DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

SAMAN PEMULA NO.R1-24-47-2010

ANTARA

1. MUHAMMAD HILMAN BIN IDHAM
2. WONG KING CHAI
3. MUHAMMAD ISMAIL BIN AMINUDDIN ... PLAINTIF-PLAINTIF
4. AZLIN SHAFINA BINTI MOHAMAD ADZA

DAN

1. KERAJAAN MALAYSIA
2. MENTERI PENGAJIAN TINGGI ... DEFENDAN-DEFENDAN
3. UNIVERSITI KEBANGSAAN MALAYSIA

JUDGMENT

Aziah Ali J :

The Plaintiffs are political science undergraduate students of the 3rd Defendant. The Plaintiffs filed this originating summons seeking a declaration that s.15(5)(a) of the Universities And University Colleges Act 1971 (Act 30) contravenes Article 10(1)(a) of the Federal Constitution and is therefore invalid, and for a consequential declaration that the pending disciplinary proceedings that have been instituted against the Plaintiffs by the 3rd Defendant for alleged breaches connected with s.15(5)(a) are not valid in law. The Plaintiffs contend that s.15(5)(a) violates their constitutional right to freedom of speech and expression under Article 10(1)(a) of the Federal Constitution.

Background

[2] The Plaintiffs were present in the constituency of Hulu Selangor during the campaign period for the parliamentary by-election of 24.4.2010.

[3] On or about 13.5.2010 each of the Plaintiffs received notices from the 3rd Defendant's Vice Chancellor requiring them to attend before a disciplinary tribunal on 3.6.2010. Together with the notices were charge sheets informing them that disciplinary proceedings had been instituted against them for alleged breaches which constituted offences under s.15(5)(a) of Act 30 and if they were found guilty, they could be sentenced as provided for under *Kaedah-Kaedah Universiti Kebangsaan Malaysia (Tatatertib Pelajar-Pelajar) 1999* ("the Regulations"). The Plaintiffs replied *vide* written representations dated 26.5.2010 denying the allegation. The 3rd Defendant scheduled hearing for 2.6.2010 and 3.6.2010. On 1.6.2010 the Plaintiffs filed this originating summons.

[4] The sole issue for determination is whether s.15(5)(a) of Act 30 violates Article 10(1)(a) of the Federal Constitution and is thus invalid. Section 15(5)(a) of Act 30 provides 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;

Article 10 of the Federal Constitution provides 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) all citizens have the right to assemble peaceably and without arms;

(c) all citizens have the right to form associations.

(2) Parliament may by law impose -

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

(b) on the right conferred by paragraph *(b)* of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;

(c) on the right conferred by paragraph *(c)* of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.

(3) Restrictions on the right to form associations conferred by paragraph *(c)* of Clause (1) may also be imposed by any law relating to labour or education.

(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.

Plaintiffs' submissions

Section 15(5)(a) falls outside the purposes specified under Article 10(2)(a).

[5] For the Plaintiffs learned counsel submits that s.15(5)(a) manifestly derogates the fundamental liberties of the Plaintiffs under Article 10(1)(a) as it prohibits absolutely any expression on the part of the Plaintiffs as students in matters pertaining to political parties and has rendered the said fundamental liberties illusory or ineffective. It is submitted that in the absence of any restrictions on Article 10(1)(a) lawfully imposed by Parliament, students in educational institutions regulated by Act 30 would be at liberty to "express or do anything which may be reasonably be construed as expressing support or sympathy with or opposition to any poltical party, whether in or outside Malaysia". Thus the court is urged to interpret Article 10(1)(a) generously to give the widest effect to it. In support counsel refers to the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507 wherein Gopal Sri Ram FCJ said –

> *Before discussing the specific areas of challenge there are three preliminary observations that must be made. The first has to do with the methodology of interpretation of the guaranteed rights. In three recent decisions this court has held that the provisions of the*

Constitution, in particular the fundamental liberties guaranteed under Part II, must be generously interpreted and that a prismatic approach to interpretation must be adopted. These are Badan Peguam Malaysia v. Kerajaan Malaysia [2008] 1 CLJ 521, Lee Kwan Woh v. PP [2009] 5 CLJ 631 and Shamim Reza v. Public Prosecutor [2009] 6 CLJ 93. The provisions of Part II of the Constitution contain concepts that house within them several separate rights. The duty of a court 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.

[6] The Plaintiffs concede that Article 10(2)(a) of the Federal Constitution empowers Parliament to restrict those freedoms housed in Article 10(1)(a) but contends that the power to enact legislation pursuant to Article 10(2) is not absolute and such restriction as imposed must be reasonably necessary and expedient for one or more of the purposes specified in Article 10(2) (*Sivarasa Rasiah v Badan Peguam Malaysia & Anor* (supra); *Dr. Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19). Counsel submits that s.15(5)(a), which aims to prohibit the involvement of students of universities and university colleges in activities pertaining to political parties, does not fall within any of the purposes specified in Article 10(2)(a) as the purpose of Act 30 is "*to provide for the establishment, maintenance and administration of Universities and University Colleges and for other matters connected therewith*" (see preamble to Act 30). It is submitted that the purpose of the said provision within the context of Act 30 is to facilitate the

administration of such institutions and is therefore outside the purposes specified under Article 10(2)(a).

Section 15(5)(a) is disproportionate to any conceivable threat sought to be avoided by Parliament

[7] It is further submitted that even if s.15(5)(a) could be said to fall within the purposes specified under Article 10(2)(a), the said provision is entirely disproportionate to any conceivable threat sought to be avoided by Parliament. Counsel refers to the judgment of Gopal Sri Ram JCA (as he then was) in *Dr. Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* (supra) wherein His Lordship said *inter alia* –

> *The other aspect to interpreting our Constitution is this. When interpreting the other parts of the Constitution, the court must bear in mind the all pervading provision of art. 8(1). That article guarantees fairness of all forms of State action. See, Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771. It must also bear in mind the principle of substantive proportionality that art. 8(1) imports. See, Om Kumar v. Union of India AIR [2000] SC 3689. This doctrine was most recently applied by this Court in the judgment of my learned brother Mohd Ghazali in Menara Panglobal Sdn Bhd v. Ariokianathan [2006] 2 CLJ 501. In other words, not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved. This is sometimes referred to as 'the doctrine of rational nexus'. See, Malaysian Bar & Anor v. Government of Malaysia [1986] CLJ 508 (Rep); [1986] 2 CLJ 343; [1987] 2 MLJ 165. A court is therefore entitled to strike down State action on the ground that it is disproportionate to the object sought to be achieved.*

Thus it is submitted that s.15(5)(a) is not only a provision that is not "reasonably necessary" but it also offends the equal protection guarantee under Article 8. Counsel submits that the application of the "catch-all" provisions of s.15(5)(a) which absolutely prohibits "anything which may reasonably be construed as expressing support for or sympathy with or opposition to any political party" would result in absurdity as the provision does not seek to differentiate between various types of conduct. Therefore the court is urged to strike down s.15(5)(a) as it is submitted that the said provision is not capable of an interpretation that is constitutional.

Defendants' submissions

The restriction imposed vide s.15(5)(a) of Act 30 is a necessary restriction in the interest of public order or morality

[8] For the 1st and 2nd Defendants the Senior Federal Counsel submits that the restriction imposed *vide* s.15(5)(a) of Act 30 is in line with Article 10(2)(a) as it is a necessary restriction in the interest of public order or public morality. It is submitted that the right conferred under Article 10(1)(a) is subject to the restraint found in Article 10(2)(a) which authorizes Parliament to impose such restrictions 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.

[9] Senior Federal Counsel refers to the Indian Supreme Court case of *Kanu Biswa v State of West Bengal* AIR 1972 SC 1656. In his judgment Khanna J referred to the judgment in the case of *Dr. Ram Manohar Lohia v State of Bihar* (1966) 1 SCR 709 wherein Hidayatullah J said –

> *...any contravention of law always affected order, but before it could be said to affect public order, it must affect the community at large.*

Khanna J then said –

> *The test to be adopted in determining whether an act affects law and order or public order,.....is: Does it lead to disturbance of current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed?*

[10] Senior Federal Counsel refers to the Federal Court case of *Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors* [2010] 3 MLJ 307 wherein the Federal Court said "*whether particular activity comes within the scope of being prejudicial to public order is a question of law upon which the Minister's view is not conclusive. It is the court that is the final arbiter on the subject....*". The Federal Court referred to the judgment of Abdoolcader J in *Re application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83 [1976] 1 LNS 126 wherein Abdoolcader J said -

The expression 'public order' is not defined anywhere but danger to human life and safety and the disturbance of public tranquility must necessarily fall within the purview of the expression. It is used in a generic sense and is not necessarily antithetical to disorder, and is wide enough to include considerations of public safety within its signification.

[11] Senior Federal Counsel also refers to the Indian Supreme Court case of *Harpal Singh v Devinder Singh & Anor* (1977) AIR (SC) 2914 wherein the Supreme Court said –

It is a malady in our country that political parties allure young students through their student wings. They do so because it is an easy method for enlisting support and participation of student population to their political programmes. Students, particularly in adolescent age, are easily swayable by political parties without much effort or costs as young and tender minds are susceptible to easy persuasiveness by party leaders. But the disturbing aspect is that most of the political leaders do not mind their student supporters developing hostility towards their fellow students belonging to rival political wings.

We think that the time is now ripe for legislative interference to salvage the campus free of political activities. We leave it to the members of the legislatures and leaders of the country to ponder over this with seriousness it deserves and to bring forth necessary measures to plug it.

[12] In the Indian case of *Sojam Framcis v Mahatma Gandhi University, Kottayam & Ors* AIR 2003 Kerala 290 referred to by the Senior Federal Counsel, the question for consideration was "*whether an educational institution has got the freedom to prohibit political activities within the college campus and forbid the student*

from organizing or attending meetings other than official ones within the college campus and whether such a restriction would violate Article 19(1)(a) and 19(1)(c) of the Constitution of India.". Radhakrishnan J held that the restriction was reasonable designed to promote discipline and efficiency in the educational institution to achieve excellence in education.

[13] Learned Senior Federal Counsel submits that Act 30 falls within the restriction mentioned in Article 10(2). It is submitted that the rights conferred under Article 10(1) are not absolute but subject to certain restriction that the law may impose in the interest of sovereignty and integrity of the country, the security of the State, friendly relations with foreign States, public order, decency or morality (*PP v Ooi Kee Saik* [1971] 2 MLJ 108). It is submitted that despite the Federal Constitution employing the words "deems necessary or expedient" and the Indian Constitution employing the words "reasonable restriction", the intention of both Constitutions are similar, which is, that the rights to freedom of speech and expression is subject to certain restrictions that can be imposed.

[14] Senior Federal Counsel further refers to the *Hansard* to aid interpretation (*Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 4 CLJ 285) and in the *Hansard* dated 10.12.2008 it is stated inter alia as follows (pg.76) –

Pindaan kepada AUKU tidak akan lengkap tanpa perubahan kepada aspek pengurusan kebajikan dan hak asasi pelajar. Perkara ini merupakan hasrat dan harapan setiap pelajar di universiti negara ini....

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.

The Minister said further (pg.94)-

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.

Walau bagaimanapun pelajar adalah dilarang untuk terlibat dengan entiti-entiti berikut: (pg.95)

(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 university

..... Meskipun terdapat larangan ke atas pelajar untuk berpolitik, rang undang-undang ini masih memberikan sedikit pengecualian. Kuasa untuk memberi pengecuaiian 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 university 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 di anjur 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.

At page 99 the Minister of Higher Education said –

"Fasal 8 bertujuan untuk menggantikan Seksyen 15 Akta 30 untuk memberikan kepada pelajar dan pertubuhan pelajar kebebasan berpersatuan tertak/uk 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."

[15] It is submitted that, as clearly stated in the preamble to Act 30, the purpose of the Act is to provide for the establishment, maintenance and administration of Universities and University Colleges and for other matters connected therewith. Reference was made to Blacks' Law Dictionary, 8th Edition on the meaning of 'administration' as follows –

"The management or performance of the institution."

Hence it is submitted that this would include matters regarding discipline of students and conduct of students outside their universities which would affect the names and reputation of universities as a whole. It is submitted that the influence of political parties can throttle and demolish a harmonious academic environment and thus the restriction imposed under s.15(5)(a) is in line with Article 10(2)(a) as it is a necessary restriction in the interest of public order or public morality. Learned Senior Federal Counsel submits that the doctrine of proportionality ought not to apply in the present case

[16] For the 3rd Respondent learned counsel adopts the submissions by the Senior Federal Counsel but submits further

that this case falls within the elements specified by the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* (supra). It is submitted that the restrictions in Act 30 fall within Article 10(2) as there is a public element in terms of public order and public morality. Counsel submits that the right of free speech, of association and of assembly cannot be regarded as being without limitation. Freedom of speech is not an absolute right (Sir Ivor Jennings '*The Law And The Constitution*' 5th Edition at p.259). In their extreme meanings, the rights conflict with the fundamental requirements of public order. Counsel refers to *A.K. Gopalan v State of Madras* (A.I.R.) S.C. 29 which states as follows –

> *There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights ... are subject to such reasonable conditions as may be deemed to be to the governing authority of the country, essential to the safety, health peace and general order and moral of the community .. What the Constitution attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control...*

[17] It is submitted that Act 30 was enacted to regulate the affairs of students in universities and university colleges including matters of student discipline. Section 15(5)(a) is not without exception. Section 15(4) provides that the Vice Chancellor may exempt students from the provisions of s.15(1)(a). Counsel submits that s.15(5)(a) is a necessary and reasonable restriction under Article 10(2)(a) of the Federal Constitution and that s.15(5)(a) must be read in the context of a purposive approach

while at the same time embracing the constitutional liberties and human rights entrenched in Part II of the Federal Constitution. Act 30 would not be enforced to the extent of inconsistency with the Federal Constitution.

[18] On the authority of *Sivarasa*'s case and the Indian authorities cited herein, it is submitted that the restrictions under s.15(5)(a) which apply equally to all students of universities and university colleges is reasonably necessary for the purpose of public order and public morality and the restrictions imposed by Parliament *vide* s.15(5)(a) are reasonable to maintain discipline of students which is part of public morality and which the students must observe. Hence counsel submits that when s.15(5)(a) is observed, the objectives of Act 30 is achieved.

Decision

[19] On the authority of *Sivarasa,* when the State relies on one or more of the provisions of Article 10(2) to justify a statute, then 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. Article 10(2)(a) of the Federal Constitution provides that Parliament may by law impose on the rights conferred by Clause (1)(a) such restrictions "as it deems necessary or expedient" in

the interest of, in the context of the present case, public order or morality.

[20] It would be instructive to refer to the Supreme Court case of *Public Prosecutor v. Pung Chen Choon* [1994] 1 LNS 208 with respect to the restriction imposed in the context of Article 10(2)(a). That case was a reference to the Supreme Court by way of a Special Case on the issue of the validity of s.8A(1) read with s.8A(2) of the Printing Presses and Publications Act 1984. At the close of the case for the prosecution, the defence had raised the question whether s.8A of the said Act imposes restrictions on the right to freedom of speech and expression in violation of art 10(1)(a) and (2)(a) of the Constitution and was therefore void under Article 4(1). Thus the question referred to the Supreme Court was whether s.8A(1) read with s 8A(2) imposes restriction on the right to freedom of expression and free speech conferred by Article 10(1)(a) of the Federal Constitution, and if so whether the restriction imposed is one permitted by or under Article 10(2)(a) of the Federal Constitution. In delivering the judgment of the Supreme Court, His Lordship Edgar Joseph Jr SCJ said -

> *Insofar as restrictions on the Right to freedom of speech and expression is concerned, cl (2)(a) of art 10 permits restrictions on this Right by laws as Parliament deems necessary or expedient relating to matters undermining the security of the Federation or any part thereof, friendly relations with other countries, public order or morality or relating to defamation, incitement to any offence, contempt of court, privileges of Parliament or of any legislative assembly.*

Clearly, therefore, in Malaysia, the position of the court when considering an infringement of this Right is different from that of the position of the court in India when considering an infringement of the equivalent Right under the Indian Constitution.

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. Moreover, by cl (2) of art 4, it is not a ground for challenge that the restriction does not relate to one of the matters specified in art 10(2)(a) for taking a case outside the protection of that article. (See Assa Singh v Mentri Besar of Johore 9 at p 38.)

To put it another way, art 4(2)(b) of the Constitution expressly prohibits the questioning of the validity of any law on the ground that such a law 'imposes restrictions as are mentioned in art 10(2) of the Federal Constitution but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in art 10(2)'. (See PP v Param Cumaraswamy 10 at p 517 col 2F-G.)

In considering this question, we had also kept in the forefront of our minds, on the one hand, the principle that the Right to freedom of speech and expression as enshrined in art 10(1)(a) of the Constitution is not absolute because the Constitution authorizes Parliament to impose certain restrictions, as it deems necessary, and which so far as might be material to this Reference, are the interest of security of the Federation or any part thereof or friendly relations with other countries, public order or morality and, on the other hand, the principle that any restriction limiting the fundamental Right of free speech and expression not falling within the four walls of art 10(2)(a), cannot be valid.

First of all, it is clear law that 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. (See PP v Datuk Harun bin Haji Idris & Ors. 15)

Secondly, we endorse the proposition that, where a law purports to authorize restrictions in language wide enough to cover restrictions both within and without the permissible limits of legislative action, it cannot be upheld, not even so far as it is applied within the constitutional limits, for it is impossible to apply the principle of severability. (See Romesh Thapper v State of Madras. 4). But we hasten to add that we adhere to the principle enunciated by the Supreme Court of India in Kader Nath Singh v Bihar 16 , that it is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the court would lean in favour of the former construction.

Having said that, we had to go further and consider the provisions of the Act generally, and s 8A(1) in particular, to determine whether the impugned law was within the perimeters of the permissible restrictions envisaged by art 10(2). In so doing, we were of the view that it was 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. We hasten to add that it is not that the meaning of the words in the impugned law changes with the prevailing conditions of the time but that the changing circumstances illustrate and illuminate the full import of that meaning.

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

The difficulty which faced counsel for the accused was that although a court is entitled to decide the question whether a particular piece of legislation falls within the orbit of the interests enumerated under art 10(2)(a), if the law is directed at a class of acts in the interests of, say, public order, there is authority for saying that it does not violate the Right enunciated in art 10(1)(a) even if some of the acts may not

lead to public disorder. (See Ramji Lal Modi v State of Uttar Pradesh. 18)

Having said that, we recognized that in deciding whether the particular piece of legislation falls within the orbit of the permitted restrictions, consideration must be given to the question whether such law is directed at a class of acts too remote in the chain of relation to the subjects enumerated under art 10(2)(a). In other words, the objects of the impugned law must be sufficiently connected to the subjects enumerated under art 10(2)(a). The connection contemplated must be real and proximate, not far-fetched or problematical.

Regarding the power to restrict this Right 'in the interest' of public order, the Supreme Court of India in Kanu Biswas v the State of West Bengal, 21 at pp 1658-1659 said that the test to be adopted in determining whether an act affects law and order or public order is: Does it lead to disturbance of the current life of the community so as to amount to disturbance of public order or does it affect merely an individual leaving the tranquility of society undisturbed? So, also, in Kishori Mohan Bera v the State of West Bengal 22, it was said that the true test is not the kind but the potentiality of the act in question. And, in Sk Kedar v State of West Bengal 23 , it was held that in relation to public order the determinant factor is one of degree and the extent of the reach of the act upon society and not merely the nature or quality of the act.

We considered that the test enunciated in the three last mentioned cases decided by the Supreme Court of India could be usefully adopted in determining whether an act affects public order.

[21] From the abovementioned judgment, the Supreme Court affirmed that the right to free speech and expression as enshrined in Article 10(1)(a) of the Constitution is not absolute because the Constitution enables Parliament to impose certain restrictions, as it deems necessary or expedient. There is a presumption of the constitutional validity of the impugned provision and the burden of proof lies on the Plaintiffs who seek to establish the contrary.

[22] Insofar as Malaysia is concerned, 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. If the impugned law in pith and substance is a law relating to the subjects enumerated under the permitted restrictions found in Clause 10(2)(a), the question whether it is reasonable does not arise and the law would be valid. The objects of the impugned law must be sufficiently connected to the subjects enumerated under Article 10(2)(a). The connection contemplated must be real and proximate, not far fetched or problematic.

[23] The duty of the court is 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. The abovementioned judgment also shows that the doctrine of proportionality does not apply.

[24] Following the abovementioned judgment, in the present case the scope of this court's inquiry is limited to the question whether s.15(5)(a) comes within the permitted restrictions under Article 10(2)(a). If s.15(5)(a) is related to the subject under the permitted restrictions under Article 10(2)(a), the question whether it is reasonable does not arise. Section 15(5)(a) would be valid.

[25] Section 15(5)(a) prohibits a student of a University or University College regulated by Act 30 from expressing or doing anything which may reasonably be construed as expressing support for or sympathy with or opposition to any political party whether in or outside Malaysia. I am unable to agree with submissions for the Plaintiffs that with reference to the preamble to Act 30, the purpose of Act 30 is to facilitate the administration of Universities and University Colleges and is therefore outside the purposes specified under Article 10(2)(a). In *Re application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* (supra) Abdoolcader J said *inter alia* as follows -

> *Although the preamble is a part of a statute, it is not an operating part thereof. The aid of the preamble can be taken only when there is some doubt about the meaning of the operative part of the statute. The preamble undoubtedly throws light on the intent and design of the enacting authority and indicates the scope and purpose of the legislation itself but it should not be read as a part of a particular s. of that written law. Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it. The enacting words of the statute are not always to be limited by the words of the preamble and must in many instances go beyond it, and where they do so, they cannot be cut down by reference to it. It is accordingly clearly settled law that the preamble cannot restrict the enacting part of a statute though it may be referred to for the purpose of solving an ambiguity.*
>
> *Where the enacting words are clear, the preamble cannot operate to restrict that meaning. The preamble cannot limit or change the meaning of the plain words of a statutory provision. In Secretary of State for India v. Maharajah of Bobbili [1919] 46 IA 302, their Lordships of the Privy Council interpreted the plain meaning of a Madras statute regardless of the restrictive provision of the preamble thereof, and Lord Shaw in delivering judgment remarked that as the section of the statute made operative provisions in excess of the apparent ambit of the preamble, it was the section that must govern and not the preamble.*

The most important aspect in this regard is that the preamble cannot be invoked for the purpose of creating ambiguity in a statute. As Lord Davey observed in Powell v. The Kempton Park Racecourse Company, Ltd. [1889] AC 143, 185 (at p. 185):

There is, however, another rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital. To do so would in many cases frustrate the enactment and defeat the general intention of the Legislature.

Where the terms of an enactment are clear, precise and unambiguous, it must be applied and enforced according to its plain meaning, and it is not the business of the Court to speculate as to what might have been in the mind of the enacting authority as it may appear to the Court from the preamble or otherwise (Badri Prasad v. Ram Narain Singh AIR 1939 All 157 per Collister, J).

[26] Clause (2)(a) of Article 10 enables Parliament to impose by way of legislation such restrictions on the rights conferred by Article 10(1)(a) as it deems necessary or expedient in the interest of, as submitted for the Respondents, public order or morality. I agree with the Senior Federal Counsel that discipline of students and conduct of students as a whole is a matter connected with the administration of such institutions. There is no discrimination in its application to such students. The restrictions as contained in s.15(5)(a) is to address the potentiality for disturbance of the life of the student community in the Universities and University colleges which can amount to disturbance of public order and the tranquility of society (*Kanu Biswas v the State of West Bengal,* supra; *Re application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors*, (supra). I agree with counsel for the 3rd Respondent that the restriction imposed is necessary or expedient to maintain discipline of

students which is part of public morality and which the students must observe. Further the restriction is not absolute as s.15(4) allows the Vice-Chancellor, on an application, to give exemption to a student subject to such terms and conditions as he thinks fit.

Conclusion

[27] For the aforementioned reasons I find that the restriction imposed *vide* s.15(5)(a) of Act 30 comes within the scope of and does not violate Article 10(1)(a) of the Federal Constitution. Section 15(5(a) is therefore valid. The application enclosure 1 is dismissed. Consequentially the application enclosure 4 is also dismissed. Costs to the Defendants to be taxed unless otherwise agreed.

Dated 29.9.2010

AZIAH BINTI ALI
JUDGE
HIGH COURT MALAYA
KUALA LUMPUR

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Salinan Diakui Sah

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