

A **KHALIQ MEHTAB MOHD ISHAQ & ANOR v. DEWAN**
UNDANGAN NEGERI PULAU PINANG & ANOR
HIGH COURT MALAYA, PULAU PINANG
AZIZAN MD ARSHAD JC
B [ORIGINATING SUMMONS NO: PA-24NCvC-709-10-2020]
12 APRIL 2022

C **Abstract** – *The constitutional question sought to be referred to the Federal Court ie, whether art. 14A of the State Constitution of Penang was void for being inconsistent with art. 10(c) of the Federal Constitution ('FC'), did not only concern art. 10(1)(c) of the FC but also an interpretation of arts. 10(2)(c), 48(6), 71(4), Part 1 in the Eighth Schedule and basic foundational principles in the FC and State Constitution. A validity of a law is being challenged on the ground that the State Legislative Assembly had legislated on a matter on which it had no power to make laws. The constitutional question sought to be referred have a direct bearing to the matter of dispute and the decision of the Federal Court has the effect of finality. The basic requirements of s. 84 of the Courts of Judicature Act 1964 and art. 128 of the Federal Constitution were deemed fulfilled.*

E **CONSTITUTIONAL LAW:** *Legislation – Constitutionality – Constitutional issues – Referring question of law to Federal Court – Whether art. 14A of State Constitution of Penang void for being inconsistent with art. 10(c) of Federal Constitution – Challenge of validity of law – Whether constitutional question sought to be referred have direct bearing on matter of dispute – Whether requirements of s. 84 of Courts of Judicature Act 1964 and art. 128 of Federal Constitution fulfilled*

F **CONSTITUTIONAL LAW:** *Courts – Federal Court – Constitutional issues – Referring question of law to Federal Court – Whether art. 14A of State Constitution of Penang void for being inconsistent with art. 10(c) of Federal Constitution – Challenge of validity of law – Whether constitutional question sought to be referred have direct bearing on matter of dispute – Whether requirements of s. 84 of Courts of Judicature Act 1964 and art. 128 of Federal Constitution fulfilled*

G The first plaintiff, ADUN for Bertam, and the second plaintiff, ADUN for
H Teluk Bahang, filed the originating summons ('OS') to seek a declaration that
art. 14A of the Penang State Constitution was null and void under art. 4(1)
of the Federal Constitution ('FC') because it conflicted with art. 10(c) of the
FC. They also filed applications for an injunction to stop the State from
I tabling a motion to impose the anti-hopping law and force them to vacate
their seats, which was granted. Subsequently, the defendants were allowed
to refer a question on law to the Federal Court to decide on the constitutionality

of the State's anti-hopping law and to determine whether art. 14A(1) of the State of Penang (Amendment) Enactment 2012 was void as it was against and/or inconsistent with art. 10(1)(c) of the FC on the right to freedom of association. Both parties were not challenging the power of the State to amend the State Constitution but whether that amendment must be consistent with the FC. The background facts showed that the plaintiffs were and are still members of Parti Pribumi Bersatu Malaysia ('Bersatu'). During the 14th General Elections ('14th GE'), PKR, Bersatu, Democratic Action Party and Parti Amanah Negara contested in the election as a coalition called Pakatan Harapan ('PH'). All PH candidates therefore contested using the PKR logo, including the plaintiffs from Bersatu. The plaintiffs were elected into the Penang State Legislative Assembly ('PSLA') during the 14th GE. PH won the 14th GE and also won the majority of seats in the PSLA and formed the State Government of Penang. However, the Federal Government led by PH subsequently collapsed and the new Prime Minister formed a new coalition of political parties consisting of Bersatu, Barisan Nasional and Parti Islam Se-Malaysia known as Perikatan Nasional ('PN'). Bersatu left PH to join PN. The plaintiffs were also in the opposition bloc of the PSLA as their political party, Bersatu, left PH to join PN. The second defendant introduced a motion pursuant to art. 14A during the PSLA's meeting to have the plaintiffs' seats deemed vacated and consequently for by-elections to be held ('motion'). The basis for the motion was (i) all the plaintiffs contested in the 14th GE under the PKR logo and under the PH coalition; (ii) notwithstanding the change in the Federal Government, the State Government for Penang remained as at 2018; (iii) although the plaintiffs did not leave or resign from Bersatu, they withdrew their support for the Penang State Government. The defendants contended that these facts engaged art. 14A and that the motion was justified in fact and law. The plaintiffs contended that the motion was void by reason of s. 14A being unconstitutional. The defendants filed an application to refer the following question to the Federal Court: whether art. 14A of the State Constitution of Penang was void for being inconsistent with art. 10(c) of the FC. The plaintiffs objected to this application on the basis that (i) there was no separate and distinct constitutional issue that arose in this case; and (ii) there was nothing ambiguous or vague about art. 10(1)(c) of the FC. The plaintiffs submitted that this case could be decided by the High Court based on the case of *Nordin Salleh v. Dewan Undangan Negeri Kelantan* ('*Nordin Salleh*') and all the defendants failed to pass the threshold of s. 84 of the Courts of Judicature Act 1964 ('CJA'). The plaintiffs argued that in *Nordin Salleh's* case, the Supreme Court had decided that the law for exercising a fundamental right was within the power of Parliament. It was the defendant's submission that in the case of *Nordin Salleh*, the Supreme Court considered and recognised the position of Parliament to amend law but did not consider the position that Parliament could not do the same for the State Constitution.

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A Held (allowing encl. 19):

(1) For a referral to be made under s. 84 of the CJA, the following basic requirements must be satisfied, namely (i) the question to be referred must arise in any proceedings in any High Court; (ii) the question related to the effect of any provision of the Constitution; and (iii) the High Court Judge should settle any questions of fact as may be necessary to assist the Federal Court in deciding the question and to the speedy and economical final determination of the proceedings. (para 11)

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(2) In the context of all the matters raised, questions arose as to whether *Nordin Salleh* should be treated as representing the constitutional position on the subject at hand. It was apparent that the landscape of constitutional law had changed significantly since the decision in *Nordin Salleh* and the Federal Court would be the best forum to resolve this. This court disagreed with the arguments by the plaintiffs that there were no difficult issues posed by this disputes that were irreconcilable with the decision of the Federal Court in *Nordin Salleh*. (para 23)

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(3) This was a case where the validity of a law is challenged on the ground that the State Legislative Assembly had legislated on a matter on which it had no power to make laws. The constitutional question sought to be referred have a direct bearing to the matter of dispute and the decision of the Federal Court has the effect of finality. (para 24)

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(4) The question did not only concern art. 10(1)(c) of the FC but also an interpretation of arts. 10(2)(c), 48(6), 71(4), Part 1 in the Eighth Schedule and basic foundational principles in the FC and State Constitution which were not fully argued in *Nordin Salleh* at that material time and there had been significant constitutional law developments since the decision in *Nordin Salleh*. Therefore, the basic requirements of s. 84 of the CJA 1964 and art. 128 of the FC had been fulfilled by the defendants. (paras 24 & 25)

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G Case(s) referred to:

Abdul Karim Abdul Ghani v. The Legislative Assembly Of The State Of Sabah [1988] 1 CLJ 460; [1988] 1 CLJ (Rep) 1 SC (*refd*)

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC (*refd*)

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Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor [2020] 3 CLJ 593 FC (*refd*)

Nordin Salleh & Anor v. Dewan Undangan Negeri Kelantan & Ors [1992] 1 CLJ 463; [1992] 3 CLJ (Rep) 135 HC (*refd*)

Wee Choo Keong v. Lee Chong Meng & Anor [1996] 3 CLJ 508 CA (*refd*)

Legislation referred to:

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Constitution of the State of Penang, art. 14A(1)

Courts of Judicature Act 1964, s. 84

Federal Constitution, arts. 4(1), 10(1)(c), (2)(c), 48(6), 71(4), 74(4), 128, Eight Schedule Part 1

For the applicants - DP Naban, Rosli Dahlan, Zunurajriya Muhamad Zukri & Thenesh Anbalagan (PDK); M/s Azlina Mehtab & Assocs A
For the respondents - Malik Imtiaz, Surendra Ananth, Khoo Suk Chyi & Wong Ming Yen; M/s Surendra Ananth
Reported by Suhainah Wahiduddin B

JUDGMENT

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Azizan Md Arshad JC:

Introduction

[1] The first plaintiff (ADUN for Bertam) and the second plaintiff (ADUN for Teluk Bahang) filed the originating summons (OS) to seek a declaration that art. 14A of the Constitution of the State of Penang is null and void under art. 4(1) of the Federal Constitution because it conflicts with art. 10(c) of the Federal Constitution. The prayers sought in the OS are as follows: C

1. Satu deklarası diberi bahawa Fasal 14A Perlembagaan Negeri Pulau Pinang adalah bercanggah dengan Fasal 10(1)(c) Perlembagaan Persekutuan dan adalah tidak sah; D
2. Satu deklarası bahawa sebarang usul yang diluluskan oleh Defendan Pertama yang berupa untuk mengosongkan kerusi Plaintiff-plaintif sebagai Ahli Dewan Undangan Negeri (ADUN) bagi bahagian pilihan raya Bertam (N2) dan Telok Bahang (N40) menurut Fasal 14A Perlembagaan Negeri Pulau Pinang adalah tidak sah dan terbatal; E
3. Oleh demikian, Defendan Pertama dihalang daripada membentangkan, mencadangkan, membahas, mengundi dan/atau meluluskan sebarang usul yang ingin dibentangkan, dicadangkan, dibahas dan diluluskan menurut Fasal 14A Perlembagaan Negeri Pulau Pinang; F
4. Oleh demikian, Defendan Kedua dihalang dari membenarkan, memberi persetujuan, bersetuju dan/atau sebaliknya mengizinkan pembentangan, cadangan, pembahasan, undian dan/atau kelulusan sebarang usul yang dibuat dibawah Fasal 14A Perlembagaan Negeri Pulau Pinang dalam Dewan Undangan Negeri Pulau Pinang; G
5. Satu deklarası dalam keadaan dimana sebuah usul dibawah Perkara 14A Perlembagaan Negeri Pulau Pinang telah diluluskan oleh Defendan Pertama, dan akibatnya kerusi-kerusi Ahli Dewan Undangan Negeri (ADUN) Plaintiff-plaintif dikosongkan, Plaintiff-plaintif berhak untuk dikembalikan semula sebagai Ahli Dewan Undangan Negeri (ADUN) bagi kerusi Dewan Undangan Negeri Bertam (N2) dan Telok Bahang (N40) masing-masing dan untuk memohon relif-relif lanjut dan seterusnya; H I

- A 6. Apa-apa relif lain diberi dan/atau Perintah lain diberi yang dianggap oleh Mahkamah yang Mulia ini sebagai sesuai dan adil dalam keadaan-keadaan tersebut; dan
7. Bahawa kos bagi tindakan ini disediakan sebagaimana yang difikirkan sesuai dan adil oleh Mahkamah yang Mulia ini.
- B They also filed an application for an injunction to stop the State from tabling a motion to impose the anti-hopping law and force him to vacate their seats. An injunction was granted on 27 August 2021 as follows:
- C 1. Defendan-Defendan berakujanji untuk tidak membentangkan Usul Pengisytiharan Kekosongan Kerusi Dewan Undangan Negeri Pulau Pinang melibatkan Plaintiff-Plaintif dalam sebarang sidang Mesyuarat Dewan Undangan Negeri Pulau Pinang sehingga pendengaran dan pelupusan muktamad Saman Pemula bertarikh 7 Oktober 2020 (“Lampiran 1”);
- D 2. Notis Permohonan bertarikh 20 Ogos 2021 (“Lampiran 35”) ditarik balik; dan
3. Tiada Perintah terhadap kos.

E [2] On 12 April 2022, the defendants were allowed to refer a question on law to the Federal Court to decide on the constitutionality of the State’s anti-hopping law and to determine whether art. 14A(1) of the Constitution of the State of Penang (Amendment) Enactment 2012 is void as it was against and/or inconsistent with art. 10(1)(c) of the Federal Constitution on the right to freedom of association.

F Under art. 14A(1) of the Constitution of the State of Penang (Amendment) Enactment 2012, a member of the assembly shall vacate his seat if:

- (i) having been elected as a candidate of a political party, he resigns or is expelled from or ceases for any reason whatsoever to be a member of that party; or
- G (ii) having been elected as an independent but later joins a political party.

However, our art. 10(1)(c) of Federal Constitution guarantees that all Malaysians have the freedom of association.

H [3] Both parties are not challenging the power of the State to amend the State Constitution but whether that amendment must be in consistent with the Federal Constitution. The OS is still pending before this court. The parties will be referred to as they were in the High Court.

Background Facts

The Undisputed Facts

I [4] The plaintiffs were and still are members of Parti Pribumi Bersatu Malaysia (“Bersatu”). During the 14th General Elections in 2018 (the “14th GE”), PKR, Bersatu, Democratic Action Party and Parti Amanah Negara

contested in the election as a coalition called Pakatan Harapan (“PH”). However, the PH coalition was not registered under the Societies Act 1966 at that material time. All PH candidates therefore contested using the PKR logo, including the plaintiffs from Bersatu. A

[5] The plaintiffs were elected into the Penang State Legislative Assembly (“PSLA”) during the 14th GE. PH won the 14th GE and also won the majority of seats in the PSLA. PH formed the State Government of Penang. B

[6] In February 2020, the Federal Government led by PH collapsed. Tun Mahathir Mohamad resigned as Prime Minister. Tan Sri Muhyiddin Yassin was appointed as the new Prime Minister. He formed a new coalition of political parties consisting of Bersatu, Barisan Nasional and Parti Islam Se-Malaysia. This coalition is known as Perikatan Nasional (“PN”). Bersatu left PH to join PN. C

[7] The plaintiffs are also in the opposition bloc of the PSLA as their political party, Bersatu, left PH to join PN. The second defendant introduced a motion pursuant to art. 14A during the PSLA’s meeting on 12 October 2020 to have the plaintiffs’ seats deemed vacated and, consequently, for by-elections to be held (the “motion”). D

[8] The basis for the motion was as follows:

- (i) All the plaintiffs contested in the 14th GE under the PKR logo and under the PH coalition. E
- (ii) Notwithstanding the change in the Federal Government, the State Government for Penang remained as at 2018.
- (iii) Although the plaintiffs did not leave or resign from Bersatu, they withdrew their support for the Penang State Government. The defendants contend that these facts engaged art. 14A and that the motion was justified in fact and law. F

[9] The plaintiffs contend that the motion is void by reason of art. 14A being unconstitutional. G

[10] The defendants had filed an application to refer the following question to the Federal Court:

Whether the Article 14A of the State Constitution of Penang is void for being inconsistent with the Article 10(c) of the Federal Constitution. H

The plaintiffs objected to this application on the basis that:

- (i) there is no separate and distinct constitutional issue that arises in this case; and
- (ii) there is nothing ambiguous or vague about art. 10(1)(c) of the FC. I

- A [11] For a referral to be made under s. 84 of the CJA 1964, the following basic requirements must be satisfied, namely:
- (i) the question to be referred must arise in any proceedings in any High Court;
 - B (ii) the question relates to the effect of any provision of the Constitution; and
 - (iii) the High Court judge should settle any questions of fact as may be necessary to assist the Federal Court in deciding the question and to the speedy and economical final determination of the proceedings.
- C [12] In *Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor* [2020] 3 CLJ 593 Nallini Pathmanathan FCJ (majority) held that:
- [13] The general scheme of the FC is to empower all courts to interpret the constitution (*Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors* [2018] 4 CLJ 1; [2018] 3 MLJ 417 at [35]-[36]). The power to interpret constitutional provisions is not exclusive to the Federal Court.
- D “The Federal Court is not a constitutional court, but as the final court of 614 [2020] 3 CLJ appeal on all questions of law, is the final arbiter on the meaning of constitutional provisions” (*A Harding, Law, Government and the Constitution in Malaysia* (Kuala Lumpur: Malayan Law Journal, 1996) at p 138).
- E [14] The jurisdiction of the Federal Court is of four kinds: appellate jurisdiction, original jurisdiction under art. 128(1) FC, referral jurisdiction under art. 128(2), and advisory jurisdiction under art. 130 (*Assa Singh v. Menteri Besar, Johore* [1968] 1 LNS 9; [1969] 2 MLJ 30 at 36; *Kulasingam v. PP* [1978] 1 LNS 83; [1978] 2 MLJ 243 at 244). The exclusive original
- F jurisdiction of the Federal Court is confined only to Federal-State disputes, disputes between States, and cases where the validity of a law is challenged on the ground that Parliament or a State Legislative Assembly had legislated on a matter on which it had no power to make laws. All other questions of constitutionality are within the jurisdiction of the High Court (*Gin Poh Holdings Sdn Bhd (supra)* at [36]).
- G [15] The limits of the exclusive original jurisdiction of the Federal Court are strictly construed. This is to preserve the role of the Federal Court as a final court of appeal on constitutional issues; “to extend the exclusive original jurisdiction of the Federal Court to matters which are not expressly provided by the Constitution would apart from anything else, deprive aggrieved litigants of their right of appeal to the highest court in the land”. (*Rethana M Rajasigamoney v. The Government of Malaysia* [1984] CLJ 352; [1984] 1 CLJ (Rep) 323; [1984] 2 MLJ 52 at 54).
- H [16] Under the constitutional scheme, therefore, the Federal Court is generally a court of last resort for all constitutional questions. It is only in a narrow category of exceptional cases – those expressly stipulated in
- I art. 128(1) FC – that such questions must be determined by the Federal Court at first instance.

[13] In the same case, Azahar Mohamed CJ (Malaya) held that: A

In our Federal system of Government, only the FC is supreme; Parliament and the States Legislatures are subject to the FC. ... There are certain subjects that can only be legislated upon by Parliament, some subjects only by the State Legislatures, and others by both Parliament and State Legislatures. ... Parliament and the State Legislatures' legislative powers and authority to make laws are therefore derived explicitly from the FC and both the Legislatures must not exceed their constitutional authority to legislate. B

[14] Article 128 of the FC, jurisdiction of Federal Court states as follows:

(i) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction: C

(a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and D

(b) ...

[15] In the case of *Wee Choo Keong v. Lee Chong Meng & Anor* [1996] 3 CLJ 508 Siti Norma Yaakob JCA held that: E

Before exercising his discretion under Section 84 Courts of Judicature Act 1964, the Judge must be satisfied that the constitutional question sought to be referred must have a direct bearing to the matter of dispute before him and that the decision of the Federal Court must have the effect of bringing the determination of the dispute before him to a speedy and economical end. F

[16] Abdul Malek Ahmad JCA in *Wee Choo Keong (supra)* held that:

The phrase "the effect of any provision" in s. 84 of the Courts of Judicature Act, 1964 means a constitutional provision that has left room for doubt in the sense that it is vague or ambiguous which necessitates a proper construction of its interpretation from the Federal Court. This apart, there must also be a difficult issue or issues posed by the dispute that are irreconcilable with a constitutional provision and it is only in this situation that reference of a constitutional question becomes necessary. G H

[17] According to the defendants, the case of *Nordin Salleh & Anor v. Dewan Undangan Negeri Kelantan & Ors* [1992] 1 CLJ 463; [1992] 3 CLJ (Rep) 135; [1992] MLJ 697 should be argued further. In that case, the amendment to the Kelantan Constitution "a State law, by Article XXXIA, seeks to impose a restriction on the fundamental right of a member of the Legislature to form associations which, of course includes the right to dissociate, and it operates by way of disqualification, once the member exercises that right." I

A [18] The defendants submit that in the case of *Nordin Salleh*, the Supreme Court considered and recognised the position the Parliament to amend law but did not go to consider the position that the Parliament cannot do the same for the State Constitution.

B [19] The plaintiffs submit that this case can be decided by the High Court based on *Nordin's* case and all the defendants have failed to pass the threshold of s. 84 of the CJA 1964. The plaintiffs argue that in *Nordin's* case, the Supreme Court has decided that the law for exercising a fundamental right is within the power of Parliament. The Supreme Court held that:

C In all the circumstances, the learned Judge has arrived at the unanimous conclusion that the direct and inevitable consequences of Article XXX1A of the Kelantan State Constitution which is designed to enforce party discipline does impose a restriction on the exercise by members of the Legislature of their fundamental right of association guaranteed by Article 10(1)(c) of the Federal Constitution and that such restriction is not only
D protected by Article 10(1)(c) of the Federal Constitution but clearly does not fall within any of the grounds for disqualification specified under s. 6(1) of Part 1 to the Eighth Schedule to the Federal Constitution ...

E It is, in our view, inconceivable that a member of the Legislature can be penalised by any ordinary legislation for exercising a fundamental right which the Constitution expressly confers upon him subject to such restrictions as only Parliament may impose and that too on specified grounds, and on no other grounds.

F [20] By perusing their application, the defendants' argument is premised on the power of the state to enact a law on the qualification of the Member of the State Assembly (ADUN). If their argument is to be considered by this court, then the case of *Abdul Karim Abdul Ghani v. The Legislative Assembly Of The State Of Sabah* [1988] 1 CLJ 460; [1988] 1 CLJ (Rep) 1; [1988] 1 MLJ 171 should be referred and argued further at the Federal Court level. In *Abdul Karim*, the applicant applied for leave to commence proceedings for a declaration that the Constitution (Amendment) Enactment, 1986, of Sabah
G is invalid on the ground that the legislature of Sabah has no power to enact it. The declarations sought were as follows:

H (i) A declaration that the respondents are not empowered to make laws with respect to the matter of disqualification for membership of the Assembly as effected by The Constitution (Amendment) Enactment No. 3 of 1986.

I (ii) A declaration that The Constitution (Amendment) Enactment No. 3 of 1986 of the State of Sabah thereby effecting an amendment to The Constitution of the State of Sabah by addition of cl. 2(d) to art. 18 thereto is null and void and of no effect by reason of the respondent's incompetence to enact the same.

Hashim Yeop Sani SCJ held that:

There is no doubt in my mind that the subject of disqualification of a member of the Federal Parliament is a Federal subject. The subject of disqualification of a member of the Legislative Assembly of the State is a State subject. This is clearly put in paragraph 6 of the Eighth Schedule to the Federal Constitution being one of the essential provisions required by the Federal Constitution to be incorporated in the State Constitution. Disqualification in relation to membership of the legislature of the State is within the competency of the State legislature to enact is indeed recognised by Federal law in the Election (Conduct of Elections) Regulations 1981 where Regulation 7 thereof allows objection to nomination to be made on the ground, *inter alia*, that the candidate is disqualified from being a member under the provision of the Constitution of the State concerned in the case of an election to a State Legislative Assembly.

It is also obvious in the provision of paragraph 5 of the Eighth Schedule to the Constitution that disqualification is a subject within the competency of a State. Paragraph 5 reads as follows:

Every citizen of or over the age of twenty-one years who is resident in the State is qualified to be a member of the Legislative Assembly, unless he is disqualified for being a member by the Federal Constitution or this Constitution or by any such law as is mentioned in section 6 of the Eighth Schedule to the Federal Constitution.

Paragraph 5 has been carried as Article 16 of the Sabah Constitution word for word. The words “this Constitution” of course refer to the State Constitution of Sabah.

Finally, if the new provision is regarded as a provision for the tenure of seats of members of the State legislature then it is certainly a State matter clearly falling under Item 7 (machinery of State Government) of the State List in the Ninth Schedule to the Federal Constitution. Article 74(4) of the Federal Constitution reads:

Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

Reading Item 7 of the State List with Article 74(4) it is obviously within the power of a State legislature to enact a law in the nature of the new Article 18(2)(d) of the Sabah Constitution.

[21] The case of *Abdul Karim (supra)* was never argued (stand to be corrected) in the case of *Nordin Salleh (supra)*. The decision in the case of *Abdul Karim (supra)* that “if the tenure of seats of members of the state legislature is exclusively vested in the State Constitution then, it cannot be

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A taken to be limited by the Federal Constitution seems to be left unexplained in *Nordin Salleh*.” Therefore, this case should be determined directly at the Federal Court level. This court agrees with the arguments by learned counsel for the defendants.

[12] In *Datuk Seri Anwar Ibrahim (supra)* the Federal Court held that:

B ... the general rule is that the Federal Court does not entertain abstract, academic, or hypothetical questions. This was stated by Edgar Joseph Jr FCJ in *Datuk Syed Kechik Bin Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors And Another Application* [1999] 1 MLJ 257, who at p 264, observed as follows:

C Having said that, this court does not sit to decide abstract or academic or hypothetical questions of law regarding which the parties are not in dispute. Thus, in *Ainsbury v. Millington* [1987] 1 All ER 929 (refd), Lord Bridge said this (at pp 930-931):

D It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

[22] Learned counsel for the defendants argues that constitution, as a living document, must be interpreted by considering the realities of life. In *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766; [2011] 6 MLJ 297, Richard Malanjum CJSS said:

F [105] And perhaps it is opportune here to be reminded that ‘the courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of constitutional interpretation. They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression ‘life’ in art. 5(1) is given a broad and liberal meaning’ (see *Tan Tek Seng*).

H [23] This court also agrees with learned counsel for defendants’ submission that in the context of all the matters above, questions arise as to whether *Nordin Salleh* should be treated as representing the constitutional position on the subject at hand. It is apparent that the landscape of constitutional law has changed significantly since the decision in *Nordin Salleh* and the Federal Court would be the best forum to resolve this.

I This court disagrees with the arguments by the plaintiffs that there are no difficult issues posed by this disputes that are irreconcilable with the decision of the Federal Court in *Nordin Salleh*.

[24] In a nutshell, I am of the opinion that:

- (i) this is a case where the validity of a law is challenged on the ground that State Legislative Assembly had legislated on a matter on which it had no power to make laws;
- (ii) the constitutional question sought to be referred have a direct bearing to the matter of dispute and that the decision of the Federal Court has the effect of finality;
- (iii) in the case of *Nordin Salleh* the issue was on the fundamental right of association guaranteed by art. 10(1)(c) of the Federal Constitution, whereas in the case of *Abdul Karim*, the issue was on disqualification of a member of the Legislative Assembly of the State under art. 74(4) of the Federal Constitution; and
- (iv) the question does not only concern art. 10(1)(c) of the Federal Constitution but also an interpretation of arts. 10(2)(c), 48(6), 71(4), Part 1 in the Eighth Schedule and basic foundational principles in the Federal Constitution and State Constitution which did not fully argue in *Nordin Salleh* at that material time and there have been significant constitutional law developments since the decision in *Nordin Salleh*.

Conclusion

[25] Therefore, the basic requirements of s. 84 of the CJA 1964 and art. 128 of the Federal Constitution have been fulfilled by the defendants.

[26] For the above reasons, encl. 19 is allowed. No order as to costs.

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