[1977] 2 MLJ 187

Loh Kooi Choon v Government of Malaysia

ALI, RAJA AZLAN SHAH AND WAN SULEIMAN FJJ
Federal Court, Kuala Lumpur, 7 June 1977

RAJA AZLAN SHAH FJ

It is clear that the question at issue is fraught with political controversy. No doubt the appellant and other persons hold strong views one way or the other on the justice of the impugned Act. I should add that right now no feature of our system of government has caused so much discussion, received so much criticism, and been so frequently misunderstood, than the duties assigned to the courts and the functions which they discharge in guarding the Constitution. For that reason and also because it is rarely that this court is faced with a constitutional question of this kind it is desirable at the outset to make clear the functions of the courts.

The question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution,

for as was said by Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 118:

> Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

It is the province of the courts to expound the law and "the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction"—per Roskill L.J. in *Henry v Geopresco International Ltd* [1975] 2 All ER 702 718. Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature, and not the courts; they have their remedy at the ballot box.

The Constitution is not a mere collection of pious platitudes.It is the supreme law of the land embodying 3 basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power

of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modem terms that we are a government of laws, not of men.

Clause (4) of Article 5 of the Constitution prescribes that a person arrested must be taken before a magistrate within 24 hours so that an independent authority exercising judicial powers may without delay apply its mind to his case. This safeguard is to a large extent covered by the provisions of the Criminal Procedure Code but its incorporation in the Constitution is deemed essential for assuring the minorities that their rights would be constitutionally guaranteed and that they shall not entertain any apprehension of the alleged despotism and arbitrariness of the majority and legislative omnipotence.This safeguard equally applies to any person arrested under the Restricted Residence Enactment (Cap. 39) (see *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30 "but evidently difficulties have arisen in the practical application of the enactment and hence the need for the amendment." (see [1976] 2 MLJ xcii).

The question is how safe are the provisions in clause (4) of Article 5 from change. This question arose in a case which the Supreme Court in India in *IC Golak Nath &*

Ors v State of Punjab & Ors [1967] 2 SCR 762 considered *en banc*. The same question had arisen twice before in India. On the first occasion in *Sri Sankari Prasad Singh Deo v Union of India and State of Bihar* [1952] SCR 89 the Supreme Court considered the validity of the Constitution First Amendment Act in 1950. One of the arguments against the validity of the amendment was that the power of amendment granted by the Constitution to Parliament did not extend to the abridgment or removal of any of the fundamental rights because such a law would be hit by Article 13 and void. This argument was not accepted. On the second occasion in *Sajjan Singh v State of Rajasthan* [1965] 1 SCR 933 the Seventeenth Amendment was challenged but this argument, though faintly argued, was not accepted by three judges who constituted the majority. In *Golak Nath*, *supra*, another challenge to the same amendment was made and succeeded. By a bare majority of 6:5 it was held that the powers of amendment did not extend to the taking away and abridging of the fundamental rights on the basis that there was no distinction between the Constitution and ordinary law. An Indian writer [*Tripathi* on 'Amending The Constitution'] has aptly summarised the *Golak Nath* constitutional crisis as an intellectual crisis in reality. He said:

> It does not seem to be a rash hypothesis that if any one around there could successfully state the distinction between the constitution and ordinary law in clear juridical terms at least one judge would have deserted the company of the majority and the power of Parliament to

amend the fundamental rights would not have remained eclipsed for six long years ...

Six years later the Supreme Court in *Kasavananda Bharati v State of Kerala* [1973] SCR Supp 1 had no difficulty in overruling *Golak Nath* practically without any dissent.

Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording "can never be overridden by the extraneous principles of other Constitutions"—see *Adegbenro v Akintola & Anor* [1963] 3 All ER 544 551. Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

Counsel for the appellant before us urged that any amendment affecting the fundamentality of the Constitution should be avoided at all costs. According to him that part of the Constitution must not be touched.In my view, a distinction must be made between those parts of the Constitution which the framers thought should not suffer change and those that can be changed.

Our Constitution prescribes four different methods for amendment of the different provisions of the Constitution:

(1) Some parts of the Constitution can be amended by a simple majority in both Houses of Parliament such as that required for the passing of any ordinary law. They are enumerated in clause (4) of Article 159. and are specifically excluded from the purview of Article 159;

(2) The amending clause (5) of Article 159 which requires a two-thirds majority in both Houses of Parliament and the consent of the Conference of Rulers;

(3) The amending clause (2) of Article 161E which is of special interest to East Malaysia and which requires a two-thirds majority in both Houses of Parliament and the consent of the Governor of the East Malaysian State in question;

(4) The amending clause (3) of Article 159 which requires a majority of two-thirds in both Houses of Parliament.

(For a detailed study of the subject, reference may be made to Tun Suffian, *Art Introduction to the Constitution of Malaysia*, 2nd edition, Chapter 21).

It is therefore plain that the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution, and they, accordingly, armed Parliament

with "power of formal amendment". They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in which it was drafted but also centuries later. "The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation or property in the generations which are to follow ... It is the living, and not the dead, that are to be accommodated." [Thomas Paine, *Rights of Man*].

As fundamental rights are not the same as ordinary rights, they can only be suspended or abridged in the special manner provided for it in the Constitution. In my opinion, the purpose of enacting a written Constitution is partly to entrench the most important constitutional provisions against repeal and amendment in any way other than by a specially prescribed procedure. Their Lordships of the Privy Council in *Hinds v The Queen* [1976] 2 WLR 366 373 took the view that constitutions based on the Westminster model, in particular the provisions dealing with fundamental rights, form part of the substantive law of the state and until amended by whatever special procedure is laid down in the constitution for this purpose, impose a fetter upon the exercise by the legislature of the plenitude

of its legislative power. A passage from the speech of Lord Diplock who delivered the majority judgment is apposite (page 374):

> One final general observation: where, as in the instant case, a constitution on the Westminster model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the Parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the peoples themselves. The purpose served by this machinery for 'entrenchment' is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws. So in deciding whether any provisons of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety

> or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision.

The framers of our Constitution have incorporated fundamental rights in Part II thereof and made them inviolable by ordinary legislation. Unless there is a clear intention to the contrary, it is difficult to visualise that they also intended to make those rights inviolable by constitutional amendment. Had it been intended to save those rights from the operation of clause (3) of Article 159, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. I am inclined to think that they must have had in mind what is of more frequent occurrence, that is, invasion of fundamental rights by the legislative and executive organs of the State by means of laws, rules and regulations made in exercise of legislative power and not the abridgment of such rights by amendment of the Constitution itself in exercise of the power of constitutional amendment. That power, though it has been entrusted to Parliament, has been so hedged about with restrictions that its exercise can only be made after"mature consideration by Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws."

There have also been strong arguments in support of a doctrine of implied restrictions on the power of constitutional amendment. A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power.

I concede that Parliament can alter the entrenched provisions of clause (4) of Article 5, to wit, removing the provision relating to production before the magistrate of any arrested person under the Restricted Residence Enactment as long as the process of constitutional amendment as laid down in clause (3) of Article 159 is complied with. When that is done it becomes an integral part of the Constitution, it is the supreme law, and accordingly it cannot be said to be at variance with itself. A passage from the Privy Council judgment in *Hinds v. The Queen*, *supra*, is of some assistance (page 392):

> That the Parliament of Jamaica has power to create a court ... is not open to doubt, but if any of the provisions doing so conflict with the Constitution in its present form, then it could only do so effectively if the Constitution was first amended so as to secure that there ceased to be any inconsistency between the provisions and the Constitution ...

This reasoning, in my view, is based on the premise that the Constitution as the supreme law, unchangeable by

ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself. It is the supreme law because it settles the norms of corporate behaviour and the principle of good government. This is so because the Federation of Malaya, and later, Malaysia, began with the acceptance of the Constitution by the nine Malay States and the former Settlements of Penang and Melaka, by the acceptance of it by Sabah and Sarawak that entered the Federation in 1963, as "the supreme law of the Federation ... "(clause 1 of Article 4). It is thus the most vital working document which we created and possess. If it is urged that the Constitution is on the same level with ordinary law, then the Constitution is an absurd attempt on the part of the framers, to limit a power, in its own nature illimitable.In the context of clause (1) of Article 160, "law" must be taken to mean law made in exercise of ordinary legislative power and not made in exercise of the power of constitutional amendment under clause (3) of Article 159, with the result that clause (1) of Article 4 does not affect amendments made under clause (3) of Article 159.

In conclusion, I hold that clause (4) of Article 5 is nothing but a constitutional protection which can be taken away or abridged only in the manner in which the Constitution provides. There is a world of difference between legislative immunity and a constitutional guarantee. The Constitution, by its very nature, creates the distinction. A constitutional guarantee cannot be wiped out by a simple legislative process as opposed to constitutional amendment.

Can an amendment of a clause in the Constitution operate with retrospective effect? It was strenuously contended for the appellant that a law which takes away vested right must be presumed to be intended not to operate retrospectively for the simple reason that subsequent change in the law would not prejudice such right. I accept this statement, for which authority is to be found in many cases. But my decision is based on the language of section 4 of the Constitution (Amendment) Act, 1976 (Act A354) which reads:

> Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day.

In so far as an Act of Parliament is concerned, the rule of construction is that in order to determine whether it is retrospective in its operation, the language of the Act itself must be looked into bearing in mind that an Act is not to be construed retrospectively unless it is clear that such was the intention of Parliament. If such was the intention that the Act was to be given retrospective effect even in respect of substantive right or pending proceeding, the courts have no alternative but to give effect to the Act even though the consequences might appear harsh and unjust.

The principle that parties are to be governed by the law in force on the date when an action is instituted and any

subsequent amendment or alteration cannot affect vested right or pending proceeding, must always be read subject to the corollary that Parliament can always expressly provide that vested right or pending proceeding be affected by the amendment of the law.

If Parliament retrospectively affects vested right or pending proceeding, then it would be the duty of an appellate court to apply the law prevailing on the date of appeal before it. There is abundant authority for the proposition that an appellate court is entitled to take into consideration facts and events which have come into existence since the judgment under appeal was delivered: see *In re Pulborough School Board, Bourke v Hutt* [1894] I QB 725 737 and *Barber v Pigden* [1937] 1 KB 664 673.

It cannot be gainsaid that Parliament is endowed with plenary powers of legislation and that it is within the ambit of its competence to legislate with prospective or retrospective effect. Retrospective legislation is one of the incidents of plenary legislative powers and as such is not required to be spelt out in the Constitution. Subject to the constitutional limitation of Article 7 of the Constitution, to wit, protection against retrospective criminal laws and repeated trials, Parliament would be within the ambit of its competence if it deems fit to legislate retrospectively. There is no such restriction of legislative power with regard to restrictive residence. In the absence of any constitutional provision against retrospective legislation with regard to restrictive residence it is not right to argue that Parliament

should apply such a restriction. "The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it"—per Frankfurter J.

The appeal is dismissed. No order as to costs.

Appeal dismissed.

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(*Dr Yaacob Hussain Merican* with him) for the appellant.

Lim Beng Choon (Senior Federal Counsel) for the respondent.