Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)-636 OF 2010
LOW HOP BING, MOHD HISHAMUDIN AND LINTON ALBERT JJCA
31 OCTOBER 2011

Constitutional Law — Legislation — Validity of impugned legislation — Whether s 15(5)(a) of the Universities and Universities Colleges Act 1971 unconstitutional — Whether provisions of impugned provision reasonable and within ambit of art 10(1)(a) of the Federal Constitution read with art 10(2)(a) — Universities and University Colleges Act 1971 s 15(5)(a) — Federal Constitution art 10(1)

The appellants, who were at all material times political science undergraduate students of the Universiti Kebangsaan Malaysia (the third respondent), were present in the constituency of Hulu Selangor during the campaign period for the Parliamentary by-election of 24 April 2010. The appellants were found to have in their possession paraphernalia supportive of, sympathetic with or opposed to a contesting political party in the by-election. On 13 May 2010, the appellants received notices from the third respondent requiring them to appear before a disciplinary tribunal on 3 June 2010 to answer charges of alleged breaches and offences under s 15(5)(a) of the Universities and University Colleges Act 1971 ('the UUCA'). The appellants denied the allegations and at the same time applied by way of an originating summons for a declaration that s 15(5)(a) of the UUCA contravened art 10(1)(a) of the Federal Constitution ('the Constitution') and was therefore invalid and that consequently, the disciplinary proceedings instituted by the third respondent against them were also invalid. The appellants also applied by way of an interlocutory injunction to restrain the third respondent from proceeding with the disciplinary proceedings. The High Court judge found that s 15(5)(a) of the UUCA was constitutional and valid and that the provisions of s 15(5)(a) of the UUCA were reasonable and within the ambit of art 10(1)(a) of the Constitution read with art 10(2)(a). The High Court judge thus dismissed both the appellants' OS application and the application for an interim injunction. This was the appellants' appeal against that decision on the grounds, inter alia, that the trial judge had erred in law and fact in holding that the question of reasonableness did not arise when in fact it was an important consideration. The appellants contended that the impugned provision was a restriction on the students' right to freedom of speech and that any restriction on the freedom of speech had to be for one of the purposes as specified by cl 2(a) of art 10 of the Constitution and it had to be reasonable. The respondents contended that the restriction on

freedom of speech was permitted by cl 2(a) of art 10 of the Constitution, in that, the restriction was necessary in the interest of 'public order or morality'. However, the appellants argued that there was nothing in the UUCA or in the Minister's speech, in moving the Bill in Parliament, as reported in the *Hansard*, to suggest that s 15(5)(a) of the UUCA was meant to protect public interest or public morality. Further, the appellants submitted that the restriction as imposed in s 15(5)(a) of the UUCA was unreasonable.

Held, allowing the appeal with costs:

(1) (per **Low Hop Bing JCA, dissenting**) The restrictions imposed under s 15(5)(a) of the UUCA pertain essentially to the involvement of students in politics. These restrictions were necessary and sought to prevent infiltration of political ideologies including extremities amongst students as this infiltration could adversely affect the primary purpose of the universities ie the pursuit of education. The issue of 'reasonableness' had been extensively debated in Parliament as reported in *Hansard*. Further, it was not for the court to state whether the law was 'harsh and unjust', which was a matter of policy to be decided by Parliament. In conclusion the restrictions contained in the impugned provision were within the bounds of reasonableness and came within the scope of art 10(1)(a) read with art 10(2)(a) of the Constitution (see paras 26–27 & 30).

(2) (per **Mohd Hishamudin JCA**) It is settled law that any restriction imposed on freedom of speech by Parliament had to be a reasonable restriction, and that the court if called upon to rule, as in the present case, had the power to examine whether the restriction so imposed was reasonable or otherwise, besides determining as to whether or not the restriction fell within the exceptions as set out in cl 2(a) of art 10 of the Constitution. Upon holding the restriction to be unreasonable, the court also had the right to declare the impugned law imposing the restriction to be unconstitutional and accordingly null and void. In the present case, the restrictions imposed by way of s 15(5)(a) of the UUCA were unreasonable and it was difficult to see in what manner this section related to public order or morality. There was no nexus between the exercise of the right of a university student to express support for or opposition against a political party and public order or public morality (see paras 43 & 47).

(3) (per **Mohd Hishamudin JCA**) The impugned provision was irrational. Most university students were of the age of majority and therefore at liberty to enter into contracts, sue and be sued, marry and undertake parental responsibilities and vote in general elections if they were over 21. Thus, it was ironic that legally they could not say anything that could be construed as supporting or opposing a political party. As such, a provision like s 15(5)(a) of the UUCA, which impeded the healthy development of

the critical mind and original thoughts of students was not only counter productive but also repressive in nature. Further, the Minister's speech, in moving the Bill in Parliament, as reported in the *Hansard* did not disclose any link between prohibiting university students from expressing their support for or opposition against a political party and the maintenance of public order or public morality. In fact what the Minister said in Parliament about preserving the freedom of speech of students and what the impugned provision provided were found to be contradictory (see paras 48, 52 & 54).

(4) (per **Linton Albert JCA**) In cases where the legislative enactment was self explanatory in its manifest absurdity as s 15(5)(a) of the UUCA undoubtedly was, it was not necessary to embark on a judicial scrutiny to determine its reasonableness. There could be no better illustration of the utter absurdity of s 15(5)(a) of the UUCA than the facts of the present case, where students of the university face disciplinary proceedings with the grim prospect of expulsion simply because of their presence at a Parliamentary by-election. Further, the respondents' reliance on s 15(4) of the UUCA to mitigate the effects of the impugned provision was wholly misconceived (see paras 67 & 71).

[Bahasa Malaysia summary

Perayu-perayu, yang mana pada masa matan merupakan pelajar-pelajar mahasiswa/mahasiswi sains politik Universiti Kebangsaan Malaysia ('responden ketiga'), berada untuk pilihan raya Hulu Selangor semasa tempoh kempen untuk pilihan raya kecil Parlimen pada 24 April 2010. Perayu-perayu didapati dalam milikan mereka perlengkapan yang menyokong atau menentang parti politik yang bertanding dalam pilihan raya kecil tersebut. Pada 13 Mei 2010, perayu-perayu telah menerima notis daripada responden ketiga memerlukan mereka untuk hadir di hadapan tribunal tatatertib pada 3 Jun 2010 untuk menjawab tuduhan-tuduhan pelanggaran dan kesalahan yang didakwa di bawah s 15(5)(a) Akta Universiti dan Kolej Universiti 1971 ('AUKU'). Perayu-perayu menafikan dakwaan-dakwaan tersebut dan pada masa yang sama telah memohon melalui saman pemula untuk deklarasi bahawa s 15(5)(a) AUKU bercanggah dengan perkara 10(1)(a) Perlembagaan Persekutuan ('Perlembagaan') dan oleh itu tidak sah dan bahawa lanjutan itu, prosiding-prosiding tatatertib yang dimulakan oleh responden ketiga terhadap mereka adalah tidak sah. Perayu-perayu juga memohon melalui injunksi interlokutori untuk menghalang responden ketiga daripada meneruskan prosiding-prosiding interlokutori tersebut. Hakim Mahkamah Tinggi mendapati bahawa s 15(5)(a) AUKU adalah berpelembagaan dan sah dan bahawa peruntukan-peruntukan s 15(5)(a) AUKU adalah munasabah dan dalam lingkungan perkara 10(1)(a) Perlembagaan dibaca dengan perkara 10(2)(a). Hakim Mahkamah Tinggi justeru menolak kedua-dua permohonan SP perayu-perayu dan permohonan untuk injunksi interim. Ini merupakan

rayuan perayu-perayu terhadap keputusan tersebut atas alasan-alasan, antara lain, bahawa hakim bicara telah terkhilaf dalam undang-undang dan fakta dalam memutuskan bahawa persoalan tentang keberpatutan tidak wujud apabila terdapat pertimbangan yang penting. Perayu-perayu berhujah bahawa peruntukan yang dipersoalkan adalah sekatan terhadap hak kebebasan untuk bersuara untuk pelajar-pelajar dan bahawa sebarang sekatan kebebasan untuk bersuara hendaklah untuk salah satu tujuan yang dispesifikasikan oleh klausa 2(a) perkara 10 Perlembagaan dan ia hendaklah berpatutan. Responden-responden berhujah bahawa sekatan kebebasan untuk bersuara adalah dibenarkan oleh klausa 2(a) perkara 10 PP, yakni, sekatan tersebut adalah perlu untuk kepentingan 'public order or morality'. Walau bagaimanapun, perayu-perayu membantah bahawa tidak terdapat apa-apa di dalam AUKU atau dalam ucapan Menteri, dalam mencadangkan rang undang-undang dalam Parlimen, seperti yang dilaporkan di dalam *Hansard*, menunjukkan bahawa s 15(5)(a) AUKU adalah bertujuan untuk melindungi kepentingan atau kelakuan akhlak awam. Selanjutnya, perayu-perayu berhujah bahawa sekatan yang dikenakan dalam s 15(5)(a) AUKU adalah tidak berpatutan.

Diputuskan, membenarkan rayuan dengan kos:

(1) (oleh **Low Hop Bing HMR, menentang**) Sekatan-sekatan yang dikenakan di bawah s 15(5)(a) AUKU pada asasnya berkenaan dengan penglibatan pelajar-pelajar dalam politik. Sekatan-sekatan ini adalah perlu dan bertujuan untuk menghalang penyerapan ideologi politik termasuk keterlampauan di kalangan pelajar-pelajar memandangkan penyerapan ini secara bertentangan boleh menjejaskan tujuan utama universiti-universiti iaitu untuk melanjutkan pelajaran. Isu 'reasonableness' telah didebatkan secara meluas dalam Parlimen seperti yang dilaporkan di dalam *Hansard*. Selanjutnya, adalah bukan bagi mahkamah untuk menyatakan sama ada undang-undang adalah 'harsh and unjust', yang mana merupakan perkara polisi yang harus diputuskan oleh Parlimen. Secara kesimpulan, sekatan-sekatan yang terkandung dalam peruntukan yang dipersoalkan adalah terangkum dalam batasan keberpatutan dan termasuk dalam skop perkara 10(1)(a) dibaca dengan perkara 10(2)(a) Perlembagaan (lihat perenggan 26–27 & 30).

(2) (oleh **Mohd Hishamudin HMR**) Adalah menjadi undang-undang tetap bahawa sebarang sekatan kebebasan untuk bersuara oleh Parlimen seharusnya suatu sekatan yang berpatutan, dan bahawa sekiranya mahkamah yang diarahkan untuk memutuskan, seperti dalam kes ini, mempunyai kuasa untuk meneliti sama ada sekatan yang dikenakan adalah berpatutan atau sebaliknya, selain daripada menentukan sama ada atau tidak sekatan tersebut tertakluk dalam pengecualian-pengecualian yang dinyatakan dalam klausa 2(a) perkara 10 Perlembagaan. Setelah memutuskan bahawa sekatan adalah tidak berpatutan, mahkamah juga

mempunyai hak untuk mengisytiharkan undang-undang yang mengenakan sekatan tersebut sebagai tidak berpelembagaan dan selanjutnya terbatal dan tidak sah. Dalam kes ini, sekatan-sekatan yang dikenakan melalui s 15(5)(a) AUKU adalah tidak berpatutan dan adalah sukar untuk melihat dalam bentuk apa seksyen ini berkaitan dengan ketenteraman dan kelakuan akhlak awam. Tidak terdapat hubung kait antara pelaksanaan hak pelajar universiti untuk memberikan sokongan untuk atau menentang parti politik dan ketenteraman atau kelakuan akhlak awam (lihat perenggan 43 & 47).

(3) (oleh **Mohd Hishamudin HMR**) Peruntukan yang dipersoalkan adalah tidak munasabah. Kebanyakan pelajar-pelajar universiti adalah berusia majoriti dan oleh itu bebas untuk memasuki kontrak, menyaman atau disaman, berkahwin dan mengambil tanggungjawab sebagai ibu bapa dan mengundi secara amnya dalam pilihan raya umum sekiranya mereka melebihi 21 tahun. Justeru, adalah ironik bahawa dari sisi undang-undang mereka tidak boleh menyatakan apa-apa yang boleh ditafsirkan sebagai menyokong atau menentang parti politik. Oleh itu, peruntukan seperti s 15(5)(a) AUKU, yang mana menghalang perkembangan untuk minda kritis yang sihat dan pemikiran asal pelajar-pelajar bukan hanya tidak produktif tetapi juga bersifat menindas. Justeru, ucapan Menteri, dalam mencadangkan rang undang-undang dalam Parlimen, seperti yang dilaporkan di dalam *Hansard* tidak mengemukakan sebarang kaitan di antara mencegah pelajar-pelajar universiti untuk memberikan sokongan untuk atau menentang parti politik dan mengekalkan ketenteraman atau kelakuan akhlak awam. Malahan apa yang dikatakan oleh Menteri dalam Parlimen tentang memelihara kebebasan untuk bersuara pelajar-pelajar dan apa yang diperuntukkan oleh peruntukan yang dipersoalkan didapati bercanggah (lihat perenggan 48, 52 & 54).

(4) (oleh **Linton Albert HMR**) Dalam kes-kes di mana enakmen perundangan adalah jelas dengan sendirinya dalam kebenaran yang tidak munasabah seperti, yang tidak dapat disangsikan, s 15(5)(a), adalah tidak perlu untuk memulakan penelitian dan pembetulan kehakiman untuk menentukan keberpatutannya. Tidak terdapat illustrasi yang lebih baik tentang ketidakmunasabahan s 15(5)(a) AUKU daripada fakta-fakta kes ini, di mana pelajar-pelajar universiti berdepan dengan prosiding-prosiding tatatertib dengan prospek suram pengusiran semata-mata kerana kehadiran mereka semasa pilihan raya kecil sidang Parlimen (lihat perenggan 67 & 71).]

Notes

For cases on validity of impugned legislation, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2551–2556.

Cases referred to

Adegbenro v Akintola [1963] 3 WLR 63; [1963] AC 614, PC (refd)
Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285; [2008] 1 CLJ 521, FC (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)
Educational Company of Ireland Ltd v Fitzpatrick (No 2) (1961) IR 345 (refd)
Federal Steam Navigation Co Ltd and another v Department of Trade and Industy [1974] 2 All ER 97, HL (refd)
Government of the State of Kelantan, The v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj [1963] MLJ 335 (refd)
Kesavananda Bharati v State of Kerala AIR 1973 SC 1461 (refd)
Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)
PP v Ooi Kee Saik & Ors [1971] 2 MLJ 108 (refd)
PP v Pung Chen Choon [1994] 1 MLJ 566; [1994] 1 LNS 208, SC (refd)
Shamim Reza Abdul Samad v PP [2009] 6 CLJ 93, FC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 607, FC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2006] 1 MLJ 727, CA (refd)
Sweezy v New Hampshire 354 US 234 (1957) (refd)
Vedprakash v The State AIR 1987 Gujerat 253 (refd)
Whitney v California 274 US 357 (1927) (refd)

Legislation referred to

Federal Constitution arts 4(1), 10(1), (1)(a), (1)(c), (2), (2)(a), (2)(c), Part II
Legal Profession Act 1976 s 46A
Printing Presses and Publications Act 1984 s 8A(1)
Universities and University Colleges Act 1971 s 15(4), (5), (5)(a)

Appeal from: Originating Summons No R1-24-47 of 2010 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (Jenine Gill with him) (Kandiah Partnership) for the appellant.
Noor Hisham bin Ismail (Senior Federal Counsel, Attorney General's Chambers) for the first and second respondents.
Muhammad Shafee Abdullah (Sarah Abishegam with him) (Shafee & Co) for the third respondent.

Low Hop Bing JCA (dissenting):

APPEAL

[1] In the Kuala Lumpur High Court, the appellants' ('the plaintiffs') originating summons (encl 1) sought a declaration that s 15(5)(a) of the

Universities and University Colleges Act 1971 ('s 15(5)(a)') is invalid, on the ground that it contravenes art art 10(1)(a) of the Federal Constitution, and consequentially the pending disciplinary proceedings instituted against the plaintiffs by Universiti Kebangsaan Malaysia, the third respondent ('the third defendant') are invalid (for brevity and convenience, a reference hereinafter to an article is a reference to that article in the Federal Constitution).

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

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

FACTUAL BACKGROUND

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

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

QUESTION FOR DETERMINATION

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

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

(b) s 15(5)(a) violated the plaintiffs' fundamental liberties to speech and expression, and is unconstitutional as it lies outside the ambit of art

10(2)(a). They relied on, inter alia, the judgment of the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 607 (FC).

[7] Learned senior federal counsel Noor Hisham bin Ismail derived support from the judgment of the (then) Supreme Court in *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 (SC) and argued for the first and second respondents (the first and second defendants) that the learned High Court judge is correct in arriving at the decision that s 15(5)(a) is constitutional and valid. In any event, he added that the provisions of s 15(5)(a) are reasonable and within the ambit of art 10(1)(a) read with art 10(2)(a). Likewise, Dato' Sri Dr Muhammad Shafee Abdullah (Miss Sarah Abishegan with him) submitted for the third defendant and supported the decision of the High Court as correct.

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

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

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

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

(b) the methodology of constitutional interpretation;

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

(d) the reasonableness of those restrictions.

SECTION 15(5)(a), ART 10(1)(a) AND ART 10(2)(a)

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

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

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

10 Freedom of speech, assembly and association

(1) *Subject to* Clauses (2), —

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

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

(2) Parliament may by law impose —

(a) on the rights conferred by paragraph (a) of Clause (1), such *restrictions as it deems necessary or expedient* in the 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. (Emphasis added.)

METHODOLOGY OF CONSTITUTIONAL INTERPRETATION

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

[14] In *Pung Chen Choon*, the accused was prosecuted in the Magistrate's Court Kota Kinabalu. He faced a charge under s 8A(1) of the Printing Presses and Publications Act 1984 ('s 8A(1)') ie maliciously publishing false news in 'The Borneo Mail' dated 16 July 1990. At the close of the case for the prosecution, the defence raised the question whether s 8A imposes restrictions on the right to freedom of speech and expression in violation of art 10(1)(a) and art 10(2)(a) and thereby void.

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

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

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

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

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

B

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

8A

(1) Where in any publication there is maliciously published any false news, the printer, publisher, editor and the writer thereof shall be guilty of an offence and C shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine not exceeding twenty thousand ringgit or to both.

(2) For the purposes of this section, malice shall be presumed in default of evidence showing that, prior to publication, the accused took reasonable measures to verify the truth of the news. D

[18] The (then) Supreme Court answered question (one) in the affirmative.

[19] Questions (two) and (three) were considered together. Edgar Joseph Jr E SCJ (as he then was) held, inter alia, that:

(a) In Malaysia, when infringement of the right to freedom of speech and expression is alleged, the scope of the court's inquiry is limited to the question whether the impugned law comes within the ambit of the F permitted restriction. So, for example, if the impugned law, in pith and substance, is a law relating to the subject enumerated under the permitted restrictions found in art 10(2)(a), *the question whether it is reasonable does not arise*; the law would be valid (p 575H).

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

(c) The Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great H Britain, the United States of America or Australia: per Thomson CJ in *The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ 335 at p 358 column 1J (FC). See also *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at p 189 column 1A (FC); *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108 at p 113 column 2B–C; and I *Adegbenro v Akintola* [1963] 3 WLR 63; [1963] AC 614 (PC) per Lord Radcliffe (p 576B–D).

(d) There is a presumption, perhaps even a strong presumption, of the

constitutional validity of the impugned section and so the burden of proof lies on the party seeking to establish the contrary (p 576H).

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

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

[21] On the other hand, in *Sivarasa Rasiah*, the appellant raised three broad grounds in support of his challenge to the constitutionality of s 46A of the Legal Profession Act 1976 ('s 46A'). Section 46A prohibits the appellant, an advocate and solicitor, who is also an office bearer of a political party and a Member of Parliament, from standing for and, if elected, serving on the Bar Council which is the governing body of the Malaysian Bar. The second ground, which is relevant to the instant appeal, states that s 46A violates his right of association guaranteed by *art 10(1)(c)* read with *art 10(2)(c)*. The court considered Part II of the Federal Constitution which houses, inter alia, art 10(1)(a) and art 10(2)(a), and guarantees fundamental liberties or rights. On the methodology of interpretation in relation to fundamental liberties or rights, the Federal Court held, inter alia, that:

(a) these provisions must be generously interpreted in the sense that a prismatic approach to interpretation must be adopted: per Gopal Sri Ram FCJ (as he then was) speaking for the Federal Court at p 514, applying *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285; [2008] 1 CLJ 521 (FC); *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 (FC); and *Shamim Reza Abdul Samad v Public Prosecutor* [2009] 6 CLJ 93 (FC);

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

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

(d) in interpreting *art 10(2)(c)* (which says that 'Parliament may by law impose … (c) on the right conferred by para (c) of cl (1), such restrictions as it deems necessary or expedient in the interest of the security of the

Federation or any part thereof, public order or morality') *the word 'reasonable' should be read into the provision to qualify the width of the proviso*;

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

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

[22] His Lordship explained that part of public morality is the proper conduct and regulation of professional bodies, and matters of discipline, and that it is in the public interest that advocates and solicitors who serve on the governing body behave professionally, act honestly and independent of any political influence. He concluded that an independent Bar Council may act morally in the proper and constitutional sense of that term, and that the absence of political influence secures an independent Bar. Consequently, the appellant's challenge based on art 10(1)(c) failed.

[23] There are now two separate and conflicting judgments emanating from the (then) Supreme Court and the present Federal Court respectively. These courts bear different names for our apex court at different times. It is therefore necessary to consider which judgment to follow. In *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1, (as he then was) delivered the judgment for the Federal Court and held that where the Federal Court departs from its previous decision when it is right to do so, then also by necessary implication its decision represents the present state of the law. When two decisions of the Federal Court conflict on a point of law, the later decision prevails over the earlier decision.

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

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

proceed to consider the reasonableness of the restrictions in the light of s 15(5)(a) and art 10(2)(a).

REASONABLENESS OF RESTRICTIONS

[26] The reasonableness of the restrictions contained in s 15(5)(a) of the Universities and University Colleges Act 1971 ('UUCA') may be traced to its being enacted as a source of Federal law to regulate the affairs of students in universities. The restrictions imposed under s 15(5)(a) pertain essentially to the involvement of students in politics. It is necessary and seeks to prevent infiltration of political ideologies, including extremities, amongst students. This infiltration may adversely affect the primary purpose of the universities ie the pursuit of education. This is particularly significant as university students could well be vulnerable youth capable of being subject to peer pressure and be easily influenced. The issue of 'reasonableness' has been extensively debated in Parliament as reported in *Hansard* dated 10 December 2008 at p 76. In essence, the restrictions were stated to protect the interest of the students and institutions of higher learning, as a matter of policy.

[27] It is not for the court to say that the law is 'harsh and unjust'. This was succinctly stated by the Federal Court in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, and the principles may be extracted as follows:

(a) The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution.

(b) Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

(c) Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the Legislature, and not the courts; they have their remedy at the ballot box.

CONCLUSION

[28] Based on the above judicial pronouncements I find that the provisions contained in s 15(5)(a) are reasonable.

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

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

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

Mohd Hishamudin JCA:

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

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

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

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

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

[35] The facts of the case are not in dispute. The appellants are political science undergraduate students of the third respondent, that is, Universiti Kebangsaan Malaysia ('the university') (the third defendant in the originating summons). They were present in the Parliamentary constituency of Hulu

Selangor in the campaign period for the Parliamentary by-election of 24 April 2010 to observe a Parliamentary by-election.

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

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

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

THE CONSTITUTIONAL PROVISIONS

[38] Clause (1)(a) of art 10 of the Federal Constitution provides:

> Freedom of speech, assembly and association
>
> 10
>
> (1) Subject to Clauses (2), (3) and (4) —
>
> (a) every citizen has the right to freedom of speech and expression;
>
> (b) ...
>
> (c) ...
>
> (2) Parliament may by law impose —
>
> (a) On the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of Court, defamation, or incitement to any offence.

THE ISSUE

[39] It is not disputed that the impugned provision of the UUCA is a

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

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

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

[42] I am allowing the appeal with costs.

MY GROUNDS

[43] It is now settled law that Parliament can no longer impose a restriction on freedom of speech, in any manner it deems fit, for the purpose of protecting the interests spelt out in cl 2(a) of art 10. Any restriction imposed on freedom of speech by Parliament must be a *reasonable restriction*, and the court, if called upon to rule (such as in the present case), has the power to examine whether the restriction so imposed is reasonable or otherwise (besides determining as to whether or not the restriction falls within the permissible exceptions as spelt out by cl (2)(a) of art 10); and — in the event it were to hold that the restriction is unreasonable — to declare the impugned law imposing the restriction as being unconstitutional and accordingly null and void. This is now the law as ruled by the Federal Court recently in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333. In this case, Gopal Sri Ram (FCJ), in delivering the unanimous decision of the Federal Court (the other two members of the panel being Richard Malanjum CJ (Sabah and Sarawak) and Zulkifli Ahmad Makinudin FCJ (as he then was)), said (at p 340):

> Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. … The correct position is that when reliance is placed by the state to justify a statute under one or more of the

provisions of art 10(2), the question for determination is whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article.

[44] In this regard I feel that I should add that the Federal Court also went further to hold that the fundamental rights guaranteed by Part II of the Federal Constitution form part of the basic structure of the Federal Constitution, thereby giving recognition for the first time, albeit in a limited fashion, to the doctrine of basic structure of the Constitution as enunciated by the Supreme Court of India almost 40 years ago in the landmark case of *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461. This is a remarkable departure from the position taken by the Federal Court 33 years ago in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187. In that case the Federal Court was urged to adopt the doctrine, but the court then refused to do so.

[45] In so deciding the way it did in *Sivarasa Rasiah*, the Federal Court reversed the decision of the Court of Appeal (the Court of Appeal judgment is reported in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2006] 1 MLJ 727). The Court of Appeal had ruled that whether an impugned statutory provision is reasonable or not in relation to the purpose in question is not a matter for the court to decide but for Parliament. In so deciding, the Court of Appeal had relied on the Supreme Court case of *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566. Hence the Federal Court in *Sivarasa Rasiah* can be said to have departed from the position that it held in *Pung Chen Choon*; meaning that *Pung Chen Choon* is now no longer good law.

[46] On the principles of interpretation that should be adopted by the courts in interpreting the Federal Constitution, in particular, those provisions touching on fundamental liberties, the Federal Court ruled (at pp 349–350):

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

[47] Now, reverting to the facts of the present case and the issue before this court, in my judgment, I fail to see in what manner that s 15(5)(a) of the UUCA) relates to public order or public morality. I also do not find the restriction to be reasonable. I am at a loss to understand in what manner a student, who expresses support for, or opposition against, a political party, could harm or bring about an adverse effect on public order or public morality? Are not political parties legal entities carrying out legitimate political activities?

Are not political leaders, including Ministers and members of the Federal and State Legislatures, members of political parties? I read intensely the affidavits of the respondents and the written submissions of learned counsel for the respondents, searching for a clear explanation on the nexus between the exercise of the right of a university student to express support for (or opposition against) a political party and public order or public morality: but with respect, not surprisingly, I find none.

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

[49] In my opinion such a provision as s 15(5)(a) of the UUCA impedes the healthy development of the critical mind and original thoughts of students — objectives that seats of higher learning should strive to achieve. Universities should be the breeding ground of reformers and thinkers, and not institutions to produce students trained as robots. Clearly the provision is not only counter productive but repressive in nature.

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

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

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

> Pindaan kepada AUKU tidak akan lengkap tanpa perubahan kepada aspek pengumsan kebajikan dan hak asasi pelajar. Perkara ini merupakan hasrat dan harapan setiap pelajar di universiti Negara ini. Pelajar merupakan stakeholder utama kepada sesebuah universiti Mereka juga merupakan bakal pewaris kepada kepimpinan negara. Justeru, kebajikan dan hak asasi pelajar hendaklah sentiasa dipelihara dan mengikut Perlembagaan Persekutuan dan amalan terbaik (best practices) antara bangsa.

Justeru rang undang-undang ini akan memberi penekanan khusus kepada aspek kebajikan dan hak asasi pelajar tersebut. Antara perkara yang akan dilihat semula merangkumi:

(i) kebebasan berpersatuan;

(ii) kebebasan bersuara;

(iii) pemansuhan peruntukan berkaitan kesalahan dan hukuman jenayah;

(iv) pemansuhan peruntukan berkaitan penggantungan atau pembuangan secara automatik;

(v) hak asasi pelajar kepada pendidikan;

(vi) tatacara pengendalian kes tatatertib;

(vii) penggantungan atau pembubaran pertubuhan pelajar;

(viii) hak pelajar pasca siswazah;

(ix) perwakilan dalam jawatankuasa kebajikan pelajar; dan

(x) penglibatan pelajar dalam Senat.

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

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

Seperti yang dimaklumi AUKU sedia ada memperuntukkan bahawa mana-mana pelajar yang hendak menganggotai mana-mana persatuan atau organisasi di luar universiti hendaklah mendapat kebenaran pihak universiti terlebih dahulu. Peruntukkan ini dilihat oleh setengah pihak sebagai agak negatif dan tidak memberi kebaikan kepada pelajar dalam peningkatan ciri-ciri kepimpinan dan sahsiah diri. Justeru rang undang-undang yang dicadangkan ini akan membenarkan pelajar untuk bersekutu dengan, atau menjadi ahli sesuatu pertubuhan, persatuan atau organisasi sama ada di dalam atau luar negara.

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

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

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

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

Dalam menyediakan senarai pertubuhan yang tidak sesuai tersebut Menteri akan berunding dengan Lembaga Pengarah Universiti terlebih dahulu dan senarai yang akan disediakan adalah untuk kegunaan semua universiti. Meskipun terdapat larangan ke

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

[58] Appeal allowed with costs.

Linton Albert JCA:

[59] I begin by setting out the facts which are brief and straightforward. The appellants are undergraduates of University Kebangsaan Malaysia, the third respondent. Their presence in the Parliamentary Constituency of Hulu Selangor during the campaign period for the by-election in April 2010 brought about disastrous consequences to them because as a result of that, the third respondent instituted disciplinary proceedings against them. For an ordinary citizen similarly circumstanced, nothing would have come out of it, other than, perhaps being lauded for expressing faith in our democracy which is the bedrock of the Federal Constitution. As final year political science students the

prospect of expulsion was even more disastrous but they were in clear breach of an equally clear prohibition against expressing or doing anything which may reasonably be construed as expressing support for, or sympathy with, or in opposition to any political party under s 15(5)(a) of the Universities and University Colleges Act 1971 ('UUCA'). For completeness it is reproduced and it is as follows:

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

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

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

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

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

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

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

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

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

[64] With the greatest of respect, in my judgment, the correct approach would be that which was laid down in the Federal Court Case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, not least because it was a decision of our apex court after *Pung Chen Choon*, in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 the Federal Court held that where two decisions of the Federal Court conflict on a point of law the later decision prevails over the earlier decision. There is no reason not to apply that principle where, as here, the earlier decision is that of the Supreme Court. Returning now to *Sivarasa Rasiah* Gopal Sri Ram FCJ, delivering the judgment of the Federal Court set out the approach to be taken in determining

the constitutionality of a legislative enactment like s 15(5)(a) of the UUCA which purports to limit the freedom of expression under art 10(1)(a) of the Federal Constitution at pp 340–342:

> 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 para (c) of cl (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality'. 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 CLJ 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.
>
> The second observation has to do with the test that should be applied in determining whether a constitutionally guaranteed right has been violated. The test is that laid down by an unusually strong Supreme Court in the case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697, as per the following extract from the headnote to the report:
>
> In testing the validity of the state action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory.
>
> The third and final observation is in respect of the sustained submission made on the appellant's behalf that the fundamental rights guaranteed under Part II is part of the basic structure of the Constitution and that Parliament cannot enact laws (including Acts amending the Constitution) that violate the basic structure …
>
> It was submitted during argument that reliance on the *Vacher*'s case was misplaced because the remarks were there made in the context of a country whose Parliament is supreme. The argument has merit. As Suffian LP said in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112:
>
> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State Legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.
>
> This earlier view was obviously overlooked by the former Federal Court when it followed *Vacher*'s case. Indeed it is, for reasons that will become apparent from the discussions later in this judgment, that the courts are very much concerned with

issues of whether a law is fair and just when it is tested against art 8(10). Further, it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See *Keshavananda Bharati v State of Kerala* AIR 1973 SC 1461.

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

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

[66] The observations expressed by Gokulakrishnan CJ in *Vedprakash v The State* AIR 1987 Gujerat 253 at para 24 reinforce the proposition that in considering the constitutionality of legislative enactments restricting a fundamental right those legislative enactments must measure up to the test of reasonableness which include notions of proportionality:

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

[67] I do not think it is either necessary or useful to lay down inflexible propositions to assess the reasonableness of legislative enactments which purport to violate rights guaranteed by the Federal Constitution because each must be determined on its own peculiar facts and circumstances. But where the legislative enactment is self explanatory in its manifest absurdity as s 15(5)(a) of the UUCA undoubtedly is, it is not necessary to embark on a judicial scrutiny to determine its reasonableness because it is in itself not reasonable. What better illustration can there be of the utter absurdity of s 15(5)(a) than the facts of this case where students of universities and university colleges face disciplinary proceedings with the grim prospect of expulsion simply because of

their presence at a Parliamentary by-election. A legislative enactment that prohibits such participation in a vital aspect of democracy cannot by any standard be said to be reasonable. In my judgment, therefore, because of its unreasonableness, s 15(5)(a) of the UUCA does not come within the restrictions permitted under art 10(2)(a) of the Federal Constitution and is accordingly in violation of art 10(1)(a) and consequently void by virtue of art 4(1) of the Federal Constitution which states:

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

[68] Quite apart from what was laid down in *Sivarasa Rasiah* it is absolutely necessary to read the word 'reasonable' into and before the word 'restrictions' in art 10(2)(a) of the Federal Constitution to avoid the absurdity that it would otherwise produce. A rigid application of the plain and literal meaning of the words of art 10(2)(a) of the Federal Constitution would make nonsense of the freedom of expression under art 10(1)(a) by rendering it nugatory because every legislative enactment which takes away the freedom of expression under art 10(1)(a) can conceivably be justified as being within the restrictions set out under art 10(2)(a). Article 10(1)(a) would thus be subsumed under art 10(2)(a), a result that is manifestly absurd. In *Federal Steam Navigation Co Ltd and another v Department of Trade and Industy* [1974] 2 All ER 97 Lord Salmon made this observation in relation to statutory interpretation at p 114:

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

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

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

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

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

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

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

Appeal allowed with costs.

Reported by Kohila Nesan