"Judiciary as The Principal Guardians of The Rule of Law"

(A discussion related to Sir John Laws' paper on Judicial Activism 16th August 2018, International Malaysia Law Conference 2018)

By

JUSTICE DATUK DR. HAJI HAMID SULTAN BIN ABU BACKER

JUDGE, COURT OF APPEAL, MALAYSIA

Assalamualaikum warrahmatullahi wabarakatuh, salam sejahtera and good afternoon.

Honourable and Distinguished Speakers, Judges, Jurists, Ladies and Gentlemen,

It is my pleasure and honour to share my thoughts with you on the subject related to judicial activism. The term 'judicial activism' is indeed an oxymoron. Sir John Laws himself has described the phrase as being "ambiguous".

Be it Judicial 'Activism' or 'Passivism' or Dynamism' it all depends on the Oath of Office of a Judge. I will say the following:

I. A Malaysian Judge by his Oath of Office is the Supreme Policeman and Custodian of the Rule of Law, the Federal Constitution as well as the Constitutional Functionaries.

II. Political Rowdyism + Judicial Passivism = Corruption and/or Kleptocracy and/or Insolvency of the State.

III. Judicial Dynamism will arrest Political Rowdyism as well as Judicial Passivism and will also ensure an oasis like Malaysia is not turned into a desert.

IV. Meanings:

a) Passivism- Not acting as per the Oath of Office.

b) Dynamism- Acting as per the Oath of Office.

c) Rowdyism- Acting in breach of the Rule of Law as well as the Federal Constitution.

I have read the article on Judicial Activism by Sir John Laws. In my view it has little or of no relevance to judges who have taken a Constitutional Oath to preserve, protect and defend the Constitution, like that of India or Malaysia.

England is a country which is well known for Parliamentary Supremacy and judges take oath to be subservient to Parliament and/or its laws. The concept of parliamentary supremacy works well in civilized nation where political rowdyism or judicial rowdyism may not exist. The judges there need not be judicial activists or they can afford to restrain from doing so. It will be sufficient to address problematic issues by just making *obiter* or *en passant* statement to enable the law makers as well as public to pave way for legislative amendments. When the British gave independence to India and Malaysia, our founding fathers of our Constitution knew very well the concept of Parliamentary Supremacy will not work and opted for

'Constitutional Supremacy'. India and Malaysia is a country where judges take oath to be subservient to the Constitution and not Parliament. Hence, the distinction in jurisprudence in the application of the Rule of Law is not one related to an apple and an orange but a marble and a pumpkin.

English jurist who is not apprised with the Oath of Office of an Indian or Malaysian judge will tend to conclude some of the judgments in these countries display judicial activism.

In my view, far and large Malaysian judges in the last 30 or more years have become judicial passivist. That is to say, they may not lift their finger to protect, preserve and defend the constitutional rights of the public from executive manipulation of legislation or decision which are ultra vires the Constitution. This is so because the majority decision of the then Supreme Court had destroyed the concept of constitutional supremacy and also the concept of accountability, transparency and good governance, and decision had leaned towards the concept of parliamentary supremacy, opening the door to corruption as well as kleptocracy. [See Government of Malaysia v Lim Kit Siang [1988] 1 CLJ 219].

<u>No Activism in Malaysia.</u>

I can assure you that judges in Malaysia are not judicial activist. I have had the benefit of sitting in the coram of three of Malaysia's greatest judges who had always displayed judicial dynamism in all their judgments, namely Dato' Mah Weng Kwai, Dato' Mohamad Ariff Mohd Yusof (who is now the Speaker of Parliament), and Dato' Mohd Hishamudin Mohd Yunus. Because of their commitment to judicial dynamism it was no surprise for me when they were not elevated to the Federal Court. That is the price judges may have to pay for judicial dynamism. Many take the easy route to elevation,success,honorific titles,post retirement rewards etc. and become judicial passivist.Many of the judges including those coming from the Bar often advise me not to rock the boat – failing to realise that I am a Gandhi in a Nehru's jacket.

In reliance of the strength of my C.V., I can attest that all their judgments were according to constitutional Oath of Office. Their judgments had nothing to do with judicial activism. Equally one of our greatest lawyer, constitutional expert, judge, as well as giant in jurisprudence, Justice Datuk Seri Gopal Sri Ram who is here with us, also wrote judgments which had nothing to do with judicial activism.

Judicial Activism and English Judge

Some time back, a well-known English judge came to Malaysia to speak on the rule of law. His Lordship visited us at the Palace of Justice, Putrajaya and His Lordship went on to explain the development of law in England and at the end said that 'we are not

judicial activists like the Indian judges'. I posed a question to the learned judge and asked whether His Lordship was aware of the Oath of Office of a judge in India and Malaysia which is different from that of England. His Lordship said that he was not aware. My response *inter alia* was:

(a) Indian and Malaysian judges take Oath of Office to preserve, protect and defend the Constitution;

(b) By their oath, they are constitutionally bound to strike out legislation or constitutional amendment if it is ultra vires the Constitution or was arbitrarily enacted in breach of the Oath of Office of members of parliament.

(c) They have to strike out arbitrary decisions of executives.

(d) They have to even strike out policy decision of the executives if it is in breach of the Constitution.

(e) All the above constitutional acts by the Indian and Malaysian judges will be seen as judicial activism in England.

In addition, I said that:

(a) the rule of law as well as the role of the judge in respect of parliamentary supremacy and constitutional supremacy are different.

(b) In constitutional supremacy, the judges must protect fundamental rights of the public and the court is the constitutional guardian of the Rule of Law as well as the Constitution.

(c) The court is not a weaker arm of the Government but it is the supreme policing authority of the Constitution as well as the Constitutional functionaries.

(d) The judges need to demonstrate judicial dynamism to protect public interest inclusive of the poor, needy and the oppressed.

I immediately noticed there was a pin drop silence. It took some time to recover as the jurisprudence was spiking. However, His Lordship with all frankness responded by saying that 'I like the phrase judicial dynamism'.

I now come to wonder whether judges in England who sat at the Privy Council to hear decisions from Malaysia and similar countries were aware of the difference related to the Oath of Office and applied the right rule of law.

Constitutional Oath

It is well-known here that I have developed the constitutional oath jurisprudence. [See *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors* [2007] 5 MLJ 441[1]; *Nik Nazmi Nik Ahmad v PP* [2014] 4 CLJ 944[2]*; Nik Noorhafizi Nik Ibrahim & Ors v. PP* [2014] 2 CLJ 273[3]; *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 213]. It all started upon my appointment as a judge which was by way of a letter from HRH Yang Di Pertuan Agong. There was no other contract. The next was my Oath of Office. I checked the English and Indian books on Constitutional law to find out what are my roles as per my oath. Every author appears to have forgotten the fundamental basis of judges' role and sacrosanct Oath of Office in which the judge starts his judicial career. In India, instead of developing the constitutional oath jurisprudence which is simple and straight forward and which all laymen can understand, the judiciary by its own motion developed a

[1] Here I have said that the three pillars of the constitution, namely the executive, legislature and the judiciary are the foundation for the constitution. All members of these three pillars take an oath to protect the constitution. Expounding on this constitutional responsibility, I explained the consequence of ouster clauses in legislations as follows, "when any laws are made to exclude the final decision making process by the courts, they will tantamount to tinkering with one of the pillars of the constitution itself and thereby weaken the judiciary and this will also undermine the constitutional role of the courts. This per se is not permissible as it will result in the public being ruled by law and not by rule of law."

[2] I have said that Article 10 of the Federal Constitution does not permit penal sanction to be imposed on citizen's right to assemble peacefully and without arms. However, those who assemble and subsequently breach the law may be liable for criminal prosecution. It is a risk, those who assemble take.

[3] In this case, the appellant was convicted for being found at an assembly without a police license in the compound of the National Mosque in Kuala Lumpur in June 2001. In my dissenting judgment, I said, "The Constitution did not prohibit peaceful assembly." I have further stated that, "It is not permissible for the Superior Courts under the doctrine of Constitutional Supremacy to be the guardian of legislation and/or protectors of the executive action if the action is in breach of the constitution."

complicated concept what is often termed as basic structure jurisprudence, to protect the fundamental rights under the Constitution. [See *IC Golaknath v State of Punjab AIR* (1967) SC 1643; *Kesavananda Bharathi v State of Kerala* [1973] 4 SCC 225; *Sajjan Singh v. State of Rajasthan AIR* (1965) SC 845; *Shankari Prasad Singh Deo v Union of India* AIR (1951) SC 458]. Basic structure jurisprudence does not originate from the constitution. My concept on Oath of Office originates from the constitution and in consequence it is legitimate.

I first started developing the constitutional oath jurisprudence in the year 2007 in the case of *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors* [2007] 5 MLJ 441 and thereafter a number of historical judgments including in the case of *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157 as well as '*Teoh Beng Hock*' in *Teoh Meng Kee v PP* [2014] 7 CLJ 1034 in which Dato' Mah Weng Kwai and Dato' Ariff were Panel members and wrote separate judgments.

I perfected the constitutional oath jurisprudence in my dissenting judgment in the well-known case of '*Indira Gandhi*' in *Pathmanathan Krishnan v Indira Gandhi Mutho & other appeals* [2016] 1 CLJ 911, and I personally though that the judgment was my greatest gift to the Malaysian public in terms of the jurisprudence related to constitutional law, oath of office and the role of four pillars of the Federal Constitution. To my surprise, I was shocked when I got into trouble with a top judge in the judiciary. Immediately, after the

judgment was released to the public, a top judge called up the entire coram and severely reprimanded me alleging *inter alia* of judicial activism and not only that but he started throughing tantrums at me in an uncivilised manner. I stood my ground. My response to that top judge was that I do not have to defend my judgment and I will not be cowed to act against my Oath of Office. This incident created a long-term strained relationship with that judge and many more.

After that case, I was not surprised when I was not assigned or empaneled to hear cases related to the Federal Constitution and public interest matters. However, I managed to raise the constitutional oath jurisprudence in some of the civil and commercial cases as well. There are two recent cases worth mentioning. They are *Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd* [2018] 5 AMR 349 (my dissenting judgment) and *La Kaffa International Co. Ltd v Loob Holding Sdn Bhd* [2018] 5 AMR 242 a majority decision.

I invite the participants to read all these three cases and decide for yourself, whether as per my Oath of Office indeed a case for judicial activism can be made out.

Conclusion

I take a strong view that without a judiciary committed to Judicial Dynamism, the Rule of Law will be meaningless and corruption as well as kleptocracy cannot be arrested.

I am now extremely inspired by our Prime Minister Tun Dr. Mahathir Mohamad who to me is a political, medical and religious miracle. To secure political power, Tun with other Political Colleagues have promised a true change with a view to deliver a New Malaysia. I only hope and pray for myself and all Malaysians, with the sacrosanct and unique elixir of youth endowed by the Almighty to our Prime Minister that Tun be blessed with a 'Lion Heart' to bring a miraculous change to our judiciary which is perceived to be impoverished.

To the members of the Malaysian Bar, I wish to say:
"whether in politics or judiciary,' 'bad habits die hard'. Cosmetic changes to the judiciary may not be a constitutional solution to a judiciary which is perceived to have demonstrated judicial interference as well as Judicial Rowdyism. On the face of such perceived allegations it will be prudent for the Bar Council to move a resolution for the setting up of a Royal Commission to once and for all address these negative perceptions that are or has afflicted the judiciary. The ultimate aim must be to restore public confidence in the institution! This will augur well for judges whose decision will be scrutinized on its issues rather than on other perceived connotations beyond the realm of the Court room.

On a firmer note - I do not support Judicial Activism. I subscribe to Judicial Dynamism. In addition and notwithstanding that I have a large fellowship in the Malaysian Bar -when writing judgments I don't have any friends or enemies' and all my judgments are conscious judgments subscribing to my oath of office.

On a personal note I like to place on record that I have been greatly affected by the debate related to judicial activism, passivism and dynamism in the judiciary itself. I am continuously being harassed for some of my decisions directly or indirectly. If a royal commission is appointed I will gladly give my reasons.

On a serious note I like to be remembered not as any Hamid but Justice Hamid Sultan bin Abu Backer, who served the Malaysian Judiciary without Fear or Favour with meritocracy, integrity and also gumption, displaying Judicial Dynamism at the fullest.

On a lighter note – I went to do law in England at the age of 28. Until then I was a restaurateur and a master cook. I have a track record as a chief cook preparing briyani for 10 thousand people. You can have a cook in the judiciary, but New Malaysia cannot afford to have intellectually dishonest, morally corrupt and judicially incompetent judges to uphold the rule of law. The office of the judge is 'sacrosanct'. This what the Holy Quran says, I am sure the Bible, the Vedas and other religious text will say the same. [See 'Syariah Law, Administration of Justice and the Federal Constitution' by Hamid Abu Backer – Bar Council Journal 'INSAF']. I now challenge my good

friends George Varughese - President and Steven Thiru - Ex-President of the Malaysia Bar, to propose a resolution at the Malaysian Bar AGM to say that I am intellectually dishonest, morally corrupt and judicially incompetent judge. If the motion succeeds, I will stop writing Janab law book Series and start immediately a chain restaurant in the name of 'Janab's Briyani House'. Hopefully, with the help of Dato' Ariff, I will be able to convince Tun Mahathir, to officiate the launch at Parliament House itself.

Wake up Malaysian Bar! Do your statutory duty under S.42 of the Legal Profession Act without fear or favour to 'Uphold the Rule of Law'. It is Now or Never.

Thank you.

Wabillahitaufiq walhidayah wassalamualaikum warrahmatullahi wabarakatuh.

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