Faculty of Law, University of Malaya

Constitutional Law Lecture Series

Protection of Marginalised Minorities Under The Constitution

By

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Distinguished Audience,

Ladies and Gentleman,

Good evening,

It is truly an honour to be invited by the Faculty of Law, University of Malaya, to deliver a Constitutional law lecture in this pleasant evening. I must thank and congratulate Dr. Johan, Dean of the Faculty and Messrs Chooi & Company for jointly organizing this Constitutional law lecture series, which is very beneficial to law students and the general public.

Introduction

The topic of today's lecture is "Protection of Marginalised Minorities Under the Constitution" There are two elements in today's topic: on one hand we have the "Federal Constitution"; and on the other hand, we have "marginalised minorities".

I shall begin by referring to a basic principle of constitutional law that many members of the audience are familiar with: the principle of the supremacy of the Constitution. This principle stipulates that no one institution is supreme; not even Parliament. Only the Federal Constitution is supreme, being the highest law of the country. 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.

Now, the phrase "marginalised minorities" is not defined in our Constitution; and therefore, I look into dictionaries for guidance. The Fowler's Dictionary of Modern

English published by Oxford shed some light in this regard. The word "marginalised" originates from "marginal", it carries a sociological meaning of "isolated from or not conforming to the dominant society or culture".[1] In other words, it means "belonging to a minority group". But this phrase carries a very broad definition. Very often the term "marginalised minorities" also refers to the lower classes in the socioeconomic hierarchy, who have low education and low income. In Malaysia, the term or phrase 'marginalised minorities' include the disabled persons, Orang Asli, indigenous people of Sabah and Sarawak, migrant workers, refugees, and transgenders.

In today's lecture, the topic demands a discussion on how the Federal Constitution as the highest law of the land, extends its arms to protect and improve the wellbeing of the marginalized minorities.

In the interest of time, however, I do not propose to discuss how the Federal Constitution safeguards the interest and well-being of each and every marginalised community. Rather, in the light of recent events and judicial decisions which have affected the indigenous people in Malaysia, it would be beneficial for us to zoom in on this specific group, the indigenous people.

When we look at recent decisions by the Court, there are good ones and "not-so-good" ones. I applaud the decision of the High Court in Kota Bharu in ordering the Kelantan Government to gazette 9,300 hectares of land in Pos Belatim as orang Asli reserve within six months.[2] I must also commend Mr. Lim Heng Seng[3] and

[1] J. Butterfield, *Fowler's Dictionary of Modern English Usage* (4th rev edn, OUP 2015)
[2] 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 (Kota Baru, 23 April 2017) < https://www.thestar.com.my/news/nation/2017/04/23/kota-baru-high-court-rules-pos-belatim-is-native-customary-land/>
[3] A senior partner of Messrs Lee Hishammuddin Allen & Gledhill.

Ms. Tan Hooi Ping[4], who were counsel representing the Orang Asli in this case. Both of them are also graduates from the Faculty of Law of this university.

On the other hand, with respect, I strongly disagree with the majority decision of the Federal Court in the case of ***Director of Forest, Sarawak & Anor v TR Sandah Tabau***.[5] In this case, the Federal Court denied the Ibans of Sarawak of their Native Customary Rights on land to claim virgin forests as their territorial domains and communal forest reserves. I shall discuss this case further in the later part of today's lecture.

Thus, my lecture today would be a topical one. I also hope that the discussion later, on constitutional protection of aboriginal Malaysians, gives you an idea on how the Constitution should be or should not be interpreted in the context of protecting marginalised communities.

Defining "Indigenous People"

Although there is no universal definition of "indigenous people", the United Nations have adopted a working definition which 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.[6] Based on the UN 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.

[4] An associate of Messrs Lee Hishammuddin Allen & Gledhill.
[5] [2017] 3 CLJ 1.
[6] Martinez Cobo Study, E/CN.4/Sub.2/1986/7/Add.4, para. 379.

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

Article 160 of the Federal Constitution defines an 'aborigine' merely as 'an aborigine of the Malay Peninsula' or commonly known as the Orang Asli. Section 3 of the Aboriginal Peoples Act 1954, 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 about 0.6% of the country's population, that is to say, about 178,197 people.[7]

In the case of ***Sagong Tasi v Kerajaan Negeri Selangor & Ors***,[8] a large tract of Temuan inhabited land was appropriated for the construction of a highway leading to Kuala Lumpur International Airport. The Temuans claimed 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 Defendants (that is to say, the State Government of Selangor) argued that the Temuan people are no longer Orang Asli because they did not continue to practise Temuan 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 do not lose their status as Orang Asli merely because they speak other languages apart from the Temuan language,

[7] Vincent Tan, 'Getting to know indigenous Malaysians' The Star (Petaling Jaya, 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/>

[8] [2002] 2 MLJ 591.

or because they cultivate cash crops instead of traditional crops. The Court did not take such a simplistic view, and in my opinion, the Court 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, is 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 Article 161A. Altogether they make up about 71.2% of the total Sarawakian population[9]. These indigenous groups include the Iban, Bidayuh, Melanau, etc. The Iban is the largest ethnic group in Sarawak, comprising about 30% of the total population.

The drafters of the Federal Constitution named the indigenous people in Sabah and Sarawak as "natives", and preferred to name indigenous people in Peninsula as the "aborigines" or "Orang Asli".

Challenges and Struggles Faced by Indigenous People

Ladies and gentlemen,

Throughout my research, I discover a plethora of challenges and difficulties faced by the indigenous communities. On some issues I find them very saddening, especially those related to Orang Asli. As history speaks for itself, I am convinced that there has been a historical discrimination against the Orang Asli, who are the ancestors of many present-day Malays.

[9] Report of the National Inquiry into the Land Rights of Indigenous Peoples, Human Rights Commission of Malaysia (SUHAKAM), 2013, p. 15, para 2.18.

The term 'Orang Asli' means the 'original people' or 'first people'. Historically, they are the original and tribal inhabitants of the Peninsular Malaysia. They are believed to have entered this land about 5000 years ago[10]. Orang Asli come from diverse backgrounds and speak different languages. Based on geographical presence they are divided into three groups:

(1) Negrito – also known as Semangs, they are the Orang Asli residing in the Northern peninsular region.
(2) Senoi – they are the tribes who reside in the central part of Peninsular Malaysia.
(3) Proto-Malay – they are the aboriginal Malays who reside in the southern part of Peninsular Malaysia.

According to a scholar, Nicholas Dodge, the Malays have historically regarded the Orang Asli as subordinate and inferior people.[11] There is evidence in Malay socio-history to suggest that Malays used the derogatory word of '*Sakai*' to describe the Orang Asli as a group of people who were subjected to corvee labour (unpaid labour). In the traditional Malay world, those Malays claimed themselves to be superior compared to the Orang Asli and were considered fit to rule over the Orang Asli.

British intervention into the Malay states in 19th century further exacerbated Malay preconceptions towards the Orang Asli. The British dealt with the Malay Sultans in their colonial expansion. They considered Malay as the dominant and superior

[10] 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.
[11] Nicholas Dodge, 'The Malay-Aborigine Nexus under Malay Rule' (1981) Bijdragen Tot de Taal-, Land und Volkenkunde 1.

society, assuming them as the only indigenous people, and the Orang Asli were the Malays' dependents. The government at that time positioned the Orang Asli as people who need to follow the Malay development path in order to be successful. This ethnocentric view of the Orang Asli has eventually translated into governmental policies affecting Orang Asli.

For example, in the 1960s, there was a policy with the objective of integrating 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 the Orang Asli rights, very little focus was given on empowering Orang Asli through effective consultation and giving them the right to determine their own development priorities.

Ladies and gentleman,

As I have said a moment ago, 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 being looked down upon, and their religion as an aspect of their cultural identity is under threat. According to the findings of Professor Alberto Gomes, an anthropologist at La Trobe University, Australia, the Orang Asli's identities have been robbed as their culture are laughed upon and are considered primitive by the mainstream population[12].

[12] Alberto Gomes, 'The Orang Asli of Malaysia', (2004) IIAS Newsletter #35 < https://iias.asia/sites/default/files/IIAS_NL35_10.pdf> Accessed 4 April 2017.

Poverty is another major issue faced by the Orang Asli and the natives of Sabah and Sarawak. I learnt that the poverty rate within the Orang Asli community is 76.9% and out of which 35.2% are classified as 'hardcore poor'. They are economically disadvantaged. Other difficulties include lack of healthcare facilities and lack of education for the indigenous communities across Malaysia. The Orang Asli have endured dispossession, marginalization and discrimination in preserving and developing their continued existence as indigenous people in accordance with their own cultural practices, social institutions and legal systems. I believe this information is nothing unfamiliar to us.

Professor Andrew Harding said this in his article "Protection of the Indigenous Peoples of Sabah and Sarawak":

> Indigenous people 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.[13]

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 the 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

[13] Andrew Harding & James Chin (eds), *50 Years of Malaysia: Federalism Revisited* (Marshall Cavendish, 2014) 186.

stipulated in the UNDRIP. However, Dr. Yogeswaran Subramaniam has this comment on our government's commitment to the UNDRIP,

> 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.[14]

In the time to come, I do earnestly 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 general elections.

Federal Constitution, the 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 provide for fundamental liberties and rights. In fact, according to the Federal Constitution, Malays and Natives of Sabah and Sarawak are given preferential treatments.

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.

[14] Yogeswaran Subramaniam, 'Ethnicity, Indigeneity and Indegenous 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.

> (1) It shall be the responsibility of 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 licenses for operation of business required by federal law. However, it is pertinent to note that "Orang Asli" is not mentioned here in these provisions; which means, sadly, the Orang Asli does not enjoy equivalent constitutional rights and protections as the Malays and natives of Sabah and Sarawak.

Article 89 of the Federal Constitution provides for Malay reservations, whilst Article 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 Article 76(2) and Article 150(6A). Meanwhile, Article 3(1) and Article 76(2) cumulatively provide constitutional protection for the religion of Islam, the religion of all Malays. Furthermore, Article 152 provides that the Malay language is the national language. We can see that at each and every aspect the Malays are given special privileges. However, Orang Asli have no mandatory constitutional protection with respect to their languages, laws, traditions, customs and institutions.

Ladies and gentlemen,

The Orang Asli is acknowledged as the indigenous people of Peninsular Malaysia at the United Nations. Despite Orang Asli indigeneity, they are positioned as

marginalised community with inadequate rights while the Malays are afforded the "indigenous" status and special privileges. I think it is about time for us to be honest with the Orang Asli communities. Our parliamentarians should amend the Constitution in order to afford Orang Asli similar constitutional protections as the Malays and the natives of Sabah and Sarawak.

Allow me to draw your attention to Article 8(5)(c) of the Constitution. This Article permits the Federal Government to legislate for "the protection, well-being or advancement" of 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 Article 8(1) which provides for equality. Essentially, this Article 8(5)(c) empowers the Federal Government to discriminate positively for the welfare of Orang Asli and also to legislate for their protection. Although this Article does not expressly oblige the Federal Government to safeguard the position of Orang Asli, it shows an implicit intention of the Constitution to protect Orang Asli. It is also an overt recognition of the position of 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 Aboriginals Peoples Act 1954 ('the APA') carries a lesser weight compared to an express mandatory protection guaranteed by the Federal Constitution. This leads me to the discussion of the nature of the APA, and how we should interpret the provisions of this Act.

The APA is the principal statute governing the administration and rights of Orang Asli. The preamble of the Act 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 not an ordinary legislation. It acquires a status much higher than ordinary legislation but not as supreme as the Constitution. This proposition is enunciated by the Court of Appeal case of ***Kerajaan Negeri Selangor v Sagong Tasi***[15], wherein Justice Gopal Sri Ram held that the Aboriginal Peoples Act 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 human rights legislation that must be interpreted broadly and purposively, in order for Orang Asli rights to be capable of enforcement in the court of law and to allow justice to be done. Judges are required to recognize the special nature and purpose of the Aboriginal Peoples Act, 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

Ladies and gentlemen,

[15] [2005] 6 MLJ 289.

Although the Federal Government has the power under the Constitution to carry out acquisition of land for the welfare of Orang Asli, the Federal Government has yet to undertake such an action. On the contrary, from time to time we hear the Federal Government acquiring Orang Asli lands for development.

One of the most serious challenges to the rights of the Orang Asli communities today is unabated logging activities within their traditional land. This was the reason why the Temiar Orang Asli in Kelantan set up a blockade last year, to prevent loggers from carrying out deforestation in the Orang Asli's ancestral land.

In Sabah and Sarawak, similarly, the lands of the vulnerable indigenous communities are affected by developments. There are more than 100 native land claims in the courts in Sarawak alone.

In the late 90s, in the Bakun Dam Project, 10,000 natives of Sarawak were forced to leave their long houses to make way for the project.

According to statistics from SUHAKAM, the complaints lodged to SUHAKAM in Sabah and Sarawak are mainly on land issues or disputes, specifically issues on encroachment of indigenous lands.

All land claims by natives and Orang Asli cannot be looked at only from the standpoint of ownership of the lands by the indigenous people. The forest is their home, their food factory and their pharmacy. As Justice David Wong rightly pointed out in the case of ***Agi Anak Bungkong v Ladang Sawit Bintulu Sdn Bhd***[16]:

[16] [2010] 1 LNS 114.

> …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 (Article 13), to profess their religion (Article 11) and to livelihood (Article 5) might all be at stake.

I shall now discuss a few important cases involving the indigenous people and their constitutional rights in order to give a better understanding on how the Federal Constitution operates to safeguard their rights to property and livelihood.

The case of ***Director-General of Environment Quality v Kajing Tubek***[17], also known as the "Bakun Dam Case" decided in 1997 was a case worth discussing. In this case, some 10,000 natives of Sarawak were not given a chance to be heard before the Environmental Impact Assessment Report (EIA) 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 of the opportunity of being 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 of Sarawak had no substantive locus standi to challenge the environmental impact assessment (EIA) for a dam that would flood their traditional land and deprive them of livelihood. On the question of locus standi, the Court acknowledged the

[17] [1997] 3 MLJ 23.

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 Article 5(1) of the Constitution were satisfied.

With respect, I am 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 Article 5(1) must include and incorporate fundamental rules of natural justice and procedural fairness (see ***Re Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri***[18]). The fundamental rules of natural justice are the rule against bias (*nemo judex in causa sua*) and the right to be heard *(audi alteram partem*). In this case, the Court of Appeal, in applying the relevant Sarawak law, has disregarded the 10,000 natives their right to be heard, a fundamental rule of natural justice, when it effectively ruled that the Environmental Assessment Report can be approved first, and, if the public has any ideas, they can submit later. In my opinion, Article 5(1) requirement cannot be said to have been satisfied when the "law" in question effectively denied the natives' their right to be heard.

Whilst agreeing with the High Court, I am of the view that Article 5 of the Constitution demands the first EIA report to be held invalid and 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 Article 5 protection mere illusory.

Native land rights are a proprietary interest protected by Article 13 of the Federal Constitution, which provides for right to property. In the case of ***Adong bin Kuwau v Government of Johor***[19], 53,000 acres of ancestral lands belonging to the Jakun

[18] [1977] 1 LNS 110.
[19] [1997] 1 MLJ 418.

tribe in Johore were alienated by the Johore State Government to Singapore for the construction of a dam. In a demonstration of judicial activism, a wide interpretation was given to the term "property" in Article 13 by the High Court, and it was held that constitutional right to property and adequate compensation for its deprivation is applicable to indigenous land rights. In his judgment Mokhtar Sidin J said –

> 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, with the establishment of the United Nations of which the UN Charter guarantees certain fundamental rights. Native rights have been greatly expounded on by the Courts in Canada, New Zealand and Australia restating the colonial laws imposed on native rights over their lands. It is worth noting that these native peoples' traditional land rights are now firmly entrenched in countries that had and/or are still practicing the Torrens land law – namely, Canada, New Zealand and Australia – 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 by the case of ***Government of Selangor v Sagong Tasi***.[20] In fact, in ***Sagong Tasi***, 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 "customary community title" at common law, and that their property is constitutionally protected.

The same principles have been extended to the indigenous people of Sabah and Sarawak in the Federal Court case of ***Superintendent of Lands and Survey Miri***

[20] [2005] 4 CLJ 169.

Dvision and Anor v Madeli bin Salleh[21]. The Federal Court also acknowledged that the government's title is subjected to any native rights over such land.

In 2011, in the unreported case of ***Andawan bin Ansapi v PP***,[22] 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 their customary rights were guaranteed by right to life under Article 5(1) of the Federal Constitution.

The Major Blow: The Federal Court's judgment in *Tr Sandah*

In 2016, the Federal Court in ***TR Sandah*** delivered a major blow to Native Customary Rights of the indigenous Dayak people. The question before the Federal Court was whether native customs of *pemakai menoa* and *pulau galau* enable the Respondents to claim a valid native customary rights (NCR) over the land they claimed. *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 (I was the presiding judge at the Court of Appeal), 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.

[21] [2007] 2 MLJ 390.
[22] File K41-128 of 2010.

However, at the Federal Court, in the majority decision written by Justice Raus Sharif, it was held that there was no legislation in Sarawak that gives the force of law to the native people to claim native customary rights over virgin forests around their longhouses. The majority judgment held that these two customs do not fall within the definition of 'law' under Article 160(2) of the Federal Constitution. With respect, in my opinion, the majority judgment was wrong. The correct decision was rightly made by Justice Zainun Ali in her dissenting judgment. I respectfully urge all of you, especially law students, to read Justice Zainun's dissenting judgment because it was well written and a brilliant display of judicial activism; and reading her judgment allows us to understand how erroneous the majority judgment was. Justice Zainun holds that the definition of 'law' under Article 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)***[23] ('***Mabo (No. 2)***') and the English case of ***Tyson v Smith***[24] went on to rule that –

> Custom is a source of unwritten law.

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and that –

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[23] [202] 175 CLR 1.
[24] [1838] 112 E.R. 1265.

> 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, neither did any of the judges ever serve in any of 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**. Art. 8 states –

> ARTICLE VIII
>
> 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 paragraph 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 Borneon 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. I also believe 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 Article 160(2) is defined as including –

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written law, the common law insofar 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.

Ladies and gentlemen,

Custom in itself is a form of unwritten law. In my opinion, it is unreasonable to assume that a custom has no force of law merely because that custom is not codified. Even if a custom is not codified, it does not mean that a custom does not exist and it certainly does not mean that common law does not recognize that particular custom.

The existence of custom is a question of fact. In this case, there is adequate evidence to support the argument that *pemakai menoa* and *pulau galau* are customs recognized under common law, having the force of native customary rights. Justice

Zainun cited with approval what was said by Abdul Wahab JCA at the Court of Appeal in ***TR Sandah***[25] –

> 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 from and in response to changing circumstances and gain general acceptance. 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 recognized natives' right to forage and access virgin forest. In the High Court case of ***Adong bin Kuwau***, it was held and I quote:

> ... 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 my humble view that these customary rights are protected by Article 5 of the Federal Constitution as their right to life. The majority judgment in ***TR Sandah***

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

disregarded the spirit of Article 5. As a result of the judgment, the constitutional right to livelihood of the natives is adversely affected due to deforestation and logging activities. As I have mentioned earlier, the forest is the pharmacy and food factory to the natives; the majority judgement in ***TR Sandah*** rendered the protection offered by Article 5 illusory.

Judicial Activism Is the Key

Ladies and gentlemen,

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.

And 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. And I hope the above discussions do give you a vivid picture on how the Constitution should be interpreted in protecting the rights of the indigenous people.

In the case of ***Loh Kooi Choon v Government of Malaysia***,[26] Raja Azlan Shah FJ (as His Highness then was), opined and I quote:

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[26] [1977] 2 MLJ 187.

> 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 Article 8 of the Constitution. In fact, it is axiomatic that the Constitution exists precisely so that the minority cannot be subject to the tyranny of the majority. And I have said this in my judgement in the Court of Appeal case of ***Muhamad Juzaili bin Mohd Khamis & 2 Ors v State Government of Negeri Sembilan & 4 Ors***.[27]

The Constitution is not self-enforcing. Challenging the constitutionality of unjust, illegal, or unreasonable administrative actions against the marginalized 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 his judgment and determine the meaning of the Constitution. And "the Constitution is a living document that demands judges to breathe life into the provisions expressed in abstract statements of fundamental rights or liberties", this was mentioned by Justice Gopal Sri Ram in the Federal Court case of ***Lee Kwan Woh v PP***.[28]

In order to do so, judges, in my opinion, must exercise some form of judicial activism in order to uphold the rule of law and for the judiciary to effectively act as a check and balance to the Executive.

[27] [2015] 1 CLJ 954.
[28] [2009] 5 CLJ 631.

Judges must take a liberal and holistic approach and not to adopt a view too simplistic in interpreting Constitutional provisions, in ensuring that the rights of the minorities are safeguarded. Allow me to end my lecture by sharing what an activist judge should do in protecting minority's rights; and this is a small paragraph of what I wrote in my article in 2012, entitled: "**Judicial Activism: The Way to Go**"[29].

> "The activist judge (or court) 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. He must acknowledge that he must not cross the line. Yet the parameters within which he is to operate are never clear. All that he has to guide him in his difficult task is the statutory provision in question and the Constitution, his judicial experience, his understanding of broad principles of justice, and his perception of noble values. And in high profile cases involving the constitution, he may even be expected to be both 'philosopher and king'"

Thank you for listening.

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[29] Hishamudin Yunus, 'Judicial Activism – The Way to Go' [2012] 5 CLJ (A) ix.