

**A Khaliq Mehtab Mohd Ishaq & Anor v Dewan Undangan
Negeri Pulau Pinang & Anor**

B HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS
NO PA-24NCvC-709–10 OF 2020
AZIZAN MD ARSHAD JC
12 APRIL 2022

C *Constitutional Law — Legislation — Validity and constitutionality*
— *Constitution of State of Penang art 14A — Plaintiffs sought declaration that*
art 14A of the Constitution of State of Penang was null and void under art 4(1) of
the Federal Constitution ('the FC') because it conflicted with art 10(1)(c) of the FC
D — *Defendants applied to refer question of law to Federal Court — Whether*
requirements of s 84 of the Courts of Judicature Act 1964 and art 128 of the Federal
Constitution had been fulfilled

E The first plaintiff ie the Member of the State Assembly ('ADUN') for Bertam,
and the second plaintiff ie the ADUN for Teluk Bahang, were members of Parti
Pribumi Bersatu Malaysia ('Bersatu'). During the 14th General Elections in
2018 ('14th GE'), PKR, Bersatu, Democratic Action Party and Parti Amanah
Negara contested in the election as a coalition called Pakatan Harapan ('PH').
Since the PH coalition was not registered under the Societies Act 1966 at that
time, all PH candidates contested using the PKR logo, including the plaintiffs
F 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
G Bersatu, Barisan Nasional and Parti Islam Se-Malaysia known as Perikatan
Nasional ('PN'). The plaintiffs were in the opposition bloc of the PSLA as their
political party, Bersatu, left PH to join PN. The second defendant introduced
a motion to impose the anti-hopping law pursuant to art 14A of the
Constitution of the State of Penang and to have the plaintiffs' seats deemed
H vacated and consequently for by-elections to be held ('the motion'). The
plaintiffs contended that the motion was void by reason of art 14A of the
Constitution of the State of Penang being unconstitutional. The plaintiffs filed
an originating summons to seek a declaration that art 14A of the Constitution
of the State of Penang was null and void under art 4(1) of the Federal
I Constitution ('the FC') because it conflicted with art 10(1)(c) of the FC. They
also filed an application for an injunction to stop the State from tabling the
motion which was granted. Subsequently, the defendants had 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(1)(c) of the FC. The plaintiffs objected to the application on the basis that: (a) there was no separate and distinct constitutional issue that arose in this case; and (b) there was nothing ambiguous or vague about art 10(1)(c) of the FC. The defendants' submitted that in the case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 ('Nordin bin 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. The plaintiffs submitted that the defendants had failed to pass the threshold of s 84 of the Courts of Judicature Act 1964 ('the CJA'). The plaintiffs argued that in *Nordin bin Salleh's* case, the Supreme Court had decided that the law for exercising a fundamental right was within the power of Parliament.

Held, allowing encl 19 with no order as to costs:

- (1) In the context of all the matters raised, questions arose as to whether *Nordin bin 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 bin Salleh* and the Federal Court would be the best forum to resolve this. There were difficult issues posed by this disputes that were irreconcilable with the decision of the Federal Court in *Nordin bin Salleh*. This was a case where the validity of a law was 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 had a direct bearing to the matter of dispute and that the decision of the Federal Court had the effect of finality. 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 did not fully argue in *Nordin bin Salleh* at that material time and there had been significant constitutional law developments since the decision in *Nordin bin Salleh*. Therefore, the basic requirements of s 84 of the CJA 1964 and art 128 of the FC had been fulfilled by the defendants (see para 23–25).

[Bahasa Malaysia summary]

Plaintif pertama iaitu Ahli Dewan Undangan Negeri ('ADUN') Bertam, dan plaintiff kedua iaitu ADUN Teluk Bahang, adalah ahli Parti Pribumi Bersatu Malaysia ('Bersatu'). Semasa Pilihan Raya Umum ke-14 pada 2018 ('PRU ke-14'), PKR, Bersatu, Democratic Action Party dan Parti Amanah Negara bertanding dalam pilihan raya itu sebagai gabungan yang dipanggil Pakatan Harapan ('PH'). Memandangkan gabungan PH tidak didaftarkan di bawah Akta Pertubuhan 1966 ketika itu, semua calon PH bertanding menggunakan logo PKR termasuk plaintiff dari Bersatu. Plaintiff telah dipilih ke Dewan Undangan Negeri Pulau Pinang ('DUNPP') semasa PRU ke-14. PH

- A memenangi PRU ke-14 dan juga memenangi majoriti kerusi dalam DUNPP dan membentuk Kerajaan Negeri Pulau Pinang. Bagaimanapun, Kerajaan Persekutuan pimpinan PH kemudiannya tumbang dan Perdana Menteri baharu membentuk gabungan parti politik baharu yang terdiri daripada Bersatu, Barisan Nasional dan Parti Islam Se-Malaysia yang dikenali sebagai
- B Perikatan Nasional ('PN'). Plaintif berada dalam blok pembangkang DUNPP kerana parti politik mereka, Bersatu, meninggalkan PH untuk menyertai PN. Defendan kedua memperkenalkan usul untuk mengenakan undang-undang anti-lompat menurut perkara 14A Perlembagaan Negeri Pulau Pinang dan supaya kerusi plaintif disifatkan kosong dan seterusnya pilihan raya kecil
- C diadakan ('usul'). Plaintif-plaintif berhujah bahawa usul itu terbatal oleh kerana perkara 14A Perlembagaan Negeri Pulau Pinang adalah tidak berperlembagaan. Plaintif memfailkan saman pemula untuk mendapatkan pengisytiharan bahawa perkara 14A Perlembagaan Negeri Pulau Pinang adalah
- D terbatal dan tidak sah di bawah perkara 4(1) Perlembagaan Persekutuan ('PP') kerana ia bercanggah dengan perkara 10(1)(c) PP. Mereka juga memfailkan permohonan injunksi untuk menghalang Negeri daripada membentangkan usul yang diluluskan. Selepas itu, defendan telah memfailkan permohonan untuk merujuk soalan berikut kepada Mahkamah Persekutuan: sama ada
- E perkara 14A Perlembagaan Negeri Pulau Pinang adalah terbatal kerana tidak konsisten dengan perkara 10(1)(c) PP. Plaintif membantah permohonan itu atas dasar bahawa: (a) tiada isu perlembagaan yang berasingan dan berbeza yang timbul dalam kes ini; dan (b) tiada apa-apa yang samar atau kabur tentang
- F perkara 10(1)(c) PP. Defendan berhujah bahawa dalam kes *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 ('Nordin bin Salleh'), Mahkamah Agung menimbangkan dan mengiktiraf kedudukan Parlimen untuk meminda undang-undang tetapi tidak
- G pertimbangkan pendirian bahawa Parlimen tidak boleh melakukan perkara yang sama untuk Perlembagaan Negeri. Plaintif berhujah bahawa defendan telah gagal melepasi ambang s 84 Akta Mahkamah Kehakiman 1964 ('AMK'). Plaintif berhujah bahawa dalam kes *Nordin bin Salleh*, Mahkamah Agung telah memutuskan bahawa undang-undang untuk melaksanakan hak asasi adalah dalam kuasa Parlimen.
- H **Diputuskan**, membenarkan lampiran 19 tanpa perintah kos:
- I (1) Dalam konteks semua perkara yang dibangkitkan, persoalan timbul sama ada *Nordin bin Salleh* patut dianggap sebagai mewakili kedudukan perlembagaan mengenai perkara yang sedang dihadapi. Jelas sekali landskap undang-undang perlembagaan telah berubah dengan ketara sejak keputusan di *Nordin bin Salleh* dan Mahkamah Persekutuan akan menjadi forum terbaik untuk menyelesaikannya. Terdapat isu-isu sukar yang ditimbulkan oleh pertikaian ini yang tidak dapat diselaraskan dengan keputusan Mahkamah Persekutuan di *Nordin bin Salleh*. Ini adalah kes di mana kesahihan undang-undang dicabar atas alasan bahawa

Dewan Undangan Negeri telah menggubal sesuatu perkara yang tidak mempunyai kuasa untuk membuat undang-undang. Persoalan perlembagaan yang ingin dirujuk mempunyai kaitan langsung dengan perkara pertikaian dan keputusan Mahkamah Persekutuan mempunyai kesan muktamad. Soalan itu bukan sahaja melibatkan perkara 10(1)(c) PP tetapi juga tafsiran perkara 10(2)(c), 48(6), 71(4), Bahagian 1 dalam Jadual Kelapan dan asas prinsip dalam PP dan Perlembagaan Negeri yang tidak dihujah sepenuhnya di *Nordin bin Salleh* pada masa itu dan terdapat perkembangan undang-undang perlembagaan yang ketara sejak keputusan *Nordin bin Salleh*. Oleh itu, keperluan asas s 84 AMK dan perkara 128 PP telah dipenuhi oleh defendan (lihat perenggan 23–25).]

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Cases referred to

Abdul Karim bin Abdul Ghani v Legislative Assembly of Sabah [1988] 1 MLJ 171; [1988] 1 CLJ 460; [1988] 1 CLJ Rep 1, SC (refd)

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Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297; [2011] 8 CLJ 766, FC (refd)

Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2020] 4 MLJ 133; [2020] 3 CLJ 593, FC (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697; [1992] 1 CLJ 463; [1992] 3 CLJ Rep 135, SC (refd)

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Wee Choo Keong v Lee Chong Meng & Anor [1996] 3 MLJ 41; [1996] 3 CLJ 508, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 84

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Federal Constitution arts 4(1), 5(1), 10(1)(c), (2)(c), 48(6), 71(4), 74(4), 128, 128(1), (2), Eighth Schedule, Part 1

Penang State Constitution art 14A, 14A(1)

Societies Act 1966

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DP Naban (with Rosli Dahlan and Zunurajriya Muhamad Zukri) (Azlina Mehtab & Assoc) for the applicant.

Malik Imtiaz (with Surendra Ananth, Khoo Suk Chyi and Wong Ming Yen) (Surendra Ananth) for the respondents.

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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(1)(c) of the Federal Constitution. The prayers sought in the OS are as follows:

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| A | 1. Satu deklarasi diberi bahawa Fasal 14A Perlembagaan Negeri Pulau Pinang adalah bercanggah dengan Fasal 10(1)(c) Perlembagaan Persekutuan dan adalah tidak sah; |
| B | 2. Satu deklarasi bahawa sebarang usul yang diluluskan oleh Defendan Pertama yang berupa untuk mengosongkan kerusi Plaintif-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; |
| C | 3. Oleh demikian, Defendan Pertama dihalang daripada membentangkan, mencadangkan, membahar, mengundi dan/atau meluluskan sebarang usul yang ingin dibentangkan, dicadangkan, dibahas dan diluluskan menurut Fasal 14A Perlembagaan Negeri Pulau Pinang; |
| D | 4. Oleh demikian, Defendan Kedua dihalang dari membenarkan, memberi persetujuan, bersetuju dan/atau sebaliknya mengizinkan pembentangan, cadangan, pembahar, undian dan/atau kelulusan sebarang usul yang dibuat dibawah Fasal 14A Perlembagaan Negeri Pulau Pinang dalam Dewan Undangan Negeri Pulau Pinang; |
| E | 5. Satu deklarasi 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) Plaintif-plaintif dikosongkan, Plaintif-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; |
| F | 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 |
| G | 7. Bahawa kos bagi tindakan ini disediakan sebagaimana yang difikirkan sesuai dan adil oleh Mahkamah yang Mulia ini. |

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:

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| H | 1. Defendan-Defendan berakujanji untuk tidak membentangkan Usul Pengisytiharan Kekosongan Kerusi Dewan Undangan Negeri Pulau Pinang melibatkan Plaintif-Plaintif dalam sebarang sidang Mesyuarat Dewan Undangan Negeri Pulau Pinang sehingga pendengaran dan pelupusan muktamad Saman Pemula bertarikh 7 Oktober2020 ('Lampiran 1'); |
| I | 2. Notis Permohonan bertarikh 20 Ogos 2021 ('Lampiran 35') ditarik balik; dan |
| | 3. Tiada Perintah terhadap kos. |

[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.

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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:

- (a) 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
- (b) having been elected as an independent but later joins a political party.

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

[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.

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BACKGROUND FACTS

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The undisputed facts

[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.

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[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.

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[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

- A** 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.
- B** [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').
- C** [8] The basis for the motion was as follows:
- (a) all the plaintiffs contested in the 14th GE under the PKR logo and under the PH coalition;
- D** (b) notwithstanding the change in the Federal Government, the State Government for Penang remained as at 2018; and
- (c) 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.
- E**
- [9] The plaintiffs contend that the motion is void by reason of art 14A being unconstitutional.
- F**
- [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(1)(c) of the Federal Constitution.
- G**
- The plaintiffs objected to this application on the basis that:
- (a) there is no separate and distinct constitutional issue that arises in this case; and
- H** (b) there is nothing ambiguous or vague about art 10(1)(c) of the FC.
- [11] For a referral to be made under s 84 of the CJA 1964, the following basic requirements must be satisfied, namely:
- I** (a) the question to be referred must arise in any proceedings in any High Court;
- (b) the question relates to the effect of any provision of the Constitution; and

- (c) 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. A

[12] In *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133; [2020] 3 CLJ 593 Nallini Pathmanathan FCJ (majority) held that: B

[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] 3 MLJ 417; [2018] 4 CLJ 1 at [35]–[36]). The power to interpret constitutional provisions is not exclusive to the Federal Court. ‘The Federal Court is not a constitutional court, but as the final court of 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). C

[14] The jurisdiction of the Federal Court is of four kinds: appellate jurisdiction, original jurisdiction under art 128(1) of the FC, referral jurisdiction under art 128(2), and advisory jurisdiction under art 130 (*Assa Singh v Menteri Besar, Johore* [1969] 2 MLJ 30 at 36; [1968] 1 LNS 9; *Kulasingam v Public Prosecutor* [1978] 2 MLJ 243 at 244; [1978] 1 LNS 83). The exclusive original 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* at [36]). D

[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] 2 MLJ 52 at 54; [1984] CLJ 352; [1984] 1 CLJ Rep 323). E

[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 art 128(1) of the FC — that such questions must be determined by the Federal Court at first instance. F

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

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. I

- A [14] Article 128 of the FC, jurisdiction of Federal Court states as follows:
(1) 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:
- B (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
- C (b) ...
- D [15] In the case of *Wee Choo Keong v Lee Chong Meng & Anor* [1996] 3 MLJ 41; [1996] 3 CLJ 508 Siti Norma Yaakob JCA held that:
Before exercising his discretion under s 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.
- E [16] Abdul Malek Ahmad JCA in *Wee Choo Keong* 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.
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- G [17] According to the defendants, the case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697; [1992] 1 CLJ 463; [1992] 3 CLJ Rep 135 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’.
- H [18] The defendants submit that in the case of *Nordin bin 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.
- I [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:

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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 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 ...

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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.

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[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 bin Abdul Ghani v Legislative Assembly of Sabah* [1988] 1 MLJ 171; [1988] 1 CLJ 460; [1988] 1 CLJ Rep 1 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 is invalid on the ground that the Legislature of Sabah has no power to enact it. The declarations sought were as follows:

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- (a) 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.
- (b) 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.

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Hashim Yeop Sani SCJ held that:

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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 para 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 reg 7 thereof allows objection to nomination to be made on the ground, inter alia, that

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- A 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 para 5 of the Eighth Schedule to the Constitution that disqualification is a subject within the competency of a State.
- B 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
- C Constitution.
- Paragraph 5 has been carried as art 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
- D 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
- E the former shall not be taken to be limited by the latter.
- Reading Item 7 of the State List with art 74(4) it is obviously within the power of a State Legislature to enact a law in the nature of the new art 18(2)(d) of the Sabah Constitution.
- F
- [21] The case of *Abdul Karim* was never argued (stand to be corrected) in the case of *Nordin bin Salleh*. The decision in the case of *Abdul Karim* that 'if the tenure of seats of members of the state Legislature is exclusively vested in the State Constitution then, it cannot be taken to be limited by the Federal
- G Constitution seems to be left unexplained in *Nordin bin 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* the Federal Court held that:
- H ... 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:
- I 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):
- 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.

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[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 and another appeal* [2011] 6 MLJ 297; [2011] 8 CLJ 766, Richard Malanjum CJSS said:

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[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*).

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[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 bin 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 bin Salleh* and the Federal Court would be the best forum to resolve this.

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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 bin Salleh*.

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

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- (a) 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;
- (b) 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;
- (c) in the case of *Nordin bin 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
- (d) 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),

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A Part 1 in the Eighth Schedule, and basic foundational principles in the Federal Constitution and State Constitution which did not fully argue in *Nordin bin Salleh* at that material time and there have been significant constitutional law developments since the decision in *Nordin bin Salleh*.

B 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.

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

Enclosure 19 allowed with no order as to costs.

Reported by Ahmad Ismail

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