Hearing Date
14.10.2016

DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO.: W-01(A)-271-08/2015

ANTARA

HARIS FATILLAH B. MOHD IBRAHIM ... PERAYU
(NO. K/P: 590404-08-5067)

DAN

SURUHANJAYA PILIHAN RAYA MALAYSIA ... RESPONDEN

(Dalam Mahkamah Tinggi Malaysia Di Kuala Lumpur
Saman Pemula No. 24-3-01/2015

Dalam perkara Aturan 5 Kaedah 4, Aturan 7, Aturan 15 Kaedah 16 dan Aturan 28 Kaedah-Kaedah Mahkamah 2012

dan

Dalam perkara Seksyen 41 Akta Spesifik 1950

dan

Dalam perkara Perkara 10, 113, 116, 117, Seksyen 2, 4 dan 5, Jadual 13 Perlembagaan Persekutuan

dan

Item 1, Jadual kepada Akta Kehakiman 1964

Antara

Haris Fatillah B Mohd Ibrahim ...Plaintif

Dan

Suruhanjaya Pilihan Raya Malaysia ...Defendan)

OUTLINE SUBMISSION OF COUNSEL FOR THE APPELLANT

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I Introduction

1. The central question in this appeal is what information is the Respondent required to give or make available to voters in respect of a re-delineation exercise carried out by the Respondent under Article 113(2) and the 13th Schedule, Federal Constitution.

2. With a view to clarifying this matter, and establishing his rights in law, the Appellant had, by way of Kuala Lumpur High Court Originating Summons No. 24-3-01/2015 ("**OS**"), sought the following declarations[1]:

   2.1. All affected persons have the right to all information in relation to the changes made to:-

      a. the parliamentary/state constituencies wherein the persons affected are registered voters; and/or

      b. all other parliamentary/state constituencies.

   all other information that may be relevant (the "**Relevant Information**") which includes:-

      a. recommendations or proposed recommendations (the "Recommendations");

[1] Rekod Rayuan ("R/R"), Bahagian A, p.17

b. map or maps of proposed constituency, including voting areas; and

c. reasons for proposed changes along with the relevant documents used in support or alternatively, as justification for the proposed changes.

(*Primary Declarations*)

2.2. all persons affected are conferred the right to the Relevant Information given in a form and manner which enables the affected persons, if required, to facilitate in having the affected persons make effective representations with respect to the proposed recommendations under section 5, Thirteenth Schedule, Federal Constitution;

2.3. the Respondent does not have the right or authority to restrict the right of examination of affected person or persons only to physical examination for recommended proposals at a designated and fixed location in a constituency;

2.4. the Relevant Information provided be made available by the Respondent to all persons affected (resident in Malaysia or abroad), in a way which enables all persons affected to make effective representations within the specified time stipulated under section 4(b), Thirteenth Schedule, Federal Constitution, including but not limited to:-

a. publication of the Relevant Information in a digital format that may be downloaded from the web page of the Respondent; and

b. printed or digital copies of the Relevant Information be made available at the request of the affected persons at a nominal cost.

(*Secondary Declarations*)

3. At the time of the filing of this OS, the Respondent had begun a review of the division of the Federal and State constituencies under Article 113(2), Federal Constitution.[2]

4. The High Court dismissed the OS on the ground that the Appellant had no locus standi to seek the declaratory reliefs in paragraph 2 above and that he had no right to the Relevant Information under Article 10(1)(a), FC.[3]

5. On 15.09.2016, the Respondent gazetted a notice under section 4, Part II, 13th Schedule, Federal Constitution to propose its recommendations based on the review of the constituencies mentioned in paragraph 3 above (the "**Notice**"). As at the time of the hearing of this appeal, the representation process is still ongoing.

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[2] R/R, Bahagaian C, pp.50-55
[3] R/R Tambahan, pp.18-51

6. The Appellant's argument was essentially that; firstly, he had the locus standi as a registered voter to seek the declarations in the OS; and secondly, he was and is entitled to the Relevant Information under Section 4 of the 13th Schedule read with Article 10(1)(a) Federal Constitution.

II Material facts

7. The Appellant was, and still, is a registered voter in the Parliamentary Constituency of Petaling Jaya Selatan and the State Legislative Assembly of Bukit Gasing.[4]

8. The Respondent had on or about October 2014 announced to the public that it was gathering information to commence a nationwide re-delineation exercise in accordance with sections 4 and 5, Part II, 13th Schedule, Federal Constitution. The Respondent further announced that[5]:

   8.1. The public would be allowed to make the necessary representations after the delineation notice had been gazette and for that purpose inspect the proposed re-delineation at selected places; and

[4] R/R, Bahagian B, p.23
[5] R/R, Bahagaian C, pp.50-55

8.2. The said representations would have to be made within one (1) month of the gazetting of the re-delineation notice.

9. In light of the above, the Appellant had vide his letter dated 08.12.2014 (the "**said Letter**") written to the Respondent requesting that the Appellant be supplied with all the Relevant Information for the purposes of making an effective representation. The said request was premised on section 4 and 5, Part II, 13th Schedule of the Federal Constitution.[6] The said sections provide[7]:

"4. Where the Election Commission have provisionally determined to make recommendations under Clause (2) of Article 113 affecting any constituency, they shall inform the Speaker of the House of Representatives and the Prime Minister accordingly, and shall publish in the Gazette and in at least one newspaper circulating in the constituency a notice stating -

(a) the effect of their proposed recommendations, and (except in a case where they propose to recommend that no alteration be made in respect of the constituency) that a copy of their recommendations is open to inspection at a specified place within the constituency; and

(b) that representations with respect to the proposed recommendations may be made to the Commission within one month after the publication of such notice,

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[6] R/R, Bahagaian C, pp.167-169
[7] Ikatan Autoriti Perayu ("**IAP**"), tab 1

and the Commission shall take into consideration any representations duly made in accordance with any such notice.

5. Where, on the publication of the notice under section 4 of a proposed recommendation of the Election Commission for the alteration of any constituencies, the Commission receive any representation objecting to the proposed recommendations from -

(a) the State Government or any local authority whose area is wholly or partly comprised in the constituencies affected by the recommendation; or

(b) a body of one hundred or more persons whose names are shown on the current electoral rolls of the constituencies in question,

the Commission shall cause a local enquiry to be held in respect of those constituencies."

10. Further, the Appellant had vide the said Letter expressed his concern that the right to effective representation would be illusory, given the short period of time (1 month) allowed for the same, unless the Relevant Information was provided once the re-delineation notice was gazetted.[8] This was further underscored by the fact that, based on previous conduct of the Respondent[9]:

[8] R/R, Bahagaian C, p.168
[9] R/R, Bahagaian C, pp.167-168; R/R, Bahagaian B, pp.25-26

10.1. The Appellant would be restricted to inspecting the proposed changes for his constituency (and not any other) at a designated location; and

10.2. The Appellant would have to make himself physically present at the designated locations in other constituencies in order to know the proposed changes to those constituencies. This would, in effect, require the Appellant to travel to each constituency to inspect the proposed changes. This would undermine the representation process bearing in mind the requirement that a minimum of 100 registered voters would be required for a valid protest in respect of each constituency.

11. As at the date of the filing of the OS, the Appellant had not received any reply to the said Letter.

12. Further, the Respondent had caused to be gazetted a delineation notice for Federal and State constituencies in the State of Sarawak on 05.01.2015.[10] This was important as it provided context to the concerns of the Appellant. In Sarawak, the delineation notice was gazetted without providing the Relevant Information.

12.1. The electoral roll was not provided to the voters. It had to be purchased. The electoral roll is essential in order to determine which polling district an elector has been assigned to. This

[10] R/R, Bahagaian B, p.28

information was necessary in order to ascertain who it is that could join in an effort to make a representation under section 5(b), 13th Schedule (requiring 100 or more objectors)[11];

12.2. The reasons behind the proposals were not made known.[12]

III The High Court decision

13. The High Court dismissed the OS on 11.06.2015. The grounds of the said decision can be summarized as follows:

Jurisdiction and locus standi

13.1. The Appellant was not in any way aggrieved by a decision as the Respondent had not commenced the delineation process and/or taken any action towards that direction[13];

13.2. The OS was neither an action commenced as a representative action nor a public interest litigation. The Appellant must show that he has a proper and tangible interest to move the court for declaratory relief[14];

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[11] See the decision of the High Court in ***See Chee How & Anor v Pengerusi Suruhanjaya Pilihan Raya Malaysia (Election Commission of Malaysia) [2016] 8 MLJ 384*** at p.417 (IAP, tab 9). The factual finding of the High Court on this point was not disturbed by the Court of Appeal

[12] It was not a disputed fact that the reasons behind the proposed recommendations in Sarawak were not made known

[13] R/R Tambahan, p.29, paragraph 20

[14] R/R Tambahan, p.31, paragraph 25

13.3. The Appellant was asking the court to declare something beyond the scope of duty and/or responsibilities of the Respondent in the Federal Constitution[15];

13.4. The declarations sought would interfere with other constituencies and would affect the local enquiries to be held there. The Appellant was therefore interfering with the constitutional right of the voters to make representations in those constituencies[16];

13.5. The Appellant had not averred in his affidavit that there was interference with his public right such that it would affect his private right or that he had suffered some special damage peculiar to him from such interference. Neither was the Appellant able to demonstrate that there was a controversy or a ripe issue between him and the Respondent[17];

13.6. The Appellant had not averred as to how his rights were said to have been affected by the Respondent as there was yet to be any action by the Respondent under Article 113, Federal Constitution. The Appellant could not demonstrate how he was prejudiced by an act of the Respondent[18];

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[15] R/R Tambahan, p.32, paragraph 28
[16] R/R Tambahan, p.32, paragraph 29
[17] R/R Tambahan, p.32, paragraph 30
[18] R/R Tambahan, p.33, paragraph 31

13.7. The Appellant had not fulfilled the six conditions laid down in the case of ***Caxton (Kelang) Sdn Bhd v Susan Joy Labrooy [1988] 2 MLJ 604***[19] ("***Caxton***"), that is[20]:

a. There must exist a controversy between the parties;

b. These proceedings must involve a right;

c. These proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as 'standing' or 'locus standi';

d. The controversy must be subject to the court's jurisdiction;

e. The defendant must be a person having a proper or tangible interest in opposing the plaintiff's claim; and

f. The issue must be ripe, i.e. it must not be academic interest, hypothetical or one whose resolution would be of no practical utility.

13.8. Based on the foregoing, the Appellant has no locus standi to commence the OS[21];

Right to the Relevant Information by virtue of Article 10, Federal Constitution

[19] IAP, tab 10
[20] R/R Tambahan, p.33, paragraphs 32-34
[21] R/R Tambahan, p.35, paragraph 37

13.9. The Relevant Information that the Appellant would require to enable him to exercise his right to make a representation could be viewed in the proposed recommendations which would be made available once the same is open for inspection at the designated location. The Federal Constitution does not require the particulars to be inserted in the notice under section 4, Part II, 13th Schedule, Federal Constitution. The Federal Constitution does not envisage that the Relevant Information has to be supplied to the Appellant beforehand[22];

13.10. The right to make representations under sections 4 and 5, Part II, 13th Schedule, Federal Constitution is based on the Respondent's recommendation and not the notice. The former is more detailed while the notice merely states the effect of the Recommendations. The declarations sought for would render the words, "and a copy of their recommendations is open for inspection at a specified place within the constituency" in section 4(a), "that representations with respect to the proposed recommendations" in section 4(b), and "any representations objecting to the proposed recommendations" in section 5 superflous and meaningless[23];

13.11. Further, the declarations sought for would amount to reading words into the provisions of the Federal Constitution which are

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[22] R/R Tambahan, pp.40-41
[23] R/R Tambahan, p.43, paragraph 57

not intended and gives no consideration to the "words existing in sections 4 and 5 of the 13th Schedule of the FC". It would have the effect of declaring "the Defendant to do something which the Defendant is not required under the FC to do, something outside and beyond the scope and or the function of the Defendant under Article 113 of the FC"[24];

13.12. The Court of Appeal in ***Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor [2016] 3 MLJ 365*** ("***See Chee How***") decided that the Respondent was not required to provide the detailed particulars as ordered by the Kuching High Court as the said particulars do not fall within the meaning of "effect of the proposed recommendations"[25];

Conclusion

13.13. The proper avenue to raise the various shortcomings and to seek answers as to whether the Respondent's recommendations complies with section 2, Part I, 13th Schedule, Federal Constitution was at the local enquiry conducted by the Respondent and not the courts.[26]

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[24] R/R Tambahan, p.44
[25] R/R Tambahan, p.48, paragraph 71
[26] R/R Tambahan, p.49, paragraph 75

IV Submission

14. In order to appreciate the central issue in the appeal herein, it is pertinent to analyze the role of the Respondent as a constitutional body charged with the responsibility of overseeing the free and fair elections guaranteed by Article 119 Federal Constitution[27].[28] That article is the cornerstone of a representative democracy.

A. The Respondent

15. The Respondent is a body established under Article 113(1), Federal Constitution. Its role is primarily two-fold: firstly, to conduct elections to the House of Representatives and the Legislative Assemblies of the States and prepare and revised electoral rolls for such elections; and secondly, to review the division of the Federation and the States into constituencies and recommend such changes therein as they may think necessary in order to comply with the provisions contained in the Thirteenth Schedule.

16. The importance of the role of the Respondent in a representative democracy cannot be overstated. It is the Respondent's role to oversee the election of members into the House of Representatives

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[27] IAP, tab 1

[28] See ***Harris Mohd Salleh v Ismail Bin Majin, Returning Officer & Ors [2001] 3 MLJ 433***, where Muhammad Kamil, J said, at p.453, "*The exposure of fraudulent practices such as massive registration of phantom voters is time consuming. However, it has to be done if we wish to defend and preserve the meaningful practice of democracy in Malaysia. As custodians of free and fair elections, the SPR is duty bound to do it.*" (IAP, tab 12)

and the Legislative Assemblies of the States.[29] The Yang di-Pertuan Agong ("**YDPA**") then appoints as Prime Minister, a member of the House of Representatives who in his judgment is likely to command the confidence of the majority of the members of that house.[30] It is on the advice of the Prime Minister that the YDPA appoints other ministers to form the Cabinet.[31]

17. To put it simply, the Respondent oversees the process that culminates in the establishment of the federal government and the state governments. It is the Respondent's primary duty to ensure that the elections, and the re-delineation and preparation of electoral rolls leading to the elections, is free and fair. It is for this very purpose that the Respondent must be independent and enjoy public confidence. Article 114(2), Federal Constitution states[32]:

"(2) In appointing members of the Election Commission the Yang di-Pertuan Agong shall have regard to the ***importance of securing an Election Commission which enjoys public confidence****."*

18. The importance of the independence of the Respondent to a democratic state was stressed by the Federation of Malaya Constitutional Commission ("**Reid Commission**") in its report in 1957 where the commission noted, at paragraph 71[33]:

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[29] See Articles 116 and 117, Federal Constitution (IAP, tab 1)
[30] See Article 43(2)(a), Federal Constitution (IAP, tab 1)
[31] See Article 43(2)(b), Federal Constitution (IAP, tab 1)
[32] IAP, tab 1
[33] IAP, tab 42

"Before any elections can be held for the House of Representatives it will be necessary to delimit constituencies and to prepare electoral rolls for each constituency. We recommend that an independent Commission should have the duty and responsibility of carrying out these matters and of organising and conducting elections and that this Commission should be called the Election Commission and should consist of three members. ***We regard it as a matter of great importance that this Commission should be completely independent and impartial****. We therefore recommend that the* ***Election Commission should be a permanent body, that its members should be appointed by the Yang di-Pertuan Besar and should be persons in whom all democratic parties and all communities have complete confidence. The independent position of its members should be recognised by providing that they can only be removed from office in the manner provided with regard to a Judge of the Supreme Court, and that their salaries cannot be diminished during their term of office but shall be a charge on the Consolidated Fund****."*

19. This is a position that both Parliament and the Executive has subscribed to.

19.1. Principle 4(2) of the Declaration on Criteria for Free and Fair Elections (unanimously adopted by the Inter-Parliamentary

Council (the Malaysian Parliament is a member) at its 154th session at Paris on 26.03.1994) ("**IPC Declarations**") states[34]:

"In addition, States should take the necessary policy and institutional steps to ensure the progressive achievement and consolidation of democratic goals, including through the establishment of a neutral, impartial or balanced mechanism for the management of elections."

19.2. On 10.04.2012, all Member States (including Malaysia) in the United Nation General Assembly had agreed to, inter alia, the following principles vide Resolution 66/163 ("**Resolution 66/163**")[35]:

"Recognizing also that Member States are responsible for ensuring free and fair elections, free of intimidation, coercion and tampering of vote counts, and that all such acts are sanctioned accordingly.

...

Reiterating that transparency is a fundamental basis for free and fair elections, which contribute to the accountability of Governments to their citizens, which, in turn, is an underpinning of democratic societies"

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[34] IAP, tab 43
[35] IAP, tab 44

19.3. These aspirations are reflected by national laws. In addition to the Federal Constitution, reference can be made to the Elections Act 1958, Election Commission Act 1957 and Election Offences Act 1954, all of which are directed to the conduct of free and fair elections.

B. Delimitation

(i) Representative democracy and equal suffrage

20. That Malaysia was to be a free and democratic state was at the forefront of the Reid Commission's mind when drafting the Federal Constitution. The said commission noted in its report, at paragraph 14[36]:

"14. In making our recommendations we have had constantly in mind two objectives: first that there must be the fullest opportunity for the growth of a united, free and democratic nation, and secondly that there must be every facility for the development of the resources of the country and the maintenance and improvement of the standard of living of the people."

[36] IAP, tab 42

21. The Alliance (now known as Barisan Nasional) supported the notion of a democratic state. In its Memorandum to the Reid Commission entitled "Political Testament of the Alliance", it noted[37]:

"The political testament, which we set out below, reflects the firm desire of the majority of the people of this country for a form of government which will ensure freedom, equality and unity of the new nation. We, therefore, desire that the future constitution of this country must provide for the establishment of a sovereign and fully independent State in which the people shall enjoy freedom and equality. ***This constitution shall also provide for a stable democratic government and ensure, peace and harmony amongst all its people.***

...

Elections

The constitution of Malaysia should provide for a parliamentary democracy, and it is therefore imperative that the Dewan Rakyat should be fully elected*. The election of the members of the Dewan Rakyat should be fully elected. The election of members of the Dewan Rakyat should be under the system of direct elections from single-member constituencies held once at least in every five years. Every national of Malaysia who has attained the age of 21 years should have the right to vote in such election."*

[37] IAP, tab 45

22. The intention of the framers makes it clear that democratic principles are part of the basic structure of our Federal Constitution. In ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333***, Gopal Sri Ram, FCJ said, at p.342[38]:

"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."

23. Democracy refers to a form of government in which sovereign power resides in the people as a whole. It is for this reason that the people elect their representatives to Parliament, a body which represents the will of the people. In ***Kerajaan Negeri Selangor & Ors v Sagong Bin Tasi & Ors [2005] 6 MLJ 289***, Gopal Sri Ram, JCA (as he then was) said, at p.312[39]:

"In a system of Parliamentary democracy modelled along Westminster lines, it is Parliament which is made up of the

[38] IAP, tab 13
[39] IAP, tab 14

representatives of the people that entrusts power to a public body. It does this through the process of legislation. The donee of the power — the public body — may be a Minister of the Crown or any other public authority. The power is accordingly held in trust for the people who are, through Parliament, the ultimate donors of the power. It follows that every public authority is in fact a fiduciary of the power it wields. Sometimes the power conferred is meant to be exercised for the benefit of a section or class of the general public, as is the case here. At other tunes it is to be exercised for the general good of the nation as a whole, that it to say, in the public interest. But it is never meant to be misused or abused. And when that happens, the courts will intervene in the discharge of their constitutional duty."

24. In a democratic system, the will of the people is exercised by the Government on their behalf. In ***Australian Capital Television Pty Ltd And Others v Commonwealth Of Australia (No 2) (1992) 108 ALR 577***, Mason, CJ said, at p.593[40]:

"The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives."

25. The concept of a representative democracy necessitates equal representation in government. This necessarily means that the voting

[40] IAP, tab 15

power of each citizen must be relatively equal. In ***Reference Re Provincial Electoral Boundaries (Sask.) [1991] 2 S.C.R. 158*** ("***Saskatchewan***") , McLachlin, J said, at pp.183-184[41]:

*"It is my conclusion that the purpose of the right to vote enshrined in s. 3 of the Charter is not equality of voting power per se, but the right to "effective representation". **Ours is a representative democracy. Each citizen is entitled to be represented in government**. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative; as noted in Dixon v. B.C. (A.G.), [1989] 4 W.W.R. 393, at p. 413, elected representatives function in two roles -- legislative and what has been termed the "ombudsman role".*

***What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted**. The legislative power of the [page184] citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation."*

26. This is line with universally accepted practice, which the Malaysian Parliament and Executive has subscribed to:

[41] IAP, tab 16

26.1. Principle 1 of the IPC Declarations state[42]:

"In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage."

26.2. Article 21(3) of the Universal Declarations of Human Rights, proclaimed by the United Nations General Assembly on 10.12.1948 vide General Assembly Resolution 217(III)(A) ("**UDHR**"), states[43]:

"(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

26.3. The Malaysian government had pledged to the world that it would uphold the fundamental liberties in Part II of the Federal Constitution in a manner consistent with the UDHR. The Malaysian government, in its Aide-Memoire to the United Nations on 28.04.2006 detailing Malaysia's voluntary pledges

[42] IAP, tab 43
[43] IAP, tab 46

and commitments in support of its candidature for the United Nations Human Rights Council, stated[44]:

"Malaysia, since attaining independence in 1957, upholds that the promotion and protection of all human rights as an indispensable aspect in the process of nation building. ***Consistent with the Universal Declaration of Human Rights (UDHR), successive Malaysian Governments have made the guarantee of the individual's fundamental rights and liberties, as enshrined in the Constitution, the cornerstone of its policies and programmes****; while noting that all individuals have duties and responsibilities to the community to ensure the continued enjoyment of peace, stability and prosperity."*

26.4. Further, Principle 25 of the ASEAN Human Rights Declaration (adopted by ten ASEAN member states, including Malaysia, during the 21st ASEAN Summit in Phnom Penh on 18.11.2012) provides[45]:

"(1) Every person who is a citizen of his or her country has the right to participate in the government of his or her country, either directly or indirectly through democratically elected representatives, in accordance with national law.

[44] IAP, tab 47
[45] IAP, tab 48

(2) Every citizen has the right to vote in periodic and genuine elections, which should be by universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electors, in accordance with national law."

26.5. These aspirations are reflected by our Federal Constitution. This is explained further in the paragraphs that follow. It would however be opportune to consider the implications of positions adopted by the federal government internationally, including the ratification of treaties and the adoption of declarations. Put simply, while these positions in themselves do not bring into force international law, they nonetheless are foundation for a legitimate expectation to procedural and substantive fairness on the part of citizens (see ***Minister of Immigration and Ethnic Affairs v Teoh (1995) 128 ALR 353*** at pp.370-374[46]; ***Regina v North and East Devon Health Authority, Ex parte Coughlan [2001] QB 213***[47] at pp.241-242).

(ii) *Equal suffrage in Malaysia*

27. In line with the formation of a democratic state, the framers of the Federal Constitution envisaged the delimitation of constituencies on the principle of equal suffrage. A question arose as to whether the constituencies should be divided equally by reference to the number

[46] IAP, tab 17
[47] IAP, tab 18

of voters or the population in general. The framers ultimately decided that regard must be given to both, but the number of voters in any constituency should not be more than 15% below or above the average. The Reid Commission noted, at paragraphs 72-74 of its report[48]:

*"**The first question to be decided is whether constituencies should contain approximately equal populations or approximately equal numbers of voters. In most countries it makes little difference which basis is chosen because the proportion of voters to population does not greatly vary between different areas. But in the Federation today the proportion varies very greatly**. For example in the present constituency of Kuala Lumpur Barat there were at the last election 8,862 registered voters out of a total population of 132,300, and in the present constituency of Kelantan Utara there were 42,510 registered voters out of a total population of 93,300. We expect that this disparity will be greatly reduced when the new qualifications for citizenship have had time to operate so that a large proportion of the new voters have been included in electoral rolls. But we expect that for a long time to come there will still be very considerable differences between the proportion of voters to population in different areas. This is not due to any defect in our recommendations for new qualifications for citizenship but to there being resident in the Federation today considerable numbers of persons of voting age who would not be qualified for citizenship under any of the proposals which have been submitted to us, or who, even*

[48] IAP, tab 42

if qualified are unlikely to apply to have their names entered in the electoral rolls. Such persons tend to be concentrated in particular areas and whatever may be the qualifications for citizenship inserted in the Constitution, we would expect that the proportion of voters to population will be considerably smaller in, say, Kuala Lumpur than in rural constituencies.

73. We think that delimitation of constituencies should take place in two stages: the Election Commission should first allocate the total of 100 seats among the States giving each State a quota so that the sum of the eleven quotas is 100. It should then delimit in each State a number of constituencies equal to the quota for that State. We do not think that it would in present circumstances be fair to the various communities to determine the State quotas either solely by reference to the population in each State or solely by reference to the number of voters in each State. ***In normal circumstances the main object of delimitation is to ensure that so far as practicable every vote is of equal value and we think that the principal factor to which the Commission should have regard is the number of voters in the State; but we think that it is necessary also to have regard to the total population of the State. That means that if two States have equal numbers of voters but the population of one is considerably greater than that of the other then the State with the greater population could have a larger quota than the State with the smaller population.***

74. In delimiting constituencies within a State it would be in accord with general practice elsewhere and it is in our opinion necessary in the Federation that regard should be had not only to the number of voters in each constituency but also to the total population, the sparsity or density of population, the means of communication, and the distribution of different communities. We recommend that the Commission should be required to have regard to these factors, but in order to prevent too great weight being given to any of them, we recommend that the number of voters in any constituency should not be more than 15 per cent above or below the average for the State."

28. The principle of equal suffrage with a permitted difference of 15% was ultimately codified in our Federal Constitution under Article 116. Though amendments were made to remove the cap, the principle that all voters should have equal voting power remained.

28.1. The Constitution (Amendment) Act 1962 introduced the 13th Schedule into the Federal Constitution, replacing the provisions in Article 116. Section 2(c) was incorporated to mandate that "each constituency ought to be approximately equal". The 15% difference cap was removed and replaced with a 50% cap for rural constituencies only. When introducing the bill on 29.01.1962, the then Deputy Prime Minister, Tun Haji Abdul Razak, clarified that the removal of the cap was not indicative of

any principles having been changed. He said, at pp.4177-4178[49]:

"Honourable Members will observe that Section 2 of the new Thirteenth Schedule specifies certain general principles which, as far as possible, are to be taken into account in delimiting constituencies. ***These are known and accepted principles and were taken into account when delimiting the present constituencies. There is therefore no new principle which has been brought in. One of these principles is the weightage of rural constituencies for area. Basically, the number of electors in each constituency ought to be approximately equal except that, having regard to the greater difficulty of reaching electors in country districts and other disadvantages affecting rural constituencies, weightage for area may be given to rural constituencies to the extent that in certain instances rural constituencies may contain as little as half the number of electors in an urban constituency. This is not a new principle. It is to be found in the existing Constitution and is accepted in other countries.*** *The percentage of weightage now suggested is that recommended in the Report of the Committee appointed in 1953 to examine the question of elections to the Federal Legislative Council. In other words, the purpose of this amendment is merely to permit the retention of the existing constituencies and not to bring in any new principle."*

[49] IAP, tab 49

28.2. After the amendment, section 2(c) in the 13th Schedule read:

"The number of electors within each constituency ought to be approximately equal except that, having regard to the difficulty of reaching electors in country districts and the other disadvantages of facing rural constituencies, a measure of weightage for an area ought to be given to such constituencies to the extent that in some cases a rural constituency may contain as little as one-half of the electors of any urban constituency"

28.3. The 13th Schedule of the Federal Constitution was then amended again on 09.07.1973 vide Constitution (Amendment) (No.2) Act 1973. The phrase "to the extent that in some cases a rural constituency may contain as little as one-half of the electors of any urban constituency" was removed. When introducing the bill on 09.07.1973, the then Prime Minister, Tun Haji Abdul Razak, noted that the amendment was to ensure that rural voters were fairly represented and given equal treatment by their representatives in Parliament. He said, at p.1625[50]:

"Ahli-ahli Yang Berhormat tentulah faham bahawa bebanan tanggungjawab Ahli-ahli yang mewakili kawasan pilihanraya luar bandar yang luas seperti Ulu Kelantan atau Kuala Lipis

[50] IAP, tab 50

ataupun kawasan saya sendiri di Pekan adalah jauh berbedza dengan Ahli dari Bungsar ataupun Bukit Bintang. Kesulitan perhubungan dengan penduduk-penduduk yang diam di kampung-kampung yang terpencil memerlukan penyemakan atas keadaan yang berlaku sekarang bagi penyusunan semula kawasan pilihanraya ***supaya membolehkan Wakil Rakyat memberikan perhatian dan layanan yang lebih saksama kepada pengundi-pengundi mereka****."*

28.4. As a consequence of the said amendment, Section 2(c), 13th Schedule, Federal Constitution read, and still reads, as follows:

"(c) the number of electors within each constituency in a State ought to be approximately equal except that, having regard to the greater difficulty of reaching electors in the country districts and the other disadvantages facing rural constituencies, a measure of weightage for area ought to be given to such constituencies;"

29. As such, it is indisputable that the principle of equal suffrage is embedded in the Federal Constitution.

30. This conclusion is fortified by the guarantees of equality and non-discrimination, and substantive fairness, under Article 8, Federal Constitution, which provides[51]:

[51] IAP, tab 1

"(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment."

31. As is clear from the 13th Schedule, any deviation from the equal suffrage principle must be justified by reference to the "greater difficulty of reaching electors in the country districts and the other disadvantages facing rural constituencies". It is only on this basis that the Respondent can deviate from the equal suffrage principle, that is, to ensure that rural voters are effectively represented.

32. The Canadian authorities on this point are instructive. Similar to Malaysia, Canada is a parliamentary democracy that is a federation comprising a number of provinces. Canada, like Malaysia, has a diverse community. The relevant laws allow a difference of 25% from the average from the average electors. However, the Canadian Electoral Boundaries Commission is allowed to exceed this cap as due regard must be given to other considerations such as geography, community history, community interests and minority representation. The ultimate objective however is to ensure that the legislative

assembly effectively represents the diversity of Canadian society. Any deviation from the equal suffrage principle **must be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed**. In ***Saskatchewan (supra)***, McLachlin, J said at pp.184-185[52]:

"First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible.

Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. ***Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation****; the list is not closed.*

It emerges therefore that deviations from absolute voter parity may be justified on the grounds of practical impossibility or the

[52] IAP, tab 16

provision of more effective representation. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced. I adhere to the proposition asserted in Dixon, supra, at p. 414, that "only those deviations should be admitted which can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed."

(The said decision was reaffirmed by the Canadian Supreme Court in ***Figueroa v A-G of Canada (A-G of Quebec intervening) [2003] 1 SCR 912*** ("***Figueroa***")[53])

(iii) Delimitation by the Respondent

33. It is respectfully submitted that when the Respondent undertakes a re-delineation exercise, regard must be given to the principles stated above. A re-delineation exercise must necessarily accord with the requirements of the 13th Schedule, Federal Constitution. Article 113(2) contains an important pre-condition to the exercise of power to re-delineate as follows. A review must first be conducted by the Respondent. Where that review reveals that the current division of constituencies does not comply with the requirements of the 13th Schedule, changes are to be recommended in order to achieve compliance. Where the current division does not give rise to any

[53] IAP, tab 19

concerns about non-compliance, there is no legal basis for a re-delineation exercise. For clarity, Article 113(2)(i), Federal Constitution provides[54]:

*"(2) (i) Subject to paragraph (ii)**, the Election Commission shall, from time to time, as they deem necessary, review the division of the Federation and the States into constituencies and recommend such changes therein as they may think necessary in order to comply with the provisions contained in the Thirteenth Schedule**; and the reviews of constituencies for the purpose of elections to the Legislative Assemblies shall be undertaken at the same time as the reviews of constituencies for the purpose of elections to the House of Representatives."*

34. The process of representation contemplated under section 5, must be appreciated in the context of the foregoing. Clearly, the aim of that process is to allow for clarity as to whether proposed changes are necessary and, if so, whether the recommended changes will achieve the purpose of compliance with the provisions of the 13th Schedule.

35. The declarations sought in the OS must be understood in the light of the foregoing.

C. Locus standi

[54] IAP, tab 1

(i) *General*

36. It is respectfully submitted that the learned Judge misapprehended the correct approach to adopt in determining whether the Appellant had locus standi. The correct approach required the learned Judge to consider whether:

36.1. The declarations sought were of a nature that allowed for recourse to section 41, Specific Relief Act 1950 ("**SRA**")[55]; and

36.2. If so, whether the Appellant had a genuine interest in the matters that formed the subject of the declarations he sought.

37. The learned Judge failed to consider the OS on that basis. Further, the learned Judge erred in applying the principles in ***Caxton (supra)***. These principles run counter to high authority on the subject.

38. The locus classicus on the subject is the decision of the Federal Court in ***Tan Sri Haji Othman Saat v Mohamed Bin Ismail [1982] 2 MLJ 177*** ("**Othman Saat**"). Abdoolcader, J (as he then was), said, at p.179[56]:

"The sensible approach in the matter of locus standi in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the

[55] IAP, tab 2
[56] IAP, tab 20

commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interests substantially or ***where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice****. When it comes however to the question of discretion on a consideration of the substantive application, it may well be proper in particular cases to refuse a remedy to persons who, though they may have standing as a matter of jurisdiction on the lines we have indicated, do not merit it, perhaps because, inter alia, others are more directly affected, or the plaintiff himself is fundamentally not."*

(ii) High Court had jurisdiction to grant the declarations

39. Given the nature of the declarations sought, all the Appellant had to show is that he has "*some genuine interest in having his legal position declared*". The fact that the declarations concerned matters under the 13th Schedule, Federal Constitution did not in any way require a departure from this test. Respectfully, the learned Judge erred in concluding that the only avenue of recourse was the lodging of a representation pursuant to section 5(2), 13th Schedule. The 13th Schedule does not preclude the jurisdiction of the High Court and, accordingly, the legal right of a person to seek declaratory relief concerning the conduct of a re-delineation exercise, subject to a genuine interest being established on the part of that person.

40. The availability of this recourse is made that much more evident by the way in which challenges to the results of an election are treated under the Federal Constitution. Article 118, Federal Constitution expressly states that any such challenge must be brought by way of an election petition. It is on that basis that the courts have struck out actions seeking declarations concerning the conduct of elections.[57]

41. The absence of a legal provision, be it in the Federal Constitution or in any other law, precluding access to the courts is a material consideration. In ***Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113***, the Federal Court concluded that the jurisdiction of the High Court can only be excluded by provision of law. Augustine Paul, FCJ said, at p.129[58]:

"The rule that the exclusion of jurisdiction of civil courts is not to be readily inferred is based on the theory that ***civil courts are courts of general jurisdiction and the people have a right, unless expressly or impliedly debarred, to insist for free access to the courts of general jurisdiction of the state*** *(see Lee v Showmen's Guild of Great Britain [1952] 1 All ER 1175; Madhav Rao Scindia v Union of India AIR 1971 SC 530)"*

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[57] See ***Marcel Jude v The Chairman, Election Commission Of Malaysia [2013] 10 CLJ 452*** (IAP, tab 22); ***Jamil Dzulkarnain v Mohamad Kamil Shafie [2015] 2 CLJ 1079*** (IAP, tab 23)
[58] IAP, tab 21

42. This is more so for the jurisdictional basis of the High Court to grant diverse declarations being a matter of settled law. In ***Othman Saat (supra)***, Abdoolcader, J (as he then was) said, at p.178[59]:

"It will be necessary at the outset to consider the scope of the power to grant declaratory orders and judgments. Chapter VI of the Specific Relief Act, 1950 deals with declaratory decrees and section 41 thereof provides for the discretion of the court as to declarations of status or right. Section 41 of the Specific Relief Act was textually adopted totidem verbis from section 42 of the Indian Specific Relief Act, 1877 (now section 34 of the Indian Specific Relief Act, 1963), and on an application of the law enunciated by the Privy Council and the Supreme Court of India in relation to the equivalent provisions in the Indian Specific Relief Act and Civil Procedure Code, ***section 41 of the Specific Relief Act gives statutory recognition to a well-recognised type of declaratory relief and subjects it to a limitation but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of the courts to give declarations of right in appropriate cases falling outside it.*** *The court has power to grant such a decree independently of the requirements of the section, and such a declaration outside the purview of this statutory enactment will be governed by the general provisions of Order 15 rule 16 of the Rules of the High Court, 1980 which will then apply [Supreme General Films Exchange Ltd v His Highness Maharaja Sir Brijnath Singhji Deo of Maihar & Ors AIR 1975 SC 1810, following Vemareddi Ramaraghava Reddy & Ors v*

[59] IAP, tab 20

Konduru Seshu Reddy & Ors AIR 1967 SC 436 relying on the decisions of the Privy Council in Fisher v Secretary of State for India in Council (1899) 26 IA 16 and Partab Singh v Bhabuti Singh (1913) 40 IA 182]."

43. That the court has the jurisdiction to provide declaratory relief in a wide range of matters and circumstances, was further reinforced by the Supreme Court in ***Petaling Tin Bhd v Lee Kian Chan & Ors [1994] 1 MLJ 657***, where Edgar Joseph Jr, SCJ said, at p.673[60]:

*"**We would add that one of the great attractions of the declaration is that it is an all-purpose remedy which can be used in an extraordinarily wide variety of cases**. And, as the late Prof E Borchard said at p 49 of his pioneering treatise on Declaratory Judgments (2nd Ed), one cannot talk in terms of causes of action in the strict sense because **two of the main virtues of the declaratory action are to get relief before damage or to escape from dilemma and uncertainty by a clarification of the legal position**."*

44. It was open to the High Court to employ such flexibility for the purposes of the OS, having regard to the fact that the OS was clearly in the public interest. The declarations sought ultimately pertain to the right to vote on the part of all registered voters. In ***YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener) [2009] 4 MLJ 24***, the Federal Court had clarified that a party can move the court for

[60] IAP, tab 24

declaratory relief for infringement of rights that are entitled to protection under public law. Augustine Paul, FCJ said, at p.54[61]:

"They are therefore entitled to seek a declaration of their legal right pursuant to O 15 r 16. ***It cannot be argued that they ought to have proceeded under O 53 itself for declaratory relief for two reasons. Firstly, O 53 does not say it is the exclusive provision for the grant of declaratory relief*** *as stated by Lord Diplock in O'Reilly v Mackman [1982] 3 All ER 1124 at p 1134 in the following words:*

My Lords, O 53 does not expressly provide that procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law*; nor does s 31 of the Supreme Court Act 1981. There is great variation between individual cases that fall within O 53 and the Rules of Committee and subsequently the legislature were, I think, for this reason content to rely on the express and the inherent power of the High Court, exercised on a case to case basis, to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly, I do not think that Your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy*

[61] IAP, tab 25

against infringement of rights of the individual that are entitled to protection in public law."

45. Further, in ***Malik Brothers v Narendra Dadhich AIR 1999 SC 3211***, Pattanaik, J said[62]:

"Public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated."

(The said passage was cited with approval by the Court of Appeal in ***QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164***, at p.172[63]. The Court of Appeal decision, including the passage citing the Indian decision, was cited with approval by the Federal

[62] IAP, tab 26
[63] IAP, tab 27

Court in ***Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145***, at p.161[64])

46. This conclusion is reinforced by paragraph 1, Schedule, Courts of Judicature Act which empowers the High Court make any order to give effect to the fundamental liberties in Part II, Federal Constitution.[65] For clarity, that provisions reads as follows[66]:

"Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose."

47. As is shown below, the subject of the declarations sought, necessarily engaged Article 10(1)(a), Federal Constitution.

(iii) *Genuine interest*

a. General

48. It is respectfully submitted that the Appellant has a genuine interest in the subject matter. He is a citizen of the country and is a registered

[64] IAP, tab 28
[65] See ***Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641, at pp. 653 and 661*** (IAP, tab 29); ***Hong Leong Equipment Sdn Bhd v Liew Fook Chuan And Another Appeal [1996] 1 MLJ 481*** (IAP, tab 30), at pp.541-542
[66] IAP, tab 4

voter. As a matter of course, he is therefore entitled to participate in the processes provided for under the 13th Schedule.

49. The question that necessarily arises is what such participation entails. The starting point of the discussion must be the purpose of a re-delineation exercise. As noted in paragraph 33 above, a re-delineation exercise is only necessary if the current division of constituencies is not in compliance with section 2, 13th Schedule, Federal Constitution. This is dictated by Article 113(2), Federal Constitution.

50. It is respectfully submitted that section 4, 13th Schedule, Federal Constitution, must be interpreted by reference to Article 113(2). This is clear from the express wording of section 4 which provides[67]:

*"4. Where the **Election Commission have provisionally determined to make recommendations under Clause (2) of Article 113 affecting any constituency,** they shall inform the Speaker of the House of Representatives and the Prime Minister accordingly, and shall publish in the Gazette and in at least one newspaper circulating in the constituency a notice stating -*

*(a) **the effect of their proposed recommendations**, and (except in a case where they propose to recommend that no alteration be made in respect of the constituency) that a copy of their recommendations is open to inspection at a specified place within the constituency; and*

[67] IAP, tab 1

(b) that representations with respect to the proposed recommendations may be made to the Commission within one month after the publication of such notice,

and the Commission shall take into consideration any representations duly made in accordance with any such notice."

51. Equally, the obligation on the Respondent to state "the effect of the proposed recommendations" under section 4(a) must be understood in the light of the purpose of an intended re-delineation exercise under Article 113(2). This means that the said notice must make clear:

51.1. That the current division of constituencies does not comply with section 2, 13th Schedule and why that is; and

51.2. The proposed recommendations and why, in the opinion of the Respondent, those recommendations would allow for compliance with section 2, 13th Schedule.

52. This approach is consistent with the established principle that the Federal Constitution must be considered as a whole, and that no one provisions is to be separated from the others. In ***Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin***

Abdul Kadir (Attorney General, intervener) [2010] 2 MLJ 285, Arifin Zakaria, CJ said, at p.299[68]:

*"**One other important guide in interpretation of Constitution is that, 'The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established canon of constitutional construction that no one provision of the Constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument**. An elementary rule of construction is, that if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the fundamental law should be treated as superfluous'."*

53. It follows therefore that section 4, 13th Schedule cannot be read literally and in isolation. Further, the said provision must be read generously and liberally. In ***Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301*** ("***Lee Kwan Woh***"). Gopal Sri Ram, FCJ, said at p.311[69]:

*"In the second place, the Constitution is a document sui generis governed by interpretive principles of its own. **In the forefront of these is the principle that its provisions should be interpreted***

[68] IAP, tab 31
[69] IAP, tab 32

generously and liberally. On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights"

54. It is necessary at this juncture to address the decision of this Honourable Court in ***See Chee How (supra).*** In that case, the Court of Appeal held, by reference to ordinary statutory interpretation principles, that the word "effect" in section 4(a) must be given its ordinary and popular meaning. The court further found that the Respondent is obligated to only provide such information as is necessary to allow registered voters to know the changes affecting their constituencies resulting from the review exercise undertaken. Abdul Rahman Sebli, JCA said, at pp.384-386[70]:

"There is no mystery to the word. ***It must be given its popular and ordinary meaning. It is a noun which in common parlance means consequence.*** *But if at all a dictionary meaning is required, reference may be made to The Major Law Lexicon by P Ramanatha Aiyar where the word is defined to mean:*

> *A result which follows a given act; consequence; event and sometimes used as synonymous with weight (as) Effect of evidence. The 'Effect' of a cause, is anything which would not have happened but for that cause; and it is none the less an*

[70] IAP, tab 11

Effect of such a cause, because it has been developed or accelerated by something supervening.

[37] ***It is a cardinal rule of statutory interpretation that words in a statute ought to be construed in a way in which they will best harmonise with the object of the statute. Where the meaning of words is plain and unambiguous, judges must not read words into the statute in order to give it a different meaning****.*

[38] ***In our view the word 'effect' in s 4(a) of the Thirteenth Schedule means no more than the consequence or the resulting changes brought about by the proposed recommendations following the EC's determination under cl (2) of art 113 of the Constitution. Contextually, the word has no causal link to the requirement to disclose detailed particulars of the proposed recommendations, let alone particulars of the nature mentioned by the learned judge****.*

[39] Of course particulars must be given (the proposed recommendations cannot be barren of particulars) but only so much as is necessary to allow registered voters to know the changes affecting their constituencies resulting from the review exercise undertaken by the EC. So long as the First and Second Schedules contain such particulars, the requirements of s 4(a) would have been met.

[40] We note that there is nothing in s 4 nor indeed in the whole of the Thirteenth Schedule that can be construed as to require 'detailed particulars' to be stated in the notice under s 4(a), as the respondents seem to be suggesting. These are words that the EC themselves used in paras 4 and 5 of the notice in reference to the particulars given in the First and Second Schedules annexed to the notice. It is unfortunate that their choice of words, rightly or wrongly, has triggered a chain legal reaction that threatens to forestall the review process they are undertaking.

[41] Nor do we find any ambiguity in the words 'stating the effect of their proposed recommendations' in s 4(a) of the Thirteenth Schedule. ***It means what it says, that is, to state the effect or consequence of the proposed recommendations. It does not mean to state the adverse effect or adverse consequence of the recommendations. To give such construction would be to read words into the section which are not there.*** *For all intents and purposes this is what the respondents are imploring the court to do and which the learned judge agreed to when she held at para 97 of the judgment:*

> *[97] I am of the view that in order for the public or registered voters mentioned in s 5(a) and (b) of the Thirteenth Schedule to effectively exercise their constitutional right to make representation and to be heard in the inquiry, s 4(a) of the Thirteenth Schedule must be complied with not just verbatim. The s 4 Notice must communicate to the public the effect of the*

proposed recommendation. In other words, s 4 Notice must disclose detailed particulars to show the effect of the proposed recommendations that would enable the public to know whether they are adversely affected by the proposed recommendation, and whether they have locus standi to make representation.

[42] There is a distinction between a requirement to state the effect of a proposed recommendation and a requirement to disclose details of the recommendation in the sense understood by the respondents. The first is a requirement of law whereas the second is a requirement of the respondents. Failure to appreciate the distinction can lead to a serious misapprehension of the law, as had happened in this case.

55. It is respectfully submitted that the attention of this Honourable Court was not drawn to the impact of Article 113(2) or, as will be demonstrated, the implication of the freedom to information housed under Article 10(1)(a) (***Sivarasa (supra)***) on the rights vested under the Article 119 and the 13th Schedule.

56. Before examining the decision in ***See Chee How (supra)***, it is necessary to provide a brief analysis on the right to information.

b. <u>Right to information</u>

57. The right to information is derived from, or is implicit in, the freedom of expression guaranteed under Article 10(1)(a), Federal Constitution. In ***Sivarasa (supra)***, Gopal Sri Ram, FCJ said, at pp.343-344[71]:

*"**Article 10 contains certain express and, by interpretive implication, other specific freedoms**. For example, the freedom of speech and expression are expressly guaranteed by art 10(1)(a). **The right to be derived from the express protection is the right to receive information, which is equally guaranteed**. See Secretary, Ministry of Information and Broadcasting, Government of India v Cricket Association of Bengal AIR 1995 SC 1236."*

58. This is the position also adopted by the Indian, Canadian and the English courts (more of which will be said in due course). Though it has been stated by the courts on several occasions that the constitutional jurisprudence of other commonwealth courts is not applicable as of right to questions of Malaysian constitutional law, it is respectfully submitted that for the purpose at hand, there is much in common between the three jurisdictions. The apex court has on many occasions referred to the decisions from these jurisdictions in interpreting the Federal Constitution.

59. The analysis must start with the form of Government established under the Malaysian Federal Constitution. This has been briefly highlighted above. Like India and Canada, both of which have written constitutions, and the United Kingdom by virtue of its common law,

[71] IAP, tab 13

the Federal Constitution put in place a democratic form of government which is participatory in nature. Citizens have a right to decide by whom, and by what rules, they shall be governed, and an equipollent right to call on those who govern on their behalf for their conduct. Participatory democracy, in this regard, can be understood in one of two ways. Firstly, as consisting merely of citizens exercising their franchise once in five years (or so) to choose their legislators, then retiring in passivity and not taking any interest in government. This characterization could only be achieved by interpreting Article 119 of the Federal Constitution (Qualification of Electors) narrowly and in isolation, and in disregard of the historical events that led to the establishment of this nation.

60. The second, and admittedly preferred, way in which participatory democracy could be understood is as allowing for citizens not only being entitled to cast intelligent and rational (informed) votes but also exercising sound judgment on the conduct of the Government and the merits of public policies, so that democratic participation is not merely the sporadic casting of ballots but a continuous process of involvement in governance. This form of participatory democracy, predicated on accountability, is what the founders envisaged.

61. The courts in Canada, India and England have adopted the second approach. For the purposes of this submission, the position in Canada would be of most assistance. Section 3 of the Canadian Charter of Rights of Freedoms[72], which is similar to Article 119,

[72] IAP, tab 7

Federal Constitution, guarantees every Canadian citizen the right to vote. The Canadian Supreme Court in ***Figueroa (supra)*** decided that the said section should be understood with reference to the right of each citizen to play a meaningful role in the electoral process, rather than, merely, the election of a particular form of government. The freedom of expression is a crucial aspect of this process. Iacobucci, J said, at pp.933-936[73]:

*"**But the right to effective representation contemplates more than the right to an effective representative in Parliament or a legislative assembly.** In Haig, supra, L'Heureux-Dubé J., for the majority of the Court, summarized McLachlin J.'s discussion of the purpose of s. 3 as follows (at p. 1031):*

> *Clearly, in a democratic society, the right to vote as expressed in s. 3 must be given a content commensurate with those values embodied in a democratic state. For the majority of the Court, McLachlin J. concluded at p. 183 that it is the Canadian system of effective representation that is at the centre of the guarantee:*
>
> > *... **the purpose of the right to vote enshrined in s. 3 of the Charter is not equality of voting power per se, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to***

[73] IAP, tab 19

> ***be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative.***
>
> ***The purpose of s. 3 of the Charter is, then, to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate.*** *[First emphasis in original; second emphasis added.]*

As this passage indicates, this Court has already determined that the purpose of s. 3 includes not only the right of each citizen to have and to vote for an elected representative in Parliament or a legislative assembly, but also to the right of each citizen to play a meaningful role in the electoral process. This, in my view, is a more complete statement of the purpose of s. 3 of the Charter.

Support for the proposition that s. 3 should be understood with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the election of a particular form of government, is found in the fact that the rights of s. 3 are participatory in nature. *Section 3 does not advert [page934] to the*

composition of Parliament subsequent to an election, but only to the right of each citizen to a certain level of participation in the electoral process. On its very face, then, the central focus of s. 3 is the right of each citizen to participate in the electoral process. ***This signifies that the right of each citizen to participate in the political life of the country is one that is of fundamental importance in a free and democratic society and suggests that s. 3 should be interpreted in a manner that ensures that this right of participation embraces a content commensurate with the importance of individual participation in the selection of elected representatives in a free and democratic state. Defining the purpose of s. 3 with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the composition of Parliament subsequent to an election, better ensures that the right of participation that s. 3 explicitly protects is not construed too narrowly****.*

An understanding of s. 3 that emphasizes the right of each citizen to play a meaningful role in the electoral process also is sensitive to the full range of reasons that individual participation in the electoral process is of such importance in a free and democratic society*. As Dickson C.J. wrote i n R. v. Oakes, [1986] 1 S.C.R. 103, at p. 136:*

> *The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of*

the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

In this passage, Dickson C.J. was addressing s. 1. ***Yet since reference to "a free and democratic society" is essential to an enriched understanding of s. 3, this passage indicates that the best interpretation of s. 3 is one that advances the values and principles that embody a free and democratic state, including respect for a diversity of beliefs and opinions. Defining the purpose of s. 3 with reference to the [page935] right of each citizen to meaningful participation in the electoral process, best reflects the capacity of individual participation in the electoral process to enhance the quality of democracy in this country****.*

As this Court frequently has acknowledged, the free flow of diverse opinions and ideas is of fundamental importance in a free and democratic society. In R. v. Keegstra, [1990] 3 S.C.R. 697, at pp. 763-64, Dickson C.J. described the connection between the free flow of diverse opinions and ideas and the values essential to a free and democratic society in the following terms:

> ***The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b)***

guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

Put simply, full political debate ensures that ours is an open society with the benefit of a broad range of ideas and opinions: *see Switzman v. Elbling, [1957] S.C.R. 285, at p. 326; RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, at p. 583; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, at p. 1336; and R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 23.* ***This, in turn, ensures not only that policy makers are aware of a broad range of options, but also that the determination of social policy is sensitive to the needs and interests of a broad range of citizens.***

It thus follows that participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of

elections. ***To be certain, the electoral process is the means by which [page936] elected representatives are selected and governments formed, but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy. The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses. In each instance, the democratic rights entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process****.*

In the final analysis, I believe that the Court was correct in Haig, supra, to define s. 3 with reference to the right of each citizen to play a meaningful role in the electoral process. ***Democracy, of course, is a form of government in which sovereign power resides in the people as a whole. In our system of democracy, this means that each citizen must have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives. The fundamental purpose of s. 3, in my view, is to promote and protect the right of each citizen to play a meaningful role in the political life of the country. Absent such a right, ours would not be a true democracy****."*

62. Decisions of the courts in England and India have arrived at the same conclusion. A sample of these decisions is annexed to this submission as Annexure A.

63. This Honourable Court has recognized the principles of participatory democracy in deciding that a democratically elected government and its officials should be open to public criticism. In ***Utusan Melayu (M) Bhd v Dato' Sri DiRaja Hj Adnan bin Hj Yaakob [2016] 5 MLJ 56***, Idris Harun, JCA said at p.70[74]:

"On that score, and as public interest dictates, ***a democratically elected government and its officials should be open to public criticism and that it is advantageous that every responsible citizen should not be in any way fettered in his statements where it concerns the affairs and administration of the government. Any action to the contrary would in our view, be against public interest and directly affect the fundamental right guaranteed by art 10(1)(a) of the Federal Constitution unless it is clearly allowed by federal law****."*

64. The right to information is merely the other side of the right to express. Public discussion on governmental affairs is only meaningful when there is information on which such discussion can occur. The plurality of opinions, views and ideas is indispensable for enabling citizens to make informed judgments. In ***Secretary, Ministry of Information and Broadcasting, Government of India v Cricket***

[74] IAP, tab 33

Association of Bengal AIR [1995] SC 1236, Bhagwati, J said at paragraph 198[75]:

*"**In a democracy, people govern themselves and they cannot govern themselves properly unless they are aware - aware of social, political, economic and other issues confronting them. To enable them to make a proper judgment on those issues, they must have the benefit of a range of opinions on those issues. Right to receive and impart information is implicit in free speech. This plurality of opinions, views and ideas is indispensable for enabling them to make an informed judgment on those issues to know what is their true interest, to make them responsible citizens, to safeguard their rights as also the interests of society and State**. All the constitutional courts of leading democracies, reference to which has been made hereinbefore, have recognised and reiterated this aspect."*

c. No need for freedom of information legislation

65. It is further respectfully submitted that the absence of any federal legislation is not an impediment. Such legislation is not aimed at creating the right to information but, rather, the facilitation of that right and the balancing of competing interests. In ***Ontario (Public Safety and Security) v. Criminal Lawyers' Association [2010] 1 S.C.R.***

[75] IAP, tab 34

815 ("**Ontario**"), the Canadian Supreme Court held that section 2(b) of the Canadian Charter of Rights and Freedoms (on freedom of expression) in itself permits the right to information. McLachlin, CJ and Abella, J said at pp.834-835[76]:

"To show that access would further the purposes of s. 2(b), the claimant must establish that access is necessary for the meaningful exercise [page835] of free expression on matters of public or political interest: see Irwin Toy, at pp. 976 and 1008; Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877. ***On this basis, the Court has recognized access to information under s. 2(b) in the judicial context: "members of the public have a right to information pertaining to public institutions and particularly the courts" (Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, at p. 1339). The "open courts" principle is "inextricably tied to the rights guaranteed by s. 2(b)" because it "permits the public to discuss and put forward opinions and criticisms of court practices and proceedings"*** *(Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, at para. 23, per La Forest J.)."*

d. Competing interests

66. Is remains to consider whether this, freedom of, and to, information is unqualified. The courts in England, India and Canada recognise a

[76] IAP, tab 35

public interest basis in denying access to information consistent with the entitlement of the State (through legislature) to restrict expression. Decisions on this point are included in Annexure A.

67. The starting point for any discussion on the subject in Malaysia is Article 10(2)(a), Federal Constitution, which provides[77]:

"(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;"

68. As the right to information is implicit in, or a derivative of, the freedom of expression, such right can only be restricted by:

68.1 federal law; and

68.2 enacted on the limited grounds stated in Article 10(2)(a), Federal Constitution.

[77] IAP, tab 1

69. There are several statutes or statutory provisions which impact. These include the Official Secrets Act 1972[78] ("**OSA**") and section 123 of the Evidence Act 1950 ("**EA**")[79] which pertains to 'evidence as to affairs of state'. In the case at hand, the Respondent has not relied on section 123, EA or the OSA. The Respondent's Affidavit in Reply merely states that the Appellant has no standing to bring the underlying proceedings.[80] There is no denial per se of the Appellant's right to the Relevant Information.

70. It is respectfully submitted that the information sought by the Appellant was *necessary for the meaningful exercise of free expression on matters of public or political interest* within the sense explained by McLachlin CJ and Abella J in ***Ontario (supra)***. It must be borne in mind that the Respondent is not a government body or agency. It is a constitutional body and must be required to act with a level of transparency and accountability that warrants public confidence.

e. Revisiting See Chee How (supra)

71. Having regard to the matter stated above, it is respectfully submitted that it would be appropriate for this Honourable Court to revisit its decision in ***See Chee How (supra)***.

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[78] IAP, tab 5
[79] IAP, tab 6
[80] R/R, Bahagian B, p.38

71.1. The attention of this Honourable Court was not drawn to the implications of Article 10(1)(a), Federal Constitution and the freedom of information;

71.2. Further, it was not emphasized to this Honourable Court that section 4(a), 13th Schedule must be construed by reference to Article 113(2) and Article 119. It would be useful to recall the decision of the Federal Court in ***Dato Menteri Othman Bin Baginda & Anor v Dato Ombi Syed Alwi Bin Syed Idrus [1981] 1 MLJ 29***, where Raja Azlan Shah, CJ said, at p.32[81]:

"In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — "with less rigidity and more generosity than other Acts" (see Minister of Home Affairs v Fisher [1979] 3 All ER 21. A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the

[81] IAP, tab 36

traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting constitutions "with less rigidity and more generosity" was again applied by the Privy Council in Attorney-General of St Christopher, Nevis and Anguilla v Reynolds [1979] 3 All ER 129, 136."

71.3. Such a reading of section 4, 13th Schedule would render the right to make representations illusory (see ***Dewan Undangan Negeri Kelantan & Anor v Nordin Bin Salleh & Anor [1992] 1 MLJ 697*** at p.712[82]);

71.4. The fact that leave was refused by the Federal Court to appeal against the said decision does not have any bearing on its authority. In ***Datuk Syed Kechik Syed Mohamed & Anor v The Board Of Trustees Of The Sabah Foundation & Ors [1999] 1 MLJ 257***, Edgar Joseph Jr, FCJ said at p.260[83]:

*"Having said that, we hasten to add, in the words of Lord Diplock speaking in the House of Lord in Modern Engineering v. Gilbert - Ash [1974] AC at p. 715, 716: "**Refusal of leave to***

[82] IAP, tab 38
[83] IAP, tab 37

appeal does not imply approval by this House of a judgment sought to be appealed against. That judgment carries the same authority as any other unappealed judgment of the Court of Appeal - neither more nor less." *With this statement of principle we respectfully agree.* ***The natural tendency, therefore, to claim that a judgment of the Court of Appeal which has been the subject of an unsuccessful application for leave to appeal carries greater authority than one which has gone unchallenged, must be resisted.***"

f. Establishing genuine interest in the subject matter of the OS

72. Further to the foregoing:

72.1. As noted above, the Appellant and all voters are only given 30 days to make representations. They are informed of the proposed recommendations, and its effect by way of the section 4 re-delineation notice. The information provided by way of this notice becomes the basis of a voter making a decision as to whether he should take steps to protest.

72.2. In his Affidavit in Support, the Appellant had noted that some constituencies had nine times more voters then other constituencies.[84]

a. Based on the proposed recommendations in the Notice, the Appellant's constituency will have 129,363 electors. Other Parliamentary constituencies in Selangor, such as Sabak Bernam (37,126 electors), Tanjong Karang (42,658 electors) and Sungai Besar (42,833 electors) will have approximately three times less electors than the Appellant's constituency;

b. The ratio of 3:1 cannot possibly be considered "approximately equal" within the meaning of section 2(c), 13th Schedule, Federal Constitution;

72.3. As noted above, the Respondent is allowed to deviate from the equal suffrage principle only to ensure that citizens in rural areas are effectively and fairly represented. However, the Respondent still has to adhere to the equal suffrage principle. Any deviation must be justified on the ground mentioned above. Without being appraised of the reasons for such deviation, it would not be possible for the Appellant to make an informed objection on the recommendations;

72.4. It is only with such information that the Appellant can meaningfully exercise his right to object to the Notice.

[84] R/R, Bahagian B, p.29

Respectfully, the learned Judge erred in concluding that the Appellant would be interfering with the rights of voters in other constituencies in seeking the declarations. The information sought was vital for all voters.

73. The fact that the section 4 re-delineation notice was not issued at the time of the filing of the OS is irrelevant. In ***Datuk Syed Kechik Bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101***, the Federal Court observed that a declaration can be granted to declare future rights and to eliminate the anxiety of uncertainty and fear. Lee Hun Hoe, CJ said, at p.107[85]:

"A declaratory order will eliminate anxiety of having to live under a cloud of fear. In granting a declaration the court has to consider the utility of the declaration claimed and the usefulness of the declaration on the one hand as against the inconvenience and embarrassment that may result on the other hand. As to the determination of future right its importance for certain purposes is not in doubt, particularly when a mere declaration is usually the only remedy. Zamir on "The Declaratory Judgment" at page 206 states:—

> *"It is not uncommon for persons to confront an allegation that at some future date they will become liable to another, or that they will not have a certain right which they expect to come into existence, or that their existing right will then expire. They may*

[85] IAP, tab 39

in such circumstances bring a declaratory action to remove the cloud from their future rights."

74. The Appellant was entitled to clarify his legal position, more so for the fact of how the Respondent had conducted itself in connection with the Sarawak delimitation exercise.

75. In view of the foregoing, it is respectfully submitted that the Appellant has a genuine interest in the matter.

D. Granting the declarations

76. The arguments in Part IV(C) above also establish that the Appellant is entitled to the Primary Declarations sought. To be clear, the Appellant sought the following information:

76.1. The proposed recommendations ("**Item 1**");

76.2. The maps of the relevant constituencies which includes the polling districts ("**Item 2**"); and

76.3. The reasons for the proposed recommendations, which includes the documents to support the same ("**Item 3**").

77. It remains to consider how the Relevant Information is to be provided. The Secondary Declarations are aimed at clarifying this position. It is

78.3. Reading the second limb as requiring nothing more than allowing for inspection of material already provided under the section 4 notice would render the second limb redundant.

79. In the alternative, it is respectfully submitted that Item 3 must be provided in the section 4 re-delineation notice, to the extent that it is sufficient for voters to make an informed decision on whether the proposed recommendations have addressed any non-compliance with section 2 of the 13th Schedule. Items 1 and 2, and any documentation to support Item 3 should be then provided in the manner prayed for in paragraphs 2.2 to 2.4 above.

IV Conclusion

80. In view of the foregoing, the Appellant respectfully prays that the appeal herein be allowed with costs.

Dated this 7th day of October 2016

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Counsel for the Appellant

Malik Imtiaz Sarwar and Surendra Ananth

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ANNEXURE A

A. Right to information in England and India

1. In ***R v Shayler [2003] 1 AC 247*** ("***Shayler***"), Lord Bingham of Cornhill made it clear that the rationale of the right to free expression is supportive of participatory democracy being viewed a more inclusive way rather than in a way which is restrictive and reduces the right to vote to nothing more than the mechanical act of casting a vote at a general election said. He said, at p.267[1]:

> ***"The reasons why the right to free expression is regarded as fundamental are familiar, but merit brief restatement in the present context. Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated.*** *Sometimes, inevitably, those involved in*

[1] Ikatan Autoriti Perayu ("**IAP**"), tab 40

the conduct of government, as in any other walk of life, are guilty of error, incompetence, misbehaviour, dereliction of duty, even dishonesty and malpractice. Those concerned may very strongly wish that the facts relating to such matters are not made public. Publicity may reflect discredit on them or their predecessors. It may embarrass the authorities. It may impede the process of administration. Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied. Even where abuses have already been remedied, the public may be entitled to know that they occurred."

2. The said characterization of a participative democracy is consistent with the way in which the Indian Supreme Court has approached the subject. In ***S.P. Gupta v Union of India [AIR] 1982 SC 149*** ("***Gupta***"), Bhagwati, J said at paragraphs 63-64[2]:

"Now it is obvious from the Constitution that we have adopted a democratic form of Government. Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. The citizens have a right to decide by whom and by what rules they shall be governed and they are entitled to call on those who govern on their behalf to account for their conduct. No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government. It is

[2] IAP, tab 41

only if people know how government is functioning that they can fulfill the role which democracy assigns to them and make democracy a really effective participatory democracy. *"Knowledge" said James Madison, "will forever govern ignorance and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of obtaining it. is but a prologue to a farce or tragedy or perhaps both."* ***The citizens' right, to know the facts, the true facts, about, the administration of the country is thus one of the pillars of a democratic State. And that is why the demand for openness in the government is increasingly growing in different parts of the world.***

The demand for openness in the government is based principally on two reasons. ***It is now widely accepted that democracy, does not consist merely in people exercising their franchise once in five years to choose their rules and, once the vote is cast, then retiring in passivity and not taking any interest in the government. Today it is common ground that democracy has a moralities content and its orchestration has to be continuous and pervasive. This means inter alia that people should not only cast intelligent and rational votes but should also emeralds sound judgment on the conduct of the government and the merits of public policies; so that democracy does not remain merely a sporadic exercise in voting but becomes a continuous process of government--an attitude and habit of mind. But this important role people can fulfill in a democracy only if it is an***

open government where there is full access to information in regard to the functioning of the government."

3. It was on this basis that the Indian Supreme Court recognized the freedom of information as being implicit to the freedom of expression. In ***Gupta (supra)***, Bhagwati, J said, at paragraph 66[3]:

"This is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception. The concept of an open Government is the direct emanation from the right to know which seems to be implicit in the right to free speech and expression guaranteed under Article 19(1)(a) . Therefore, disclosure of information in regard to the functioning of Government must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest."

B. Restrictions on the right to information

4. England, India and Canada recognize a public interest basis in denying access to information consistent with the entitlement of the State (through legislature) to restrict expression.

[3] IAP, tab 41

"But at the same time it must be conceded that even in a democracy, Government at a high level cannot function without some degree of secrecy. No minister or senior public servant can effectively discharge the responsibility of his office if every document prepared to enable policies to be formulated was liable to be made public. It is therefore in the interest of the State and necessary for the proper functioning of the public service that some protection be afforded by law to documents belonging to this class."

7. In ***Ontario (Public Safety and Security) v. Criminal Lawyers' Association [2010] 1 S.C.R. 815***, McLachlin, CJ and Abella, J said at paragraphs 39-40[6]:

"Privileges are recognized as appropriate derogations from the scope of the protection offered by s. 2(b) of the Charter. The common law privileges, like solicitor-client privilege, generally represent [page836] situations where the public interest in confidentiality outweighs the interests served by disclosure. This is also the rationale behind common law privileges that have been cast in statutory form, like the privilege relating to confidences of the Queen's Privy Council under s. 39 of the Canada Evidence Act, R.S.C. 1985, c. C-5. Since the common law and statutes must conform to the Charter, assertions of particular categories of privilege are in principle open to constitutional challenge. However, in practice, the outlines of these privileges are likely to be well settled, providing predictability and certainty to what must be produced and what remains protected.

[6] IAP, tab 35

5. Thus in ***Shayler (supra)***, Lord Bingham recognised, at para 23, that[4]:

"Despite the high importance attached to it, the right to free expression was never regarded in domestic law as absolute. Publication could render a party liable to civil or criminal penalties or restraints on a number of grounds which included, for instance, libel, breach of confidence, incitement to racial hatred, blasphemy, publication of pornography and, as noted above, disclosure of official secrets. The European Convention similarly recognises that the right is not absolute: article 10(2) qualifies the broad language of article 10(1) by providing, so far as relevant to this case:

> *'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime … for the protection of the … rights of others, for preventing the disclosure of information received in confidence …'*

6. In ***Gupta (supra)***, Bhagwati J observed (at para 71)[5]:

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[4] IAP, tab 40
[5] IAP, tab 41

It may also be that a particular government function is incompatible with access to certain documents. For example, it might be argued that while the open court principle requires that court hearings and judgments be open and available for public scrutiny and comment, memos and notes leading to a judicial decision are not subject to public access. This would impair the proper functioning of the court by preventing full and frank deliberation and discussion at the pre-judgment stage. The principle of Cabinet confidence for internal government discussions offers another example. The historic function of a particular institution may assist in determining the bounds of institutional confidentiality, as discussed in Montréal (City), at para. 22. In that case, this Court acknowledged that certain government functions and activities require privacy (para. 76). This applies to demands for access to information in government hands. Certain types of documents may remain exempt from disclosure because disclosure would impact the proper functioning of affected institutions."