MUHAMMAD HILMAN IDHAM & ORS A

v.

KERAJAAN MALAYSIA & ORS

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
HISHAMUDIN MOHD YUNUS JCA
LINTON ALBERT JCA
[CIVIL APPEAL NO: W-01(IM)-636-2010]
31 OCTOBER 2011 C
[2011] CLJ JT(5)

CONSTITUTIONAL LAW: *Fundamental liberties - Freedom of speech and expression - Section 15(5)(a) Universities and University Colleges Act 1971 (UUCA) barring students from expressing support for or sympathy with or opposition to any political party - Whether s. 15(5)(a) UUCA restricting right to freedom of speech and expression - Whether infringing art. 10(1)(a) Federal Constitution - Whether restriction reasonable and permissible by virtue of art. 10(2)(a) Federal Constitution - Whether s. 15(5)(a) UUCA rendered unconstitutional and invalid* D E

CONSTITUTIONAL LAW: *Legislation - Validity of s. 15(5)(a) Universities and University Colleges Act 1971 (UUCA) - Section 15(5)(a) UUCA barring students from expressing support for or sympathy with or opposition to any political party - Whether s. 15(5)(a) UUCA restricting right to freedom of speech and expression - Whether infringing art. 10(1)(a) Federal Constitution - Whether restriction reasonable and permissible by virtue of art. 10(2)(a) Federal Constitution - Whether s. 15(5)(a) UUCA rendered unconstitutional and invalid* F

The appellants were students of the third respondent university G
(University Kebangsaan Malaysia). The third respondent brought disciplinary proceedings against the appellants under s. 15(5)(a) of the Universities and University Colleges Act 1971 ('UUCA') for their presence at a parliamentary by election that was held in the constituency of Hulu Selangor. Section 15(5)(a) UUCA barred H
students from expressing or doing anything which might reasonably be construed as expressing support for or sympathy with or opposition to any political party in or outside Malaysia. The appellants applied to the High Court, *inter alia*, for a declaration that s. 15(5)(a) UUCA which restricted their right to freedom of I
speech and expression was invalid as it violated the constitutional

guarantee enshrined in art. 10(1)(a) of the Federal Constitution ('Constitution'). The High Court dismissed their application. The appellants now appealed to the Court of Appeal.

The respondents contended that the restriction on freedom of speech and expression was permitted by cl. (2)(a) of art. 10 of the Constitution and that the restriction was necessary or expedient for the protection of public interest or public morality. The appellants, on the other hand, contended that any restriction on the freedom of speech and expression should be for one of the purposes as specified under cl. (2)(a) of art. 10. They argued that there was nothing in the UUCA or in the Minister's speech in moving the Bill in Parliament as reported in the Hansard, to suggest that s. 15(5)(a) UUCA was meant to protect public interest or public morality. It was further argued that the restriction should be reasonable but that the restriction as imposed by s. 15(5)(a) UUCA was not reasonable.

Held (allowing the appeal by a majority)
Per Hishamudin Mohd Yunus JCA (majority):

(1) On the authority of the Federal Court decision in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor*, Parliament could no longer impose a restriction on freedom of speech and expression in any manner it deemed fit for the purpose of protecting the interests as spelt out in cl. 2(a) of art. 10 of the Constitution. Any restriction imposed must be reasonable and the court had the power to examine whether the restriction so imposed was reasonable or otherwise. If the restriction was unreasonable, the impugned law imposing the restriction could be declared as unconstitutional and accordingly null and void. The Federal Court in *Sivarasa Rasiah* had departed from the position that it held in *PP v. Pung Chen Choon*. It followed that *PP v. Pung Chen Choon* was no longer good law. (paras 12 & 14)

(2) A student who expressed support for or opposition against a political party could not be seen to harm or bring about an adverse effect on public order or public morality. Political parties were legal entities carrying out legitimate political activities. Political leaders including Ministers and members of the federal and state legislatures were members of political parties. The respondents failed to give a clear explanation on the nexus between the exercise of the right of a university student to express support for (or opposition against) a

political party and public order or public morality. Accordingly, s. 15(5)(a) UUCA did not relate to public order or public morality and the restriction was found to be unreasonable. (para 16)

(3) Most university students were of the age of majority and could enter into contracts and sue or be sued. They could marry, become parents and undertake parental responsibilities. They could vote in general elections if already 21 years old. They could become directors of companies and office bearers of societies. Yet they were told that they could not say anything that could be construed as supporting or opposing a political party. Section 15(5)(a) UUCA was therefore irrational. (para 17)

(4) Section 15(5)(a) UUCA impeded the healthy development of the critical mind and original thoughts of students – objectives that seats of higher learning should strive to achieve. Universities should be the breeding ground of reformers and thinkers and not institutions to produce students trained as robots. The provision clearly was not only counter-productive but repressive in nature. (para 18)

(5) The report in Hansard provided no explanation as to the link between prohibiting university students from expressing support for or opposition against a political party and the maintenance of public order or public morality. In the Minister's speech, there was no mention of public disorder as a result of students expressing their view in support for or in opposition to political parties. On the contrary, the Minister spoke about the preservation of the fundamental rights of the students as provided for by the Constitution and in accordance with 'international best practices'. In fact, the Minister conceded that students were matured enough in exercising their fundamental rights. Accordingly, what the Minister said in Parliament about preserving the freedom of speech and expression of students and what s. 15(5)(a) UUCA provided were found to be irreconcilable or contradictory. (paras 21-23)

Per Linton Albert JCA (majority):

(1) The correct approach in determining the constitutionality of s. 15(5)(a) UUCA which purported to limit the freedom of expression under art. 10(1)(a) of the Constitution would be that taken by the Federal Court in *Sivarasa Rasiah*. The earlier

A decision of *Pung Chen Choon* should be overruled following the principle laid down in *Dalip Bhagwan Singh v. PP*, *ie*, where two decisions of the Federal Court conflict on a point of law, the later decision prevailed over the earlier decision. (para 32)

B **(2)** In considering the constitutionality of legislative enactments restricting a fundamental right, the legislative enactments must measure up to the test of reasonableness. There was no necessity to lay down inflexible propositions to assess the reasonableness of the legislative enactments because each must C be determined on its own peculiar facts and circumstances. But where the legislative enactment was self-explanatory in its manifest absurdity such as s. 15(5)(a) UUCA, it was not necessary to embark on a judicial scrutiny to determine its reasonableness because it was in itself unreasonable. The D absurdity of s. 15(5)(a) could be illustrated on the facts of the present case where the appellants faced disciplinary proceedings with possible expulsion simply because of their presence at a parliamentary by-election. A legislative enactment that prohibited such participation in a vital aspect of E democracy could not by any standard be reasonable. Therefore, because of its unreasonableness, s. 15(5)(a) did not come within the restrictions permitted under art. 10(2)(a) of the Constitution and was accordingly in violation of art. 10(1)(a) and consequently void by virtue of art. 4(1) of F the Constitution. (para 34-35)

(3) The word "reasonable" must be read before the word "restrictions" in art. 10(2)(a) of the Constitution to avoid the absurdity that it would otherwise produce. A plain and literal G meaning of art. 10(2) did not make any sense of the freedom of expression under art. 10(1)(a) because every legislative enactment which took away the freedom of expression under art. 10(1)(a) could be justified as being within the restrictions set out under art. 10(2)(a). Similarly, the word "reasonable" H should be read into art. 10(2)(a) to avoid the absurdity that it would otherwise produce. Further, the respondent's reliance on s. 15(4) UUCA was misconceived. Section 15(4) was a derisory appendage to s. 15(5)(a) UUCA and therefore patently inconsequential. (paras 36-38)

I **(4)** Notwithstanding the presumption of constitutionality of a legislative enactment and the rule that the court must endeavour to sustain its validity, s. 15(5)(a) UUCA was found to be patently unsustainable. (para 38)

Per Low Hop Bing JCA (dissenting):

(1) Following the case of *Dalip Bhagwan Singh v. PP*, the Federal Court case of *Sivarasa Rasiah* represented the present state of law and prevailed over the Supreme Court case of *Pung Chen Choon* on the point that the word "reasonable" should be read into art. 10(2) of the Constitution. (para 63)

(2) Section 15(5)(a) UUCA was enacted as a source of federal law to regulate the affairs of the students in universities. The restrictions imposed under s. 15(5)(a) pertained essentially to the involvement of students in politics. It sought to prevent infiltration of political ideologies including extremities amongst students which might adversely affect the primary purpose of the universities, *ie*, the pursuit of education. The issue of "reasonableness" had been extensively debated in Parliament as reported in the Hansard dated 10 December 2008. In essence, the restrictions were stated to protect the interest of students and institutions of higher learning as a matter of policy. (para 65)

(3) It was not a matter for the court to say that the law was "harsh and unjust" *(Loh Kooi Choon v. Government of Malaysia)*. It was a question of policy to be debated and decided by Parliament and therefore not for judicial determination. To sustain it would cut very deeply into the very being of Parliament. The courts ought not to enter that political thicket, even in a worthwhile cause as the fundamental rights guaranteed by the Constitution. A judicial tribunal had nothing to do with the policy of any act which it might be called upon to interpret. That was a matter of private judgment. The duty of the court, and its only duty, was to expound the language of the Act in accordance with the settled rules of construction. Those who found fault with the wisdom or expediency of the impugned Act and with vexatious interference of fundamental rights must normally address themselves to the legislature and not the courts. They had their remedy at the ballot box. (para 66)

(4) The restrictions contained in s. 15(5)(a) UUCA were within the bounds of reasonableness and came within art. 10(1)(a) read with art. 10(2)(a) of the Constitution. It was therefore constitutional and valid. (para 68)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu-perayu adalah pelajar-pelajar universiti responden ketiga (Universiti Kebangsaan Malaysia). Responden ketiga membawa prosiding disiplin terhadap perayu-perayu di bawah s. 15(5)(a) B Akta Universiti dan Kolej Universiti 1971 ('AUKU') kerana mereka telah menghadirkan diri di Pilihan Raya Kecil Parlimen yang diadakan di bahagian pilihanraya Hulu Selangor. Seksyen 15(5)(a) AUKU melarang pelajar-pelajar dari menyatakan atau membuat tindakan yang boleh ditafsirkan sebagai menunjuk sokongan untuk C atau bersimpati dengan atau menentang mana-mana parti-parti politik di dalam atau di luar Malaysia. Perayu-perayu membuat permohonan di Mahkamah Tinggi, antara lain, untuk deklarasi bahawa s. 15(5)(a) AUKU yang telah menyekat hak mereka untuk kebebasan bersuara dan menyatakan pendapat adalah tidak sah D kerana ia melanggar jaminan perlembagaan yang ditetapkan dalam per. 10(1)(a) Perlembagaan Persekutuan ('Perlembagaan'). Mahkamah Tinggi telah menolak permohonan mereka. Perayu-perayu sekarang merayu ke Mahkamah Rayuan.

E Responden berhujah bahawa sekatan kebebasan bersuara dan menyatakan pendapat dibenarkan oleh kl. (2)(a) fasal 10 Perlembagaan dan sekatan adalah perlu atau sesuai untuk perlindungan kepentingan atau moraliti awam. Perayu-perayu, sebaliknya, berhujah bahawa apa-apa sekatan ke atas kebebasan F bersuara dan menyatakan pendapat harus untuk tujuan-tujuan yang telah dinyatakan di bawah kl. (2)(a) fasal 10. Mereka berhujah bahawa tidak terdapat apa-apa di dalam AUKU atau di dalam ucapan Menteri dalam menggerakkan Rang Undang-Undang Parlimen seperti yang dilaporkan di dalam Hansard, untuk G menunjukkan bahawa s. 15(5)(a) AUKU bermaksud untuk melindungi kepentingan atau moraliti awam. Ia seterusnya dihujahkan bahawa sekatan harus munasabah tetapi sekatan yang dikenakan oleh s. 15(5)(a) AUKU tidak munasabah.

Diputuskan (membenarkan rayuan oleh satu majoriti)
H **Oleh Hishamudin Yunus HMR (majoriti):**

(1) Atas otoriti keputusan Mahkamah Persekutuan *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor*, Parlimen tidak lagi boleh mengenakan satu sekatan ke atas kebebasan bersuara dan I menyatakan pendapat dalam apa-apa cara ia anggap sesuai untuk tujuan melindungi kepentingan-kepentingan seperti yang dijelaskan di dalam kl. 2(a) fasal 10 Perlembagaan Persekutuan.

Apa-apa sekatan yang dikenakan harus munasabah dan mahkamah mempunyai kuasa untuk memeriksa sama ada sekatan yang dikenakan adalah munasabah atau sebaliknya. Jika sekatan didapati tidak munasabah, undang-undang yang dipertikaikan yang mengenakan sekatan boleh diisytiharkan sebagai tidak mengikut perlembagaan dan seterusnya adalah tidak sah dan terbatal. Mahkamah Persekutuan di dalam *Sivarasa Rasiah* telah menyimpang dari kedudukan yang diputuskan di dalam *PP v. Pung Chen Choon*. Ia diikuti bahawa *PP v. Pung Chen Choon* bukan lagi undang-undang yang bagus.

(2) Seorang pelajar yang menunjuk sokongan untuk atau menentang mana-mana parti politik tidak akan merosakkan atau membawa satu kesan buruk ke atas ketenteraman umum atau moraliti awam. Parti-parti politik adalah entiti-entiti yang sah yang melaksanakan aktiviti politik yang sah. Pemimpin-pemimpin politik termasuk Menteri-Menteri dan ahli-ahli perundangan persekutuan dan negeri adalah ahli-ahli parti-parti politik. Responden-responden gagal memberi penerangan jelas mengenai kaitan di antara perlaksanaan hak seorang pelajar universiti untuk menunjukkan sokongan untuk (atau menentang terhadap) parti politik dengan ketenteraman umum dan moraliti awam. Sewajarnya, s. 15(5)(a) AUKU tidak mempunyai kaitan dengan ketenteraman umum dan moraliti awam dan sekatan didapati tidak munasabah.

(3) Kebanyakan pelajar-pelajar universiti sudah mencapai umur dewasa dan boleh memasuki kontrak-kontrak dan menyaman atau disaman. Mereka boleh berkahwin, menjadi ibu bapa dan menjalankan tanggungjawab sebagai ibu bapa. Mereka boleh mengundi di pilihanraya umum jika sudah mencapai 21 tahun. Mereka boleh menjadi pengarah-pengarah syarikat dan pemegang jawatan persatuan-persatuan. Tetapi mereka diberitahu mereka tidak boleh mengatakan apa-apa yang boleh ditafsirkan sebagai menyokong atau menentang parti politik. Seksyen 15(5)(a) AUKU adalah tidak waras.

(4) Seksyen 15(5)(a) AUKU menjejaskan perkembangan sihat minda kritis dan idea-idea asal pelajar-pelajar - objektif-objektif yang harus dicapai oleh kerusi-kerusi pembelajaran tinggi. Universiti-universiti sepatutnya menjadi tempat memupuk ahli-ahli reformasi dan para pemikir dan bukan institusi-institusi yang melahirkan pelajar-pelajar yang dilatih sebagai robot-robot. Peruntukan dengan jelas bukan sahaja tidak produktif tetapi bersifat menindas.

(5) Laporan Hansard tidak membekalkan apa-apa penjelasan mengenai hubungan antara melarang pelajar-pelajar universiti dari menunjukkan sokongan untuk atau menentang sebuah parti politik dengan mengekalkan ketenteraman umum atau moraliti awam. Di dalam ucapan Menteri, tidak disebut gangguan umum berbangkit dari pelajar-pelajar menunjukkan sokongan untuk atau menentang parti-parti politik. Sebaliknya, Menteri telah memberi ucapan mengenai pemeliharaan hak-hak asasi pelajar-pelajar seperti yang disediakan oleh Perlembagaan dan sejajar dengan 'international best practices.' Malah, Menteri mengakui bahawa pelajar-pelajar cukup matang dalam melaksanakan hak-hak asasi mereka. Maka, apa yang disebut oleh Menteri dalam Parlimen berhubungan pemeliharaan kebebasan pelajar-pelajar bersuara dan menyatakan pendapat dan apa yang ditetapkan oleh s. 15(5)(a) AUKU didapati tidak boleh disesuaikan atau bertentangan.

Oleh Linton Albert HMR (majoriti):

(1) Pendekatan yang betul dalam menentukan keperlembagaan s. 15(5)(a) AUKU yang bermaksud menghadkan kebebasan bersuara dan menyatakan pendapat di bawah fasal 10(1)(a) Perlembagaan adalah yang diambil oleh Mahkamah Persekutuan di dalam kes *Sivarasa Rasiah*. Keputusan terdahulu *Pung Chen Choon* seharusnya ditolak berikutan prinsip yang dibentangkan di dalam *Dalip Bhagwan Singh v. PP*, contohnya, di mana dua keputusan-keputusan Mahkamah Persekutuan berkonflik atas satu perkara undang-undang, keputusan kemudiannya mengatasi keputusan terdahulu.

(2) Dalam mempertimbangkan keperlembagaan enakmen-enakmen perundangan menyekatkan satu hak asasi, enakmen-enakmen perundangan mesti memenuhi jangkaan ujian kemunasabahan. Tiada keperluan untuk membina pendapat-pendapat tegar untuk menilai kemunasabahan enakmen-enakmen perundangan kerana setiap satu perlu diputuskan atas fakta-fakta dan keadaan-keadaan tersendiri. Tetapi di mana enakmen perundangan boleh memperjelaskan dengan sendiri kemustahilannya seperti s. 15(5)(a) AUKU, ia adalah tidak perlu untuk memulakan satu pemeriksaan rapi kehakiman untuk memutuskan kemunasabahannya kerana ia adalah sendiri tidak munasabah. Kemustahilan s. 15(5)(a) boleh ditunjukkan melalui fakta-fakta kes ini di mana perayu-perayu menghadapi prosiding disiplin dengan kemungkinan dibuang universiti hanya

disebabkan mereka telah menghadirkan diri di Pilihan Raya Kecil Parlimen. Enakmen perundangan yang mencegah penyertaan sedemikian dalam satu aspek sangat penting demokrasi tidak boleh dikatakan munasabah. Oleh itu, disebabkan ketidak wajarannya, s. 15(5)(a) tidak termasuk di dalam sekatan-sekatan yang dibenarkan di bawah fasal 10(2)(a) Perlembagaan dan oleh itu telah berlakunya percabulan fasal 10(1)(a) dan akibatnya ia tidak sah menurut fasal 4.1 Perlembagaan.

(3) Perkataan "reasonable" harus dibaca sebelum perkataan "restrictions" di dalam fasal 10(2)(a) Perlembagaan untuk mengelak kemustahilan yang boleh timbul. Dalam maksud jelas dan harfiah fasal 10(2) tidak memasuki akal fikiran mengenai kebebasan menyatakan pendapat di bawah fasal 10(1)(a) kerana setiap enakmen perundangan yang merampas kebebasan menyatakan pendapat di bawah fasal 10(1) boleh dijustifikasikan termasuk dalam sekatan-sekatan yang dinyatakan di bawah fasal 10(2)(a). Serupa itu, perkataan "reasonable" harus dibaca ke dalam fasal 10(2)(a) untuk mengelakkan kemustahilan yang boleh timbul. Selanjutnya, pergantungan responden kepada s. 15(4) AUKU adalah disalah anggap. Seksyen 15(4) adalah satu tambahan mengejek ke s. 15(5)(a) AUKU and oleh itu adalah nyata tidak penting.

(4) Meskipun anggapan keperlembagaan enakmen perundangan dan peraturan mahkamah mesti berusaha untuk mengekalkan kesahihannya, s. 15(5)(a) AUKU adalah dengan nyata tidak boleh bertahan.

Oleh Low Hop Bing HMR (menentang):

(1) Mengikuti kes *Dalip Bhagwan Singh v. PP*, kes Mahkamah Persekutuan *Sivarasa Rasiah* mewakili keadaan undang-undang sekarang dan mengatasi kes Mahkamah Agung *Pung Chen Choon* mengenai hal bahawa perkataan "reasonable" harus dibaca ke dalam fasal 10(2) Perlembagaan.

(2) Seksyen 15(5)(a) AUKU telah digubal sebagai sumber undang-undang persekutuan untuk mengawal hal ehwal pelajar-pelajar universiti. Sekatan-sekatan yang dikenakan di bawah s. 15(5)(a) adalah pada dasarnya mengenai penglibatan pelajar-pelajar politik. Ia bertujuan untuk menghalang penyusupan ideologi-ideologi politik termasuk fikiran-fikiran ekstremisme di kalangan pelajar-pelajar yang boleh membawa kesan buruk kepada tujuan

A utama universiti-universiti, contohnya, pengejaran pendidikan. Isu "reasonableness" telah dengan luas diperdebatkan di Parlimen seperti yang dilaporkan di dalam Hansard bertarikh 10 Disember 2008. Dalam intipatinya, sekatan-sekatan dinyatakan untuk melindungi kepentingan pelajar-pelajar dan
B institusi-institusi pengajian tinggi sebagai soal polisi.

(3) Ia bukan satu perkara untuk mahkamah menyatakan bahawa undang-undang adalah "harsh and unjust" (*Loh Kooi Choon v. Government of Malaysia*). Ia adalah satu soalan polisi untuk
C diperdebatkan dan diputuskan oleh Parlimen dan oleh itu bukan untuk penentuan kehakiman. Untuk mempertahankannya akan menebus intipati Parlimen. Mahkamah-mahkamah tidak sepatutnya memasuki belukar politik, walaupun untuk tujuan yang berguna seperti hak-hak asasi yang dijamin oleh
D Perlembagaan. Satu tribunal kehakiman tidak mempunyai apa-apa kaitan dengan dasar mana-mana tindakan yang mana mungkin dipanggil untuk tafsiran. Itu adalah satu perkara penghakiman peribadi. Tugas mahkamah, dan satu-satunya tugas mahkamah, adalah untuk menjelaskan tafsiran Akta
E sejajar dengan peraturan-peraturan pentafsiran yang sedia ada. Sesiapa yang mencari salah dengan kebijaksanaan atau kesesuaian Akta yang dipersoalkan itu dan dengan gangguan menyusahkan hak-hak asasi mesti mengalamatkan diri mereka kepada badan perundangan dan bukan ke mahkamah. Mereka
F akan dapat remedi mereka di peti undi.

(4) Sekatan-sekatan yang terdapat di dalam s. 15(5)(a) AUKU adalah dalam batasan-batasan kemunasabahan dan termasuk dalam fasal 10(1)(a) dibaca dengan fasal 10(2)(a) Perlembagaan. Oleh itu ia adalah berperlembagaan dan sahih.
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Case(s) referred to:

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Educational Company Of Ireland Ltd v. Fitzpatrick (No 2) [1961] IR 345 ***(refd)***

H *Federal Steam Navigation Co Ltd & Anor v. Department Of Trade And Industry [1974] 2 All ER 97* ***(refd)***

Kesavananda Bharati v. State of Kerala AIR [1973] SC 1461 ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***

PP v. Pung Chen Choon [1994] 1 LNS 208 SC ***(ovrd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2006] 1 CLJ 139 CA
I ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(foll)***

Sweezy v. New Hampshire 354 US 234 (1957) ***(refd)***
Vedprakash v. The State [1987] AIR Gujarat 253 ***(refd)***
Whitney v. California 274 US 357 ***(refd)***

Legislation referred to:
Federal Constitution, art. 4(1), 10(1)(a), (c), (2)(a), (c)
Legal Profession Act 1976, s. 46A
Printing Presses and Publications Act 1984, s. 8A(1), (2)
Universities and University Colleges Act 1971, s. 15(4), (5)(a)

For the appellants - Malik Imtiaz Sarwar (Jenine Gill, Haris Ibrahim & Ashok Kandiah with him); M/s Kandiah & Partnership
For the 1st & 2nd respondents - Noor Hisham Ismail (Shamsul Bol Hassan, Aida Adha Abu Bakar & Rohaiza Zainal with him) SFC; AG's Chambers
For the 3rd respondent - Dato' Sri Muhammad Shafee Abdullah (Sarah Abishegan with him); M/s Shafee & Co

Reported by Usha Thiagarajah

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This is the appellants' appeal against the decision of the High Court Judge of Kuala Lumpur (of the Appellate & Special Powers Division) of 28 September 2010 dismissing their originating summons application.

[2] By an originating summons the appellants have sought a declaration that s. 15(5)(a) of the Universities and University Colleges Act 1971 ("UUCA") contravenes art. 10(1)(a) of the Federal Constitution. The appellants have also sought a consequential declaration that the pending disciplinary proceedings, brought against them by the 3rd respondent for alleged disciplinary breaches connected with s. 15(5)(a) UUCA, are not valid in law.

[3] The appellants' appeal against the decision of the learned High Court judge is on the following grounds:

(a) that the learned judge had erred in law and/or in fact in holding that the question of reasonableness did not arise when in fact it was an important consideration to be addressed;

(b) that the learned judge had erred in law and/or in fact in concluding that s. 15(5)(a) of the UUCA was reasonably necessary and not disproportionate;

[4] The facts of the case are not in dispute. The appellants are political science undergraduate students of the 3rd respondent, that is, Universiti Kebangsaan Malaysia ('the University') (the 3rd defendant in the originating summons). They were present in the parliamentary constituency of Hulu Selangor in the campaign period for the parliamentary by-election of 24 April 2010 to observe a parliamentary by-election.

[5] On or about 13 May 2010, each appellant received a notice from the Vice Chancellor of the University requiring their attendance before a disciplinary tribunal on 3 June 2010. Before the disciplinary tribunal they were charged for purported breaches of disciplinary offences under s. 15(5)(a) of the UUCA. The provision reads:

> **15. Student or students' organization, body or group associating with societies, etc.**
>
> (5) No student of the University and no organization, body or group of students of the University which is established by, under or in accordance with the Constitution, shall express or do anything which may reasonably be construed as expressing support for or sympathy with or opposition to:
>
> (a) any political party, whether in or outside Malaysia;

[6] The allegations in the charges include, amongst others, having in their possession paraphernalia supportive of or sympathetic with or opposed to a contesting political party in the said by-election.

The Constitutional Provisions

[7] Clause (1)(a) of art. 10 of the Federal Constitution provide:

> **Freedom of speech, assembly and association**
>
> 10(1) Subject to Clauses (2), (3) and (4):
>
> (a) every citizen has the right to freedom of speech and expression;
>
> (b) …
>
> (c) …
>
> (2) Parliament may by law impose:
>
> (a) On the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in

> the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of Court, defamation, or incitement to any offence.

The Issue

[8] It is not disputed that the impugned provision of the UUCA is a restriction on the students right to freedom of speech, and, therefore, *prima facie*, violates the constitutional guarantee of cl. (1)(a) of art.10. It is also not disputed that unless such a provision can be saved by the permissible restrictions as provided for by cl. (2)(a) of art. 10, the provision is unconstitutional.

[9] However, it is the contention of the counsel for the respondents that the restriction on freedom of speech is permitted by cl. (2)(a) of art. 10 of the Federal Constitution. It is submitted by the respondents that the restriction is necessary or expedient in the interest of 'public order or morality'.

[10] The appellants, on the other hand, contend that any restriction on the freedom of speech must be for one of the purposes as specified by cl. (2)(a) of art. 10. In addition, the restriction must also be reasonable. The appellant argue that there is nothing in the UUCA or in the Minister's speech, in moving the Bill in Parliament, as reported in the Hansard, to suggest or indicate that s. 15(5)(a) of the UUCA was meant to protect public interest or public morality. It is further contended by the appellants that the restriction as imposed by s. 15(5)(a) of the UUCA is, in any case, unreasonable.

[11] I am allowing the appeal.

My Grounds

[12] It is now settled law that Parliament can no longer impose a restriction on freedom of speech, in any manner it deems fit, for the purpose of protecting the interests spelt out in cl. 2(a) of art. 10. Any restriction imposed on freedom of speech by Parliament must be a reasonable restriction, and the court, if called upon to rule (such as in the present case), has the power to examine whether the restriction so imposed is reasonable or otherwise (besides determining as to whether or not the restriction falls within the exceptions as spelt out by cl. (2)(a) of art. 10);

and – in the event it were to hold that the restriction is unreasonable – to declare the impugned law imposing the restriction as being unconstitutional and accordingly null and void. This is now the law as ruled by the Federal Court recently in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507. In this case, Gopal Sri Ram (FCJ), in delivering the unanimous decision of the Federal Court (the other two members of the panel being Richard Malanjum CJ (Sabah & Sarawak) and Zulkifli Ahmad Makinudin FCJ (as he then was)), said (at p. 515):

> Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. … The correct position is that when reliance is placed by the state to justify a statute under one or more of the provisions of art. 10(2), the question for determination is whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article.

[13] In this regard I feel that I should add that the Federal Court also went further to hold that the fundamental rights guaranteed by Part II of the Federal Constitution form part of the basic structure of the Federal Constitution, thereby giving recognition for the first time, *albeit* in a limited fashion, to the doctrine of basic structure of the Constitution as enunciated by the Supreme Court of India almost 40 years ago in the landmark case of *Kesavananda Bharati v. State of Kerala* AIR [1973] SC 1461. This is a remarkable departure from the position taken by the Federal Court 33 years ago in *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90. In that case the Federal Court was urged to adopt the doctrine, but the court then refused to do so.

[14] In so deciding the way it did in *Sivarasa Rasiah*, the Federal Court reversed the decision of the Court of Appeal (the Court of Appeal judgment is reported in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2006] 1 CLJ 139). The Court of Appeal had ruled that whether an impugned statutory provision is reasonable or not in relation to the purpose in question is not a matter for the court to decide but for Parliament. In so deciding, the Court of Appeal had relied on the Supreme Court case of *PP v. Pung Chen Choon* [1994] 1 LNS 208. Hence the Federal Court in *Sivarasa Rasiah* can be said to have departed from the position that it held in *Pung Chen Choon*; meaning that *Pung Chen Choon* is now no longer good law.

[15] On the principles of interpretation that should be adopted by the courts in interpreting the Federal Constitution, in particular, those provisions touching on fundamental liberties, the Federal Court ruled (at pp. 514-515): A

> In three recent decisions this court has held that the provisions of the Constitution, in particular, the fundamental liberties under Part II, must be generously interpreted and that a prismatic approach to interpretation must be adopted. B
>
> …
>
> Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. C

[16] Now, reverting to the facts of the present case and the issue before this court, in my judgment, I fail to see in what manner that s. 15(5)(a) of the UUCA) relates to public order or public morality. I also do not find the restriction to be reasonable. I am at a loss to understand in what manner a student, who expresses support for, or opposition against, a political party, could harm or bring about an adverse effect on public order or public morality? Are not political parties' legal entities carrying out legitimate political activities? Are not political leaders, including Ministers and members of the federal and state legislatures, members of political parties? I read intensely the affidavits of the respondents and the written submissions of the learned counsel for the respondents, searching for a clear explanation on the nexus between the exercise of the right of a university student to express support for (or opposition against) a political party and public order or public morality: but with respect, not surprisingly, I find none. D E F

[17] The impugned provision is irrational. Most university students are of the age of majority. They can enter into contracts. They can sue and be sued. They can marry, becomes parents and undertake parental responsibilities. They can vote in general elections if they are 21 years old. They can become directors of company. They can be office bearers of societies. Yet – and herein lies the irony – they are told that legally they cannot say anything that can be construed as supporting or opposing a political party. G H

[18] In my opinion such a provision as s. 15(5)(a) of the UUCA impedes the healthy development of the critical mind and original thoughts of students – objectives that seats of higher learning should strive to achieve. Universities should be the breeding I

ground of reformers and thinkers, and not institutions to produce students trained as robots. Clearly the provision is not only counter-productive but repressive in nature.

[19] In *Sweezy v. New Hampshire* 354 U. S. 234 (1957) Chief Justice Warren Burger of the United States Supreme Court said (at p. 250):

> Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

[20] In the present case it is the contention of the learned Senior Federal Counsel for the first and second respondents that the Minister's speech in Parliament in moving the bill as reported in Hansard explains the rationale for the provision. The relevant parts of the speech as reported in Hansard (DR. 10 December 2008) are set out extensively in the written submission of the learned Senior Federal Counsel. I have examined the speech closely. Those parts are as follows:

> Pindaan kepada AUKU tidak akan lengkap tanpa perubahan kepada aspek pengurusan kebajikan dan hak asasi pelajar. Perkara ini merupakan hasrat dan harapan setiap pelajar di universiti Negara ini. Pelajar merupakan stakeholder utama kepada sesebuah universiti. Mereka juga merupakan bakal pewaris kepada kepimpinan negara. Justeru, kebajikan dan hak asasi pelajar hendaklah sentiasa dipelihara dan mengikut Perlembagaan Persekutuan dan amalan terbaik (best practices) antarabangsa.
>
> Justeru rang undang-undang ini akan memberi penekanan khusus kepada aspek kebajikan dan hak asasi pelajar tersebut. Antara perkara yang akan dilihat semula merangkumi:
>
> (i) kebebasan berpersatuan;
>
> (ii) kebebasan bersuara;
>
> (iii) pemansuhan peruntukan berkaitan kesalahan dan hukuman jenayah;
>
> (iv) pemansuhan peruntukan berkaitan penggantungan atau pembuangan secara automatik;
>
> (v) hak asasi pelajar kepada pendidikan;
>
> (vi) tatacara pengendalian kes tatatertib;

(vii) penggantungan atau pembubaran pertubuhan pelajar;

(viii) hak pelajar pasca siswazah;

(ix) perwakilan dalam jawatankuasa kebajikan pelajar; dan

(x) penglibatan pelajar dalam Senat.

Seperti yang dimaklumi AUKU sedia ada memperuntukkan bahawa mana-mana pelajar yang hendak menganggotai mana-mana persatuan atau organisasi di luar universiti hendaklah mendapat kebenaran pihak universiti terlebih dahulu atau dengan izin, prior permission. Peruntukan ini dilihat oleh sesetengah pihak sebagai agak negatif dan tidak memberi kebaikan kepada pelajar dalam peningkatan ciri-ciri kepimpinan dan sahsiah diri.

Justeru rang undang-undang yang dicadangkan ini akan membenarkan pelajar untuk bersekutu dengan atau menjadi ahli sesuatu pertubuhan, persatuan atau organisasi sama ada di dalam atau luar negara.

Walaubagaimanapun, pelajar adalah dilarang untuk terlibat dengan entiti-entiti berikut:

(i) parti politik sama ada di dalam atau luar negara;

(ii) pertubuhan yang menyalahi undang-undang sama ada di dalam atau luar negara;

(iii) pertubuhan, badan atau kumpulan yang dikenal pasti oleh Menteri sebagai tidak sesuai demi kepentingan dan kesentosaan pelajar atau universiti.

Dalam menyediakan senarai pertubuhan yang tidak sesuai tersebut Menteri akan berunding dengan Lembaga Pengarah Universiti terlebih dahulu dan senarai yang akan disediakan adalah untuk kegunaan semua universiti. Meskipun terdapat larangan ke atas pelajar untuk berpolitik, rang undang-undang ini masih memberikan sedikit pengecualian. Kuasa untuk memberi pengecualian ini akan dilaksanakan oleh Naib Canselor. Dalam menjalankan kuasa tersebut Naib Canselor atas permohonan pelajar boleh memberi kebenaran untuk terlibat dalam parti politik. Ini akan membolehkan seseorang ahli politik yang bergiat dalam mana-mana parti politik mendaftar sebagai pelajar di universiti tanpa perlu melepaskan kerjaya politiknya. Rang undang-undang yang dicadangkan ini juga akan memberi kebebasan kepada pelajar untuk bersuara dalam hal yang berkaitan dengan perkara akademik yang diikuti dan dilakukannya. Pelajar adalah dibenarkan untuk memberi pendapat dalam seminar, simposium dan sebagainya dengan syarat seminar atau simposium tersebut tidak dianjur atau diberi peruntukan kewangan oleh entiti-entiti berikut:

A (i) parti politik sama ada di dalam atau luar negara;

(ii) pertubuhan yang menyalahi undang-undang sama ada di dalam atau luar negara;

(iii) pertubuhan, badan atau kumpulan yang dikenal pasti oleh
B Menteri sebagai tidak sesuai demi kepentingan dan kesentosaan pelajar atau universiti.

Fasal 8 bertujuan untuk menggantikan Seksyen 15 Akta 30 untuk memberikan kepada pelajar dan pertubuhan pelajar kebebasan berpersatuan tertakluk kepada sekatan berhubung dengan parti
C politik, pertubuhan yang menyalahi undang-undang dan pertubuhan, badan atau kumpulan orang yang dikenal pasti oleh menteri sebagai tidak sesuai demi kepentingan dan kesentosaan pelajar atau universiti itu. Sebagai tambahan, Naib Canselor boleh atas permohonan seseorang pelajar mengecualikan pelajar itu daripada
D sekatan yang disebut dalam perenggan 1(a) yang dicadangkan. Fasal 9 bertujuan meminda seksyen 15A Akta iaitu penalti jenayah dalam sub seksyen 2 digantikan dengan tindakan tatatertib.

[21] Having read the above, I must say that I am unable to find any explanation as to the link between prohibiting university
E students from expressing support for or opposition against a political party and the maintenance of public order or public morality. Indeed, in the speech, there is not even any mention of public disorder as a result of students expressing their view in support for or in opposition to political parties. On the contrary,
F the Minister spoke about the preservation of the fundamental rights of the students as provided for by the Federal Constitution and in accordance with 'international best practices'; for he said:

Mereka juga merupakan bakal pewaris kepada kepimpinan negara.
G Justeru, kebajikan dan hak asasi pelajar hendaklah sentiasa dipelihara dan mengikut Perlembagaan Persekutuan dan amalan terbaik (best practices) antarabangsa.

[22] In fact the Minister even conceded that students are matured enough in exercising their fundamental rights when he
H said (at p. 76 DR. 10 December 2008):

Selain daripada itu, kementerian juga sedar bahawa masyarakat pelajar pada masa ini lebih matang dalam menangani erti kebebasan dan kepelbagaian.

I **[23]** With respect I find that what the Minister said in Parliament about preserving the freedom of speech of students and what s. 15(5)(a) provides to be irreconcilable or contradictory.

Conclusion

[24] I propose to conclude by saying this. Freedom of expression is one of the most fundamental rights that individuals enjoy. It is fundamental to the existence of democracy and the respect of human dignity. This basic right is recognized in numerous human rights documents such as art. 19 of the Universal Declaration of Human Rights and art. 19 of the International Covenant on Civil and Political Rights. Free speech is accorded pre-eminent status in the constitutions of many countries.

[25] The words of wisdom of Brandeis J of the United States Supreme Court in *Whitney v. California* 274 US 357 (1927) (at p. 375) is a salutary reminder:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary … They believe that freedom to think as you will and to speak as you think are means indispensible to the discovery and spread of political truth, … that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.

[26] I, therefore, grant the declarations prayed for.

[Appeal allowed; appellants not asking for costs.]

Linton Albert JCA:

[27] I begin by setting out the facts which are brief and straightforward. The appellants are undergraduates of University Kebangsaan Malaysia, the third respondent. Their presence in the Parliamentary Constituency of Hulu Selangor during the campaign period for the by-election in April 2010 brought about disastrous consequences to them because as a result of that, the third respondent instituted disciplinary proceedings against them. For an ordinary citizen similarly circumstanced, nothing would have come out of it, other than, perhaps being lauded for expressing faith in our democracy which is the bedrock of the Federal Constitution. As final year political science students the prospect of expulsion was even more disastrous but they were in clear breach of an equally clear prohibition against expressing or doing anything which may reasonably be construed as expressing support for, or

sympathy with, or in opposition to any political party under s. 15(5)(a) of the Universities and University Colleges Act 1971 (UUCA). For completeness it is reproduced and it is as follows:

> (5) No student of the University and no organization, body or group of students of the University which is established by, under or in accordance with the Constitution, shall express or do anything which may reasonably be construed as expressing support for or sympathy with or opposition to:
>
> (a) any political party, whether in or outside Malaysia.

[28] Faced with the grim prospect of expulsion the appellants asked for a declaration that s. 15(5)(a) of the UUCA contravened art. 10(1)(a) of the Federal Constitution and was therefore invalid and consequently, the disciplinary proceedings instituted by the third respondent against the appellants was also invalid. The relevant part of the Federal Constitution relied on by the appellants is as follows:

> (10) Freedom of speech, assembly and association.
>
> (1) Subject to Clauses (2), (3) and (4):
>
> (a) every citizen has the right to freedom of speech and expression;
>
> (b) …
>
> (c) …

[29] The learned High Court Judge disagreed with the appellants and accordingly dismissed their application. Hence this appeal.

[30] It is universally accepted that freedom of expression is not and cannot be absolute. The Federal Constitution recognizes this and specifically sets out the restrictions. The restrictions to the freedom of expression that are relevant to the determination of this appeal are set out in art. 10(2)(a) which reads in part as follows:

> (2) Parliament may by law impose:
>
> (a) on the rights conferred by paragraph (a) Clause (1), such restrictions as it deems necessary or expedient in the interest of … public order or morality …

[31] It was contended for the respondents and accepted by the learned High Court judge that s. 15(5)(a) of the UUCA falls squarely within the ambit of the restrictions spelled out under art. 10(2)(a) of the Federal Constitution and the appellants'

argument that s. 15(5)(a) of the UUCA contravened art. 10(1)(a) of the Federal Constitution was therefore, misconceived. Hence the validity of the disciplinary proceedings premised, as it was, on a valid legislative enactment, could not be challenged. The approach taken by the learned High Court judge was one that was unrestrictively literal giving unbridled effect to the plain meaning of the words used in art. 10(2)(a) of the Federal Constitution and s. 15(5)(a) of the UUCA and disregarding all notions of reasonableness or proportionality. Based on this hypothesis there is no difficulty in concluding that s. 15(5)(a) of the UUCA relates to the purpose for which it was enacted, which was the establishment, maintenance and administration of universities and university colleges because the discipline and conduct of the students affect the maintenance and administration of universities and university colleges and given their plain and literal meaning the discipline and conduct of the students are also part of public morality. It was thus held by the learned High Court Judge applying the plain and literal meaning of the words, that the prohibition imposed under s. 15(5)(a) of the UUCA comes within the restrictions envisaged and set out under art. 10(2)(a) of the Federal Constitution and hence there was no violation of the appellants' fundamental right to freedom of expression guaranteed under art. 10(1)(a). The learned High Court Judge relied on the Supreme Court case of *Public Prosecutor v. Pung Chen Choon* [1994] 1 LNS 208. It is useful to reproduce the relevant parts of the judgment of Edgar Joseph Jr SCJ at pp. 211-212 relied on by the learned High Court judge:

> With regard to India, the Indian Constitution requires that the restrictions, even if within the limits prescribed, must be 'reasonable' – and so that court would be under a duty to decide on its reasonableness. But, with regard to Malaysia, when infringement of the Right of freedom of speech and expression is alleged, the scope of the court's inquiry is limited to the question whether the impugned law comes within the orbit of the permitted restrictions. So, for example, if the impugned law, in pith and substance, is a law relating to the subjects enumerated under the permitted restrictions found in cl. 10(2)(a), the question whether it is reasonable does not arise; the law would be valid.

[32] With the greatest of respect, in my judgment, the correct approach would be that which was laid down in the Federal Court case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, not least because it was a decision of our apex court after *Pung Chen Choon (supra)*. In *Dalip Bhagwan Singh v. Public*

A *Prosecutor* [1997] 4 CLJ 645 the Federal Court held that where two decisions of the Federal Court conflict on a point of law the later decision prevails over the earlier decision. There is no reason not to apply that principle where, as here, the earlier decision is that of the Supreme Court. Returning now to *Sivarasa Rasiah*
B *(supra)* Gopal Sri Ram FCJ, delivering the judgment of the Federal Court set out the approach to be taken in determining the constitutionality of a legislative enactment like s. 15(5)(a) of the UUCA which purports to limit the freedom of expression under art. 10(1)(a) of the Federal Constitution at pp. 515-517:

C

> The other principle of constitutional interpretation that is relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art. 10(2)(c). It says that 'Parliament may by law impose … (c) on the right conferred by paragraph (c) of Clause (1), such
D restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'. Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. The reasons for reading the derogation as 'such
E reasonable restrictions' appear in the judgment of the Court of Appeal in *Dr. Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19 which reasons are now adopted as part of this judgment. The contrary view expressed by the High Court in *Nordin bin Salleh & Anor v. Dewan Undangan Negeri Kelantan & Ors.* [1992] 1 CLJ 343: [1992] 1 CLJ 463 is clearly
F an error and is hereby disapproved. The correct position is that when reliance is placed by the state to justify a statute under one or more of the provisions of art. 10(2), the question for determination is whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more
G of the purposes specified in that article.
>
> The second observation has to do with the test that should be applied in determining whether a constitutionally guaranteed right has been violated. The test is that laid down by an unusually strong Supreme Court in the case of *Dewan Undangan Negeri*
H *Kelantan & Anor v. Nordin bin Salleh & Anor* [1992] 1 MLJ 697, as per the following extract from the headnote to the report:
>
> > In testing the validity of the state action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable
I effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory.

> The third and final observation is in respect of the sustained submission made on the appellant's behalf that the fundamental rights guaranteed under Part II is part of the basic structure of the Constitution and that Parliament cannot enact laws (including Acts amending the Constitution) that violate the basic structure …
>
> It was submitted during argument that reliance on the *Vacher*'s case was misplaced because the remarks were there made in the context of a country whose Parliament is supreme. The argument has merit. As Suffian LP said in *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 112:
>
> > The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State Legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.
>
> This earlier view was obviously overlooked by the former Federal Court when it followed *Vacher*'s case. Indeed it is, for reasons that will become apparent from the discussions later in this judgment, that the courts are very much concerned with issues of whether a law is fair and just when it is tested against art. 8(10). Further, it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See *Keshavananda Bharati v. State of Kerala* AIR [1973] SC 1461.

[33] The appropriate response to the pleas made by the appellants to assert their fundamental right to freedom of expression must be the one stated by Budd J in *Educational Company Of Ireland Ltd v. Fitzpatrick (No. 2)* [1961] IR 345 at p. 365:

> The Court will therefore assist and uphold a citizen's constitutional rights. Obedience to the law is required of every citizen, and it follows that if one citizen has a right under the Constitution there exists a correlative duty on the part of the other citizens to respect that right and not to interfere with it.

[34] The observations expressed by Gokulakrishnan, CJ in *Vedprakash v. The State* [1987] AIR Gujarat 253 at para 24 reinforce the proposition that in considering the constitutionality of

A legislative enactments restricting a fundamental right those legislative enactments must measure up to the test of reasonableness which include notions of proportionality:

> Our democratic Constitution inhibits blanket and arbitrary deprivation of a person's liberty by authority. It guarantees that no one shall be deprived of his personal liberty except in accordance with procedure established by law. It further permits the State, in the larger interests of the Society to so restrict that fundamental right in a reasonable but delicate balance is maintained on a legal fulcrum between individual liberty and social security. The slightest deviation from, or displacement or infraction or violation of the legal procedure symbolised on that fulcrum upsets the balance, introduces error and aberration and vitiates its working. The symbolic balance, therefore, has to be worked out with utmost care and attention.

[35] I do not think it is either necessary or useful to lay down inflexible propositions to assess the reasonableness of legislative enactments which purport to violate rights guaranteed by the Federal Constitution because each must be determined on its own peculiar facts and circumstances. But where the legislative enactment is self-explanatory in its manifest absurdity as s. 15(5)(a) of the UUCA undoubtedly is, it is not necessary to embark on a judicial scrutiny to determine its reasonableness because it is in itself not reasonable. What better illustration can there be of the utter absurdity of s. 15(5)(a) than the facts of this case where students of universities and university colleges face disciplinary proceedings with the grim prospect of expulsion simply because of their presence at a parliamentary by-election. A legislative enactment that prohibits such participation in a vital aspect of democracy cannot by any standard be said to be reasonable. In my judgment, therefore, because of its unreasonableness, s. 15(5)(a) of the UUCA does not come within the restrictions permitted under art. 10(2)(a) of the Federal Constitution and is accordingly in violation of art. 10(1)(a) and consequently void by virtue of art. 4(1) of the Federal Constitution which states:

> 4(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[36] Quite apart from what was laid down in *Sivarasa Rasiah (supra)* it is absolutely necessary to read the word "reasonable" into and before the word "restrictions" in art. 10(2)(a) of the Federal Constitution to avoid the absurdity that it would otherwise

produce. A rigid application of the plain and literal meaning of the words of art. 10(2)(a) of the Federal Constitution would make nonsense of the freedom of expression under art. 10(1)(a) by rendering it nugatory because every legislative enactment which takes away the freedom of expression under art. 10(1)(a) can conceivably be justified as being within the restrictions set out under art. 10(2)(a). Article 10(1)(a) would thus be subsumed under art. 10(2)(a), a result that is manifestly absurd. In *Federal Steam Navigation Co. Ltd & Anor v. Department Of Trade And Industry* [1974] 2 All ER 97 Lord Salmon made this observation in relation to statutory interpretation at p. 114:

> On the other hand, there are ample precedents of the highest authority for reading the word 'or' for 'and' or substituting the word 'and' for 'or' when otherwise, as here, the statute would be unintelligible and absurd.

[37] Similarly, reading the word "reasonable" into art. 10(2)(a) as aforesaid would avoid the absurdity that it could otherwise produce.

[38] Finally, the respondents have also sought to rely on s. 15(4) of the UUCA to mitigate the effects of s. 15(5)(a), s. 15(4) UUCA states:

> The Vice-Chancellor may, on the application of a student of the University, exempt the student from the provisions of paragraph (1)(a), subject to such terms and conditions as he thinks fit.

With respect, it is impossible not to suppose s. 15(4) of the UUCA to be anything other than a derisory appendage to s. 15(5)(a) and therefore, patently inconsequential. In my view, the respondents' reliance on s. 15(4) is wholly misconceived.

Notwithstanding the presumption of constitutionality of a legislative enactment and the rule that the court must endeavour to sustain its validity, in the circumstances aforesaid, the validity of s. 15(5)(a) of the UUCA is nevertheless patently unsustainable.

[39] For the reasons aforesaid, the appeal is allowed with no order as to costs. The orders made by the High Court are set aside. The declarations prayed for in the appellants' originating summons dated 1 June 2010 are accordingly allowed. Deposit to be refunded to the appellants.

Low Hop Bing JCA:

Appeal

[40] In the Kuala Lumpur High Court, the appellants' (the plaintiffs') originating summons (encl. 1) sought a declaration that s. 15(5)(a) of the Universities and University Colleges Act 1971 ("s. 15(5)(a)") is invalid, on the ground that it contravenes art. 10(1)(a) of the Federal Constitution, and consequentially the pending disciplinary proceedings instituted against the plaintiffs by Universiti Kebangsaan Malaysia, respondent 3 (defendant 3) are invalid. (For brevity and convenience, a reference hereinafter to an article is a reference to that article in the Federal Constitution).

[41] The plaintiffs' summons in chambers (encl. 4) prayed for an interlocutory injunction to restrain defendant 3 from proceeding with the disciplinary proceedings.

[42] The High Court had dismissed the plaintiffs' originating summons and summons in chambers. Hence, this appeal by the plaintiffs.

Factual Background

[43] The undisputed facts are simple and straightforward. The plaintiffs are political science undergraduate students of defendant 3. They were present in the constituency of Hulu Selangor during the campaign period for the Parliamentary by-election of 24 April 2010. They were having in their possession paraphernalia supportive of, sympathetic with or opposed to a contesting political party in the by-election.

[44] On or about 13 May 2010, the plaintiffs received notices from defendant 3's Vice Chancellor, requiring them to appear before a disciplinary tribunal on 3 June 2010, to answer charges of alleged breaches and offences under s. 15(5)(a), punishable under the disciplinary regulations of defendant 3. In response thereto, the plaintiffs made written representations dated 26 May 2010 denying the allegations.

Question For Determination

[45] Plaintiffs' learned counsel Mr Malik Imtiaz Sarwar (assisted by Miss Jenine Gill) conceded that Parliament is permitted to enact laws that contravene art. 10(1)(a) if such laws fall within the ambit of art. 10(2)(a). However, they contended in essence that:

(1) The court ought to have regard to the nature of the fundamental rights guaranteed under art. 10(1)(a) which must be interpreted generously to give its widest effect; and

(2) Section 15(5)(a) violated the plaintiffs' fundamental liberties to speech and expression, and is unconstitutional as it lies outside the ambit of art. 10(2)(a). They relied on, *inter alia*, the judgment of the Federal Court in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, FC.

[46] Learned Senior Federal Counsel Noor Hisham bin Ismail derived support from the judgment of the (then) Supreme Court in *PP v. Pung Chen Choon* [1994] 1 LNS 208 SC and argued for respondents 1 and 2 (defendants 1 and 2) that the learned High Court judge is correct in arriving at the decision that s. 15(5)(a) is constitutional and valid. In any event, he added that the provisions of s. 15(5)(a) are reasonable and within the ambit of art. 10(1)(a) read with art. 10(2)(a). Likewise, Dato' Sri Dr Muhammad Shafee Abdullah (Miss Sarah Abishegan with him) submitted for defendant 3 and supported the decision of the High Court as correct.

[47] A glimpse of the aforesaid submissions led me to the consideration of the following question:

> Upon a true construction of s. 15(5)(a), and testing it against art. 10(1)(a) read with the restrictions under art. 10(2)(a), can s. 15(5)(a) be said to contravene art. 10(1)(a) and *ultra vires* the Federal Constitution, unconstitutional and invalid?

[48] In my view, consideration of the aforesaid question would necessarily revolve around:

(1) An analysis of s. 15(5)(a), art. 10(1)(a) and art. 10(2)(a);

(2) The methodology of constitutional interpretation;

(3) The ambit of art. 10(1)(a) read with the restrictions under art. 10(2)(a); and

(4) The reasonableness of those restrictions.

Section 15(5)(a), art. 10(1)(a) And art. 10(2)(a)

[49] Section 15(5)(a) merits reproduction as follows:

> 15. Student or students' organization, body or group associating with societies, etc.

A (5) No student of the University and no organization, body or group of students of the University which is established by, under or in accordance with the Constitution, shall express or do anything which may reasonably be construed as expressing support for or sympathy with or opposition to:

B (a) any political party, whether in or outside Malaysia.

[50] Article 10(1)(a) provides for fundamental "Freedom of speech, assembly and association" in the following words:

C 10. Freedom of speech, assembly and association.

(1) Subject to Clauses (2), ...:

(a) Every citizen has the right to freedom of speech and expression. (emphasis added)

D **[51]** Since art. 10(1)(a) is "subject to", *inter alia*, art. 10(2)(a), art. 10(1)(a) is subservient while art. 10(2)(a) is predominant. Where art. 10(1)(a) is in conflict with, repugnant to or inconsistent with art. 10(2)(a), then art. 10(1)(a) would give way and art. 10(2)(a) would prevail. Article 10(2)(a) authorizes E Parliament to enact laws imposing restrictions as follows:

(2) Parliament may by law impose:

(a) on the rights conferred by paragraph (a) of Clause (1), **such restrictions as it deems necessary or expedient** in the F interest of the security of the Federation or any part thereof, friendly relations with other countries, **public order** or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any G offence. (emphasis added)

Methodology Of Constitutional Interpretation

[52] In relation to art. 10(1) and art. 10(2), our apex court has apparently developed two different methodologies of interpretation, H as illustrated below.

[53] In *Pung Chen Choon, supra*, the accused was prosecuted in the Magistrate's Court Kota Kinabalu. He faced a charge under s. 8A(1) of the Printing Presses and Publications Act 1984 I ("s. 8A(1)") ie, maliciously publishing false news in "The Borneo Mail" dated 16 July 1990. At the close of the case for the prosecution, the defence raised the question whether s. 8A

imposes restrictions on the right to freedom of speech and expression in violation of art. 10(1)(a) and art. 10(2)(a) and thereby void.

[54] The aforesaid question was eventually referred to the (then) Supreme Court where four questions were formulated for consideration, out of which the relevant questions are:

(1) Whether s. 8A(1), read with s. 8A(2), imposes restrictions on the right to freedom of speech and expression conferred by art. 10(1)(a)?

(2) If so, whether the restriction imposed is one permitted by or under art. 10(2)(a)?

(3) Whether s. 8A(1) read with s. 8A(2) is consistent with art. 10(1)(a) and art. 10(2)(a) and therefore valid?

[55] Article 10(1)(a) and art. 10(2)(a) had been reproduced above.

[56] The provisions of s. 8A(1) and (2) read as follows:

> 8A(1) Where in any publication there is maliciously published any false news, the printer, publisher, editor and the writer thereof shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine not exceeding twenty thousand ringgit or to both.
>
> (2) For the purposes of this section, malice shall be presumed in default of evidence showing that, prior to publication, the accused took reasonable measures to verify the truth of the news.

[57] The (then) Supreme Court answered Question (1) in the affirmative.

[58] Questions (2) and (3) were considered together. Edgar Joseph Jr SCJ (as he then was) held, *inter alia*, that:

> (1) In Malaysia, when infringement of the right to freedom of speech and expression is alleged, the scope of the court's inquiry is limited to the question whether the impugned law comes within the ambit of the permitted restriction. So, for example, if the impugned law, in pith and substance, is a law

relating to the subject enumerated under the permitted restrictions found in art. 10(2)(a), the question whether it is reasonable does not arise; the law would be valid (p. 575H);

(2) The right to freedom of speech and expression as enshrined in art. 10(1)(a) is not absolute because the Constitution authorizes Parliament to impose certain restrictions, as it deems necessary (p. 576E);

(3) The Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia: per Thomson CJ in *Government of State of Kelantan v. Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ 335 at p. 358 column 1 J FC. See also *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187, at p. 189 col 1A FC; *PP v. Ooi Kee Saik & Ors* [1971] 2 MLH 108 at p. 113 col 2 B-C; and *Adegbenro v. Akintola* [1963] 3 WLR; [1963] AC 614 PC per Lord Radcliffe (p. 576B-D);

(4) There is a presumption, perhaps even a strong presumption, of the constitutional validity of the impugned section and so the burden of proof lies on the party seeking to establish the contrary (p. 576H);

(5) It is impossible to lay down an abstract standard applicable to all cases. It would be the duty of the court to consider each impugned law separately, regard being had to the nature of the right alleged to have been infringed, the underlying purpose of the restriction, the extent and the urgency of the evil sought to be remedied, not forgetting the prevailing conditions of the time (p. 577B-C);

[59] The (then) Supreme Court gave the answers to Questions 2 and 3 in the affirmative. In other words, the restriction imposed under s. 8A(1) read with s. 8A(2) is one permitted under art. 10(2)(a), and consistent therewith, and therefore valid.

[60] On the other hand, in *Sivarasa Rasiah, supra*, the appellant raised three broad grounds in support of his challenge to the constitutionality of s. 46A of the Legal Profession Act 1976 ("s. 46A"). Section 46A prohibits the appellant, an advocate and solicitor, who is also an office bearer of a political party and a Member of Parliament, from standing for and, if elected, serving on the Bar Council which is the governing body of the Malaysian Bar. The second ground, which is relevant to the instant appeal,

states that s. 46A violates his right of association guaranteed by art. 10(1)(c) read with art. 10(2)(c). The court considered Part II of the Federal Constitution which houses, *inter alia*, art. 10(1)(a) and art. 10(2)(a), and guarantees fundamental liberties or rights. On the methodology of interpretation in relation to fundamental liberties or rights, the Federal Court held, *inter alia*, that:

(1) These provisions must be generously interpreted in the sense that a prismatic approach to interpretation must be adopted: per Gopal Sri Ram FCJ (as he then was) speaking for the Federal Court at p. 514, applying *Badan Peguam Malaysia v. Kerajaan Malaysia* [2008] 1 CLJ 521 FC; *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 FC; and *Shamim Reza v. PP* [2009] 6 CLJ 93 FC;

(2) The provisions of Part II contain concepts that house within them several separate rights; and the duty of a court in interpreting these concepts is to discover whether the particular right claimed as infringed by state action is indeed a right submerged within a given concept;

(3) Provisions or restrictions that limit or derogate from a guaranteed right must be read restrictively;

(4) In interpreting art. 10(2)(c) (which says that "Parliament may by law impose ... (c) on the right conferred by para (c) of cl. (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality") the word "reasonable" should be read into the provision to qualify the width of the proviso;

(5) When reliance is placed by the state to justify a statute under one or more of the provisions of art. 10(2), the question for determination is whether the restriction that the particular statute imposes is "reasonably" necessary and expedient for one or more of the purposes specified in that article; and

(6) The disqualifications imposed under s. 46A are reasonable restrictions within art. 10(2)(c), because they are justifiable on the ground of morality ie, in the nature of public morality as understood by the people as a whole.

[61] His Lordship explained that part of public morality is the proper conduct and regulation of professional bodies, and matters of discipline, and that it is in the public interest that advocates and solicitors who serve on the governing body behave professionally, act honestly and independent of any political influence. He concluded that an independent Bar Council may act

morally in the proper and constitutional sense of that term, and that the absence of political influence secures an independent Bar. Consequently, the appellant's challenge based on art. 10(1)(c) failed.

[62] There are now two separate and conflicting judgments emanating from the (then) Supreme Court and the present Federal Court respectively. These courts bear different names for our apex court at different times. It is therefore necessary to consider which judgment to follow. In *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645, Peh Swee Chin FCJ (as he then was) delivered the judgment for the Federal Court and held that where the Federal Court departs from its previous decision when it is right to do so, then also by necessary implication its decision represents the present state of the law. When two decisions of the Federal Court conflict on a point of law, the later decision prevails over the earlier decision.

[63] Arising from the above judicial statement in *Dalip Bhagwan Singh, supra,* for the purposes of the instant appeal, I am bound to treat the judgment of the Federal Court in *Sivarasa Rasiah, supra*, as representing the present state of the law and prevails over the decision of the (then) Supreme Court in *Pung Chen Choon, supra*, on the point that the word "reasonable" should be read into art. 10(2).

[64] I therefore take the view that art. 10(1)(a) and art. 10(2)(a) must be generously interpreted in the sense that a prismatic approach to interpretation must be adopted and that the word "reasonable" should be read into the provisions of art. 10(2)(a) and to consider whether the restriction that art. 10(2)(a) imposes is "reasonably" necessary and expedient for one or more of the purposes specified therein. In the circumstances, it is necessary for me to proceed to consider the reasonableness of the restrictions in the light of s. 15(5)(a) and art. 10(2)(a).

Reasonableness Of Restrictions

[65] The reasonableness of the restrictions contained in s. 15(5)(a) of the Universities and University Colleges Act 1971 (UUCA) may be traced to its being enacted as a source of Federal law to regulate the affairs of students in universities. The restrictions imposed under s. 15(5)(a) pertain essentially to the

involvement of students in politics. It is necessary and seeks to prevent infiltration of political ideologies, including extremities, amongst students. This infiltration may adversely affect the primary purpose of the universities ie, the pursuit of education. This is particularly significant as university students could well be vulnerable youth capable of being subject to peer pressure and be easily influenced. The issue of "reasonableness" has been extensively debated in Parliament as reported in Hansard dated 10 December 2008 p. 76. In essence, the restrictions were stated to protect the interest of the students and institutions of higher learning, as a matter of policy.

[66] It is not for the court to say that the law is "harsh and unjust". This was succinctly stated by the Federal Court in *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90, and the principles may be extracted as follows:

(1) 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 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.

(2) 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 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.

(3) 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.

A

Conclusion

[67] By reason of the foregoing, I hold that the provisions contained in s. 15(5)(a) are reasonable. I answer the above question in the negative.

B

[68] The restrictions contained in s. 15(5)(a), being within the bounds of reasonableness, come within the scope of art. 10(1)(a) read with art. 10(2)(a). It is therefore constitutional and valid. The instant appeal is dismissed. The decision of the High Court is affirmed. As agreed by the parties herein, there is no order as to costs. Deposit to be refunded to the appellants.

C

[69] Strictly, by way of *obiter*, Parliament may wish to consider an amendment to s. 15(5) in particular and the whole Act in general so as to bring about a repeal or review thereof. This measure can only be brought about by legislative acts. The making or unmaking of the law is a matter within the exclusive domain of Parliament, while the courts are entrusted with the responsibility for interpretation of the law.

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