A

SIVARASA RASIAH

v.

BADAN PEGUAM MALAYSIA & ANOR

B

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ZULKEFLI MAKINUDIN FCJ
GOPAL SRI RAM FCJ
[CIVIL APPEAL NO: 01-8-2006(W)]

C

17 NOVEMBER 2009

CONSTITUTIONAL LAW: *Fundamental liberties - Freedom of association - Article 10 Federal Constitution - Meaning of 'in the interest of morality' - Whether restriction imposed by s. 46A Legal Profession Act*

D

1976 reasonable within art. 10(2)(c) on grounds of public morality

CONSTITUTIONAL LAW: *Fundamental liberties - Freedom of association - Article 10(1)(c) Federal Constitution - Whether right to form association under art. 10(1)(c) infringed by prohibition to serve as a*

E

member of Bar Council - Whether right to stand for Election or to be elected to Bar Council and a political party a fundamental right - Whether art. 10(1)(c) applies to Malaysian Bar

CONSTITUTIONAL LAW: *Fundamental liberties - Personal liberty - Article 5(1) Federal Constitution - Whether s. 46A Legal Profession Act*

F

1976 deprives appellant's constitutional right to serve on Bar Council - Whether personal liberty infringed by prohibition to serve as a member of Bar Council - Whether s. 46A is compliant with equality clause of art. 8(1) Federal Constitution - Whether s. 46A a fair and just law within art. 5(1)

G

LEGAL PROFESSION: *Law Society/Malaysian Bar - Bar Council - Need for an independent Bar Council free from political influence - Whether members of Bar Council can be prevented from holding office in political party - Likelihood of potential impartiality in discharging duties*

H

and responsibilities as member of Bar Council - Whether s. 46A Legal Profession Act 1976 a fair and just law within art. 5(1)

The appellant was an advocate and solicitor. He was also an office bearer of a political party and a Member of Parliament. The

I

appellant wished to be elected to the Bar Council, the governing body of the Malaysian Bar. However, s. 46A(1) of the Legal Profession Act 1976 ('the Act') prohibited him from doing so. As

such, the appellant challenged the constitutionality of s. 46A(1) on the following three broad grounds: (i) that the section violates his rights of equality and equal protection guaranteed by art. 8(1) of the Constitution; (ii) that it violates his right of association guaranteed by art. 10(1)(c); and (iii) that it violates his right to personal liberty guaranteed by art. 5(1). It was contended that in the event that any one of these rights was found to be violated, the section must be declared void as being inconsistent with the supreme law. The appellant's challenge failed before the High Court and the Court of Appeal and hence this appeal.

Held (dismissing the appeal)
Per Gopal Sri Ram FCJ delivering the judgment of the court:

(1) The Malaysian Bar was created by statute and has, from its inception, been governed by statute, namely the Act and the subsidiary legislation made thereunder. As such, no complaint can be made on the ground that the appellant's right of freedom of association has been violated. Article 10(1)(c) does not apply to the Malaysian Bar. Accordingly no question can arise on the issue of the right to serve on the Bar Council. (para 11)

(2) Even if the Malaysian Bar is an association and even if the appellant has a fundamental right to serve on the Bar Council, the disqualifications that s. 46A imposes are reasonable restrictions within art. 10(2)(c) based on morality. Matters of discipline of the legal profession and its regulation do form part of public morality. An independent Bar Council may act morally in the proper and constitutional sense of that term. The absence of political influence secures an independent Bar Council. Hence, the restriction is reasonable and justifiable on grounds of public morality. (para 12)

(3) Article 5(1) proscribes the deprivation of life and personal liberty save in accordance with law. The right to be a member of a statutorily created and regulated professional body - in this case the Malaysian Bar – comes within "personal liberty" and is protected by art. 5(1). However, in the present case there had been no deprivation of that right "in accordance with law" because s. 46A did not infringe the appellant's right to be a

member of the Malaysian Bar. What it did was to prevent him from serving on a distinctly separate body, namely the Bar Council. (paras 13 & 15)

(4) An advocate and solicitor who has been admitted to practise law can only do so if he or she is a member of the Malaysian Bar. Hence what the Act confers upon an advocate and solicitor is not a mere privilege; it is a right to earn a livelihood. It is this right which the personal liberty vested in a member of the Malaysian Bar carries with it. Included in the bundle of rights that form part of the membership of the Malaysian Bar is the legitimate expectation to participate in the Bar Council elections and, if elected, to serve on that body. Accordingly, the legitimate expectation to serve on the Bar Council is also a right protected by the personal liberty clause of art. 5(1). The inevitable effect or consequence of s. 46A is to render the appellant's constitutional right to serve on the Bar Council ineffective or illusory. The appellant had therefore been deprived of his constitutionally guaranteed right. (para 16)

(5) Section 46A classifies advocates and solicitors into those who are Members of Parliament and those who are not. It classifies advocates and solicitors who hold office in a political party and those who do not. This is a reasonable classification. There is an important reason of policy in support of the classification that the section makes. Therefore, s. 46A is compliant with the equality clause of art. 8(1). It is therefore a fair and just law within art. 5(1) and therefore does not offend that article. Hence, the appellant's right within the compass of the personal liberty clause was deprived in accordance with law. (paras 26 & 33)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah seorang peguambela dan peguamcara. Beliau juga adalah seorang ahli jawatankuasa sebuah parti politik serta seorang Ahli Parlimen. Perayu berhasrat untuk dipilih sebagai ahli Majlis Peguam, iaitu badan yang mengawalselia Peguam-peguam Malaysia. Bagaimanapun, s. 46A(1) Akta Profesion Undang-Undang 1976 ("Akta") melarangnya dari berbuat demikian. Oleh yang demikian, perayu mencabar keperlembagaan s. 46A(1) atas tiga alasan umum berikut, iaitu: (i) bahawa seksyen tersebut melanggari hak kepada

kesamarataan dan perlindungan sama rata yang dijamin oleh fasal 8(1) Perlembagaan; (ii) bahawa seksyen tersebut melanggari hak untuk berpersatuannya seperti yang dijamin oleh fasal 10(1)(c); dan (iii) bahawa seksyen tersebut juga melanggari hak kebebasan dirinya seperti yang dijamin oleh fasal 5(1). Dihujahkan bahawa jika mana-mana dari hak-hak ini didapati telah dilanggari, maka seksyen tersebut harus diisytiharkan sebagai batal kerana bertentangan dengan undang-undang tertinggi. Cabaran perayu di peringkat Mahkamah Tinggi dan Mahkamah Rayuan telah menemui kegagalan dan perayu merayu seterusnya.

Diputuskan (menolak rayuan)

Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah:

(1) Bar Malaysia dicipta oleh statut dan sejak awal penubuhannya telah dikawali oleh statut, iaitu Akta dan undang-undang kecil yang digubal di bawahnya. Oleh itu, tiada rungutan boleh dibuat berdasarkan pengataan bahawa hak perayu terhadap kebebasan diri telah dicabuli. Fasal 10(1)(c) tidak terpakai kepada Bar Malaysia. Ianya mengikut bahawa tiada persoalan boleh berbangkit berkaitan isu hak untuk berkhidmat dalam Majlis Peguam.

(2) Jikapun Bar Malaysia merupakan sebuah persatuan dan jika sekalipun perayu mempunyai hak asasi untuk berkhidmat dalam Majlis Peguam, kenyahlayakan seperti yang dikenakan oleh s. 46A adalah satu larangan munasabah yang berdasarkan moraliti dan masih dilingkungi oleh fasal 10(2)(c). Halperkara-halperkara disiplin profesion undang-undang serta peraturan-peraturannya adalah merupakan halperkara moraliti awam. Sebuah Majlis Peguam yang bebas boleh sahaja bertindak mengikut naluri moral sesuai dengan maksud perlembagaan terma tersebut. Ketiadaan pengaruh politik akan mewujudkan Majlis Peguam yang bebas. Oleh itu, larangan, berdasarkan moraliti awam, adalah munasabah dan berjustifikasi.

(3) Fasal 5(1) melarang pengambilan nyawa dan perlucutan kebebasan diri kecuali jika dibuat mengikut undang-undang. Hak untuk menjadi ahli sebuah badan profesion yang ditubuhkan dan dikawalselia oleh statut – dalam kes ini Bar Malaysia – adalah termasuk dalam kaedah "kebebasan diri" dan dilindungi oleh fasal 5(1). Bagaimanapun, dalam kes semasa,

A tidak terdapat perlucutan hak kebebasan diri "mengikut undang-undang" kerana s. 46A tidak mencabuli hak perayu untuk menjadi seorang ahli Bar Malaysia. Apa yang seksyen tersebut perbuat adalah melarangnya dari berkhidmat dengan sebuah badan terasing yang lain, iaitu Majlis Peguam.

B

(4) Seorang peguambela dan peguamcara yang telah diterimamasuk untuk mengamalkan undang-undang hanya boleh berbuat demikian jika dia adalah seorang ahli Bar Malaysia. Oleh itu, apa yang diberikan oleh Akta kepada seorang peguambela dan
C peguamcara bukan semata-mata satu keistimewaan; ianya adalah hak kepada mata pencarian. Inilah hak yang diperolehi seorang ahli Bar Malaysia yang terbit dari hak kebebasan dirinya. Termasuk juga dalam ikatan hak yang diperolehi melalui keahlian Bar Malaysia adalah pengharapan sah untuk
D mengambil bahagian dalam pemilihan-pemilihan Majlis Peguam dan, jika dipilih, untuk berkhidmat dengannya. Ianya mengikut bahawa pengharapan sah untuk berkhidmat di dalam Majlis Peguam adalah juga merupakan suatu hak yang dilindungi oleh ungkapan kebebasan diri fasal 5(1). Maka kesan atau akibat
E tidak dapat s. 46A adalah bahawa ianya menjadikan hak perlembagaan perayu untuk berkhidmat di dalam Majlis Peguam tidak berkesan atau sebagai satu khayalan sahaja. Perayu dengan itu telah dilucutkan haknya yang telah dijamin oleh perlembagaan.

F

(5) Seksyen 46A membahagikan peguambela dan peguamcara kepada mereka yang menjadi Ahli Parlimen dan mereka yang tidak. Ia mengkelasifikasikan peguambela dan peguamcara kepada mereka yang memegang jawatan dalam parti politik dan
G mereka yang tidak. Ini adalah kelasifikasi yang munasabah. Terdapat alasan polisi yang penting yang menyokong pengkelasifikasian yang dibuat oleh seksyen ini. Oleh itu, s. 46A telah mematuhi klausa sama rata di fasal 8(1). Maka ia adalah satu undang-undang yang adil dan saksama dalam lingkungan
H fasal 5(1) dan tidak melanggari fasal tersebut. Oleh itu, hak perayu, dalam ertikata klausa kebebasan diri, telah dilucutkan mengikut undang-undang.

I

Case(s) referred to:

Ah Thian v. Government of Malaysia [1976] 2 MLJ 112 ***(refd)***
Asiatic Engineering Co v. Achhru Ram and Ors AIR [1951] All 746 ***(refd)***
Azeez Basha v. Union of India AIR [1968] SC 662 ***(refd)***
Badan Peguam Malaysia v. Kerajaan Malaysia [2008] 1 CLJ 521 FC ***(refd)***
Bates v. Lord Hailsham of St. Marylebone [1972] 1 WLR 1373 ***(refd)***
Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***
Daman Singh v. State of Punjab AIR [1985] SC 973 ***(refd)***
Datuk Haji Harun Idris v. PP [1977] 2 MLJ 155 ***(refd)***
de Freitas v. The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1998] UKPC 30 ***(refd)***
Dewan Undangan Negeri Kelantan v. Nordin Salleh [1992] 1 MLJ 709 ***(refd)***
Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia [2007] 1 CLJ 19 CA ***(refd)***
Govind v. State of Madhya Pradesh AIR [1975] SC 1378 ***(refd)***
Indira Nehru Ghandi v. Raj Narain AIR [1975] SC 2299 ***(refd)***
Keshavananda Bharati v. State of Kerala AIR [1973] SC 1461 ***(refd)***
Kharak Singh v. State of Uttar Pradesh [1963] AIR SC 1295 ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 ***(refd)***
Malaysian Bar v. Government of Malaysia [1986] 2 MLJ 225 ***(refd)***
Malaysian Bar v. Government of Malaysia [1987] 2 MLJ 165 ***(refd)***
Manohar v. State of Maharashtra AIR [1984] Bom 47 ***(refd)***
Nordin Salleh & Anor v. Dewan Undangan Negeri Kelantan & Ors [1992] 1 CLJ 463 HC ***(refd)***
Nyambirai v. National Social Security Authority [1996] 1 LRC 64 ***(refd)***
Om Kumar v. Union of India AIR [2000] SC 3689 ***(refd)***
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Anor Appeal [2002] 4 CLJ 105 FC ***(refd)***
Poe v. Ullman 367 US 497, 543 [1961] ***(refd)***
PP v. Khong Teng Khen [1976] 2 MLJ 166 ***(refd)***
Raymond v. Honey [1983] 1 AC 1 ***(refd)***
R v. Oakes [1986] 1 SCR 10 ***(refd)***
R v. Secretary of State for the Home Department, ex parte Leech [1993] All ER 539 ***(refd)***
Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal AIR [1995] SC 1236 ***(refd)***
Secretary of State For The Home Department, Ex Parte Daly, R v. [2001] UKHL 26 ***(refd)***
Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC ***(refd)***
Shri Sitaram Sugar Co Ltd v. Union of India & Ors [1990] 3 SCC 223 ***(refd)***
Sumangalam Co-operative Society Ltd v. High Court of Gujarat AIR [2007] SC 671 ***(refd)***

A *Thai Trading Co (a firm) v. Taylor [1998] 3 All ER 65* ***(refd)***
Union of India v. Cynamide India Ltd AIR [1987] SC 1802 ***(refd)***
Williams v. Illinois 399 US 235, 262 [1970] ***(refd)***

Legislation referred to:
B Federal Constitution, arts. 5(1), 8(1), 10(1)(a), (c), (2)(c), 160(2)
Interpretation Acts 1948 and 1967, s. 66
Legal Profession Act 1976, s. 46A(1)

Indian Constitution, arts. 19(1)(c), (2)(4), 21

Other source(s) referred to:
C *Commentary on the Constitution of India,* 8th edn, 2007, vol 1, p 958

For the appellant - Tommy Thomas; M/s Tommy Thomas
For the 1st respondent - Bastian Vendargon (T Gunaseelan with him); M/s Hamid Sultan Loga Chitra & Assoc
D *For the 2nd respondent - See Mee Chun; AG's Chambers*

[Appeal from Court of Appeal, Civil Appeal No: W-01-49-2002]

Reported by Amutha Suppayah

E

JUDGMENT

Gopal Sri Ram FCJ:

F **[1]** The appellant is an advocate and solicitor. He is also an office bearer of a political party and a Member of Parliament. He wishes to stand for and, if elected, serve on the Bar Council which is the governing body of the Malaysian Bar. Section 46A(1) of the Legal Profession Act 1976 ("the Act") prohibits him from doing so. It says, among other things not relevant here:

G

> A person shall be disqualified for being a member of the Bar Council or a Bar Committee or of any committee of the Bar Council or a Bar Committee:
>
> (b) if he is a member of either House of Parliament, or of a State
H Legislative Assembly, or of any local authority; or
>
> (c) if he holds any office in:
>
> (i) any trade union; or
>
I (ii) any political party;

[2] The appellant challenged the constitutionality of s. 46A(1). His challenge failed before the High Court and the Court of Appeal. He has now appealed to us. The challenge is based on three broad grounds. First, that the section violates his rights of equality and equal protection guaranteed by art. 8(1) of the Constitution. Second, that it violates his right of association guaranteed by art. 10(1)(c). Third, that it violates his right to personal liberty guaranteed by art. 5(1). He argues that in the event that any one of these rights is found to be violated, the section must be declared void as being inconsistent with the supreme law. The arguments advanced in support of the appeal require the case to be taken through several stages.

[3] 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.

[4] Article 5(1) may be selected to illustrate the point that is sought to be made since it is one of the provisions relied on in this case. That article proscribes the deprivation of life or personal liberty, save in accordance with law. "Law" wherever mentioned in Part II of the Constitution includes – by statutory direction – the common law of England (see art. 160(2) read with s. 66 of the Consolidated Interpretation Acts of 1948 & 1967). It is now well-settled that by the common law of England the right of access to justice is a basic or a constitutional right. See, *Raymond v. Honey* [1983] 1 AC 1, 13; *R v. Secretary of State for the Home Department, ex parte Leech* [1993] All ER 539. In *Thai Trading Co (a firm) v. Taylor* [1998] 3 All ER 65 at 69, Millett LJ described it as a fundamental human right. Thus, the common law right of access to justice is part of the "law" to which art. 5(1) refers. In other words,

A a law that seeks to deprive life or personal liberty (both concepts being understood in their widest sense) is unconstitutional if it prevents or limits access to the courts.

[5] The other principle of constitutional interpretation that is
B relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art. 10(2)(c). It says that "Parliament may by law impose ... (c) on the right conferred by para (c) of cl. (1), such restrictions as it deems necessary or expedient in the interest of the security of
C the Federation or any part thereof, public order or morality." Now although the article says "restrictions", the word "reasonable" should be read into the provision to qualify the width of the proviso. The reasons for reading the derogation as "such reasonable restrictions" appear in the judgment of the Court of Appeal in *Dr Mohd Nasir*
D *Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19 which reasons are now adopted as part of this judgment. The contrary view expressed by the High Court in *Nordin Salleh v. Dewan Undangan Negeri Kelantan* [1992] 1 CLJ 463 is clearly an error and is hereby disapproved. The correct position is that when reliance is placed by
E 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.

F **[6]** The second observation has to do with the test that should be applied in determining whether a constitutionally guaranteed right has been violated. The test is that laid down by an unusually strong Supreme Court in the case of *Dewan Undangan Negeri Kelantan v.*
G *Nordin bin Salleh* [1992] 1 MLJ 709, as per the following extract from the headnote to the report:

> In testing the validity of the state action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the
H fundamental rights is such that it makes their exercise ineffective or illusory.

[7] The third and final observation is in respect of the sustained submission made on the appellant's behalf that the fundamental rights guaranteed under Part II is part of the basic structure of the
I Constitution and that Parliament cannot enact laws (including Acts

amending the Constitution) that violate the basic structure. A frontal attack was launched on the following observation of the former Federal Court in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187:

> 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 meet 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, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v. London Society of Compositors* [1913] AC 107, 118:
>
> > 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, I apprehend, 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.
>
> It is the province of the courts to expound the law and the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction – per Roskill LJ in *Henry v. Geopresco International Ltd* [1975] 2 All ER 702, 718. 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.

[8] It was submitted during argument that reliance on the *Vacher* case was misplaced because the remarks were there made in the context of a country whose Parliament is supreme. The argument has merit. As Suffian LP said in *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 112:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

A This earlier view was obviously overlooked by the former Federal Court when it followed *Vacher*'s case. Indeed it is, for reasons that will become apparent from the discussions later in this judgment, that the courts are very much concerned with issues of whether a law is fair and just when it is tested against art. 8(1). Further, it is
B clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part
C of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See, *Keshavananda Bharati v. State of Kerala* AIR [1973] SC 1461.

D

[9] It now becomes necessary to turn to the respective constitutional provisions that are said to have been violated by the impugned section. And it is convenient to begin with art. 10(1)(c) which says that "all citizens have the right to form associations."
E The argument here is as follows. "Associations" to which the article refers includes professional bodies that are created and regulated by statute. Accordingly, the Malaysian Bar is an "association" within art. 10(1)(c). The concept of freedom of association includes within it the right not only to be a member but also to serve on the Bar
F Council, the governing body of the Malaysian Bar. What s. 46A does is to impact upon and render illusory this fundamental right of the appellant. Further, the impugned section is not saved by the proviso contained in art. 10(2)(c). So much for the submissions on this point.

G

[10] The first question to ask is whether a statutory body like the Malaysian Bar is an "association" within art. 10(1)(c). A careful examination of the authorities provides a negative response. In *Daman Singh v. State of Punjab* AIR [1985] SC 973 the Supreme Court of India speaking through O Chinappa Reddy J said:
H

> In the cases before us we are concerned with co-operative societies which from the inception are governed by statute. They are created by statute, they are controlled by statute and so, there can be no objection to statutory interference with their composition on the
I ground of contravention of the individual right of freedom of association.

It is of interest to note that *Daman Singh* was recently applied in *Sumangalam Co-operative Society Ltd v. High Court of Gujarat* AIR [2007] SC 671.

[11] The Malaysian Bar was created by statute and has, from its inception, been governed by statute, namely the Act and the subsidiary legislation made thereunder. As such, no complaint can be made on the ground that the appellant's right of freedom of association has been violated. In short, art. 10(1)(c) does not apply to the Malaysian Bar. Accordingly no question can arise on the issue of the right to serve on the Bar Council.

[12] Even if *Daman Singh* and the cases that have applied it were wrongly decided, and the Malaysian Bar is an association and even if the appellant has a fundamental right to serve on the Bar Council, the disqualifications that s. 46A imposes are reasonable restrictions within art. 10(2)(c). That provision says that "Parliament may by law impose ... (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality." As earlier pointed out, the clause must be read as "such reasonable restrictions". The restrictions are reasonable because they are justifiable on the ground of morality. The expression "morality" is not defined by the Constitution. However, in *Manohar v. State of Maharashtra* AIR [1984] Bom 47 (a case cited by learned senior federal counsel) it was held that morality in the equipollent Indian art. 19(2)(4):

> is in the nature of public morality and it must be construed to mean public morality as understood by the people as a whole.

Part of public morality is the proper conduct and regulation of professional bodies. Matters of discipline of the legal profession and its regulation do form part of public morality. This is because 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. An independent Bar Council may act morally in the proper and constitutional sense of that term. The absence of political influence secures an independent Bar Council. Hence, as stated earlier, the restriction is entirely reasonable and justifiable on grounds of public morality. It follows that the challenge based on art. 10(1)(c) fails.

[13] The next ground is based on art. 5(1). It is convenient to deal with the challenge mounted on arts. 5(1) and 8(1) together for reasons that will become clear later in this judgment. To remind, art. 5(1) proscribes the deprivation of life and personal liberty save in accordance with law. The starting point is the submission of senior federal counsel that if the appellant cannot bring his case as a violation of his right of association under art. 10(1)(c), then that is the end of his case and he cannot rely on art. 5(1). With respect that submission is devoid of any merit. Article 10 contains certain express and, by interpretive implication, other specific freedoms. For example, the freedom of speech and expression are expressly guaranteed by art. 10(1)(a). The right to be derived from the express protection is the right to receive information, which is equally guaranteed. See, *Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal* AIR [1995] SC 1236. However, there are freedoms that do not fall within the wide scope of that article. These freedoms may be found to be embedded in the "life" and "personal liberty" limbs of art. 5(1). As Ayyangar J said in *Kharak Singh v. State of Uttar Pradesh* [1963] AIR SC 1295, when discussing art. 21 of the Indian Constitution, the expression 'personal liberty':

> ... is used in the article as a compendious term to include within itself all the varieties of rights which go to make up the 'personal liberties' of man other than those dealt with in the several clauses of art 19(1). In other words, while article 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in article 21 takes in and comprises the residue.

[14] In the present instance, the appellant bases his case on the "personal liberty" limb. Learned senior federal counsel submits that the concept "personal liberty" in art. 5(1) should receive the narrow and restricted meaning ascribed to it by a two member Bench of this court in *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* [2002] 4 CLJ 105. With respect this submission must be rejected as being without merit. The authorities referred to earlier in this judgment are clearly against such an approach to constitutional interpretation.

[15] It is patently clear from a review of the authorities that "personal liberty" in art. 5(1) includes within its compass other rights such as the right to privacy (see, *Govind v. State of Madhya Pradesh* AIR [1975] SC 1378). By parity of reasoning, the right to

be a member of a statutorily created and regulated professional body – in this case the Malaysian Bar – comes within "personal liberty" and is protected by art. 5(1). The issue is whether there has been a deprivation of that right "in accordance with law". The answer must straightaway be in the negative. Because s. 46A does not infringe the appellant's right to be a member of the Malaysian Bar. What it does is to prevent him from serving on a distinctly separate body, namely the Bar Council. Two questions then arise. First, whether membership of the Bar Council is a right within the personal liberty clause. Second, if it is, then whether the right has been deprived in accordance with law. Each must be separately considered.

[16] There can be no doubt that the appellant's right to membership of the general body, that is to say the Malaysian Bar falls within the concept of "personal liberty". The mere fact that the body in question is statutory in nature makes no difference. An advocate solicitor who has been admitted to practise law can only do so if he or she is a member of the Malaysian Bar. In order to be eligible to commence practice, the advocate and solicitor must obtain a practising certificate and pay the subscription and other dues to the Malaysian Bar. He or she may earn his or her livelihood only if he or she is approved for practise in the sense already described. All this is required by the Act and the relevant subsidiary legislation made under it. Hence what the Act confers upon an advocate and solicitor is not a mere privilege; it is a right to earn a livelihood. And it is this right which the personal liberty vested in a member of the Malaysian Bar carries with it. Included in the bundle of rights that form part of the membership of the Malaysian Bar is the legitimate expectation to participate in the Bar Council elections and, if elected, to serve on that body. Accordingly, the legitimate expectation to serve on the Bar Council is also a right protected by the personal liberty clause of art. 5(1). What s. 46A does in pith and substance is to directly impact on this right of the appellant and render it ineffective or illusory. Put slightly differently, the inevitable effect or consequence of s. 46A is to render the appellant's constitutional right to serve on the Bar Council ineffective or illusory. This satisfies the test in *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh*. The appellant has therefore been deprived of his constitutionally guaranteed right. Learned senior federal counsel relies on *Azeez Basha v. Union of India* AIR [1968] SC 662, 675 to argue that there is no such right

as contended by the appellant. In that case, the Supreme Court of India held that art. 19(1)(c) (the equipollent of our art. 10(1)(c)) of the Indian Constitution does not give any right to any citizen to manage any association but merely the right to form associations. She submits that by parity of reasoning there should be no such right under the personal liberty clause. There is no question that *Azeez Basha v. Union of India* is certainly good law in the context of art. 10(1)(c). But it has no application to the separate and distinct right of personal liberty guaranteed by art. 5(1). The submission is with respect not well founded.

[17] Now for the second question, namely, whether the deprivation of the appellant's fundamental right is in accordance with law under art. 5(1). What does "law" mean? As earlier observed, by definition it includes written law and the common law of England. This is the result when art. 160(2) is read with s. 66 of the Consolidated Interpretation Acts 1948 and 1967. Also see, *Lee Kwon Woh*. "Law" therefore means a system of law that encompasses the procedural and substantive dimensions of the rule of law. And this is the point at which arts. 8(1) and 5(1) interact.

[18] Following the majority decision of this court in *Badan Peguam Malaysia v. Kerajaan Malaysia*, the other provisions of the Constitution must be interpreted in keeping with the doctrine of procedural and substantive fairness housed in art. 8(1). Thommen J in *Shri Sitaram Sugar Co Ltd v. Union of India & Ors* [1990] 3 SCC 223 at p 251 explained the effect of art. 14 of the Indian Constitution which is the equipollent of our art. 8(1) as follows:

> Any arbitrary action, whether in the nature of a legislative or administrative or quasi-judicial exercise of power, is liable to attract the prohibition of art. 14 of the Constitution. As stated in *EP Royappa v. State of Tamil Nadu* [1974] 4 SCC3 'equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch'. Unguided and unrestricted power is affected by the vice of discrimination: Maneka Gandhiv Union of India. The principle of equality enshrined in art. 14 must guide every State action, whether it be legislative, executive, or quasi-judicial: *Ramana Dayaram Shetty v. International Airport Authority of India* [1979] 3 SCC 489, 511-12, *Ajay Hasia v. Khalid Mujib Sehravardi* [1981] 1 SCC 722 and *DS Nakara v. Union of India* [1983] 1 SCC 305.

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

[20] It is clear from the authorities thus far discussed that "in accordance with law" in art. 5(1) refers to a law that is fair and just and not merely any enacted law however arbitrary or unjust it may be. The question whether an enacted law is arbitrary must be decided upon settled principles that govern the right in Parliament to pass discriminatory laws. So long as the law does not produce any unfair discrimination it must be upheld. This is the effect of the equality limb of art. 8(1). And it is here that a discussion of that article becomes necessary. If s. 46A passes the test of fairness as housed in the equality clause then it is a fair law and therefore is a valid law for the purposes of art. 5(1).

[21] Article 8(1) provides that: "All persons are equal before the law and entitled to the equal protection of the law". As may be seen, the article guarantees two separate and distinct rights, namely, (i) equality before the law; and (ii) equal protection of the law. It cannot be over-emphasised that in accordance with well settled principles of constitutional interpretation each of these rights must

A be treated as a separate and distinct right despite an overlap as will be seen later in this judgment. Indeed, each right is derived from a distinctly different source. The framers of our Constitution (like the framers of the Indian Constitution) derived the equality clause from the Constitution of the Irish Free State. The equality doctrine in
B reality is drawn from Dicey's Rule of Law one of the pillars of which is that persons are equal before the law. As pointed out by Chandrachud J in *Indira Nehru Ghandi v. Raj Narain* AIR [1975] SC 2299, 2470:

> C Dicey gave three meanings to rule of law: Absence of arbitrary power, **equality before the law** or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts and that the Constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the Courts. (emphasis added)

D

[22] The framers drew the equal protection clause from the 14th Amendment to the Constitution of the United States which reads:

> E No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is important to note that the Constitution of the United States
F does not contain an equality clause. It was through the ingenuity of the Supreme Court's interpretation of the due process clause that an implied right to equality, that is to say, the right to challenge any form of state action as arbitrary, was established through case law. See, *Poe v. Ullman* 367 US 497, 543 [1961]; *Williams v. Illinois*
G 399 US 235, 262 [1970].

[23] Basu in his authoritative work *"Commentary on the Constitution of India"*, 8th edn (2007) vol 1, p. 958 says this in respect of art. 14 of the Indian Constitution:

> H The expressions 'equality before the law' and 'equal protection of laws' do not mean the same thing, even if there may be much in common ... Equality before the law is a dynamic concept having many facets. One facet – the most commonly acknowledged – is that there shall be no privileged person or class and none shall be
> I above the law. Equality before the law is a positive concept and cannot be enforced in a negative manner. Where the State commits

an illegality or irregularity in favour of any individual or group of individuals others cannot claim the same illegality or irregularity on the ground of a denial thereof.

[24] This view finds judicial support. In *Asiatic Engineering Co. v. Achhru Ram and Ors.* AIR [1951] All 746, the court said:

> Article 14 of our Constitution lays down two things. It enacts that:
>
> > The State shall not deny to any person (1) equality before the law or (2) the equal protection of the laws within the territory of India.
>
> Obviously, these two phrases have different meanings to some extent. We consider it unnecessary to discuss at length the meaning of the expression 'equality before the law,' as no point in connection with it seriously arises in the case. It appears to have been taken from the Constitution of the Irish Free State. Professor Dicey described the rule of law as one of the characteristics of the British Constitution. Of this rule of law one of the main features is, according to that great writer, 'equality before the law.'

[25] How is the court then to say in a given case that the particular statute under challenge is compliant with the equality clause? The answer lies in the following passage in the judgment of Suffian LP in *Public Prosecutor v. Khong Teng Khen* [1976] 2 MLJ 166:

> The principle underlying Article 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation', *Kedar Nath v. State of West Bengal* AIR [1953] SC 404, 406. In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a Magistrate's court, others in a Sessions Court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires

> pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate Article 8. All that Article 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on.

[26] Apply that here. What s. 46A does is to classify advocates and solicitors into those who are Members of Parliament and those who are not. It classifies advocates and solicitors who hold office in a political party and those who do not. This is a reasonable classification for the purpose of permitting a member of the profession from having a say in the governance of the profession. There is an important reason of policy in support of the classification that the section makes. It is fair and just that the governance of a professional body be kept in the hands of professionals who have no other visible political interests that may create the perception that the Bar Council has political leanings. Even before the introduction of s. 46A into the Act by way of amendment in 1978, the Bar Council had no political leanings. All that the impugned section does is to ensure that professional politicians are excluded from the governance of the profession. In the words of Harun J when speaking of s. 46A in *Malaysian Bar v. Government of Malaysia* [1986] 2 MLJ 225:

> The object is clearly that the affairs of the Bar be managed by members of the legal profession who are not only professionally independent but appear to the outside world to be so. **The emphasis is an independent Bar which is not subject to external influences of a non-professional character.** Hence the provision that lawyers who are members of Parliament, or any of the State Legislatures or local authorities; or hold office in any trade unions or political party or organisations of a political nature are disqualified from holding office in the Bar Council or Committees. (emphasis added)

For these reasons, s. 46A is compliant with the equality clause of art. 8(1).

[27] The next issue to consider is whether the section violates the equal protection clause. This calls for an interpretation of that clause. The test here is whether the legislative state action is disproportionate to the object it seeks to achieve. Parliament is

entitled to make a classification in the legislation it passes. But the classification must be reasonable or permissible. To paraphrase in less elegant language the words of Mohamed Azmi SCJ in *Malaysian Bar v. Government of Malaysia* [1987] 2 MLJ 165, the classification must (i) be founded on an intelligible differentia distinguishing between persons that are grouped together from others who are left out of the group; and (ii) the differentia selected must have a rational relation to the object sought to be achieved by the law in question. And to quote that learned judge: "What is necessary is that there must be a nexus between the basis of classification and the object of the law in question." In short, the state action must not be arbitrary. This, then, is the common thread that webs and binds the two limbs of art. 8(1). Hence the overlap.

[28] Although there are a number of cases on what is meant by arbitrary state action, the most authoritative is the judgment of Gubbay CJ in *Nyambirai v. National Social Security Authority* [1996] 1 LRC 64 which was approved by the Privy Council in *de Freitas v. The Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1998] UKPC 30. Lord Clyde when delivering the judgment of the Board said:

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

[29] In *Secretary of State For The Home Department, Ex Parte Daly, R v.* [2001] UKHL 26, Lord Steyn adopted what was said in *de Freitas*:

> The contours of the principle of proportionality are familiar. In *de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

A whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

B **[30]** It will be seen from a reading of the speech of Lord Steyn in Daly that the threefold test is applicable not only to test the validity of legislation but also executive and administrative acts of the State. In other words, all forms of state action – whether legislative or executive – that infringe a fundamental right must (i) C have an objective that is sufficiently important to justify limiting the right in question; (ii) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (iii) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it D seeks to achieve.

[31] It is clear from the foregoing discussion that the equal protection clause houses within it the doctrine of proportionality. This indeed is the point made by the Indian Supreme Court in *Om* E *Kumar v. Union of India* AIR [2000] SC 3689. There, Jagannadha Rao J a most learned judge whose views are entitled to great respect said:

> So far as Article 14 is concerned, the Courts in India examined F whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the Court considered the question whether the classification was based on intelligible differentia, the Courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle G of proportionality.

[32] It appears that Canada has led the way in the field of defining arbitrariness of state action. In *R v. Oakes* [1986] 1 SCR 10, a case that has influenced the jurisprudence of many H jurisdictions, including Zimbabwe, Dickson, CJ identified three components of the proportionality test:

> To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair I the right in question as little as possible. Lastly, there must be a

proportionality between the effects of the limiting measure and the objective the more severe the deleterious effects of a measure, the more important the objective must be.

[33] Returning to the present instance the first question to be asked is whether s. 46A is a piece of discriminatory legislation. See, *Datuk Haji Harun bin Idris v. Public Prosecutor* [1977] 2 MLJ 155. The answer must surely be in the affirmative because it discriminates against those advocates and solicitors who are either office bearers of a political party or a Member of Parliament or both. The next question to ask is whether the discrimination is arbitrary in the sense already discussed. A careful examination of the reasons behind the enactment as revealed in the speech of the Minister for Law and Attorney General as reported in Hansard when introducing s. 46A in Bill form to Parliament is to keep the Bar Council free from political influence. It is now settled that resort to Hansard may be legitimately had as a guide to interpreting an Act of Parliament. See, *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285. As earlier observed, it is in the public interest to have the governing body, namely, the Bar Council, free of any political influence. The section however does not prevent the appellant and those members of the Bar similarly circumstanced as him from attending and speaking at a general meeting of the Bar to put their views across for the purpose of influencing the Bar Council. It follows that the legislative measure under challenge is proportionate to the object it seeks to achieve. The result may have well been different if the section had prohibited the appellant and others in his position from practising law or from attending the general meetings of the Bar. Such a measure may well have been disproportionate and therefore arbitrary and unconstitutional. In short, s. 46A satisfies the threefold test laid down in *Nyambirai* and hence does not violate art. 8(1). It follows that it is a fair and just law within art. 5(1) and therefore does not offend that article as well. Put shortly, the appellant's right within the compass of the personal liberty clause was deprived in accordance with law.

[34] To sum up, s. 46A of the Act does not violate art. 10(1)(c) or art. 5(1) or art. 8(1). It is a valid law. The appeal is therefore dismissed. The orders of the High Court and the Court of Appeal are affirmed. By agreement of the parties there shall be no order as to costs. The deposit shall be refunded to the appellant.