

Column - Need for an enlightened judiciary

The Sun Daily

05 February 2017

OF late we have heard a ratcheting up of proposals to fortify our body politic – by amending the Federal Constitution. The outgoing chief justice proposes that we amend the constitution to entrench the right to a clean and healthy environment. Several NGOs also clamour for the inclusion of the tenets of the Rukun Negara as a preamble to our constitution.

All very laudable. And certainly well-meant, of course. These beneficent add-ons cannot but help strengthen the protection of the environment, the rule of law, rights, preserve the integrity of institutions and keep unbridled power in check.

The objective is to ensure that new laws are shaped – and existing laws reshaped – to put into effect the thrust of these changes; and by which the country's governance will be adjudged. And that the courts, as the final arbiter when there is a contestation between the citizenry and the executive, will implement these accordingly.

This is where the rub lies. There are already sufficient provisions in our laws – written laws passed by Parliament, the common law (pronounced by court decisions) and the custom or usage of our natives (the orang asal of Sarawak and Sabah; and the orang asli of Peninsular Malaysia) – to achieve the same objectives.

The fundamental constitutional right to a clean and healthy environment was laid down as long ago as 1997 by the Court of Appeal in *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan*. The court interpreted the fundamental right to life in Article 5 of the constitution to incorporate all facets that are an integral part of life itself and those matters which form the quality of life. This generous interpretation extended the constitutional guarantee to include the right to a healthy environment – so that people can enjoy life meaningfully.

This outcome was achieved when there was no express constitutional or statutory provision on the right to a healthy environment. This is a binding decision that has the force of law – derived from an expansive and dynamic interpretation of the constitution.

This perspective was reinforced by the later Bakun Dam case (although the final Appeals Court decision remains a major blot on our environmental jurisprudence).

These appellate courts' pro-environment pronouncements were anchored on judicially charted waters. The highest courts in other jurisdictions – India, Australia, Canada and many others – have established such rights from sparse, or no, explicit provisions. The Indian Supreme Court even reached into legal history – William Blackstone's 1876 Commentaries on the Law of England – to demonstrate the immemorial existence of such a right to a clean environment. It declared that the source of the right to fresh air, clean water and pollution-free environment was the inalienable common law right to a clean environment.

But this development – incorporating the right to a clean environment as a constitutional imperative – was reversed by a subsequent Federal Court decision Sugumaran on rather vacuous grounds.

So it's all about an enlightened judiciary.

Similarly, out of the Directive Principles of the Indian Constitution – encapsulated broadly in our Rukun Negara – the Indian courts have birthed a plethora of rights. This, despite a cautionary provision (Article 37) that these directive principles are not binding in the interpretation of the constitution. Again, the magic interpretative wand of an enlightened judiciary breathed contemporary life into the Indian Constitution.

Our constitution, formulated by the Reid Commission in 1957, could not possibly have considered the impact of the environment on the lives of its citizens. Environment was then off the radar of policymakers. British prime minister Margaret Thatcher, once tagged those who expressed environmental concerns as "greeny loonies" bent on obstructing development. Now there is a palpable realisation of the need to address the deleterious impacts of a degraded environment, such as climate change; and the danger of disregarding other social values.

So what is of crucial importance is the need for a dynamic interpretation of the constitution's broad and general terms to give it contemporary life – taking into account

the complexity of modern commercial, economic, social and political activities and realities.

Alas, our apex judiciary has increasingly signalled a narrow and static approach to the interpretation of the constitution and related issues. For example, recently it overruled an appellate court decision which sanctioned only "reasonable" restrictions of fundamental constitutional rights. The Federal Court said that it was not for the courts to ascertain what was (or was not) reasonable. This based on an observation of one member of the Reid Commission made in 1957! There are numerous other examples – which will needlessly overcrowd the limited space of this column.

Make no mistake. I applaud the relentless efforts by civil society and the CJ in advancing the cause of the environment and other social concerns. My simple point is that while it may be a necessary step, it is not a sufficient one. One more step is needed so that these proposals – once embedded – are insulated from being thwarted. By an enlightened judiciary. This will restore our long-lost golden age of justice.

This vision may yet materialise – given the direction of several recent promising Court of Appeal judgments.

As the late Supreme Court luminary, Justice Eusoffe Abdoolcader observed, in a landmark case on the right of citizens to bring an action involving diffused rights (since overturned yet again by another Supreme Court):

" ... with increased and increasing civic-consciousness and appreciation of rights and fundamental values in the citizenry, (the law's pace) must strive to be relevant if it is to perform its function of peaceful ordering of the relations between and among persons in society, and between and among persons and government at various levels."

Gurdial, a former law professor, is humbled by the discernible signs of the higher judiciary to resurrect the golden age of justice. Comments: letters@thesundaily.com

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