Nik Noorhafizi bin Nik Ibrahim & Ors v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–94 OF 2011
APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA
4 SEPTEMBER 2013

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Constitutional Law — Legislation — Constitutionality — Constitutionality of s 27 of the Police Act 1967 — Unlawful assembly — Appellants convicted and sentenced — Appeal — Whether law used to convict them unconstitutional — Whether s 27 contravened art 10(1)(b) of the Federal Constitution with regards to right to assemble peaceably — Whether restriction in ss 27(2) and (5) were mere restrictions or amounted to prohibition of basic right under art 10 of the Constitution — Whether restrictions reasonable — Whether issues raised in present appeal rendered academic by repeal of impugned section — Police Act 1967 ss 27(5) & (8) — Federal Constitution art 10

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Criminal Law — Police Act 1967 — s 27 — Unlawful assembly — Appellants convicted and sentenced — Appeal against conviction and sentence — Whether law used to convict them unconstitutional

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The appellants were found in an assembly in a public place in respect of which a police licence had not been issued under s 27(2) of the Police Act 1967 ('the Act'). After a full trial before the magistrate they were convicted under s 27(5) of the Act and sentenced to a fine of RM3,900 each. The appellants paid the fines and appealed to the High Court to set aside their convictions and sentence on the grounds that the law used to prosecute them was unconstitutional. It was the appellants contention that ss 27(2) and (5) of the Act contravened art 10(1)(b) of the Federal Constitution ('Constitution'), which guaranteed the primary right of freedom to assemble and only allowed the State to restrict this freedom on certain grounds, ie in the interests of the security of the Federation or public order. The High Court was of the view that s 27(5) of the Act read together with s 27(2) of the Act did not contravene the Constitution and that s 27 of the Act was valid and constitutional. The appellants obtained leave to proceed with the present appeal. In this appeal the appellants continued with the argument that ss 27(2) and 27(5) of the Act were unconstitutional. In essence, the appellants submitted that the High Court judge should have found s 27(5) read with s 27(2) inconsistent with art 10(2)(b) of the Constitution, as they contained restrictions that were not permitted by art 10(2)(b), and ought to have struck down the same. It was the appellants' argument that the restriction contained in the impugned section was prohibitory in nature and not regulatory. Although the impugned section had been repealed and

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superseded by the Peaceful Assembly Act 2012 ('the PAA'), the appellants also submitted that the issue raised in this appeal was not academic. In their submissions the appellants had urged this court to borrow and adopt various decisions in the Commonwealth over similar issues.

Held, dismissing the appeal:

(1) (per **Apandi Ali JCA**) The principles to be filtered from the Federal Court decision in *Siva Segara v Public Prosecutor* [1984] 2 MLJ 212 ('the *Siva Segara's* case'), which was a binding decision on this court, and the other cases referred to by the parties, were that the words expressed in the Constitution, particularly those provisions that guarantee individuals the protection of fundamental rights and liberties should be interpreted generously and liberally, while provisions or restrictions that limited or derogated a fundamental right had to be read restrictively. At the same time it should also be borne in mind that the underlying objective for the prior requirement for a police licence for any assembly as prescribed in s 27(2) of the Act had to be associated with the avoidance of public disorder. Section 27(2) of the Act read with art 10(1)(b) and 10(2) of the Constitution provided various considerations for the police to take into account if they had to reject a particular licence application. Under s 27(2) of the Act, the police had to issue the licence applied for unless the assembly or the like was viewed to be prejudicial to security or to excite a disturbance of the peace. As the licensing requirement was to regulate the public assembly so as to avoid a catalyst for riot, chaos and disorder; barring the limited criteria for refusal, the police had to issue the licence as applied for. Thus, ss 27(2) and (5) were in law reasonable restrictions that were regulatory in nature and not prohibitory. The police force is duty bound to maintain the security and public order in the country for the public interest. As such, s 27 of the Act, which did not prohibit the right to peaceful assembly, was neither unconstitutional nor in conflict or inconsistent with art 10(1)(b) of the Constitution (see paras 42, 48–49 & 67).

(2) (per **Apandi Ali JCA**) The fact that s 27 of the Act had been deleted in its entirety and replaced by the PAA had not made the issues raised in the present case academic. The issues raised in this case were a public law matter and they should still be heard in the public interest. The appellants in the present case had raised the issue that their constitutional right to peaceful assembly had been trampled upon with no regard whatsoever as to why those rights had to be restricted. The gist of the restriction remained and had to be heard, evaluated, deliberated and judiciously dealt with. Further, this was a criminal case in which the appellants had been found guilty and paid their respective fines of RM3,900 each in default of three months imprisonment. Therefore, the appellants had a direct interest in pursuing this appeal on the issues circumscribed and to

overturn their convictions; for in the event they were successful, their status quo would be restored and their fines refunded. This militated against any argument academic or hypothetical (see parass 50–51, 59 & 65).

(3) (per **Hamid Sultan JCA, dissenting**) The appeal record and the judgment of the High Court failed to address the issue that an unlicensed assembly was not an unlawful assembly in the light of s 141 of the Penal Code read with art 10 of the Constitution. It was difficult to fathom how a charge anchored on the premise of unlawful assembly could succeed without proving the vital elements of s 141 of the Penal Code, taking into consideration that the deeming provision of s 27(5) of the Act was contrary to art 10 of the Constitution for asserting that a licence should be issued for the assembly. Article 10 of the Constitution did not permit to criminalise an assembly which was not licensed. In essence, the right to assemble peacefully is a guaranteed right in the constitution and there could not be penal sanction legislated when citizens assembled peacefully without committing offences under the Penal Code (see para 114).

(4) (per **Hamid Sultan JCA, dissenting**) Although art 10(2)(b) allows legislation to permit restrictions in respect of the right to assemble, it is settled law that the restriction could not amount to a prohibition. The word restriction had now an extended meaning as given by the Federal Court decision in the *Siva Segara*'s case. In the instant case there was a requirement under s 27 of the Act to obtain a licence, but in that process the police authority could not prohibit or refuse to grant the licence. They could only place terms to regulate the assembly and the licence had to be issued to all without any form of subjective discrimination failing which it would violate art 8(1) of the Constitution. The court was constitutionally bound to arrest any wrong contrary to human right values, and advance a remedy to ensure that respect and recognition was given to individual liberties as enshrined in the Constitution and also in recognition of Malaysia being a signatory to the relevant International Convention on Human Rights. In the circumstances the appellants' appeal ought to be allowed (see paras 114(b), (d) & 117).

[Bahasa Malaysia summary

Perayu-perayu didapati menyertai perhimpunan di tempat awam di mana tiada lesen polis telah dikeluarkan di bawah s 27(2) Akta Polis 1967 ('Akta tersebut'). Selepas perbicaraan penuh di hadapan majistret mereka telah disabitkan di bawah s 27(5) Akta tersebut dan masing-masing dikenakan denda RM3,900. Perayu-perayu telah membayar denda tersebut dan merayu ke Mahkamah Tinggi untuk mengetepikan sabitan dan hukuman mereka atas alasan bahawa undang-undang yang digunakan untuk mendakwa mereka tidak berperlembagaan. Perayu-perayu berhujah bahawa ss 27(2) dan (5) Akta tersebut bertentangan dengan perkara 10(1)(b) Perlembagaan Persekutuan

('Perlembagaan'), yang menjamin hak kebebasan asasi untuk berhimpun dan hanya membenarkan Kerajaan Negeri untuk menghalang kebebasan ini atas alasan-alasan tertentu, iaitu demi kepentingan keselamatan Persekutuan atau ketenteraman awam. Mahkamah Tinggi berpendapat bahawa s 27(5) Akta tersebut dibaca bersama s 27(2) Akta tersebut tidak bertentangan dengan Perlembagaan dan bahawa s 27 Akta tersebut adalah sah dan berperlembagaan. Perayu-perayu telah memperoleh kebenaran untuk meneruskan rayuan ini. Dalam rayuan ini perayu-perayu telah meneruskan dengan hujah bahawa ss 27(2) dan 27(5) Akta tersebut adalah tidak berperlembagaan. Pada dasarnya, perayu-perayu berhujah bahawa hakim Mahkamah Tinggi sepatutnya mendapati s 27(5) dibaca dengan s 27(2) adalah tidak konsisten dengan perkara perkara 10(2)(b) Perlembagaan, kerana ia mengandungi sekatan bahawa tidak dibenarkan oleh perkara 10(2)(b), dan patut dibatalkan. Perayu-perayu berhujah bahawa sekatan itu mengandungi dalam seksyen yang diragukan adalah bersifat larangan dan bukan bersifat kawal selia. Walaupun seksyen yang diragukan telah dimansuhkan dan digantikan oleh Akta Perhimpunan Aman 2012 ('APA'), perayu-perayu juga berhujah bahawa isu itu yang ditimbulkan dalam rayuan ini adalah tidak akademik. Dalam hujah mereka perayu-perayu telah mendesak mahkamah ini menggunakan dan memakai pelbagai keputusan Komanwel mengenai isu-isu yang sama.

Diputuskan, menolak rayuan:

(1) (oleh **Apandi Ali HMR**) Prinsip-prinsip yang perlu ditapis daripada keputusan Mahkamah Persekutuan dalam kes *Siva Segara v Public Prosecutor* [1984] 2 MLJ 212 ('kes *Siva Segara*'), yang merupakan keputusan mengikat ke atas mahkamah ini, dan kes-kes lain yang dirujuk oleh pihak-pihak, adalah perkataan-perkataan yang dinyatakan dalam Perlembagaan, terutamanya peruntukan-peruntukan yang menjamin individu perlindungan hak dan kebebasan asasi patut ditafsirkan secara umum dan liberal, manakala peruntukan atau sekatan yang terhad atau mengurangkan hak asasi perlu dibaca secara terhad. Pada masa sama ia juga wajar diingat bahawa objektif asas bagi keperluan sebelum lesen polis diperoleh untuk mana-mana perhimpunan yang ditetapkan dalam s 27 (2) Akta itu harus dikaitkan dengan mengelakkan gangguan awam. Seksyen 27(2) Akta yang dibaca dengan perkara 10(1)(b) dan 10(2) Perlembagaan memperuntukkan pelbagai pertimbangan perlu diambil kira oleh pihak polis jika mereka terpaksa menolak permohonan lesen tertentu. Di bawah s 27(2) Akta tersebut, polis perlu mengeluarkan lesen yang dipohon kecuali jika perhimpunan atau sepertinya dianggap memudaratkan keselamatan atau membangkitkan kekacauan. Oleh kerana keperluan perlesenan adalah untuk mengawal selia perhimpunan awam agar mengelakkan tercetusnya rusuhan, huru-hara dan gangguan; melarang kriteria yang terhad untuk keengganan, polis perlu mengeluarkan lesen sebagaimana dipohon. Oleh itu, ss 27(2) dan (5)

adalah dari segi undang-undang sekatan yang munasabah yang bersifat kawal selia dan bukan larangan. Pasukan polis berkewajipan untuk mengekalkan keselamatan dan ketenteraman awam di negara ini demi kepentingan awam. Oleh itu, s 27 Akta tersebut, yang tidak melarang hak untuk berhimpun secara aman, bukanlah tidak berperlembagaan dan tidak bercanggah atau tidak selaras dengan perkara 10(1)(b) Perlembagaan (lihat perenggan 42, 48–49 & 67).

(2) (oleh **Apandi Ali HMR**) Hakikat bahawa s 27 Akta tersebut telah dihapuskan keseluruhannya dan digantikan dengan APA tidak menjadikan isu-isu yang dibangkitkan dalam kes ini akademik. Isu-isu yang ditimbulkan dalam kes ini adalah perkara mengenai undang-undang awam dan patut didengar demi kepentingan awam. Perayu-perayu dalam kes ini telah menimbulkan isu bahawa hak perlembagaan mereka terhadap perhimpunan yang aman tidak dihiraukan tanpa mengira kenapa hak-hak tersebut perlu disekat. Secara dasarnya sekatan itu masih kekal dan perlu didengar, dinilai, dipertimbangkan dan ditangani dengan bijaksana. Selanjutnya, ini adalah kes jenayah di mana perayu-perayu didapati bersalah dan telah pun membayar denda masing-masing berjumlah RM3,900 setiap seorang dan jika gagal tiga bulan penjara. Oleh itu, perayu-perayu mempunyai kepentingan secara langsung dalam meneruskan rayuan ini berhubung isu-isu yang dihadkan dan untuk membatalkan sabitan mereka, kerana sekiranya mereka berjaya, status quo mereka akan dipulihkan dan denda mereka dikembalikan. Ini bertentangan dengan mana-mana hujah akademik atau andaian (lihat perenggan 50–51, 59 & 65).

(3) (oleh **Hamid Sultan HMR, menentang**) Rekod rayuan dan penghakiman Mahkamah Tinggi telah gagal mengutarakan isu itu bahawa perhimpunan tanpa lesen bukan perhimpunan haram berdasarkan s 141 Kanun Keseksaan dibaca bersama perkara 10 Perlembagaan. Adalah sukar untuk memahami bagaimana pertuduhan berlandaskan premis perhimpunan haram boleh berjaya tanpa membuktikan elemen-elemen penting s 141 Kanun Keseksaan, dengan mengambil kira bahawa peruntukan berhubung s 27(5) Akta tersebut adalah bertentangan dengan perkara 10 Perlembagaan kerana menegaskan bahawa lesen patut dikeluarkan untuk perhimpunan itu. Perkara 10 Perlembagaan tidak membenarkan perhimpunan yang tiada lesen itu menjadi suatu jenayah. Pada dasarnya, hak untuk berhimpun dengan aman adalah hak yang dijamin dalam Perlembagaan dan tidak boleh membenarkan sanksi keseksaan digubal apabila rakyat berhimpun secara aman tanpa melakukan kesalahan di bawah Kanun Keseksaan (lihat perenggan 114).

(4) (oleh **Hamid Sultan HMR, menentang**) Walaupun perkara 10(2)(b)

membenarkan perundangan untuk membenarkan sekatan berkaitan hak untuk berhimpun, adalah undang-undang tetap bahawa sekatan itu tidak boleh membentuk larangan. Perkataan sekatan kini mempunyai maksud yang diperluaskan sepertimana diberikan oleh keputusan Mahkamah Persekutuan dalam kes *Siva Segara*. Dalam kes ini terdapat keperluan di bawah s 27 Akta tersebut untuk memperoleh lesen, tetapi dalam proses tersebut kuasa polis tidak boleh melarang atau menolak pemberian lesen. Ia hanya boleh menyatakan terma-terma untuk mengawal perhimpunan dan lesen itu hendaklah dikeluarkan kepada semua tanpa apa-apa bentuk diskriminasi subjektif yang mana jika tidak akan melanggar perkara 8(1) Perlembagaan. Mahkamah terikat dari segi Perlembagaan untuk menangkap apa-apa kesalahan bertentangan dengan nilai-nilai hak kemanusiaan, dan mengemukakan remedi bagi memastikan rasa hormat dan pengiktirafan diberikan kepada kebebasan individu sebagaimana termaktub dalam Perlembagaan dan juga pengiktirafan Malaysia yang menanelatangani Konvensyen Antarabangsa berkaitan dengan Hak-Hak Asasi. Dalam keadaan berikut rayuan perayu-perayu patut dibenarkan (lihat perenggan 114(b), (d) & 117).]

Notes

For a case on constitutionality, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2706.

For cases on s 27 of the Police Act 1967, see 4(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3227–3228.

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)

Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & Ors [2006] 3 MLJ 208; [2006] 1 CLJ 977, CA (refd)

Centre for PIL v Union of India [2012] 3 SCC 1, SC (refd)

Chai Kheng Lung v Inspector Dzulkarnain Abdul Karim & Anor [2008] 8 MLJ 12, HC (refd)

Chee Soon Juan v PP [2003] 2 SLR 445, HC (refd)

Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors [2007] 5 MLJ 441, HC (refd)

Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (refd)

Dato' Seri Anwar Ibrahim v PP [2004] 1 MLJ 497; [2004] 3 CLJ 747, CA (refd)

Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101, FC (refd)

Datuk Yong Teck Lee v PP & Anor [1993] 1 MLJ 295, HC (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697, SC (refd)

Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213; [2007] 1 CLJ 19, CA (folld)
EP Royappa v State of Tamil Nadu [1974] 4 SCC 3, SC (refd)
Eu Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37 (refd)
Francis v Chief of Police [1973] AC 761, PC (refd)
Gobind Singh Deo v Yang Di Pertua, Dewan Rakyat & Ors [2010] 2 MLJ 674, HC (refd)
Golak Nath v State of Punjab AIR 1967 SC 1643, SC (refd)
Government of Malaysia v Lim Kit Siang; United Engineers (Malaysia) Berhad v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)
Himat lal K Shah v Commissioner of Police, Ahmedabad and anor 1973 SCR (2) 266, SC (refd)
Hubbard v Pitt [1976] QB 142, QBD (refd)
IR Coelho v State of Tamil Nadu [2007] 2 SCC 1, SC (refd)
Indulal K Yagnik v State of Gujarat AIR 1963 Guj 259, HC (refd)
Inspector General of Police v All Nigeria People's Party and others [2007] AHRLR 179 (Ng), CA (refd)
JB Jeyaretnam v PP and another appeal [1990] 1 MLJ 129, HC (refd)
Kamara and others v Director of Public Prosecutions [1973] 2 All ER 1242, HL (refd)
Kameshwar Prasad and Ors v The State of Bihar and Anor AIR 1962 SC 1166, SC (refd)
Kesavananda Bharati v State of Kerala AIR 1973 SC 1461, SC (refd)
Koh Wah Kuan v PP [2007] 5 MLJ 174, CA (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301; [2009] 5 CLJ 631, FC (folld)
Lim Kit Siang v Dato Seri Dr Mahathir Mohamad [1987] 1 MLJ 383, SC (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)
Madhavan Nair & Anor v PP [1975] 2 MLJ 264 (refd)
Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113; [2006] 3 CLJ 177, FC (refd)
Minerva Mills Ltd v Union of India AIR 1980 SC 1789, SC (refd)
Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors [2011] 6 MLJ 507, CA (refd)
Mulundika v The People [1996] 2 LRC 175, SC (refd)
Munhumeso, Re [1994] 1 LRC 282, SC (refd)
Nandini Sundar v State of Chattisgarh AIR 2011 SC 2839, SC (refd)
New Patriotic Party v Inspector General of Police (2001) AHRLR 138 (GhSC) 1993, SC (refd)
Pendakwa Raya v Cheah Beng Poh & Ors; Cheah Beng Poh & Ors v Pendakwa Raya [1984] 2 MLJ 225; [1984] 2 CLJ(Rep) 382, FC (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311; [1987] 1 CLJ 550, SC (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1; [2007] 6 CLJ 341, FC (refd)
Ram Jethmani v Union of India & ors [2011] 7 SCC 104, SC (refd)

Rev Christopher Mtikila v Attorney General (Civil Case No 5 of 1993), HC (refd)
Robert Linggi v The Government of Malaysia [2011] 2 MLJ 741, HC (refd)
Romesh Thappar v The State of Madras [1950] SCR 594, SC (refd)
SMT Nilabati Behera Alias Lalita Behera v State of Orissa and Another AIR 1993 SC 1960, SC (refd)
Siva Segara v PP [1984] 2 MLJ 212, FC (folld)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507, FC (folld)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289; [1998] 3 CLJ 85, CA (refd)
Suresh Chaudhary v State of Bihar [2003] 4 SCC 128, SC (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261, CA (refd)
Teoh Heng Han, Re; Ex P OCBC Bank (M) Bhd [2010] 9 CLJ 328, HC (refd)
Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran [2006] 6 MLJ 689; [2006] 4 CLJ 847, FC (refd)
Tun Datu Haji Mustapha bin Datu Harun v State Legislative Assembly of Sabah & Anor [1993] 1 MLJ 26, HC (refd)
Vacher & Sons Ltd v London Society of Compositors [1913] AC 107, HL (refd)
Vishaka & Ors v State of Rajasthan AIR 1997 SL 3011, SC (refd)

Legislation referred to

Bombay Police Act 1951[IND] ss 33, r 7
Civil Law Act 1956 ss 3, 25
Courts of Judicature Act 1964 s 50(2)
Constitution of India [IND] arts 19(1)(b), 53(1), (2), Part III
Constitution of Zimbabwe [ZIMB] ss 6(1), (2), (3), (6), 11, 20, 20(1), (2), (6), 21, 21(1), (3), (4), 24(2),
Criminal Procedure Code ss 173A, 294
Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 3(3)(a), (3)(b)
Federal Constitution arts 4(1) 5, 5(1), 8(1), 10, 10(1)(b), (1)(c), (2), (2)(b), (2)(c), 37, 37(1), 39, 40(1), (1A), 41, 121(1), 124, 159, Part II
Law and Order (Maintenance) Act 1960 [ZIMB] ss 6, 6(2), (6)
Legal Profesion Act 1976 s 46A
Peaceful Assembly Act 2012
Penal Code s 141
Police Act 1967 s 27, 27(2), (5), (5)(a), (8)
Public Meeting and Processions Act 1969 [UK] s 5
Police Ordinance of 1952
Public Order (Preservation) Ordinance 1958
Rules of Court 2012 O 53

Appeal from: Suit No 41–120 of 2009 (High Court, Kuala Lumpur)

Edmund Bon Tai Soon (Chan Yen Hui and New Sin Yew with him) (Daim & Gamany) for the appellants.

Yusaini Amer bin Abd Karim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Apandi Ali JCA (delivering majority judgment of the court):

INTRODUCTION

[1] All the five appellants were charged under s 27(5) of the Police Act 1967 ('PA 1967'). After a full trial before the magistrate all the appellants were convicted and were fined RM3,900 each, in default three months imprisonment. The appeal is in respect of the second and fourth appellants only.

[2] At the commencement of the appeal proceedings, the first, third and fifth appellants withdrew their appeals. As such in essence the appeals before us were in respect of the second and fourth appellants only.

[3] My learned brother Justice Linton Albert JCA have read the draft judgment and had indicated his agreement that this judgment to be the judgment of this court. However my learned brother, Justice Hamid Sultan bin Abu Backer had indicated his disagreement with this judgment and had written a dissenting judgment. As such, this is a majority judgment of this court.

[4] The charge against all the appellants reads as follows:

> Bahawa kamu pada 8hb Jun 2001 di antara jam 2.00 petang hingga 2.15 petang, di perkarangan Masjid Negara, Jalan Perdana, dalam Daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur telah didapati berada dalam satu perhimpunan haram (unlawful assembly) iaitu satu perhimpunan di tempat awam di mana lesen di bawah seksyen 27(2) Akta Polis 1967 (Akta 344) tidak dikeluarkan, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 27(5) Akta Polis 1967 (Akta 344) dan boleh dihukum di bawah seksyen 27(8) Akta yang sama.

In English it reads:

> That you on the 8th of June 2001 between 2.00 pm to 2.15 pm, in the National Mosque compound, Jalan Perdana, in the District of Dang Wangi, Wilayah Persekutuan Kuala Lumpur has been found to be in an unlawful assembly, that is a gathering in a public place where a license under section 27(2) of the Police Act

A 1967 (Act 344) was not issued, therefore you have committed an offence under section 27(5) of the Police Act 1967 (Act 344) and punishable under section 27(8) of the same Act.

B **[5]** All the five appellants had appealed to the High Court Kuala Lumpur which appeals had been dismissed by the learned judge Dato' Su Geok Yiam on the 27 January 2011.

C **[6]** Since the case originated from the magistrates court the appellants obtained leave to appeal to this court as required under s 50(2) of the Courts of Judicature Act 1964. The issues of law that were allowed to be ventilated in the appeal were circumscribed by a single question posed:

D Bahawa seksyen 27(2) dan (5) Akta Polis 1967 adalah tidak berpelembagaan dan berlawanan dengan peruntukan Perkara 10 Perlembagaan Persekutuan berdasarkan kepada keputusan Mahkamah Persekutuan di dalam kes *Lee Kwan Woh v Public Prosecutor* [2009] 5 CLJ 631 dan kes *Sivarasa Rasiah v Public Prosecutor* [2010] 3 CLJ 507.

E The English version:

F Whether section 27(2) and (5) of the Police Act 1967 are unconstitutional and in conflict or inconsistent with the provision of Article 10(1)(b) of the Federal Constitution based on the Federal Court decisions in *Lee Kwan Who v Public Prosecutor* [2009] 5 CLJ 631 and *Sivarasa Rasiah v Public Prosecutor* [2010] 3 CLJ 507.

[7] To fully appraise the relevant issues, perhaps it is pertinent to look from a birds' eye view perspective.

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[8] The constitutional challenge to s 27(2) and 27(5) of the Act was taken from the beginning and form the backbone of the contention by the appellants. In defending a criminal charge such as this an accused is allowed to mount such a collateral contention on the legality or constitutionality of the relevant H provisions as part of the defence — see *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37; *Ahmad Saidi bin Md Isa v Timbalan Menteri Hal Ehwal & ors* [2006] 3 MLJ 208; [2006] 1 CLJ 977.

THE IMPUGNED LEGISLATION

I

[9] The contentious legislation to which its constitutionality is challenged is part of the then s 27 of the PA 1967. We herein quote the full version of s 27 of the PA 1967 (as it stood then, prior to the amendment) (relevant provisions in bold):

27 Power to regulate assemblies, meetings and processions

(1) Any Officer in Charge of a Police District or any police officer duly authorized in writing by him may direct, in such manner as he may deem fit, the conduct in public places in such Police District of all assemblies, meetings and processions, whether of persons or of vehicles and may prescribe the route by, and the time at, which such assemblies or meetings may be held or such procession may pass.

(2) *Any person intending to convene or coliect any assembly or meeting or to form a procession in any public place aforesaid, shall before convening, collecting or forming such assembly, meeting or procession make to the Officer-in-Charge of the Police District in which such assembly, meeting or procession is to be held an application for a licence in that behalf, and if such police officer is satisfied that the assembly, meeting or procession is not likely to be prejudicial to the interest of the security of Malaysia or any part thereof or to excite a disturbance of the peace, he shall issue a licence in such form as may be prescribed specifying the name of the licensee and defining the conditions upon which such assembly, meeting or procession is permitted;*

Provided that such police officer may at any time on any ground for which the issue of a licence under this subsection may be refused, cancel such licence.

(2A) An application for a licence under subsection (2) shall be made by an organization or jointly by three individuals.

(2B) Where an application is made jointly by three individuals, the police officer to whom the application is made shall refuse the application if he is satisfied that the assembly meeting or procession for which a licence is applied is in actual fact intended to be convened, collected or formed by an organisation.

(2C) Where an application is made jointly by three individuals, the police officers issuing the licence shall specify in the licence, the names of those persons as licensees.

(2D) No licence shall be issued under subsection (2) on the application of an organisation which is not registered or otherwise recognized under any law in force in Malaysia.

(3) Any police officer may stop any assembly, meeting or procession in respect of which a licence has not been issued or having been issued was subsequently cancelled under subsection (2) or which contravenes any of the conditions of any licence issued in respect thereof under that subsection; and any such police officer may order the persons comprising such assembly, meeting or procession to disperse.

(4) Any person who disobeys any order given under the provisions of subsection (1) or subsection (3) shall be guilty of an offence.

(4A) Where any condition of a licence issued under the provisions of subsection (2) is contravened, the licensees shall be guilty of an offence.

(5) *Any assembly, meeting or procession —*

(a) *which takes place without a licence issued under subsection (2); or*

(b) *in which three or more persons taking part neglect or refuse or obey any order given under the provisions of subsection (1) or subsection (3),*

shall be deemed to be an unlawful assembly, and all persons attending, found at or taking part in such assembly, meeting or procession and, in the case of an assembly, meeting or procession for which no licence has been issued, all persons taking part of concerned in convening, collecting or directing such assembly, meeting or procession, shall be guilty of an offence.

(5A) in any prosecution for an offence under subsection (5) of attending, being found at or taking part in an assembly, meeting or procession which is an unlawful assembly, it shall not be a defence that the person charged did not know that the assembly, meeting or procession was an unlawful assembly or did not know of the facts or circumstances which made the assembly, meeting or procession an unlawful assembly.

(5B) in any prosecution for an offence under subsection (5) of attending or being found at an assembly, meeting or procession which is an unlawful assembly, it shall be a defence that the presence of the person charged came about through innocent circumstances and that he had no intention to be otherwise associated with the assembly, meeting or procession.

(5C) For the purposes of subsection (5), where it appears from all the circumstances relating to an assembly, meeting or procession that it was convened, collected or directed by or with the involvement, participation, aid, encouragement, support or connivance of an organization, every member of the governing body of the organization shall be deemed to have taken part or been concerned in convening, collecting or directing the assembly, meeting or procession unless he proves that he did not know nor had any reason to believe or suspect that the assembly, meeting or procession was going to take place or, if he knew or had reason to believe or suspect as aforesaid, he had taken all reasonable steps to prevent the assembly, meeting or procession from taking place or, if it was not reasonably within his power to so prevent, he had publicly objected to or dissociated himself from the convening, collecting or directing of the assembly, meeting or procession.

(6) Any police officer may, without warrant, arrest any person reasonably suspected of committing any offence under this section.

(7) Any person aggrieved by the refusal of the Officer-in-Charge of a Police District to issue a licence under subsection (2) may within forty-eight hours of such refusal appeal in writing to the Commissioner of Chief Police Officer; and the decision of the said Commissioner or Chief Police Officer thereon shall be final.

(8) Any person who is guilty of an offence under this section shall be liable on conviction to a fine of not less than two thousand ringgit and not more than ten thousand ringgit and imprisonment for a term not exceeding one year.

(8A) Sections 173A and 294 of the Criminal Procedure Code shall not apply in respect of an offence under this section.

The full text of art 10 of the Federal Constitution reads as follows (with relevant provisions in bold):

(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 association.

(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 iaw 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 in, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

[10] Before us the appellants' argument on s 27(2) and 27(5) of the PA 1967 is placed in two alternatives:

(a) first, the appellants contend that the requirement to obtain a licence for any assembly under s 27(2) of the PA 1967, and by extension, the 'deemed' offence of assembling without a licence under s 27(5)(a) of the same Act are unconstitutional. They say the said provisions of s 27(2) and 27(5) are unconstitutional because they amount to a form of 'prohibition' and not a permitted 'restriction' under art 10(2)(b) of the

Federal Constitution. Simply put they contend that the PA 1967 cannot take away by the 'prohibition' what the Federal Constitution specifically gives as part of fundamental liberty. Quite obviously this argument can only be accepted if the prior requirement for a police permit prescribed in s 27(2) of the PA 1967 in fact and in law, amounts to a 'prohibition'; and

(b) in the alternative, the appellants are contending that, even if the courts were to decide that the provision does not amount to a 'prohibition' but a mere 'restriction', the 'restriction' therein is nevertheless an unreasonable one, violative of art 10(2)(b) of the Federal Constitution.

HISTORICAL PERSPECTIVE OF EARLY CASES THAT DECIDED ON S 27 (2) AND 27(5) OF THE PA 1967

[11] There are local cases that have decided on these very impugned provisions of the PA 1967.

[12] In *Pendakwa Raya v Cheah Beng Poh & Ors; Cheah Beng Poh & Ors v Pendakwa Raya* [1984] 2 MLJ 225; [1984] 2 CLJ (Rep) 383, a decision of FJ Hashim Yeop Sani setting as the High Court judge tracing the history of the scheme of the Act held:

> As far as can be gathered from the language of s 27 of the Police Act 1967, the scheme of legislation in the section seems to be as follows. There is a general power given by law to senior police officers to direct the conduct of assemblies, meetings and processions and in the case of processions to prescribe the route etc. Any person who intends to convene an assembly or meeting or to form a procession in a public place is required to apply to the OCPD of the area for a licence. It would appear that the OCPD must issue the licence in ordinary cases and he can only refuse to issue the licence if he is not satisfied that the assembly, meeting or procession is not likely to be prejudicial to the security or to excite a disturbance of the peace. After he issues the licence the OCPD can cancel the licence if subsequently he is not satisfied that the assembly, meeting or procession is not likely to be prejudicial in the interest of security or that he is not satisfied that it is not likely to excite a disturbance of the peace …

After explaining what constitutes assembly the learned judge further held (at p 227 (MLJ); p 387 (CLJ)):

> It was strenuously argued that s 27(5) of the Act creates uncertainty and puts innocent individuals in fear of being arrested for being members of an unlawful assembly if they assemble in a public place for lawful object. Examples were made of family outings consisting of three or more members of the family patronising a laksa stall. Another illustration given was that of a snake charmer gathering a crowd for his show. With respect all these illustrations reflect in my view too naive an approach to ordinary human affairs. In my view s 27(5) of the Police Act should not be read in

isolation. It should be read not only in the context of all the provisions carried under s 27 itself but also the other provisions relating to unlawful assembly carried in the general law.

[13] It is our judgment that what was expressed by the learned judge CJ Hashim Yeop Sani in *Cheah Beng Poh* quoted above was in effect an examination whether the restriction expressed in s 27(2) and (5) is in law a mere restriction or that it amounts to a total prohibition of the basic right under art 10(1)(b) with regards to the right to assemble peaceably and without arms. There are authorities that support the view that only prohibitions that amount to a total prohibition of the basic right run the risk of being nullified as against the Constitution.

It is for that reason the learned judge had earlier on in the same judgment said:

> The court as guardian of the rights and liberties enshrined in the Constitution is always jealous of any attempt to tamper with rights and liberties. But the right in issue here ie the right to assemble peaceably without arms is not absolute for the Constitution allows Parliament to impose by law such restrictions as it deems necessary in the interest of security and public order. In my view, what the court must ensure is only that any such restrictions may not amount to a *total prohibition* of the basic right as to nullify or render meaningless the right guaranteed by the Constitution.

[14] It is clear that in *Cheah Beng Poh*, in upholding the validity and constitutionality of s 27(2) and (5) of the PA 1967, FJ Hashim Yeop Sani must necessarily hold that the impugned provisions were not 'prohibition' of the basic right of assembly conferred in art 10(1)(b). This can be seen from the above quoted passages.

[15] The above said High Court judgment and observations were confirmed at the Federal Court by way of a Federal Court criminal reference in *Siva Segara v Public Prosecutor* [1984] 2 MLJ 212. But the Federal Court there in a written judgment by Abdul Hamid CJ (Malaya) then went on to a great extent addressing several relevant issues, specifically:

(a) issue of knowledge and intention, if required for the offence under s 27(5)(a) of the PA 1967;

(b) whether s 27(5)(a) of the PA 1967 can be interpreted without reference or aid to all other provisions of that section; and

(c) in addressing the ingredients of the offence of s 27(5) read with s 27(2) of the PA 1967, what type of assemblies are caught within the criminality ambit.

All the above issues are relevant for our purposes as well.

[16] In respect of issue (a) the Federal Court held that knowledge or intention is required for the 'participants' and 'organisers' respectively. This is correct as knowledge and intention are two faces of intention itself. They are two sides of the same coin. Knowledge is intention as to circumstances of the offence and intention itself denotes intention as to consequence. Glanville Williams in his Textbook on Criminal Law supports this idea. In participating in an unlawful assembly one must have knowledge that the assembly is unlawful (circumstances). In organising an unlawful assembly one intends to breach the requirement with consequence. The Federal Court stated:

> Clearly therefore under sub-s 5(a) itself, there are two separate offences, applicable to two categories of person or persons namely, (a) all persons taking part in such assembly and (b) all persons taking part in convening, collecting, etc, such assembly.
>
> The first category, that is, those taking part in the assembly, must relate specifically to an assembly, … which takes place without a licence issued under the provisions of sub-s (2). The necessary question that calls for determination is what assembly requires a licence under that sub-section. It is, to this effect and in answer to this question what we form the view that sub-s (5)(a) has to be construed with reference to sub-s (2). Subsection (2) speaks of an assembly, meeting or procession which is intended to be convened, collected, etc, in other words, an assembly, meeting or procession which is intended to be organised. It is in this respect that in our view the element of intention becomes a necessary element. In the first place, it applies to the convenor or organiser. If therefore a person intends to convene or organize an assembly and he in fact takes part in convening or organising an assembly envisaged by this subsection and that assembly does take place without the convenor ororganiser first obtaining a licence, such assembly is deemed by law to be an unlawful assembly and the convenor or organiser commits an offence under sub-s (5)(a) of s 27. Further, we form the view and it is in respect of such assembly, that is, the assembly which takes place without a licence issued under the provisions of sub-s (2), that whoever takes part in such an assembly commits an offence under sub-s (5)(a). That being the case, knowledge on the part of the person who takes part in such an assembly becomes the essential ingredient of the offence. It is to be observed that both categories of offences apply to those 'taking part', in other words, 'participation'.
>
> …, in the case of (a) there must necessarily be an element of knowledge and (b) an element of intention. The operative words under sub-s (5) are 'taking part'. In this regard we approve that part of the judgment in *Public Prosecutor v Ismail bin Ishak* [1976] 1 MLJ 183 where it was held that there is a distinction between 'taking part' in the Police Act and 'being a member of or is found at an unlawful assembly' under the Penal Code. The knowledge we refer to here is the knowledge that a person has that he is taking part in a public place in an assembly, meeting, etc, that is being convened or organised without a licence.
>
> To this effect we are of the opinion that the construction to be laced upon sub-s (5)(a) of s 27, shall to be read in the light of or with reference to s 27(2).

[17] With regard to suggestions by the appellants that an innocent family

outing could be caught as an assembly needing a police licence, apart from the retort by FJ Hashim Yeop Sani in *Cheah Beng Poh*'s case (to which we have quoted above) the Federal Court in *Siva Segara* said:

> We are also of the opinion that it is not the intention of Parliament that a gathering or an assemblage of persons in a public place shall become an unlawful gathering or assembly. An assembly, in a public place brought about by a spontaneous collection, gathering or assemblage of persons does not necessarily come within the scope of sub-s (5)(a) of s 27. The mere gathering or assemblage is insufficient to attract the deeming provision to be invoked. Such an assembly cannot by law be deemed to be unlawful …

With that holding the argument that s 27(2) and (5) in effect forbid any and all assembly or gathering of persons without distinction in law should no longer be available as a valid argument.

[18] It is of great significance to note that the Federal Court in *Siva Segara* and the High Court in *Cheah Beng Poh* found it relevant to trace the legal history of the Malaysian laws on assembly and public order from the common law through the provisions in the Criminal Procedure Code (Chapter VIII), Penal Code (Chapter VIII) (offences against public tranquility), Public Order (Preservation) Ordinance 1958, Police Ordinance of 1952 until the PA 1967. In fact the Federal Court in *Siva Segara* held that the underlying object of all these provisions clearly was to uphold public order and to protect the public generally against lawlessness and disorder. In that regard, they further hold the position seems to be similar to that under the common law (*Kamara and others v Director of Public Prosecutions* [1973] 2 All ER 1242 was quoted).

[19] It is important to deal with the two cases in extensor as they are landmark cases on the point. Further the cases laid down the foundation for laws regarding right to assembly in this country. They laid down the historical perspectives for the local jurisprudence in this matter. From our examination of the reported cases in our jurisdiction, the legal and constitutional position of the laws in this country pertaining to the issue of unlawful assembly especially that subscribed in the PA 1967 had been consistently in favour of upholding these laws in relation to the constitutional right provided. We shall now refer to some of these cases.

[20] In *Madhavan Nair & Anor v Public Prosecutor* [1975] 2 MLJ 264, Chang Min Tat J in the High Court had to deal with a reference from a magistrate in Petaling Jaya on the following question:

> Whether the OCPC may by virtue of the powers conferred upon him by s 27 of the Police Act 1967 to issue licences for public performances impose a condition on the said licence which contravenes art 10 of the Federal Constitution of Malaysia.

[21] While recognising the question to be silly as it was pregnant with the obvious answer, the learned judge acknowledged that the real purpose of the defence was to strike down a condition of the licence and therefore the need for the learned judge to deal with the issues nevertheless. Chang Min Tat J held as follows:

> (a) The OCPD has the powers under the Police Act 1967 to impose the condition in the licence that the public meeting should not make any reference to the results of the MCE examination and the status of Bahasa Malaysia as the national language of the Federation;
>
> (b) There was nothing erroneous or unconstitutional for the OCPD to impose as a condition of the licence on the right to convene a public meeting (likewise for an assembly) a restriction that touches on another right, viz, freedom of speech and expression as both freedoms are not absolute. Section 40 of the Interpretations Act, No 23 of 1967 was found to aid this proposition;
>
> (c) Section 27 of the Police Act 1967 is not without guidance as to the OCPD's exercise of the licensing power. His sole guide in issuing such licences was to preserve public order and security of his district in particular and the country at large, and clearly this can best be done by him by prevention rather than detection.

[22] The court there relied on a Privy Council decision in *Francis v Chief of Police* [1973] AC 761, an appeal from the Court of Appeal for St Christopher, Nevis and Anguilla. That case involved an appellant charged with using a loudspeaker during a public meeting without the permission (or licence) or the chief of police, contrary to s 5 of the Public Meeting and Processions Act 1969. It was contended that s 5 providing for control of loudspeakers at public meetings was ultra vires the Constitution because it curtailed the freedom of communication (equivalent to our freedom of speech and expression) guaranteed by s 10 of their Constitution (substantively equivalent to ours). Both the High Court and the Privy Council decided that the provision was not ultra vires the Constitution.

[23] In the High Court case of *Datuk Yong Teck Lee v Public Prosecutor & Anor* [1993] 1 MLJ 295 the issues are more pointed and similar to our current situation. There, the plaintiff, Datuk Yong Teck Lee, an elected Sabah Legislative Assemblyman was charged on two charges of participating in an illegal procession in Kota Kinabalu. He filed an originating summons seeking two declarations, one of which is relevant here:

> A declaration that ss 27(2) and (5) of the Police Act, 1967 are ultra vires the Federal Constitution in that they contravene Article 10(1)(b) as the stated sections are prohibitive and not restrictive in nature.

[24] *The issue is squarely within the case herein*. Syed Ahmad Idid J in that case held that under s 27(2), the application for a licence has to satisfy the police officer that the assembly, meeting or proceeding is not prejudicial to the interest of security or that it will not excite disturbance of the peace. When that satisfaction is achieved, the police will and must issue a licence. The section is not prohibitive. It is facilitative and regulatory and designed to meet the requirements of art 10(2). It was therefore held to be not ultra vires the Federal Constitution. The right therefore is not illusory. In coming to the conclusion that the section is not prohibitive the learned judge stressed on the phrase in s 27(2) '… he *shall* issue a licence'. (Emphasis added.) Similar sentiment of jurisprudence is expressed across the causeway in Singapore.

[25] In *JB Jeyaretnam v Public Prosecutor and another appeal* [1990] 1 MLJ 129 (High Court Singapore) per Chan Sek Keong J (as he then was) ruled that:

> … a system of licencing is the natural method, there must be some licencing authority to grant or refuse the permission.
>
> … There is no evidence and no reason to infer that he has abused the power or would be likely to abuse it in any way. It is reasonable to assume that the legislature knowing the local conditions, made a suitable choice of licencing authority.
>
> … he is not without guidance. It is plain from the preamble to the Act and from its provisions as a whole that its object is to facilitate the preservation of public order. That being the object of the Act, he must exercise his powers bona fide for the achievement of that object. *Roncarelli v Duplesis* (1959) 16 DLR (2d) 689.

[26] The learned judge adopted several propositions in two other cases. He adopted passages in *Indulal K Yagnik v State of Gujarat* AIR 1963 Guj 259, per Miabhoy J that the provision:

> … is also not naked and arbitrary, but it is hedged in by a few conditions which indicate the policy governing the exercise of that power.
>
> …
>
> … a restriction cannot be held to be unreasonable on the ground that the power may be exercised by an officer mala fides. As pointed out in the same case (AIR 1954 SC 465), in such a case the arms of the courts are strong enough to deal with such a refractory officer.'

[27] This Singapore decision also adopted the decision in *Arthur Francis v Chief of Police* (the Privy Council decision) adverted to earlier.

[28] In another Singapore case, *Chee Soon Juan v Public Prosecutor* [2003] 2 SLR 445, CJ Yong Pung How adopting *JB Jeyaretnam*'s decision confirmed the validity of the licensing system for purposes of holding a rally in Singapore.

A INVITATION BY THE APPELLANTS FOR US TO ADOPT CASES FROM THE COMMONWEALTH JURISDICTION

[29] In the course of the argument by all parties, the appellants had urged upon us to borrow and adopt various decisions in the Commonwealth over similar issues. The following are the cases that have been referred to us:

(a) from Zimbabwe in the case of *Re Munhumeso* [1994] 1 LRC 282, a decision of the Supreme Court of Zimbabwe;

(b) from Zambia in the case of *Mulundika v The People* [1996] 2 LRC 175, a decision of the Supreme Court of Zambia;

(c) from Ghana in the case of *New Patriotic Party v Inspector General of Police* (2001) AHRLR 138 (GhSC) 1993, a decision of the Supreme Court of Ghana;

(d) from Tanzania in the case of *Rev Christopher Mtikila v Attorney General* (Civil Case No 5 of 1993), a High Court judgment from Tanzania;

(e) from Nigeria in the case of *Inspector General of Police v All Nigeria People's Party and others* [2007] AHRLR 179 (Ng) (CA), a decision of Court of Appeal of Nigeria; and

(f) from India in the cases of *Himat lal K Shah v Commissioner of Police, Ahmedabad and anor* 1973 SCR (2) 266, a decision of the Supreme Court of India and *Kameshwar Prasad & Ors v The State of Bihar and anor* AIR 1962 SC 1166 (SC), another Supreme Court decision.

[30] As far as African cases are concerned we have looked at them very closely. The leading and earliest recent case in Africa is the Zimbabwe decision of the Supreme Court in *Re Munhumeso and others*, a decision in 1994. We think it is best that we deal with this case in a little more detail as our commentary on this case would be similarly applicable to the rest of the African cases as every one of the African cases subsequent to *Re Munhumeso* adopted this decision and the jurisprudence expressed therein. In that case the Zimbabwe Congress of Trade Unions applied pursuant to s 6(2) of the Law and Order (Maintenance) Act to the regulating authority (Police) for permission to stage a peaceful public procession in Harare one Saturday morning. The application was denied and no explanation was given for the refusal. In fact, the relevant police officer in command for Harare Central District gave a cryptic response to their application: 'We must advise you that taking other factors into consideration the application was not successful'. No factors or reasons were disclosed.

[31] Not paying heed to the refusal, on the morning in question some member workers commenced a procession towards the city centre. They were

stopped by police officers who advised them that their participation in the procession was illegal and called upon them to disperse. Many dispersed but six of the marchers who continued their march were arrested. They were charged in a magistrate court with a contravention of s 6(6) of the Law and Order (Maintenance) Act, it being alleged that they have taken part in a public procession for which a permit under s 6(2) of the Act had not been obtained. Counsel for the applicants sought to argue that s 6 of the Act was ultra vires ss 20 and 21 of the Constitution of Zimbabwe which deals with the freedom of expression and freedom of assembly respectively. This was the typical collateral attack that we are accustomed to. The presiding magistrate however referred this important question to the Supreme Court of Zimbabwe for determination under s 24(2) of the Constitution. Sections 20(6) and 21(4) of the Constitution contained identically worded limitations on the freedom of expression and freedom of assembly respectively to the effect that such freedoms did not confer any rights to their exercise in or any street or thoroughfare which existed for the free passage of persons or vehicles. The attorney general and the applicants' counsel took divergent views on the manner of interpretation of ss 20(6) and 21(4). The attorney general argued that the restraints were lawful, clear and ought to be accorded a wide meaning and the unambiguous language totally prohibited such freedoms in places existing for the free passage of persons or vehicles regardless of whether the exercise would cause any actual interference with such traffic. This was an unnecessary total concession by the Attorney General of Zimbabwe. The applicants' counsel however argued that ss 20(6) and 21(4) were to be narrowly construed so that they limit the freedom of expression and freedom of assembly to only situations where traffic would be impeded by a public gathering of procession. The applicants also submitted that the restrictions of s 6 of the Act were not justifiable in a democratic society.

[32] Section 20 of the Constitution of Zimbabwe as relevant, reads:

> (1) Except with his own his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision —
>
> (a) In the interests of defence, public safety, public order, the economic interests of the State, public morality or public health …
>
> Except so far as that provision or, as the case may be, the things done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

A …

(6) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of expression in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles.

B And s 21 of the Constitution of Zimbabwe provides:

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.

C …

(3) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision -

D (a) In the interests of defence, public safety, public order, public morality or public health;

… except so far as that provision or, as the case may be the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

E (4) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of assembly or association in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles.

F **[33]** The impugned legislation of s 6 of the Law and Order (Maintenance) Act, of Zimbabwe are as follows:

(1) A regulating authority may issue directions for the purpose of controlling the conduct of public processions within his area and the route by which and the times at which a public procession may pass.

G (2) Any person who wishes to form a procession shall first make application in that behalf to the regulating authority of the area in which such procession is to be formed and if such authority, is satisfied that such procession is unlikely to cause or lead to breach of the peace or public disorder, he shall, subject to the provisions of section ten, issue a permit in writing authorizing such procession and specifying the name of the person to whom it is issued and such conditions attaching to the holding of such procession as the regulating authority may deem necessary to impose for the preservation of public order.

H (3) Without prejudice to the generality of the provisions of subsection (2), the conditions which may be imposed under the provisions of that subsection may relate to -

I (a) The date upon which and the place and time at which the procession is authorized to take place;

(b) The maximum duration of the procession; A

And to any other matter designed to preserve public order.

…

(6) Any person who convenes, directs or takes part in a public procession for which a permit under subsection (2) has not been obtained shall be guilty of an offence and may be arrested without warrant, and shall be liable to a fine not exceeding two hundred dollars or to imprisonment for a period not exceeding one year. B

C

[34] We take note of the drastic differences between ss 20 and 21 of the Zimbabwe Constitution as compared to our art 10 of the Federal Constitution. Firstly, the Zimbabwe Constitution provides for 'to receive and impart ideas and information without interference, …'. Secondly, any restriction justifiable for the rights under s 20 must be 'reasonably justifiable in a democratic society'. D Thirdly, s 20(6) of the Zimbabwe Constitution says 'the provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of expression in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exist for the free passage of persons or vehicles'. This sub-paragraph together with s 21(3) and (4) of the E Zimbabwe Constitution as quoted above form a strong argument for the applicants in the *Re Munhumeso* case. As the thrust of the argument of counsel for the appellants in that case was that, viewed in the their contextual settings ss 20(6) and 21(4) are plainly susceptible of a restricted meaning which, is to this effect: 'The exercise of freedoms of expression and assembly are limited in F public thoroughfares only to the extent that they prevent, or interfere with, the free passage of persons or vehicles in place existing for such traffic; that what is excluded from the asserted freedoms is the consequent right to impede traffic in public ways, in the course of a public gathering or procession; but not the G freedom of a person to express himself, or to foregather with others, without creating a public nuisance or obstruction. Stated otherwise, the purport of ss 20(6) and 21(4) is to preserve the freedoms of expression and assembly in the places specified, provided the right of access is reserved for traffic, both pedestrian and vehicular. What has been removed is nothing more than a right H to impede traffic in thoroughfares by forming a public gathering or procession'.

[35] On the other hand, the argument of the attorney general was that if the said constitutional provision were to be accorded a wide and not a restricted meaning; that they provide a definite restraint upon the enjoyment of rights to I a freedom of expression and assembly; that in clear and unambiguous language they totally prohibit such freedoms in or on any place which exists for the free passage of persons or vehicles and that it matters not their exercise will cause no interference therewith. According to him, where legislation proscribes the

enjoyment of these freedoms in roads, streets, pavements and other similar places, it must be taken to be intra vires the Constitution. And s 6 of the Act is just such a provision.

[36] The Supreme Court held that if the attorney general's view were to be correct the framers of the Constitution would have stated so those limitations in a manner interpreted by the attorney general. Secondly, the Supreme Court held the object of ss 20(6) and 21(4) was simply to underscore what is implicit in s 11 (equivalent to our art 5 of the Federal Constitution); that whereas the freedoms exist and may be enjoyed their exercise does not involve licence to interfere with or obstruct the free passage of persons or vehicles; it is very clear that this lies at the heart of the decision.

[37] The Supreme Court of Zimbabwe held that the interference with or obstruction of the free passage of persons or vehicles was the only reason for the restriction allowed under that part of the Constitution. This was their interpretation of their own Constitution. It is by no stretch of the imagination comparable to our constitutional setting vis a vis s 27 of the PA 1967.

[38] Further, in view of the fact that the phrase 'reasonably justifiable in a democratic society' is a concept recognised in the two provisions of the Zimbabwe Constitution, (which we do not have), further jurisprudential differences and settings exist between our system and theirs.

[39] The subsequent decisions in the rest of the African countries paid great respect to *Re Munhumeso*'s decision and they adopted this decision as their own and as being applicable to their own similar settings and jurisprudence.

[40] The cases from India that were quoted to us, are equally based on constitutional and jurisprudential settings different from ours as decided by our apex court to which we adverted to earlier.

THE SIGNIFICANCE OF THE CASES OF SIVA SEGARA AND CHEAH BENG POH

[41] The decision in *Siva Segara* in the Federal Court, as we have stated earlier, which approved and adopted *Cheah Beng Poh*'s decision in no uncertain terms decided the following:

(a) the restrictions imposed by s 27(2) of the PA 1967 read together with s 27(5) of the same do not impose a total prohibition of the right to assembly and therefore it comes within the permissible limits of art 10(2)(b) of the Malaysian Constitution;

(b) it was clearly stated in both the said decisions, for any restriction to amount to a prohibition it has to be a total prohibition, for which s 27(2) and 27(5) of the PA 1967 read together are not violative of and therefore art 10(2)(b) of our Constitution was not breached;

(c) s 27 of the PA 1967 in authorising the OCPD to process the application or permit for assembly of public meetings etc, has given clear guidelines in its preamble and in s 27 itself read together with art 10 of the Federal Constitution. The powers to be exercised by the OCPD are canalised and are not naked and potentially not arbitrary nor disproportionate;

(d) quite clearly our system places more trust on the police in their management of national security and public order issue. This perhaps could be the factual differences on the ground between the situations in the African nations and us; and

(e) in both *Cheah Beng Poh* and *Siva Segara* the courts have held that the OCPD must issue the licence. He has no discretion except that he can refuse to issue the licence if he is not satisfied that the assembly, meeting or procession is not likely to be prejudicial to the security or to excite a disturbance of the peace. This is the only ground the OCPD can invoke in order to refuse the licence or subsequently cancel it after approval for cause to the contrary.

[42] The Federal Court decision in *Siva Segara* has been closely followed by a number of our High Courts in both East and West Malaysia as we have alluded to earlier. *Siva Segara* is a binding decision on us. We are in no position to disagree with that decision. It is perhaps worthy of note that the Federal Court then constituted of a formidable quorum of Abdul Hamid CJ (Malaya), FJ Mohamed Azmi Kamaruddin and FJ Syed Agil Barakbah. It is suffice to quote the case of *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113, in relation to our duty to be bound by the apex court decision as a matter of stare decisis:

> Gopal Sri Ram JCA is therefore correct in saying that *Lam Kong Co Ltd v Thong Guam Co Pte Ltd* [2000] 4 MLJ 1; [2000] 3 CLJ 769 and *Capital Insurance Bhd v Aishah Manap* [2000] 4 MLJ 65; [2000] 4 CLJ 1 were wrongly decided. Unfortunately he is not the right authority permitted by law to express such an opinion. As both cases on judgments of the Federal Court he is bound to follow them whether he agrees with them or not. The stand taken by him is in blatant disregard of the doctrine of state decisis particularly when the need to comply with this fundamental rule of the common law was brought to his attention by James Foong JCA in his separate judgment.
>
> … we can only add that the castigation of a judge of the High Court for not respecting the doctrine of state decisis must apply with greater force to a judge of the Court of Appeal.

A OUR ANALYSIS OF THE CASES OF LEE KWAN WOH AND SIVARASA

[43] We now have to consider whether s 27(2) and (5) taken together is a reasonable restriction of the right to assemble within the meaning of art 10(2)(b) and the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507 (*'Sivarasa*').

[44] First let us examine the decision of *Lee Kwan Woh*. The facts in *Lee Kwan Woh* are not relevant to our situation but the principles filtered from it are significant for us to bear in mind. The following are the principles distilled from the case:

(a) that the words expressed in the Federal Constitution cannot be interpreted by ordinary canons of interpretation;

(b) that the Constitution being *sui generis* is governed by interpretive principles special to itself;

(c) on that account the Constitution is to be interpreted generously and liberally. On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee individuals the protection of fundamental right and liberties;

(d) in interpreting provisions of fundamental rights guaranteed under Part II of the Constitution (Fundamental Liberties) the court should adopt a prismatic approach. When the prismatic approach is employed, various related categories of genus of rights emerge from certain fundamental rights. The approach to construction of these must be ambulatory;

(e) parts of the Constitution, and in particular the provisions on personel liberties are expressed in general and abstract and declaratory terms which require the judiciary to flesh them so that they can deal with specific issues in a concrete and practical manner. The Constitution being a living document demands future judges to further breathe life into the provisions expressed in abstract statements of fundamental rights or liberties;

(f) rights have to be interpreted in the broadest terms and any restrictions of these rights must be construed as narrowly as possible and practicably;

(g) the omnipresence of art 8(1) of the Constitution provides the 'harmonising and all pervading' influence and impact in interpreting other provisions and in determining whether any form of state action (whether executive, legislative or judicial) is arbitrary or excessive when fundamental rights become vexed;

(h) art 5(1) strikes down all forms of state action that deprive either life or personel liberty in both substantive or procedural aspects;

(i) the expression 'law' in art 5(1) includes written law and the common law of England. That being the case the rule of law and all its integral components, both in its procedural and substantive dimensions are *equally accommodated* within 'law';

(j) rules of natural justice or procedural fairness are an integral part of arts 5(1) and 8(1) of the Constitution; and

(k) a breach of any of these fundamental rights or liberties, in their main or component aspects, be it in substance or procedure, can bring about a nullification of state actions and/or proceedings.

[45] For purposes of this case, the concept most relevant is under principle ('f') summarised above. That brings us to the application of that principle in the Federal Court judgment in *Sivarasa*.

[46] When we consider these two cases we are in the realm of the second alternative issue, namely whether the restrictions imposed by s 27(2) and (5) of the PA 1967 were reasonable or otherwise.
Sivarasa's case upheld the following:

(a) in interpreting the Constitution, provisions or restrictions that limit or derogate a fundamental right have to be read restrictively, adopting *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19. In that case the word 'reasonable' was read into before the word 'restrictions' in art 10(2)(c) as though the word reasonable had always been there. In other words such restrictions on fundamental rights have to be reasonable;

(b) adopting the Supreme Court decision in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697:

> … 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 of the fundamental rights are such that it makes their exercise ineffective or illusory.

(c) in Malaysia, unlike the UK, the Constitution is supreme, not the Parliament. In that regard the Federal Court decision in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, which adopted *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 was overruled. It will be the duty of the courts to concern itself with whether a written law is fair and just when it is tested against art 8(1) and the Constitution's 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'. The Federal Court further held that all

rights guaranteed by Part II of the Constitution which are enforceable in the courts form part of the basic structure of the Federal Constitution;

(d) the Federal Court went on to declare that s 46A of the Legal Profesion Act 1976, which restricts a person from being a member of the Bar Council or Bar Committee if he is also a member of either House of Parliament or of a State Legislative Assembly, or of any local authority or … if he holds any office in any political party as constitutional as that restriction was deemed 'reasonably' necessary or expedient in the interest of morality (public morality). The court held:

> 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.

(e) the Federal Court also considered if s 46A is offensive to arts 5(1) and 8(1). To put it differently, whether s 46A can stand the scrutiny of being 'in accordance with law' ie if it is fair and just and not arbitrary or unjust, and the scrutiny of equality provision of art 8(1). In the latter context the court held (see para 26 of *Sivarasa*'s case):

> Apply that here. What s 46A does is to classify advocates and solicitors in to those who are members of Parliament and those who are 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 *Malaysia Bar & Anor v Government of Malaysia* [1986] 2 MLJ 225:
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> > 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 organizations of a political nature are disqualified from holding office in the bar council or committees.

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

Further down at para 27 of the case, the court held:

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 & Anor v Government of Malaysia* [1987] 2 MLJ 165, the classification must (a) be founded on an intelligible differentia distinguishing between persons that are grouped together from others who are left out of the group; and (b) 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.

[47] Applying the principles enunciated in the cases of *Lee Kwan Woh* and *Sivarasa* to the facts and the laws involved in this case, we must firstly apply the similar premise that art 10(2)(b) is to be read as though the word 'reasonable' between the words 'such' and 'restrictions' has existed in that provision. Therefore we ask, is it a reasonable restriction to require any person intending prior to convening or collecting any assembly or meeting or forming any procession in any public place to make an application for a licence under s 27(2) of the PA 1967?

[48] We have to remind ourselves that the entire underlying objective of this requirement must of necessity be associated with the avoidance of public disorder which if uncontrolled may result in breach of national security of the Federation or any part thereof. But primarily, as a start, the concern of the local police would be on public order and to protect the public generally against lawlessness and disorder.

[49] Section 27(2) of the PA 1967 read with art 10(1)(b) and 10(2) provide various considerations for the police to take into account if they have to reject a particular application. We have to stress that the police would have to issue the licence under s 27(2) of the PA 1967 unless the assembly or the like is viewed to be prejudicial to security or to excite a disturbance of the peace. Barring these limited criteria for refusal, we cannot emphasise enough that the police must issue the licence as applied for. The licencing requirement is to regulate the public assembly, meeting, procession etc, as they are without a

doubt potentially a catalyst for riot, chaos and disorder. We are not for one moment saying there can never be a peaceful assembly etc, we are in fact saying the reverse. Regulating the right to assemble in public is to allow the police the benefit of reading the pulse of the situation on the ground and to make an intelligent assessment of public safety and public order.

ONE LAST MATTER WHICH ARISES — WHETHER THE MATTER IS RENDERED ACADEMIC AND HENCE SHOULD NOT BE HEARD AT ALL?

[50] The question then, which arises is, bearing in mind that s 27 of the PA 1967 has been deleted in its entirety, is there a need to revert to the old legislation instead of that replacing s 27 ie the Peaceful Assembly Act. It is clear that the matter has not become academic to our mind.

[51] This is a public law matter and of public interest. Central to the arguments raised in favour of freedom of assembly are security concerns which does not destroy the rights accorded to the citizen under art 10 of the Federal Constitution. It accord us such enthusiasm and intellectual pleasure to hear the appeal. We shall explain why.

[52] In *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran* [2006] 6 MLJ 689; [2006] 4 CLJ 847 ('Arasa') a preliminary objection by counsel raised in the Federal Court for the appeal to be dismissed as it had become academic following the making of a second detention order after a successful release of the respondent on a habeas corpus application.

[53] It was held by Their Lordships in the Federal Court (Augustine Paul FCJ) that the resultant matter for consideration was whether the appeal must still be heard in the public interest. In involves a public authority and the issues submitted on relate to questions of public law. It was held that the proper interpretation to be accorded to s 3(3)(a)–(b) of the 1969 Ordinance is of tremendous significance and it would not involve a consideration of the facts of the case. It was held that the question of the applicability of the ratio decidendi of *Mohd Faizal*'s case to the 1969 Ordinance was of greater importance as these are issues which will affect existing cases and will arise in the future if they are not resolved as soon as possible. They must therefore be settled as public interest required the appeal to be heard (see pp 659–690 of the case).

[54] Arasa's case followed *R v Secretary of State for the Home Dept ex p Salem*. In the *Salem*'s case [1999] 1 AC 450 at p 456, the House of Lords held that in a cause where there is an issue involving a public authority as to a question of public law, Their Lordships have a discretion to hear the appeal, even if by the

time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se.

[55] Their Lordships went on to hold that the discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discreet point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.

A CLEAR PRESENT AND SUBSTANTIVE ISSUE

[56] In an extract taken from MP Jain's *Administrative Law of Malaysia and Singapore*, (4th Ed) the case of *Tun Datu Haji Mustapha bin Datu Harun v State Legislative Assembly of Sabah & Anor* [1993] 1 MLJ 26 was discussed. In that case, the applicant was a member of the Sabah Legislative State Assembly and a member of USNO. He resigned from USNO and joined UMNO and ceased to be a member of the assembly under a state constitutional provision which barred change of party affiliation by members of the House. He was re-elected at a by-election and thereafter, sought a declaration that the State Constitutional provisions was invalid or being in conflict of art 10(1)(c) of the Malaysian Constitution.

[57] The state argued that the matter was hypothetical as there was no dispute in existence. The court rejected this claim saying that the plaintiff's claim raised 'a present and substantive issue for determination by court' by observing that 'There cannot be any justification for the contention that the present state of affairs is *in posse* and not *in esse*, and therefore theoretical, abstract, hypothetical, premature or academic'.

[58] It was held that 'There can be no doubt that the plaintiff's complaints are grave and serious and have even attracted state-wide interest. The situation may be revved to national proportion' (at p 38 of *Tun Datu Haji Mustapha*'s case.)

[59] We note that this striking reality to the situation at hand; there is a breach of security, a breach of the peace and the five appellants are running a war — cry of their constitutional rights being trampled upon, with no regard whatsoever for the reasons those rights have to be restricted, not taken away in its entirety but restricted. That does not become academic merely by the changing legislation. The gist of the restriction remains and has to be dealt with.

[60] *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 was referred to in *Tun Datu Haji Mustapha*'s case. In *Syed Kechik*'s case, the Federal Court held that this was not a case where something has happened for which there is a remedy which the appellant has not utilised but a case where the appellant fears that the threat may become a reality and seeks a declaration to protect his right.

[61] Lee Hun Hoe CJ in *Syed Kechik*'s case referred to *EM Borchard on Declaratory Judgements*, (2nd Ed), at p 20 which referred to cases where no traditional wrong has yet been committed or immediately threatened:

> … a condition of affairs is disclosed which indicates the existence of a cloud upon the plaintiff's rights, a cloud which endangers his peace of mind, his freedom and his pecuniary interests. This is a tangible interest which the law protects against impairment, and by protecting it, promotes social peace.

(At p 108 of *Syed Kechik*'s case where Borchard is quoted.)

[62] Their Lordships recognised the stark threat to the appellant, Datuk Syed Kechik, there was a threat by the official party in power by an official statement which has never been denied or withdrawn. It was stated that the appellant need not have to wait for something to happen before seeking the courts protection (at p 107 of *Syed Kechik*'s case).

[63] *Arasa*'s case also followed the Federal Court decision in *Metramac Corp Sdn Bhd (formely known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113 where it was held by Their Lordships that the test in deciding whether an appeal has become academic is to determine whether there is in existence a matter in actual controversy between the parties which will affect them in some way. If the answer to the question is in the affirmative, the appeal cannot be said to have become academic, it would seriously affect the undertaking in damages given by the respondent. It followed that the fact that the orders had been dissolved could not render the appeal academic (see p 114 of *Metramac*).

[64] Hence, in light of these cases and texts, how can we relegate the burning issue of the right to peaceful assembly against the dire threat of national security and public order to the back burner before it has been thoroughly analysed, reviewed and burnt itself out? Dozens of assemblies continue to be held in the city and in other parts of the country. Apart from security concerns, tax payers monies literally goes up in smoke clearing the debris and after effects of the assemblies, not to mention the casualties. We are duty bound by our oath of office to hear, evaluate, deliberate and judiciously deal with such burning issues.

[65] Lastly, we wish to point out that this is a criminal case where all the appellants had been found guilty and has paid their respective fines of RM3,900 each in default of three months imprisonment. Apart from the usual possible issue of being registered as convicted persons and liable to suffer certain disqualifications or stigma of some sort, the appellants therefore had direct interest in pursuing this appeal on the issues circumscribed to overturn their convictions and in the event of them being successful their status quo would be restored and their fines refunded. This surely militates against any argument that this appeal is academic or hypothetical. It is for these reasons adumbrated herein that we have decided to hear the appeal fully and in fact in an extended fashion to give parties the fullest latitude to argue their respective cases.

THE CONCLUSION

[66] Having heard the arguments and submission from both sides and for reasons as extensively explained above, it is our judgment that there is no merit in the appeals by the appellants.

[67] It is our judgment that s 27(2) and (5) of the Police Act 1967 are neither unconstitutional nor in conflict or inconsistent with the provision of art 10(1)(b) of the Federal Constitution. This is so because those subsections to s 27 of the Police Act 1967 are in law reasonable restrictions and does not prohibit the right to peaceful assembly. The reasonable restrictions are regulatory in nature and not prohibitory. Such terms to regulate is within the law, as it is for the larger interest of protecting and maintaining law and order for the public interest. The police force are duty bound to maintain the security and public order in the country, to ensure continued peace and harmony.

[68] Wherefore, the appeals are dismissed. We accordingly, affirmed the decision of the High Court in its appellate capacity in this matter.

Hamid Sultan JCA, (dissenting)::

[69] The second and fourth appellants' (the appellants) appeal came up for hearing on 12 March 2013 and the court heard the submission involving a constitutional issue and invited parties to submit further and reserved judgment.

THE BRIEF FACTS

[70] The appellants were convicted under s 27(5)(a) of the Police Act 1967 ('PA 1967') and sentenced under s 27(8) of the PA 1967 by the magistrate

court for being found in an assembly in respect of which a police license had not been issued under s 27(2) of the PA 1967. The learned magistrate sentenced each of them to a fine of RM3,900, in default three months' imprisonment. The appellants had paid the fines and had also appealed to the High Court. The High Court, inter alia, dealt with the constitutionality of s 27(5)(a), read with s 27(2) of the PA 1967 and had stated as follows:

> [18] Having considered the facts and circumstances of the instant case and the submissions of all the parties, the court was of the view that s 27(5) of the Act read together with s 27(2) of the Act did not contravene the Federal Constitution and that it was valid and constitutional.
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> [19] The court also rejected the appellants' submission that the requirement contained in s 27(2) of the Act for the *obtaining of a permit* under that section (the 'requirement') overreaches the permissible restriction allowed for under art 10(2)(b) of the Federal Constitution. The court was of the view that the requirement was a permissible restriction and that it was not an unreasonable restriction. (Emphasis added.)

[71] The said s 27 of the PA 1967 reads as follows:

Power to regulate assemblies, meetings and processions. (Emphasis added.)

> 27(1) Any Officer in Charge of a Police District or any police officer duly authorized in writing by him may direct, in such manner as he may deem fit, the conduct in public places in such Police District of all assemblies, meetings and processions, whether of persons or of vehicles and may prescribe the route by, and the time at, which such assemblies or meetings may be held or such procession may pass.
>
> (2) Any person intending to convene or collect any assembly or meeting or to form a procession in any public place aforesaid, shall before convening, collecting or forming such assembly, meeting or procession make to the Officer in Charge of the Police District in which such assembly, meeting or procession is to be held an application for a licence in that behalf, and if such police officer is satisfied that the assembly, meeting or procession is not likely to be prejudicial to the interest of the security of Malaysia or any part thereof or to excite a disturbance of the peace, he shall issue a licence in such form as may be prescribed specifying the name of the licensee and defining the conditions upon which such assembly, meeting or procession is permitted:
>
> Provided that such police officer may at any time on any ground for which the issue of a licence under this subsection may be refused, cancel such licence.
>
> (2A) An application for a licence under subsection (2) shall be made by an organization or jointly by three individuals.
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> (2B) Where an application is made jointly by three individuals, the police

officer to whom the application is made shall refuse the application if he is satisfied that the assembly, meeting or procession for which a licence is applied is in actual fact intended to be convened, collected or formed by an organization.

(2C) Where an application is made jointly by three individuals, the police officer issuing the licence shall specify in the licence the names of those persons as licensees.

(2D) No licence shall be issued under subsection (2) on the application of an organization which is not registered or otherwise recognized under any law in force in Malaysia.

(3) Any police officer may stop any assembly, meeting or procession in respect of which a licence has not been issued or having been issued was subsequently cancelled under subsection (2) or which contravenes any of the conditions of any licence issued in respect thereof under that subsection; and any such police officer may order the persons comprising such assembly, meeting or procession to disperse.

(4) Any person who disobeys any order given under subsection (1) or subsection (3) shall be guilty of an offence.

(4A) Where any condition of a licence issued under subsection (2) is contravened, the licensees shall be guilty of an offence.

(5) Any assembly, meeting or procession —

(a) which takes place without a licence issued under subsection (2);

or

(b) in which three or more persons taking part neglect or refuse to obey any order given under subsection (1) or subsection (3), shall be deemed to be an unlawful assembly, and all persons attending, found at or taking part in such assembly, meeting or procession and, in the case of an assembly, meeting or procession for which no licence has been issued, all persons attending, found at or taking part or concerned in convening, collecting or directing such assembly, meeting or procession, shall be guilty of an offence.

(5A) In any prosecution for an offence under subsection (5) of attending, being found at or taking part in an assembly, meeting or procession which is an unlawful assembly, it shall not be a defence that the person charged did not know that the assembly, meeting or procession was an unlawful assembly or did not know of the facts or circumstances which made the assembly, meeting or procession an unlawful assembly.

(5B) In any prosecution for an offence under subsection (5) of attending or being found at an assembly, meeting or procession which is an unlawful assembly, it shall be a defence that the presence of the person charged came about through innocent circumstances and that he had no intention to be otherwise associated with the assembly, meeting or procession.

A (5C) For the purposes of subsection (5), where it appears from all the circumstances relating to an assembly, meeting or procession that it was convened, collected or directed by or with the involvement, participation, aid, encouragement, support or connivance of an organization, every member of the governing body of the organization shall be deemed to have taken part or been concerned in convening, collecting or directing the assembly, meeting or procession unless he proves that he did not know nor had any reason to believe or suspect that the assembly, meeting or procession was going to take place or, if he knew or had reason to believe or suspect as aforesaid, he had taken all reasonable steps to prevent the assembly, meeting or procession from taking place or, if it was not reasonably within his power to so prevent, he had publicly objected to or dissociated himself from the convening, collecting or directing of the assembly, meeting or procession.

[72] The charge in this case is anchored as follows:

> Bahawa kamu pada 8 Jun 2001 di antara jam 2.00 petang hingga 2.15 petang, di perkarangan Masjid Negara, Jalan Perdana, dalam Daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur telah di dapati *berada dalam satu perhimpunan haram* (unlawful assembly) iaitu satu perhimpunan di tempat awam di mana lesen di bawah seksyen 27(2) Akta Polis 1967 (Akta 344) tidak dikeluarkan, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 27(5) Akta Polis 1967 (Akta 344) dan boleh dihukum di bawah seksyen 27(8) Akta yang sama.
>
> (Emphasis added.)

The complaint in the charge is related to 'not having license' and has nothing to do with the assembly or the conduct of persons in the assembly. This distinction must be kept in mind to appreciate the appellants' argument, and the decision in this judgment.

[73] On 26 April 2011, the Court of Appeal had granted the appellants leave to appeal pursuant to s 50(2) of the Courts of Judicature Act 1964. The question of law posed reads as follows:

> Whether s 27(5)(a) read with s 27(2) of the Police Act 1967 is void for being inconsistent with art 10(1)(b) of the Federal Constitution based on the latest decisions of the Federal Court in cases such as *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 and *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333; [2010] 3 CLJ 507?

[74] Learned counsel says if the answer to the question is in the affirmative, the law under which the appellants were prosecuted and convicted would be struck down under art 4(1) of the Federal Constitution. And asserts that it would dispose of this appeal in favour of the appellants. And says the issue is

not academic notwithstanding the said impugned section has been superseded by the Peaceful Assembly Act 2012 ('PAA 2012').

[75] On the issue of whether the appeal is academic, learned counsel for the appellants submits as follows:

> Section 27 of the PA was repealed by the Police (Amendment) Act 2012 that came into force on 23.04.2012. On the same date, the Peaceful Assembly Act 2012 (PAA) came into force. The Honourable Prime Minister when debating the PAA tacitly acknowledged the inappropriateness of section 27 of the PA.
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> > Semasa menyampaikan perutusan khas Hari Malaysia pada 15 September 2011, sempena sambutan Hari Malaysia ke-48 saya telah mengumumkan bahawa kajian comprehensive akan dilaksanakan oleh kerajaan yang menyentuh kerangka perundangan Negara termasuk mengkaji semula seksyen 27 Akta Polis 1967.
> >
> > Ini dibuat dengan mengambil kira peruntukan Perkara 10 Perlembagaan Persekutuan mengenai kebebasan berhimpun dan menentang sekerang-kerasnya demontrasi jalanan. Di samping itu, kebenaran berhimpun diberi selaras dengan kaedah-kaedah yang ditetapkan kelak di samping mengambil kira norma-norma di peringkat antarabangsa. Susulan daripada keputusan kerajaan untuk mengkaji seksyen 27 Akta Polis 1967, suatu akta baru telah dicadang dan digubal bagi mengadakan peruntukan mengenai hak untuk berhimpun dan seterusnya memansuhkan seksyen 27 dan seksyen lain yang berhubungan dengan perhimpunan mesyuarat dan perarakan. Bagi maksud akta baru tersebut Rang Undang-Undang Perhimpunan Aman 2011 atau Peaceful Assembly Bill 2011 telah digubal.

Further, the Honourable Deputy Minister in the Ministry of Home Affairs Malaysia, Datuk Liew Vui Keong said this in the Dewan Negara:

> Yang Berhormat Dr. Syed Husin Ali juga menyoal adakah rang undang-undang ini mengatasi Perkara 10, Perlembagaan Persekutuan' Untuk makluman Yang Berhormat, intipati penting rang undang-undang ini ialah untuk memberi nafas 'breath life' dengan izin kepada Perkara 10, Perlembagaan Persekutuan dengan memasukkan elemen-elemen pelaksanaan berkaitan dengan kebebasan perhimpunan secara aman.

The appellants submit that judicial notice may be taken of the speeches in Parliament in support of the submission that sections 27(2) and 27(5)(a) are unconstitutional. (Emphasis added.) Under the PAA, there is no longer a need to apply for a police licence to organise an assembly. A more notification is sufficient. The PAA sits better with the right to peaceful assembly.

In the event the Respondent submits that this appeal is academic as section 27 of the PA has been repealed, the appellants submit as follows:

1 This appeal relates to the conviction and sentences of the appellants. The appellants seek to exercise their constitutional right to appeal under the

Courts of Judicature Act 1964 and have their convictions and sentences set aside. The only ground the appellants are relying on is that the law used to prosecute them is unconstitutional. The question in this appeal is therefore still a live issue.

2 Further, the constitutionality (or otherwise) of sections 27(2) and 27(5)(a) is a matter of considerable public importance and interest as it engages a basic and fundamental right in the Constitution. It will provide binding precedent and guidance for lawmakers and the public.

3 The decision of this Court will affect pending cases still being tried in the lower courts. Public interest requires that this appeal be heard and decided on its merits.

The appellants submit that the test in *Metramac Corp Sdn Bhd v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113 has been satisfied:

> The test, therefore, in deciding whether an appeal has become academic is to determine whether there is in existence a matter in actual controversy between the parties which will affect them in some way. If the answer to the question is in the affirmative the appeal cannot be said to have become academic. This test has found favour with a plethora of local cases such as *Menteri Hal Ehwal Dalam Negeri Malaysia & Ors v Karpal Singh* [1992] 1 MLJ 147; *Datuk Syed Kechik bin Syed Mohamed & Anor v Board of Trustees of the Sabah Foundation & Ors* [1997] 1 MLJ 257 and *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513.

Further, even if the question in the appeal has become academic (which is denied), it may still be heard in the public interest: see *R v Secretary of State for the Home Dept, ex parte Salem* [1999] 2 All ER 42:

> … in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a list to be decided which will directly affect the rights and obligations of the parties inter se. The decisions in the *Sun Life* case and *Ainsbury v Millington* (and the reference to the latter in r 42 of the Practice Directions Applicable to Civil Appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.
>
> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.

See also *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran* [2006] 4 CLJ 847.

JURISPRUDENCE

[76] Before I deal with the appellants' and the respondent's argument on constitutionality and judicial power of the court, which is a subject matter of variant views in our contemporary jurisprudence, it will be most appropriate to set out the jurisprudential approach and methodology that I have taken to deal with the issue in hand (see *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341 — no judicial power argument). It is pertinent to observe, notwithstanding the judicial power argument, the Federal Constitution by virtue of the constitutional oath of the judge to preserve, protect and defend the constitution, has in immutable terms vested with the court, independent jurisdiction and power to preserve, protect and defend the constitution without any shackles or limitation related to judicial power or judicial review concept or jurisprudence or lack of procedural mechanism to canvass the constitutional complaint. Thus, the English cases on judicial review or power as well as its limitation or time constraint (if O 53 of the RC 2012 is not applicable) is not applicable when the legislation or arbitrariness of executive action is challenged for breach of constitutional provision (see *IR Coelho v State of Tamil Nadu* [2007] 2 SCC 1). In addition, the threshold test to canvass the complaint is low, when it relates to constitutional breach and it is sufficient as long as the applicant can demonstrate the infringement and the question is not frivolous, vexatious or abuse of process of court as this case itself will demonstrate. In the instant case the Court of Appeal itself on a low threshold had given the appellant the right to canvass the constitutional complaint readily in the appeal though the subject matter does not originate from O 53 of the RC 2012. Support for the proposition is found in a number of cases within the commonwealth jurisdiction, (see *Vishaka & Ors v State of Rajasthan* AIR 1997 SL 3011). The distinction, concept, jurisdiction and power of courts in the regime of Parliamentary Supremacy and Constitutional Supremacy was eloquently summarised by the learned author, Peter Leyland, in his book *The Constitution of the United Kingdom*, (2nd Ed), 2012 at p 50 as follows:

> A further crucially important point about legal sovereignty which will be relevant in relation to many issues under discussion in this book is that this principle determines the relationship between Parliament and the courts. It means that although the courts have an interpretative function in regard to the application of legislation, it is Parliament, and not the courts, which has the final word in determining the law. This is markedly different from most codified constitutions. For example, in the United States, the Supreme Court held in *Marbury v Madison* (1803) 1 Cranch 137, that it could determine whether laws passed by Congress and the President were in conformity with the constitution, permittinp *judicial review of constitutional powers*. The situation in the United States is that ultimately there is judicial rather than legislative supremacy. (Emphasis added.)

[77] I must say at the outset that any arbitrary power vested by law with the

executives and/or public authority which may compromise the fundamental guarantees enshrined in the constitution is bound to be struck down by the courts. Support for the proposition is found in a number of cases. In *EP Royappa v State of Tamil Nadu* [1974] 4 SCC 3 it was stated that equality and arbitrariness are sworn enemies; one belong to the rule of law in a republic while the other to the whim and caprice of an absolute monarch. In *Maneka Gandhi v Union of India* it was stated that unguided and unrestricted power is affected by the vice of discrimination, (see *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 3 CLJ 507). In *Himat Lal K Shah v Commissioner of Police, Ahmedebad and Another* [1970] Cri A No 152, it was asserted that prima facie to give an arbitrary discretion to an officer is an unreasonable restriction. Such arbitrary discretion to issue license will in actual fact create a situation where it leads to favouritism and abuse. Quite recently in the landmark case of *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507, the Court of Appeal had given a realistic dimension to the word reasonableness without mincing words and it is poles apart from the conservative position of the apex court before the cases of *Lee Kwan Woh* or *Sivarasa* which are the subject matter of the question posed. And that part of the judgment reads as follows:

> [66] The observations expressed by Gokulakrishnan CJ in *Vedprakash v The State* 1987 AIR Gujerat 253 at para 24 reinforce the proposition that in considering the constitutionality of legislative enactments restricting a fundamental right those legislative enactments must measure up to the test of reasonableness which include notions of proportionality:
>
> > Our democratic Constitution inhibits blanket and arbitrary deprivation of a person's liberty by authority. It guarantees that no one shall be deprived of his personal liberty except in accordance with procedure established by law. It further permits the state, in the larger interests of the society to so restrict that fundamental right in a reasonable but delicate balance is maintained on a legal fulcrum between individual liberty and social security. The slightest deviation from, or displacement or infraction or violation of the legal procedure symbolised on that fulcrum upsets the balance, introduces error and aberration and vitiates its working. The symbolic balance, therefore, has to be worked out with utmost care and attention.
>
> [67] I do not think it is either necessary or useful to lay down inflexible propositions to assess the reasonableness of legislative enactments which purport to violate rights guaranteed by the Federal Constitution because each must be determined on its own peculiar facts and circumstances. But where the legislative enactment is self explanatory in its manifest absurdity as s 15(5)(a) of the UUCA undoubtedly is, it is not necessary to embark on a judicial scrutiny to determine its reasonableness because it is in itself not reasonable. What better illustration can there be of the utter absurdity of s 15(5)(a) than the facts of this case where students of universities and university colleges face disciplinary proceedings with the grim prospect of

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

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

[78] The primary role of the High Court, Court of Appeal and the Federal Court (Superior Courts) is to preserve, protect and defend the constitution and they are also the guardians of the constitution. Other incidental roles as to hearing of civil or criminal cases are matters that can be assigned to inferior courts or tribunal by way of legislation, subject only to a final scrutiny by Superior Courts. Failure of the judiciary to protect the constitution will only promote all form of vice which will not only destabilise the functioning of the government and the security of the state but also all aspects of the nation as well as nation building. And I must say thousands of MACC (anti-corruption agencies) or its like cannot replace the strength and power of an independent judiciary, functioning within the spirit and the intent of the constitution, to arrest any form of vice and maintain social order, and also to ensure that there is no lawlessness in law enforcement agencies. When executive, inclusive of judiciary, takes solace in vice, it will not only create a shameless society but also create anarchy in law enforcement agency. To avert the result the judiciary by its oath of office is empowered to protect the constitution and ensure that executives are accountable to their action inclusive of discretion. A classic case in the negative where the apex court by majority refused to promote the doctrine of accountability is the case of *Government of Malaysia v Lim Kit Siang; United Engineers (Malaysia) Berhad v Lim Kit Siang* [1988] 2 MLJ 12. The majority decision in that case has been continuously argued to be a negative chapter and an emergence of rot in public law remedies in our judicial history, in that it had compromised the jurisprudence of accountability and discretion in favour of the executive, to the detriment of the public and paved way for vice to set in executive decision making process without appropriate check and balance by the judicial arm of the constitution. Justice Gopal Sri Ram in the recent Ahmad Ibrahim Lecture had this to say:

> But once a prima facie case of an abuse of power is shown, for example that the approval for the construction of a road was given in breach of a statute, be it even a penal law, the court is duty bound to make inquiry and apply the appropriate level of intensity of review to determine whether there has been an abuse of power. The failure of the majority judgments in particular the judgment of Salleh Abas LP in

> *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 to recognise this important principle ranks that case as the lowest ebb in the field of Malaysian public law. The dissents of Seah and Abdoolcader SCJJ really point the way forward. The way forward therefore lies in applying the highest level of scrutiny whenever a fundamental right is infringed and whenever an abuse of power by reason of unfairness is brought home. But there is a proviso to this. Those entrusted with the judicial power of the state must act according to established principles of constitutional and administrative law and not display a propensity that shows them to be — to paraphrase Lord Atkin — more pro-executive than the executive. *When that happens, the rule of law dies as does the Constitution itself.* (Emphasis added.)

[79] The jurisprudence of accountability and discretion are vital aspects in the functioning of the government and the role of the executive. Failure will lead to all forms of vice, including corruption in all aspect, not in arithmetic but in geometrical progression.

[80] In *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors* [2007] 5 MLJ 441, Hamid Sultan Abu Backer JC (as he then was) had dealt with contemporary issues relating to the constitution in extensor within the context of judicial review and judicial power, and had this to say:

> [21] Judicial review is nothing but a potent and effective procedural device within the armoury of the High Court to supervise and control the decision making process of public bodies or like to ensure that they act within the spirit and powers of the statutes and if necessary to restrain the decision maker from acting in excess and/or abuse of power. This process is also used to check and arrest executive excesses and encroachment. The concept originates from the doctrine of separation of powers which flows from English legal jurisprudence and in the Malaysian context it can be explained in a simple manner as follows:
>
> (i) The doctrine of separation of powers is not a concept written in the Federal Constitution, because it is the foundation of the constitution itself, without which the establishment will collapse and will have no footing to stand on. There are also other concepts such as Independence of Judiciary, Judicial Review, which are not written in the constitution but stands as a sine qua non to protect the constitution and without these concepts and its application the constitution cannot function as intended. As such the constitution cannot be read in isolation.
>
> (ii) The three pillars of the constitution, namely the executive, legislature and the judiciary, directly and/or indirectly, which I say is the foundation for the constitution, are appointed at the pleasure of the public. For, the two pillars can be replaced by the public and one pillar only by parliament, and who should be in parliament is always determined by the public.
>
> (iii) All the said pillars before coming into office take an oath to protect the constitution. In consequence, they have taken upon themselves a sacrosanct duty and obligation to the public to ensure that one pillar does not undermine the other in whatever manner, because the weakness of any

of the pillars will undermine the stability of the constitution and this will ultimately affect the public. Although, humans can stand on two legs or one, the Federal Constitution needs all three to stand individually to uphold the constitution and protect the public. This concept of standing separately to protect public interest is often termed as the doctrine of separation of powers.

(iv) Under the said doctrine, executive, with the help of legislature can pass any laws within the frame work of the constitution only. However, when any laws are made to exclude the final decision making process by the courts, they will tantamount to tinkering with one of the pillars of the constitution itself and thereby weaken the judiciary and this will also undermine the constitutional role of the courts. This per se is not permissible as it will result in the public being ruled by law and not by rule of law, as envisaged by the Federal Constitution at the time of its inception. This docthne is articulated by art 4 of the Federal Constitution which asserts that the constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this constitution, shall to the extent of the inconsistency, be void. And this is very importantly reflected in Rukun Negara or the pillars of the nation which commands: Belief in God, Loyalty to King and Country, Upholding the Constitution, Rule of Law, Good Behaviour and Morality. And the concept of rule of law does not permit legislature or executive to subject its citizen to any form of arbitrariness which will impinge on them to enjoy the dignity of man. And the judiciary is required to protect that dignity.

(v) The judges have taken oath of office to protect the constitution. The executive and legislatures under the doctrine of separation of powers has a duty to the public to ensure that judges' oath to protect the constitution is not made illusory by enacting laws which attempts to take judicial scrutiny on executive decisions. This duty is a sine quo non to protect the constitution, the protection of which in its true sense means protecting the public. This is also the basic tenet of the constitution and Rukun Negara.

(vi) Parliament cannot pass law or amend the constitution to by pass judicial supervision on executive decision as it will be totally abhorrent to the notion of the doctrine of separation of powers. There is no doubt that Parliament is supreme, subject only to the constitution, any attempt to tinker with the foundation will be against their oath of office and such attempt will have to be treated by the courts as ultra vires, the spirit and intent of the constitution by virtue of the doctrine of separation of powers when it comes for judicial scrutiny. Further, it will be against judges' oath of office to consider such laws and the decisions which recognise such laws are always unconstitutional but still valid unless set aside. Where decisions are perceived to be unconstitutional, the courts have a judicial duty coupled with sacrosanct entrustment of the public, pursuant to the doctrine of the separation of powers and oath office, to revisit such decisions in the wider interest of the public and also to uphold their

esteem and dignity as judges of their constitution and also as the component pillar of the Federal Constitution. At the same time, the judiciary has sacrosanct duty to ensure that the functions of the executive and the legislature, in the right perspective, are not undermined. There is a balance of cardinal importance which has to be met with to maintain the respective role and status quo of the pillars. In consequence, pure interpretation of law which may destabilise the constitutional role of the executive and legislature and undermine the progress, development and stability of the nation is averted and the interpretation of certain aspects of the law is tempered with matured interpretation. In England, they discreetly call it as 'policy consideration' which more often than not is reviewed on case by case basis, according to the needs of the nation, taking into consideration public interest as a whole.

(vii) Any aggrieved person can now complain to the court as of right if he can satisfy the threshold requirement of locus standi, as set out in various cases, which is subject to O 53 of the RHC. However, if the complainant is not an aggrieved person, and the complaint is of a serious nature and the general locus element is not satisfied, then under the doctrine of separation of powers, the courts in performance of its constitutional role, can on its own motion take cognisance of the complaint and hear the relevant parties and pass suitable orders or directions. But, such acts are extremely rare and the issue must be one where public interest will be compromised or issues of a nature which is extremely serious. In India, it is called judicial activism and/or public interest litigation which permit a litigant, who does not have a private right of his own, to commence proceedings to redress a public wrong which is alleged to have been violated by government or public body. There is no precedent in Malaysia for the last 20 years as seen in other jurisdiction. However, the right to place the complaint of any nature is with courts but that does not mean that the complaint must be heard or relief granted. At times the complaint itself can expose the error or omission and this may help to bring such errors to the notice of the concerned bodies for their correction. The right to complain must not be confused with the 'locus standi' test. Further, the right to complain may be subject to 'ouster clauses' which the court may want to tolerate, where on the whole it is a necessity and need and justifiable in the circumstances of case, and they have absolute discretion to revisit such decision if the impact of not doing so is devastating. Thus, the right to complain to the court is a fundamental right and whether the complaint will be heard is another matter. But if the complaint is dismissed the complainant may be burdened with costs, and may also be subject to a claim in damages, unless otherwise ordered by the court.

(viii) The concept and doctrine of judicial review in England has developed only to entertain exclusive complains and for this purpose much fetters have been placed by the courts to control exodus of complaints against public bodies by busy bodies and alike. The development of law there will clearly show that the goal post for obtaining the relief has often been moulded from time to time and is not seen as a static concept.

(ix) The doctrine of judicial review in India has developed leaps and bounds as the remedy of issuing the prerogative writ stands as a constitutional remedy entrenched in the Indian constitution. This is not the case in England as England does not have a written constitution and to protect whatever they have is done so by the common law powers of the court. These common law powers have developed in a restrictive manner but with effective remedy and reliefs sufficient to protect the doctrine of separation of powers. These laws will appear to be in development because it is required to be spelt out by judges from time to time when justice of the case so warrants. These jurisdiction and powers cannot be taken away by parliament in England as they are needed to protect the unwritten constitution. The position in Malaysia is hybrid in nature for the right to issue prerogative writs are not spelt out in the constitution but in the statutes. Since the criteria to issue is not spelt out, it necessarily requires the adoption of the common law principles, more importantly the doctrine of separation of powers to protect the constitution and act on other incidental matters such as excess and abuse by public bodies. In England, the Supremacy of Parliament is such that the English courts have no power at all for judicial review of legislation but that is not the case here because of the several protective articles entrenched in the Federal Constitution. This is an obvious difference where the courts here have to deal with independently. Hence, the English Jurisprudence on the concept of judicial review and alike cannot be the cure for all maladies. Thus, entire reliance of English authorities moulded to the doctrine of Supremacy of Parliament may not be sufficient to protect a written constitution where dominant reliance has been entrusted to the judiciary to protect and defend the constitution relating to law and justice, more so after 50 years of independence and our legal jurisprudence can never be reduced to the status of dependency. Hence, there has been much development of law in the area relating to judicial review.

(x) Much literature has been fashioned by jurists and judges proclaiming the courts' jurisdiction and powers in a restrictive manner. It will appear to be unnecessary as this creates utter confusion, for under the doctrine of separation of powers, the court is the supreme body to decide what is right and what is wrong in any given circumstance. More so when it has to check any form of errors, whether they be judicial or on merit. The court can and always must act to cure any form of injustice within the parameter and scope of the doctrine of separation of powers, to be read with the spirit and intent of the Federal Constitution. Our courts are not obliged to follow the fetters and restrictions placed by English courts. If judicial fetters are employed, it is only for the purpose of stopping busy bodies who ultimately cannot be given any form of relief from disturbing the courts and the workings of the government and public bodies. Further, the courts always have the option to penalise such busy bodies and advocates who fail to bring serious issues relating to breach of constitutional safeguards. Judicial fetter must not be seen as absolute and immutable fetter as the courts have jurisdiction and powers, inter alia, under the doctrine of separation of powers to revisit them and act according to the

justice of the case. In particular, when it is not related to matters involving interests of national security or public order in its true sense.

(xi) All the three pillars are expected by their oath of office to provide exemplary duty to the nation and that service is much more superior to any other service provided by any of the institutions in the country, because it is a sacrosanct duty which needs full courage and commitment to ensure, peace, prosperity, harmony to the public and its future generations. And this exemplary mission can only be achieved by upholding the spirit and interest of the Federal Constitution and nothing less. For this very purpose, each pillar has to respect the role of the other, and there is sufficient provision in the constitution and law to check each and every pillar's excesses and make them accountable to the public. One such provision permits the judges to be removed and the other is the provision for judicial review to check among others executive excesses. Thus, it is a well planned constitution and law, provided it is given full force and effect. No pillar is supreme. All are subject to accountability. Each pillar is not expected to compete with each other, which is the foundation of the constitution. They are required to respect each other and also complement each other for nation building. And also accept that the Federal Constitution with the doctrine of separation of powers, independence of judiciary and judicial review is the charter for progress, democracy and nation building in the right perspective. In *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, HRH Raja Azlan Shah FJ (as HRH then was) articulated some of the difficult propositions and concepts as follows (at pp 188, 190):

> The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the state may encroach. The second is the distribution of sovereign power between the states and the federation, that the 13 states shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modem terms that we are a government of laws, not of men.
>
> This reasoning, in my view, is based on the premise that the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself. It is the supreme law because it settles the norms of corporate behaviour and the principle of good government. This is so because the Federation of Malaya, and later, Malaysia, began with the acceptance of the Constitution by the nine Malay States and the former Settlements of Penang and Melaka, by the acceptance of it by Sabah and Sarawak that entered the Federation in 1963, as the supreme law of the Federation … (cl 1 of art 4). It is thus the most vital working document which we created and possess. If it is urged that the Constitution is on

the same level with ordinary law, then the Constitution is an absurd attempt on the part of the framers, to limit a power, in its own nature illimitable.

[81] The judge of the superior court is duty bound to hear any complaint, in relation to the constitution as they are protectors of the constitution by virtue of their oath of office pursuant to art 124, which reads as follows:

> 1 Oath of Office and Allegiance
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> I, …, having been elected (or appointed) to the office of … do solemnly swear (or affirm) that I will faithfully discharge the duties of that office to the best of my ability, that I will bear true faith and allegiance to Malaysia, and *will preserve, protect and defend its Constitution*. (Emphasis added.)
>
> And the oath of office of parliamentarian reads as follows:
>
> 2. Oath as Member of Parliament and of Allegiance
>
> I, …, having been elected (or appointed) as a member of the House of Representatives (or the Senate) do solemnly swear (or affirm) that I will faithfully discharge my duties as such to the best of my ability, that I will bear true faith and allegiance to Malaysia, and will *preserve, protect and defend its Constitution*. (Emphasis added.)

(a) it is pertinent to note that the three pillars of the constitution namely the legislature, executive and the judiciary have taken the constitutional oath to *preserve, protect* and *defend* the constitution. The oath is no ordinary oath but a sacrosanct oath. Failure of any pillar to act according to the oath of office will cause an imbalance in the society compromising the rights of public and attracting the proverbial *peribahasa* 'harapkan pagar, pagar makan padi' which if allowed to prosper, will destroy the nation, as well as nation building. Among the three pillars, the judiciary is not only entrusted to act according to the oath of office but also required, however challenging it may be, to ensure the other component pillars do not breach their oath of office. The constitution had been framed in such a way that the nation's vice is to be attributed to the judiciary when it abrogates its role or fails or omits to act pursuant to the oath of office to ensure the country is governed by rule of law according to the Constitution. And the judge is required not to permit the executive to subject the citizens to any form of arbitrariness that will impinge on them to enjoy the dignity of man. And the judiciary is required to protect that dignity. The judiciary pursuant to its oath cannot abrogate its sacrosanct duty and place arbitrary fetters such as that the court has no judicial power, and thereby favouring the concept of rule by law and not rule of law which is draconian as well as inimical to the rule of law and democratic virtues and a blatant attempt to destroy the

constitutional framework as well as the legitimate expectation of public (see *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341);

(b) to put it crudely, protecting the constitution must necessarily mean that judges are bound to ensure that the country is governed by rule of law and not by rule by law. Rule by law is alien to our constitutional framework and other democratic countries and those who take the oath of office of a judge at least need to appreciate the distinction and cannot simply administer justice as a form of administrative procedure as is usually done by the civil service. The constitution does not allow that and the *Rukun Negara* does not permit it to be done in that manner and constitutional questions cannot be compromised without jurisprudence or basis. The *Rukun Negara* states as follows: (i) believe in God, (ii) loyalty to the King and country, (iii) upholding the constitution, (iv) rule of law, and (v) good behaviour and morality;

(c) Parliamentarian oath of office also does not permit the country to be ruled by law as the constitution and *Rukun Negara* only permits them to ensure the country is managed by rule of law. It is not for the judge to say that the dignity of his office has been stripped by parliament, and concede to the argument that the court has no judicial power. On the contrary, it is for the judge to say parliament cannot compromise the dignity of the office of the judge under the constitution. It is pertinent to observe under the constitution parliamentarians as well as judges take individual oath and not a collective oath. In consequence the doctrine of judicial precedent for judges will not be applicable if the decision will impinge on the constitution and similar shackles such as collective responsibility or loyalty to party or group etc, cannot tie the hands of parliamentarians when it comes to voting on legislation etc, which will impinge on the constitution or its framework;

(d) it is pertinent to note that a compliant judiciary or bench cannot stand as a bulwark of liberty. A compliant judiciary or bench is one which does not want to subscribe to its sacrosanct oath, and *Rukun Negara* and does not believe in rule of law and does not want to protect the constitution and abrogates its role by saying that it has no judicial power and paves way for rule by law. It is for the public through parliament or His Royal Highness (HRH), the Rulers, in particular the Yang Di Pertuan Agong (His Majesty) to initiate the steps to arrest the progress of a compliant judiciary and ensure that the judiciary is independent to protect the constitution and sustain the rule of law. A compliant judiciary will directly and/or indirectly promote all form of vice which in all likelihood will destabilise the nation as well as harmony and security. In *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383 the Supreme Court had this to say:

When we speak of government it must be remembered that this comprises three branches, namely, the legislature, the executive and the judiciary. The courts have a constitutional function to perform and they are the guardian of the Constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the State and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.

(e) our founding fathers have framed the constitution by giving the courts absolute jurisdiction and power to police and adjudicate on legislation as well as executive decisions in the right perspective. The important distinction is that in UK the court is not empowered to police legislation and declare them as ultra vires of their uncodified constitution though by way of interpretation of statute or judicial review they are permitted to declare the decision of executive was in breach of their uncodified constitution, etc; (see Peter Leyland: 2012, *The Constitution of United Kingdom*). In addition our founding fathers to protect the constitution and as a further security to ensure the rule of law and order in the country is observed by all parties inclusive of the three pillars have entrusted the force and might of the state exclusively to His Majesty, by entrusting His Majesty as the Supreme Commander of the Armed Forces without any executive shackles as is placed in other countries on the Heads of the country such as UK (Queen) or India (President). In essence, if the pillar or pillars fail in their obligation the public are entitled to lodge a complaint petition with His Majesty, who is obliged pursuant to the Constitution and Constitutional Oath to independently adjudicate upon the complaint (without any executive shackles). And His Majesty to ensure order in the country and also as the last bastion within the constitutional framework is constitutionally bound to consider the problem, assess the consequence, evaluate alternative and if need be advance the remedy. No pillar can abrogate its role and constitutional oath and the judiciary is no exception and the judiciary without jurisprudence simply cannot say they have no judicial power. All pillars inclusive of constitutional functionaries are answerable to His Majesty more so when a complaint is lodged with His Majesty. Thus, our founding fathers of the constitution unlike the Indian Constitution have placed full responsibility in respect of 'Order in the Country' to His Majesty and His Majesty has a supreme role to play in policing the pillars as well as other constitutional functionaries, subject only to the constitutional framework and limitations. The relevant part of the constitutional oath of His Majesty pursuant to art 37(1) reads as follows:

> … and by virtue of that oath do solemnly and truly declare that We shall justly and faithfully perform (carry out) our duties in the administration of Malaysia in accordance with its laws and Constitution which have been promulgated or which may be promulgated from time to time in the future. Further We do solemnly and truly declare that We shall at all time protect the Religion of Islam and uphold the rules of law and *order in the Country*. (Emphasis added.)

[82] The common law position of parliamentary supremacy has limited relevance in our constitution which is founded on Constitutional Supremacy.

[83] All legislations must be made subject to the constitution and amenable to the scrutiny of the Superior Courts. In *Gobind Singh Deo v Yang Di Pertua, Dewan Rakyat & Ors* [2010] 2 MLJ 674, Mohamad Ariff Yusof JC (as he then was) held:

> *In Malaysia although the fundamental constitutional principle is Constitutional supremacy and not Parliamentary supremacy*, since the Malaysian Parliamentary system is modeled after the Westminster system, the general principles and usages of Westminster are not entirely irrelevant to resolve ambiguities except where the Federal Constitution, State Constitutions, or local laws prohibit reliance upon such principles and usages. The first point of reference must be the Malaysian Constitution or Malaysian law, as was done in Zambry's case. (Emphasis added.)

And the learned judge went on to say:

> The doctrine of the separation of powers is a feature of the Malaysian Constitution. The separation of powers, in the sense of checks and balances within the three branches of Government exists and animates the Malaysian Constitution.

(a) it is beyond doubt that in Malaysia it is the Constitution and not Parliament that is supreme. In *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 Suffian LP held:

> 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.

(b) in essence it means Legislature or the executive cannot act or exercise any discretionary power vested on them by law so as to infringe a right that is protected by the constitution save to the extent permitted by the constitution itself.

[84] It is not permissible for the Superior Courts under the doctrine of Constitutional Supremacy to be the guardian of legislation and/or protectors of the executive action if the action is in breach of the constitution. Every

Malaysian has a right to ensure the constitution is not breached and no constitutional question properly framed by interested parties can be struck out as academic when it relates to the constitution and the case of *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; [2006] 3 CLJ 177 at p 189 will not apply when the court has to deal with a constitutional issue. In *Robert Linggi v The Government of Malaysia* [2011] 2 MLJ 741, David Wong Dak Wah J (as he then was) had this to say:

> With respect to counsel for the defendant, to adopt her contention would be taking a retro step in the law on 'locus standi' in public law especially when there is a challenge to legislations made in contravention to the Federal Constitution. The Federal Constitution is the supreme law of the country and was drafted by the founding fathers of the country after taking into consideration the interests of all relevant parties prior to the formation of Malaysia. It is a document which belongs to all Malaysian irrespective of their race and standing in society and starting from that base, it must logically follow that all Malaysian have an entrenched right to litigate their grievance in court whenever there is a perceived breach of the Federal Constitution by the Legislature. In the local jurisdiction, suffice for me to refer to two judiciary pronouncements in the person of Suffian LP and Abdoolcader J. The former Lord President in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 states as follows:
>
> > 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.
> >
> > Under our Constitution written law may be invalid on one of these grounds:
> >
> > (1) in the case of federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of state written law, because it relates to a matter which respect to which the State Legislature has no power to make law, art 74; or
> >
> > (2) in the case of both federal and state written law, because it is inconsistent with the Constitution, see art 4(1); or
> >
> > (3) in the case of state written law, because it is inconsistent with Federal law, art 75.
> >
> > The court has power to declare any federal or state law invalid on any of the above three grounds.
> >
> > The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by government or by an individual.
> >
> > The Lord President's pronouncement that the Federal Constitution as the supreme law of the country is premised on art 4(1) of the Federal Constitution which states as follows:

A

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

In *Government of Malaysia v Lim Kit Siang United Engineers (Malaysia) Berhad v Lim Kit Siang* [1988] 2 MLJ 12 Abdoolcader J at p 45 states as follows:

> In *Finlay v Minister of Finance of Canada* the Federal Court of Appeal of Canada allowed a citizen who was neither directly affected nor a taxpayer to challenge the validity of federal and provincial transfer of payments under the Canada Assistance Plan. The decision has been upheld by the Supreme Court of Canada subnominee *Finlay v Canada*. The Supreme Court decided that the interest of the applicant was too remote or speculative to grant standing under the general requirement that the plaintiff must have a sufficient private or personal interest in the subject matter. The court went on to hold, however, that in appropriate public law cases, as a matter of judicial discretion, standing might be given to a private individual notwithstanding the fact that a constitutional or Charter of Rights and Freedoms issue was not involved. The court thus extended that principle laid down in *Thorson v Attorney-General for Canada*, *Nova Scotia Board of Censors v McNeil* (both of which I dealt with in *Lim Cho Hock*) and Minister of Justice for *Canada v Borowski* — all three of which involved the requirements for standing in a constitutional case where a party has no direct interest — to the field of administrative law and, in the result, granted standing to Finlay to bring action for a declaration to challenge the legality of the federal cost sharing arrangements.

Counsel for the plaintiff had also referred to a case of the Tanzanian High Court which in my view is the correct approach in determining the plaintiffs locus standing in constitutional challenge cases. That case is *Rev Christopher Mtikila v The Attorney-General* Civil Case No 5 of 1993, High Court of Tanzania, where it held that:

> The notion of personal interest, personal injury or sufficient interest over and above the interest of the general public has more to do with private law as distinct from public law. In matters of public interest litigation this court will not deny standing to a genuine and bona fide litigant even where he has no personal interest in the matter … Given all these and other circumstances, if there should spring up a public-spirited individual and seek the court's intervention against legislation or actions that pervert the Constitution, the court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing. The present petitioner is such an individual.

Another case that is worth mentioning is a decision by the Supreme Court of Ireland in *The Society for the Protection of unborn children (Ireland) Limited v Diarmund Coogan & Ors, defendants* [1988] IR 734; (1988 No 7714P). The Supreme Court shared the same sentiment as the Tanzanian High Court, where the court in its judgment held that:

> Every member of the public has an interest in seeing that the fundamental law of the state is not defeated, and although the courts are the ultimate guardian of the Constitution, such protection is possible only where their powers are invoked. Since breaches of constitutional rights may on occasion be threatened by the government itself or its agents, it would be intolerable if access to the courts to defend and vindicate such constitutional rights were confined to the attorney general as the very officer of state instructed to defend the government's position.
>
> The plaintiff, as a Sabahan, in my view is genuinely concerned with the erosion of the rights of Sabah in so far as 'the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court' and since it concerns an attempt to uphold the Federal Constitution, I have no hesitation in finding that the plaintiff has the 'locus standi' to bring this action. *I am fully aware of the argument that this may encourage litigation but in my view when there is a challenge concerning any dismantling of the supreme law of the country, litigation should be encouraged. In any event, all Malaysians have a duty to protect our constitution*. (Emphasis added.)

[85] The Federal Constitution does not permit legislature to arm executive and/or public authority with uncivilised powers and/or discretion. Uncivilised powers or discretion are powers and discretion which may usurp the spirit and intent of the Federal Constitution. For example, if power is vested with the executive or public to prohibit freedom of assembly as opposed to restrict or regulate freedom to assemble then it will fall into the category of being 'uncivilised'. This right to assemble is a fundamental right guaranteed by the constitution and is also in line with Universal Declaration Human Rights, Article 20(1) which says:

> Everyone has the right to freedom of peaceful assembly and association.

[86] On the similar issue on civility the Supreme Court of India had taken into consideration International Convention to promote the object of the constitutional guarantees. In *Vishaka v State of Rajasthan* AIR 1997 SL 3011, Justice JS Verma had this to say:

> Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.

[87] Constitutional jurisdiction and/or power of Superior Courts to exhale as supreme arbiter of what is right and wrong cannot be usurped by the Legislature if there is no provision in the constitution at its inception. Article 4(1) states:

A

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

B

[88] In essence the Federal law cannot restrict the Superior Courts from advancing a remedy after Merdeka Day as law in the constitution will cover judicial power of the court. After Merdeka Day it will cover the constitution by itself which vests the courts with jurisdiction and power to protect the constitution (judicial review of constitutional powers), and is clearly reflected in the oath of office of the judge.

C

[89] Article 4(1) is unique to our constitution and is not found in the Indian Constitution and many other written constitutions of the commonwealth. Our founding fathers of the constitution have preserved the powers and jurisdiction of the courts in immutable terms making sure that the constitution

D

is the supreme law of the federation, and any law which is inconsistent with the constitution, as void. The article does not say any provision of the constitution *but the constitution itself*. That is to say parliament may have some amending powers in art 159, subject to basic structure jurisprudence but parliament has not been given the jurisdiction to compromise the jurisdiction or power of the

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court before and after the inception of the constitution. (Emphasis added.)

[90] The provision of art 4(1) which stands from the inception of the Federal Constitution cannot be whittled away by parliament or for that matter even by the judiciary by the process of judicial interpretation; as such decision which

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are unconstitutional will not be binding on subsequent bench and the doctrine of judicial precedent related to common law and parliamentary supremacy has no jurisprudential significance when it relates to constitution and Constitutional Supremacy. The Indian Supreme Court's decision of *Golak Nath v State of Punjab* AIR 1967 SC 1643 which was overruled by decision of

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Kesavananda v State of Kerala AIR 1973 SC 1461, will stand as an authority to the said proposition. In *IR Coelho* the Supreme Court of India stated:

> In *SR Bommai & Ors v Union of India & Ors* [(1994) 3 SCC 1; 1994 Indlaw SC 2206] it was reiterated that the judicial review is a basic feature of the Constitution and that the power of judicial review is a constituent power that cannot be abrogated

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> by judicial process of interpretation. It is a cardinal principle of our Constitution that no one can claim to be the sole judge of the power given under the Constitution and that its actions are within the confines of the powers given by the Constitution. It is the duty of this Court to uphold the constitutional values and enforce constitutional limitations as the ultimate interpreter of the Constitution.

I

> Principles of Construction
>
> The Constitution is a living document. The constitutional provisions have to be construed having regard to the march of time and the development of law. It is, therefore, necessary that while construing the doctrine of basic structure due regard be had to various decisions which led to expansion and development of the law.

The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers, it requires a diffusion of powers, necessitating different independent centers of decision making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.

Common Law Constitutionalism

The protection of fundamental constitutional rights through the common law is main feature of common law constitutionalism.

According to Dr Amartya Sen, the justification for protecting fundamental rights is not on the assumption that they are higher rights, but that protection is the best way to promote a just and tolerant society.

According to Lord Steyn, judiciary is the best institution to protect fundamental rights, given its independent nature and also because it involves interpretation based on the assessment of values besides textual interpretation. It enables application of the principles of justice and law. Under the controlled Constitution, the principles of checks and balances have an important role to play. Even in England where Parliament is sovereign, Lord Steyn has observed that in certain circumstances, Courts may be forced to modify the principle of parliamentary sovereignty, for example, in cases where judicial review is sought to be abolished. By this the judiciary is protecting a limited form of constitutionalism, ensuring that their institutional role in the Government is maintained.

Principles of Constitutionality

There is a difference between Parliamentary and constitutional sovereignty. Our Constitution is framed by a Constituent Assembly which was not the Parliament. It is in the exercise of law making power by the Constituent Assembly that we have a controlled Constitution. Articles 14, 19, 21 represent the foundational values which form the basis of the rule of law. These are the principles of constitutionality which form the basis of judicial review apart from the rule of law and separation of powers. If in future, judicial review was to be abolished by a constituent amendment, as Lord Steyn says, the principle of parliamentary sovereignty even in England would require a relook. This is how law has developed in England over the years. It is in such cases that doctrine of basic structure as propounded in *Kesavananda Bharati* 1973 Indlaw SC 537's case has to apply.

[91] In *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, Raja Azlan Shah AG LP (as HRH then was) in respect of the issue in discussion made the following pertinent observation:

In interpreting a constitution two points must be borne in mind. *First, judicial precedent plays a lesser part* than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v Fisher* [1979] 3 All ER 21. A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms'. The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v Reynolds* [1979] 3 All ER 129 at p 136.

It is in the light of this kind of ambulatory approach that we must construe our Constitution. The Federal Constitution was enacted as a result of negotiations and discussions between the British Government, the Malay Rulers and the Alliance Party relating to the terms on which independence should be granted. One of its main features is the enumeration and entrenchment of certain rights and freedoms. Embodied in these rights are the guarantee provisions of article 71 and the first point to note is that that right does not claim to be new. It already exists long before Merdeka, and the purpose of the entrenchment is to protect it against encroachment. In other words the provisions of article 71 are a graphic illustration of the depth of our heritage and the strength of our constitutional law to guarantee and protect matters of succession of a Ruler (including election of the Undangs) which already exist against encroachment, abrogation or infringement. (Emphasis added.)

[92] In addition, our courts have repeatedly stated that:

(a) the scheme of the Federal Constitution recognises separation of powers. In addition the doctrine of separation of powers is an essential feature of the Federal Constitution;

(b) the Court of Appeal in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289; [1998] 3 CLJ 85, through Gopal Sri Ram JCA (as he then was) said 'the Federal Constitution has entrusted to an independent judiciary the task of interpreting the supreme law and indeed, all laws enacted by the legislative arm of the government'. And His lordship then referred to *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789 where Bhagwati J, spoke of separation of powers;

(c) in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor*

[1998] 3 MLJ 289; [1998] 3 CLJ 85, the Court of Appeal held that the amendment to art 121(1) of the Federal Constitution, whereby the words 'judicial power of the federation' were deleted on 10 June 1998 by Act A704 has not taken away the judicial powers from the High Court; and

(d) in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 at p 21; [2007] 6 CLJ 341 at p 359, Richard Malanjum CJ SS observed that: 'The amendment which states that 'the High Courts and inferior courts shall have jurisdiction and powers as may be conferred by or under federal law' should be by no means be read to mean that the doctrine of separation of powers and independence of the Judiciary are now no more the basic features of the Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a Federal Act of Parliament and that the courts are now only to perform mechanically and command or binding of a Federal law'.

[93] What is meant by judicial power was explained by Zakaria Yatim J (as he then was) in the case of *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; [1987] 1 CLJ 550; and in the Malaysian context it is a simple concept, giving the right to hear cases, and nothing more. The definition does not include the constitutional power or jurisdiction (judicial review of constitutional powers) of the superior court to protect and defend the constitution. In *Dato' Yap Peng*'s case the court stated:

> under our constitution the words 'judicial power of the federation' have been defined to mean 'that the court has the power to adjudicate in civil and criminal matter which are brought before the court'.

[94] In *Re Teoh Heng Han; Ex P OCBC Bank (M) Bhd* [2010] 9 CLJ 328, Hamid Sultan Abu Backer J (as he then was) dealt with the judicial power argument and the doctrine of judicial precedent in extensor and had this to say:

> The doctrine of separation of powers is a well recognised concept in Malaysia and the Commonwealth and from time to time advocated by the apex court. *And the concept relating to judicial power stands as its soul, to protect the constitution*. The observation of one learned judge in *Kok*'s case in relation to judicial power with respect must be seen at the most as res integra; as only one learned judge advanced such an opinion to limit the parameters of judicial power and the other who also participated in writing of the judgment strongly dissented and the majority on an important issue was silent as it was not necessary to deal with that issue at that stage though all were unanimous in allowing the appeal. Further there was no legal jurisprudence of sufficient nature advanced by the learned counsels in that case on an issue relating to the soul, of the constitution as well as the doctrine of separation of powers, in the right perspective to justify a conclusion at the apex stage.

Business Dictionary.com defines judicial power as constitutional authority vested in courts and judges to hear and decide justifiable cases, and to interpret, and enforce or void, statutes when disputes arise over their scope or constitutionality. In the Malaysian context the definition is much more wider and does not necessarily confine to the Federal Constitution per se to search for the vested rights which are not spelled out in the Federal Constitution or Statutes giving jurisdiction and powers to the court. Support for the proposition can be found in art 4, s 3 of the Civil Law Act 1956, s 25 of the CLA etc; and a number of case laws.

It cannot be doubted for a moment that the Federal Constitution and the Federal statutes recognises the doctrine of separation of powers, judicial review, judicial power, etc; in contrast to the view expressed in *Kok*'s case. And quite recently the Court of Appeal in *Dato' Dr Zambry Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar Jamaluddin; Attorney General of Malaysia, (Intervener)* [2009] 5 CLJ 265 the quorum consisting of Justice, Raus Sharif, Zainun Ali and Ahmad Maarop had asserted that the Malaysian system of government is founded on the Westminster model and observed as follows:

> [79] A brief outline of the essential features of the Federal Constitution will be useful. This is because much of what is found in the Federal Constitution are reflected in the State Constitution.
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> [80] Inclined as is the Federal Constitution towards the Westminster structure, it has its own peculiarities. The Westminster model is not to be found in one document, but could be seen in bits and pieces in the Magna Carta, the Bill of Rights, the Act of Settlement and a series of Parliament Acts. Conversely, the Federal Constitution however is embodied in one document and gathers unto itself various sources of law some of which are implicit. The unique presence of the written law, shot through with informal and unwritten sources in the form of conventions, prerogatives, discretionary and residual powers as such, help ensure the continuation of constitutionalism and the rule of law. Thus the sources of law in our Constitution are several. Article 160(1) of the Federal Constitution says it all. 'Law includes written law, the common law, insofar as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

Chandrachud J in *Indira Nehru Ghandi v Raj Narain* AIR 1975 SC 2299, had asserted that the constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the courts. The proposition was affirmed and quoted by Gopal Sri Ram FCJ in the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2009] 1 LNS 1476:

> 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 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 at p 2470:
>
> > 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.)

And at para 17 made the following observation:

> What does 'law' mean? As earlier observed, by definition it includes written law and the common law of England. This is the result when article 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 articles 8(1) and 5(1) interact.

In addition the learned judge of Federal Court articulated the meaning of basic fabric or structure of the constitutions as follows:

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

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

The entire legal system, to a large extent is based on Westminster constitutional theory. And in my view judicial power vested in the court by the Federal Constitution upon its birth is not a subject matter vested by Parliament for the power to be revoked. It is a power entrusted by the public to the court and that power cannot be removed by Parliament or court through a scheme of interpretation as it will go against judge's oath of office to protect the constitution. And such interpretation must always be seen to be arbitrary or illegal if the judgment is not supported by legal jurisprudence and/or decision of respected jurisdiction in the commonwealth. And such interpretation are not binding on each and every judge as judges have taken a sacrosanct oath to defend the constitution and such an oath is not a collective oath to recognise unconstitutional proposition or fatally wrong jurisprudence like that advocated in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133 which was rightly over ruled by the apex in the case of *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 CLJ 269. The learned professor Dr Ashgar Ali bin Ali Mohamed in his article *Rationale for*

Departing from Stare Decisis: A Review ofRe Hj Khalid Abdullah, Ex P Danaharta Urus Sdn Bhd [2008] 6 MLJ cxxv; [2008] 2 CLJ 326; [2008] 6 MLJA 125 relating to stare decisis made the following observation:

> The doctrine of stare decisis or the rule of judicial precedent dictates that it is necessary for each lower tier in the court structure to accept loyally the decision of the higher tiers.
>
> Having stated the above, this article will consider the recent High Court's decision in *Re Hj Khalid Abdullah; Ex p Danaharta Urus Sdn Bhd*, in relation to the doctrine of stare decisis. In the above case, Hamid Sultan Abu Backer JC stated, inter alia, that:
>
> > When an apex court decision is fatally flawed and will cause substantive injustice, then the stare decisis principle cannot override the constitutional responsibility of a judge, for if he does so, it will be in breach of his oath of his office. When the English Courts were dealing with the sanctity of the principles of stare decisis, they were not focused on issues relating to appellate courts 'decisions which promote fraud or rewards fraud or the enforcement of the decision of the appellate court will cause substantive miscarriage of justice, the nature of which any courts ought not to condone or entertain. Thus, to apply the principles of stare decisis to such cases will, in my view, be in breach of sacrosanct oath of the office of the judge. Further, perpetration of illegality is no part of the doctrine of stare decisis.

In addition in *Chai Kheng Lung v Inspector Dzulkarnain Abdul Karim & Anor* [2009] 8 MLJ 12; [2009] 7 CLJ 133; [2008] 1 LNS 527, I have made the following observation:

> This does not mean that the High Court is restricted by the doctrine of judicial precedent to take the revolutionary measures within the parameters of legal jurisprudence to advance justice (see HRH Raja Nazrin Shah — speech at Judges Conference on 9 April 2008 relating to judicial precedent (see *Re Haji Khalid bin Abdullah; ex parte Danaharta Urus Sdn Bhd* [2008] 2 CLJ 326; [2007] 6 AMR 694).

It must not be forgotten that the High Court, Court of Appeal and Federal Court are superior courts vested with jurisdiction and/or power to protect the constitution. It is not permissible by judicial interpretation of the constitution to reduce the status of the superior courts to tribunals; as only tribunals or inferior courts are solely dependent on the statute for its jurisdiction and powers. And to a large extent there is no merit in the judicial power argument raised by appellant in respect of registrar as the registrar power to hear cases is limited to the powers provided by statute, rules, etc; And that power cannot be equated to judicial powers vested in the superior courts.

[95] There is a distinction between judicial power and constitutional jurisdiction and/or power of the courts. The former is reminiscent of the past and it continues to be so because of art 4(1), notwithstanding that some jurists

have argued that it has disappeared with no jurisprudential justification from respected jurisdiction, and such views were purely based on emotional burst of novice interpretation of the constitution, (see *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341; *Re Teoh Heng Han*; *Ex Parte OCBC Bank (M) Bhd* [2010] 9 CLJ 328). The later (judicial review of constitutional powers) is the robust, dynamic and dominant version of the former which stands to protect the constitution based on constitutional supremacy and the concept originates from the constitution itself and is distinct from the judicial review concept in vogue in UK, which is based on parliamentary supremacy. The distinction is vital to appreciate the working of the Federal Constitution (see *Ram Jethmani v Union of India & ors* [2011] 7 SCC 104; *Nandini Sundar v State of Chattisgarh* AIR 2011 SC 2839; *Centre for PIL v Union of India* [2012] 3 SCC 1).

[96] It is also trite when dealing with written constitution based on Westminster model, the Privy Council had said that it *is taken for granted* that the basic principle of the separation of powers will apply to the exercise of their respective functions by three organs of government. (Emphasis added.) Justice Gopal Sri Ram in his 'Ahmad Ibrahim Lecture' had this to say:

> It is a fundamental requirement of a democratic state that all forms of State action must be supportable in law — either a statute or the common law. Illegal State action is incompatible with a democratic society. This proposition lies at the heart of the rule of law.
>
> The elements of a democracy were set out in *The State v Abdul Rachid Khovrattv* [2007] 1 AC 80. It is a case of first importance. It was an appeal from Mauritius, a country governed by a written constitution modelled along Westminster lines. It is a very important case for several reasons not all of them relevant to the present occasion. Two of them may be mentioned. In a normal case before it, the Board of the Privy Council when it is unanimous delivers only a single judgment in the form of an Advice to the Head of State of the country from which the appeal emanates. However, in *Khoyratty*, three members of the Judicial Committee delivered separate judgments all concurring in the result. It is necessary to quote from each of them. In his judgment Lord Steyn analysed the elements of a democratic state. He said:
>
> > The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary.
>
> In his separate judgement, Lord Rodger of Earlsferry said this when speaking of interpreting the Constitution of Mauritius:
>
> > On the other hand, what matters is the content of the concept of a democratic state as that term as used in section 1 and not just generally. That said, the Constitution is not to be interpreted in a vacuum, without any regard to thinking

in other countries sharing similar values. Equally, experience in Mauritius is likely to prove of value to courts elsewhere. Therefore, the decisions cited by Lord Steyn do indeed 'help to give important colour' to the guarantee that Mauritius is to be a democratic state. In particular, *it is a hallmark of the modern idea of a democratic state that there should be a separation of powers between the legislature and the executive, on the one hand, and the judiciary, on the other.* (Emphasis added.)

Lord Mance added this observation:

> 34 On the one hand, the Attorney General and Minister of Justice made clear that Chapter 2 (sections 3 to 19) of the Constitution was not in the same situation as Chapter 1: sections 1 and 2. This is evident from the confined nature of the entrenchment achieved by section 47(3). So, many amendments of the 'fundamental rights and freedoms' of the individual spelled out in detail in Chapter 2 of the Constitution are possible with a two-thirds majority of the Assembly. On the other hand, the Attorney General and Minister of Justice also made clear that section 1 was not envisaged as an empty general statement, but as a real bastion to 'protect and perpetuate' among other things 'the rule of law' and 'the existence of an independent judiciary', that is independent of the executive and legislature.
>
> 35 *These are basic principles themselves not expressly spelled out elsewhere in the Constitution*, for reasons explained by Lord Diplock in *Hinds v The Queen* [1977] AC 195 (a decision followed in Director of *Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411, to which Lord Steyn has referred). Lord Diplock, giving the majority judgment, said that new constitutions on the Westminster model were, particularly in the case of unitary states, evolutionary not revolutionary and, at p 212:
>
> > Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. *Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature* … Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively.
> >
> > (Emphasis added).

What is to be gathered from these statements is (i) that the rule of law and the doctrine of separation of powers is an integral part of a democratic constitution founded on the Westminster model although it may not be expressly provided for and (ii) decisions interpreting such a constitution of one member of the Commonwealth cast much light on how the constitution of another member should be interpreted.

[97] Based on the decision of respected jurisdiction in the commonwealth, the argument propounded by some jurists in Malaysia that the courts have lost its judicial power is in actual fact an incoherent argument and does not hold value within the parameter of constitutional jurisprudence, more so when the oath of the office of the judge is to preserve, protect and defend the constitution at its inception and in particular its own jurisdiction and power; before and after the inception of the constitution.

[98] In *Koh Wah Kuan v Public Prosecutor* [2007] 5 MLJ 174, the quorum of the Court of Appeal consisting of Justice Gopal Sri Ram, Zulkefli Makinudin and Raus Sharif JCA (as they were) on the issue of judicial power had this to say:

> [3] Prior to 10 June 1988, art 121 of the Constitution opened with the words 'the judicial power of the Federation shall be vested'. This phrase was taken by the framers of our Constitution from s 71 of the Australian Constitution. It was interpreted by Griffith CJ in *Huddart, Parker and Co Proprietary Ltd v Moorehead* (1908–1909) 8 CLR 330, to mean:
>
> > … the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision … is called upon to take action.
>
> This definition was cited with approval by the Privy Council in *Shell Co of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275.
>
> [4] However, by Act A704, art 121 was amended with effect from 10 June 1988 and the expression 'judicial power' was deleted. No challenge as to the constitutionality of Act A704 was ever taken before any court. To our minds such a challenge, even if taken, would have failed because the amendment did not have the effect of divesting the courts of the judicial power of the Federation. There are two reasons for this. First, the amending Act did nothing to vest the judicial power in some arm of the Federation other than the courts. Neither did it provide for the sharing of the judicial power with the Executive or Parliament or both those arms of government. Second, the marginal note to art 121 was not amended. This clearly expresses the intention of Parliament not to divest the ordinary courts of the judicial power of the Federation and to transfer it to or share it with either the Executive or the Legislature.
>
> [5] Now, marginal notes are admissible guides to statutory interpretation. Indeed: It is now well settled that a marginal note is a part of the section. It is the key to open the mind of the legislature by affording guidance in understanding their intendment. See, *The Film Exhibitors Guild v State* AIR 1987 AP 110, per K Ramaswamy J on behalf of the Full Bench.
>
> Of course, guidelines for statutory interpretation should not be applied when interpreting a Constitution. See, *Hinds v The Queen* [1976] 1 All ER 353, per Lord Diplock. But, a marginal note in a written Constitution is nevertheless part of the

supreme law and 'furnishes some clue as to the meaning and purpose of the article'. See, *Bengal Immunity Co Ltd v State of Bihar* AIR 1955 SC 661, per Das, Ag CJ at para 24.

[6] In *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289, this court said (at p 308):

> The Constitution of Sri Lanka (formerly Ceylon) does not even mention the expression judicial power. Yet, upon high authority it has been held that despite the omission, the provisions in that document:
>
> > … manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature (per Lord Pearce in *Liyanage v The Queen* [1967] 1 AC 259 at p 287).
>
> > The Indian Constitution also does not make mention of judicial power being vested in the judiciary. Yet, the same position obtains there as in Sri Lanka. See *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789. Like the Constitutions of Sri Lanka and India, the Federal Constitution preserves the separation of powers between the three arms of government and evinces no intention that the judicial power of the Federation shall be passed to or shared with the Executive or the Legislature. It follows that the judicial power of the Federation remains where it has always been, namely, with the judiciary.
>
> That is a view to which we still adhere.

[7] In *Hinds v The Queen*, Lord Diplock made two observations that are applicable to the case at hand. In the first place he said of the Jamaican Constitution that:

> It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government.

He then made this further observation:

> What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution: *Liyanage v The Queen* [1967] 1 AC 259, pp 287–288.

[8] Based on the foregoing discussion, it is in our judgment beyond argument that the doctrine of separation of powers is very much an integral part of the Federal Constitution. Since art 4(1) declares the Constitution to be the supreme law, it

follows that any state action that violates the doctrine of separation of powers must be struck down as unconstitutional. And that brings us to the second issue that has fallen for determination.

[99] The Indian Supreme Court has dealt with constitutional issues based on a complaint letter which was not based on judicial power but based on constitutional jurisdiction and power. In *SMT Nilabati Behera Alias Lalita Behera v State of Orissa and Another* AIR 1993 SC 1960, JS Verma J sitting in the Indian Supreme Court heard a complaint by a letter relating to a constitutional question and asserted that the Supreme Court and the High Court had jurisdiction and/or power to do so which I have adverted earlier under the constitution. And to protect the constitutional rights lack of procedural requirement was not treated by the Supreme Court as an issue at all. The decision per se has nothing to do with judicial activism as some will attempt to demean it by stating so, but has everything to do with constitutional dynamism which is necessary to protect the constitution and the rights and dignity of the citizen, from any form of executive encroachment.

[100] One of the well known and often cited cases in India on similar issues relating to freedom of assembly, is the case of *Himat Lal K Shah*, where the Indian Supreme Court struck down a subsidiary legislation which required permission from the police to hold public meetings that too on public streets, to be in contravention of art 19(1)(b) of the Indian Constitution which is pari materia to our art 10(1)(b) of the Federal Constitution. The impugned rule was r 7, formulated pursuant to s 33 of the Bombay Police Act 1951. The said r 7 reads as follows:

> No public meeting with or without loudspeaker, shall beheld on the public street within the jurisdiction of the Commissionerate of the Police, Ahmedabad City unless the necessary permission in writing has been obtained from the officer authorised by the Commissioner of Police. (8). The, application for permission shall be made in writing and shall be signed by the persons who intend to organise or promote such a meeting.

Chief Justice SM Sikri had this to say:

> In our view r 7 confers arbitrary powers on the officer authorised by the Commissioner of Police and must be struck down.

Mathew J had opined:

> The power of the appropriate authority to impose reasonable regulation in order to assure the, safety and convenience of the people in the use of public highways has never been regarded as inconsistent with the fundamental right of assembly. A system of licensing as regards the time and the manner of holding public meetings on public street has not been regarded as an abridgement of the fundamental right of public assembly or of free speech. But a system of licensing public meeting will be

upheld by courts only if definite, standards are provided by the law for the guidance of the licensing authority. Vesting of unregulated discretionary power in a licensing authority has always been considered as bad (see the cases on the point discussed in the concurring opinion of Justice Frankfurter in *Niemotko v Maryland (2)*).

If there is a fundamental right to hold public meeting in a public street, then I need hardly say that a rule like r 7, which gives an unguided discretion, practically dependent upon the subjective whim of an authority to grant or refuse permission to hold a public meeting on public street, cannot be held to be valid. There is no mention in the rule of the reasons for which an application for licence can be rejected. 'Broad prophylactic rules in the area of free expression and assembly are suspect. Precision of regulation must be the touch stone in an area so closely touching our precious freedoms' (see *NAACP v Button(3)*). I would allow the appeal.

Beg J stated:

If we bear this definition in mind, it would appear that the public could conceivably hold a meeting at a place falling under this definition of a street. If this is so, could the Commissioner not be authorised to regulate it in the manner contemplated by r 7? I think he could, provided there are sufficient safeguards against misuse of such a power. Rule 7 is so worded as to enable the Commissioner to give or refuse permission to hold a public meeting at a place falling within the definition of 'a Street' without the necessity of giving reasons for either a refusal or a permission. It will, therefore, be possible for him, under the guise of powers given by this rule, to discriminate. If he chooses to give no reasons either for giving the permission or for refusing it, it will not be possible for a High Court or this court to decide, without holding a trial and taking evidence, what those reasons really are in a particular case. Such a wide power my even enable an exceptional user of a public thoroughfare, completely inconsistent with the rights of the public to pass or repass, to be made of it without sufficient justification for it.

The Commissioner may give permission to use a place for a public meeting on a public street, which may not be suitable for it, to influential or powerful persons but deny it to others. Although, the right to hold a public meeting at a public place may not be a fundamental right by itself, yet, it is so closely connected with fundamental rights that a power to regulate it should not be left in a nebulous state. It should be hedged' round with sufficient safeguards against its misuse even if it is to be exercised by the Commissioner of Police. He ought to be required to give reasons to show why he refuses or gives the permission for such exceptional user of a 'street' as it is defined in the Act. The rule should make clear the circumstances in which the permission may be given or refused.

Therefore, although I have had my serious doubts as to whether we need declare r 7 invalid for a contravention of art 19(1)(b) of the Constitution, yet, on fuller consideration, I respectfully concur with Mylord the Chief Justice in declaring it invalid because it is capable of being used arbitrarily so as to discriminate unreasonably and unjustiably and thus to affect the exercise of rights conferred by art 19(1)(a)–(b) without sufficient means 'of control over possible misuse of power. The Rule of law our Constitution contemplates demands the existence of adequate means to check possibilities of misuse of every kind of power lodged in officials of the state. I would prefer to 'strike it down for contravening art 14 of the

Constitution although, if its' repercussions on the rights guaranteed by art 19(1)(a)–(b) were also taken into account, it could be struck down as an unreasonable restriction on those rights as well.

[101] From the above decisions and many other decisions from respected jurisdiction to which the appellants have referred to advance the salient jurisprudence that the doctrine of Constitutional Supremacy vests the court with the jurisdiction and power to protect the constitution and in that process can hold any law or its part as invalid on the grounds, it is ultra vires the Constitution. These extended jurisdiction and power under the constitution as I have stated earlier are not enjoyed by the courts in England which is subject to the doctrine of parliamentary supremacy.

[102] In *Tan Tek Seng v Perkhidmatan Suruhanjaya Pendidikan & Anor* [1996] 1 MLJ 261 at p 283 had laid down the test to determine the constitutionally of a legislative provision as follows:

When the constitutionality of state action; be it Legislative (which is not the case here) or administrative; is called into question on the ground that it infringes a fundamental right, the test to be applied is, whether that action directly affects the fundamental rights guaranteed by the Federal Constitution, or that its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory.

[103] In *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 the court observed:

The courts of Hong Kong have adopted a similar approach when interpreting their basic law. In *Leung Kwok Hung v The Hong Kong Special Administrative Region* [2005] 887 HKCU 1, Li CJ when delivering the unanimous judgment of the Court of Final Appeal said:

It is well established in our jurisprudence that the courts must give such a fundamental right a generous interpretation so as to give individuals its full measure. *Ng Ka Ling v Director of Immigration* [1999] 2 HKCFAR 4 at 28–9. On the other hand, restrictions on such a fundamental right must be narrowly interpreted. *Gurung Kesh Bahadur v Director of Immigration* [2002] 5 HKCFAR 480 at para 24. Plainly, the burden is on the government to justify any restriction. This approach to constitutional review involving fundamental rights, which has been adopted by the court, is consistent with that followed in many jurisdictions. Needless to say, in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them. (Emphasis added.)

We return home to end our citation of the authorities. In the recent case of *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285; [2008] 1 CLJ 521, this court in the judgment of Hashim Yusoff FCJ approved, inter alia, the following

A passage in the judgment of the Court of Appeal in *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19:

> The long and short of it is that our Constitution — especially those articles in it that confer on our citizens the most cherished of human rights-must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become.

B

THE SUBMISSION OF COUNSEL

C

[104] Learned counsel for the appellants has summarised their arguments as follows:

(a) Article 10(1)(b) only allows the State to restrict the right to freedom of assembly on certain grounds ie in the interests of the security of the Federation or public order. These restrictions may be penal in nature (such as found in the Penal Code) but they cannot supersede the primary right of freedom to assemble per se, be unreasonable and/or disproportionate to the object they intend to achieve.

D

E

(b) Article 10 does not allow prohibitions or nullification of the right to peaceful assembly.

(c) Restrictions that are in essence prohibitions or nullifications are unconstitutional, invalid and should be struck down.

F

(d) Restrictions in the form of regulations of the conduct of assemblies are permitted eg conditions such as time, place and number of participants, and are not unconstitutional.

(e) The requirement to obtain a permit to assemble is a form of 'prior restraint' that amounts to a prohibition, and not a regulation as a form of a restriction permitted by Article 10. Section 27(2) of the PA is therefore unconstitutional.

G

(f) A law cannot create an offence criminalising the exercise of the constitutional right to freedom of assembly per se. In other words, there cannot be enacted an offence for exercising the right to peaceful assembly simpliciter.

H

(g) Section 27(5)(a) of the PA is such a law because a citizen is penalised for the exercise of the right to peaceful assembly only because no prior permit had been issued. Section 27(5)(a) of the PA is therefore unconstitutional.

I

[105] In essence learned counsel for the appellants says that on a proper application of the 'reasonable restriction' test expounded by the Court of Appeal in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213, and the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507 and *Lee Kwan Woh v Public*

Prosecutor [2009] 5 MLJ 301; [2009] 5 CLJ 631, the learned judge should have found s 27(5) read with s 27(2) inconsistent with art 10(2)(b) of the FC, and struck down the same. And asserts that s 27(2) and 27(5)(a) are not restrictions permitted by art 10(2)(b) of the Federal Constitution.

[106] Learned counsel for the appellants concedes that the police should indeed have powers to regulate assemblies by imposing conditions as to time, place, size, and other matters but such powers should not be to prohibit. And relies on the case of:

(a) *Pendakwa Raya v Cheah Beng Poh & Ors; Cheah Beng Poh & Ors v Pendakwa Raya* [1984] 2 MLJ 225; [1984] 1 CLJ 117, where it was stated:

> The court as guardian of the rights and liberties enshrined in the constitution is always jealous of any attempt to tamper with rights and liberties. But the right in issue here i.e. the right to assemble peaceably without arms is not absolute for the Constitution allows Parliament to impose by law such restrictions as it deems necessary in the interest of security and public order. In my view, what the court must ensure is only that any such restrictions may not amount to a total prohibition of the basic right so as to nullify or render meaningless the right guaranteed by the Constitution.

(b) *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213, where it was stated unreasonable restrictions are unconstitutional. Justice Gopal Sri Ram JCA (as he then was) said:

> Against the background of these principles it is my judgment that the restrictions which art 10(2) empower Parliament to impose must be reasonable restrictions. In other words, the word 'reasonable' must be read into the sub-clauses of art 10(1).

And subsequently at para 11, His Lordship said:

> There it is. The court must not permit restrictions upon the rights conferred by art 10 that render those rights illusory. In other words, Parliament may only impose such restrictions as are reasonably necessary. To emphasise, only proportionate legislative response is permissible under art 10(2)(c).

(c) *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507, where the Federal Court asserted that every legislative action must be proportionate to the object which it seeks to achieve. Gopal Sri Ram FCJ had this to say:

> 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 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 whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of 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 of proportionality.

At pp 345–346 (MLJ); 521–522(CLJ) of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507, the court also said:

> 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 article 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 SCC 3 '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 Gandhi v Union of India*. The principle of equality enshrined in article 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.
>
> 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).

(d) *Romesh Thappar v The State of Madras* [1950] SCR 594, where the Supreme Court of India stated:

> Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as if may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, cl (2) of article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the state is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent.

(e) *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116, where it was stated:

> The presumption of constitutional validity would appear to be of little assistance in the case of a statutory provision where on the face of it there is no classification at all or no principles for selection based on intelligible differentia, and hostile discrimination is writ large on the face of the impugned provision.

[107] It is pertinent to note that peaceful assembly does not attract penal sanction under the Penal Code. The constitution also does not prohibit peaceful assembly. Thus, an assembly prima facie will not be unlawful if the ingredients stated in s 141 of the Penal Code are not satisfied. The said s 141 states:

> 141 An assembly of five or more persons is designated an 'unlawful assembly', if the common object of the persons composing that assembly is —
>
> (a) to overawe by criminal force, or show of criminal force,the Legislative or Executive Government of Malaysia or any State, or any public servant in the exercise of the lawful power of such public servant;
>
> (b) to resist the execution of any law, or of any legal process;
>
> (c) to commit any mischief or criminal trespass, or other offence;
>
> (d) by means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or
>
> (e) by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.
>
> Explanation — An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.

[108] If an assembly is not licensed it does not mean it is unlawful assembly in the light of s 141 of the Penal Code read with art 10. The appeal record and the judgment of the High Court do not address this issue, as the constitution clearly prohibits any convictions which are not according to law. Article 5(1) of the Federal Constitution reads as follows:

> 5(1) No person shall be deprived of his life or personal liberty save in accordance with law.

[109] In addition when there are two provisions of the law which appear to be in conflict, the most favourable to the accused must be given effect under the general jurisprudence of the criminal law (see *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2004] 1 MLJ 497; [2004] 3 CLJ 747).

[110] Further, the learned authors of *Nandi Criminal Ready Reference*, (3rd Ed), Vol 3 at p 368 place a further caveat as follows:

> Law is now well settled that if a sudden unpremeditated free fight takes place between two groups, the members thereof cannot be said to have formed an unlawful assembly within the meaning of sec 141 IPC. In such a case each of them would be liable for their individual acts and not for the acts of others - *Shahji Govind Misal v State* [1997] 8 SCC 341; see also *Lalji v State* [1974] 3 SCC 295; AIR 1973 SC 2505; *Puran v State* [1976] 1 SCC 28; AIR 1976 SC 912; *Ishwar v State* [1976] 4 SCC 355; AIR 1976 SC 2423.

[111] From the records it is difficult even to fathom how a charge anchored on the premise of unlawful assembly can succeed without proving the vital elements of s 141 of the Penal Code, taking into consideration that deeming provision of s 27(5) is contrary to art 10 for asserting that *there must be licence for the assembly.* (Emphasis added.)

[112] The learned deputy public prosecutor for the respondent had been magnanimous and also economic in the submission and does not appear to dispute the jurisprudence or principle stated in many of the cases relied on by the appellants inclusive of the cases in Zimbabwe, Zambia, Ghana, Tanzania and many more, which I do not think are necessary to set out as the Indian Supreme Court's decisions in this area of jurisprudence are comprehensive enough to deal with the issues, and very relevant to our constitutional framework.

[113] The learned deputy public prosecutor concedes that restriction on fundamental rights needs to be reasonable as stated by the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507.

[114] I have read the appeal record and submission of the parties in detail. I take the view that (a) the appeal must be allowed; (b) the question posed must be ruled in the affirmative; (c) the conviction and sentence must be quashed; (d) the fines paid must be returned; (e) the sentence and conviction of others who were convicted and sentenced must also be quashed and the state must return the fines that they had paid. My reasons, inter alia, are as follows:

(a) freedom of speech, assembly and association forms part and parcel of fundamental guarantees enshrined in the constitution. Article 10 of the Federal Constitution reads as follows:

> 10(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 paragraph (a) of Clause (2), 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.

(b) Article 10(2)(b) allows legislation to permit restriction in respect of right to assemble. It must be stated that restriction cannot amount to prohibition, as decided by case laws in this area of jurisprudence. The word restriction has now an extended meaning given by case laws to

mean reasonable restrictions as promulgated by the Federal Court in the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507;

(c) the Indian Constitution has similar provision as that of art 10 and their equipollent in relation to freedom of assembly is art 19(1)(b) which had been dealt in extensor in *Himat Lal*'s case and the court had asserted that power to regulate cannot be said to be a power to prohibit;

(d) in the instant case there is a requirement under s 27 of the PA 1967 to obtain licence but in that process the police authority cannot prohibit or refuse to grant the license. They can only place terms to regulate the assembly and license has to be issued to all without any form of subjective discrimination failing which it will violate art 8(1) of the Federal Constitution. The said article reads as follows:

> 8(1) All persons are equal before the law and entitled to the equal protection of the law.

(e) fundamental liberties in Part II of the Constitution is equipollent to fundamental rights in Part III of the Indian Constitution. It is well settled in India that Parliament in exercising its amending powers cannot modify, restrict or impair fundamental freedoms in Part III affecting the basic structure of the Indian Constitution, (see *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461);

(f) basic structure jurisprudence does not permit novice or pathetic interpretation of the Constitution. Basic structure jurisprudence also does not permit Parliament to undermine the doctrine of separation of powers between the Legislature, the Executive and the Judiciary by Constitutional or Legislative amendment. In essence Parliament cannot legislate to subject the Superior Courts to be subservient to the Executive. And basic structure jurisprudence does not permit the judiciary to abrogate its constitutional role and succumb to fallacious and/or pathetic argument that Parliament has deprived its judicial powers when Parliament is not authorised to do so under the Constitution. To put it crudely, if not for the basic structure, jurisprudence the Indian Constitution can be converted into nothing more than an irrelevant document by an unscrupulous Parliament. In the Malaysian context it is pertinent to note the following:

(i) our founding fathers of the Federal Constitution have given additional protection to the public to ensure that the pillars of the Constitution act according to the sacrosanct oath of office by entrusting His Majesty as the supreme fountain of justice as well as the supreme bastion to protect the constitution from unscrupulous pillars by enacting art 37 and the oath of office of His Majesty and to

execute the oath, His Majesty has been made the Supreme Commander of the Armed Forces (art 41) without any executive shackles as seen relating to His Majesty's role as the Executive Head of Government pursuant to art 39 and other shackles provided for in art 40(1) and (1A) etc;. The distinction is unique and clear when contrasted with the Indian Constitution. In Malaysia art 39 reads as follows:

> 39 The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorized by the Cabinet, but Parliament may by law confer executive functions on other persons.

And article 41 reads as follows:

> 41 The Yang di-Pertuan Agong shall be the Supreme Commander of the armed forces of the Federation.

And article 40(2) excludes 40(1) and (1A) and reads as follows:

> 40(2) The Yang di-Pertuan Agong may act in his discretion in the performance of the following functions, that is to say:

(a) the appointment of a Prime Minister;

(b) the withholding of consent to a request for the dissolution of Parliament;

(c) the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of Their Royal Highnesses, and any action at such a meeting, and in any other case mentioned in this Constitution.

Under the Indian Constitution, the President of India is subject to executive shackles in relation to the President's role as the Executive Head of the Government as well as the supreme commander of the Defence Forces. That is not the case in Malaysia for reasons stated above. Article 53(1)–(2) of the Indian Constitution reads as follows:

> (1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.
>
> (2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.

(ii) the oath of office of His Majesty in relation to 'Order in the Country' is an independent provision recognising the role of His

Majesty when the pillars fail in their sacrosanct oath. The oath of office of His Majesty gives locus for the public to petition to His Majesty of any complaints in respect of the pillars or other constitutional functionaries;

(iii) to put it crudely our founding fathers have solely armed His Majesty as the Supreme Commander of armed forces to execute the constitutional oath when necessary, to arrest any threat to the country or constitution by unscrupulous pillars or constitutional functionaries or the public, etc. Such authority and supreme power to the Constitutional Heads is not found in the Indian Constitution or other constitution within the commonwealth. Thus, one may conclude that the founding fathers have provided a dominant role for His Majesty and His Royal Highness, the Rulers and not just a ceremonial role as often our book and article writers will project. The pillars must perform according to their constitutional oath failing which upon the complaint of the public, His Majesty is empowered to provide the relief to protect the constitution and sustain order in the country. In this respect it is pertinent to note the oath of office of His Majesty is entirely different from the oath of office of the President of India under the Indian Constitution. And the constitutional obligations also differ;

(iv) if the public have grievance against the Legislature or Executive or Judiciary or any other constitutional functionaries in performing the constitutional role the proper procedure to seek relief under the constitution and rule of law is to lodge a complaint petition with His Majesty and not by injudicious attack on the web or street, that too without exhausting the constitutional remedies;

(v) our Federal Constitution is a well planned constitution and is unique in contrast to the Indian Constitution. It has many inbuilt mechanism to check any form of vice which will stand to be a threat to the 'Order of the Country'. As I have said elsewhere all the pillars have a sacrosanct duty and obligation to the public to ensure that one pillar does not undermine the other in whatever manner, because the weakness of the pillars will undermine the stability of the nation and this will ultimately affect the public. Although human can stand on two legs or one, the Federal Constitution needs all the three to stand individually to uphold the constitution and protect the public. This concept of standing separately to protect public interest is often termed as the doctrine of separation of powers. In addition the Federal Constitution has placed a complaint and relief mechanism in the hands of His Majesty to ensure Order in the country; and

(vi) it is for the judiciary to police and adjudicate on legislation,

executive or constitutional functionaries' action or decision. A compliant judiciary or bench which says it has no judicial power has no constitutional status within the framework of the constitution and has to be corrected by due process within the constitutional framework. In consequence a judge is obliged to act pursuant to oath of office and deal with constitutional issues without abrogating his role by saying the court has no judicial power or it's like (see *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341);

(g) M Saravanabavan and M Amuthaganesh in their article *The Leading Paradigm in the Democratisations of Public Law Judicial Process*: *The Indian Experience* [2012] 6 MLJ cliii had dealt with the Supreme Court's decision of *Golak Nath*'s case and *Kesavananda Bharathi* and concluded as follows:

> In India, the people have given unto themselves a written Constitution that embodies and defines the diffusion of sovereign power. The power of judicial review is a part of the basic structure of the Constitution, unalterable even by a constitutional amendment as affirmed by the Supreme Court in *Kesavananda Bharati*. There is representative democracy as an expression of the people's will, speaking through their elected representatives is a non-negotiable premise of a republican charter, which itself is the product of an exercise of the unbroken sovereign power. It is submitted that such a system under arts 32 and 226 for the enforcement of fundamental rights of a citizen by the court is truly 'sui generis' as it provides for an extraordinary procedure to safeguard the fundamental rights by way of judicial review. The Supreme Court, while interpreting some provisions of the Constitution, has often extended the peripheries of the articles so as to include some rights, which are not there explicitly in the Constitution. According to the Constitution, interpretations by the Supreme Court become binding on all the lower courts and therefore become the law of the land. It is clear that fundamental liberties and democratic ideals are secured by way of judicial review in India. The notion of *ubi jus ibi remedium* has asserted its rightful position in Indian Public Law.

(h) freedom to assemble is a right recognised at common law for centuries. The Federal Constitution recognises the right and does not permit any legislation to compromise on the right to assemble save at the most to regulate. And the common law does not prohibit the right to assemble, and in that process the right to demonstrate and the right to protest on matters of public concern. However, if it is not done peaceably and without arms it will attract penal sanction under the Penal Code or any other relevant law. What art 10 does not permit is to place penal sanction on citizen's right to assemble without permission. In *Hubbard v Pitt* [1976] QB 142 Lord Denning had this to say:

> Here we have to consider the right to demonstrate and the right to protest on matters of public concern. *These are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done.* It is often the only means by which grievances can be brought to the knowledge of those in authority — at any rate with such impact as to gain a remedy. Our history is full of warnings against suppression of these rights. Most notable was the demonstration at St Peter's Fields, Manchester, in 1819 in support of universal suffrage. The magistrates sought to stop it. At least 12 were killed and hundreds injured. Afterwards the Court of common Council of London affirmed 'the undoubted right of Englishmen to assemble together for the purpose of deliberation upon public grievances'. Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern. As long as all is done peaceably and in good order, without threats or incitement to violence or obstruction in traffic, it is not prohibited. (Emphasis added.)

In essence the right to assemble peacefully is a guaranteed right in the Constitution and there cannot be penal sanction legislated when citizens assemble peacefully without committing offences under the Penal Code, etc.

(i) *art 10 does not permit to criminalise an assembly which is not licensed.* (Emphasis added.) However, those who assemble and subsequently breach any of the penal provision in the Penal Code or other statues may be liable for criminal prosecution. It is a risk, those with or without a licence take when they assemble and they cannot be penalised if the assembly is peaceful. The Indian Supreme Court in the case of *Kameshwar Prasad and Ors v The State of Bihar and Anor* 1962 AIR 1166 (SC) had this to say:

> … a demonstration is a visible manifestation of the feelings or sentiments of an individual or a group. It is thus a communication of one's ideas to others to whom it is intended to be conveyed. It is in effect therefore a form of speech or of expression, because speech need not be vocal since signs made by a dumb person would also be a form of speech. It has however to be recognised that the argument before us is confined to the rule prohibiting demonstration which is a form of speech and expression or of a mere assembly and speeches therein and not other forms of demonstration which do not fall within the content of article 19(1)(a) or 19(1)(b). A demonstration might take the form of an assembly and even then the intention is to convey to the person or authority to whom the communication is intended the feelings of the group which assembles … It is needless to add that from the very nature of things a demonstration may take various forms. It may be noisy and disorderly, for instance stone-throwing by a crowd may be cited as an example of a violent and disorderly demonstration and this would not obviously be within article 19(1)(a) or (b). It is equally be peaceful and orderly such as happens when the members of the group merely wear some badge drawing attention to their grievances.

And went on to consider whether the rule in question was unreasonable restriction on freedom to assemble and decided as follows:

> The vice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration — be the same however innocent and however incapable of causing a breach of public tranquillity and does not confine itself to those forms of demonstrations which might lead to that result … We would therefore allow the appeal in part and grant the appellants a declaration that r 4A in the form in which it now stands prohibiting 'any form of demonstrations' is violative of the appellants' rights under article 19(1)(a)–(b) and should therefore be struck down.

It was also the contention of the appellants that since 18 November 2012 Malaysia has adopted the ASEAN Human Rights Declaration where art 24 of the said declaration confirms the right to freedom of peaceful assembly is a human right. And the appellants assert that the court is constitutionally bound to arrest any wrong contrary to human right values, and advance a remedy to ensure respect and recognition is given to individual liberties as enshrined in the Federal Constitution and also in recognition of Malaysia being a signatory to the relevant International Convention on Human Rights in reliance of the case of *Chai Kheng Lung v Inspector Dzulkarnain Abdul Karim & Anor* [2008] 8 MLJ 12 where Hamid Sultan Abu Backer JC (as he then was) in relation to preventive detention observed:

> If all procedural requirements have been fairly dealt with then there is very little the detained person can complain of, when it involves preventive detention. Preventive detention is now seen as a social evil and blatant abuse of human rights values, and there is much literature though some of them do not propagate balanced view. However, in the Malaysian context, it is a constitutionally recognised form of restriction to civil liberty in addition to penal laws and is seen as a necessary armoury for law enforcement agencies to ensure peace, prosperity and harmony of the nation at the expense of selective individual. That does not mean that the constitution has not given powers to court to arrest any form of injustice, by issuing prerogative orders or direction to arrest any form of injustice occasioned by executive or law enforcement agencies, (see *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors* [2007] 4 AMR 472; [2007] 5 MLJ 441). Thus, within the constitutional framework there is a balance; it is only a matter of the court to, where necessary, move to arrest the wrong and advance the remedy to be held to the oath of office of His Majesty's judges, which is a legitimate expectation of the public within the spirit and intent of the Federal Constitution. Cases in this area of law which does not take into account growing concern of human rights values, must be expeditiously struck down by the apex court to ensure more respect and recognition is given to individual liberties as enshrined in the Federal Constitution, and also in recognition of Malaysia being signatory to the relevant International Convention on Human Rights. This does not mean that the High Court is restricted by the doctrine of judicial precedent to take the revolutionary measures within the

parameters of legal jurisprudence to advance justice. (See HRH Raja Nazrin Shah — speech at Judges Conference on 9 April 2008 relating to Judicial Precedent: (see *Re Hj Khalid Abdullah*; *Ex-Parte Danaharta Urus Sdn Bhd* [2008] 2 CLJ 326). For example, though a court may not want to disturb the subjective discretion of executive and/or enforcement agencies, the court is empowered to define the parameters of the definition of public order or national security, or its like to ensure that the detaining authorities do not interpret the said phrase as a cure for all maladies and exercise their subjective discretion arbitrarily. By doing so, the court will be in a position to ensure fair detention under the preventive laws within the much desired values of civil liberties and human rights values.

I must say the appellants' submission have merits.

[115] There is also one point relating to housekeeping which has to be dealt with. That is the status of those co-accused or accused who have been charged in relation to the said assembly, convicted and sentenced but have not appealed to this court. It is trite that if no conviction of any accused is possible, the benefit of doubt must be extended to the co-accused of the assembly, though he has not challenged the order by way of an appeal. This principle is also in line with arts 5(1) and 8(1) of the Federal Constitution (see *Suresh Chaudhary v State of Bihar* [2003] 4 SCC 128).

[116] Support for the above proposition can be found in a number of cases. The learned authors of Durga Das Basu, (2nd Ed), *Case Book on Indian Constitutional Law* at pp 480–481 state:

> Even in a case where one of the accused has not preferred appeal, or even if his special leave petition is dismissed, in case relief is granted to the remaining accused and the case of the non-appealing accused stands on the same footing, he should not be denied the benefit which is extended to the other accused - *Gurucharan v State of Rajasthan* [2003] 2 SCC 698; refers to *Harbans Singh v State of UP* [1982] 2 SCC 101; *Raja Ram v State of MP* [1994] 2 SCC 568; *Dandu v State of AP* [1999] 7 SCC 69 and *Akhil AH v State of Maharashtra* [2003] 2 SCC 708.
>
> Where on the evaluation of a case the court reaches the conclusion that no conviction of any accused is possible, the benefit of doubt must be extended to the co-accused similarly situated though he has not challenged the order of conviction by way of appeal - *Suresh v State of Bihar* [2003] 4 SCC 128. Refers to *Bijoy Singh v State of Bihar* [2009] 9 SCC 147; *Anil Rai v State of Bihar* [2001] 7 SCC 318.

[117] For reasons stated above, I have no hesitation to rule in the affirmative on the question posed and allow the appeal. The conviction and sentence is quashed, not only for the appellants but also for all co-accused of the assembly who had not preferred an appeal to this court.

[118] The appellants and co-accused of the assembly are discharged and

acquitted of the offence charged. The state, to refund the fines to all who have paid. I will allow the appeal, with a note that my learned brothers Justice Dato' Sri Mohamed Apandi bin Hj Ali and Justice Datuk Linton Albert by majority have dismissed the appeal.

Appeal dismissed.

Reported by Kohila Nesan