## SEPAKAT EFEKTIF SDN BHD v. MENTERI DALAM NEGERI & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
TENGKU MAIMUN JCA
VARGHESE GEORGE JCA
[CIVIL APPEALS NO: W-01-500-2011 & W-01-501-2011]
9 OCTOBER 2014

***ADMINISTRATIVE LAW:*** *Exercise of administrative powers – Judicial review – Appeal against Minister's order banning books alleged to be prejudicial to public order – Compilation of cartoons with political satires and parodies – Whether posed threat to public order – Test – Whether reasonable Minister similarly situated would have acted in same manner – Whether books already in circulation long before being banned – Whether fell within Wednesbury unreasonableness test – Whether political cartoon disrupts public order – Printing Presses and Publications Act 1984, s. 7(1)*

***CONSTITUTIONAL LAW:*** *Fundamental liberties – Freedom of speech and expression – Appeal against Minister's order banning books alleged to be prejudicial to public order – Compilation of cartoons with political satires and parodies – Whether exercise of Ministerial discretion affected citizen's freedom of expression – Test – Whether action directly affected fundamental right – Whether Minister acted reasonably and rationally in issuing orders – Federal Constitution, arts. 5, 8 & 10(1) – Printing Presses and Publications Act 1984, s. 7(1)*

The subject matter of the appeals was in relation to the banning of two books by the Deputy Minister for Home Affairs under s. 7(1) of the Printing Presses and Publications Act 1984 ('PPPA'), namely, 'Perak Darul Kartun' and '1 Funny Malaysia', containing a compilation of cartoons. Both publications were political satires and parodies. The prohibition imposed on the two publications was wide-ranging and absolute, and based on the reason that they 'are prejudicial to public order'. The order was challenged in the High Court on the grounds of illegality, procedural impropriety and irrationality. It was contended that the Minister's exercise of power under s. 7 of the PPPA was for an ulterior or improper motive and therefore the banning of the publications was in contravention of arts. 5, 8 and 10(1) of the Federal Constitution ('the Constitution'). The High Court Judge dismissed all the grounds of challenge. The argument based on the doctrine of legitimate expectation arising from the international obligation undertaken by the Government to respect universal standards of human rights with particular reference to the Universal Declaration of Human Rights, the Bangalore Principles and the enactment of the Human Rights Commission Act 1998 was also dismissed based on the alleged undertaking of the Government to respect its international human rights obligations. Hence, the appeal. The

objections raised by the Minister were not against the entirety of the publications but merely to certain parts which were deemed offensive and prejudicial to public order. The nub of the objection was that the cartoons were seditious and therefore posed a threat to public order. The grounds relied on by the respondents to justify the prohibition and to classify the publications as undesirable were that they 'mempersendakan sistem kehakiman negara dan agensi-agensi penguatkuasaan kerajaan'. The issues raised in the appeals were: (i) as to what extent could political cartoons be construed as being prejudicial to public order; (ii) given the literary genre, whether they should be accorded a higher degree of tolerance; (iii) whether offensive humour and exaggerated illustrations could be so threatening that they could disrupt public safety and tranquillity and disturb the even tempo of community life; and (iv) whether they are part of the tempo of community life.

**Held (allowing appeals)**

**Per Mohamad Ariff Yusof JCA:**

**(1)** Both publications were in circulation before they were banned. Perak Darul Kartun had been in circulation some eight months before whilst 1 Funny Malaysia had been published online over time and were in circulation for about three years. The Court of Appeal in *SIS Forum (Malaysia) v. Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri)* held that if the book had been in circulation for two years and no prejudice to public order had occurred, it must follow that it was in the first place unlikely to have been prejudicial to public order. In the circumstances, for the Minister to be satisfied that its publication was likely to be prejudicial to public order, was so outrageous and in defiance of logic as to fall squarely within the *Wednesbury* unreasonableness test. (para 45)

**(2)** The argument by the respondents that the court should not step into the shoes of the Minister had to be qualified, since, if fully accepted, it will truncate the role of the court in controlling excesses of administration and run foul of accepted principles of administrative law, as presently developed. The exercise of Ministerial discretion under s. 7 of the PPPA affected a citizen's freedom of expression under the Constitution. Where an exercise of discretion has a constitutional dimension, it is incumbent on the court to examine that exercise more vigilantly, and not rely solely on the *ipse dixit* of the Minister. (para 47)

**(3)** The relevant test to be adopted is whether a reasonable Minister similarly situated would have acted in the same manner. The courts can test the exercise of subjective discretion against objective facts in order to determine whether the discretion has been fairly and justly exercised. In the context of the facts in the appeals and testing the exercise of the

Minister's discretion on the facts, and bearing in mind the primacy that should be placed on fundamental rights, it was evident that the recourse to 'prejudicial to public order' had no plausible evidential basis. The trial judge treated the matter as one involving national security, having accepted that the correct test was the objective test. The facts did not demonstrate the case as being one of national security, nor did the facts support a finding of prejudice to public order or a likelihood of prejudice to public order. (para 47)

**(4)** The publications had made fun of, insulted, demeaned, ridiculed, been contemptuous of and possibly defamed the leadership and essential institutions of Malaysia. There was scant evidence to support any allegation of sedition or acts having a seditious tendency. The law of sedition was being used as a convenient peg to control freedom of expression. The facts demonstrated more a case of politicians and institutions being held to public odium and did not support a finding of the publications being acts prejudicial to public order. Public odium cannot be so conveniently equated with public order, let alone sedition. (paras 48 & 49)

**(5)** The trial judge had not properly addressed the governing law, nor appreciated the constitutional dimension which required primacy to be accorded to fundamental rights in any balancing exercise between the interests of the state as opposed to the rights of the individual. When the constitutionality of a state action is challenged for infringement of a fundamental right, the test to be applied is whether that action directly affects the fundamental right in question, or the inevitable consequence on that fundamental right is such as to render its exercise ineffective or illusory. (paras 10 & 50)

**(6)** Cartoons, a special genre of literary and artistic work, have special characteristics which sets it apart from written prose. No reasonable person will read a cartoon with the same concentration, contemplation and seriousness as one would when reading a work of literature. The political cartoonist, unlike the serious political pamphleteer, seeks to ridicule persons and institution with humour to deliver a message. It will be most exceptional if a political cartoon will have the effect of disrupting public order, security or the safety of a nation. There was no plausible evidence of the books being a threat to public order in this case. (para 53)

**(7)** Section 4 of the Human Rights Commission Act merely requires the courts to have regard to Universal Declaration of Human Rights in the process of interpretation and in the absence of clear constitutional provisions in the Constitution of Malaysia. The facts of the appeals herein required the court to have regard to express constitutional

provisions in the form of arts. 10, 8 and 5 of the Constitution. There was no compelling need to directly apply international law rules to supplement domestic provisions. (para 57)

**Per Varghese George JCA (supporting):**

**(1)** Cartoons or caricature by way of drawings primarily was meant to capture the mood, the contradictions and the vagaries of life as reflected upon by the artist with reference to his observations of topical issues or events. They were essentially pieces of creative works possessed of similar intellectual input and vibrancy akin to other expressions of artistic works. Such passive material was in any case open to varying interpretations or levels of appreciation by a beholder or reader. To say that such material was incendiary and had stirred up strife and disturbed public order was not a supportable conclusion in the circumstances by any reasonable criteria. (para 63)

**(2)** The Ministerial orders were issued without convincing evidence being present, at the time they were made, to back a decision that the impugned material was prejudicial to public order and therefore undesirable for open circulation. The decision was unsupportable and therefore the Minister had acted unreasonably and irrationally in issuing the orders. (paras 64 & 68)

**(3)** If at all any of the material had the tendency of being defamatory in nature, the individuals or groups affected had recourses through the court. The Minister ought to have been slow to abrogate to himself the settled function of the courts, as adequate checks and due process were in place and readily available to any aggrieved party to counter any perceived abuse of the constitutionally guaranteed freedom of speech and expression. The grounds advanced by the Minister to act pre-emptively, by making a blanket 'ban order' on the two books, was therefore neither acceptable nor justifiable. (paras 66 & 67)

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

Perkara dalam rayuan-rayuan ini adalah berkaitan dengan pengharaman dua buah buku oleh Timbalan Menteri Dalam Negeri di bawah s. 7(1) Akta Mesin Cetak dan Penerbitan 1984 ('Akta'), iaitu 'Perak Darul Kartun' dan '1 Funny Malaysia', yang mengandungi kompilasi-kompilasi kartun. Kedua-dua penerbitan tersebut merupakan satira dan parodi bersifat politik. Pengharaman yang dikenakan ke atas kedua-dua penerbitan tersebut mempunyai kesan yang meluas dan mutlak, dan berdasarkan alasan bahawa ia 'memudaratkan ketenteraman awam'. Perintah tersebut dicabar di Mahkamah Tinggi atas alasan-alasan ketaksahan, ketidakwajaran prosedur dan tidak rasional. Dihujahkan bahawa pelaksanaan kuasa Menteri di bawah s. 7 Akta adalah dengan motif tersembunyi atau tidak wajar dan dengan itu, pengharaman penerbitan tersebut adalah bertentangan dengan per. 5, 8 dan 10(1) Perlembagaan Persekutuan ('Perlembagaan'). Hakim Mahkamah

Tinggi menolak kesemua alasan yang dicabar. Hujahan berasaskan doktrin harapan sah yang timbul daripada kewajipan antarabangsa yang diakujanji oleh Kerajaan untuk menghormati standard sejagat hak asasi manusia dengan rujukan khusus kepada Pengisytiharan Sejagat Hak Asasi Manusia, Prinsip-Prinsip Bangalore dan enakmen Akta Suruhanjaya Hak Asasi Manusia 1998 juga ditolak berdasarkan dakwaan akujanji oleh Kerajaan untuk menghormati kewajipan hak asasi manusia antarabangsa. Oleh itu, rayuan ini. Bantahan-bantahan yang dibangkitkan oleh Menteri bukan terhadap keseluruhan penerbitan-penerbitan tersebut tetapi hanya terhadap bahagian-bahagian tertentu yang dianggap keterlaluan dan memudaratkan ketenteraman awam. Pokok bantahan adalah bahawa kartun-kartun tersebut bersifat menghasut dan oleh itu mengundang ancaman kepada ketenteraman awam. Alasan-alasan yang disandarkan oleh responden-responden untuk menjustifikasikan larangan tersebut dan untuk mengklasifikasikan penerbitan-penerbitan tersebut sebagai tidak wajar adalah bahawa ia 'mempersendakan sistem kehakiman negara dan agensi-agensi penguatkuasaan kerajaan'. Isu-isu yang dibangkitkan dalam rayuan-rayuan ini adalah: (i) setakat mana kartun-kartun bersifat politik boleh ditafsirkan sebagai memudaratkan ketenteraman awam; (ii) memandangkan genre sastera, sama ada ia perlu diperuntukkan tahap toleransi yang tinggi; (iii) sama ada kelucuan yang melampau dan ilustrasi yang keterlaluan boleh menjadi ancaman sehingga ia boleh mengganggu keselamatan dan ketenangan awam serta keamanan kehidupan masyarakat; dan (iv) sama ada ia daripada sebahagian kehidupan masyarakat.

**Diputuskan (membenarkan rayuan-rayuan)**
**Oleh Mohamad Ariff Yusof HMR:**

**(1)** Kedua-dua penerbitan telah berada dalam edaran sebelum ia diharamkan. Perak Darul Kartun telah berada dalam edaran selama lapan bulan sebelumnya sementara 1 Funny Malaysia telah diterbitkan dalam talian berkali-kali dan terdapat dalam edaran selama kira-kira tiga tahun. Mahkamah Rayuan dalam kes *SIS Forum* (*Malaysia) v. Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri)* memutuskan bahawa jika buku tersebut telah berada dalam edaran untuk dua tahun dan tiada kemudaratan telah berlaku kepada ketenteraman awam, dengan itu boleh dikatakan bahawa tidak mungkin ia akan memudaratkan ketenteraman awam. Dalam keadaan tersebut, untuk Menteri berpuas hati bahawa penerbitannya mungkin memudaratkan ketenteraman awam adalah luar biasa dan menentang logik sehingga terangkum dalam ujian ketidakmunasabahan *Wednesbury*.

**(2)** Hujahan oleh responden-responden bahawa mahkamah tidak sepatutnya mengambil tempat Menteri perlu dibataskan, kerana, jika diterima sepenuhnya, ia akan memangkas peranan mahkamah dalam mengawal pentadbiran yang berlebihan dan bertentangan dengan prinsip undang-undang pentadbiran yang diterima, seperti perkembangan ini. Pelaksanaan budi bicara Menteri di bawah s. 7 Akta menjejaskan

kebebasan bersuara oleh rakyat di bawah Perlembagaan. Apabila satu pelaksanaan budi bicara mempunyai satu dimensi berpelembagaan, adalah kewajipan mahkamah untuk memeriksa pelaksanaan tersebut dengan berhati-hati dan bukan menyandar atas *ipse dixit* Menteri semata-mata.

**(3)** Ujian yang relevan untuk digunakan adalah sama ada seseorang Menteri yang munasabah dalam situasi yang serupa akan bertindak dalam cara yang sama. Mahkamah boleh menguji pelaksanaan budi bicara subjektif terhadap fakta-fakta objektif untuk menentukan sama ada budi bicara telah dilaksanakan dengan adil dan saksama. Dalam konteks fakta-fakta dalam rayuan-rayuan dan menguji pelaksanaan budi bicara Menteri atas fakta, dan mempertimbangkan keutamaan yang perlu diberikan kepada hak-hak asasi, adalah jelas bahawa tindakan bagi 'memudaratkan ketenteraman awam' tidak mempunyai asas keterangan yang munasabah. Hakim bicara menganggap perkara tersebut melibatkan keselamatan nasional, setelah menerima ujian yang betul adalah ujian objektif. Fakta tidak menunjukkan kes tersebut melibatkan keselamatan nasional, dan juga tidak menyokong dapatan kemudaratan kepada ketenteraman awam atau kemungkinan kemudaratan kepada ketenteraman awam.

**(4)** Penerbitan-penerbitan tersebut telah mengusik, menghina, merendahkan maruah, mempersendakan, menunjukkan kebencian dan kemungkinan memfitnah pucuk pimpinan dan institusi-institusi penting di Malaysia. Keterangan yang menyokong dakwaan menghasut atau tindakan-tindakan yang bersifat menghasut adalah amat sedikit. Undang-undang bagi hasutan digunakan sebagai halangan mudah untuk mengawal kebebasan bersuara. Fakta menunjukkan ia adalah kes yang lebih kepada ahli-ahli politik dan institusi-institusi menjadi kebencian umum dan tidak menyokong dapatan bahawa penerbitan-penerbitan tersebut adalah tindakan-tindakan yang memudaratkan ketenteraman awam. Kebencian awam tidak boleh disamakan secara mudah dengan ketentaraman awam, lebih-lebih lagi hasutan.

**(5)** Hakim bicara tidak mempertimbangkan undang-undang yang terpakai dengan sewajarnya, dan juga tidak mempertimbangkan haluan perlembagaan yang memerlukan keutamaan diberikan kepada hak-hak asasi dalam mengimbangi pelaksanaan antara kepentingan negara berbanding hak-hak individu. Apabila keperlembagaan tindakan negara dicabar kerana pelanggaran hak asasi, ujian yang perlu digunapakai adalah sama ada tindakan tersebut secara langsung menjejaskan hak asasi yang dipersoalkan, atau akibat yang tidak dapat dielakkan atas hak asasi menyebabkan pelaksanaannya tidak efektif atau hanya khayalan.

**(6)** Kartun, genre khas bagi kerja-kerja sastera atau seni, mempunyai ciri-ciri istimewa yang menjadikannya berbeza daripada prosa bertulis. Seseorang yang berfikiran munasabah tidak akan membaca kartun dengan tumpuan, pemikiran dan keseriusan seperti yang diberikan apabila membaca kerja sastera. Kartunis politik, tidak seperti penulis risalah politik yang serius, mempersendakan orang atau institusi dengan kelucuan untuk menyampaikan suatu mesej. Adalah amat terkecuali jika kartun bersifat politik mempunyai kesan mengganggu ketenteraman awam atau keselamatan negara. Tidak ada keterangan munasabah bahawa buku-buku tersebut mengancam ketenteraman awam dalam kes ini.

**(7)** Seksyen 4 Akta Suruhanjaya Hak Asasi Manusia hanya memerlukan mahkamah mempertimbangkan Pengisytiharan Sejagat Hak Asasi Manusia dalam proses pentafsiran dan dalam ketiadaan peruntukan jelas perlembagaan dalam Perlembagaan Malaysia. Fakta rayuan-rayuan di sini memerlukan mahkamah mempertimbangkan peruntukan perlembagaan jelas dalam bentuk per. 10, 8 dan 5 Perlembagaan. Tiada keperluan mendesak penggunaan langsung kaedah undang-undang antarabangsa untuk menambah peruntukan domestik.

**Oleh Varghese George HMR (menyokong):**

**(1)** Kartun atau karikatur secara lukisan pada asasnya bermaksud menunjukkan suasana, percanggahan dan ragam hidup seperti yang ditunjukkan oleh artis dengan rujukan kepada pemerhatiannya terhadap isu-isu atau kejadian-kejadian semasa. Ia adalah pada asasnya sebahagian kerja-kerja kreatif yang mengandungi pemasukan intelek dan semangat serupa, sama seperti hasil kerja-kerja seni yang lain. Material pasif sedemikian adalah terbuka kepada tafsiran atau tahap penerimaan yang berbeza terhadap pemandang atau pembaca. Untuk menyatakan bahawa material tersebut mengapi-apikan atau menimbulkan perbalahan dan mengganggu ketenteraman awam adalah kesimpulan yang tidak boleh disokong dalam keadaan tersebut dengan apa-apa kriteria yang munasabah.

**(2)** Perintah Menteri telah dikeluarkan tanpa keterangan yang meyakinkan, pada masa ia dibuat, untuk menyokong keputusan bahawa bahan yang dipersoalkan adalah memudaratkan kepada ketenteraman awam dan oleh itu tidak wajar bagi pengedaran secara terbuka. Keputusan tersebut tidak boleh disokong dan oleh itu Menteri telah bertindak secara tidak munasabah dan tidak rasional dalam mengeluarkan perintah-perintah tersebut.

**(3)** Jika mana-mana bahan tersebut mempunyai kecenderungan memfitnah, individu-individu atau kumpulan-kumpulan yang terjejas mempunyai jalan melalui mahkamah. Menteri tidak sepatutnya melupuskan fungsi

matan mahkamah, kerana semakan sewajarnya dan proses keadilan wujud dan sedia ada untuk mana-mana pihak yang terkilan untuk mematahkan apa-apa penyalahgunaan kebebasan bersuara dan bercakap. Alasan-alasan yang diberikan oleh Menteri untuk bertindak terlebih dahulu, dengan membuat 'perintah pengharaman' menyeluruh bagi kedua-dua buku, adalah oleh itu tidak boleh diterima dan tidak wajar.

**Case(s) referred to:**

*Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors [2013] 1 LNS 296 CA* ***(dist)***

*Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300 FC* ***(refd)***

*Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia) [2012] 9 CLJ 297 CA* ***(refd)***

*Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (1) [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC* ***(refd)***

*Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia [1969] 1 LNS 65 FC* ***(refd)***

*Kartar Singh & Ors v. The State of Punjab [1956] SCR 46* ***(refd)***

*Kerajaan Malaysia & Ors v. Nasharuddin Nasir [2004] 1 CLJ 81 FC* ***(refd)***

*Laugh it Off Promotions CC v. South African Breweries International (Finance) Case (2005) 5 LRC 475* ***(refd)***

*Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC* ***(refd)***

*Leonard Hector v. AG of Antigua and Barbuda [1990] 2 WLR 606* ***(refd)***

*Leroy v. France (Application No. 36109/03)* ***(dist)***

*Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Ors [2005] 3 CLJ 517 CA* ***(refd)***

*Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC* ***(refd)***

*Merdeka University Bhd v. Government of Malaysia [1982] 1 LNS 1 FC* ***(refd)***

*Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186 SC* ***(refd)***

*Minister of Labour, Malaysia v. Chan Meng Yuen [1992] 4 CLJ 1808; [1992] 1 CLJ (Rep) 216 SC* ***(refd)***

*Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 FC* ***(refd)***

*Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 1 LNS 126 HC* ***(refd)***

*S Rangarajan v. P Jhagivan Ram & Ors [1989] 2 SCC 574* ***(refd)***

*Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC* ***(refd)***

*SIS Forum (Malaysia) v. Dato' Seri Syed Hamid Syed Jaafar Albar [2010] 2 MLJ 377* ***(foll)***

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

*Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA* ***(refd)***

**Legislation referred to:**

Federal Constitution, arts. 5, 8, 10(1)(a), (2)(a)

Human Rights Commission Act 1998, s. 4(4)

Printing Presses and Publications Act 1984, s. 7(1)

European Convention for Human Rights [EU], art. 10

*For the appellants - Edmund Bon Tai Soon (New Sin Yew, Nurul Rafeeza Hamdan, Shanmuga Kanesalingam & Aston Paiva with him); M/s Azzat & Izzat*
*For the respondents - Noor Hisham Ismail (Shamsul Bolhassan with him); SFCs*

*[Appeal from High Court, Kuala Lumpur; Judicial Reviews No: R2-25-394-2010 & R2-25-395-2010]*

*Reported by S Barathi*

## JUDGMENT

**Mohamad Ariff Yusof JCA:**

### Introduction

**[1]** This judgment addresses two appeals against the decision of the learned High Court Judge in two judicial review applications which were heard together with the agreement of the parties. The learned judge provided one judgment for three separate judicial review applications. These present two appeals concern (a) Sepakat Efektif Sdn Bhd and (b) Mkini Dotcom Sdn Bhd as the appellants in Civil Appeals No. W-01-500-2011 and W-01-501-2011 respectively. In both appeals, the respondents are the same.

**[2]** The subject matter of both appeals relate to the banning of two books by the Deputy Minister for Home Affairs under s. 7(1) of the Printing Presses and Publications Act 1984 ("PPPA"). The relevant Order is the Printing Presses and Publications (Control of Undesirable Publications) (No. 5) Order 2010 ("Order No. 5"). The concerned publications are "Perak Darul Kartun" and "1 Funny Malaysia."

**[3]** This judgment is not concerned with the third judicial review application heard before the same learned judge, where the applicants are different parties, namely Yong Thy Chong and Oriengroup Sdn Bhd, with the impugned publication being a book entitled "*The March to Putrajaya – Malaysia's New Era Is at Hand*". This particular publication was also banned under the same Order No. 5. There is also an appeal lodged against Her Ladyship's decision on this third judicial review application as well, but this appeal has been heard by a different panel of this court. This present judgment that we are rendering is therefore not concerned with the decision with regard to this publication ("*The March to Putrajaya – Malaysia's New Era Is at Hand*").

### Order No. 5

**[4]** Order No. 5, dated 25 May 2010 and signed by the second respondent, for and on behalf of the first respondent, states:

> Larangan
>
> 2. Pencetakan, pengimportan, penghasilan, penghasilan semula, penerbitan, penjualan, pengeluaran, pengelilingan, pengedaran atau pemilikan hasil penerbitan yang diperihalkan dalam Jadual dan yang

A memudaratkan ketenteraman awam adalah dilarang secara mutlak di seluruh Malaysia.

From its wording, the prohibition imposed on the two publications is wide-ranging and absolute, and based on the reason that they "are prejudicial to public order."

B

**Section 7, PPPA**

**[5]** The ground "prejudicial to public order" appears as one of the grounds in s. 7 of the PPPA which empowers the Minister to control "undesirable publications". The full provision reads:

C

> 7. (1) If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the Gazette prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of the publication and future publications of the publisher concerned.

D

E

As can be readily appreciated, at least on its apparent wording, any order prohibiting an undesirable publication is made on the Minister's "satisfaction" which he may exercise "in his absolute discretion" by an order published in the Gazette and supported by any or more of the grounds stated in this statutory provision. Despite the seeming breadth of the Minister's power and discretion, the PPPA does not purport to provide an exclusion clause for a s. 7 exercise of discretion. In other words, there is no statutory provision to disallow challenge in a court of law on the ground that the Minister's decision shall be final and should not be questioned in any court of law on any ground whatsoever.

F

G

**The Constitutional Source**

**[6]** Being a restriction on publication, ministerial control and prohibition on undesirable publications under the PPPA has an impact on our constitutional right to freedom of speech and expression, which is the subject matter of arts. 10(1)(a) and (2)(a) of the Federal Constitution of Malaysia. We quote the relevant provisions below:

H

> 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;
>
> ...

I

(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; ...

(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, position, privilege, sovereignty or 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.

**[7]** The constitutionally allowable grounds are very carefully defined, to include (a) security of the Federation or any part thereof; (b) friendly relations with other countries; (c) public order; (d) morality; (e) protection of the privileges of Parliament or of any Legislative Assembly; and (f) provision against contempt of court, defamation, or incitement to any offence.

**[8]** These are the permissible "restrictions" constitutionally. Constitutionally too, these restrictions must be "such restrictions as [Parliament] deems necessary or expedient" in the interest of any one or more of the permissible grounds.

**[9]** This then is the statutory and constitutional scenario against which the ministerial prohibition on the two publications deemed undesirable has to be assessed.

**[10]** The traditional approach of our courts when reviewing an alleged infringement of fundamental rights by state action has tended to control the exercise of power, whether executive or legislative, by according primacy to the fundamental rights and testing the legality or constitutionality of action by principles of procedural fairness, rationality and proportionality, and further by construing the impugned action strictly as against a broader deference to the fundamental rights affected. When the constitutionality of a state action is challenged for infringement of a fundamental right, the test to be applied is whether that action directly affects the fundamental right in question, or the inevitable consequence on that fundamental right is such as to render its exercise ineffective or illusory (*Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261; *Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (1)* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72; [1992] 1 MLJ 697). The principle of fairness in state action is guaranteed under art. 8 of the Federal

Constitution (*Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Ors* [2005] 3 CLJ 517; [2005] 5 MLJ 193). Fundamental liberties in the Federal Constitution must be interpreted generously and given a wide meaning, and the courts must read them in a "prismatic" fashion (*Lee Kwan Woh v. PP* [2009] 5 CLJ 631; *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93). The state action must not be disproportionate to the object it seeks to achieve, and the measures taken must be fair and not arbitrary and should impair the fundamental right in question no more than is necessary to accomplish the legislative or administrative objective (*Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507). Where an administrative power is granted as a subjective discretion, courts will subject its exercise to review based on an objective assessment (*Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309; *Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara* [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186; [1990] 1 MLJ 351; *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300; [2010] 3 MLJ 307). The test is that of whether a reasonable minister similarly situated would have acted in the same manner. The courts can test the exercise of the subjective discretion against objective facts in order to determine whether the discretion has been fairly and justly exercised. Nevertheless, in matters of public order or national security, courts may defer to the executive discretion on the facts of a particular case. See, for instance, the approach of the Court of Appeal in *Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors* [2013] 1 LNS 296; [2013] 5 MLJ 174, where the court held:

> The wordings in s. 7(1), "if the Minister is satisfied" and " he may in his absolute discretion by order" are clear manifestations of the power being vested personally in the Minister and corollary to that vesting, any exercise of such power is to the subjective satisfaction of the Minister. Here the test for such satisfaction is subjective. It is without doubt a subjective discretionary power of the Minister.

**[11]** This exact passage has been cited by Senior Federal Counsel to persuade us not to interfere with the Minister's decision on the facts of these appeals. Likewise, some earlier authorities such as *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia* [1969] 1 LNS 65; [1969] 2 MLJ 129, *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11; [1997] 1 MLJ 789, *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 1 LNS 126; [1976] 2 MLJ 83 and *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81 have been marshalled in argument for this broad proposition. As for the notion of "prejudicial to public order", Senior Federal Counsel argued the phrase "does not necessarily refer to the existence of actual public disorder, but includes potential to disrupt public order." Taking a cue from *Darma Suria*, *supra*, an act "prejudicial to public order" is taken to mean any act which "disrupts or has the potential to disrupt the even tempo of the life of the community" or "to disrupt public safety and tranquillity".

**[12]** On the basis of the jurisprudence and the facts of these two appeals, counsel for the appellants have urged us to allow the appeal and set aside the judgment of the High Court on all the accepted grounds of review – illegality, procedural impropriety, irrationality and proportionality. Senior Federal Counsel, appearing for the respondents, however, has urged us not to place ourselves "in the shoes of the minister", since the issue is one of public order. We are asked not to go behind the reasons given by the Minister and not to question his subjective assessment.

**[13]** We will return to the detailed submissions of the parties in a separate section in this judgment, but first, it becomes necessary to consider the nature of the subject matter, ie, the exact nature of the two publications.

**The Nature Of The Publications**

**[14]** Both publications are books containing a compilation of cartoons, although the publication in Appeal No. W-01-500-2011 ("Perak Darul Kartun") does contain some satirical essays as well. The publication in Appeal No. W-01-501-2011 ("1 Funny Malaysia") comprises exclusively of a compilation of cartoons by the political cartoonist, Zunar, or, going by his full name, Zulkiflee bin SM Anwarul Haque.

**[15]** The objections raised by the Minister are not against the entirety of the publications but merely to certain parts which are deemed offensive and prejudicial to public order. For Perak Darul Kartun, the objection concerns 14 pages out of 70 pages, whilst for 1 Funny Malaysia it concerns 11 out of 80 pages. Perak Darul Kartun had been in circulation for about eight months. In the case of 1 Funny Malaysia, the cartoons, except for the one cartoon on the cover page, had been earlier published on the internet in the online news portal, Malaysiakini, for around three years. Mkini Dotcom Sdn Bhd owns and operates this online news portal.

**[16]** Both publications are political satires and parodies. These appeals therefore raise an issue of some importance: to what extent can political cartoons be construed as being prejudicial to public order? Given their literary genre, should they not be accorded a higher degree of tolerance? Can offensive humour and exaggerated illustrations be so threatening that they can disrupt public safety and tranquillity and disturb the even tempo of community life? Or are they not in themselves part of the tempo of community life?

**[17]** Counsel for the appellants readily conceded that the cartoons are, in his own words, "quite rude and satirical", but they do not offend public order. The pithy observation by Justice Albie Sachs of the Constitutional Court of South Africa in *Laugh it Off Promotions CC v. South African Breweries International (Finance) Case* (2005) 5 LRC 475, is quoted to indicate the proper approach courts should take when assessing parodies and satires: "If parody does not prickle it does not work."

**[18]** We now turn to consider the judgment of the High Court which dismissed both judicial review applications.

**Decision Of The High Court**

**[19]** Her Ladyship in the High Court, in addressing the grounds of challenge against the orders of the Minister, noted that the challenge was mounted on the grounds of illegality, procedural impropriety and irrationality. As for illegality, the publications were said to be not prejudicial to public order, if objectively viewed, and hence the Minister's exercise of power under s. 7 of the PPPA was for an ulterior or improper motive. Further, the publications contained opinions in the form of political satire which criticised Government policies and administration. The banning of the publications were therefore contended as being in contravention of arts. 5, 8 and 10(1) of the Federal Constitution. As regards procedural impropriety, the argument advanced was on the basis of no opportunity to be heard having been given, and no reasons were supplied by the Minister in making the respective orders. As for unreasonableness, the challenge was mounted on the fact that the cartoons in 1 Funny Malaysia had been in circulation for three years prior to the banning. The publications themselves had been in circulation for three months before the orders were issued.

**[20]** There was another argument canvassed before Her Ladyship based on the doctrine of legitimate expectation arising from the international obligation undertaken by the Government to respect universal standards of human rights with particular reference to the Universal Declaration of Human Rights, the Bangalore Principles and the enactment of the Human Rights Commission Act 1998.

**[21]** Her Ladyship dismissed all three grounds of challenge, and likewise dismissed the argument on to the doctrine of legitimate expectation based on the alleged undertaking of the Government to respect its international human rights obligations.

**[22]** Her Ladyship did not decide purely on the basis of the Minister having an absolute subjective discretionary power. On the contrary, the objective test was applied by Her Ladyship, as can be seen in the following passage:

> In the upshot ... the question pertinent to be asked in the present case are these; whether the ban of the Books are reasonably necessary for the purpose of preventing public order. Looking at it in another way, following the question that was posed in *Darma Suria* the question to be posed is this. Whether a reasonable Minister appraised of the materials set out in the statement of facts would objectively be satisfied that the actions of the Applicants here are prejudicial to Public Order ...

**[23]** Nevertheless, Her Ladyship held that on the facts there was sufficient material before the Minister to arrive at his satisfaction even on this objective test. The relevant part of the judgment states:

> On the facts of the present case in my view there are sufficient materials before the Minister to arrive at the decision that he so did. My reasons are as below.
>
> In the first two publications it was stated by the Minister that the publications are offensive under two broad contents. The various parts of the Books depict the leadership of the country as corrupt, with low moral esteem, and these are done in the nature of ridicule and revile and despicable. The Books, in the opinion of the Minister can be viewed as having the effect of trying to corrupt the mind of the leaders and having seditious tendency. They are publications that will instil hatred and suspicion and prejudices within the race which is so prejudicial to the Public Order in this country. For example, the condemnation towards the judiciary was found to be so contemptuously done according to the Minister. This, he said, would instill a negative perspective and will tarnish the confidence in the judicial system. These are found in all the three publications as averred in the affidavits of the Minister.

See also the following passage:

> Now back to the questions posed in *Darma Suria* that I have earlier alluded to. Whether a reasonable Minister appraised of the materials set out in the statement of facts would objectively be satisfied that the actions of the Applicants here were prejudicial to Public Order. In my considered view there is sufficient material before the Minister to arrive at his satisfaction. The Minister substantiated his decision by referring to the specific chapters and scrutinized the contents of the Books and explain the content which undermine administrative system, judiciary and some that can cause instability of public order. The Minister further had carefully done his perusal and reading of the Books before forming his opinion in coming to his decision, as disclosed in the affidavits in reply.

**[24]** As regards the argument premised on legitimate expectation, Her Ladyship reiterated the Malaysian position as posited in *Merdeka University Berhad v. Government of Malaysia* [1982] 1 LNS 1; [1981] 2 MLJ 356, that international law norms are not part of the laws of Malaysia unless expressly incorporated by our own legislation as part of our domestic law. This remains so despite the passing of s. 4(4) of the Human Rights Commission Act 1998. The said provision merely exhorts Malaysian courts to have regard to the Universal Declaration of Human Rights as part of the interpretive function so long as these norms are not inconsistent with our own constitutional provisions. The same approach as adopted by the High Court in the earlier decision of *SIS Forum (Malaysia) v. Dato' Seri Syed Hamid Syed Jaafar Albar* [2010] 2 MLJ 377 was cited in further support.

**[25]** Her Ladyship then concluded that the court could not find any illegality or error in jurisdiction committed by the Minister, since the Minister had in exercise of his discretion taken into account all relevant facts before him. Her Ladyship opined that she did not believe the court "in the exercise of judicial review jurisdiction should supplant the Minister's objective satisfaction with its own, unless the bounds of illegality are transgressed ...".

**[26]** As for the arguments of failure to provide a right of hearing and failure to give reasons, Her Ladyship found no express provision in the PPPA to impose such a duty and there was no legitimate or reasonable expectation to provide a hearing prior to the prohibition. The principle established by the Supreme Court decision in *Minister of Labour, Malaysia v. Chan Meng Yuen* [1992] 4 CLJ 1808; [1992] 1 CLJ (Rep) 216; [1992] 2 MLJ 337 was followed:

> ... what is clear from the decided cases…is that the courts cannot compel the Minister to give reasons for his decision where there is no duty to do so ...

**[27]** The subject matter of the prohibition being "prejudicial to public order" seemed uppermost in the mind of the learned judge, drawing Her Ladyship to conclude thus:

> ... I find that the limitation on fundamental liberties conferred under Article 10 has to be necessarily constrained in meeting the need for a public order of the society at large ...
>
> ... in matters involving public order and national security as in this case, the preservation of public order and national security prevails over legitimate expectation of the Applicants. This principle was also laid down by Lord Fraser of Tullybelton in the case *Civil Service Union & Ors v. Minister for the Civil Service* [1984] 3 All ER 935 ...

**[28]** In the context of these present appeals, the issue to be evaluated is whether the learned judge has properly directed Her Ladyship's mind to the relevant laws, and/or properly and judicially evaluated, and appreciated, the relevant facts before her as disclosed in the affidavits.

**[29]** We now turn to evaluate those parts of the affidavits which persuaded the learned judge to decide as she did.

**The Grounds As Stated By The Deputy Minister/Second Respondent**

**[30]** Despite the factual differences between the two publications, the grounds relied on by the respondents to justify the prohibition and to classify the publications as undesirable publications are very similar. In both, reference is made to each publication as "mempersendakan sistem kehakiman negara dan agensi-agensi penguatkuasaan kerajaan".

**Perak Darul Kartun**

**[31]** Perak Darul Kartun consists of a compilation of cartoon by various artists together with some satirical writings which narrate the "Perak Crisis" by way of satire and parody. Hence Perak Darul Ridzuan is described as "Darul Kartun". In its introductory remarks, the publication made plain the thrust of its contents: "Malaysia diperintah oleh para badut dan episod politik adalah kartun. Oleh itu jangan salahkan kami, kami hanya menterjemahkannya dalam kertas."

**[32]** To best appreciate the grounds, some pertinent excerpts from the affidavit-in-reply of the Deputy Minister are reproduced below:

> 14. Saya selanjutnya menyatakan bahawa sebelum memutuskan untuk melarang penerbitan buku tersebut, saya telah mempertimbangkan perkara-perkara berikut:
>
> 14.1 Bahawa Bahagian Kawalan Penerbitan dan Teks Al-Quran, Kementerian Dalam Negeri setelah mengkaji kandungan buku tersebut mendapati buku tersebut:
>
> 14.1.1 Memuatkan isu-isu politik tanah air yang menggambarkan pemimpin negara sebagai korup, meletakkan kepentingan peribadi mengatasi segalanya, mempunyai moral yang rendah dan berbagai-bagai tuduhan lain yang bersifat mencerca; dan
>
> 14.1.2 Memuatkan gambaran yang mempersendakan sistem kehakiman negara dan agensi-agensi penguatkuasaan kerajaan.
>
> 14.2 Bahawa saya sendiri setelah meneliti kandungan buku tersebut mendapati buku tersebut memuatkan gambaran bahawa pemimpin negara adalah korup, meletakkan kepentingan peribadi mengatasi segalanya, mempunyai moral yang rendah dan berbagai-bagai tuduhan lain yang bersifat mencerca. Antara contohnya adalah:
>
> 14.2.1 Pada m/s 3 buku tersebut ... frasa "Malaysia dipimpin oleh para badut ..." yang jelas sekali menghina pemimpin negara dengan menggambarkan mereka sebagai badut.
>
> 14.2.2 Pada m/s 25 buku tersebut ... digambarkan bahawa Perdana Menteri Malaysia Dato' Sri Najib Tun Razak meniru idea-idea Pakatan Rakyat yang jelas menuduh beliau tidak mempunyai kredibiliti dalam memimpin negara.
>
> 14.2.3 Perdana Menteri Malaysia Tan Sri Muhyiddin Yassin ketika menyampaikan ucapan dituduh sebagai korup.
>
> 14.2.4 Pada m/s 61 buku tersebut ... digambarkan bahawa Perdana Menteri Malaysia Dato' Sri Najib Tun Razak menabur emas dan wang ringgit kepada jaring yang digelar "kroni" dan rakyat di bawah jaring tersebut hanya mendapati sisa-sisa makanan dan sampah yang jelas menuduh beliau meletakkan kepentingan peribadi mengatasi segalanya.
>
> 14.3 Bahawa gambaran sedemikian merupakan tuduhan yang bersifat dahsyat, keterlaluan dan satu penghinaan kepada pemimpin negara yang pastinya akan menjatuhkan maruah dan menjejaskan kredibiliti kepimpinan mereka.
>
> 14.4 Bahawa tuduhan-tuduhan tersebut tidak bersandarkan kepada sebarang bukti yang kukuh dan/atau tidak pula dinyatakan dari mana sumber-sumber maklumat tersebut boleh didapati ...

A

14.4.2 Pada m/s 48 buku tersebut ... terdapat berita yang bertajuk "Kerajaan peruntuk undang-undang baru – permit ketawa" yang menceritakan bahawa Menteri Dalam Negeri, Dato' Seri Hishamuddin Tun Hussein yang digelar "Aumuddin Husin" berkata bahawa "kerajaan akan menggubal undang-undang untuk mewajibkan mereka yang hendak ketawa mesti terlebih dahulu mendapatkan permit" yang jelas memperlekehkan proses penggubalan undang-undang iaitu untuk kepentingan politik, tetapi tidak pula dinyatakan buktinya dan/atau tidak pula dinyatakan dari mana sumber-sumber maklumat tersebut boleh didapati.

B

C

14.4.3 Pada m/s 48 buku tersebut ... terdapat iklan "Meybank2ya.com" yang menggambarkan Perdana Menteri Malaysia, Dato' Sri Najib Tun Razak telah menggunakan "transaksi komisen antara bank terus ke Mongolia" dan "replika kapal selam Scorpene akan diberikan secara percuma kepada 100 pelanggan yang pertama", tetapi tidak pula dinyatakan buktinya dan/atau tidak pula dinyatakan dari mana sumber-sumber maklumat tersebut boleh didapati.

D

14.4.4 Pada m/s 64 buku tersebut ... terdapat pantun-pantun dan illustrasi yang jelas menyatakan dan menggambarkan serta menuduh Perdana Menteri Malaysia, Dato' Sri Najib Tun Razak sebagai pemimpin yang gila kuasa, tamak haloba, mengamalkan rasuah, pemimpin yang tidak meghiraukan kepentingan negara dan rakyat dan lain-lain tuduhan, tetapi tidak pula dinyatakan buktinya dan/atau tidak pula dinyatakan dari mana sumber-sumber maklumat tersebut boleh didapati.

E

F

14.5 Bahawa tuduhan-tuduhan sebegini, walaupun dibuat dalam bentuk kartun atau sindiran, secara efektifnya telah membelakangkan kedaulatan undang-undang dan satu penyalahgunaan hak kebebasan bersuara. Selain itu, ia juga secara efektifnya manafikan fungsi agensi-agensi penguatkuasaan kerajaan yang dipertanggungjawabkan di sisi undang-undang untuk menyiasat apa-apa salah laku atau kesalahan oleh mana-mana orang, sekiranya ada.

G

14.6 Bahawa saya sendiri setelah meneliti kandungan buku tersebut mendapati buku tersebut turut memuatkan gambaran yang mempersendakan sistem kehakiman negara dan agensi-agensi penguatkuasaan kerajaan antara contohnya adalah:

H

14.6.1 Pada m/s 5 hingga 14 buku tersebut ... dimuatkan cerita "Darul Kartun" yang mengisahkan tentang krisis pelantikan Menteri Besar Perak dan digambarkan bahawa Menteri Besar Perak iaitu Datuk Seri Dr. Zambry Abdul Kadir dan kerajaan pimpinannya "kerajaan primitif" yang membelakangkan demokrasi dan kedaulatan undang-undang, sedangkan umum mengetahui bahawa Datuk Seri Dr. Zambry Abdul Kadir telah disahkan oleh Mahkamah sebagai Menteri Besar Perak yang sah ...

I

14.7 Bahawa tuduhan-tuduhan sebegini akan menghilangkan kepercayaan rakyat dan mengundang kebencian rakyat terhadap pemimpin negara dan pentadbiran mereka serta menghilangkan kepercayaan rakyat terhadap sistem kehakiman negara dan agensi-agensi penguatkuasaan kerajaan dan dalam keadaan ini memudaratkan ketenteraman awam ...

**1 Funny Malaysia**

**[33]** To complete the narrative, some excerpts from 1 Funny Malaysia require consideration. we quote the relevant parts:

14. Saya selanjutnya menyatakan bahawa sebelum memutuskan untuk melarang penerbitan buku tersebut, saya telah mempertimbangkan perkara-perkara yang berikut:

14.1 Bahawa Bahagian Kawalan Penerbitan dan Teks Al-Quran, Kementerian Dalam Negeri setelah mengkaji kandungan buku tersebut mendapati buku tersebut:

14.1.1 Memuatkan isu-isu politik tanah air yang menggambarkan pemimpin negara sebagai korup, meletakkan kepentingan peribadi mengatasi segalanya, mempunyai moral yang rendah dan berbagai-bagai tuduhan lain yang bersifat mencerca; dan

14.1.2 Memuatkan gambaran yang mempersendakan sistem kehakiman negara dan agensi-agensi penguatkuasaan kerajaan.

14.2 Bahawa saya sendiri setelah meneliti kandungan buku tersebut mendapati buku tersebut memuatkan gambaran bahawa pemimpin negara adalah korup, meletakkan kepentingan peribadi mengatasi segalanya, mempunyai moral yang rendah dan berbagai-bagai tuduhan yang bersifat mencerca. Antara contohnya ialah:

14.2.1 Pada m/s 12 buku tersebut ... digambarkan bahawa Mantan Perdana Menteri Malaysia Tun Abdullah Ahmad Badawi mengatakan "Anybody got information on corruption, please come forward ... my door is always open ..." tetapi pada masa yang sama digambarkan pintu terbuka tersebut adalah pintu penjara.

14.2.2 Pada m/s 23 buku tersebut…digambarkan bahawa Mantan Perdana Menteri Malaysia Tun Dr. Mahathir Mohamad mudah lupa ketika inkuiri kes V. K. Lingam.

14.2.3 Pada m/s 45 … digambarkan bahawa Perdana Menteri Malaysia Dato' Sri Najib Tun Razak adalah seorang yang berselera besar sehingga rakyat tertindas, yang jelas menuduh beliau meletakkan kepentingan peribadi mengatasi segalanya.

14.2.4 Pada m/s 58 … digambarkan bahawa Mantan Perdana Menteri Malaysia Tun Dr. Mahathir Mohamad adalah seorang penipu.

14.3 Bahawa gambaran sedemikian merupakan tuduhan yang bersifat dahsyat, keterlaluan dan satu penghinaan kepada pemimpin negara yang pastinya akan menjatuhkan maruah dan menjejaskan kredibiliti kepimpinan mereka.

14.4 Bahawa tuduhan-tuduhan tersebut tidak pula bersandarkan kepada sebarang bukti yang kukuh dan/atau tidak pula dinyatakan dari mana sumber-sumber maklumat tersebut boleh didapati ...

14.5 Bahawa tuduhan-tuduhan sebegini walaupun dibuat dalam bentuk kartun atau sindiran, secara efektifnya telah membelakangkan kedaulatan undang-undang dan suatu penyalahgunaan hak kebebasan bersuara. Selain itu, ia juga secara efektifnya menafikan fungsi agensi-agensi penguatkuasaan kerajaan yang dipertanggungjawabkan di sisi undang-undang untuk menyiasat apa-apa juga salah laku atau kesalahan oleh mana-mana orang, sekiranya ada.

14.6 Bahawa saya sendiri setelah meneliti kandungan buku tersebut mendapati buku tersebut turut memuatkan gambaran yang mempersendakan sistem kehakiman negara dan agensi-agensi penguatkuasaan kerajaan ...

14.6.1 Pada m/s 15 ... digambarkan bahawa hakim dalam membuat keputusan dipengaruhi oleh kenaikan pangkat dan juga wang ringgit dan turut digambarkan bahawa Ketua Hakim Negara adalah boneka kepada V. K. Lingam dan terdapat frasa "Rule by Lawyer" yang jelas menggambarkan sistem kehakiman negara yang korup ...

14.7 Bahawa tuduhan-tuduhan sebegini akan menghilangkan kepercayaan rakyat dan mengundang kebencian rakyat terhadap negara dan pentadbiran mereka serta menghilangkan kepercayaan rakyat terhadap sistem Kehakiman negara dan agensi-agensi penguatkuasaan Kerajaan dan keadaan ini memudaratkan ketenteraman awam ...".

**The Substance Of The Objections: Publications Are Seditious And Are A Threat To Public Order**

**[34]** As evident from these passages in the two affidavits in reply filed, there are common grounds raised to support the prohibition under s. 7 of the PPPA, although the factual contexts may be different. It is said that the cartoons "bersifat dahsyat" ("have a horrible connotation"), "keterlaluan" ("exceed bounds of decency"), "satu penghinaan kepada pemimpin" ("an insult to the leadership"), "mencerca" ("to insult and demean"), "mempersendakan sistem kehakiman" ("to ridicule the judicial system"), "menjatuhkan maruah" ("lower their esteem and reputation") and "menjejaskan kredibiliti mereka" ("affect and lower their credibility"). The cartoons are said to cause a loss of respect ("menghilangkan kepercayaan")

of the citizens towards their country and its administration as well as towards its enforcement agencies. These cartoons are also said to invite and cause disaffection and hatred ("mengundang kebencian") by its citizens towards the country and these institutions.

**[35]** Senior Federal Counsel, in his combined submission, makes the issue plain: the publications are seditious in nature. To quote Senior Federal Counsel:

> 31. In the mind of the 2nd Respondent, the contents of the publications are seditious in nature, since it promotes hatred, contempt and disaffection against the lawful Government as well as against the administration of justice in Malaysia. The publications too have the effect of instilling hatred, suspicion and prejudices within the races. The contents of the publications thus, according to the 2nd Respondent, are so prejudicial to Public Order in the country.

**[36]** Therein lies the nub of the objection: the cartoons are seditious, and therefore pose a threat to public order.

**[37]** We have further been referred to the decision of the European Court of Human Rights in *Leroy v. France* (Application No. 36109/03) decided in 2008 which was a case involving a cartoon which resulted in a prosecution and conviction under French law (more specifically, the French Press Act 1881 which penalises incitement to terrorism or condonation of terrorism). The prosecution and conviction by the French Courts was upheld by the European Court of Human Rights which did not find any violation of art. 10 of the European Convention for Human Rights. Even cartoons may pose a threat to public order, so it is argued. Cartoons or "caricatures" are not exempted from s. 7 of the PPPA.

**[38]** We have at the outset summarised the broad position argued by the respondents. The court it is argued, should not stray from the overriding principle of administrative law that it should only be concerned with the question whether proper process has been followed. It should not enter into the thicket of the merits of the case. Again, to repeat the thrust of the submission – we are not to "step into the shoes" of the Minister and should concern ourselves only with the narrow question of compliance with process.

**The Appellants' Submissions**

**[39]** In contrast, the appellants, through counsel, made no bones about the nature of the cartoons being, according to counsel, "quite rude and satirical". Nevertheless, they cannot be said to offend public order, let alone be seditious. In the present context, the appellants argued the proper remedies should lie in the law of defamation, including criminal defamation, and contempt of court. It is common ground that there has been no proceedings or prosecution instituted against any of the appellants thus far on any of the

grounds. According to the appellants, a threat to public order must mean some threat of violence. The preservation of the image of the judiciary or the leadership cannot be connected with any threat to public order.

**[40]** These cartoons are argued to be just satire and parody. The nub of the issue is that the institutions of Government are made fun of, but they do not threaten public order or incite violence. In a free democratic society, it is argued, "it is too obvious to need stating that those who hold office in Government and who are responsible for public administration must always be open to criticism", citing the observations of the Judicial Committee of the Privy Council in *Leonard Hector v. AG of Antigua and Barbuda* [1990] 2 WLR 606.

**[41]** The appellants place emphasis on the principles extolled in the Indian Supreme Court decision in *S Rangarajan v. P Jhagivan Ram & Ors* [1989] 2 SCC 574, and the general approach to be adopted by the courts that although there should be a compromise between the interest of freedom of expression and social interest, courts cannot simply balance the two interests as if they are of equal weight. See the following passage cited by counsel:

> Court's commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. It should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg".

**[42]** Proceeding from these principles, the written submission of the appellants then argues:

> 27. There is absolutely no evidence at all before this Court that any such "spark" has been lit by the publication of the Book. At this juncture, it might be worth recalling that the Books in question were in publication for almost 8 months before its ban. In the case of 1 Funny Malaysia, the cartoons within the Book had all been published online for more than 3 years. Yet, there is no evidence whatsoever that any breach of the peace occurred or was threatened as a result of the Book. The respondent does not in his affidavit in reply speak of any reports by civil servants, the police or security services stating that the Book is likely to pose a threat to public order. There is, with respect, no threat to public order at all by the publication of these collections of cartoons within the Books.
>
> 28. By failing to produce material evidence of any reports before the Deputy Minister which he relied on in any of the affidavits filed before this Court, the Minister must be deemed to have no good reasons for his decision. This is fatal to the Deputy Minister's position. See *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309 ...

**[43]** Mention is also made by counsel of the "salutary advice" by the Indian Supreme Court in the somewhat interesting case of *Kartar Singh & Ors v. The State of Punjab* [1956] SCR 46 which concerns the proper response to vulgar criticisms of Government. In the course of a procession to protest against the Punjab Government's plan to nationalise motor transport, two vulgar slogans were raised, ie, "Jaggu mama hai bai" (Jaggu, maternal uncle be dead) and "Khachar Khota hai bai" (Mule-cum donkey be dead). These slogans were directed against the Transport Minister and the Chief Minister of the State. The appellants, being members of the procession, were prosecuted and convicted under the Punjab Security of the State Act 1953. The Indian Supreme Court allowed the appeal. The Indian Supreme Court held the slogans could not be said to undermine the security of the state or public order. The prosecution and conviction were held to be unjustified. The Supreme Court further held:

> Public men may as well think it worth their while to ignore such vulgar criticisms and abuses hurled against them, rather than give importance to the same by prosecuting the persons responsible for the same.

**[44]** In the course of submissions, counsel for the appellants conceded that the appellants would not be pressing the argument on the duty of the Minister to give reasons for his decision, just as it was also agreed that the right to be heard need not be given in cases involving national security. Nevertheless, it was argued that on the facts of these appeal there were no issues of national security or public order, and in this respect, it was argued, the High Court had applied the wrong principles of law in concluding that natural justice rules did not apply and that the Deputy Minister had no duty to provide reasons for his decision. See paras. 55, 56 and 57 of the written submission of the appellants:

> 55. In the Indian case of *Collector and District Magistrate v. S Sultan* [2008] SC 2096, cited with approval by the Federal Court in *Darma Suria bin Risman Saleh v. Menteri Dalam Negeri & 3 lagi* [2010] 1 CLJ 300 ..., the concept of public order, law and order, the security of the state were likened to three concentric circles with the security of the state occupying the smallest circle. Thus, an act affecting public order may not necessarily affect the security of the state.
>
> 56. The High Court, with respect, applied the wrong principles of law when it found that natural justice need not apply. The High Court erred in applying cases relating to the preservation of "national security" in this case which only affected "public order." The binding decisions of our highest courts in *Sivarasa*, *Kelab Lumba Kuda Perak* and *Darma Suria* show there is a difference between national security and public order, and that the rules of natural justice were applicable in this instance.
>
> 57. In the absence of any evidence of urgency or any imminent threat to national security or any imminent threat of violence or public disorder, the Deputy Minister was wrong to deny the Appellants an opportunity to be heard before banning the Books and to give reasons for his ban to the Appellants being the persons most affected by the ban.

A **Evaluation**

**[45]** In the course of submissions, we have been told that 4,000 copies of 1 Funny Malaysia and 11,500 copies of Perak Darul Kartun had been printed before the banning order was made. There does not appear to be any evidence on record on how many copies had been sold before this, although the statement under O. 53, r. 3(2) filed by the appellants speak of "brisk sales". What is clear is that both publications were in circulation before they were banned. In the case of Perak Darul Kartun, the publication had been in circulation some eight months before, and in the case of 1 Funny Malaysia, the cartoons had been published online over time and were in circulation for about three years. This general factual scenario therefore appears somewhat similar to that found in *SIS Forum (Malaysia) v. Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri)* [2010] 2 MLJ 377 (High Court), where the prohibited book (a collection of essays) was in circulation for two years before its banning. A different panel of this Court heard the appeal by the Minister against the High Court decision, reported as *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri v. SIS Forum (Malaysia)* [2012] 9 CLJ 297; [2012] 6 MLJ 340, and held that if the book had been in circulation for two years and no prejudice to public order had occurred, it must follow that it was in the first place unlikely to have been prejudicial to public order. Indeed, the Court of Appeal by a unanimous decision went on to further hold that in these circumstances, for the Minister to be satisfied that its publication was likely to be prejudicial to public order was so outrageous and in defiance of logic as to fall squarely within the *Wednesbury* unreasonableness test.

**[46]** The Court of Appeal in that case was not constrained by the argument advanced by the appellant that its mandate was strictly limited to considering only the decision-making process, and not to deal with policy considerations. The court held:

> Although the court will not readily question administrative decisions, it is the duty of the court to intervene in an application for review of that decision if it was *ultra vires*, or unfairly or unjustly exercised. See *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 1 MLJ 417 ... It arises in this manner. In *T Ganeswaran lwn. Suruhanjaya Polis Di Raja Malaysia & 1 lagi* [2005] 6 MLJ 97 ... it was explained that judicial review is not an appeal from an administrative decision and therefore the court is not entitled in judicial review to consider whether the administrative decision itself was fair and reasonable. Hence, it is often said that in judicial review the court is concerned not with the decision but the decision making process. But this is not to say that the examination of the decision making process is confined only to whether the various overt steps in the process had been adhered to ...

**[47]** The argument by the respondents that the court should not step into the shoes of the Minister has to be qualified, since, if fully accepted, it will truncate the role of the court in controlling excesses of administration and

run foul of accepted principles of administrative law, as presently developed. Here we are faced with an exercise of ministerial discretion under s. 7 of the PPPA, which affects a citizen's freedom of expression under the Federal Constitution, in which challenge has been mounted not only on the ground of procedural fairness and breach of natural justice – the so-called ground of "procedural impropriety". The challenge has been based as well on the grounds of "illegality" and "irrationality". Where an exercise of discretion has a constitutional dimension, it is incumbent on the court to examine that exercise more vigilantly, and not rely solely on the *ipse dixit* of the Minister. We have earlier referred to the main lines of case authorities on the approach to be adopted, such as fundamental liberties in the Federal Constitution must be interpreted generously and given a wide meaning, and the courts must read them in a "prismatic" fashion (*Lee Kwan Woh v. PP* [2009] 5 CLJ 631; *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93); state action must not be disproportionate to the object it seeks to achieve, and the measures taken must be fair and not arbitrary and should impair the fundamental right in question no more than is necessary to accomplish the legislative or administrative objective (*Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507). There is also the issue of where an administrative power is granted as a subjective discretion, courts will subject its exercise to review based on an objective assessment (*Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309; *Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara* [1990] 1 CLJ 699; [1990] 1 MLJ 351; *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300 [2010] 3 MLJ 307). The relevant test to be adopted has also been stressed: it is whether a reasonable minister similarly situated would have acted in the same manner? It means to say courts can test the exercise of subjective discretion against objective facts in order to determine whether the discretion has been fairly and justly exercised. In the context of the facts in these appeals, and testing the exercise of the Minister's discretion on these facts, and bearing in mind the primacy that should be placed on fundamental rights, it seems evident that the recourse to "prejudicial to public order" has no plausible evidential basis. The learned judge treated the matter as one involving national security, although Her Ladyship accepted that the correct test is the objective test. With respect, the facts demonstrate the case as not being one of national security, nor do the facts support a finding of prejudice to public order or a likelihood of prejudice to public order.

**[48]** This is more a case of publications which have made fun of, insulted, demeaned, ridiculed, been contemptuous of, and possibly defamed the leadership and essential institutions of Malaysia. The two affidavits filed by the second respondent attest to this. The analysis by the Indian Supreme Court in *S Rangarajan v. P Jhagivan Ram & Ors*, *supra*, that the anticipated danger should not be remote, conjectural or far-fetched, and that it should have proximate and direct nexus with the expression, such that the

A expression of thought should be intrinsically dangerous to the public interests, is highly persuasive and offers a very relevant rational basis for a judicial evaluation.

**[49]** Contrary to the respondents' submission, there is scant evidence to support any allegation of sedition, or acts having a seditious tendency. With
B respect again, this is a case where the law of sedition is being used as a convenient peg to control freedom of expression. The facts demonstrate more a case of politicians and institutions being held to public odium; the facts do not support a finding of the publications being acts prejudicial to public order. Public odium cannot be so conveniently equated with public order,
C let alone sedition.

**[50]** On these facts, we are of the view that the learned judge has not properly addressed the governing law, nor appreciated the constitutional dimension which requires primacy to be accorded to fundamental rights in any balancing exercise between the interests of the state as opposed to the
D rights of the individual. The reliance on a case having a clear public security and public order issue, namely *Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors* [2013] 1 LNS 296; [2013] 5 MLJ 174, as a case which is somehow very relevant to the present facts, ignores the proper context of these present appeals.

E

**[51]** *Arumugam Kalimuthu*, *supra*, was a case where a book written in Tamil touched on the racial disturbance in Kampung Medan, Selangor. It contained passages which seemed to apportion blame between the Malays and Indians. No doubt the contents borrowed from an academic thesis, but there were passages in the book which tended to inflame racial sensitivities. That was
F the reason why the High Court upheld the decision of the Minister to ban the book. The Court of Appeal affirmed the decision. The context, however, is different; the subject matter likewise is different.

**[52]** In applying the principles of administrative law, context and subject matter cannot be ignored. That is the reason why there are areas of activity,
G for instance national security, prevention of terrorism, defence and intelligence, where greater deference will be given to the executive, and courts will tend to support the decision of the executive. The exceptions should not be elevated as the norm, however.

H **[53]** What is the subject matter and context of the present appeals? We are not dealing with serious and sober works of literature in written prose. We are instead dealing with cartoons, political cartoons, satire and parody. To start with, can cartoons *per se* and as a rule, have a tendency to disrupt public order? This special genre of literary and artistic work have special
I characteristics which sets it apart from written prose. No reasonable person will read a cartoon with the same concentration, contemplation and seriousness as one would when reading a work of literature. Cartoons

exaggerate, satirise and parody life, including political life. When read (more likely, glanced through), they would tickle the ribs, perhaps evoke a chuckle, and makes one reflect for a momentary instance the humorous side of life. Quite often the reader is drawn to it by its incisive wit. The political cartoonist, unlike the serious political pamphleteer, seeks to ridicule persons and institutions with humour to deliver a message. It will be most exceptional if a political cartoon will have the effect of disrupting public order, security or the safety of a nation. This is not to say that cartoons cannot have this negative effect. They can. The case of *Leroy v. France*, *supra*, as cited by the respondents, is a case in point. In *Leroy v. France*, the cartoon depicted the attack on the Twin Towers with words to the effect that "Many can only dream ... Hamas did it". These words were held to have glorified terrorism, and hence the prosecution under French press law. On the facts, there were sufficient evidence to establish disquiet amongst the French public as a direct reaction to the publication. With respect, on the facts of the present appeals, and as noted above, there was no plausible evidence of the books being a threat to public order. The press cuttings tendered in the affidavits of the Deputy Minister fell far short of the requisite proof.

**[54]** These cartoons are admittedly rude, as conceded by counsel. Some may even say, they are crude, contemptuous and defamatory. It will be open to persons and institutions affected to sue the appellants under the applicable law if the complaints are borne out. This will be a better alternative than an outright ban on the implausible ground of prejudicial to public order based on affidavit evidence.

**[55]** On these grounds, we are inclined to allow the two appeals and quash the decision of the Minister.

**[56]** The other grounds of failure to accord a right of hearing and failure to give a reasoned decision, however, are unconvincing on the facts and the law. In the context of s. 7 of PPPA, it might be difficult to interpose a duty to hear before the Government decides to prohibit a publication. There could conceivably be instances where speed may be of the essence and it will be impracticable to insist rigidly on a right of hearing. As far as the duty to provide reasons is concerned, counsel for the appellants have already stated in his submission that he is not pressing this ground, since the grounds have been disclosed belatedly in the affidavits in reply.

**[57]** As regards the issue of international law standards being applicable, and the legitimate expectations of the appellants in this regard, the findings of the learned judge are correct. Section 4 of the Human Rights Commission Act merely requires our courts to have regard to Universal Declaration of Human Rights in the process of interpretation and in the absence of clear constitutional provisions in the Federal Constitution of Malaysia. The facts of these appeals require the court to have regard to express constitutional provisions in the form of arts. 10, 8 and 5. There is no compelling need to directly apply international law rules to supplement our domestic provisions.

## Conclusion And Orders

**[58]** Based on the findings and grounds stated above, and on an evaluation of the relevant laws and case authorities, we are allowing both appeals. The decisions and orders of the High Court are therefore set aside. Consequently, we order that judgment be entered in terms as prayed in paras. 1 and 2 of the respective applications for judicial review, namely for an order of *certiorari* to quash the second respondent's decision forthwith, and further for an order of declaration that that part of the order dated 25 May 2010 which bans each of the two publications respectively is null and void and of no effect as being *ultra vires* s. 7 of the Printing Presses and Publications Act 1984, and contravening arts. 5, 8 and 10(1)(a) of the Federal Constitution.

**[59]** As for costs, the learned High Court Judge made no order as to costs in the court below. In the circumstances of this case, we are inclined not to order costs to be paid to the appellants. The issues raised here concern matters of constitutional law which have required ventilation and development where the publications themselves have been categorised as "rude" by counsel, and it is also submitted that the parties affected could take whatever actions necessary under ordinary law if liability can be established. The appeals themselves are concerned with the narrow, although important, question whether the publications consisting of satirical cartoons and parody could be said to be prejudicial to public order. In these circumstances, it will be appropriate and just to order that each party bear their own costs of this appeal. On the same arguments, although the appellants have claimed "special damages", it will be fair for this court not to order this relief, particularly since no submissions have been taken on this in the course of this appeal. Nevertheless, in view of the quashing of the order banning the publications, a consequential order directing the respondents and each of them to return copies of Perak Darul Kartun and 1 Funny Malaysia seized will be appropriate, and so it should be ordered by this court.

**[60]** In summary, therefore, and by a unanimous decision, we are making the following orders:

(a) both appeals (Rayuan Sivil No:W-01-500-2011 and Rayuan Sivil No: W-01-501-2011) are allowed;

(b) the decisions and orders of the High Court dated 14 July 2011 are set aside;

(c) consequently, judgment is entered in terms prayed in paras. 1 and 2 of the respective applications for judicial review for (i) an order of *certiorari* to quash the second respondent's decision forthwith, and (ii) an order of declaration that part of the order dated 25 May 2010 which bans each of the two publications ("Perak Darul Kartun" and "1 Funny Malaysia") respectively is null and void and of no effect as being *ultra vires* s. 7 of the Printing Presses and Publications Act 1984, and contravening arts. 5, 8 and 10(1) of the Federal Constitution;

(d) a consequential order that the respondents and each of them do return the seized copies of Perak Darul Kartun and 1 Funny Malaysia to the appellants respectively;

(e) each party to bear their own costs of this appeal; and

(f) deposits refunded to the appellants.

**Varghese George JCA (Supporting):**

**[61]** I have read the judgment in draft of my brother Mohamad Ariff JCA. I am in complete agreement with the analysis of the issues and the law discussed in the judgment and endorse the views and conclusions of His Lordship therein. I further note that the same has also found favour with my sister Tengku Maimun JCA. I only wish to add emphasis to two points in support of this judgment of the court.

**[62]** In the judgment of my brother Mohamad Ariff JCA, it has been pointed out that particular consideration should be given to the subject matter and context of the material we were dealing with and in these cases they were not a sober work of literature in written prose but two books containing cartoons which involved satire and parody. There was no doubt that some of the material in question bordered upon or carried political undertones and, as candidly agreed by counsel for the appellants, some material could even be considered as perhaps rude.

**[63]** Nonetheless, in my view, cartoons or caricature (imitations) by way of drawings done by a gifted individual in that respect, primarily was meant to capture the mood, the contradictions and the vagaries of life as reflected upon by the artist with reference to his observations of topical issues or events. From that perspective they were essentially pieces of creative works possessed of similar intellectual input and vibrancy akin to other expressions of artistic works, like paintings, sculptures, individual or collections of poem or sajak. Even for that matter, these days, works termed generally as 'graffiti', has evolved to be a tolerated and acclaimed art form. Such passive material, was in any case open to varying interpretations or levels of appreciation by a beholder or reader. To say that such material was incendiary and had stirred up strife and disturbed public order was, in my view, not a supportable conclusion in the circumstances, by any reasonable criteria.

**[64]** The maturing democratic society that we pride ourselves to be, would be the one that would be the poorer if access to the inherent richness found in such art forms are curtailed on the grounds they are undesirable. In any event in the cases before us the Ministerial orders were issued without convincing evidence being present at the time the same were made, to back such a decision that the impugned material was prejudicial to public order and therefore undesirable for open circulation.

**[65]** Secondly, as could be gleaned from the Minister's affidavits, the absolute prohibitory orders in these cases seem to have been persuaded by a concern on the part of the Minister that the material in the books did undermine or tarnish the confidence of the public in the judiciary or was defamatory of individuals or other groups. However, it cannot be denied that, in so far as the courts were concerned, they were armed with sufficient powers to protect or safeguard its integrity against any contempt, either on its own motion or at the instance of the Honourable Attorney General or any aggrieved party. There was in existence a legal process and powers to effectively deal with any affront to the court's dignity or any attempt at interference with the administration of justice.

**[66]** Similarly, if at all any of the material had the tendency of being defamatory in nature, the individuals or groups affected had always open to them recourses through the court to seek remedies for damage to their reputation and also for appropriate correction to be ordered to any false representation, or any wrongful and malicious imputation caused to them and attributable directly to the impugned cartoons.

**[67]** The Minister ought to have been slow to abrogate to himself the settled function of the courts, as adequate checks and due process were in place, and readily available to any aggrieved party to counter any perceived abuse of the constitutionally guaranteed freedom of speech and expression. Those grounds advanced by the Minister to act pre-emptively, by making a blanket 'ban order' on the two books was therefore neither acceptable nor justifiable.

**[68]** In my view therefore, for the reasons elaborated upon by me above, the Minister's decision that he found the publications to be prejudicial to public order was unsupportable. The Minister had here acted unreasonably and irrationally in issuing the orders as he did. With due respect, the learned judge sitting in the review court below ought to have granted the order for *certiorari* applied for and quashed the Minister's Order No. 5 in respect of 'Perak Darul Kartun' and '1 Funny Malaysia', the subject of the appeals before us.