Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NOS 01-44-91 AND 01-2-92
ABDUL HAMID OMAR LP, HARUN HASHIM, MOHAMED YUSOFF, GUNN CHIT TUAN AND EDGAR JOSEPH JR SCJJ
3 APRIL 1992

Civil Procedure *— Declaration — Discretion to grant declaration — Persons interested not made parties to the proceedings — Whether such persons were defended in any way — Whether the court was prevented from granting the declarations in their absence*

Administrative Law *— Declaratory relief — Discretion of court to grant — Principles applicable*

Constitutional Law *— Fundamental liberties — Right to form associations — State Constitution providing that member of legislative assembly who is member of political party and who resigns or is expelled from or ceases to be member of political party shall cease to be member of legislative assembly — Whether article infringes right to freedom of association guaranteed under the Federal Constitution — Test to be applied in determining if article infringes fundamental right — Interpretation of State Constitution — Laws of the Constitution of Kelantan (First Part) (Amendment) Enactment 1991 art XXXIA — Federal Constitution art 10*

Constitutional Law *— State Constitution — Declaration that article in State Constitution constitutionally invalid — Effect of — Removal of respondents from membership of state legislative assembly invalid — By-election subsequently held invalid — Respondents are and continue to be lawful members of the state legislative assembly — Election Offences Act 1954 s 32 — Laws of the Constitution of Kelantan (First Part) (Amendment) Enactment 1991 art XXXIA — Federal Constitution arts 4, 10 & 118*

The respondents were elected members of the Kelantan State Legislative Assembly at a general election. However, pursuant to art XXXIA of the Kelantan Constitution, the State Legislative Assembly of Kelantan passed a resolution that the first and second respondents, who had resigned from the political party for which they stood and were elected in the elections, had ceased to be members of the legislative assembly and their seats were declared vacant. A by-election was held in the constituencies concerned, wherein the first and second respondents stood for election but they were defeated. One Haji Samat and one Haji Mahmud were the successful candidates elected in their place. Subsequently the respondents brought an action in the High Court seeking a declaration that art XXXIA of the Kelantan Constitution was invalid, null and void as it contravened art 10(1)(c) of the Federal Constitution guaranteeing the fundamental right of freedom of association. The High Court granted the declaration in favour of the respondents that art XXXIA of the Kelantan Constitution was void under art 4(1) of the Federal Consti-

tution to the extent that it imposes a restriction on the exercise of the fundamental right of a member of the Kelantan State Legislative Assembly to resign his membership of a political party (see [1992] 1 MLJ 343). The appellants appealed against the decision. It was argued that the High Court had acted without jurisdiction in further granting the declaration that the respondents are and continue to be lawful members of the State Legislative Assembly of Kelantan for the constituencies concerned. Neither Haji Samat nor Haji Mahmud or even the Election Commission had been made parties to the proceedings even though they were directly affected and it was contended that they have thereby been denied the opportunity of being heard so that there had been a breach of the rules of natural justice.

Held, dismissing the appeals:

Per Abdul Hamid Omar LP:

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

(2) The enunciation of the right to freedom of association in art 10(1)(c) of the Federal Constitution means a citizen's right to form, to join, not to join or resign from an association. Any restriction to dissociate from an association would make the guaranteed right ineffective and illusory.

(3) A constitution should be construed with less rigidity and more generosity than other statutes and as sui juris, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used.

(4) In this case the Kelantan Constitution — a state law — by art XXXIA, seeks to impose a restriction on the fundamental right of a member of the legislature to form associations, which of course includes the right to dissociate, and it operates by way of disqualification once the maker exercises that right. It is inconceivable that a member of the legislature can be penalized by any ordinary legislation for exercising a fundamental right which the Federal Constitution expressly confers upon him subject to such restrictions as only Parliament may impose and that too on specified grounds, and on no other grounds.

(5) The direct and inevitable consequence of art XXXIA of the Kelantan State Constitution which is designed to enforce party discipline does impose a restriction on the exercise by members of the legislature of their fundamental right of association guaranteed by art 10(1)(c) of the Federal Constitution, and that such restriction is not only not protected by art 10(1)(c) of the Federal Constitution but clearly does not fall within any of the grounds

for disqualification specified under s 6(1) of Pt I of the Eighth Sch to the Federal Constitution. By virtue of art 4(1) of the Federal Constitution, art XXXIA of the Kelantan Constitution is to that extent void.

Per Gunn Chit Tuan SCJ:

(1) In Malaysia, freedom of association is a fundamental right guaranteed by art 10(1)(c) of the Federal Constitution and can only be restricted on any of the grounds specified in art 10(2)(c) and (3), namely, in the interest of the security of the Federation or any part thereof, public order or morality.

(2) Article XXXIA of the Kelantan Constitution imposes a restriction on the membership of a legislative assembly which infringes a citizen's right to form associations under art 10(1)(c) of the Federal Constitution. Such a restriction cannot, by any stretch of the imagination, be deemed necessary or expedient in the interest of the Federation or any part thereof, public order, morality or even labour or education. As art XXXIA of the Kelantan Constitution is inconsistent with the Federal Constitution which is the supreme law of Malaysia, it is therefore void under art 4(1) of the Federal Constitution.

(3) Article 10(2) of the Federal Constitution provides that only Parliament may by law impose restrictions referred to in art 10(2), (3) and (4) of the Federal Constitution. The restriction imposed by art XXXIA of the Kelantan Constitution even if valid (which it is not) could not be imposed by a law passed by state legislature and as such art XXXIA should be invalidated.

(4) The test to be applied in determining whether a statute infringes a particular fundamental right was as to what the direct and inevitable consequence or effect of the impugned state action was on the fundamental right. Article XXXIA of the Kelantan Constitution did impose a restriction on the exercise of the respondents' right of association in that the respondents were penalized by a disqualification from continuing as members of the state legislative assembly having exercised their fundamental right of association, which includes the right to dissociate from an association, by resigning from one political party to join another. The direct and inevitable effect or consequence of art XXXIA was to make the exercise of the fundamental right of association of the respondents ineffective and illusory.

(5) Fundamental rights inhere in every citizen including a legislator. The right claimed by the respondents to leave one political party and to join another is an integral part of the fundamental right of association or at least partakes of the same basic nature and character as the freedom of association so that although the object of art XXXIA of the Kelantan Constitution may ostensibly be to curb defection from one political party to another, its direct and

inevitable consequence is the abridgement of the respondents' right of association. For that reason, the impugned legislation should be struck down.

(6) As to the contention that the declaratory order should not have been made because the Election Commission and the incumbents of the state seats, namely, Haji Samat and Haji Mahmud, were directly affected but were not before the court, the court found that the appellants were in reality fighting the suit on behalf of Haji Samat and Haji Mahmud. In the circumstances, there was no principle of law which disentitles the court from disposing of the case by making a declaration of title in the respondents' favour.

(7) Article 118 of the Federal Constitution was not relevant to the issues in the appeals as the respondents were not challenging the validity of the by-elections. The reinstatement of the respondents was not dependent on the by-elections being declared void on grounds mentioned in s 32 of the Election Offences Act 1954.

Per Edgar Joseph Jr SCJ:

(1) The granting of a declaration is a matter of discretion and the learned judge, in the exercise of his discretion in this case, has thought fit to make a declaration. His decision in the exercise of his discretion should not be disturbed unless the court can be satisfied that he proceeded on some wrong principle.

(2) A law which is invalid for unconstitutionality as in this case art XXXIA of Pt I of the Kelantan Constitution was held to be is invalid ab initio and this makes all decisions thereunder invalid. Nor can such a law be enforced or confer any legal right.

(3) Since the respondents had been removed from the membership of the State Legislative Assembly of Kelantan pursuant to an invalid and void law, their removal was wrongful and consequently, the subsequent election of Haji Samat and Haji Mahmud was also wrongful. In the circumstances the High Court judge was entitled, in the exercise of his discretion, to declare accordingly and further declare that the respondents were entitled to reinstatement.

(4) The orders made by the learned judge were of a consequential nature being consequent upon his having declared that art XXXIA(1) of the Kelantan Constitution was constitutionally invalid. Order 15 r 16 of the Rules of the High Court 1980 confers power upon the court to make binding declarations of right. Article 118 of the Federal Constitution and s 32 of the Election Offences Act 1954, relied on by the appellants, are therefore irrelevant to the issues arising upon this appeal, especially so as the respondents are not challenging the validity of the by-election upon any of the grounds stipulated under s 32 of the Act.

(5) Although neither Haji Samat nor Haji Mahmud, being the persons interested in the subject matter of the declarations sought,

were made parties to the proceedings in the High Court, the learned judge was not prevented from making the declarations prayed for, having regard to the very exceptional circumstances in this case. Even though there was no attempt by Haji Samat or Haji Mahmud to be made a party to the proceedings, nevertheless it could be said that the State Legislative Assembly of Kelantan was, in reality, fighting the suit on behalf of them.

(6) In the particular circumstances of the case, there were ample grounds to invoke the doctrine of substantive fairness the effect of which is that natural justice may impinge upon the substance of a decision. After considering the merits of the case it has been clearly demonstrated that even if Haji Samat and Haji Mahmud had been made parties to the proceedings in the court below, the result of the litigation would have been the same so that it could not be said that there was a real likelihood of their having suffered any prejudice. It follows that their non-joinder is a matter which should be condoned in the exercise of the court's discretion.

(7) As for the non-joinder of the Election Commission in the proceedings in the court below, this in no way prevented the learned trial judge from granting the declaration prayed for in the exercise of his discretion. The Election Commission was merely charged with the responsibility of conducting the election and it would be indifferent to the result of the election, its rights being in no way at stake. In any event, even had it been made a party to the proceedings in the court below, it would have made no difference to the result of the litigation, so that it could not be said that there was a real likelihood of it having suffered any prejudice.

(8) In construing constitutional documents it is axiomatic that the highest of motives and the best of intentions are not enough to displace constitutional obstacles. Whenever legally permissible the presumption must be to incline the scales of justice on the side of the fundamental rights guaranteed by the Constitution, enjoying as they do, precedence and primacy.

[Bahasa Malaysia summary

Kedua-dua responden telah dipilih menjadi ahli Dewan Undangan Negeri Kelantan di dalam satu pilihanraya umum. Walaupun demikian, mengikut perkara XXXIA Perlembagaan Kelantan, Dewan Undangan Negeri Kelantan telah meluluskan satu ketetapan bahawa responden pertama dan kedua, yang telah berhenti daripada menjadi ahli parti politik atas nama yang mana mereka bertanding sebagai calon dan telah dipilih di dalam pilihanraya itu, telah berhenti menjadi ahli dewan undangan negeri itu dan kerusi mereka telah diisytiharkan kosong. Satu pilihanraya kecil telah dilangsungkan di daerah berkenaan, di mana responden pertama dan kedua telah bertanding tetapi telah ditewaskan. Haji Samat dan Haji Mahmud adalah calon yang berjaya dipilih sebagai ganti. Kemudian responden telah mengambil tindakan dalam Mahkamah Tinggi memohon deklarasi bahawa perkara XXXIA

Perlembagaan Kelantan adalah tidak sah dan terbatal kerana ia melanggar perkara 10(1)(c) Perlembagaan Persekutuan yang menjamin hak asasi berpersatuan. Mahkamah Tinggi telah memberikan deklarasi menyokong responden bahawa perkara XXXIA Perlembagaan Kelantan adalah tidak sah di bawah perkara 4(1) Perlembagaan Persekutuan setakat mana ia mengenakan sekatan atas penggunaan hak asasi seorang ahli Dewan Undangan Negeri Kelantan untuk berhenti menjadi ahli sesebuah parti politik (lihat [1992] 1 MLJ 343). Perayu telah membuat rayuan terhadap keputusan itu. Perayu berhujah bahawa Mahkamah Tinggi telah bertindak tanpa bidang kuasa dengan selanjutnya memberikan deklarasi bahawa kedua-dua responden adalah dan terus menjadi ahli sah Dewan Undangan Negeri Kelantan bagi daerah berkenaan. Baik Haji Samat mahupun Haji Mahmud ataupun Suruhanjaya Pilihanraya tidak dicantumkan menjadi parti prosiding walaupun ia melibatkan mereka secara langsung dan telah dihujah bahawa oleh kerana itu mereka tidak diberi peluang untuk didengar yang menyebabkan perlanggaran rukun keadilan asasi.

Diputuskan, menolak kedua-dua rayuan itu:
Menurut Abdul Hamid Omar KHN:

(1) Untuk menentukan keesahan tindakan negeri berhubungan dengan hak-hak asasi, apa yang seharusnya dipertimbangkan oleh mahkamah ialah sama ada ia menyentuh secara langsung hak-hak asasi itu atau membuatkan penggunaannya tidak berkesan atau maya.

(2) Peruntukan hak kebebasan berpersatuan di dalam fasal kecil (1)(c) perkara 10 Perlembagaan Persekutuan bermakna hak seseorang rakyat menubuh, menjadi ahli atau tidak menjadi ahli atau berhenti menjadi ahli sesuatu persatuan. Mana-mana sekatan untuk memisahkan diri dari sesuatu persatuan akan menjadikan hak yang dijamin itu tidak berkesan dan maya.

(3) Sesuatu undang-undang perlembagaan hendaklah ditafsirkan dengan kurang kekakuan dan lebih kemurahan hati daripada undang-undang lain dan sebagai sui juris yang memerlukan prinsip-prinsip tafsiran sendiri yang sesuai dengan coraknya tanpa melupakan bahawa kehormatan hendaklah diberi kepada perkataan dan bahasa yang digunakan.

(4) Di dalam kes ini Perlembagaan Kelantan — sebuah undang-undang negeri — dengan perkara XXXIA telah cuba mengenakan sekatan ke atas hak asasi seorang ahli dewan undangan untuk berpersatuan, yang semestinya termasuk hak memisahkan diri dari persatuan itu, dan ia berkesan secara menghilangkan kelayakan sebaik sahaja hak itu digunakan. Tidaklah boleh dibayangkan bahawa seorang ahli dewan undangan boleh dikenakan penalti oleh sebarang perundangan biasa oleh kerana ia menggunakan hak asasi yang diberi dengan nyata kepadanya oleh Perlembagaan Persekutuan tertakluk kepada apa-apa sekatan yang hanya boleh dikenakan oleh Parlimen dan itu pun atas sebab-sebab yang tertentu sahaja dan bukan atas sebab lain.

(5) Kesan secara langsung dan yang tidak dapat dielakkan dari perkara XXXIA Perlembagaan Negeri Kelantan yang bertujuan menguatkuasakan tatatertib parti adalah mengenakan sekatan atas kegunaan hak asasi yang dijamin oleh perkara 10(1)(c) Perlembagaan Persekutuan dan sekatan itu bukan hanya tidak diberi perlindungan di bawah perkara 10(1)(c) Perlembagaan Persekutuan tetapi jelasnya tidak termasuk dalam sebarang sebab-sebab untuk kehilangan kelayakan yang disebut di bawah s 6(1) Bahagian I Jadual Delapan Perlembagaan Persekutuan. Oleh kerana perkara 4(1) Perlembagaan Persekutuan, perkara XXXIA Perlembagaan Negeri Kelantan adalah setakat itu tidak sah.

Menurut Gunn Chit Tuan HMA:

(1) Di Malaysia, kebebasan berpersatuan adalah satu hak asasi yang dijamin oleh perkara 10(1)(c) Perlembagaan Persekutuan dan hanya boleh disekat atas alasan yang ditentukan dalam perkara 10(2)(c) dan (3), iaitu, untuk kepentingan keselamatan persekutuan atau sebarang bahagiannya, ketenteraman awam atau akhlak.

(2) Perkara XXXIA Perlembagaan Kelantan mengenakan sekatan ke atas keahlian dewan perundangan yang melanggar hak seseorang warganegara untuk berpersatuan di bawah perkara 10(1)(c) Perlembagaan Persekutuan. Sekatan seperti itu tidak boleh, dengan meregangkan imaginasi bagaimana sekalipun, dianggap satu keperluan atau bermanfaat untuk kepentingan persekutuan atau sebarang bahagiannya, ketenteraman awam, akhlak ataupun perburuhan atau pendidikan. Kerana perkara XXXIA Perlembagaan Kelantan tidak konsisten dengan Perlembagaan Persekutuan yang menjadi undang-undang utama Malaysia, maka ia tidak sah di bawah perkara 4(1) Perlembagaan Persekutuan.

(3) Perkara 10(2) Perlembagaan Persekutuan memperuntukkan bahawa hanya Parliamen boleh dengan undang-undang mengenakan sekatan yang dirujuk dalam perkara 10(2), (3) dan (4) Perlembagaan Persekutuan. Sekatan yang dikenakan oleh perkara XXXIA Perlembagaan Kelantan biarpun sah (yang mana ia bukan) tidak boleh dikenakan oleh undang-undang yang diluluskan oleh badan perundangan negeri dan kerana itu perkara XXXIA haruslah dibatalkan.

(4) Ujian yang terpakai dalam menentukan sama ada sesuatu statut melanggar satu hak asasi yang tertentu adalah apakah kesudahan atau kesan yang langsung dan yang tidak dapat dielakkan statut yang dicabar itu atas hak asasi itu. Perkara XXXIA Perlembagaan Kelantan mengenakan sekatan atas penggunaan hak berpersatuan responden sebab responden telah dijatuhkan penalti kehilangan kelayakan terus menjadi ahli dewan perundangan negeri kerana menggunakan hak berpersatuan mereka, yang termasuk hak memisahkan diri dari sesuatu persatuan, dengan memberhentikan penganggotaan satu parti politik untuk menyertai parti yang lain. Kesudahan atau kesan yang langsung dan yang tidak dapat

dielakkan perkara XXXIA menyebabkan penggunaan hak asasi berpersatuan responden tidak berkesan dan maya.

(5) Hak asasi wujud dalam setiap warganegara termasuk pembuat undang-undang. Hak yang dituntut oleh responden untuk meninggalkan satu parti politik dan menyertai parti yang lain ialah bahagian yang perlu dalam hak asasi berpersatuan atau sekurang-kurangnya menyerupai sifat asas yang sama dengan kebebasan berpersatuan supaya walaupun matlamat perkara XXXIA Perlembagaan Kelantan boleh dikatakan dengan penyembunyian kebenaran ialah untuk menahan pembelotan dari satu parti politik kepada yang lain, kesudahan yang langsung dan yang tidak dapat dielakkan menyingkatkan hak berpersatuan responden. Oleh sebab itu, perundangan yang dicabar itu harus dibatalkan.

(6) Mengenai penghujahan bahawa perintah deklarasi itu tidak seharusnya dibuat kerana Suruhanjaya Pilihanraya dan pemegang kerusi negeri, iaitu, Haji Samat dan Haji Mahmud tidak hadir di hadapan mahkamah walaupun perkara itu melibatkan mereka secara langsung, mahkamah berpendapat bahawa perayu pada hakikatnya bertindak dalam guaman itu bagi pihak Haji Samat dan Haji Mahmud. Dalam keadaan begitu, tiada prinsip undang-undang yang melarang mahkamah daripada menyelesaikan kes itu dengan membuat deklarasi hakmilik untuk faedah responden.

(7) Perkara 118 Perlembagaan Persekutuan tidak relevan kepada isu rayuan itu kerana responden tidak mencabar keesahan pilihanraya kecil itu. Penempatan semula responden tidak bergantung kepada pilihanraya kecil itu diisytiharkan tidak sah atas alasan yang disebutkan dalam s 32 Akta Kesalahan Pilihanraya 1954.

Menurut Edgar Joseph Jr HMA:

(1) Pemberian deklarasi adalah perkara budi bicara dan hakim yang arif, dalam menggunakan budi bicaranya di dalam kes ini, telah berpendapat adalah wajar membuat deklarasi itu. Keputusannya di dalam menjalankan budi bicaranya itu tidak seharusnya diganggu kecuali mahkamah berpuashati bahawa beliau telah bertindak atas prinsip yang salah.

(2) Suatu perundangan yang terbatal kerana tidak sah dari segi undang-undang perlembagaan seperti di dalam kes ini perkara XXXIA Perlembagaan Kelantan telah diputuskan adalah terbatal dari mulanya (ab initio) dan ini membuat segala keputusan di bawahnya terbatal juga. Undang-undang seperti itu juga tidak boleh dikuatkuasakan atau memberi apa-apa hak menurut undang-undang.

(3) Oleh kerana kedua-dua responden telah diberhentikan daripada keahlian Dewan Undangan Negeri Kelantan mengikut undang-undang yang tidak sah dan terbatal, pemberhentian mereka adalah salah dan oleh kerana itu pemilihan kemudian Haji Samat dan Haji Mahmud juga salah. Dalam keadaan begitu hakim Mahkamah Tinggi berhak, dalam menggunakan budi bicaranya, untuk membuat deklarasi yang bersesuaian dan juga membuat deklarasi bahawa responden berhak ditempatkan semula.

(4) Perintah-perintah yang dibuat oleh hakim yang arif adalah bersifat konsekuen dan berakibat daripada apa yang telah diisytiharkan oleh beliau bahawa perkara XXXIA(1) Perlembagaan Kelantan adalah tidak sah dari segi undang-undang perlembagaan. Aturan 15 k 16 Kaedah-Kaedah Mahkamah Tinggi 1980 memberi kuasa kepada mahkamah untuk membuat deklarasi mengikat tentang hak seseorang. Oleh kerana itu perkara 118 Perlembagaan Persekutuan dan s 32 Akta Kesalahan Pilihanraya 1954, yang dirujuk oleh perayu, adalah tidak berkaitan dengan isu yang timbul di dalam rayuan ini, lebih-lebih lagi oleh kerana responden tidak mencabar keesahan pilihanraya kecil atas mana-mana alasan yang disebut di dalam s 32 itu.

(5) Sungguhpun baik Haji Samat mahupun Haji Mahmud, yang mempunyai kepentingan dalam perkara deklarasi yang dipohonkan, tidak dijadikan pihak di dalam prosiding di Mahkamah Tinggi, hakim yang arif tidak dihalang daripada membuat deklarasi yang dipohonkan, memandangkan keadaan istimewa kes ini. Walaupun Haji Samat dan Haji Mahmud tidak membuat apa-apa percubaan untuk dicantum sebagai pihak di dalam prosiding itu, namun bolehlah dikatakan bahawa Dewan Undangan Negeri Kelantan, pada hakikatnya, bertindak bagi pihak Haji Samat dan Haji Mahmud.

(6) Di dalam keadaan tertentu berhubungan dengan rayuan ini, terdapat alasan-alasan yang mencukupi untuk menggunakan doktrin kesaksamaan substantif (substantive fairness) yang mempunyai kesan bahawa keadilan asasi boleh menyentuh isi sesuatu keputusan. Selepas mempertimbangkan merit kes ini, telah ditunjukkan dengan jelas bahawa biarpun Haji Samat dan Haji Mahmud dijadikan pihak di dalam prosiding di Mahkamah Tinggi, keputusan litigasi itu tidak akan berubah dan oleh kerana itu tidaklah boleh dikatakan bahawa terdapat kemungkinan sebenar yang mereka mengalami apa-apa prasangka. Ini bermakna ketakcantuman mereka adalah suatu perkara yang hendaklah dimaafkan mengikut budi bicara mahkamah.

(7) Mengenai ketakcantuman Suruhanjaya Pilihanraya dalam prosiding di Mahkamah Tinggi, perkara ini sama sekali tidak menghalang hakim yang arif daripada memberi deklarasi yang dipohonkan dalam penggunaan budi bicaranya. Suruhanjaya Pilihanraya telah ditugaskan dengan tanggungjawab menguruskan pilihanraya dan sememangnya ia mempungai sikap berkecuali terhadap keputusan pilihanraya itu; haknya sama sekali tidak terlibat. Walau bagaimanapun, biarpun ia dijadikan pihak di dalam prosiding di Mahkamah Tinggi, ini tidak akan mengubah keputusan litigasi ini, dan oleh kerana itu tidaklah boleh dikatakan terdapat kemungkinan sebenar yang ia mengalami apa-apa prasangka.

(8) Di dalam mentafsirkan dokumen perlembagaan adalah tidak dapat disangkal bahawa tujuan setinggi-tingginya dan niat sebaik-baiknya tidak mencukupi untuk menggantikan halangan-halangan per-

lembagaan. Seberapa boleh yang dibenarkan oleh undang-undang sesuatu anggapan hendaklah mencenderungkan neraca keadilan kepada belah hak-hak asasi yang dijamin oleh perlembagaan, yang sememangnya mempunyai keutamaan.] A

Cases referred to B

1 *Mian Bashir Ahmad & Ors v The State* AIR 1982 Jammu & Kashmir 26 (distd)
2 *Raja Kulkami v State of Bombay* AIR 1951 Bom 105 (refd)
3 *OK Ghosh v EX Joseph* AIR 1963 SC 812 (folld)
4 *Minister of Home Affairs v Fisher* [1980] AC 319; [1979] 2 WLR 889; [1979] 3 All ER 21 (folld) C
5 *McKinley v Commonwealth of Australia* (1975) 135 CLR 1 (refd)
6 *Amalgamated Society of Engineers v Adelaide Steamship* (1920) 28 CLR 129 (refd)
7 *Ong Ah Chuan v PP* [1981] AC 648; [1981] 1 MLJ 64 (refd)
8 *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (refd) D
9 *Smt Maneka Ghandi v Union of India* AIR 1978 SC 597 (folld)
10 *Gunaratne v People's Bank* [1987] LR Com 383 (folld)
11 *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 (refd)
12 *Damyanti v Union of India* [1971] 1 SCC 678 (refd)
13 *Jumuna Prasad & Ors v Lachi Ram & Ors* [1955] 1 SCR 608 (distd) E
14 *Sakhawat Ali v State of Orissa* [1955] 1 SCR 1004 (distd)
15 *London Passenger Transport Board v Moscrop* [1942] AC 35 (refd)
16 *Ikebife Ibeneweka & Ors v Peter Egbuna & Anor* [1964] 1 WLR 219 (folld)
17 *Kunstler v Kunstler* [1969] 3 All ER 673; [1969] 1 WLR 1506 (refd) F
18 *Majumder v Attorney General of Sarawak* [1967] 1 MLJ 101 (refd)
19 *Chop Chuah Seong Joo v Teh Chooi Nai & Ors* [1963] MLJ 96 (refd)
20 *Brickfield Properties v Newton* [1971] 3 All ER 328; [1971] 1 WLR 862 (refd) G
21 *Sutherland Shire Council v Leyendekkers* (1970) 91 WN (SSW) 250 (refd)
22 *Acs v Anderson* [1975] 1 NSW 212 (refd)
23 *Vine v National Dock Labour Board* [1956] 1 All ER 1; [1956] 1 QB 658; [1956] 2 WLR 311 (folld) H
24 *Vine v National Dock Labour Board* [1956] 3 All ER 939; [1957] AC 488; [1957] 2 WLR 106 (refd)
25 *JB Jeyaretnam v PP* [1990] 1 MLJ 129 (refd)
26 *Marbury v Madison* (1803) 1 Cranch 137 (refd)
27 *Tun Datuk Haji Mohamed Adnan Robert v Tun Datuk Haji Mustapha bin Datuk Harun* [1987] 1 MLJ 471 (refd) I
28 *Malloch v Aberdeen Corp* [1971] 1 WLR 1578; [1971] 2 All ER 1278 (refd)

29 *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356 (refd)
30 *Cheall v APEX* [1983] AC 180; [1983] 1 All ER 1130; [1983] 2 WLR 679 (refd)

Legislation referred to
Election Offences Act 1954 s 32
Federal Constitution arts 4(1), 10(1), 118, Eighth Sch Pt I s 6(1)
Laws of the Constitution of Kelantan (First Part) (Amendment) Enactment 1991 art XXXIA

Appeal from: Civil Case No R1–22–11–1991 (High Court, Kuala Lumpur)

Zainur Zakaria, Haji Idris bin Othman (State Legal Adviser, Kelantan) and *Zulkifli Noordin* (*Zainur Zakaria & Co*) for the appellants.
Dato' Zaki Azmi and *Juliana Solomon* (*Rashid & Lee*) for the respondents.

Cur Adv Vult

Abdul Hamid Omar LP (delivering the judgment of the court in Civil Appeal No 01–44–91): In this appeal, the dominant question of law which calls for determination is: whether art XXXIA of Pt I of the Constitution of the State of Kelantan ('the Kelantan Constitution') to the extent that it provides that a member of the legislative assembly who is a member of a political party, shall cease to be a member of the legislative assembly if he resigns or for any reason whatsoever ceases to be a member of such political party, is inconsistent with sub-cl (1)(c) of art 10 of the Federal Constitution which enunciates the right to freedom of association and, if so, to that extent invalid and therefore ineffective by virtue of sub-cl (1) of art 4 of the Federal Constitution?

In the High Court at Kuala Lumpur, Eusoff Chin J (as he then was) answered the first part of the question in the affirmative and proceeded to hold that it was void under art 4(1) of the Federal Constitution to the extent where it imposes a restriction in the exercise of the fundamental right of a member of the Kelantan State Legislative Assembly to resign his membership of a political party or for any other reason whatsoever ceases to be a member of such political party. The appeal is against that decision.

The constitutional problem posed emerged from the following facts as to which the parties to the appeal were and are both in the court below and here in complete agreement. For brevity and convenience, those facts as set out in the judgment of the learned trial judge are reproduced hereunder as follows:

(a) The plaintiffs were elected to the Dewan Undangan Negeri Kelantan during the general elections held on 21 October 1990 and subsequently sworn in as members.

(b) On 25 April 1991 the first defendant passed the Enakmen Undang-Undang Perlembagaan Tubuh Kerajaan Kelantan (Bahagian Pertama) (Pindaan) 1991 [Laws of the Constitution of Kelantan (First Part) (Amendment) Enactment 1991].
(c) On 3 July 1991 the first defendant passed a resolution pursuant to the impugned legislation that the first and second plaintiffs had ceased to be members of the Dewan Undangan Negeri Kelantan and declared the seats for the constituencies of Sungai Pinang and Limbongan vacant.
(d) By reason of the vacancies the Election Commission of Malaysia took steps to hold by-elections in the aforesaid constituencies, with the dates of nominations of candidates fixed for 12 August 1991 and the by-elections held and completed on 26 August 1991.
(e) In the by-elections aforesaid, the plaintiffs stood for election as candidates of the Barisan Nasional but lost.

It would be more convenient if we referred to the two appellants as the first and second defendants and the two respondents as the first and the second plaintiffs. The Suruhanjaya Pilihanraya, Malaysia, the third defendant, has not appealed and so is not a party to this appeal.

To put matters in their proper perspective, it is necessary to reproduce art XXXIA of the Kelantan Constitution, sub-cl (1) of art 4 and sub-cl (1)(c) and (2)(c) of art 10 of the Federal Constitution. They say this:

XXXIA(1) If any member of the Legislative Assembly who is a member of a political party resigns or is expelled from, or for any reasons whatsoever ceases to be a member of such political party, he shall cease to be a member of the Legislative and his seat shall become vacant.

(2) For the purpose of Clause (1) the Legislative Assembly shall determine whether a seat has become vacant or as to when a seat becomes vacant and the determination of the Assembly shall be final and shall not be questioned in any Court on any ground whatsoever.

Art 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.

Art 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) ...
(b) ...
(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.

Before we embark upon a consideration of the arguments advanced by counsel on both sides, we would advert to two preliminary matters as to which, there appears to be no dispute. First, the enunciation of the right to freedom of association in sub-cl (1)(c) of art 10 of the Federal Constitution means a citizen's right to form, to join, not to join or resign from an association (see *Mian Bashir Ahmad & Ors v The State*[1] at p 55 para 89; *Raja Kulkami v State of Bombay*[2]). In *OK Ghosh v EX Joseph*,[3] the Supreme Court of India was of the view that any restriction to dissociate from an association would make the guaranteed right under art 19(1)(c) of the Constitution ineffective and illusory.

Secondly, as the Judicial Committee of the Privy Council held in *Minister of Home Affairs v Fisher*[4] at p 329, a constitution should be construed with less rigidity and more generosity than other statutes and as sui juris, calling for principles of interpretation of its own, suitable to its character but not forgetting that respect must be paid to the language which has been used.

In this context, it is also worth recalling what Barwick CJ said when speaking for the High Court of Australia, in *Attorney General of the Commonwealth, ex relatione McKinley v Commonwealth of Australia*[5] at p 17:

> the only true guide and the only course which can produce stability in constitutional law is to read the language of the constitution itself, no doubt generously and not pedantically, but as a whole and to find its meaning by legal reasoning.

In our approach to this appeal we have accordingly kept in the forefront of our minds the principles aforesaid.

Before us the judgment of the learned judge was attacked by counsel for the appellants on a number of grounds the main thrust of which may be conveniently stated as follows.

It was argued that the learned judge had misdirected himself in construing art XXXIA of the Kelantan Constitution in relation to art 10(1)(c) of the Federal Constitution. In particular, it was argued that the learned judge failed to appreciate that the plaintiffs' right to be or to continue to be members of the Legislative Assembly of the State of Kelantan was distinct and separate from, and did not affect, their fundamental right under art 10(1)(c) of the Federal Constitution.

As a result of the misdirection as aforesaid, it was said that the learned judge did not take into account or failed to adequately consider or appreciate the broader constitutional issues underlying art XXXIA of the Kelantan Constitution and the implications of the electoral process under the Federal and State Constitutions.

The constitutional problem to which the learned trial judge had to direct his mind thus bore a strong resemblance to that which faced the Full Bench of Jammu and Kashmir in the Indian case of *Mian Bashir Ahmad & Ors v The State*,[1] a case which received considerable attention in his judgment.

It would therefore be convenient, at this stage, to direct our attention to that case. There, the issue central to the petition before the court was whether s 24–G of the J & K Representation of the People Act providing for cessation of membership of a legislator of the house to which he belongs in the event of his resigning his membership of the party to which he belongs

on whose platform he contested the election and was elected, had violated the legislator's right to freedom of speech under art 19(1)(a) and the right to freedom of association guaranteed under art 19(1)(c) of the Constitution of India. For easy reference, the relevant part of that article is reproduced hereunder as follows:

> Constitution of India
> 19(1) All citizens shall have the right —
>
> Protection of certain rights regarding freedom of speech, etc.
> (a) to freedom of speech and expression;
> (b) to assemble peaceably and without arms;
> (c) to form associations or unions.
>
> (2) ...
> (3) ...
> (4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent *the State* from making any law imposing, in the interest of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause. (Emphasis added.)

The Full Bench which comprised four judges were equally divided with the Chief Justice Mufti Baha-Ud-Din and Mr Justice Mir holding that s 24–G of the Representation of the People Act did not violate the legislator's right to freedom of speech under art 19(1)(a) and the right to freedom of association under art 19(1)(c) of the Indian Constitution, whilst on the other hand Mr Justice Dr Anand and Mr Justice Kotwal, taking a diametrically opposed view. By r 21 of the Jammu and Kashmir High Court Rules, the view taken by the Chief Justice and Mr Justice Mir constituted the majority view, whilst the view taken by Mr Justice Dr Anand and Mr Justice Kotwal constituted the minority view.

There are certain general observations we should like to make regarding *Mian Bashir Ahmad*'s case.[1]

It is obvious from the judgment of the Acting Chief Justice that in upholding the validity of the impugned legislation he had placed great stress upon what he described as the post-independence history of prevalent political defections and their baneful effect in that they had threatened the functioning of parliamentary democracy in many parts of the Indian subcontinent. He emphasized with great clarity and detail, including the citation of many examples, that these political defections were not because of genuine proddings of conscience but because of personal aggrandizement and rank opportunism and had thus become a pernicious form of political corruption threatening the functioning of parliamentary democracy contemplated by the Constitution. It was against the backdrop of these events, he said that the impugned legislation was enacted into law. In the words of the Acting Chief Justice:

> Viewed on this background, it cannot be said that the object of the section is merely to curb dissent but the object, truly and properly understood, is to eradicate the evil of political defections in the state. In actual operation, however, the direct and inevitable effect of the section is that the legislator's liberty to vote in the legislature is impaired and, moreover, he will not be able to leave his party

habitat so long as he continues to be a legislator. It is in the light of the background that we have to consider the validity of the impugned legislation.

The position in this country cannot, however, be said to be similar to the position in India then, for the background events to which we have briefly referred have no parallel here. Certainly, no attempt whatsoever was made either by the introduction of evidence or even by way of argument to establish the contrary.

In any event, it is axiomatic that the highest of motives and the best of intentions are not enough to displace constitutional obstacles, so that the background events which led to the passing of the impugned legislation in Jammu and Kashmir are, with all due respect to the Acting Chief Justice, irrelevant to the question of its constitutional validity.

It is not difficult to cite an anthology of cases for this proposition; suffice if we refer to the following cases.

In *Amalgamated Society of Engineers v Adelaide Steamship,*[6] Knox CJ speaking for the High Court of Australia, said at p 152, thus: 'Therefore the doctrine of political necessity, as a means of interpretation, is indefensible on any ground.'

In *Minister of Home Affairs v Fisher,*[4] Lord Wilberforce, speaking for their Lordships of the Board said that the way to interpret a constitution on the Westminster model is to treat it not as if it were an Act of Parliament but 'as sui juris, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law'.

In *Ong Ah Chuan v PP,*[7] Lord Diplock speaking for their Lordships of the Board referred with approval to the extract from the judgment of Lord Wilberforce quoted above, and added:

> As in that case, which concerned fundamental rights and freedoms of the individual guaranteed by the Bermuda Constitution their Lordships would give to Part IV of the Constitution of the Republic of Singapore 'a generous interpretation avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of the [fundamental liberties] referred to'.

And, in *Loh Kooi Choon v The Government of Malaysia*[8] Raja Azlan Shah FJ (as he then was) speaking for the Federal Court said this at p 188 col 1D to E:

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

judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the legislature.'

We must now turn to the minority opinion in *Mian Bashir*'s case[1] which commended itself to Eusoff Chin J.

The main judgment which constituted the minority opinion was delivered by Dr Anand. The most pertinent point of his Lordship's judgment on the correct approach to adopt in determining whether the impugned legislation violates the fundamental right guaranteed under art 19(1)(c) of the Constitution was that (at p 59 para 101):

> the legislation can be, of course, struck down if it directly infringes the fundamental rights of a legislator but *it can also be struck down if the inevitable consequences of the legislation is to prevent the exercise of the fundamental rights guaranteed under art 19(1)(c) or to make the exercise of that right 'ineffective or illusory'.* (Emphasis added.)

In so holding, his Lordship relied upon the judgment of the Supreme Court of India in *Smt Maneka Ghandi v Union of India*[9] at pp 632–633 where the entire case law on the point was considered, and where their Lordships explained, that the word 'direct' would go to the quality or character of the effect and not the subject matter; and, on the other hand, they pointed out:

> that the test of 'inevitable' consequence 'helps to quantify the extent of direction necessary to constitute' infringement of a fundamental right. Now, if the effect of state action on a fundamental right is direct and inevitable, then a fortiori it must be presumed to have been affected ... this is the test which must be applied for the purpose of determining whether the impugned order made under it is violative of art 19(1)(a) or (c).

Explaining the expression 'direct and inevitable effect' as used by their Lordships in *Smt Maneka Ghandi*'s case,[9] Dr Anand said (at p 59 para 102 col 2) that the impugned action would be struck down if either it directly affects the fundamental rights or its inevitable effect on the fundamental rights is such that it makes their exercise 'ineffective or illusory'.

He then proceeded to conclude as follows: 'Since the inevitable effect of s 24–G(a) is that it makes the exercise of right of association guaranteed under art 19(1)(c) ineffective and illusory in so far as legislators are concerned, it must be held to be unconstitutional.'

We share Dr Anand's view taken from the Supreme Court decision in *Smt Maneka Ghandi*'s case,[9] that in testing the validity of state action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise 'ineffective or illusory'.

The next point which we would direct our minds to is whether the right to stand as a candidate and to contest an election is a statutory right regulated by the relevant statute — in this case the Kelantan Constitution — and the exercise of which right depends upon compliance with the conditions laid down therein. Clearly, the answer to this question is in the

affirmative. In other words, no one has a fundamental right to be elected a member of Parliament.

Be that as it may, the position is clear in that upon his election to the legislature, the right to freedom of speech and expression in the legislature is guaranteed by art 72(2) of the Constitution and the right to continue as a member for the whole of the duration of the term of the legislature is likewise guaranteed by the Constitution with this qualification, namely, that a member of the legislature may be disqualified upon the grounds specified in s 6(1) of Pt I of the Eighth Schedule to the Constitution, the provisions of which are inserted in every State Constitution in our country.

Quite apart from the rights we have just mentioned, a member enjoys, in common with other citizens, the fundamental rights or liberties guaranteed under art 10(1) of the Federal Constitution, namely, the right to freedom of speech and expression, the right to assemble peaceably and without arms, and the right to form associations, subject to such restrictions as Parliament may impose on the grounds specified in art 10(2).

We are supported in this by the following passage in Sir Erskine May's well-respected work on *Parliamentary Practice* where he explains the content of parliamentary privileges in the following terms:

> The sum of peculiar rights enjoyed by each House collectively as a constituent part of the High Court or Parliament, and by members of each House individually, without which they could not discharge their functions, and which *exceed those possessed by other bodies or persons.* (Emphasis added.)

Turning to the right to form associations guaranteed by art 10(1)(c), it being the right of direct relevance to the issue which arises for decision in the present case, by art 10(2)(c) only *Parliament* may by law impose such restrictions thereon, as it deems necessary or expedient in the most exceptional circumstances and that too in the interest of the security of the Federation or any part thereof, public order or morality, and on no other grounds.

In this case the Kelantan Constitution — a state law — by art XXXIA, seeks to impose a restriction on the fundamental right of a member of the legislature to form associations, which of course includes the right to dissociate, and it operates by way of disqualification, once the member exercises that right.

It is, in our view, inconceivable that a member of the legislature can be penalized by any ordinary legislation for exercising a fundamental right which the Constitution expressly confers upon him subject to such restrictions as only Parliament may impose and that too on specified grounds, and on no other grounds.

We are thus reminded of what Mr NA Palkhivala, the eminent Indian constitutional lawyer said at p 68 para 2 of his book *Our Constitution Defaced and Defiled*:

> No greater insult can be imagined to members of Parliament and the state legislatures than to tell them that once they become members of a political party, apart from any question of the party constitution and any disciplinary action the party may choose to take, the Constitution of India itself expects them to have no right for themselves, but they must become soulless and conscienceless

entities who would be driven by their political party in whichever direction the party chooses to push them. A

In the present case, we would not overlook the submission of Encik Zainur for the defendants that art XXXIA does not impose any restriction on the fundamental right of association of the plaintiffs under the Constitution because they were free to exercise it and it is only if they did so they would incur the disqualification from membership of the legislature. B

In *Gunaratne v People's Bank,*[10] the appellant had been required to resign from a trade union in order to qualify, under the terms of his letter of appointment issued by the respondents, for promotion. He refused to sign and sought in the district court a declaration that his fundamental right to freedom of association under art 18(1)(f) of the Constitution of Sri Lanka 1972 (equivalent to our art 10(1)(c)) had been violated. It was held that he was entitled to the declaration but on appeal to the Court of Appeal, the decision was reversed. The appellant then appealed to the Supreme Court. In allowing his appeal and restoring the judgment of the district court, Wanasundera J had to consider a similar point to that advanced by Encik Zainur and to which we have just referred. At p 393 para (d) to (f), his Lordship said, inter alia, this: C D

> But, on the other hand, if a person is a member of a lawful trade union which is engaged in lawful activity, a dismissal or disciplinary action solely on this ground would certainly violate the constitutional guarantee. It was, however, sought to interpret this case to mean that an employee can be dismissed for exercising his fundamental right of joining or being in a union and that it would be a sufficient answer to an action challenging the dismissal to say that the order does not in fact interfere with the employee's right of association as this right still remains with him. Applying this argument to the facts of the present case, it is suggested that it would be legitimate to have a condition in the contract of employment against the employee joining a union and such a condition would not as such interfere with his right of association because he will continue to have the right and if he insists on it he must seek employment elsewhere. This appears to me to be a misunderstanding of the language and a complete misreading of the case. Such an interpretation which strangely enough had appealed to the Court of Appeal would, if given effect to, result in nothing less than this guaranteed right being wiped out altogether from the Constitution. E F G

In *Ghosh v Joseph,*[3] r 4B of the Central Civil Service (Conduct) Rules 1955 laid down that no government servant shall join or continue to be a member of any service association of government servants (a) which had not within a period of six months of its formation obtained the recognition of the government under the rules prescribed in that behalf of (b) recognition in respect of which has been refused or withdrawn by the government under the said rules. These rules were to be read along with the Recognition of Service Association Rules 1959. In the course of his judgment Gajendragadkar J said this: H

> It is not disputed that the fundamental rights guaranteed by art 19 can be claimed by government servants .... Thus, the validity of the impugned rule has to be judged on the basis that the respondent and his co-employees are entitled to form associations or unions. It is clear that r 4–B imposes a restriction on this right. It virtually compels a government servant to withdraw his membership of I

A the Service Association of Government Servants as soon as recognition accorded to the said association is withdrawn or if, after the association is formed, no recognition is accorded to it within six months. In other words, the right to form an association is conditioned by the existence of the recognition of the said association by the government. If the association obtains the recognition and continues to enjoy it, government servants can welcome members of the said
B association; if the association does not secure recognition from the government, or recognition granted to it is withdrawn, government servants must cease to be the members of the said association. That is the plain effect of the impugned rule. Can this restriction be said to be in the interests of public order and can it be said to be a reasonable restriction? In our opinion, the only answer to these questions would be in the negative. It is difficult to see any direct or proximate
C or reasonable connection between the recognition by the government of the association and the discipline amongst, and the efficiency of, the members of the said association. Similarly, it is difficult to see any connection between recognition and public order. (Vide also *Madan Lal v Deputy Inspector General of Police* AIR 1963 Rajasthan 136.)

D We are in agreement with the views expressed by the court in *Gunaratne*'s case[10] and *Ghosh*'s case[3] quoted above.

The remaining points in this appeal may be dealt with briefly.

We recognize that as regards that part of the plaintiffs' case which alleged inconsistency between art XXXIA of the Kelantan State Constitution and art 10(1)(c) of the Federal Constitution, the alleged inconsistency must,
E first of all, be identified.

According to *Lane on the Australian Federal System* (2nd Ed) p 882:

> Etymologically, inconsistency arises between two things 'when they cannot stand together at the same time'. *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at p 503. 'Inconsistency' derives from 'in' (privative) and 'con' (together)
F and 'sistere' (stand). Judicially, however, the meaning of inconsistency has not been restricted to this narrow connotation. 'Inconsistent' for the High Court comprises four different relations (including the one just given): (1) Impossible to obey both laws and direct collision. (2) Commonwealth permits or confers: State prohibits or deprives. (3) Commonwealth confers or imposes: State modifies. (4) Commonwealth covers the field: State enters the field.

G It appears to us that of the four different relations mentioned above, the one relevant to the issue which arises for decision in the present case is the situation under para (2).

At p 886, in commenting on para (2), the learned author says this: 'A Commonwealth law may simply permit X subject to certain prerequisites,
H and, by contrast, a state law may prohibit X absolutely or permit X conditionally upon its prerequisites being fulfilled.' And further down, on the same page, he says this by way of explanation:

> One statute is inconsistent with another when it takes away a right conferred by that other ... or, (i)f one enactment makes or acts upon as lawful that which the other makes unlawful ... the two are to that extent inconsistent. (*Clyde Engineer-*
I *ing Co Ltd v Cowburn* (1926) 37 CLR 466 at pp 478, 490.)

Applying the principles enunciated above, and having regard to the test laid down by the Supreme Court of India in *Smt Maneka Ghandi*'s case[9] to determine the constitutional validity of a state law to which we have

referred, and what appears in the passages we have extracted from the judgments of Wanasundera J in *Gunaratne*'s case[10] and Gajendragadkar J in *Ghosh*'s case,[3] we are satisfied that the inconsistency alleged by the plaintiffs in their statement of claim had been made out.

We might as well add that we have not overlooked the point — not raised during the argument — that s 24–G of J & K Representation of Peoples Act provides specifically for *disqualification* for, inter alia, being a member of the legislative assembly or the legislative council of the state, if a member having been elected as such member gives up his membership of the political party by which he was set up as a candidate in such election *whereas* the word 'disqualification' does not appear in art XXXIA of the Kelantan State Constitution; instead, it provides, inter alia, that a member shall *vacate* his seat in the state legislative assembly if, inter alia, he resigns or is expelled from his political party. In our view, this is a difference without a distinction. The word 'disqualified' is used in s 24–G in a wide colloquial sense, so that a member becomes disqualified if he does some act or suffers some thing to be done which causes him to vacate his seat as a member; this is what art XXXIA in effect provides. There is therefore nothing in the point.

We have also considered the question whether the proceedings in the court below came under art 4(3) of the Federal Constitution so that leave was required. We are satisfied that they do not.

The primary declaration sought for in the present case was that art XXXIA of the Kelantan State Constitution was inconsistent with art 10(1)(c) of the Federal Constitution. If so, it would be void by reason of art 4(1) of the Federal Constitution. No declaration had been sought that art XXXIA was invalid on the ground that it related to a matter with respect to which the Kelantan State Legislature had no power to make law.

In so holding, we have taken into consideration the principles of legislative review enunciated by Tun Suffian LP in *Ah Thian v Government of Malaysia*[11] at p 113.

In all the circumstances, we have arrived at the unanimous conclusion that the direct and inevitable consequence of art XXXIA of the Kelantan State Constitution which is designed to enforce party discipline does impose a restriction on the exercise by members of the legislature of their fundamental right of association guaranteed by art 10(1)(c) of the Federal Constitution, and that such restriction is not only not protected by art 10(1)(c) of the Federal Constitution but clearly does not fall within any of the grounds for disqualification specified under s 6(1) of Pt I to the Eighth Schedule to the Federal Constitution. Accordingly, we agree with the learned judge in the court below though on somewhat different grounds that by virtue of art 4(1) of the Federal Constitution, art XXXIA of the Kelantan Constitution is to that extent void. In the event we would dismiss this appeal with costs.

Gunn Chit Tuan SCJ: I have had the benefit of reading the draft judgment of Abdul Hamid Omar LP, in Civil Appeal No 01–44–91 (hereinafter referred to as the 'the first appeal') and also that of Edgar Joseph Jr SCJ, in Civil Appeal No 01–2–92 (hereinafter referred to as the 'the second appeal').

A As the facts as agreed to by the parties as well as the appellants' grounds of appeal and the contention of counsel on both sides are set out fully in the judgment of Abdul Hamid Omar LP in the first appeal, as well as in that of Edgar Joseph Jr SCJ in the second appeal, I need not repeat them here. I would agree with both my learned brothers that the appeals should be dismissed with costs for the reasons stated in their respective judgments and
B I only have the following additional observations to make.

In certain countries without a written constitution such as England, the right of association, like all other rights of the citizen are derived from the principle that a man may do what he likes and therefore associate with whom he likes provided that no law is thereby broken. Various statutes
C there have, however, restricted this common law freedom; for example, there are statutes prohibiting secret societies or associations the object of which is to advocate or carry on some immoral purpose such as gambling. In Malaysia, freedom of association is guaranteed by sub-cl (1)(c) of art 10 of the Federal Constitution and can only be restricted on any of the grounds specified in sub-cl (2)(c) and (3) of art 10, namely, in the interest
D of the security of the Federation (hereinafter referred to as 'Malaysia') or any part thereof, public order or morality (*Damyanti v Union of India*[12] at p 686). When one reads art XXXIA of the Kelantan Constitution, which is reproduced in the judgment of Abdul Hamid Omar LP, it can be seen that it provides that if any member of the legislative assembly who is a member
E of a political party resigns or is expelled from, or for any reasons whatsoever, ceases to be a member of such political party, he shall cease to be a member of the legislative assembly and his seat shall become vacant. I cannot, by any stretch of imagination, see how such a restriction on the membership of a legislative assembly, which infringes a citizen's right to form associations under art 10(1)(c) of the Federal Constitution, can be
F deemed necessary or expedient in the interest of Malaysia or any part thereof, public order, morality or even labour or education. As that art XXXIA in the Constitution of Kelantan is inconsistent with the Federal Constitution which is the supreme law of Malaysia, it is therefore void under art 4(1) of the Federal Constitution.

G Next it must be observed that art 10(2) of the Federal Constitution provides that only Parliament may by law impose those restrictions referred to in art 10(2), (3) and (4) of the Federal Constitution. Therefore even if any such restriction purported to have been imposed by the Constitution of the State of Kelantan was valid, and it is not, it is clear that the restriction could not be imposed by a law passed by any state legislature. That would
H be another ground why art XXXIA of the Constitution of Kelantan should be invalidated.

As the right to form associations is one of the fundamental rights guaranteed in the Federal Constitution, in this respect it is useful to be reminded of the following passage in the judgment of Raja Azlan Shah FJ (as
I he then was) in *Loh Kooi Choon v The Government of Malaysia*[8] at p 189:

> As fundamental rights are not the same as ordinary rights, they can only be suspended or abridged in the special manner provided for it in the Constitution. In my opinion, the purpose of enacting a written Constitution is partly to entrench the most important constitutional provisions against repeal and amendment in any way other than by a specially prescribed procedure. Their Lordships

of the Privy Council in *Hinds v The Queen* [1976] 2 WLR 366 took the view that constitutions based on the Westminster model, in particular the provisions dealing with fundamental rights, form part of the substantive law of the state and until amended by whatever special procedure is laid down in the Constitution for this purpose, impose a fetter upon the exercise by the legislature of the plenitude of its legislative power.

As regards the test or yard-stick to be applied for determining whether a statute infringes a particular fundamental right, I would agree with Bhagwati J in *Maneka Ghandi v The Union of India*[9] at p 635 that 'the test (to be) applied was as to what is the direct and inevitable consequence or effect of the impugned state action on the fundamental right'. I agree with the Lord President that this is the test to be applied in this case and I also agree with the learned trial judge who applied that test and held that art XXXIA of the Kelantan State Constitution did impose a restriction on the exercise of the respondents' right of association guaranteed by art 10(1)(c) of the Federal Constitution in that the respondents were penalized by a disqualification from continuing as members of the state legislative assembly as they have exercised their fundamental right of association guaranteed by art 10(1)(c) of the Federal Constitution by resigning from one political party to join another. Here one must be reminded that the right to form an association under art 10(1)(c) of the Federal Constitution also includes within its sweep the right to dissociate from an association. I would with respect follow the decision of the Indian Supreme Court in *OK Ghosh v EX Joseph*[3] when it opined that any restriction to dissociate from an association would make the guaranteed right of association 'ineffective and illusory'. I would also agree with the opinion expressed by Dr Anand J in *Mian Bashir Ahmad v The State*[1] at p 55, that whatever fundamental rights are available to a citizen cannot be denied to him on his election as a legislator as those rights inhere in every citizen including a legislator. Thus prima facie art XXXIA of the Kelantan Constitution only provides that if a legislator dissociates from a recognized political party, he shall be disqualified to continue as a member of the legislature. That implies that a penalty is attracted for exercising the right guaranteed under art 10(1)(c) in so far as the legislators are concerned because under that impugned legislation a legislator can only dissociate from a recognized political party on the pain of being disqualified to continue as a member of the state legislature. The direct and inevitable effect or consequence of art XXXIA of the Kelantan State Constitution therefore was to make the exercise of the fundamental right of association of the respondents 'ineffective and illusory'.

I would again agree with Bhagwati J in *Maneka Ghandi v The Union of India*[9] that 'the test which must be applied is whether the right claimed is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right'. Applying that test, I am of the view that the right claimed by the respondents in this case, ie the right to leave one political party and to join another is an integral part of the fundamental right of association or at least partakes of the same basic nature and

character as the freedom of association so that the exercise of that right to leave one political party and join another is in reality and substance nothing but an instance of the exercise of the fundamental right of association guaranteed under art 10(1)(c) of the Federal Constitution. The object of art XXXIA of the Kelantan State Constitution may ostensibly be to curb defection from one political party to another, but its direct and inevitable consequence is the abridgement of the respondents' right of association guaranteed by the Federal Constitution. For that reason, that impugned legislation should be struck down.

I would also deal briefly with the remaining points raised in the first appeal. It has to be noted that the Lord President in his judgment has already pointed out that no one has a fundamental right to be elected a member of any legislature as the rights guaranteed by art 10 of the Federal Constitution refer to natural and common law rights as distinguished from rights which are created by a statute. Therefore I would agree with Dato' Zaki, counsel for the respondents, that some of the cases referred to by counsel for the appellants are not relevant to the first appeal. Although I am aware that the purpose of counsel for the appellants referring to those cases is to show that there is a need first to establish what is the real complaint of the respondents in order to determine what is the right which they claim to have been violated, it need only be pointed out that *Jumuna Prasad & Ors v Lachi Ram & Ors*[13] and *Sakhawat Ali v State of Orissa,*[14] which were among the cases cited, merely showed that a person in India has no fundamental right to stand as a candidate for the legislature and are therefore not directly relevant to the issues in the first appeal.

Another point raised by counsel was with reference to the validity of the restrictions imposed on civil servants by Chapter 'D' of the General Orders. That point is of no relevance to these appeals and was not raised in the court below. Counsel also referred to certain parts of UMNO's Constitution and contended that if the judgment of the learned trial judge was accepted, then the regulations in UMNO's Constitution might be void as being violative of certain constitutional rights guaranteed by the Constitution. That again was a matter which was not raised in the court below and was irrelevant in these appeals.

As regards the second appeal, it was the contention of counsel for the appellants that the learned judge should not have made the declaratory order because the Election Commission and the incumbents of the state seats, namely, Haji Mahmud and Haji Samat, were directly affected but were not before the court and he relied on the case of *London Passenger Transport Board v Moscrop*[15] for his contention. I too consider that the answer to that contention can be found in the following passage in the judgment of Viscount Radcliffe in *Ikebife Ibeneweka & Ors v Peter Egbuna & Anor*[16] at p 226:

> However that may be, there has never been any unqualified rule of practice that forbids the making of a declaration even when some of the persons interested in the subject of the declaration are not before the court, see *London Passenger Transport Board v Moscrop* [1942] AC 35 ('except in very special circumstances'), *New York Life Assurance v Public Trustee* [1924] 2 Ch 101. Where, as here,

defendants have decided to make themselves the champions of the rights of those not represented and have fought the case on that basis, and where, as here, the trial judge takes the view that the interested parties not represented are in reality fighting the suit, so to say, from behind the hedge, there is, in their Lordships' opinion, no principle of law which disentitles the same judge from disposing of the case by making a declaration of title in the plaintiffs' favour.

In any case, I consider that it has been correctly pointed out by Dato' Zaki, counsel for the respondents, that the persons who could have been affected by the declaratory order chose not to make an application to court to be joined as interested parties and the appellants in these appeals were in reality fighting the suit on behalf of the two present Assemblymen.

Reference was also made by counsel for the appellants to art 118 of the Federal Constitution and s 32 of the Election Offences Act 1954, which are reproduced in the judgment of Edgar Joseph Jr SCJ, and contended that the learned judge had no jurisdiction to make the declaratory order and that his Lordship had erred in having arrogated to himself the powers of an election judge. Here again, I would agree with the contention of counsel for the respondents that art 118 is not relevant to the issues in the appeals before the trial court as the respondents were not there challenging the validity of the by-elections. In any case, the reinstatement of the respondents is not dependent on the by-elections being declared void on grounds mentioned in s 32 of the Election Offences Act 1954.

Finally I would note that Dato' Zaki, counsel for the respondents, has referred us to Chapter 1 of Oliver Field's book called *Effect of an Unconstitutional Statute*. He referred us to the passage therein on the 'void ab initio theory'. I notice that the authorities referred to therein are all cases decided in the United States of America whose Constitution is different from ours. I would suggest that in this case we need not go further than art 4 of the Federal Constitution which, as the supreme law, has declared that any law passed after Merdeka Day which is inconsistent with the Federal Constitution shall, to the extent of the inconsistency, be void. As the impugned art XXXIA of the Kelantan State Constitution is inconsistent with the Federal Constitution, the learned judge was therefore correct to have declared it void.

I have already indicated above that both the appeals be dismissed with costs and would add that there should be a further order that the deposit be paid to the respondents on account of taxed costs.

Edgar Joseph Jr SCJ (delivering the judgment of the court in Civil Appeal No 01–2–92): I have had the advantage of reading the draft judgment of Abdul Hamid Omar LP in the principal appeal, being Appeal No 41/91, with which the present appeal is closely connected, and am in complete agreement with it and have nothing to add.

I must now address the issues which arise for decision in the present appeal.

Encik Zainur Zakaria, counsel for the appellants ('the first and second defendants'), in outlining the agreed facts upon which he relied, pointed out that consequent to the State Legislative Assembly of Kelantan ('the first

defendant') having passed the resolution pursuant to the impugned legislation referred to in the judgment of the Lord President, the first and second respondents ('the first and second plaintiffs') had ceased to be members of the State Legislative Assembly of Kelantan, and had had their seats for the constituencies concerned declared vacant, and a by-election had been conducted by the Election Commission, wherein the first and second plaintiffs had stood for election as candidates, but were defeated whilst the victorious candidates were Haji Samat bin Mamat and Haji Mahmud bin Haji Yaacob.

Yet, said counsel, neither Haji Samat nor Haji Mahmud or even the Election Commission, had been made parties to the proceedings in the court below, thereby denying them the opportunity of being heard, so that there had been a breach of the rules of natural justice.

It was further argued by counsel that neither Haji Samat nor Haji Mahmud could be removed from the State Legislative Assembly of Kelantan, save and except by virtue of a declaration made by an election judge declaring their election void, made pursuant to an election petition, regard being had to the provisions of art 118 of the Federal Constitution and s 32 of the Election Offences Act 1954 (Act 5) which read as follows:

> Article 118 of the Federal Constitution
>
> No election to the House of Representatives or to the Legislative Assembly of a State shall be called in question except by an election petition presented to the High Court having jurisdiction where the election was held.
>
> Section 32 of the Election Offences Act 1954 (Act 5)
>
> The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the Election Judge:
>
> (a) that general bribery, general treating or general intimidation or other misconduct or other circumstances whether similar to those before enumerated or not have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;
> (b) non-compliance with the provisions of any written law relating to any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that non-compliance affected the result of the election;
> (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;
> (d) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been convicted or found guilty of a corrupt practice by a Sessions Court, or by the report of an Election Judge; or
> (e) that the candidate was at the time of his election a person disqualified for election.

It followed, said counsel, that in holding as he did in fact hold

(1) that the removal of the first and second plaintiffs from the membership of the State Legislative Assembly of Kelantan and the declaration by

the Assembly that their seats had fallen vacant as on 3 July 1991, were void and of no effect; A

(2) that consequently, the two notices issued by the Speaker of the Legislative Assembly of Kelantan, who is the second defendant, to the Election Commission, were also void and of no effect; and

(3) that since the Election Commission had acted on the invalid and void notices, the by-election conducted by the Election Commission on 26 August 1991, and the consequent election of Haji Samat and Haji Mahmud for the constituencies concerned were also void; B

and accordingly, in granting the declaration prayed for by the plaintiffs, that they are and continue to be lawful members of the State Legislative Assembly of Kelantan, for the constituencies concerned, the learned judge had acted without jurisdiction. C

In support, Encik Zainur cited *Kunstler v Kunstler*,[17] *Majumder v Attorney General of Sarawak*[18] and *Chop Chuah Seong Joo v Teh Chooi Nai & Ors.*[19]

It would be more convenient if I dealt with the second of counsel's contentions first. D

I accept, as indeed I am bound to, that the grant of declaratory relief is discretionary. However, whilst it is easy to cite a plethora of cases for the proposition that courts should grant declarations sparingly, in my view this would be misleading. Nowadays, the courts recognize the advantages of the declaration, and therefore pay little attention to the early cases. So, for example, in the Privy Council case of *Ibeneweka v Egbuna*[16] Lord Radcliffe said this at pp 224–225: E

> The general theme of judicial observations has been to the effect that declarations are not lightly to be granted. The power should be exercised 'sparingly', with 'great care and jealousy', with 'extreme caution', with 'the utmost caution'. These are indeed counsels of moderation, even though as Lord Dunedin once observed, such expressions afford little guidance for particular cases. Nevertheless, anxious warnings of this character appear to their Lordships to be not so much enunciations of legal principle as administrative cautions issued by eminent and prudent judges to their, possibly more reckless, successors. After all, it is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realization that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration. F G

It goes without saying that ideas change as to what is 'a proper sense of responsibility'. The minimum requirement must be to achieve justice between litigants and that is: 'a subject on which experience may teach the courts of one generation to take what they may regard as wider or more liberal view than that of their predecessors': see *Brickfield Properties v Newton*[20] at p 335 per Sachs LJ (speaking of the rules of practice and procedure). H

Street J in *Sutherland Shire Council v Leyendekkers*,[21] made specific reference to the above passage in *Ibeneweka*[16] and concluded (at p 258) that the 'anxious warnings' in the older cases (to the effect that declarations should not be granted lightly) 'now find no legitimate place in the exercise of the I

A discretion to grant declaratory relief'. His Honour went on to observe that if the warnings were not intended to bind future judges, then they could be disregarded as unnecessary. But if they were regarded as offering real guidance: 'then they could lead to error. A judicial attitude of pre-conceived reluctance to grant declaratory relief could amount to a vitiating element in the exercise of the discretion.'

B And, in *Acs v Anderson,*[22] at pp 218–219, Mahoney JA said this:

> In the exercise of this discretion there is no simple formula or rule of thumb which will easily produce the proper result; to use a phrase adapted by Lord Radcliffe in another context, judges may not hope to arrive at a just result 'in feather-beds, it is not the way', but only by the anxious weighing of, and
> C judgment upon, the factors involved. Nor, in my opinion, is it possible to lay down in advance that a declaration cannot be appropriate in a particular field or a particular class of case; omniscience is not an attribute which judges have or ought to aspire to, and I am conscious that, where it is said that a particular context or class of case is not the proper subject of a judicial intervention, the events have a habit of requiring the qualification of the generality.

D

I must next refer to the following passage in the judgment of Jenkins LJ in the Court of Appeal in *Vine v National Dock Labour Board*[23] at p 8 paras G–H, approved of by Viscount Kilmuir LC on appeal to the House of Lords[24] at p 944B, and with which I respectfully agree:

E

> As my Lord has said the granting of a declaration is a matter of discretion, and the learned judge, in the exercise of his discretion, thought fit to make a declaration in this case. Further, his decision in the exercise of his discretion should not be disturbed unless this court can be satisfied that he proceeded on some wrong principle.

F Now, turning to the particular circumstances of the present appeal, counsel for the plaintiffs Dato' Zaki Tun Azmi had explained, in answer to the court, that he had not proceeded by way of an election petition under s 32 of the Election Offences Act 1954, because none of the grounds specified thereunder were applicable.

G It is pertinent to note that if the plaintiffs were correct in their contentions in the principal appeal, and we have held that they were, then their removal from the membership of the State Legislative Assembly of Kelantan consequent upon the declaration by the Assembly that their seats had fallen vacant as on 3 July, was void and of no effect. I am supported in this by both principle and authority to which I should now like to refer.

H Now, a law which is invalid for unconstitutionality — and we have held that art XXXIA(1) of Pt I of the Constitution of Kelantan is, to the extent indicated in the judgment of the Lord President in the principal appeal, such a law — is invalid ab initio and makes all decisions thereunder invalid: see *JB Jeyaretnam v PP*[25] at p 135 col 1I; Durga Das Basu *Shorter Constitution of India* (10th Ed, 1989) p 20. Nor can such a law be enforced or confer
I any legal right: see *Marbury v Madison*[26] which has been called 'the rib of the American Constitution' by Glendon A Schubert *Constitutional Politics*; *Tun Datuk Haji Mohamed Adnan Robert v Tun Datuk Haji Mustapha bin Datuk Harun*[27] at p 483 col 1A to E.

It follows that since the plaintiffs had been removed from membership of the State Legislative Assembly of Kelantan pursuant to an invalid and void law, their removal was wrongful and, consequently, the subsequent election of Haji Samat and Haji Mahmud was also wrongful. In such circumstances, the learned judge in the court below was entitled, in the exercise of his discretion, to declare accordingly, and to further declare that the plaintiffs were entitled to reinstatement.

These orders by the learned judge were really of a consequential nature being consequent upon his having decided the issue of the constitutional validity of art XXXIA(1) in favour of the plaintiffs. Not to have granted these consequential orders would have reduced his Lordship's ruling on the constitutional issue to a mere judicial snapshot, a remedy which records but changes nothing, and would plainly have been neither right nor fair. It is noteworthy that the Rules of the High Court 1980 by O 15 r 16 confers power upon that court to make *binding* declarations of right. Having regard to these matters, art 118 of the Federal Constitution and s 32 of the Election Offences Act 1954 pale into insignificance and, with respect, are irrelevant to the issues arising upon this appeal especially so since the plaintiffs were not challenging the validity of the by-election upon any of the grounds stipulated under s 32.

As for the other contention based upon the breach of the rule of natural justice, to wit, that neither Haji Samat nor Haji Mahmud had been made parties to the proceedings in the court below seeking declaratory reliefs, and so had been denied the opportunity of being heard, it is true that the grant of such reliefs would, and as events turned out, did directly affect their position, and therefore they should have been made parties to those proceedings. That, however, is not conclusive of the issue before us. Those proceedings had right from the start received considerable treatment in the local press, and both Haji Samat and Haji Mahmud must have known about them; yet they remained passive and did nothing; they made no attempt to apply to be joined as defendants, which they certainly could have done. A denial of the opportunity of being heard is a wrong which is personal to the party aggrieved. If therefore such a party does not complain, it is not the affair of others to complain.

I find, therefore, that there is substance in the submission of counsel for the plaintiffs that the State Legislative Assembly of Kelantan is, in reality, as he put it, fighting the suit on behalf of Haji Samat and Haji Mahmud.

In this context, I consider the following passage in the judgment of Viscount Radcliffe, speaking for the Privy Council in *Ibeneweka v Egbuna*[16] at p 266 to be apt:

> ... there had never been any unqualified rule of practice that forbade the making of a declaration even when some of the persons interested in the subject of the declaration were not before the court. Where, as here, the appellants had decided to make themselves the champions of the rights of those not represented — the Obosi people — and had fought the case on that basis, and where, as here, the trial judge took the view that the interested parties not represented were in reality fighting the suit, so to say, from behind the hedge, there was no principle of law which disentitled the judge from making a declaration of title in the respondents' favour.

A Having regard to the very exceptional circumstances to which I have directed attention, I consider that the learned judge was not prevented from making the declarations prayed for, in the exercise of his discretion, notwithstanding the fact that two of the persons interested in the subject matter of the declarations were not before the court.

B In any event, in certain circumstances, the courts may invoke the doctrine of substantive fairness, the effect of which is that natural justice may impinge upon the substance of a decision, as the following case will serve to illustrate.

In *Malloch v Aberdeen Corp*[28] at p 1582, Lord Reid said this:

C > It was argued that to have afforded a hearing to the appellant before dismissing him would have been a useless formality because whatever he might have said could have made no difference. If that could be clearly demonstrated it might be a good answer.

The observations of Lord Wilberforce (at pp 1594–1595) and Lord Simon (at p 1600) to the like effect are also noteworthy.

D In *Merdeka University Bhd v Government of Malaysia,*[29] Abdoolcader J (as he then was) had occasion to refer to the observation of Lord Reid in *Malloch,*[28] quoted above, and said this: 'This seems to imply that the discretion to refuse a remedy may be exercised when the court judges that natural justice would make no difference or that there was no prejudice'.

E The problem of an 'inevitable result' had arisen again in the House of Lords' case of *Cheall v APEX*[30] where the House upheld a submission that it would have been 'a cruel deception' to observe natural justice where nothing could be said that would affect the outcome.

In the particular circumstances of the present appeal, not forgetting that the basic question which arises for decision is the constitutional validity of
F art XXXIA(1) — a question of construction and therefore a pure question of law — and the fact that neither Haji Samat nor Haji Mahmud, who it was said had been denied the opportunity of being heard, had made any attempt to be joined as co-defendants, I consider that there are ample grounds to invoke the doctrine of substantive fairness. Having therefore considered the merits of the case I am of the view that it has been clearly demonstrated that
G even if Haji Samat and Haji Mahmud had been made parties to the proceedings in the court below, the result of the litigation would have been the same so that it could not be said that there was a real likelihood of their having suffered any prejudice. It follows that their non-joinder is a matter which should be condoned in the exercise of the court's discretion.

H As for the non-joinder of the Election Commission, in the proceedings in the court below, I do not consider that this in any way prevented the learned trial judge from granting the declaration prayed for in the exercise of his discretion. The Election Commission was merely charged with the responsibility of conducting the election and it would, of course, be indifferent to the result of the election; its rights being in no way at stake.

I In any event, even had it been made a party to the proceedings in the court below, I am completely convinced that it would have made no difference to the result of the litigation, so that it could not be said that there was a real likelihood of it having suffered any prejudice.

Looking back, a final point by way of a general observation needs to be made. The Lord President has succinctly pointed out that in construing constitutional documents it is axiomatic that the highest of motives and the best of intentions are not enough to displace constitutional obstacles. I would add that whenever legally permissible the presumption must be to incline the scales of justice on the side of the fundamental rights guaranteed by our Constitution, enjoying as they do, precedence and primacy.

In all the circumstances, I would dismiss this appeal and with costs. Deposit to the plaintiffs to account of their taxed costs.

I have been asked by the Lord President to say that he and the other members of the court concur in this judgment.

Appeals dismissed.

Reported by Prof Ahmad Ibrahim