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Subshini decision - constitution being rewritten

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Not only is the majority decision in [R Subshini case](#) wholly unacceptable to all right-thinking Malaysians - the decision has wider and more worrying long-term implications for the direction of the country.

In the writings of Montesquieu and AV Dicey, whose works underpin the concept of democracy, the judiciary is conceived of as the final bulwark of justice upon which the hapless citizen can depend when he or she is pitted against the seemingly endless resources of the state. Moreover, the judiciary is the arm of government charged with upholding the spirit and purpose of the constitution.

Our Federal Constitution clearly limits the jurisdiction of the Syariah Court to "persons professing the religion of Islam". [Sch. 9, List 2 (1), Federal Constitution] By expanding the jurisdiction of the Syariah Court to non-Muslims, the decision of the majority of the Court of Appeal in the Subshini case turns the traditional view of the role of the judiciary on its head.

Here, we have a situation where the judiciary is performing the most fantastic of legal gymnastics in order to side with the state, going as far as to adopt a highly dubious interpretation of the very constitution it was meant to protect. So severe are the possible implications of this interpretation that it would be reasonable to view the decision in Subshini as an attempt to rewrite our constitution.

Irrespective of one's preferences or personal beliefs, it is a fact that were it not for the constitution, most of our structures of governance including the judiciary and the syariah courts themselves would have nothing upon which to base their legitimacy and authority.

Thus, to establish a precedent where a fundamental provision of the constitution affecting a large proportion of the population is so glaringly contradicted in such a casual fashion could be the start of a very slippery slope - one with the potential to threaten the very foundations of our nation.

In view of this, judges and legislators must ask some harsh questions of themselves. Principally, they must decide whether they are prepared to forgo narrow, communal interests for the good of the nation.

A judge has a duty which is owed to all Malaysians and that duty is to fearlessly uphold the principles of the constitution, even if it conflicts with his or her personal or religious beliefs. Currently, Malaysia possesses far too few judges of this calibre.

Overall, we can draw two points from the majority decision in this case. First, it typifies why the Bar Council's call for the establishment

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of a Judicial Appointments Committee must not go unheeded. Second, the disaster that is the 1988 amendment to Article 121(1) of the Federal Constitution must be rectified to enable our judiciary to regain its distant integrity.

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