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TR SANDAH: WITHERING JUDICIAL ACTIVISM

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ABSTRACT

This study discusses the Federal Court judgment in the case of *Director of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors and other appeals* [2017] 3 CLJ 1. The Federal Court's decision was said to deviate from an earlier established principle of the common law recognition of existing indigenous peoples' land rights, the content and extent of which are determined by community customary laws. The common law acknowledgement or recognition of indigenous peoples' pre-existing rights to their traditional and customary lands held by the Federal Court in *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418 and *Madeli Salleh v. Superintendent of Lands & Surveys & Anor* [2005] 3 CLJ 697 complimented the existing safeguards given under the Federal Constitution and statutory laws relevant to Orang Asli in Peninsular Malaysia and the natives of Sabah and Sarawak. Therefore, this study aims to examine whether the Federal Court's decision in TR Sandah FC reflects judicial conservatism by giving preference to statutory laws passed by the elected officials

that resulted in the regression of the recognition of the indigenous peoples' customary land rights. The method adopted in this study is a qualitative approach via doctrinal legal research. This is a text-based examination of legal texts and other scholarly materials. This shows judges in Malaysia are said to play a more conservative role in the interpretation of legislation. It would be fundamental to highlight the development of the judicial treatment of the indigenous peoples' land rights in Malaysia and its implications.

Keywords: Common Law, land rights, indigenous peoples, judicial conservatism, judicial activism.

INTRODUCTION

The Federal Court's landmark case, *Director of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors and other appeals* [2017] 3 CLJ 1 (hereinafter referred to as "TR Sandah FC") has a significant impact on all current and future native customary land rights cases in Malaysia. The Federal Court ruled that the indigenous peoples of Sarawak's native customary rights (NCR) over land, which are based on the concept of continuous occupation, exclude areas where the natives traditionally had access to hunting, fishing, and collecting plants and herbs to meet their basic needs. The court held that "the natives' rights are confined to the areas where they settled, not where they foraged for food".

The respondents at the Federal Court, TR Sandah, and others were Ibans and Sarawakians. They claimed 5,639 hectares of land, asserting native customary rights under Iban *adat* or custom known as *pemakai menoa* and *pulau galau* as well as common law. The appellants acknowledged that the respondents had valid native customary rights to 2,802 hectares of cultivated and cleared land, but they disputed the respondent's claim to the remaining land. The respondents claimed in Appeals Nos. 30 and 42 (Federal Court Civil Appeals Nos (01)-30-04-2015(Q); and 02(f)42-06-2015(Q) that the authorities violated their native customary rights, which they had obtained since the 1800s, by granting Rosebay Enterprise Sdn Bhd a provisional lease of state land. The appellant in Civil Appeal No. 42 was Rosebay Enterprise Sdn Bhd.

In *TR Sandah ak Tabau & 7 Ors v. Kanowit Timber Sdn Bhd & 2 Ors* [2011] 13 MLRH 919, the High Court ruled that the natives had

acquired native customary and usufructuary rights over the claimed area through Iban customs of *pemakai menoa* and *pulau galau*. According to the High Court, the fact that the Iban customs of *pemakai menoa* and *pulau galau* were not legislated did not mean that they were no longer customs until there was clear, unequivocal language to repeal or reject the customs. The native customs of *pemakai menoa* and *pulau galau* were also recognised as native customary rights with legal status under Article 160 of the Federal Constitution. Article 160 defines 'law' as "written law," "common law in so far as it is in operation in the Federation or any portion thereof," and "any custom or practice having the force of law in the Federation or any part thereof." The ruling of the High Court was upheld by the Court of Appeal. Upon further appeal to the Supreme Court, the Federal Court overturned the Court of Appeal's decision (*Director Of Forest Sarawak & Anor V. Tr Sandah Tabau & Ors* [2014] 2 CLJ 175) which affirmed the earlier High Court's decision, granting the respondents native customary rights over the claimed area of land in Kanowit-Ngemah, Sawarak in respect of areas held under the Iban's custom of *pulau galau* (reserved forests) and *pemakai menoa* (territorial domain) areas, which are beyond the settled land by the native communities.

The majority opinion, written by Raus PCA (as he then was), ruled that Sarawak lacks legislation that allows indigenous peoples to legally assert their customary rights to virgin forests surrounding their longhouses. An issue that was raised at the Federal Court on the Director of Forest's appeal is whether the customs of *pemakai menoa* and *pulau galau* correspond to the definition of "law" pursuant to Article 160(2) of the Federal Constitution. The main contention of the state appellants was that, unlike the Iban custom of *temuda*, the customs of *pemakai menoa* and *pulau galau* were never sanctioned or recognised in any of Sarawak's enacted legislation or executive directives and thus cannot be considered as "customs and usages having the force of law" within the scope of the definition of "law" under the Article 160 of the Federal Constitution. While a significant majority of Raus PCA and Justice Ahmad Maarop acknowledged the existence of the custom of *pemakai menoa*, it was determined that the customs lacked legal power under the Federal Constitution of Article 160. Raus PCA stated, "common law as established in Malaysia further demands occupation and perhaps upkeep of the land in question". As a result, His Lordship believed that the tradition did not adhere to common law principles. He further said that the tradition lacked legal authority due to the fact that was not the case as documented

in primary records such as the Iban Tusun Tunggu and the Iban Adat Order. According to Justice Abu Samah bin Nordin, the other majority judge, TR Sandah did not even discharge the burden of proving NCR over the contested area of 2,712 hectares based on the facts. As a result, he "did not see it necessary to respond to the Court's queries."

Pemakai menoa, or "land to eat from," refers to the physical area of the longhouse settlement as well as the Iban's surrounding land. It has resources such as arable land, water, fishing, hunting, and forest produce. *Tanah umai* (cultivated land), *tembawai* (the old longhouse site), *pendam* (cemetery), and a woodland location are all parts of the *pemakai menoa*. The *temuda* (agricultural land) within the *menoa* (territory) is obtained through eradication and soil growth. The Ibans frequently preserve a woodland zone known as a *galau* or *pulau galau*. The *pulau* is a primary forest that has been preserved for hunting, water storage and the provision of forest resources. Additionally, it is also preserved as a memorial to notable persons. The *pemakai menoa*'s boundaries are defined by cliffs, slopes, streams, and other natural features and physical characteristics. The Ibans leave *temuda* fallow to enable the earth to revert to fertility and for the reforestation and regeneration of tree products within the jungle, a lengthy procedure that can last up to 25 years. The land is designated in four stages within the forest-following cycle: (1) *jerami* or *redas* land – one to two years after a *padi* grain harvests (2) *temuda* – a land that has been fallow for three to ten years, (3) *damun* – a land that has been fallow for ten to twenty years, and (4) *pengerang* – which resembles virgin forest but is secondary growth or *temuda* that has been fallow for more than 25 years. The preservation of the *pulau* or forest that provides forest goods is critical to the Ibans' livelihood (Bulan & Locklear, 2009).

Following that, the applicants, TR Sandah AK Tabau and others, applied for a review of the Federal Court decision under Rule 137 of the Rules of the Federal Court 1995, claiming that the majority judgment was illegal. Rule 137 of the Federal Court Rules of 1995 states:

> *Inherent powers of the Court: For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent abuse of the process of the Court.*

The review applications, on the other hand, were rejected by a panel of five judges (*TR Sandah Ak Tabau & Ors v Director of Forest Sarawak & Anor and Other Applications* [2019] 10 CLJ 436), citing, among other things, the notion of a Federal Court judgment's finality, which states that once all appeals have been exhausted, the case's merits or any other legal issue, no matter how erroneous they are, should not be reopened. The Federal Court's inherent jurisdiction and powers to review its own decision under Rule 137 of the Federal Court Rules of 1995 must be used cautiously. Before the court can exercise this power, it must be demonstrated that there was unfairness on the face of the evidence. As a result, arguments such as the earlier panel reaching the incorrect decision, misinterpreting another Federal Court decision, statutes or case law, going against the weight of legal authorities, or wrongly disturbing findings of facts by lower courts cannot form a valid and legitimate basis for seeking review under the rule.

Following the ruling that made the prospect of common law native title recognition uncertain, the judiciary has been chastised for practising conservatism (Subramaniam, 2017). This is because the majority decision was said to limit itself to interpreting only Sarawak's specific written laws, edicts, and executive orders because customs recognised by Sarawak's laws and customs and usages endowed with legal force were limited to laws and executive orders, effectively excluding those customs recognised by the courts in earlier cases through the common law (*Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418 ("Adong") and *Sagong bin Tasi v Kerajaan Negeri Selangor* [2002] 2 MLJ 591 ("Sagong Tasi").

This study discusses whether the Federal Court decision in TR Sandah reflects judicial conservatism, giving preference to statutory laws passed by the elected officials as propounded by Subramaniam (2017). This has been said to undermine the fundamental principles that underpin common law recognition of indigenous land rights.

Then, the methodology used in this study is a qualitative approach applying doctrinal legal research. Doctrinal legal research is a research that focuses on determining a legal proposition or proposition by way of analysing the existing statutory provisions and cases by applying reasoning power. This is a text-based analysis of legal texts, case law, and other relevant published scholarly materials.

CUSTOMARY LAND RIGHTS UNDER COMMON LAW

The common law respects and maintains the existing rights of indigenous peoples, including customary land ownership rights. The legal rights continue to exist until or unless legislative provisions or an act of executive government authorised by legislation extinguish them. These rights are not based on a legal provision or an executive declaration. It exists on its own and is protected by common law, but it can be extinguished legally. Therefore, state property ownership is conditional and subject to pre-existing legal rights.

Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418 was the first case that established the concept of native title in Malaysian law and the first land claim lawsuit by the Orang Asli. Both the High Court and the Court of Appeal acknowledged indigenous rights in areas where they had traditionally foraged. Following the decision, two High Court decisions were issued: *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 involving the logging of Iban forest land in Bintulu, Sarawak, and *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591 involving the taking of Temuan land in Selangor. In both judgments, the High Court strongly supported the concept of native title and took significant steps to expand its borders.

In *Sagong Tasi v. Kerajaan Negeri Selangor* [2002] 2 MLJ 591, the Court of Appeal upheld the High Court's ruling that the Plaintiffs owned the disputed properties through a permanent customary community title. The Plaintiffs claimed compensation for the acquisition of land for the construction of a highway. A portion of the land was gazetted under the Aboriginal Peoples Act of 1954. The community claimed the other portion was not included in the gazette as customary land. The courts recognised that the Temuan tribal group's customary land constituted a property right with a completely beneficial interest in and to the land. The lands are inheritable; they can be passed down from one generation to the next. The right to live on the land for settlement and agriculture may include not only the right to live on the land for settlement and agriculture but also the right to access areas of land for resources such as hunting and fishing, so long as it is clear that these activities are integral to the communities' customs and continue to be practised.

However, despite the previous rulings, in granting native customary rights (NCR) to unsettled areas, in *Sagong bin Tasi v The Selangor*

State Government [2002] 2 MLJ 591, the courts restricted the Orang Asli to areas settled and not to the land which they customarily foraged. *Sagong Tasi* differed from *Adong* in that Adong dealt with the deprivation of traditional land on which the Orang Asli foraged for their living, whereas *Sagong Tasi* dealt with the acquisition of ancestral land on which the Orang Asli resided. Thus, in *Sagong Tasi*, the native title was conceptualised as a fully blown interest in land rather than a mere usufructuary right.

According to Wook (2015), prior to *Sagong Tasi*, the National Land Code, while containing saving clauses to preserve customary tenures, were not interpreted to include the Orang Asli's customary rights. The interpretation of the legislation and its practical application had compromised the Orang Asli's land tenure. State forestry regulations impose state control of forests and have resulted in the establishment of forest reserves, which further restrict Orang Asli's access to natural resources. Following North American common law, the court in *Sagong Tasi* found that the construction of reserves provided by the Aboriginal Peoples Act 1954 is the obligation of the state authority as a fiduciary with legal rights and responsibilities to safeguard the people. The purpose of establishing reserves under the legislation is to avoid the state from alienating or trading with land in an aboriginal region with a non-aborigine. It just reflects the perpetual character of the plaintiffs' title. The court rejected the claim that if the state authority did not exercise the power granted by the legislation, the aborigines would have no title to or interest in the property. The court emphasised that such an approach undermines the legislation's goal of protecting the welfare of aboriginal peoples. The court reasoned that because land is a highly valued socioeconomic commodity, the legislature would not intend to deprive persons of their customary ownership under common law.

A similar perspective to Sagong's was seen in the case of *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai* [2006] 1 MLJ 256 [28]. In this case, the Court of Appeal overruled an earlier High Court's judgment that the locals had a claim to the disputed areas used for hunting, fishing, and collecting forest products within the *pemakai menoa* community area. In evaluating whether the community has rights over the *pemakai menoa*, the court determined that insufficient evidence existed to show continuous occupation. The court also referred to the High Court's decision in *Sagong Tasi*, which limited Orang Asli's land rights to possession through settlement and cultivation.

In *Superintendent of Lands & Surveys Miri Division v Madeli bin Salleh* (hereinafter referred to *Madeli Salleh*), the Federal Court recognised and decided the native's tradition of gaining rights to land when the primary forest was removed or felled, and the native farmed and occupied the land above the cleared or felled land. The description of the custom recognised and determined in *Madeli Salleh* by the Federal Court corresponds with the indigenous tradition known as *temuda*. *Temuda's* custom, or *adat*, refers to the practice of falling or clearing virgin jungles and cultivating cleared land to establish property rights. This practice has been mentioned and recognised in statutes and proclamations issued by the Rajahs and later by the Sarawak legislature. The decision is significant because courts must consider native customs to determine how much land native indigenous people have occupied. This has become a common law principle for the recognition of native title in Malaysia. There is a high standard for the government to meet before it can extinguish native rights.

Malaysian courts have since developed their brand of common law domestic jurisprudence on indigenous rights to lands, territories and resources guided by local laws and circumstances (Subramaniam & Nicholas, 2018).

In *Director of Forest, Sarawak & Anor v. TR Sandah Tabau*, the Federal Court ruled that native customary rights claims to land based on the principle of continuous occupation do not extend to places where natives once roamed to forage for food. This approach has been criticised by Subramaniam (2017) and Subramaniam and Nicholas (2018) for a lack of complete knowledge of the customary land system, despite previous rulings stating that such national norms do not need to be codified in written statutes to be recognised under common law. It was expected that judges would not intervene in judicial proceedings or rulings to enhance their interests. Accordingly, does Malaysia's judiciary practice judicial conservatism over judicial activism?

JUDICIAL CONSERVATISM AND JUDICIAL ACTIVISM

What exactly is judicial conservatism? Judicial conservatism is the belief that the courts should only interpret the law and not enact

new policies. Advocates of judicial conservatism believe that judges should not have the authority to make policy. Palshikar (2007), Goldsworthy (2017) and Hartz (2014) are among the supporters of judicial conservatism. Nevertheless, the opponents claim that activism is needed when other branches of government fail to intervene to achieve social change.

A judicial conservative advises that judges should "follow the law" rather than make a law. Cross (1997) stated in this work and related references that if judges make law, judges will frequently advance their interests through decisions that conform to their assessment of what constitutes proper law. Accordingly, the best way to alter the law is for the judiciary to be reformed. Aside from the argument that judges should not make law, Palshiker (2007), Jones (2001), and Das (2001) stated that the constitution expressly grants the legislature the power to legislate. The court does not have such legislative authority and a proper balance must be struck between the judiciary and the executive, with the former not interfering excessively with the latter. Judges are merely there to interpret the law, and they are not the law themselves. Goldsworthy (2017) agreed with Campbell (2003)[1], who was against judicial activism and argued that judges should not usurp the law-making authority that their constitution conferred on other organs of government and, to that extent, defied and might undermine the constitution itself. An activist judge willfully violated the law to promote policy goals.

Hartz (2014) also supported the view by saying that the judges should not make law as there are restraints on judicial making decisions. For example, judges have to be consistent because their words could come back to haunt them if a new twist to a case comes up. They also have to follow neutral rules so that their own legitimacy would not be called into question. The opponents of judicial activism said that excessive judicial activism produces grave consequences. According to one of the earliest scholars on judicial conservatism (Mahon, 1908), considering law as an absolute science whose rudimentary concepts are sufficiently comprehensive to cover new exigencies, judicial

[1] Revisit his paper 'Judicial Activism Justice or Treason?', derived from his valedictory lecture as a Professor at the Australian National University in 2002 and published the following year in the Otago Law Review. In that paper, he argued that judicial activism 'can be so wrong as to be treasonable, because it is a breach of trust and an abuse of judicial power that undermines the foundations of constitutional democracy.

conservatism supports uniformity of legal laws, but it invariably seeks to expand precedent in the face of changed circumstances rather than following relevant rules. The assumption that law is an absolute science helps to encourage legal rule continuity, but it falls short of ensuring full justice in individual cases. Law can never be an absolute science in the context of an immutable and rigid set of laws that is unaffected by changing circumstances and sufficiently broad to include new occurrences. Law is a science founded on experience, but it is sometimes misunderstood as an inflexible set of laws unaffected by current circumstances and unalterable in the face of new exigencies.

Nonetheless, common law and equity principles have evolved as a result of time and practice, as well as the demands of industry and society. For a long time, judges in the common law tradition performed this function. For example, in *Mabo v Queensland* (No 2) in 1992, the High Court, the apex court of Australia, determined that indigenous titles continued to exist even with the arrival of the new British sovereign in Australia from 1788 onwards. It disproved a long-held belief that England's newly acquired common law did not recognise indigenous rights. In doing so, the court acknowledged the injustice of treating Australia's indigenous peoples as trespassers on their territory, as had been the accepted legal principle at the time (Barker, 2017).

A decision that easily avoids 'threshold' hurdles may be indicative of judicial activism. Judicial activism, as per Black's Law Dictionary, is a "jurisprudential theory that motivates judges to disregard established precedents in favour of progressive and novel social policies". Svantesson (2011) believed that when a court claims to be so constrained by a lack of enactment of legislation and/or establishment of precedents in another age that it is unable to rule following prevailing policy considerations, this will be in an unfavourable setting and eventually observe the law stagnate. Judges make the law, and judges should make the law, and there are reasons to believe in the judges' competency to do so.

Svantesson's proposal for judicial activism focuses on how rapidly changing information technology necessitates more judicial activism. We are in an unfavourable environment when a court appears to be constrained by a lack of legislative action and/or precedents from a previous period, preventing it from ruling in a manner consistent with overwhelming policy considerations. "Now it is the duty of the

judges, I believe, to bring [the] laws up to date with the demands and needs of our evolving society," Justice Lionel Murphy said. Judges do make laws, and they should continue to do so. Indeed, judges are required to make laws in our rapid-paced society, and we have cause to believe in the abilities of our judges to do so.

What is the current state status of affairs in Malaysia? Are Malaysian judges branded by judicial conservatism, or, contrary to what the aforementioned scholars asserted, are the practitioners of judicial activism?

Malaysian judges and scholars have appeared in recent years to discuss judicial activism, a judicial philosophy. Justice Hishamuddin, a former Court of Appeal judge, appears realistic in stating that an active judge must be both the "philosopher and the king" when deciding high-profile constitutional cases, as they must always bear in mind. He opined that the majority judgment in TR Sandah FC was incorrect and that only the judgment written by Justice Zainun Ali was sound and acceptable, consistent with the established principles of the common law that recognised Malaysia's indigenous community's customary land rights and demonstrated an outstanding example of judicial activism (Hishamudin Yunus, 2012).

According to Hishamudin Yunus (2012), the need for checks and balances must always be the underlying principle. The judiciary is in charge of ensuring certain rights under the laws. Justice Hishamuddin Yunus (2018) emphasised that an activist judge must always follow and support the power-separation doctrine while upholding the rule of law. A judge should always be guided by his legal expertise, legal principles, and codes when making a difficult decision. A judge, in particular, must protect people's rights, especially the rights of minorities.[2]

Emeritus Professor Datuk Dr. Shad Saleem Faruqi, on Hishamuddin's view on judicial activism, talked with caution that creativity and justice are not always fellow travellers. Unfortunately, judges indeed

[2] Dato' Seri Mohd Hishamudin Yunus gave a talk on "Constitution and protection of the marginalised minority," on 28 September 2017 a 5th Constitutional Law Lecture which took place at Tun Mohamed Suffian Auditorium, Faculty of Law, University of Malaya, as part of the Constitutional Law Lecture series." - Yunus, D. S. M. Hishamudin, 'Protection of Marginalized Minorities Under The Constitution' (2018) Legal Herald (Faculty of Law, University of Malaya

exercise their creativity in interpreting the law to extend the horizons of authority and restrict those of their freedom. Nonetheless, Professor Shad did support Hishamuddin's opinions on judicial activism when he argued that there are numerous legal, theoretical, and explanatory propositions that encourage judicial ingenuity.[3]

According to Justice Abdul Malik Ishak, if the statute is unlawful, the court should strike it down. Legislative, executive, and judicial authorities should all operate within the bounds of the law. In an authoritarian state, he stated, judicial independence is impossible. Justice Abdul Malik Ishak also stated that Malaysia follows the rule of law and that pre-trial disclosure should be recognised as a universal human rights requirement. Furthermore, the prosecution must retain the discretion to determine whether or not to reveal to the defense all relevant material in the case. Finally, it is up to the court to decide whether to approve disclosure or not.[4]

Justice Datuk Dr. Haji Hamid Sultan Bin Abu Backer, Court of Appeal Judge said in a discussion related to Sir John Laws' paper on Judicial Activism in International Malaysia Law Conference 2018,[5] held in 16 August 2018, that judges in Malaysia have become judicial passivists due to their inability to safeguard, preserve, and defend the public's constitutional rights against executive influence on legislation or decisions that are unconstitutional. This is because the majority ruling of the then-Supreme Court destroyed both the concept of constitutional supremacy and the principles of accountability, transparency, and proper governance, and the ruling relied on the concept of parliamentary supremacy to allow for corruption and kleptocracy.

[3] A Judge with Many Landmark Decisions; Emeritus Professor Datuk Dr Shad Saleem Faruqi Holder of the Tunku Abdul Rahman Chair, Faculty of Law, University of Malaya as he wrote about Justice Dato' Mohd Hishamudin Mohd Yunus.

[4] Dato' Abdul Malik Ishak [2012]. Human Rights and Malaysian Judicial System. 2 CLJ(A) xxi – This paper was presented at the Judicial Colloquium on The Domestic Application Of International Human Rights Norms organized by the OHCHR Regional Office for South East Asia on 23 to 25 March 2009 held in Bangkok, Thailand.

[5] "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.

Tun Raus Sharif (2016), the former Malaysian Chief Justice who decided on the TR Sandah FC case, stated that when considering cases, Malaysian judges simply apply the law to the facts. Judicial activism will only be used when the law is ambiguous and there are no precedents to guide the judge. Only when there is a need to promulgate a new legal principle will judicial activism be useful.[6] As far as the apex court is concerned, judicial activism will only be functional once it becomes necessary to disengage from case law following the time and prevalent social values. Tun Raus further said that the judges would not have the time to dwell on the details of each case if judicial activism is practical to be fully considered. Tun Raus stressed that judicial activism should not be allowed to go unchecked, otherwise, there is always the risk that, in his view, the judge will exert his interests to such an extent that the entire meaning and object of the law will eventually be denied.[7],

Tun Raus was also quoted in a paper presented by Tun Zaki Azmi (2010), the then Chief Justice at the 15th Malaysian Law Conference, where His Lordship highlighted the risks of judges becoming excessively "activist-minded" and "creative" in their interpretations of Parliamentary statutes, saying the following:[8]

> *Activist judges are looked up by some lawyers, particularly academicians and law students because in their view this is a form of development of the law. It is also for them to analyse and discuss. Which law student has not heard of Lord Denning? He was popular because of the decisions, sometimes controversial, that he decided. While it may be good and necessary some instances, in my opinion, it can be a dangerous weapon in the hands of a too activist judge.*

Tun Raus concluded by stating that Malaysian courts are more activist than those in the United Kingdom or India. However, judicial activism is a part of everyday life, and the Malaysian judiciary is not immune. Finally, every Act of Parliament or the Constitution should be read to

[6] Judicial Activism in Malaysia: Quo Vadis 41 The Right Honourable Tan Sri Dato' Seri Raus Sharif, President of the Court of Appeal, Journal of Malaysian Judiciary. Pp 41-52.

[7] Ibid.

[8] MLC 2010: Judicial Activism by YAA Tun Dato' Seri Zaki Tun Azmi, Chief Justice of Malaysia (A Speech).

accomplish the legislators' intent. A fair balance must be maintained between Parliament's will and the will of a wronged party. When the judiciary's principal objective is to uphold justice and guarantee that existing law is adhered to and established fairly, judicial activism tends to be at its finest.

Mohamad (2021), in his book, stated that "no judge is a parliament" and that "if the doctrine of separation of powers were to have any meaning, all the three branches of the government, i.e., legislature, executive, and judiciary must respect each other's jurisdiction."

CRITICISMS TOWARDS TR SANDAH FC

The Federal Court ruled in favour of the state and other appellants in *Director of Forests, Sarawak & Anor v. TR Sandah Tabau & Ors & Other Appeals* [2017], allowing their appeals by a majority vote of 3:1. Despite agreeing with the principles stated in *Madeli Salleh* that customary practises having the force of law, the majority judges in TR Sandah FC concluded that only customs recognised by Sarawak legislation could be given effect. The traditional customs of *pemakai menoa* and *pulau galau* could not be legally enforced under Article 160(2) of the Federal Constitution since they were not specifically stated in Section 5(2) of the Sarawak Land Code. Nevertheless, in her dissenting judgment, Justice Zainun said, "... the repeated reliance on the fact that these customs have never received legislative recognition misses the heart of the appeal in this case.." And Her Ladyship further added, "To fit usufructuary NCR into the picture, they would fit either as an aspect of "common law" or "customs" that are recognised by the common law and thus have the "force of law".

The decision has attracted criticism, especially from scholars, amongst others, Subramaniam (2017), Subramaniam and Nicolas (2018), Ramy Bulan (2019), and Chua (2020). The main criticism was that TR Sandah FC reinforces the notion that the recognition of indigenous rights through the courts is unpredictable and prone to regress due to judicial conservatism (Subramaniam, 2017). Raus' reasoning was said to justify the strict interpretation of the constitution of law and failed to recognise the Federal Court's ruling in *Madeli Salleh* that customary legal rights continue to exist unless extinguished by clear and plain legislation or by an act of judicial conservatism. This finding

may have a significant impact on other cases involving Orang Asli of Peninsular Malaysia when there has been no legislative and executive recognition of Orang Asli customary land rights. Furthermore, the protection of native customary land rights in Sarawak, which is ostensibly better than Peninsular Malaysia, has been shown to restrict rather than preserve local customary rights. The decision was said to finally incline to the state, thus favouring common law native customary land rights. Subramaniam (2017) further added that, even though in cases involving customary land rights, the courts have always made reference to the Australian cases which recognise the customary land rights without the sanction of the sovereign power, this cannot be the guarantee that the Malaysian judiciary in future cases for a liberal interpretation of the rights. TR Sandah yet again illustrates the proposition that the development of indigenous rights through the courts is subject to regress and a degree of judicial unpredictability.

Subramanian and Nicholas (2018) also echoed the earlier article (Subramaniam, 2017) that the decision was also inconsistent with indigenous peoples' wishes as it had become surprising to rule in favour of the state when there was a clear trend toward the increasing acceptance of indigenous land rights. Given the questions addressed and the findings made in Sarawak, the Federal Court ruling was ambiguous as to how far Malaysian courts will apply the majority decision in Peninsular Malaysia and Sabah. The decision in TR Sandah FC effectively limits the remedy of restitution in the state of Sarawak by confining enforceable indigenous customary rights to clear, established, and cultivated lands. The concern was that, despite Malaysia's more progressive approach to indigenous land and resource rights, judicial conservatism and "strict legalism and literalism," which are still widely held in Malaysia regarding other constitutional fundamental liberties, could serve to limit the recognition and restitution of indigenous rights to lands and resources. This discretionary determination to limit NCR in Sarawak based on the fear that "vast areas of land could be" susceptible to such rights has drawn judicial criticism for having "no conceptual basis" and appeared to be "judicial policy-making." Yet, as the article observed, this same statement opened the door to a litigious debate on the subject, which resulted in the Federal Court confining NCR to settled and cultivated areas in Sarawak more than a decade later. The majority of the Federal Court also fails to provide doctrinal justification for why

the provision of existing customary rights should be limited to clear, settled, and cultivated areas rather than larger hunting and foraging areas, as specified in developed principles of common law and upheld by the Federal Court in *Madeli Salleh*.

On the other hand, Ramy Bulan (2019) wrote that the Federal Court decision in TR Sandah shows a misunderstanding of *adat*'s status as a source of legislation under the constitutional concept of justice. This comes up in the absence of "on the ground" reality and circumstances that govern the lives of the significant and related communities. The criticism ensued when Raus PCA (as he then was), in the judgment, stated that "as a matter of fact, the common law as developed in Malaysia requires additional occupation and or maintenance of the land in question." As a result, he believed that the custom did not meet common law requirements. His Lordship overlooked the fact that a custom right does not require the same occupational content as a common law right. The dissenting judge's conclusion demonstrated a better understanding of the jurisprudential foundation of the customs and the proprietary rights that resulted from it.

The Federal Court decision in TR Sandah was viewed as a disappointment in two ways (Eden Chua, 2020). The first was that indigenous peoples had lost their land, not because their distinct legal systems or practises were irrelevant in practice, but because the court ruled that it was, implying that arbitrary land-taking for modern development projects is legal. Lands are essential to their way of life and the preservation of their agricultural existence. The second source of contention was the composition of the judges hearing the case, all of whom were from Peninsular Malaysia.

Eden, on the majority and the dissenting judgment of the decision, highlighted that two perspectives have influenced the judicial interpretation of Malaysian law. The strict legalist approach, which focuses solely on statutes and the Constitution, is common. Raus PCA, for example, several orders including the Rajah's Order 1875, the Fruit Trees Order 1899, the Land Order 1920, the Land Settlement Ordinance 1933, and the Secretariat Circular 1839, and concluded that the terms *pemakai menoa* and *pulau galau* did not appear in any of them. The other approach goes beyond textual analysis, envisioning common law playing a broader role in developing laws in response to societal demands and needs rather than just guiding statutory interpretation. To summarise, the decision contradicts the

wishes of indigenous peoples, who make up a sizable portion of the state's population. The Federal Court overruled both lower court decisions, ruling in favour of the state in an area where there had been a clear trend toward increased acceptance of indigenous land rights. Additionally, any interpretation of the law should address and reflect the needs of contemporary society.

The conservatism has also been highlighted by earlier writings of Robert Aiken and Colin Leigh (2011) and Ainul Jaria (2011). They viewed that Malaysia's courts have taken a conservative approach when considering the compensation to be awarded, as the amount is still considered to be inadequate because it fails to consider the cultural and spiritual deprivation. This replaced a study by Ramy Bulan (2019) which found that the full potential and impact of "complementary" sui generis rights are dependent on the judiciary's willingness to be innovative in shaping remedies or seeking new grounds for their decisions based on the principles of justice, equality and human rights.

Thus, it is emphasised that the nature and type of native rights are embodied in their customary practices, re-enacting the argument made involving indigenous customary land rights that unwritten law is derived from custom (paras 167, 168 & 170 of TR Sandah FC). The existence of NCR necessitates a thorough examination of each community's customs and practices in this regard. It is self-evident that customary rights do not derive from the statute. Rather, they are acknowledged as a source of unwritten laws. In other words, it is highlighted that customary law is a fundamental aspect of the Malaysian legal system recognised by the Federal Constitution, which regulates law as "customs and usages having the force of law", Article 160 (2). Custom and customary laws are components of an embodiment of unwritten law, which is a historical common law norm or practice that has become an integral part of a community's accepted and anticipated behaviour. Thereby, native customary land rights are distinct, i.e., not comparable to the rights provided by statutes.

In furtherance of the criticism of the case, the contention by the majority judgment in the TR Sandah FC failed to adequately address the central tenet of an earlier Federal Court judgment, namely the *Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 (Madeli), which recognises the pre-existing rights of the indigenous peoples continue to exist unless extinguished by clear and obvious legislative intent.

CONCLUSION AND RECOMMENDATIONS

The decision in TR Sandah by the Federal Court demonstrates judicial conservatism by giving preference to statutory laws passed by elected officials. This has undermined the basic principles that gave rise to the common law recognition of indigenous land rights. What is the current state of affairs in Malaysia? Are Malaysian judges stigmatised by judicial conservatism, or, contrary to what the aforementioned scholars asserted, are the practitioners of judicial activism?

The most important criterion for judges in deciding cases is to be both the philosopher and the king while maintaining the rule of law and the doctrine of separation of power. The legislative, executive and judicial branches of government must all follow the rule of law.

Is judicial activism on the decline? Judicial activism has never been fully practised by judges. The judges resolve cases by interpreting and applying the law to the facts of the case. Judicial activism occurs only when the law is ambiguous and there are no precedents to guide the judge. Malaysia follows the notion of a judiciary that is independent and unbiased as well as the larger principle of separation of powers between the legislative, executive, and judicial branches of government. Judges would not interfere with the role of legislation under the purview of the Parliament and thus, the principle of separation of powers would not be violated. In Malaysia, judges play a more conservative role in the interpretation of legislation. Those who express their views on such matters often find themselves at odds with their colleagues in the legal advocacy field. The Malaysian judiciary does encourage judicial activism, but only to a modest extent.

To bring about justice and fairness, courts must conduct a conscious inquiry into customs enforcement in their context to ensure that the law does not become oppressive. In this respect, the existence of NCR necessitates a thorough examination of each community's customs and practices, as customary law is a fundamental aspect of the Malaysian legal system recognised by the Federal Constitution. Furthermore, any interpretation of the law should consider and reflect contemporary societal needs. Moreover, because previous judicial decisions have appeared to be unpredictable, legal reform is required to protect customary land rights. Incorporating UNDRIP (United Nations Declaration of the Rights of the Indigenous Peoples) into Malaysian laws and policies would be one way to implement this

reform, which calls for states to respect and uphold their obligations to defend the rights of indigenous peoples. According to Article 26 of the UNDRIP, states are required to recognise and defend indigenous peoples' rights to the lands, territories, and resources that they have historically owned, occupied, utilised, or acquired. In 2007, Malaysia voted in favour of approval by the UN General Assembly, which calls for states to recognise and carry out their responsibilities to safeguard the rights of indigenous peoples. Twelve years after the UNDRIP was adopted, the United Nations acknowledged in a report that there are still significant challenges to the rights of indigenous peoples around the world. It identifies resource extraction, industrial agriculture, infrastructure development, and conservation development as the primary causes of violations of indigenous people's rights.

However, the reform would only be feasible if there was political will to implement the changes. Whether the new administration could carry out the promises made in its manifesto from 2018 to recognise the ancestral lands of the indigenous peoples of Peninsular Malaysia, Sabah, and Sarawak and "establish a redress mechanism to ensure the affected party is adequately compensated" in cases of wrongful eviction. This should entail returning the original land to its owners or, if that is not possible, providing substitute land of comparable quality. We will keep waiting.

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REFERENCES

Adong bin Kuwau v. Kerajaan Negeri Johor, Sagong Tasi & Ors Kerajaan Negeri Selangor (1998) 2 CLJ 665.

Barker, M. (2017). Do judges make law?. *University of Notre Dame Australia Law Review, 19,* 1-16.

Bulan, R., & Locklear, A. (2009). *Legal perspectives on native customary land rights in Sarawak*. Human Rights Association of Malaysia. http://www.suhakam.org.my/wp-content/uploads/2013/12/Legal-Perspectives.pdf

Busing Anak Jali v. Kerajaan Negeri Sarawak & 1 Other & 5 Other Related Appeals (2022) 3 CLJ 1.

Campbell, T. (2003). Judicial activism – Justice or treason? *Otago Law Review, 10*(3), 307-326. http://www8.austlii.edu.au/nz/journals/OtaLawRw/2003/2.html

Chua, HB. E. (2020). Federalism and Indigenous peoples in Sarawak: The Malaysian Federal Court's judgments in Sandah (No 1) and (No 2) (March 2020). *Singapore Journal of Legal Studies*, 341-357.

Cross, F. B. (1997). The positivist/realist perspective. *Journal of Legal Studies Education, 15*(1)*,* 10-13.

Das, C. V. (2001). Advocating constitutional rights cases in the Courts. *Commonwealth Law Bulletin, 27*(2), 1231-1241.

Director of Forest, Sarawak & Anor v. TR Sandah Tabau & Ors (2017) 3 CLJ 1.

Goldsworthy, J. (2017). Tom Campbell on judicial activism. *Australian Journal of Legal Philosophy, 42*(1), 247-255.

Hishamuddin Yunis, M. (2012). Judicial activism – The Way to Go [2012] 5 CLJ (A) ix.

Hishamuddin Yunus, M. (2018). Protection of marginalised minorities under the constitution. *Current Law Journal*, 1 LNS(A) lx, 1-23.

Human Rights And The Malaysian Judicial System [2009] 2 CLJ(A) xxi.

Jeli Anak Naga & Ors v. Tung Huat Pelita Niah Plantation Sdn Bhd & Ors (2020) 1 CLJ 449.

Jones, G. (2001). Proper judicial activism. *Regent University Law Review, 14*(1), 141-180.

Judicial Activism — The Way to Go [2012] 5 CLJ (A) ix.

Judiciary as The Principal Guardians of The Rule of Law. (2018, August 16). *Judiciary as The Principal Guardians of The Rule of Law.* [Paper presentation]. International Malaysia Law Conference 2018.

Mabo & Others v. The State of Queensland (No 2) (1992) 175 CLR 1.

Mahon, J. (1908). The basis of law. *American Law Review, 42*(6), 872-883.

Mohamad, T. A. H. (2021). *No Judge Is a Parliament: Collections of Speeches and Articles 2016-2020.* Selangor: CLJ Publication.

Opening Of Legal Year 2014 [2014] 1 LNS(A) ix 1-8.

Palshikar, V. V. (2007). Judicial activism. *Law Review, Government Law College, 7*, 55-66.

Ramy Bulan. (2019). The Civil Courts and determination of native customary land Rights: Merely declaring or making laws? *Borneo Research Journal, 13*(12), 1-23.

Raus Shariff. (2016). Judicial activism in Malaysia: Quo Vadis 41 The Right. *Journal of the Malaysian Judiciary, July,* 41-53.

Rules of the Federal Court 1995. r. 137.

Sarawak Land Code. Chapter 81. (1958 Edition). s.5 & s.197.

Shad Saleem Faruqi. (2015, September 17). A Judge with many landmark decisions, reflecting the law. *The Star, Malaysia.* https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2015/09/17/judge-with-many-landmark-decisions

Subramaniam, Y. (2011). Rights denied: Orang Asli and rights to participate in decision-making in Peninsular Malaysia. *Waikato Law Review, 19*(2), 44-65.

Subramaniam, Y., & Nicholas, C. (2018). The courts and the restitution of Indigenous Territories in Malaysia. *Erasmus Law Review, 11*(1), 67–79.

Subramaniam, Y. (2017). Director of Forest, Sarawak v TR Sandah Tabau (Sandah): Judicial Curtailment of Native Customary Rights in Malaysia. *Indigenous Law Bulletin*. *8*(3), 29-32.

Superintendent of Land & Surveys Miri Division & Anor v. Madeli Salleh (2007) 6 CLJ 509.

Svantesson, DJB. (2011). A call for judicial activism: Rapid technological developments and slow legal developments. *Alternative Law Journal, 36(1),* 33-35.

TR Sandah ak Tabau & 7 Ors v. Kanowit Timber Sdn Bhd & 2 Ors [Civil Suit No: 21-2-2009 In the High Court in Sabah and Sarawak at Sibu]

TR Sandah Ak Tabau & Ors v. Director of Forest Sarawak & Anor and Other Applications (2019) 10 CLJ 436.

Tyson v. Smith (1838) 112 ER 1265.

United Nations.(2019). 'The State of the World's Indigenous Peoples: Implementing the United Nation Declaration on the Rights of Indigenous Peoples in 2007', 4. *Economic & Social Affairs* ST/ESA/371: 1-98.

Wook, I. (2015). The Aboriginal Peoples Act 1954 and the Recognition of Orang Asli Land Rights. *UUM Journal of Legal Studies*, *6*, 63–83. https://e-journal.uum.edu.my/index.php/uumjls/article/view/uumjls.6.2015.4587

Zaki Azmi. (2010). Judicial activism or judicial interpretation? *The Commonwealth Lawyer*, *19*(2).