justice Raus Sharif, it was held that there is no legislation in Sarawak that gives the force of law to the native people to claim NCR over virgin forests around their longhouses. The majority judgment held that these two customs do not fall within the definition of "law" under Art 160(2) of the Federal Constitution.

With respect, in the author's opinion, the majority judgment was wrong. The correct decision should have been that of Justice Zainun Ali, whose dissenting judgment should be read by law students because it is well written and a brilliant display of judicial activism. Reading it allows us to understand how erroneous the majority judgment was.

Justice Zainun held that the definition of "law" under Art 160(2) makes customary law an integral part of the legal system; and drawing inspiration from the Australian case of *Mabo & Others v The State of Queensland (No 2)*²⁴ ("*Mabo (No 2)*") and the English case of *Tyson v Smith*,²⁵ went on to rule that:

"Custom is a source of unwritten law..."

and that —

"In general, for a custom to be regarded as conferring legally enforceable rights, it is essential that such customs be immemorial, certain, reasonable and acceptable by the locality."

At the outset, the composition of the Federal Court in *TR Sandah* did not reflect the spirit of Malaysia. None of the judges were from Sabah and Sarawak, nor had any of them ever served in the Borneo states. With respect, this is not in keeping with Art 8 of the Malaysia Agreement 1963, read with para 26(4) of Chapter 3 of the Inter-Governmental Committee Report 1962. Article 8 states:

22 [2007] 2 MLJ 390

23 File K41-128 of 2010 (unreported)

24 (1992) 175 CLR 1

25 [1838] 112 ER 1265

“The Governments of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other action as may be required to implement the assurances, undertakings and recommendations contained in Chapter 3 of, and Annexes A and B to, the Report of the Inter-Governmental Committee signed on 27th February, 1963, in so far as they are not implemented by express provision of the Constitution of Malaysia.”

And para 26(4) of Chapter 3 of the IGC Report provides:

“Normally, at least one of the judges of the Supreme Court should be a judge with Bornean judicial experience when the court is hearing a case arising in a Borneo State; and it should normally sit in a Borneo State to hear appeals in cases arising in that State.”

In contrast, at the Court of Appeal, my brother judge was Wahab Patail JCA, and he is from Borneo. Judges from Sabah or Sarawak would appreciate and understand the native customs better.

Justice Raus’ decision on local customs, not having the force of law due to lack of codification, was too simplistic a view. “Law” under Art 160(2) is defined as including:

“... written law, the common law in so far as it is in operation in the Federation or any part thereof, and any **custom** or usage having the force of law in the Federation or any part thereof.”

Custom in itself is a form of unwritten law. It is unreasonable to assume that a custom has no force of law merely because it is not codified. Even if that were the case, it does not mean that a custom does not exist or that common law does not recognise that particular custom.

The existence of custom is a question of fact. There is adequate evidence to support the argument that *pemakai menoa* and *pulau galau* are customs recognised under common law, having the force of NCR. Justice Zainun cited with approval what was said by Abdul Wahab JCA at the Court of Appeal in *TR Sandah*:²⁶

“Unlike law imposed from above by coercive authority such as a king or a Legislature, native customary law develops from the ground as customs and practices evolve In a sense it is direct democracy. These customary laws traversed a broad range of subjects of communal interest, as the later Adat Iban Order 1993 itself demonstrates. Not all but some of which relate to interest in land.”

In fact, our courts have recognised the natives’ right to forage and access virgin forest. In the High Court case of *Adong bin Kuwau*, it was held that:

“... the aboriginal peoples’ rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself but not to the land itself in the modern sense that the aborigines can convey, lease or rent out the land.”

This decision was upheld by the Court of Appeal.

It is also the author’s humble view that these customary rights are protected by Art 5 of the Federal Constitution as their right to life. The majority judgment in *TR Sandah* disregarded the spirit of Art 5. As a result, the constitutional right to livelihood of the natives was adversely affected due to deforestation and logging activities.

26 *Director of Forest Sarawak & Anor v TR Sandah Tabau & Anor* [2014] 2 CLJ 175, para 47

Judicial activism is the key

The concern that a democratic government may not provide adequate protection for minorities is as old as the idea of democracy itself. History tells us that a political majority cannot be trusted to respect fundamental liberties, rights and freedoms that the Constitution affirms for every citizen, especially the minorities.

One way to safeguard the freedoms, rights and interests of the minorities is to adopt a Constitution that defines the limits of the majority power. Fortunately, in Malaysia, we have adopted a written Federal Constitution.

In *Loh Kooi Choon*,²⁷ Raja Azlan Shah FJ (as His Highness then was) held:

“The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach.”

Minorities, regardless of race, religion, gender or social origin, do enjoy these fundamental rights enshrined in the Constitution. They deserve equal protection of the law pursuant to Art 8. In fact, it is axiomatic that the Constitution exists precisely so that the minority cannot be subjected to the tyranny of the majority: see *Muhamad Juzaili bin Mohd Khamis*.²⁸

The Constitution is not self-enforcing. Challenging the constitutionality of unjust, illegal or unreasonable administrative actions against marginalised minorities has

to happen in the courtroom. And this is where the role of a judge comes into the picture. He is like an umpire in a game. A judge has to exercise judgment and determine the meaning of the Constitution.

As Justice Gopal Sri Ram observed in *Lee Kwan Woh*:²⁹

“... the Constitution is a living document that demands judges to breathe life into the provisions expressed in abstract statements of fundamental rights or liberties.”

In ensuring that the rights of the minorities are safeguarded, judges must take a liberal and holistic approach and not adopt too simplistic a view in interpreting Constitutional provisions:

“The activist judge... must steer through the delicate balancing act, always bearing in mind and respecting the doctrine of the separation of powers, yet at the same time not forgetting the need for checks and balance and to uphold the rule of law. ... in high-profile cases involving the Constitution, he may even be expected to be both ‘philosopher and king’.”³⁰ **LH-AG**

About the author



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²⁷ *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187

²⁸ *Muhamad Juzaili bin Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors* [2015] 1 CLJ 954 (CA)

²⁹ *Lee Kwan Woh v PP* [2009] 5 CLJ 631 (FC)

³⁰ Dato' Seri Mohd Hishamudin Yunus, “Judicial Activism — The Way to Go” [2012] 5 CLJ (A) ix