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Public Prosecutor v Azmi bin Sharom

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL REFERENCE NO 06–5–12 OF 2014(W)
ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA, ZULKEFLI MAKINUDIN CJ (MALAYA), ABDULL HAMID EMBONG AND SURIYADI FCJJ
C 6 OCTOBER 2015

Constitutional Law — Legislation — Validity and constitutionality — Validity of Sedition Act 1948 — Whether Sedition Act 1948 ('the Act') being pre-Merdeka legislation invalid for curtailing freedom of speech and expression guaranteed under D *art 10 of the Federal Constitution — Whether only Parliament under arts 10(2) and 10(4) of the Constitution could make laws restricting such freedoms — Whether framers of Constitution intended Act to continue in force post-Merdeka pursuant to art 162 of the Constitution — Whether s 4(1) of the Act offended art 10(2)(a) of Constitution — Whether restrictions imposed by s 4(1)* E *fell within ambit/parameters of art 10(2)(a) — Whether court could not determine whether legislative restrictions on freedoms under art 10 of the Constitution were reasonable or otherwise but only whether they passed test of proportionality*

F

The defendant was charged in the sessions court under ss 4(1)(b) and (c) of the Sedition Act 1948 ('the Act') for allegedly uttering/publishing two seditious statements. Before commencement of his trial, the defendant successfully applied to have the High Court determine the constitutionality of the Act. The G High Court, in turn, pursuant to s 84 of the Courts of Judicature Act 1964, referred two instant questions to the Federal Court for its determination– whether the Act was valid and enforceable under the Federal Constitution ('the Constitution') and, if it was, whether s 4(1) of the Act contravened art 10(2) of the Constitution and was thereby rendered void by art 4(1) of the H Constitution. The defendant argued that the Act was invalid; that since it existed before Merdeka and was not made by Parliament, the Act could not impose restrictions on freedom of speech and expression that were guaranteed under art 10 of the Constitution. The defendant contended that arts 10(2) and 10(4) clearly provided that only Parliament had sole authority to make laws I that could curtail freedom of speech and expression if such restrictions were necessary or expedient on the grounds set out in those articles. The plaintiff argued that the Act was valid as it was an 'existing law' which continued to remain in force on and after Merdeka Day pursuant to art 162 of the Constitution.

Held, ruling that the Act was valid and enforceable under the Constitution and that s 4(1) of the Act did not contravene art 10(2) of the Constitution:

(1) It was the intention of the framers of the Constitution that the existing law continued to be valid and enforceable upon the coming into operation of the Constitution on Merdeka Day. It followed, therefore, that the Act being the 'existing law' at the material date continued to be valid and enforceable post-Merdeka Day (see para 27).

(2) To say that the Act did not come within the ambit of art 10(2) of the Constitution as it was not made by Parliament was to give a highly restrictive and rigid interpretation to the phrase 'Parliament may by law' appearing in the said article. That phrase had to be read harmoniously with the other provisions of the Constitution such as art 162. The framers of the Constitution in drafting art 162 would have had in their contemplation art 10(2), and had they indeed intended that the phrase 'the existing laws' in art 162 was not to include the Act, they would have done so in no uncertain terms. On the contrary, the intention of the framers of the Constitution was to provide for the continuance of all existing laws, including the Act, subject to any modifications as might be made so as to bring them into accord with the Constitution. The existing law was only rendered void or invalid if it could not be brought into accord with the Constitution (see paras 23–25).

(3) Section 4(1) of the Act was directed to any act, word or publication having a 'seditious tendency' as defined in s 3(1) paras (a) to (f) of the Act. This was consistent with art 10(2)(a) and art 10(4) of the Constitution as it could not be said that the restrictions imposed by s 4(1) were too remote or not sufficiently connected to the subjects/objects enumerated in art 10(2)(a). Furthermore, this was not a total prohibition as it was subject to a number of exceptions as provided in s 3(2) of the Act. As legislated, it was not seditious to show that any Ruler had been misled or mistaken in any of his measures, or to point out errors or defects in any government or constitution as by law established. The restrictions imposed in s 4(1) fell squarely within the ambit or parameters of art 10(2)(a) of the Constitution and did not run counter to it (see paras 43–44).

(4) This Court agreed with the view of the Supreme Court in *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 that it was not for the court to determine whether the restriction imposed by the legislature pursuant to art 10(2) of the Constitution was reasonable or otherwise as that was a matter strictly within the discretion of the legislature and not within the purview of the court. Similarly, it was fallacious to use the reasoning in *Ooi Ah Phua v Officer in Charge Criminal Investigation Kedah/Perlis* [1975] 2 MLJ 198 as warranting this court to insert the word 'reasonable' before the word 'restriction' in art 10(2). That would be

rewriting the provisions of art 10(2). This court accordingly departed from the view of the Court of Appeal in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 as affirmed by this court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333. This court, however, agreed with *Sivarasa Rasiah* that the restriction that could be imposed by the legislature under art 10(2) was not without limit ie that the law promulgated under art 10(2) must pass the proportionality test in order to be valid. This was in line with the test laid down in *Pung Chen Choon* (see paras 37, 40 & 43).

[Bahasa Malaysia summary

Defendan didakwa di mahkamah sesyen di bawah ss 4(1) (b) dan (c) Akta Hasutan 1948 ('Akta') kerana didakwa melafazkan/menerbitkan dua kenyataan menghasut. Sebelum permulaan perbicaraan, defendan berjaya memohon agar Mahkamah Tinggi memutuskan keperlembagaan Akta. Mahkamah Tinggi, seterusnya, di bawah s 84 Akta Mahkamah Kehakiman 1964, merujuk dua soalan yang timbul kepada Mahkamah Persekutuan bagi penentuan–sama ada Akta sah dan boleh dikuatkuasakan di bawah Perlembagaan Persekutuan ('Perlembagaan') dan, jika ya, sama ada s 4(1) Akta melanggar perkara 10(2) Perlembagaan dan dengan itu terbatal di bawah s 4(1) Perlembagaan. Defendan menghujahkan bahawa Akta tidak sah; oleh sebab ia wujud sebelum Merdeka dan tidak digubal oleh Parlimen, Akta tidak boleh menyekat kebebasan bersuara dan meluahkan pendapat yang dijamin di bawah perkara 10 Perlembagaan. Defendan menegaskan bahawa perkara 10(2) dan (4) jelas memperuntukkan bahawa hanya Parlimen mempunyai kuasa mutlak untuk menggubal undang-undang yang boleh menyekat kebebasan bersuara dan menyuarakan pendapat jika sekatan perlu atau suai manfaat atas alasan yang dinyatakan dalam perkara-perkara tersebut. Plaintif menghujahkan bahawa Akta sah kerana ia 'undang-undang sedia ada' yang kekal berkuat kuasa pada dan selepas Hari Merdeka menurut perkara 162 Perlembagaan.

Diputuskan, memutuskan Akta sah dan boleh dikuatkuasakan di bawah Perlembagaan dan bahawa s 4 (1) Akta tidak melanggar perkara 10(2) Perlembagaan:

(1) Menjadi niat penggubal-penggubal Perlembagaan bahawa undang-undang yang sedia ada kekal sah dan boleh berkuat kuasa apabila mula kuat kuasa Perlembagaan pada Hari Merdeka. Berikutan itu, Akta menjadi 'undang-undang sedia ada' pada tarikh material terus menjadi hari selepas sah dan boleh dikuatkuasakan selepas Hari Merdeka (lihat perenggan 27).

(2) Untuk mengatakan bahawa Akta tidak terangkum di bawah lingkungan perkara 10(2) Perlembagaan kerana tidak digubal oleh Parlimen adalah memberikan tafsiran yang sangat ketat dan tegar untuk frasa 'Parlimen boleh melalui undang-undang' dalam perkara tersebut. Frasa yang perlu

dibaca bersekali dengan peruntukan lain dalam Perlembagaan seperti perkara 162. Penggubal-penggubal Perlembagaan dalam merangka perkara 162 pasti mempertimbangkan perkara 10(2), dan sekiranya mereka bertujuan memaksudkan frasa 'undang-undang sedia ada' dalam perkara 162 agar tidak termasuk dalam Akta, mereka pasti berbuat demikian dengan tegas. Sebaliknya, niat penggubal-penggubal Perlembagaan adalah membuat peruntukan bagi kesinambungan semua undang-undang sedia ada, termasuk Akta, tertakluk kepada apa-apa ubah suaian yang mungkin dibuat untuk membuatnya selaras dengan Perlembagaan. Undang-undang sedia ada hanya terbatal atau tidak sah jika ia tidak terangkum selaras dengan Perlembagaan (lihat perenggan 23–25).

(3) Seksyen 4(1) Akta adalah bagi apa-apa perlakuan, perkataan atau penerbitan yang mempunyai 'kecenderungan menghasut' seperti yang ditakrifkan dalam s 3(1) perenggan (a) hingga (f) Akta. Ini selaras dengan perkara 10(2) (a) dan (4) Perlembagaan kerana tidak boleh dikatakan bahawa sekatan yang dikenakan oleh s 4(1) terlalu jauh atau tidak cukup berkait dengan subjek/objek yang diperihalkan satu persatu dalam perkara 10(2)(a). Tambahan lagi, ini bukan satu larangan penuh kerana ia tertakluk pada beberapa pengecualian sebagaimana yang diperuntukkan dalam s 3(2) Akta tersebut. Seperti yang digubal, bukanlah menjadi hasutan untuk menunjukkan bahawa mana-mana Raja telah dikelirukan atau tersilap dalam apa-apa langkah-langkah, atau untuk menunjukkan kesilapan atau kecacatan dalam mana-mana kerajaan atau perlembagaan sebagai undang-undang yang ditetapkan. Sekatan yang dikenakan pada s 4(1) terjumlah tepat dalam lingkungan atau parameter perkara 10(2)(a) Perlembagaan dan tidak bertentangan dengannya (lihat perenggan 43–44).

(4) Mahkamah bersetuju dengan pandangan Mahkamah Agung dalam *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 bahawa bukan bagi mahkamah untuk menentukan sama ada sekatan yang dikenakan oleh badan perundangan menurut perkara 10(2) Perlembagaan adalah munasabah atau tidak kerana ia perkara yang sebetulnya dalam budi bicara badan perundangan dan bukan di bawah bidang kuasa mahkamah. Begitu juga, adalah salah untuk menggunakan hujahan dalam *Ooi Ah Phua v Officer in Charge Criminal Investigation Kedah/Perlis* [1975] 2 MLJ 198 yang mewajarkan mahkamah ini untuk memasukkan perkataan 'munasabah' sebelum perkataan 'sekatan' dalam perkara 10(2). Ini bermaksud menggubal semula peruntukan-peruntukan perkara 10(2). Mahkamah ini sewajarnya beralih daripada pandangan Mahkamah Rayuan dalam *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 yang disahkan oleh mahkamah ini dalam *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333. Walau bagaimanapun, mahkamah

bersetuju dengan Sivarasa Rasiah bahawa sekatan yang boleh dikenakan oleh badan perundangan di bawah perkara 10(2) bukan tidak terhad iaitu bahawa undang-undang yang dipelopori oleh perkara 10(2) mesti lulus ujian perkadaran untuk menjadi sah. Ini sejajar dengan ujian yang ditetapkan dalam *Pung Chen Choon* (lihat perenggan 37, 40 & 43).]

Notes

For a case on validity and constitutionality, see 3(2) *Mallal's Digest* (5th Ed, 2015) para 2988.

Cases referred to

Assa Singh v Mentri Besar, Johore [1969] 2 MLJ 30, FC (refd)
B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)
Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (refd)
Datuk Seri S Samy Vellu v S Nadarajah [2000] 4 MLJ 696, HC (refd)
Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697; [1992] 1 CLJ Rep 72, SC (distd)
Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213; [2007] 1 CLJ 19, CA (not folld)
Elloy de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing & Others Respondents [1999] AC 69; [1998] UKPC 30, PC (refd)
Madhavan Nair & Anor v PP [1975] 2 MLJ 264 (refd)
Mat Shuhaimi bin Shafiei v PP [2014] 2 MLJ 145, CA (refd)
Nyambirai v National Social Security Authority [1996] 1 LRC 64, SC (refd)
Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198, FC (not folld)
PP v Ooi Kee Saik & Ors [1971] 2 MLJ 108 (refd)
PP v Pung Chen Choon [1994] 1 MLJ 566, SC (folld)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (folld)

Legislation referred to

Courts of Judicature Act 1948 s 84
Federal Constitution arts 4, 4(1), (2)(b), 5, 5(1), (2), (3), 8 (1), 10, (1)(a), (1)(a)(b), (c), (2), (2)(a), (c), (4), 152, 160(2), 162, (6), 181
Constitution of India [IND] art 19 (2)
Laws of the Constitution of Kelantan art XXXIA
Printing Presses and Publications Act 1984 s 8A(1)
Restricted Residence Enactment (FMS Cap 39)
Revision of Law Act 1968
Sedition Act 1948 ss 2, 3, 3(1), (2), 4, 4(1), (1)(c)

Sedition Ordinance 1948

Abdul Majid bin Hamzah (Manoj Kurup with him) (Deputy Public Prosecutor, Attorney General's Chamber) for the plaintiff.
Malik Imtiaz Sarwar (Gobind Singh Deo, Haijan Omar, Pavendeep Singh and Joanne Chua Tsu Fae with him) (Gobind Singh Deo & Co) for the defendant.

Arifin Zakaria CJ:

BACKGROUND FACTS

[1] The defendant (accused in the sessions court) was charged in the Kuala Lumpur Criminal Sessions Court for an offence under s 4(1)(b) and alternatively under s 4(1)(c) of the Sedition Act 1948 ('the Act'). The principal charge proffered against the defendant reads:

> PERTUDUHAN
>
> Bahawa kamu, pada 15 Ogos 2014 jam lebih kurang 12.30 tengahari di pejabat Jabatan Siasatan Jenayah, Ibu Pejabat Polis Kontijen Kuala Lumpur, Jalan Hang Tuah, Bandaraya Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, telah menyebut perkataan menghasut seperti ayat-ayat yang bergaris dalam LAMPIRAN A kepada pertuduhan ini; dan oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 4(1)(b) Akta Hasutan 1948 dan boleh dihukum di bawah seksyen 4(1) Akta yang sama.
>
> HUKUMAN
>
> Sekiranya kamu didapati bersalah dan disabitkan, kamu boleh bagi kesalahan kali pertama dikenakan denda tidak lebih daripada RM5000.00 atau penjara selama tempoh tidak lebih daripada tiga tahun atau kedua-duanya selama tempoh tidak lebih daripada lima tahun.

The alternative charge reads:

> PERTUDUHAN PILIHAN
>
> Bahawa kamu, pada 15 Ogos 2014 jam lebih kurang 12.30 tengahari di pejabat Jabatan Siasatan Jenayah, Ibu Pejabat Polis Kontijen Kuala Lumpur, Jalan Hang Tuah, Bandaraya Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, telah menerbitkan perkataan menghasut seperti ayat-ayat yang bergaris dalam LAMPIRAN A kepada pertuduhan ini; dan oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 4(1)(c) Akta Hasutan 1948 dan boleh dihukum di bawah seksyen 4(1) Akta yang sama.
>
> HUKUMAN
>
> Sekiranya kamu didapati bersalah dan disabitkan, kamu boleh bagi kesalahan kali pertama dikenakan denda tidak lebih daripada RM5000 atau penjara selama tempoh tidak lebih daripada tiga tahun atau kedua-duanya dan, bagi kesalahan

yang kemudian, boleh dikenakan penjara selama tempoh tidak lebih daripada lima tahun.

[2] The charges relate to two seditious statements made by the defendant as reported by the *Malay Mail* online on 14 August 2014. The statements read:

> You don't want a repeat of that, where a secret meeting took place, ...
>
> I think what happened in Perak was legally wrong. The best thing to do is do it as legally and transparently as possible.

[3] The defendant claimed trial to the charges. Prior to the commencement of the trial, the defendant applied to the sessions court to refer the question on the constitutionality of the Act to the High Court.

[4] On 5 November 2014, pursuant to s 84 of the Courts of Judicature Act 1948 ('the CJA'), the High Court by way of a special case referred the following questions to this court:

(a) sama ada s 4(1) Akta Hasutan 1948 bercanggah dengan Perkara 10(2) Perlembagaan Persekutuan dan dengan itu terbatal menurut Perkara 4(1) Perlembagaan Persekutuan; dan

(b) sama ada Akta Hasutan 1948 suatu Akta yang sah dan berkuatkuasa menurut Perlembagaan Persekutuan.

The English translation reads as follows:

(a) whether s 4(1) of the Sedition Act 1948 contravenes art 10(2) of the Federal Constitution and is therefore void under art 4(1) of the Federal Constitution; and

(b) whether the Sedition Act 1948 is a valid and enforceable Act under the Federal Constitution.

[5] Considering the two questions posed to us, we agree with the plaintiff that it is more appropriate to consider the second question first as it concerns the validity or enforceability of the entire Act. In the event that we answer the second question in the negative then the first question no longer arises.

SECOND QUESTION

[6] The second question concerns the validity or enforceability of the entire Act against the relevant constitutional provisions. At this juncture, it would be pertinent to briefly consider the origin of the Act.

[7] The Act was first enacted as the Sedition Ordinance 1948 ('the

Ordinance') by the Federal Legislative Council and came into force on 17 June 1948. The Ordinance had effect throughout the Federation of Malaya. The Ordinance sought to consolidate the various existing Sedition Enactments in the Malay States and in the Straits Settlements into a single law. The Ordinance was later revised in 1969 under the Revision of Law Act 1968 and renamed as the Sedition Act 1948 ('the Act'). It is therefore a pre-Merdeka law. Undeniably, the Act has the effect of restricting the freedom of speech and expression as enshrined in art 10(1)(a) of the Federal Constitution.

[8] Section 4 of the Act under which the defendant was charged reads as follows:

> Offences
>
> 4 (1) Any person who–
>
> (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act which has or which would, if done, have a seditious tendency;
>
> (b) utters any seditious words;
>
> (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or
>
> (d) imports any seditious publication,
>
> shall be guilty of an offence and shall, on conviction, be liable for a first offence to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both, and, for a subsequent offence, to imprisonment for a term not exceeding five years; and any seditious publication found in the possession of the person or used in evidence at his trial shall be forfeited and may be destroyed or otherwise disposed of as the court directs.
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> (2) Any person who without lawful excuse has in his possession any seditious publication shall be guilty of an offence and shall, on conviction, be liable for a first offence to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding eighteen months or to both, and, for a subsequent offence, to imprisonment for a term not exceeding three years, and the publication shall be forfeited and may be destroyed or otherwise disposed of as the court directs.

[9] 'Seditious' is defined in s 2 of the Act to mean '… when applied to or used in respect of any act, speech, words, publication or other thing qualifies the act, speech, words, publication or other thing as one having a seditious tendency'. While the words 'seditious tendency' are defined in s 3 of the Act. It reads:

> Seditious tendency
>
> 3 (1) A 'seditious tendency' is a tendency–
>
> (a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;

A (b) to excite the subjects of any Ruler of the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;

B (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;

(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State;

C (e) to promote feelings of ill will and hostility between different races or classes of the population of Malaysia; or

(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution.

D

[10] Being a pre-Merdeka law, naturally the Act was not enacted by Parliament as Parliament was only established after Merdeka.

E **[11]** For ease of reference, we set out below the relevant part of art 10 of the Federal Constitution which reads:

10 Freedom of speech, assembly and association.

(1) Subject to Clauses (2), (3) and (4)–

F (a) every citizen has the right to freedom of speech and expression;

...

(2) Parliament may by law impose–

G (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;

H ...

(4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2) (a), Parliament may pass law prohibiting the questioning of any matter, right, status, privilege, sovereignty or

I prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law. (Emphasis added.)

[12] Premised on the terms 'Parliament may by law' and 'Parliament may

pass law' appearing in art 10(2) and art 10(4), learned counsel for the defendant contended that only Parliament has the sole authority to make law to restrict freedom of speech and expression and not any other bodies or authorities. This the defendant contended is clear from the plain language of cll (1), (2) (a) and (4) of art 10. Further, learned counsel contended that it is for Parliament to consider whether such a law is necessary or expedient on the grounds listed in the said article. No other body is clothed with that authority. In support, learned counsel referred us to the case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697; [1992] 1 CLJ Rep 72. That is a case concerning freedom of association as provided under art 10(1)(c) of the Constitution . The relevant facts in that case were as follows. The Kelantan State Constitution by art XXXIA provides that a member of the State Legislative Assembly who is a member of a political party, shall cease to be a member of the legislative assembly if he resigns or for any reason ceases to be a member of such political party. The issue in that case was whether such a provision was inconsistent with art 10(1) (c) of the Constitution and if so, to that extent invalid by virtue of art 4(1) of the Constitution. This court held, inter alia, that the restriction sought to be imposed by the State Constitution was invalid as the State Constitution, being State law, could not impose such a restriction.

In so holding, Abdul Hamid Omar LP said:

> ... Turning to the right to form associations guaranteed by art 10(1)(c), it being the right of direct relevance to the issue which arises for decision in the present case, by art 10(2)(c) only Parliament may by law impose such restrictions thereon, as it deems necessary or expedient in the most exceptional circumstances and that too in the interest of the security of the Federation or any part thereof, public order or morality, and on no other grounds.

[13] Similarly, Gunn Chit Tuan SCJ stated:

> ... Next it must be observed that art 10(2) of the Federal Constitution provides that only Parliament may by law impose those restrictions referred to in art 10(2), (3) and (4) of the Federal Constitution. Therefore even if any such restriction purported to have been imposed by the Constitution of the State of Kelantan was valid, and it is not, it is clear that the restriction could not be imposed by a law passed by any State Legislature. That would be another ground why Article XXXIA of the Constitution of Kelantan should be invalidated.

[14] Relying on that case, learned counsel submitted that only Parliament has the exclusive authority to enact law to restrict the rights as enshrined under art 10 of the Constitution. Since the Act was not enacted by Parliament, therefore, it was not a valid law.

[15] In our view, that case may be distinguished from the present case on two grounds. First, as stated in that case the impugned law was a State law and not a Federal law and secondly, it is a post-Merdeka law. Hence, the impugned law in that case clearly runs counter to art 10 (2) and art 10(4) of the Constitution, accordingly it is void under art 4(1).

[16] Having said that, the Act in the present case is a pre-Merdeka law, the issue, therefore, is whether it is saved by art 162 of the Constitution. For ease of reference, we set out below the relevant provision of art 162 of the Constitution, which reads:

> 162 Existing laws
>
> (1) Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by federal or State law.
>
> (2) ...
>
> (3) Reference in any existing law to the Federation established by the Federation of Malaya Agreement, 1948, and its territories, and to any officer holding office under that Federation or to any authority or body constituted in or for that Federation (including any references falling to be construed as such references by virtue of Clause 135 of the said Agreement) shall be construed, in relation to any time on and after Merdeka Day, as references to the Federation (that is to say, the Federation established under the Federation of Malaya Agreement, 1957 and its territories and to the corresponding officer, authority or body respectively; and the Yang di-Pertuan Agong may by order declare what officer, authority or body is to be taken for the purposes of this Clause to correspond to any officer, authority or body referred to in any existing law.

[17] 'Existing law' is defined in art 160(2) to mean '... any law in operation in the Federation or any part thereof immediately before Merdeka Day'; The word 'law' '... includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof;'.

[18] The Act, being a written law which was in operation in the Federation immediately prior to Merdeka Day clearly comes within the meaning of the term 'existing law' as defined in art 160(2). On that premise, learned counsel for the plaintiff submitted that the Act was saved by art 162 of the Constitution .

[19] What is the purport and intent of art 162? When Malaya achieved her

independence on 31 August 1957, it is not possible for a new set of legislations to be immediately enacted by Parliament to replace the 'existing law'. In the circumstances, it is inevitable that all laws then in operation will have to be continued until they are repealed. This is provided in art 162 which is a transitional provision intended to ensure the continuance of all existing laws after Merdeka Day with such modifications as may be made under the said Article and subject to any amendment as may be made by Federal or State law. Under art 162(6), the court or tribunal are given further powers to make any necessary modification to any such law to bring it into accord with the Constitution. This was in fact done in the case of *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30. In that case, the applicant was arrested and detained under the Restricted Residence Enactment (FMS Cap 39) ('the Enactment'). It was argued in that case that the Enactment has no provision: (a) for informing the person concerned of the grounds of his arrest and detention; (b) for presenting him before a magistrate or for an enquiry at which the detained person could answer the allegations made against him; (c) for review and (d) for limitation of the period of detention. Because of these reasons, it was submitted that the provisions of the Enactment were inconsistent with the provisions of arts 5 and 9 of the Constitution. In that case, it was held, inter alia, that even though the Enactment did not have provisions similar to those of cll (3) and (4) of art 5 of the Constitution, this does not render it unconstitutional despite such difference. However, it must be applied with such adaptations as may be necessary to bring it into accord with the Constitution. In the circumstances, the court held that the provisions of cll (3) and (4) of art 5 of the Constitution must therefore be read into the provisions of the Restricted Residence Enactment. Azmi LP at p 33 said:

> The court, therefore in this case must read into it the provisions of article 5(2) and (3) of the Constitution with the result that the applicant must be informed as soon as may be of the ground of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice and if not released he shall without reasonable delay and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without a magistrate's authority.

[20] In the same case, Raja Azlan Shah J observed:

> ... the impugned law which violates fundamental rights becomes eclipsed until it is modified to remove the shadow and to make it free from blemish or infirmity. If that were not so, then it is not understandable what 'existing law' can be said to be modified so as to bring it into conformity with the Constitution. The impugned law which violates constitutional conditions is not a nullity or void ab initio but remains unenforceable by reason of those conditions, but once the conditions are observed the law becomes effective and I perceive no adequate grounds for adjudging that a re-enactment of the impugned law is required before it can have effect ...

(See also *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169)

[21] In *Datuk Seri S Samy Vellu v S Nadarajah* [2000] 4 MLJ 696 Abdul Wahab J (as he then was) succinctly drew the distinction between pre-Merdeka law and post- Merdeka law. He stated:

> Articles 162(6) and 162(7) in respect of pre-Merdeka laws in any case require an approach that differs from art 4 in respect of post-Merdeka laws. In the case of the latter, a law that is inconsistent with the Constitution is to the extent of such inconsistency, void. In the case of the former, the court may apply the pre-Merdeka law with such modifications, which term includes amendment, adaptation and repeal as may be necessary to bring that provision of the pre-Merdeka law into accord with the Constitution. The question remains whether there is any inconsistency as to require amendment, adaptation and repeal, which has been dealt with above. There is no power under art 162(6) to declare that s 380(ii)(c) of the CPC, a pre-Merdeka law, to be void on the grounds of ultra vires as is being sought in this question.

We agree with the observation of Abdul Wahab J.

[22] In *Mat Shuhaimi bin Shafiei v Public Prosecutor* [2014] 2 MLJ 145 the validity of the Act was challenged by the appellant. In that case the court held that the validity of the Act comes under the saving provisions of art 162 of the Constitution.

[23] Following the above authorities, we agree with the submission of learned counsel for the plaintiff that the term 'Parliament may by law' as appearing in art 10 (2) should not be read restrictively but must be read harmoniously with the other provisions of the Constitution such as art 162. This is in consonant with the principle of interpretation of the Constitution as borne out in the case of *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, where it was held that:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matter 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 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 Reynold* [1979] 3 All ER 129 136 (per Raja Azlan Shah Ag LP).

[24] To say that the Act does not come within the ambit of art 10(2) of the Constitution as it was not made by Parliament would give it a highly restrictive and rigid interpretation to the phrase 'Parliament may by law' as appearing in the said article. We are of the view that the framers of the Constitution in drafting art 162 would have in their contemplation the provision of art 10(2), and had they indeed intended that the phrase 'the existing laws' in art 162 is not to include the Act they could have done so in no uncertain term.

[25] On the contrary, we are of the view that the intention of the framers of the Constitution is to provide for the continuance of all existing laws including the Act, subject to any modifications as may be made so as to bring it into accord with the Constitution. The existing law is only rendered void or invalid if it could not be brought into accord with the Constitution. This is to be contrasted with the treatment of post Merdeka Day legislation which by virtue of art 4 (1) is rendered null and void to the extent of its inconsistency with the Constitution.

[26] This is further affirmed by the object and purpose of art 162 as may be discerned from paras 126 and 128 of the Report of the Working Committee of Constitutional Proposals in 1946 which read:

126 Objects of the Transitional Provision. In framing the transitional clauses of the draft Federation Agreement, the Committee drew freely upon the provisions of the Malayan Union Order in Council 1946. The main objects of the transitional provisions may be summarized as follows:

(1) ...

(2) To provide for the continuance of existing laws;

(3) ...

(4) To preserve the validity and future operation of acts lawfully done before the new arrangements are brought into force;

...

We now discuss these objects in order.

...

128 Continuance of Existing Laws. We have made arrangements for the continuance of the existing laws, with such modifications as may be necessary to

adapt them to the constitutional arrangements. We have also provided for the validity and future operation of lawful acts done prior to the appointed day and for the carrying on of proceedings pending in the Courts. These are necessary provisions and call for no special comment.

[27] What we can gather from the above is that, it is thus the intention of the framers of the Constitution to ensure that the existing law will continue to be valid and enforceable upon the coming into operation of the Constitution on Merdeka Day. It follows therefore that the Act being the 'existing law' at the material date should continue to be valid and enforceable post-Merdeka Day.

[28] For the above reasons, our answer to the second question is in the positive.

FIRST QUESTION

[29] The first question before us is whether s 4 (1) of the Act is consistent with art 10 (2) (a) of the Constitution. Article 10 (1) (a) provides for freedom of speech, assembly and association. It is, however, commonly acknowledged that the rights conferred by the said article are not absolute (see *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108; *Madhavan Nair & Anor v Public Prosecutor* [1975] 2 MLJ 264). This is clear from art 10(2) itself which states that the rights conferred by art 10(1)(a)(b) and (c) are subject to cll (2), (3) and (4). What concerns us here is the kind of restriction which may be imposed under art 10(1)(a). Article 10(2) provides:

> 10 Freedom of speech, assembly and association
>
> (1) ...
>
> (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;
>
> (b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof of public order;
>
> (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.

[30] By art 10(2), Parliament is given the right to impose such restrictions as it deems necessary or expedient in the interest of the security of the Federation and other grounds enumerated in cl (2)(a). What this means is that Parliament or the Legislature is not free to impose any restrictions as they fancy; the restrictions must fall within the parameters set out by cl (2) (a) of art 10. In *Madhavan Nair*, a case concerning the validity of a condition imposed by the police in a licence to convene a public meeting, Chang Min Tat J stated thus:

> ... Any condition limiting the exercise of the fundamental right to freedom of speech not falling within the four corners of Article 10 Clauses (2), (3) and (4) of the Federal Constitution cannot be valid.

[31] The constitutionality of s 8A(1) of the Printing Presses and Publications Act 1984 came for consideration of the Supreme Court in *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566. In that case the Supreme Court laid down some of the tests to be applied in determining whether the impugned law is consistent with art 10 (2) (a) of the Constitution. The court held, firstly, that there is a strong presumption of the constitutionality of the impugned law and the burden of proof lies on the party seeking to establish the contrary. And in deciding whether a particular piece of legislation falls within the orbit of permitted restrictions, consideration must be given to the question whether such law is directed at a class of acts too remote in the chain of relation to the subjects enumerated under art 10(2) (a). The test as propounded by the court is that the connection contemplated must be real and proximate, not far-fetched or problematical. At p 578 Edgar Joseph Jr SCJ elaborated on the test:

> In considering whether the impugned s 8A(1) comes within the orbit of the permitted restrictions set out in cl 10(2)(a) of the Constitution, on the Right to freedom of the press, it is necessary for the court to determine whether this impugned provision is in pith and substance a law passed by Parliament to restrict such Right as Parliament 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 or the impugned provision is in pith and substance a law 'to provide against' contempt of court, defamation or incitement to any offence.
>
> By cl (2) (a) of art 10, challenge to any law is restricted by art 4(2)(b) which says: 'The validity of any law shall not be questioned on the ground that it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.' This means that it is not open to any court to inquire into the question whether Parliament deems or does not deem anything. Nevertheless, as has been aptly put by Prof LA Sheridan and Prof Harry E Groves in their book on the Constitution of Malaysia (4th Ed) at pp 74 and 74, a law which purports to have been passed under cl (2) is open to challenge on the ground that it is not in any of the interests set out in the clause since any other, more extensive meaning to be assigned to art 4(2)(b) would render art 10(2) otiose.

[32] However, since the Court of Appeal's decision in *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19, the court had imposed a further restriction on the law touching on the fundamental rights guaranteed by the Constitution by applying the 'reasonable' and 'proportionality' tests in determining whether the impugned law is consistent with the Constitution.

[33] In that case, Gopal Sri Ram JCA (as he then was) at pp 28–29 stated:

> The other aspect to interpreting our Constitution is this. When interpreting the other parts of the Constitution, the court must bear in mind the all pervading provision of art 8(1). That article guarantees fairness of all forms of State action. See, *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771. It must also bear in mind the principle of substantive proportionality that art 8(1) imports. See, *Om Kumar v Union of India* AIR 2000 SC 3689. This doctrine was most recently applied by this Court in the judgment of my learned brother Mohd Ghazali in *Menara Panglobal Sdn Bhd v Ariokianathan* [2006] 3 MLJ 493; [2006] 2 CLJ 501. In other words, not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved. This is sometimes referred to as 'the doctrine of rational nexus', see, *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165. A court is therefore entitled to strike down State action on the ground that it is disproportionate to the object sought to be achieved.

[34] The two tests were later affirmed by the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333. At p 340, et seq, Gopal Sri Ram FCJ stated as follows:

> [5] The other principle of constitutional interpretation that is relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art 10(2)(c). It says that 'Parliament may by law impose ... (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'. Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. The reasons for reading the derogation as 'such reasonable restrictions' appear in the judgment of the Court of Appeal in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19 which reasons are now adopted as part of this judgment. The contrary view expressed by the High Court in *Nordin bin Salleh & Anor v Dewan Undangan Negeri Kelantan & Ors* [1992] 1 MLJ 343; [1992] 1 CLJ 463 is clearly an error and is hereby disapproved. The correct position is that when reliance is placed by the state to justify a statute under one or more of the provisions of art 10(2), the question for determination is whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article.
>
> ...

[19] Accordingly, when state action is challenged as violating a fundamental right, for example, the right to livelihood or the personal liberty to participate in the governance of the Malaysian Bar under art 5(1), art 8(1) will at once be engaged. When resolving the issue, the court should not limit itself within traditional and narrow doctrinaire limits. Instead it should, subject to the qualification that will be made in a moment, ask itself the question: is the state action alleged to violate a fundamental right procedurally and substantively fair. The violation of a fundamental right where it occurs in consequence of executive or administrative action must not only be in consequence of a fair procedure but should also in substance be fair, that is to say, it must meet the test of proportionality housed in the second, that is to say, the equal protection limb of art 8(1). However, where the state action is primary or secondary legislation, that is to say, an Act of Parliament or subsidiary legislation made by the authority of Parliament, the test of constitutionality is only based on substantive fairness: no question arising on whether the legislation is the product of a fair procedure. This is because the doctrine of procedural fairness does not apply to legislative action of any sort, see *Bates v Lord Hailsham of St Marylebone & Ors* [1972] 1 WLR 1373; *Union of India v Cynamide India Ltd* AIR 1987 SC 1802.

...

[27] The next issue to consider is whether the section violates the equal protection clause. This calls for an interpretation of that clause. The test here is whether the legislative state action is disproportionate to the object it seeks to achieve. Parliament is entitled to make a classification in the legislation it passes. But the classification must be reasonable or permissible. To paraphrase in less elegant language the words of Mohamed Azmi SCJ in *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165, the classification must (a) be founded on an intelligible differentia distinguishing between persons that are grouped together from others who are left out of the group; and (b) the differentia selected must have a rational relation to the object sought to be achieved by the law in question. And to quote that learned judge: 'What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.' In short, the state action must not be arbitrary. This, then, is the common thread that webs and binds the two limbs of art 8(1). Hence the overlap.

...

[29] In *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, Lord Steyn adopted what was said in de Freitas:

> The contours of the principle of proportionality are familiar. In Elloy de *Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> > whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to

impair the right or freedom are no more than is necessary to accomplish the objective.

[35] Learned counsel for the plaintiff urged us to depart from the reasonableness test as propounded by this court in *Sivarasa Rasiah* on two grounds namely:

(a) in *Sivarasa Rasiah*, this court for some reason did not consider the earlier decision of the Supreme Court in the case of *Pung Chen Choon* where it was specifically held that the 'reasonableness test' ought not to apply to restrictions imposed pursuant to art 10; and

(b) The framers of the Constitution had deliberately omitted the word 'reasonable' from the final draft of art 10(2).

This is to be contrasted with art 19 (2) of the Indian Constitution which stipulates that such law may only impose reasonable restriction. This distinction was expressly acknowledged by the Supreme Court in *Pung Chen Choon*. In that case, the court opined:

> In our view, as we have earlier indicated, the position which we took in considering this part of the case was whether the impugned law –in this case, s 8A(1) – came within the orbit of the permitted restrictions. If, therefore, s 8A(1) was in pith and substance a law falling under one of the interests enumerated under art 10(2)(a), the question whether its provisions were reasonable did not arise; it (s 8A(1) would be valid. It follows, therefore, that in this regard, the court has a limited power of judicial review to the extent that it is entitled to decide whether s 8A(1) infringes the Right to freedom of speech and expression enunciated in art 10(1)(a).

[36] Having regard to the legislative history of art 10(2), it would appear that in the initial draft the 'restriction' was to be qualified by the word 'reasonable', as in the case of art 19(2) of the Indian Constitution. The word was however omitted from the final draft by the Working Committee, adopting the dissenting opinion of Justice Abdul Hamid of Pakistan, a member of the Reid Commission.

[37] For those reasons, we are inclined to agree with the view of the Supreme Court in *Pung Chen Choon*, that it is not for the court to determine whether the restriction imposed by the Legislature pursuant to art 10(2) is reasonable or otherwise. That, in our opinion, is a matter strictly within the discretion of the Legislature and not within the purview of the court. Similarly, we are of the view that the reasoning in *Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198 does not justify the insertion of the word 'reasonable' before the word 'restriction' in art 10(2). In *Ooi Ah Phua*, the Federal Court was concerned with the interpretation of art 5(3), which reads:

> Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

[38] Suffian LP construed that provision in the following words:

> With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interest of justice is as important as the interest of arrested persons and it is well-known that criminal elements are deterred most of all by the certainty of detection, arrest and punishment.

[39] The learned judge in *Dr Mohd Nasir Hashim* relying on the above statement by Suffian LP opined that:

> So, although the Constitution did not have any words postponing the right to counsel, the Federal Court read those words into the article. So too here. We can read the word 'reasonable' before the word 'restriction' in art 10(2)(c).

[40] With respect, the reasoning of the learned judge cited in *Dr Mohd Nasir Hashim* in our view is flawed since in *Ooi Ah Phua* the court was concerned with the interpretation of the words '... as soon as may be ...' which relates to the time within which a person arrested is to be allowed to consult his lawyer and the court opined that in the circumstances a balance need to be drawn between the interest of the accused and the interest of justice. Therefore the words '... as soon as may be ...' cannot be construed to mean 'immediately' upon arrest. That interpretation arose from the special wordings of art 5(3). It is, in our view, fallacious to use the reasoning in *Ooi Ah Phua* as warranting us to insert the word 'reasonable' before the word 'restriction' in art 10(2). That would be rewriting the provisions of art 10 (2). For those reasons we depart from the view of the Court of Appeal in *Dr Mohd Nasir Hashim* as affirmed by this court in Sivarasa Rasiah.

THE PROPORTIONALITY TEST

[41] This court in *Sivarasa Rasiah* also alluded to the proportionality test in determining whether a given law is consistent with the Constitution. This test emanates from the equality clause housed in art 8 (1). The learned judge in *Sivarasa Rasiah* considered the statement of Gubbay CJ in *Nyambirai v National Social Security Authority* [1996] 1 LRC 64, the leading authority on the matter, which was approved by the Privy Council in *Elloy de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing &*

Ors [1998] UKPC 30. In that case Lord Clyde stated:

> In determining whether a limitation is arbitrary or excessive he (Gubbay CJ) said that the court would ask itself:
>
> > whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.
> >
> > Their Lordships accept and adopt this threefold analysis of the relevant criteria.

[42] The proportionality principle/test was explained by the Court of Appeal in *Dr Mohd Nasir Hashim* in the passage we earlier quoted at para 33. In short, the learned judge said that the legislation or executive action must not only be objectively fair but must also be proportionate to the object sought to be achieved.

[43] In this regard, we agree with the learned judge in *Sivarasa Rasiah*, that the restriction that may be imposed by the Legislature under art 10(2) is not without limit. This means to say that the law promulgated under art 10(2) must pass the proportionality test in order to be valid. This, in our view is in line with the test laid down in *Pung Chen Choon* discussed earlier. Having said that, we will now consider whether s 4(1) of the Act would pass the proportionality test. One thing is clear, this section is directed to any act, word or publication having a 'seditious tendency' as defined in s 3(1) paras (a) to (f) of the Act. This in our view is consistent with art 10 (2) (a) and art 10 (4) of the Constitution, as it cannot be said that the restrictions imposed by s 4(1) is too remote or not sufficiently connected to the subjects/objects enumerated in art 10 (2) (a). Furthermore, this is not a total prohibition as it is subject to a number of exceptions as provided in s 3(2) of the Act. As legislated, it is not seditious to show that any Ruler has been misled or mistaken in any of his measures, or to point out errors or defects in any Government or constitution as by law established. Upon close analysis, we agree with the plaintiff's submission that the restrictions imposed in s 4 (1) fall squarely within the ambit or parameter of art 10 (2) (a) of the Constitution.

[44] In the result, we hold that s 4 (1) of the Act does not run counter to art 10(2) (a) of the Constitution. Accordingly, our answer to the first question is in the negative.

[45] With the above findings, we now order that this matter be remitted to the sessions court for the proceedings to be continued without any further delay.

Act ruled as valid and enforceable under the Federal Constitution and s 4(1) of Act did not contravene art 10(2) of the Federal Constitution.

Reported by Ashok Kumar