DRAFT [SUBJECT TO EDITORIAL FINE TUNING ONLY].

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. W-01(IM)-636-TAHUN 2010

ANTARA

1. **MUHAMMAD HILMAN BIN IDHAM**
   [redacted]
2. **WOON KING CHAI**
   [redacted]
3. **MUHAMMAD ISMAIL BIN AMINUDDIN**
   [redacted]
4. **AZLIN SHAFINA BINTI MOHAMAD ADZA**
   [redacted] ... **PERAYU-PERAYU**

DAN

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

(Di Dalam Mahkamah Tinggi Malaya di Kuala Lumpur
(Bahagian Rayuan dan Kuasa-kuasa Khas)
Saman Pemula No. R1-24-47-10

ANTARA

1. MUHAMMAD HILMAN BIN IDHAM
   [redacted]
2. WOON KING CHAI
   [redacted]

3. MUHAMMAD ISMAIL BIN AMINUDDIN
[redacted]

4. AZLIN SHAFINA BINTI MOHAMAD ADZA
[redacted] ... PLAINTIF-PLAINTIF

DAN

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

CORAM:

LOW HOP BING, JCA
MOHD HISHAMUDIN BIN HJ MOHD YUNUS, JCA
LINTON ALBERT, JCA

DISSENTING JUDGMENT OF LOW HOP BING, JCA

I. APPEAL

[1] In the Kuala Lumpur High Court, the Appellants' (the Plaintiffs') Originating Summons (Encl 1) sought a declaration that s.15(5)(a) of the Universities and University Colleges Act 1971 ("s.15(5)(a)") is invalid, on the ground that it contravenes art 10(1)(a) of the Federal Constitution, and consequentially the pending disciplinary proceedings instituted against the Plaintiffs by Universiti Kebangsaan Malaysia, Respondent 3 (Defendant 3) are invalid. (For brevity and

convenience, a reference hereinafter to an article is a reference to that article in the Federal Constitution).

[2] The Plaintiffs' Summons in Chambers (Encl 4) prayed for an interlocutory injunction to restrain Defendant 3 from proceeding with the disciplinary proceedings.

[3] The High Court had dismissed the Plaintiffs' Originating Summons and Summons in Chambers. Hence, this appeal by the Plaintiffs.

II. FACTUAL BACKGROUND

[4] The undisputed facts are simple and straightforward. The Plaintiffs are political science undergraduate students of Defendant 3. They were present in the constituency of Hulu Selangor during the campaign period for the Parliamentary by-election of 24 April 2010. They were having in their possession paraphernalia supportive of, sympathetic with or opposed to a contesting political party in the by-election.

[5] On or about 13 May 2010, the Plaintiffs received notices from Defendant 3's Vice Chancellor, requiring them to appear before a disciplinary tribunal on 3 June 2010, to answer charges of alleged breaches and offences under s.15(5)(a), punishable under the disciplinary regulations of Defendant 3. In response thereto, the

Plaintiffs made written representations dated 26 May 2010 denying the allegations.

III. QUESTION FOR DETERMINATION

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

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

(2) S.15(5)(a) violated the Plaintiffs' fundamental liberties to speech and expression, and is unconstitutional as it lies outside the ambit of art 10(2)(a). They relied on, inter alia, the judgment of the Federal Court in ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor*** **[2010] 3 CLJ 507, FC**.

[7] Learned Senior Federal Counsel Noor Hisham bin Ismail derived support from the judgment of the (then) Supreme Court in ***PP v Pung Chen Choon*** **[1994] 1 MLJ 566 SC** and argued for Respondents 1 and 2 (Defendants 1 and 2) that the learned High Court judge is correct in arriving at the decision that s.15(5)(a) is

constitutional and valid. In any event, he added that the provisions of s.15(5)(a) are reasonable and within the ambit of art 10(1)(a) read with art 10(2)(a). Likewise, Dato' Sri Muhammad Shafee Abdullah (Miss Sarah Abishajan with him) submitted for Defendant 3 and supported the decision of the High Court as correct.

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

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

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

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

(2) Methodology of constitutional interpretation;

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

(4) The reasonableness of those restrictions.

IV. S.15(5)(a), ART 10(1)(a) AND ART 10(2)(a)

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

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

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

> **"10. Freedom of speech, assembly and association.**
>
> (1) **Subject to** Clauses (2), ... –
>
> (a) Every citizen has the right to freedom of speech and expression." (Emphasis added)

[12] Since art 10(1)(a) is "subject to", inter alia, art 10(2)(a), art 10(1)(a) is subservient while art 10(2)(a) is predominant. Where art 10(1)(a) is in conflict with, repugnant to or inconsistent with art 10(2)(a), then art 10(1)(a) would give way and art 10(2)(a) would

prevail. Art 10(2)(a) authorizes Parliament to enact law imposing restrictions as follows:

> "(2) Parliament may by law impose –
>
> (a) on the rights conferred by paragraph (a) of Clause (1), **such restrictions as it deems necessary or expedient** in the interest of the security of the Federation or any part thereof, friendly relations with other countries, **public order** or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence." (Emphasis added)

V. METHODOLOGY OF CONSTITUTIONAL INTERPRETATION

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

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

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

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

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

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

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

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

"8A (1) Where in any publication there is maliciously published any false news, the printer, publisher, editor and the writer thereof shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine not exceeding twenty thousand ringgit or to both.

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

[18] The (then) Supreme Court answered Question (1) in the affirmative.

[19] Questions (2) and (3) were considered together. **Edgar Joseph Jr SCJ** (as he then was) held, inter alia, that:

(1) In Malaysia, when infringement of the Right to freedom of speech and expression is alleged, the scope of the court's inquiry is limited to the question whether the impugned law comes within the ambit of the permitted restriction. So, for example, if the impugned law, in pith and substance, is a law relating to the subject enumerated under the permitted restrictions found in art 10(2)(a), **the question whether it is reasonable does not arise**; the law would be valid (p575H);

(2) The Right to freedom of speech and expression as enshrined in art 10(1)(a) is not absolute because the Constitution authorizes Parliament to impose certain restrictions, as it deems necessary (p576E);

(3) The Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia: per **Thomson CJ** in ***Government of State of Kelantan v Government of the***

Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj **[1963] MLJ 335 at p358 column 1 J FC.** See also ***Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187,*** **at p189 col 1A FC;** ***PP v Ooi Kee Saik & Ors*** **[1971] 2 MLH 108 at p.113 col 2 B-C;** and ***Adegbenro v Akintola*** **[1963] 3 WLR; [1963] AC 614 PC per Lord Radcliffe** (p576B-D);

(4) 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 (p576H);

(5) It is impossible to lay down an abstract standard applicable to all cases. It would be the duty of the court to consider each impugned law separately, regard being had to the nature of the Right alleged to have been infringed, the underlying purpose of the restriction, the extent and the urgency of the evil sought to be remedied, not forgetting the prevailing conditions of the time (p577B-C);

[20] The (then) Supreme Court gave the answers to Questions 2 and 3 in the affirmative. In other words, the restriction imposed under s.8A(1) read with s.8A(2) is one permitted or under art 10(2)(a), and consistent therewith, and valid.

Therefore

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

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

(2) The provisions of Part II contain concepts that house within them several separate rights; and 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;

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

(4) In interpreting **art 10(2)(c)** (which says that "Parliament may by law impose .... (c) on the right conferred by para (c) of cl (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality") **the word "reasonable" should be read into the provision to qualify the width of the proviso**;

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

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

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

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

[24] Arising from the above judicial statement in ***Dalip Bhagwan Singh, supra***, for the purposes of the instant appeal, ~~this Court is~~ I am bound to treat the judgment of the Federal Court in ***Sivarasa Rasiah,***

supra, as representing the present state of the law and prevails over the decision of the (then) Supreme Court in ***Pung Chen Choon, supra***, on this point

[25] I therefore take the view that art 10(1)(a) and art 10(2)(a) must be generously interpreted in the sense that a prismatic approach to interpretation must be adopted and that the word "reasonable" should be read into the provisions of art 10(2)(a) and to consider whether the restriction that art 10(2)(a) imposes is "reasonably" necessary and expedient for one or more of the purposes specified therein. In the circumstances, it is necessary for me to proceed to consider the reasonableness of the restrictions in the light of s.15(5)(a) and art 10(2)(a).

VI. REASONABLENESS OF RESTRICTIONS

[26] The reasonableness of the restrictions contained in s.15(5)(a) of the Universities and University Colleges Act 1971 (UUCA) may be traced to its being enacted as a source of Federal law to regulate the affairs of students in universities. The restrictions imposed under s.15(5)(a) pertain essentially to the involvement of students in politics. It is necessary and seeks to prevent infiltration of political ideologies, including extremities, amongst students. This infiltration may adversely affect the primary purpose of the universities i.e the pursuit of education. This is particularly significant as university students could well be vulnerable youth capable of being subject to peer

pressure and be easily influenced. The issue of "reasonableness" has been extensively debated in Parliament as reported in *Hansard* dated 10 December 2008 p.76. In essence, the restrictions were stated to protect the interest of the students and institutions of higher learning, as a matter of policy.

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

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

(2) Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of

construction. It is as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

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

[28] Based on the above judicial pronouncements, I find that the provisions contained in S15(5)(a) are reasonable.

VII. CONCLUSION

~~[28]~~ I answer the above question in the negative. The restrictions contained in s.15(5)(a), being within the bounds of reasonableness, come within the scope of art 10(1)(a) read with art 10(2)(a). It is therefore constitutional and valid. The instant appeal is dismissed with costs of RM..... Deposit to the respondent on account of the fixed costs.

↑ The decision of the High Court is affirmed.

[29] Strictly, by way of *obiter*, Parliament may wish to consider an amendment to s.15(5) in particular and the whole Act in general so as to bring about a repeal or review thereof. This measure can only be brought about by legislative acts. The making or unmaking of the law

is a matter within the exclusive domain of Parliament, while the Courts are entrusted with the responsibility for interpretation of the law.

DATUK WIRA LOW HOP BING
Judge
Court of Appeal Malaysia
PUTRAJAYA

Dated this 31st day of October 2011

COUNSEL FOR APPELLANT:

Mr Malik Imtiaz Sarwar
(assisted by Miss Jenine Gill)
Tetuan Kandiah Partnership
Suite 9.01, Tingkat 9
Menara Choy Fook On
1B, Jalan Yong Shook Lin
46050 Petaling Jaya
SELANGOR

COUNSEL FOR RESPONDENT:

Peguamcara pihak Responden Pertama
Dan Responden Kedua:

Tuan Noor Hisham bin Ismail
Jabatan Peguam Negara Malaysia
Bahagian Guaman
Aras 3, Blok C3
Pusat Pentadbiran Kerajaan Persekutuan
62512 PUTRAJAYA

Peguamcara bagi pihak Responden Ketiga:

Dato' Sri Muhammad Shafee Abdullah
(Miss Sarah Abishajam with him)
Tetuan Shafee & Co.
Chambers Twenty-Five
No. 25, Jalan Tunku
Bukit Tunku
40580 KUALA LUMPUR

REFERENCE:

Sivarasa Rasiah v Badan Peguam Malaysia & Anor **[2010] 3 CLJ 507, FC**

PP v Pung Chen Choon **[1994] 1 MLJ 566 SC**

Badan Peguam Malaysia v Kerajaan Malaysia **[2008] 1 CLJ 521 FC**

Lee Kwan Who v PP **[2009] 5 CLJ 631 FC**

Shamim Reza v PP **[2009] 6 CLJ 93 FC**

Government of State of Kelantan v Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj **[1963] MLJ 335 at p358 column 1 J FC**

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, **at p189 col 1A FC**

PP v Ooi Kee Saik & Ors **[1971] 2 MLH 108 at p.113 col 2 B-C**

Adegbenro v Akintola **[1963] 3 WLR; [1963] AC 614 PC per Lord Radcliffe**

Dalip Bhagwan Singh v PP **[1998] 1 MLJ 1**

Loh Kooi Choon v Government of Malaysia **[1977] 2 MLJ 187**

Vacher & Sons Ltd v London Society of Compositors **[1912] AC 107 at p.118**