

Sagong Tasi breaks ground on human rights

How is Malaysia's human rights law developing? Legal experts and activists tell **SANTHA OORJITHAM** that a recent Court of Appeal decision has been the turning point for upholding human rights norms.

SAGONG Tasi is a 74-year-old Orang Asli of the Temuan tribe from Dengkil, Selangor. He is poor, living without basic amenities and often ill. But he and six other family heads from Bukit Tampoi are at the centre of a landmark judgment which lawyers and human rights activists believe will make their task easier in the future.

The 59-page judgment illustrated a move, in cases where there is a conflict between existing law and the Federal Constitution, to apply that law with whatever modifications are necessary to bring it in line with the Constitution.

Through such interpretations, judges say they are introducing international human rights law into the domestic system, while taking a liberal rather than a literal approach to the human rights guaranteed under Part II of the Constitution.

Last September, the Court of Appeal upheld an earlier Shah Alam High Court decision that the seven Orang Asli were customary owners of a piece of land acquired for the Kuala Lumpur-Nilai Highway.

The High Court had declared that the Orang Asli owned the land under a customary community title of a permanent nature.

It ordered the Selangor Government to compensate them for the land and ordered United Engineers (M) Bhd (UEM) and the Malaysian Highway Authority (MHA) to pay damages for trespassing.

The appellate court went further, allowing the Orang Asli's cross-appeal for exemplary damages. (The Selangor Government, Federal Government, UEM and MHA are asking for leave to appeal to the Federal Court.)

Court of Appeal judge Datuk Gopal Sri Ram, who read out the judgment, said the Aboriginal Peoples Act 1954, which was to "protect and uplift the First Peoples of this country", was a human rights statute "acquiring a quasi-constitutional status giving it pre-eminence over ordinary legislation. It must, therefore, receive a broad and liberal interpretation".

What Sri Ram and judges Datuk Arifin Zakaria and Datuk Nik Hashim Nik Abdul Rahman did was to look at the conflict between Section 12 of



TEST CASE: Some of the Bukit Tampoi Orang Asli and their lawyers at the Court of Appeal. — Bernama picture

the 1954 Act, which says, "the State Authority may grant compensation therefor" and Article 13(2) of the Federal Constitution which states that, "no law shall provide for compulsory acquisition or use of property without adequate compensation".

The Court of Appeal said the relevant section of the 1954 Act had to be brought into conformity with the Constitution. This was done, not by reading the words in Section 12 as giving the State Authority the discretion to grant compensation or not, but by reading it as, "the State Authority shall grant adequate compensation therefor".

"Sri Ram's view and the view of a number of human rights activists is that courts are free to construe statutes as they think they should be construed," says Malik Imtiaz Sarwar, deputy president of the National Human-Rights Society.

"All they have to do is look at the fundamental liberties in Part II of the Constitution and construe that broadly and dynamically."

In a speech titled "Human Rights: Incorporating International Law into the Present System" at a LexisNexis conference in 2003, Sri Ram had explained that there were two ways to incorporate international law into Malaysia's constitutional law.

One way is through the "interpretive jurisdiction" of the courts.

"Courts may, through the interpretation of municipal law, in particular the Federal Constitution, introduce principles of international human rights law into the domestic system," the judge told the conference.

Sri Ram said there was "ample scope" for Malaysian courts to rely on international law principles and documents

to develop the country's human rights law. And the principal document, he said, was the Universal Declaration of Human Rights 1948.

Parliament passed the Human Rights Commission of Malaysia Act 1999 which says, in Section 4(4), that "regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution".

"Since we are a member of the United Nations, where the 1948 Declaration is not inconsistent with the Constitution, we must adopt it," agrees Datuk Seri Nazri Aziz, chairman of the Parliamentary Caucus on Human Rights and Good Governance.

But, the Minister in the Prime Minister's Department stresses: "The Constitution must prevail." And legislation such as the Internal Security Act "must take precedence over whatever is provided for in the Universal Declaration of Human Rights".

The Suhakam Act defines human rights as the basic or fundamental rights or liberties guaranteed in Part II of the Constitution.

"Courts are under a duty to take a prismatic approach when interpreting these human rights," Sri Ram said. "On no account should a literal approach be adopted."

He cited the example of freedom of speech, which would include not only the right to speak or print but also the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought and freedom to teach.

"When prismatically interpreted, the Part II liberties are entirely consistent with the terms of the 1948 Declaration," the judge said.

Human rights activists say the recent Sagong Tasi case showed such a "prismatic" interpretation.

The judgment stressed the "fiduciary" duty of the Government towards the Orang Asli, noting that "the very authority — the state — that is enjoined by the law to protect the aborigines, turned upon them".

"The landmark ruling was a long time coming," says Dr Colin Nicholas, co-ordinator and founder of the Centre for Orang Asli Concerns and expert witness in the trial.

"There is enough in the law to recognise and give due respect to human rights, but the authorities and the people were abusing the legislation and reading it to suit their own interests."

The activist says it will be easier to take up such cases in the future.

Malik Imtiaz says the Sagong Tasi case is an "amazing breakthrough in human rights jurisprudence", not only for the principles involved but also for the procedural differences.

"Human rights is not just about the substantive norms but also the procedures by which you bring your case to court and how you bring it," he says. "There are many little facets in that judgment which are quite stunning."

For example, the general rule has been that hearsay evidence is not permissible. But oral tradition was all that the Orang Asli had to back their claims to the land.

The Shah Alam High Court recognised their oral testimony, he notes. "They gave weight to that evidence, which has never been done in this country before."

Calling the decision a turning point, Malik Imtiaz says: "It is now easier for us to mount an argument against the Government of the State or the Federation for breaches of duty or wrongdoing, through recognition of the role of the Government as trustee of the people."

Claimants, he says, will not have such an uphill task in establishing the Government's fiduciary duty.

"By recognition of the Government's stand as a trustee, that duty is implied and it's easier for lawyers to take that up."