IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO: J-09-229-09/2014

BETWEEN

PUBLIC PROSECUTOR ... APPELLANT

AND

YUNESWARAN A/L RAMARAJ … RESPONDENT

(In the Matter of High Court of Malaya at Johor Bahru
Criminal Trial No: 42S-09/9-2013

Between

Public Prosecutor

And

Yuneswaran a/l Ramaraj)

CORAM:

RAUS SHARIF, PCA

MOHD ZAWAWI SALLEH, JCA

ZAMANI A. RAHIM, JCA

JUDGMENT OF THE COURT

Introduction

[1] This appeal concerns the interpretation of section 9(5) of the Peaceful Assembly Act 2012 ("PAA").

[2] The background facts giving rise to this appeal are these. The respondent was charged in his capacity as an organizer of an assembly, at the Sessions Court, Johor Bahru, an offence under section 9(1) of the PAA, which is punishable under section 9(5) of the same Act. The charge reads as follows:

> *"Bahawa kamu pada 15hb Mei 2013 jam lebih kurang 8.30 malam, di pejabat Parti Keadilan Rakyat No. 38, Jalan Baladu 19, Taman Puteri Wangsa, Ulu Tiram, dalam Daerah Johor Bahru, dalam Negeri Johor Darul Takzim, di mana Program Himpunan Black 505, Bantahan Terhadap SPR telah diadakan, sebagai penganjur program tersebut, kamu gagal memberitahu Ketua Polis Daerah Johor Bahru Selatan sepuluh (10) hari sebelum program tersebut diadakan dan oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 9(1) Akta Perhimpunan Aman 2012 dan boleh dihukum di bawah seksyen 9(5) Akta yang sama.".*

[3] The assembly was held at the office of Parti Keadilan Rakyat ["PKR"], Johor Bahru. The respondent had failed to notify the Officer in Charge of the Police District (OCPD) of Johor Bahru Selatan of the gathering within the time stipulated under the PAA, namely, ten days before the date of the assembly was scheduled to be held. This

requirement of notification of the assembly is provided in section 9(1) of the PPA which reads:

> ñAn organizer shall ten days before the date of the assembly notify the Officer in Charge of the Police District in which the assembly is to be held.ò

A non-compliance with section 9(1) is penalised by section 9(5) which reads as follows:

> ñA person who contravene sub-section (1) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit.ò

The Prosecution's Case

[4] Briefly, the prosecutionôs evidence are as follows:

a) The respondent was the executive secretary of PKR Johor Bahru.

b) On 15.5.2013, at about 2.30 p.m., the respondent went to the Central Police Station at Jalan Meldrum, Johor Bahru where he handed ñPermohonan Untuk Mengadakan Perjumpaan/Perhimpunan (Lampiran óAôKPN(PR)19/26)ò (D11) to Copral Mizaleha bt Haji Othman, SP2. As an incorrect form was submitted, SP2 gave the respondent the correct form, ñBorang -Pemberitahuan Di Bawah Seksyen 9(1)ò serial no. 0272 and 0273, (P3). The respondent filled the particulars in P3 in the presence of

SP2. He signed it at the top of his name as Setiausaha Kerja and he appended the date 11.5.2013. He immediately handed over P3 to SP2. It was acknowledged receipt on the same day i.e. 15.5.2013 at about 2.39 p.m. The particulars of the assembly in P3 states in Bahasa Malaysia among other things are as follows:

ñ)	Maksud perhimpunan	:	Himpunan Black 505, Bantahan terhadap SPR.
ii)	Tarikh perhimpunan	:	15.5.2013 (Pejabat PKR).
iii)	Tempat perhimpunan	:	38, Jalan Beladau 19, Taman Puteri Wangsa.
iv)	Masa perhimpunan akan bermula dan tamat	:	8.30 p.m. - 11.30 p.m.ò

c) The assembly was called ñProgram Himpunan Black 505, Bantahan Terhadap SPRò It was held peaceably as scheduled.

The Defence Case

[5] The respondent gave his evidence on oath. His defence may be summarised as follows:

a) The respondent denied he was the organizer of ñProgram Himpunan Black 505 at Taman Puteri Wangsa, Johor Bahru on 15.5.2013.

b) He said that the assembly was organized by Majlis Pimpinan Negeri Parti Keadilan Rakyat, Negeri Johor (PKR Negeri Johor), chaired by Dato Chua Jui Meng.

c) He only signed ñBorang - Pemberitahuan Di bawah Seksyen 9(1)ò on behalf of DatoôChua Jui Meng.

d) He merely performed an administrative function of PKR Negeri Johor. He was the Setiausaha Kerja of the party since July, 2012.

e) He went to the Balai Polis Sentral at Jalan Meldrum, Johor Bahru where he handed Borang D11 to Copral Mizaleha bt Haji Othman, SP2. D11 was a wrong form. SP2 gave him a new and the correct form, (P3). He filled the details in P3 in front of SP2. He signed it on behalf of DatoôChua Jui Meng.

f) He conceded that his Twitter feed (Exhibit P8 (a to d)) and Facebook page (Exhibit P9 (a to e)) were both his, but both did not serve to inform the members or public to attend the ñProgram Himpunan Black 505.ò

Sessions Court Judge's Findings

[6] In deciding whether the respondent was the organizer, the Sessions Court had scrutinised the definition of órganizerôin section 3 of the PAA, and examined the role played by the respondent.

[7] The Sessions Court Judge found that the respondent did fill in and sign the notification P3 and also announced the upcoming assembly using his Twitter feed Exhibit P8 (a to d) and Facebook page Exhibit P9 (a to e), both of which would serve to invite the members or public and likely cause them to attend the assembly. This, according to the Sessions Court Judge, fell squarely within the definition of ówhich is defined in section 3 of the PAA.

[8] On the question of the non-calling of DatoôChua Jui Meng, the Sessions Court Judge found that other than his name appearing in the notification P3, there was no other role played by or action taken by DatoôChua Jui Meng to warrant him being the organizer. Therefore, DatoôChua Jui Meng was neither an important witness, nor was his evidence material to the case. The non-production of DatoôChua Jui Meng had not created any gap in the prosecutionôs case, nor an adverse inference under section 114(g) of the Evidence Act 1950 could be invoked against the prosecution.

[9] The Sessions Court Judge also found that under section 10 of the PAA, the notification required under section 9(1) must be signed by the organizer and the signature on P3 was the respondentôs signature.

[10] At the conclusion of the defence case on 26.9.2013, the Sessions Court Judge found that there was no evidence before the Court that Datoô Chua Jui Meng was the organizer of ñProgram Himpunan Black 505ò On the contrary, the role and conduct of the respondent showed that he was the actual organizer. The Sessions Court Judge also found that the respondent had failed to cast any reasonable doubt on the prosecutionôs case. As a result, the

prosecution had proved its case against the respondent beyond reasonable doubt. Consequently, the respondent was found guilty, convicted as charged and sentenced to a fine of RM6,000.00 and in default thereof, three (3) months imprisonment.

[11] Aggrieved by the decision of the Sessions Court, on 27.9.2013, the respondent filed an appeal to the High Court against the conviction and sentence.

High Court's Findings

[12] After the appeal was heard in the High Court, the decision was reserved. During that period, the Court of Appeal on 24.8.2014 delivered its decision in **Nik Nazmi Nik Ahmad v PP [2014] 4 CLJ 944** ***[Nik Nazmi]***. The Court of Appeal in ***Nik Nazmi*** dealt with the exact same provisions as in the instant appeal. The Court declared that section 9(5) of the PAA was unconstitutional. Clearly, therefore, constitutional questions that were raised in ***Nik Nazmi*** had a direct bearing on the respondent's appeal in the High Court.

[13] Before the decision in ***Nik Nazmi***, the appellant (Public Prosecutor), on 3.8.2014, filed a motion vide Criminal Application No: 44-52-08/2014 at the High Court pursuant to sections 84 and 85 of the Court of Judicature Act 1964 to refer questions regarding the constitutionality of section 9(5) of the PAA to the Federal Court. The High Court, however, refused to refer the matter to the Federal Court. Instead, the High Court proceeded to determine and decided the appeal.

[14] The High Court Judge in its decision on 24.8.2014 upheld the findings of the Sessions Court that the respondent not only submitted the notification but also periodically informed members about the progress of the assembly through his Facebook account and Twitter. This, according to the High Court, amounted to the respondent informing, arranging and being responsible for the conduct of the assembly within the definition of ôorganizerôin section 3 of the PAA.

[15] The High Court Judge also found that DatoôChua Jui Meng could not be considered an ôorganizerô as he had not done anything which could bring him within any of the prescribed acts in section 3, save for the fact his name is stated in P3. DatoôChua Jui Meng never came forward to the police to say he was the actual organizer when the respondent was being investigated. The High Court Judge held that no adverse inference should, therefore, be invoked against the prosecution for not calling him as a witness.

[16] Thus, the High Court Judge found that on the facts, the case against the respondent was made out beyond reasonable doubt. However, His Lordship held that he was bound by the decision of the Court of Appeal in ***Nik Nazmi*** which held that section 9(5) of the PAA was unconstitutional. On that ground alone, the High Court allowed the respondentôs appeal and set aside the decision of the Sessions Court Judge and ordered that the payment of fine of RM6,000.00 to be refunded forthwith.

[17] On 25.8.2014, the Public Prosecutor filed an appeal to the Court of Appeal against the decision of the High Court.

Oral Motion At Court Of Appeal And Reference To The Federal Court

[18] Before the Court of Appeal, the Deputy Public Prosecutor, by way of an oral motion, applied to refer the constitutional questions to the Federal Court on the constitutionality of section 9(5) of the PAA. After hearing the submissions by both parties on 10.10.2014, the Court of Appeal allowed the appellantôs oral motion.

[19] During the hearing of the reference at the Federal Court on 30.3.2015, the apex Court agreed with the respondentôs preliminary objection that it lacked jurisdiction to hear the reference and remitted the matter back to the Court of Appeal. Hence this appeal.

Questions Of Law

[20] On the constitutionality points alluded to earlier, four questions of law have been identified for our determination:

(i) Whether the requirement under section 9(1) of the PAA to give notice prior to the exercise of the right to assemble peaceably is a órestrictionô within meaning of Article 10(2) (b) of the Federal Constitution (**First Question**);

(ii) If the answer to the above is in the affirmative, whether, on true construction of Article 10(2) (b), there is a further requirement that such órestrictionô should also be a óreasonableô restriction (**Second Question**);

(iii) If the answer to question (1) above is in the negative, whether the imposition of a criminal sanction under section 9(5) of the PAA for the breach of the requirement to give notice is *ultra vires* Article 10(2) (b) of the Federal Constitution (**Third Question**); and

(iv) If the answer to question (2) above is in the affirmative, whether the imposition of a criminal sanction under section 9(5) for a breach of the requirement to give notice under section 9(1) amounts to a ó*r*easonable restrictionô within meaning of Article 10(2) (b) of the Federal Constitution (**Fourth Question**).

Our Decision

Principles On The Interpretation Of Constitution

[21] There is always a presumption in favour of constitutionality of statutes. The courts can declare a statute to be an invalid piece of legislation but the burden is upon a person who attacks it to show that there has been a clear transgression of the constitutional principles.

[22] In the Indian Supreme Court case of **Namit Sharma v Union of India [2013] 1 SCC 745,** it was held that the Court should exercise judicial restraint while judging the constitutional validity of the statute. When there is only clear violation of a constitutional provision beyond reasonable doubt that the Court should declare a provision to be unconstitutional. Further, even if two views are possible, one making the statute constitutional and the other making it unconstitutional, the

former view must prevail. The Court must make efforts to uphold the constitutional validity of a statute.

[23] One of the most relevant considerations in determining the constitutionality or otherwise of a statute or any of its provision is the object and reasons as well as the legislative history of the statute. It would assist the Court in arriving at a more objective and justly approach. The reasons for the enactment of the statute are the safest guide to its interpretation. It would be essential for the Court to examine the reasons of enactment of a particular provision in order to find out its ultimate impact *vis-à-vis* the constitutional provisions. In the Indian Supreme Court case of **Utkal Contractors and Joinery P Ltd & Ors v State of Orissa & Ors [1987] 3 AIR SC 279**, it was profoundly put as follows:

> ñA statute is best understood if we know the reason for it. The reason for the statute is the safest guide to its interpretation. The words of statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set sail to the wind, the interpreter may proceed ahead. No provision in the statute and no words of the statute may be construed in isolation. Every provision and every words must be looked at generally before any provision or words is attempted to be construed.

> The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions, Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for.ò

[24] Further, section 17A of the Interpretation Acts 1948 & 1967 enjoins a court to interpret a provision of an Act that would promote the purpose or object underlying the Act. The same purposive approach applies equally in interpreting the Federal Constitution. In the Court of Appeal case of **Dr Koay Cheng Boon v Majlis Perubatan Malaysia [2012] 3 MLJ 173** at p. 184, it was said:

> ñ[15] As regards the question of whether the majority judgment or the dissenting judgment of the Court of Appeal in *Yong Teck Lee* had made the correct interpretation of art 121(1B) of the Federal Constitution to represent the true constitutional position of the said article, I am more inclined to agree with the decision and reasoning arrived at by the majority judgment. In *Yong Teck Lee* the majority judgment in interpreting art 121(1B) of the Federal Constitution and reading with ss 50, 67, 68 of the CJA 1964 had adopted the ópurposive approachôby relying on the provision of s 17A of the Interpretation Acts 1948 and 1967 so as to achieve a harmonious construction amongst various provisions of a statute.ò

[25] Therefore, it is incumbent upon the Court to examine the objective or purpose of the PAA. We have scrutinise the PAA carefully. We found that the purpose of the PAA is to facilitate the exercise of a right granted by Article 10(1) (b) of the Federal Constitution and not to restrict it. The objects of the PAA are stated in section 2 as follows:

> ñThe objects of this Act are to ensure-
>
> (a) so far as it is appropriate to do so, that all citizens have the right to organize assemblies or to participate in assemblies, peaceably and without arms; and
>
> (b) that the exercise of the right to organize assemblies or to participate in assemblies, peaceably and without arms, is subject only to restrictions deemed necessary or expedient in a democratic society in the interest of the security of the Federation or any part thereof or public order, including the protection of the rights and freedoms of other persons.ò

[26] It is pertinent at this juncture to reproduce the relevant provisions of the PAA which are as follows:

> 12. (1) Upon receipt of the notification under subsection 9(1), the Officer in Charge of the Police District shall, within twenty-four hours, cause the details of the assembly to be informed to persons who have interests ï
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> (a) by posting a notice conspicuously at various locations at the place of assembly; or

(b) by any reasonable means suitable or necessary so as to make the information available to such persons.

(2) A person who has interests may, in writing, inform his concerns or objections to the assembly together with his reasons to the Officer in Charge of the Police District within forty-eight hours of being informed of the assembly under subsection (1).

(3) The Officer in Charge of the Police District shall take into account the concerns of objections received for the purpose of imposing restrictions and conditions under section 15.

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14. (1) The Officer in Charge of the Police District shall respond to the notification under subsection 9(1) within five days of the receipt of the notification and shall, in the response, inform the organizer of the restrictions and conditions imposed under section 15, if any.

(2) If the Officer in Charge of the Police District does not respond to the notification in accordance with subsection (1), the assembly shall proceed as proposed in the notification.

15. (1) The Officer in Charge of the Police District may impose restrictions and conditions on an assembly for the purpose of security or public order, including the protection of the rights and freedoms of other persons.

(2) The restrictions and conditions imposed under this section may relate to ï

(a) the date, time and duration of assembly;
(b) the place of assembly;
(c) the manner of the assembly;
(d) the conduct of participants during the assembly;
(e) the payment of clean-up costs arising out of the holding of the assembly;
(f) any inherent environmental factor, cultural or religious sensitivity and historical significance of the place of assembly;
(g) the concerns and objections of persons who have interests: or
(h) any other matters the Officer in Charge of the Police District deems necessary or expedient in relation to the assembly.

(3) Any person who fails to comply with any restrictions and conditions under this section commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit.

16. (1) Any organizer aggrieved by the imposition of restrictions and conditions under section 15 may, within forty-eight hours of being informed of the restrictions and conditions, appeal to the Minister.

(2) The Minister shall give his decision within forty-eight hours of receipt of the appeal under subsection (1).ò

[27] As can readily be seen, section 12 of the PAA imposes on the police a positive duty, after receiving the notification, to inform persons who have interests regarding the details of the proposed assembly.

And persons who have such interests may inform the police of their concerns or objections which in turn allow the police to impose such restrictions and conditions as permitted by section 15. It follows, therefore, that a reasonable time must be accorded to the police and persons who may have interest, concerns or objections, to register them. If the organizer is aggrieved by any restriction or conditions imposed, he may appeal to the Minister under section 16.

[28] Under section 14(1) of the PAA, the police has to respond to the notification under section 9(1) within five days stating what restrictions and/or conditions were being imposed but crucially, under section 14(2) if the police does not respond, the assembly may go ahead as proposed.

[29] From the above, it can be seen that the PAA is procedural in nature because nothing therein affects the substantive right to assemble peaceably. The PAA merely sets out a series of procedural steps to be taken to ensure and facilitate the exercise of a constitutional right.

Comparison Between The Police Act And The PAA

[30] To put our discussion in its proper perspective, it would be helpful for us to outline a brief comparison between the provisions of the Police Act 1967 and the PAA. This is because, as far as the peaceable assembly is concerned, to a large extent, the provisions of the PAA has replaced the relevant provisions of the Police Act, albeit in a more liberal approach. Under the Police Act, a licence was a condition precedent to a lawful assembly, that is to say, without obtaining a

licence, any assembly will be deemed to be an unlawful assembly, even if it was ultimately peaceably held. No such restrictive provision is provided in the PAA. Instead the PAA recognise the right to organize an assembly or participate in an assembly peaceably without arms, except that such right shall not extend to the following:

> (a) a non-citizen;
> (b) an assembly held at any prohibited place and within fifty metres from the limit of the prohibited place;
> (c) a street protest;
> (d) in relation to the organization of an assembly, a person below the age of twenty-one years; and
> (e) in relation to the participation in an assembly other than an assembly specified in the Second Schedule, a child.
> (see section 4(1) of the PAA)

[31] Further, under section 27 of the Police Act, the police may stop an assembly held without licence. Stopping an assembly is certainly a deprivation of the right to assemble. Members of that assembly can be ordered to disperse, failing which they may commit an offence. On the other hand, there is no power to stop any assembly under the PAA just for the failure to comply with section 9(1), provided the assembly is peaceable.

[32] Section 27 of the Police Act also provides that every person taking part in an assembly held without a licence commits an offence, again reiterating, even if the assembly was peaceable. Under the PAA, only those committing specific breaches causing the assembly to be no longer peaceable would be liable (see sections 20 and 21 of the PAA).

[33] Yet section 27 of the Police Act had been held by our courts to be constitutional (e.g **Madhavan Nair v PP [1975] 2 MLJ 264**; **Datuk Yong Teck Lee v PP [1993] 1 MLJ 295**; **Nik Noorhafizi Bin Nik Ibrahim & Ors v PP [2013] 6 MLJ 660.** In these decisions, despite the imposition of certain conditions to regulate assemblies, yet our Courts have held that such conditions do not impinge on the right granted under Article 10(1) (b) of the Federal Constitution.

[34] As we stated earlier, the rationale for enacting the PAA is to facilitate the exercise of the right under Article 10(1) (b) of the Federal Constitution. This can be gleaned from the Prime Ministerôs speech during the second and third reading of the Peaceful Assembly Bill 2011. The Prime Minister had this to say;

> *"Rang Undang-undang Perhimpunan Aman 2011 digubal selaras dengan peruntukan Perkara 10(1)(b) dan (2)(b) Perlembagaan Persekutuan. Walaupun Perkara 10(1)(b) dan (2)(b), Perlembagaan Persekutuan tidak menyatakan secara jelas mengenai hak dan kebebasan orang lain dalam mengenakan sekatan terhadap berhimpun. Namun demikian demi keselamatan persekutuan atau ketenteraman awam hak orang lain harus diambil kira. Hak dan kebebasan orang lain termasuklah hak untuk menikmati secara aman harta bendanya, hak untuk kebebasan bergerak, hak untuk menikmati persekitaran semula jadi dan hak untuk menjalankan perniagaan.".* [see Hansard at p. 140]

[35] Under the PAA, the police have ceased its function as a decision maker. Instead, they have assumed the role as a regulator and facilitator for peaceable assembly. Parliamentary Hansard dated 24.11.2011 can be referred to highlight this comparison with regards to

the power granted to the police. The Prime Minister had stated as follows:

> *"Selanjutnya sebagai memeterai waad di antara kerajaan dan rakyat, maka akan dibentangkan Rang Undang-undang Perhimpunan Aman 2011 bagi menggantikan seksyen 27, Akta Polis 1967. Di bawah rang undang-undang baru, pihak polis yang selama ini sebagai penentu izin kini berubah peranannya menjadi pengawal selia undang-undang dan pemudah cara dengan ruang lingkup kebertanggungjawaban yang lebih jelas.".* [see Hansard at p. 117]

[36] Based on the above, we are of the view that every interest of the citizen must be treated equally. It is settled jurisprudence in public law that rights of one set of citizens cannot override the rights of another. Surely, the exercise of that right must be balanced with each other. That was what the PAA was intended to regulate. We are fortified in our view by the decision of the Indian Supreme Court in the case of **Re Ramlila Maidan Incident [2012] INSC 138** where it was held [at p.11 para 32]:

> ñThe restriction placed on a fundamental right would have to be examined with reference to the concept of fundamental duties and non-interference with liberty of others. Therefore, a restriction on the right to assemble and raise protest has also to be examined on similar parameters and values. **In other words, when you assert your right, you must respect the freedom of others**. Besides imposition of a restriction by the State, the non-interference with liberties of others is an essential condition for assertion of the right to freedom of speech and expression. In the case of *Dr. D.C.*

Saxena v. Hon'ble the Chief Justice of India [(1996) 5 SCC 216], this Court held:

> "31. If maintenance of democracy is the foundation for free speech, society equally is entitled to regulate freedom of speech or expression by democratic action. The reason is obvious, viz., that society accepts free speech and expression and also puts limits on the right of the majority. Interest of the people involved in the acts of expression should be looked at not only from the perspective of the speaker but also the place at which he speaks, the scenario, the audience, the reaction of the publication, the purpose of the speech and the place and the forum in which the citizen exercises his freedom of speech and expression. **The State has legitimate interest, therefore, to regulate the freedom of speech and expression** which liberty represents the limits of the duty of restraint on speech or expression not to utter defamatory or libellous speech or expression. é ò
> (emphasis added)

[37] Premised on the above discussion, if the purposive test as alluded above is not observe in interpreting the PAA, then plainly the right to assemble peaceably would result in the rights of others to be trampled upon flagrantly. The police would not be able to play their role as facilitators and regulators effectively. Indeed, they may not even be able to prepare adequately to provide protection for those participating in the assemblies. This is a recipe for public disorder. That would run counter to the purpose of the PAA.

Is The PAA In Accordance With International Standards?

[38] Now let us examine whether the PAA is consonant with the international standards. We recognise that the freedom of peaceable assembly is an established right under international human rights law. The critical issue to be asked is whether the advance notification is required for an assembly to take place under the law. We begin our discussion by examining the position in the European Union (EU). Article 11 of the European Convention on Human Rights and Fundamental Freedoms (ñEuropean Conventionò) protects the right to peaceably assemble, but the right is not absolute. State authorities may impose certain restrictions on the exercise of this right, provided that such limitations are (a) prescribed by law, (b) necessary in a democratic society, and (c) in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

[39] While Article 11 of the European Convention does not require organizers to submit advance notification to state authorities or request authorization, however, all of the countries surveyed require advance notification, except Sweden.

[40] The question is: how far prior or advance notification is required to be given to the state authorities. Portugal requires a minimum of two days, France and Italy require three days, the United Kingdom requires six days and Malaysia requires ten days.

[41] In Malaysia, the rationale of the ten-day notice in the PAA was explained by Datoô Seri Mohamed Nazri Abdul Aziz (the Minister) during the debate of the Peaceful Assembly Bill 2011. International norms were considered in imposing the ten-day notification period. Guidelines from the Organization for Security and Cooperation in Europe (OSCE) were studied. In this context, the Minister said:

> *"Tuan Yang di-Pertua, garis panduan yang dirujuk oleh OSCE, Guidelines on Freedom of Peaceable Assembly, Europe dengan jelas memberikan budi bicara kepada sesuatu negara untuk menetapkan tempoh masa yang munasabah. Paragraph 41 saya baca dengan izin,*
>
> ñThe period of notice should not be unnecessary lengthy, but should still allow adequate time for the relevant state authorities to make the necessary plan and preparation to satisfy their positive obligationòò[see Hansard at p. 57]

[42] As can be seen above, the requirement for the ten-day notice in advance is crucial and reasonable to enable the police to make the ñnecessary plan and preparationò to satisfy their legal obligation under the PAA, particularly to facilitate the lawful exercise of oneôs right to assemble peaceably as well as to preserve public order and protecting the rights and freedoms of other persons. This position is consistent with the position in the European Union.

Decided Cases Of The European Court Of Human Right On "Prior Notification"

[43] We now turn to consider the decided cases on the requirement to give prior or advance notice before the assembly is held. The United Nation Human Rights Committee (UNCHR) in the case of **Kivenmaa v Finland, Comm. No. 412/1990, UN Doc CCPR/C/50/D/412/1990 31 March 1994** found that a requirement to notify the police of an intended demonstration in a public place six hours before its commencement may be compatible with the permitted limitations laid down in Article 21 of the International Covenant on Civil and Political Rights (ICCPR) where the committee acknowledged that a requirement to pre-notify an assembly would normally be for reasons of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. As a general rule, no State can be bound by a treaty without having given its consent to be bound. Malaysia is not a signatory to the ICCPR, but such principles can be used to assist in the interpretation of the relevant Malaysian law.

[44] The requirement to give prior or advance notice is also consistent with Article 11 of the European Convention on Human Rights. The European Commission on Human Rights stated in **Rassemblement Jurassien and Unite Jurassienne v Switzerland, ECHR Application No. 8191/78** at para 114:

> ñSuch a procedure is in keeping with the requirements of Article 11(1), if only in order that the authorities may be in a position to ensure the peaceable nature of the meeting, and

accordingly does not as such constitute interference with the exercise of the right.ò

[45] In the case of **Bukta & Others v Hungary**, **ECHR Application No. 25691/04,** the police dispersed an assembly which intended to protest a meeting between the Hungarian Prime Minister and the Prime Minister of Romania. The assembly was disbanded because the organizer failed to notify the authorities three days in advance as prescribed by their laws. The applicants argued that it was impossible for them to notify the police three days in advance as the announcement regarding the meeting was made by the Prime Minister only the day before.

[46] The European Court of Human Rights (ECHR) in declaring that there was a violation of Article 11 of the Convention held that the lack of advance warning of the Hungarian Prime Ministerôs intention to attend the reception had left the applicants with a choice between forgoing their right to peaceable assembly or disregarding the notice requirement. According to the Court, this is a special circumstance where an immediate response such as a spontaneous demonstration to a political event might be justified. Hence, the action on the part of the police to disperse the demonstration was disproportionate.

[47] A different result was reached in the case of **Éva Molnár v Hungary, ECHR Application No. 10346/05** where the Court made clear that the principle established in the case of ***Bukta and Others*** (supra) could not be extended to the point that the absence of prior notification could never be a legitimate basis for crowd dispersal. In this case, two months after the official results of the Hungary elections were

final, several hundred demonstrators started to protest against the statutory destruction of the ballots without giving any notification to the relevant authorities.

[48] The ECHR noted that the right to hold spontaneous demonstrations could override the obligation to give prior notification to public assemblies but only **in special circumstances**, namely if an immediate response to a current event was warranted in the form of a demonstration. In particular, such derogation from the general rule (of prior notification) could be justified if a delay would have rendered that response obsolete. In that case, there were no such special circumstances and the fact that the police did not break up the demonstration for several hours was a further reason for the finding of no violation.

[49] The ECHR in the case of **Skiba v Poland (dec.)**, **ECHR Application No. 10659/03** faced a similar issue in relation to prior notice for rights of peaceable assembly. The applicant in that case led its members of an association to protest against an exhibition without notifying the authorities three days in advance as required by law. As a result, the applicant was fined approximately ú100 for organizing a public meeting without first notifying the authorities. The regional court held that the applicant is liable for a fine solely for failing to give the authorities the requisite prior notification.

[50] The applicant lodged a complaint with the ECHR alleging a breach of rights in the European Convention on Human Rights by Poland, among others, right to freedom of peaceable assembly under Article 11 of the Convention. According to the Court, the legitimate aim

of the law to require an organizer to notify the authority was not to arbitrarily restrict the exercise of the right in question but rather to give the authorities a reasonable amount of time to take adequate steps to reconcile the exercise by certain people of their right to freedom of peaceable assembly. It also seeks to protect the legitimate rights and interests of other people, including the freedom of movement and at the same time upholding law and order and prevent crime.

[51] In ***Skiba's*** case, the court noted at the outset the applicant was punished not for participating in the public meeting but for knowingly disregarding the relevant domestic law under which, as the leader of the scheduled public meeting, he had an obligation to give prior notification to the authorities. In this regard, the court noted that his obligation under the national law was part of the basic conditions to be met by individuals who wish to exercise their right to freedom of peaceable assembly. The court also highlighted that the applicant's criminal conviction is proportionate to the legitimate aims pursued.

[52] We conclude, therefore, the PAA is in accordance with international norms in the imposition of the ten-day notification requirement. The requirement of advance notification is to allow the authorities to facilitate the lawful exercise of one's right to assemble peaceably.

Does Article 10(2) Of The Federal Constitution Authorises The Imposition Of A Criminal Sanction For Failure To Give Ten-Day Notice

[53] To our mind, nothing in Article 10(2) of the Federal Constitution could be construed as prohibiting the imposition of criminal sanctions for non-compliance with a ten-day notice. There are several examples to illustrate this point. For example, the freedom of speech in Article 10(1) (a). It is restricted by, *inter alia*, the Sedition Act 1948 and the restrictions imposed by that Act are backed up with criminal sanctions. Yet the Sedition Act 1948 has repeatedly and constantly been held by our Courts to be constitutional, most recently by the Court of Appeal in **PP v Karpal Singh [2012] 4 MLJ 443** and in **Mat Shuhaimi bin Shafiei v PP [2014] 2 MLJ 145**.

[54] Similarly, the right to form associations under Article 10(1) (c) of the Federal Constitution. It is restricted by the provisions of the Societies Act 1966 which provides, *inter alia*, that any person who is or acts as a member of an unlawful society or attends a meeting of an unlawful society or pays money or gift any aid to or for the purposes of unlawful society would commit an offence which attract imprisonment or fine or both.

[55] Another example would be restrictions to movement under Article 9. Under section 66 of the Immigration Act 1959/63, with certain exceptions, a non Sabahan or Sarawakian shall not be entitled to enter Sabah and Sarawak without having obtained a Permit or Pass from the relevant State Authority.

[56] Thus we are unable to agree with the contention of learned counsel for the respondent that the power to impose criminal sanctions must be expressly provided in Article 10 of the Federal Constitution itself. The correct approach is to look at the legislative competency of the Parliament under Article 74 of the Federal Constitution.

[57] Article 74 of the Federal Constitution clothes Parliament with power to legislate. Internal security, which includes public order, is within the legislative competence of Parliament under List I, Item 3 of the Ninth Schedule of the Federal Constitution. Read with section 40(1) of the Interpretation Acts 1948 & 1967, it is plain that Parliament may criminalize any act. Section 40(1) of the Interpretation Acts is as follows:

> ñWhere a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.ò

[58] It was argued by learned counsel for the respondent that ñcriminalizationò of the restrictions that limit the right guaranteed under Article 10(1) (b) was not ó**reasonable**ôand therefore unconstitutional. Learned counsel for the respondent relied on the decision of the Federal Court in **Sivarasa Rasiah v Badan Peguam & Anor [2010] 2 MLJ 333** in support of his argument. In ***Sivarasa*** (supra), the Federal Court had this to say at p. 340 para [5]:

ñ[5] The other principle of constitutional interpretation that is relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art 10(2) (c). It says that óParliament may by law imposeé (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 moralityô Now although the article says órestrictionsô, **the word 'reasonable' should be read into the provision** to qualify the width of the proviso. The reasons for reading the derogation as ósuch reasonable restrictionsôappear in the judgment of the Court of Appeal in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213; [2007] 1 CLJ 19* which reasons are now adopted as part of this judgment.ò
(emphasis added).

[59] In **Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213** the Court of Appeal held [at 29 para [9]:

ñ[9] 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 óreasonableô must be read into the sub-clauses of art 10(1). That words may be read into our Constitution has been established by the decision of the Federal Court in ***Ooi Ah Phua v Officer*** **in Charge Criminal Investigation Kedah/Perlis [1975] 2 MLJ 198**. In that case, an implied restriction in the interests of justice was read into art 5(3) of the Constitution which provides that

> Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall

be allowed to consult and be defended by a legal practitioner of his choice.

Suffian LP said:

With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interest of justice is as important as the interest of arrested persons and it is well-known that criminal elements are deterred most of all by the certainty of detection, arrest and punishment.

So, although the Constitution did not have any words postponing the right to counsel, the Federal Court read those words into the Article. So too here. We can read the word ó*reasonable*ô before the word ó*restrictions*ô in art 10(2) (c).ò

[60] In our view, the reliance on the case of **Ooi Ah Phua v Officer in Charge Criminal Investigation Kedah/Perlis [1975] 2 MLJ 198** by the Court in the ***Dr Mohd Nasir*** (supra) to justify the reading into ó**restrictions**ô the word ó**reasonable**ô was misplaced. In fact, the adoption of the reasoning by the Federal Court in ***Ooi Ah Phua*** (supra) was actually being asked to read into Article 5 the word ó**immediately**ô in the clause ñ***..shall be allowed to consult and be defended by a legal practitioner of his choice****."* This, the Federal Court refused to do so. Similarly, in this instant appeal, we are not persuaded the word

ñreasonableò should be read into Article 10(1) (b) of the Federal Constitution.

[61] With respect, in our view, the manner in which the Federal Court in ***Sivarasa*** went about on how to construe órestrictionsô was completely at variance with an earlier decision of the Supreme Court in **PP v Pung Chen Choon [1994] 1 MLJ 566** where it was held as follows [at p. 575D-H]:

> ñInsofar as restrictions on the Right to freedom of speech and expression is concerned, cl (2) (a) of art 10 permits restrictions on this Right by laws as Parliament deems necessary or expedient relating to matters undermining the security of the Federation or any part thereof, friendly relations with other countries, public order or morality or relating to defamation, incitement to any offence, contempt of court, privileges of Parliament or of any legislative assembly.
>
> Clearly, therefore, in Malaysia, the position of the court when considering an infringement of this Right is different from that of the position of the court in India when considering an infringement of the equivalent Right under the Indian Constitution.
>
> With regard to India, the Indian Constitution requires that the restrictions, even if within the limits prescribed, must be órestrictionsô ð and so that court would be under a duty to decide on its reasonableness. But, **with regard to Malaysia, when infringement of the Right of freedom of speech and expression is alleged, the scope of the court's inquiry is limited to the question whether the impugned law comes within the orbit of the permitted restrictions**. So, for

example, if the impugned law, in pith and substance, is a law relating to the subjects enumerated under the permitted restrictions found in cl 10(2)(a), **the question whether it is reasonable does not arise; the law would be valid**. Moreover, by cl (2) of art 4, it is not a ground for challenge that the restriction does not relate to one of the matters specified in art 10(2) (a) for taking a case outside the protection of that article. (See *Assa Singh v Mentri Besar of Johore 9* at p. 38.)

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

[62] Thus, as the law currently stand, there are two conflicting decisions of the apex courts. The question is: which approach ought to be followed by this Court in this instant appeal.

[63] To answer that question, it is necessary to consider three propositions which are supported with authorities:

(a) The Courts in this country do not comment on the quality of a law, that is to say, the Courts do not consider it any part of its judicial function to paint any law as órreasonableô or óunreasonableôor ónharshôor óunjustô;

(b) The Courts would only read into a provision of law, which includes provisions of the Federal Constitution, words,

without which, that particular provision under scrutiny would be completely meaningless; and,

(c) The Courts ought not read into a provision of the Federal Constitution a word which that provision once contained, but was subsequently deliberately removed by the framers of the Federal Constitution before ratification.

[64] The authority for the first proposition above is the decision of the Federal Court in **Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187** [at p.188E], where it was held as follows:

> ñThe question whether the impugned Act is ñharsh and unjustò is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors [1913] AC 107, 118*:
>
> > ñSome people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of

> Parliament, or to pass a covert censure on the Legislature.ò

[65] There is no reason for us to depart from the pronouncement in **Loh Kooi Choon** above.

[66] For the second proposition above, it is trite law that words are not to be read into any provision of a statute unless without that words, the provision of the statute would be completely meaningless (**Vickers, Sons & Maxim Ltd v Evans [1910] AC 444**, **Thein Hong Teck & Ors v Mohd Afrizan Husain [2012] 2 MLJ 299 FC**). Aligned to this proposition is the maxim ñ*Parliament does not legislate in vain*ò It is for that reason that the Court would not allow a provision of statute to be completely meaningless and therefore read words into it, if need be, to give life to it.

[67] However, the same cannot be said to Article 10(1) (b) of the Federal Constitution. The provision of the Article is very clear. Therefore, there is no necessity to read the word ñreasonableòinto that Article. If the Court is to do so, it will have the effect of the Court usurping the law-making powers of the Parliament.

Legislative History Of Article 10

[68] Concerning the third proposition, it is common ground that the Constitution of the Federation of Malaya was drafted by the Reid Commission, a body of eminent jurists from the Commonwealth of Nations.

[69] In the early draft of the Constitution prepared by the Reid Commission, freedom of, *inter alia*, assembly was found initially as Article 8(2). The draft Article 8(2) is similarly worded as the present Article 10(1) (b) with one major exception. The draft Article 8(2) dated 19.10.1956 read as follows: [at p. 216-217]

> ñ(2) Every citizen shall have the right to assemble peaceably and without arms, subject to any **reasonable** restriction imposed by law in the interest of public orderé ò
> (emphasis added).

[70] So, the framers of our Constitution did include the word ñreasonableò to qualify ñrestrictionò initially in the early draft of the Constitution, presumably following the Indian model. The question now, therefore, why that word ñreasonableô disappeared in the final draft accepted as our Federal Constitution.

[71] The answer to that poser can be found in a Note of Dissent written by one member of the Reid Commission.

[72] **Justice Abdul Hamid of Pakistan**, a member of the Commission, and subsequent to that early draft mentioned above, wrote a Note of Dissent dated **11.2.1957** that was included in the final report of the Reid Commission at p.101. His note deals with matters over which there is disagreement, among others, the draft version of Article 10 (the former draft Article 8). **Justice Abdul Hamid** objected to the inclusion of the word "reasonable", on the following grounds [at p.101]:

ñ(ii) Article 10. The word ñreasonableô wherever it occurs before the word ñrestrictionsò in the three sub-clauses of this article **should be omitted**. Right to freedom of speech, assembly and association has been guaranteed subject to restrictions which may be imposed in the interests of security of the country, public order and morality. If the Legislature imposes any restrictions in the interests of the aforesaid matters, considering those restrictions to be reasonable, the legislation should not be challengeable in a court of law on the ground that the restrictions are not reasonable. **The Legislature alone should be the judge of what is reasonable under the circumstances. If the word "reasonable" is allowed to stand, every legislation on this subject will be challenged in court on the ground that the restrictions imposed by the Legislature are not reasonable**. This will in many cases give rise to conflict between the views of the Legislature and the views of the court on the reasonableness of the restrictions. To avoid a situation like this it is better to make the Legislature the judge of the reasonableness of the restrictions. If this is not done the Legislatures of the country will not be sure of the fate of the law which they will enact. There will always be a fear that the court may hold the restrictions imposed by it to be unreasonable. The laws would be lacking in certainty.ò
(emphasis added)

[73] The Working Committee adopted Justice Abdul Hamidôs dissent and adopted his recommendation by removing the word ñreasonableô from the provisions of the proposed draft. This, in other words, eliminated the possibility of judicial review concerning the reasonableness of laws which infringed the rights granted by Article 10 of the Federal Constitution.

[74] This position of law was restated in the Constitutional Proposals for the Federation of Malaya (ñWhite Paperò) in June 1957. Clause 10 (1) (b) of the Proposed Constitution of Federation of Malaya reads [at p.36]:

> ñSubject to Clause (2), all citizens have the right to assemble peaceably and without armsò and Clause (2) (b) of the same reads ñParliament may by law impose on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of security of the Federation or public order.ò

[75] It, therefore, follows that the non-inclusion of the word ñreasonableò in Article 10 was not some oversight on the part of the Reid Commission; it was a deliberate decision anchored on an objection by one framer based on reasons given. The framers of our Constitution did not want the word ñreasonableòin Article 10 because:

(a) they want to avoid a potential conflict between the views of the Parliament and the views of the Court on the reasonableness of the restrictions;

(b) they want the Parliament to be sure of the fate of the law which they are enacting; and

(c) they want the laws of this country to be certain.

[76] In short, the framers of our Constitution wanted the Parliament to be the judge of what was ñreasonableòand not the Courts.

[77] The deliberate omission of the word ñreasonableò from the final draft that formed our Constitution is akin to Parliament itself amending the Constitution. And once so amended, it is explicit that the pre-amendment position cannot be used to determine the validity of a provision of a statute. As was stated by the Federal Court in **PP v Kok Wah Kuan [2007] 6 CLJ 341** [at p. 355]:

> ñ[21] Now that the pre-amendment words are no longer there, they simply cannot be used to determine the validity of a provision of a statute. The extent of the powers of the courts depends on what is provided in the Constitution.ò

[78] We are mindful that the words used or not used by the framers of our Constitution are not etched in stone. The Constitution may be amended to include or remove or modify any word or words originally used or excluded by the framers. But surely that is a task for Parliament. To allow the Court to reinstate that word ñreasonableò would tantamount to the Courts amending the Federal Constitution against the decision of the framers of our Constitution, in fact usurping the powers of the Parliament.

[79] In the circumstances, it is clear that the decision of ***Sivarasa*** is merely obiter. We also noted that the case of ***Pung Chen Choon*** was not even referred to, nor cited in ***Sivarasa***. All the more the dicta in ***Sivarasa*** ought not be followed.

[80] Therefore, the correct constitutional position with respect to Article 10 was as stated by the Supreme Court in ***Pung Chen Choon***. Although ***Pung Chen Choon*** did not refer to the legislative history of

Article 10, the conclusion it reached on the term ó*reasonable*ô was consistent with the legislative history.

Conclusion

[81] To recap, the whole purpose of the PAA was to enable the right to assemble peaceably and without arms. To that end, the PAA contains procedural provisions that are regulatory in nature. The non-compliance with those procedures does not stop a citizen from exercising his right to assemble peaceably and without arms. In other words, there is really no restriction on the right to assemble peaceably and without arms in the framework of the PAA.

[82] The factual matrix of the instant appeal prove that the right to assemble peaceably and without arms is not dependent on giving notice. Hence, the requirement to give notice is not a restriction of a right to assemble per se.

[83] In this instant appeal, the respondent was not charged for being a participant in the peaceable assembly. Rather he was charged for the failure to obey a federal law, namely, section 9(5) of the PAA that required him to give prior notice. Indeed, in no way was his right to assemble peaceably and without arms thereby affected.

[84] In the premises, we will answer the questions posed earlier (at pp. 9 and 10 of this Judgment) in the following manner:

First Question

The requirement under section 9(1) of the PAA to give notice prior to the exercise of the right to assemble peaceably is not a ñrestrictionò within the meaning of Article 10(2) (b) of the Federal Constitution.

Second Question

As the answer to the First Question is in the negative, there is no necessity to answer the Second Question.

Third Question

The imposition of criminal sanction under section 9(5) of the PAA for breach of requirement to give notice is not ultra vires Article 10(2) (b) of the Federal Constitution.

Fourth Question

In the light of the above, there is no necessity to answer the Fourth Question.

[85] We are of the firm opinion that section 9(5) of the PAA does not run foul of Article 10(2)(b) of the Federal Constitution. Section 9(5) is entirely constitutional, valid and enforceable.

[86] We, therefore with respect, have to depart from the earlier decision and the view taken by this Court in ***Nik Nazmi***.

[87] Based on the material before us, we are more than satisfied that there are sufficient evidence to support the conviction of the respondent as recorded by the Sessions Court Judge.

[88] Accordingly, we allowed the Public Prosecutorôs appeal on conviction and sentence. We affirm the conviction and sentence imposed by the Sessions Court.

Dated: 1st October 2015

Sgd.

(RAUS SHARIF)
President
Court of Appeal
Malaysia

Sgd.

(MOHD ZAWAWI SALLEH)
Judge
Court of Appeal
Malaysia

Sgd.

(ZAMANI A. RAHIM)
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