MUHAMMAD HILMAN (2011) CASE AND
SECTION 15 OF UNIVERSITY AND UNIVERSITY
COLLEGE ACT 1971 (UUCA).
RATIONALE AND REPERCUSSIONS

By
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Abstract

The struggle of students in higher educational institutions being participative and involved in politics in Malaysia has been a matter of debate. The laws as enacted allowed for students to be taken to task if they should show support for political parties. The judgment of the Court of Appeal in the Muhammad Hilman case in 2011 declared as unconstitutional certain provision in the University and University Colleges Act 1971 (Act). This judgement has been read as a victory for student rights by certain quarters. The government while having filed an appeal have also taken the step to amend the Act to allow for certain concessions. This article proposes to study the rationale of the Muhammad Hilman decision and the resulting amendment undertaken by the government which came into effect August 2012. The corresponding sections of like legislation is also considered.

The year 2011 had a very important implication on the fate of university students taken to task for involvement in expressing support or sympathy for political parties. In a landmark decision the Court of Appeal in the case of Muhammad Hilman and Ors v Kerajaan Malaysia & Ors [2011] MLJU 768 construed the then section 15 University and University Colleges Act 1971 (UUCA) which prohibits student expressing of political support or opposition and declared the same as unconstitutional and void being contrary to Art 10 (1) of the Federal Constitution. The government has filed an appeal and also has since amended the law relating to Section 15 UUCA and other like legislation namely the Private Higher Educational Institutions Act and the Education Institutions (Discipline) Act. The changes came into force on the 1st August 2012 and will be discussed later.

Four Universiti Kebangsaan Malaysia (UKM) students, Muhammad Hilman Idham, Woon King Chai, Muhammad Ismail Aminuddin and Azlin Shafina Mohamad Adza, were present in the constituency of Hulu Selangor during the campaign period of the parliamentary by election on 24th April 2010. They were having in their possession paraphernalia supportive of, sympathetic with or opposed to a contesting political party in the by election. On or about 13 May 2010, the plaintiffs received notice from the Vice Chancellor of UKM, the 3rd Defendant requiring them to appear before a disciplinary tribunal on 3 June 2010 to answer charges of alleged breaches of s 15 (5) (a) punishable under the 3rd Defendant disciplinary regulations. The appellant applied to the High Court
arguing that the S 15 (5) (a) which restricted their right to freedom of speech and expression violated their fundamental rights under Art 10 (1) (a). The High Court dismissed their application and they then appealed to the Court of Appeal who found in their favour. The rationale is to be discussed below.

Prior to the Court of Appeal decision in **Muhammad Hilman and Ors v Kerajaan Malaysia & Ors [2011] MLJU 768**, students for the offence of showing political support or sympathy have been expelled from Universities. They have as result suffered the disastrous consequences of being deprived of a higher education. In the case of Rafzan Ramli et al to quote according to Sonia Randhawa of the Centre of Independent Journalism concerned the ugly impact of UUCA on the lives of seven students who were arrested for taking part in anti-ISA demonstrations in 2001. They lives were put on hold for six years until in 2007 when they were expelled from the universities. One graduated having completed his studies at the time of offence.

1. It is not known if the appeal has been since withdrawn.

Out of the remaining six, only one of the six has a post-SPM qualification. For the rest, they’ll have to make do with SPM-level jobs, despite having the aptitude to contribute more to both society and the economy.

This paper aims to set out the impugned provision under University and University Colleges Act 1971 (UUCA). It then will discuss the decision and rationale given in the Muhammad Hilman case that has declared the then S15 of UUCA as unconstitutional. Finally it will discuss the amended changes made as a result of the case and consider the implications on student. The previous section S15(5)(a) merits reproduction as follows:

**15. Student or students' organization, body or group associating with societies, etc.**

(5) No student of the University and no organization, body or group of students of the University which is established by, under or in accordance with the Constitution, shall express or do anything which may reasonably be construed as expressing support for or sympathy with or opposition to:

(a) any political party, whether in or outside Malaysia.

The question before the court was whether

(a) On reading of Art 10(1) whether the court can question the restrictions imposed by Parliament from the point of reasonableness.
(b) On reading of Art 10 (2) (a) whether the restrictions imposed would be justified under any of the grounds listed.
The judges were all unanimous of their finding on question (a) but differed on (b). The relevant Article 10 of the Federal Constitution is produced below.

10. Freedom of speech, assembly and association.

(1) Subject to Clauses (2), -

(a) Every citizen has the right to freedom of speech and expression.

(2) Parliament may by law impose –

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

On the first question of whether the restriction sought to be imposed on the right to freedom of expression need to be reasonable the Court of Appeal was faced with two conflicting superior court precedents. The earlier decision of \textit{PP v Pung Chen Choon [1994]} and the later decision is \textit{Sivarasa Raisiah v Badan Peguam Malaysia & Anor [2010]}. The latter imposed the requirement that the restriction imposed should be reasonable.

Gopal Sri Ram FCJ in delivering the unanimous decision of the Federal Court in the \textit{Sivarasa Raisiah v Badan Peguam Malaysia & Anor [2010]} with reference to Art 10 said

\textit{Now although the article says “restrictions”, the word “reasonable “should be read into the provision to qualify the width of the proviso...The correct position is that when reliance is placed by the state to justify a statute under one or more of the provisions of Art 10 (2), the question for determination is whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purpose specified in that article.}

This decision has come under criticism by JC Fong (2012), who evidently do not agree with the view that judges act as custodians of fundamental rights and subscribes to the view that Parliament is supreme. The approach taken in \textit{PP v Pung Chen Choon [1994]} is preferred by the author and the judgment of Gopal Sri Ram FCJ is faulted in that it is said to found its basis on minority opinions of decided cases. However as it stands the judgement in \textit{Sivarasa Raisiah v Badan Peguam Malaysia & Anor [2010]} is good law unless and until overruled by the Federal Court.
On the authority of the principle laid down in *Dalip Bhagwan Singh v PP [1997]*, where two conflicting decisions of the Federal court conflict on a point of law the latter decision prevails over the earlier decision. The High Court judgment was in error in relying on the earlier judgment to hold the question of reasonableness of the restriction does not apply.

In the analysis of whether the restrictions were reasonable, the dissenting judge Low Hop Bing JCA found that the restriction were reasonable saying that

*It is necessary and seeks to prevent infiltration of political ideologies, including extremities amongst students. This infiltration may adversely affect the primary purpose of the universities i.e. the pursuit of education. This is particularly significant as university students could well be vulnerable youth capable of being subject to peer pressure and be easily influenced. ...It is not for the courts to say that the law is harsh and unjust...*

With reference of judicial intervention, his Lordship quoted the Federal Court decision in *Loh Kooi Choon v Government of Malaysia [1977]*

*...Our courts ought not enter this political thicket, even in such a worthwhile cause as the fundamental rights ...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...Those who find fault with the wisdom or expediency of the impugned Act and with vexatious interference of fundamental rights normally must address themselves to the legislature and not the courts, they have their remedy at the ballot box.*

It is interesting to note that the member of the entire forum of the Court of Appeal agreed that the restriction to be reasonable. The minority judgment of Low Hop Bing JCA decided that the restriction was reasonable. The majority judgment disagreed with the minority judge that the restriction was reasonable and further also raised doubts as to whether the restrictions were within the permitted grounds under S 10(2) (a).

On the question of restriction on fundamental rights Linton Albert JCA part of the majority judgment observed that

*in considering the constitutionality of the legislative enactments restricting a fundamental right those legislative enactments must measure up to the test of reasonableness which includes the notion of proportionality*

On the question of supremacy of Parliament, Linton Albert JCA quoted *Suffian LP in Ah Thian v Government of Malaysia [1976] 2 MLJ 112*
The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of the Parliament and of State Legislature in Malaysia is limited by the Constitution and they cannot make any law they please.

The basis or jurisdiction to declare any law as in violation of the Federal Constitution as unconstitutional and void is found in Art 4 of the Federal Constitution which reads,

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.

The view that Parliament cannot enact laws that violate basic structure like the fundamental rights is seen in his judgment

Unless sanctioned by the Constitution itself any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure may struck down as unconstitutional. ...Suffice to say that the rights guaranteed by Part 11 which are enforceable by the courts from part of the basic structure of the Federal Constitution.

On the question of how to assess the reasonableness of restrictions,

I do not think it is either necessary or useful to lay down inflexible propositions to assess the reasonableness of legislative enactments which purport to violate rights guaranteed by the Federal Constitution because each must be determined on its own peculiar facts and circumstances.

On the question of the reasonableness of the restrictions on the present facts, Linton Albert JCA found the restriction undoubtedly unreasonable.

What better illustration can there be of the utter absurdity of the section 15 (5) (a) than the facts of this case where the students of universities and university colleges face disciplinary action with the grim prospect of expulsion simply because of their presence at a parliamentary by election. A legislative enactment that prohibits such participation in a vital aspect of democracy cannot by any standard be said to be reasonable.

The judgment of Mohd Hishamuddin Yunus JCA runs in a like vein and exceeds on the point that the restrictions imposed under S 15 of the UCCA do not fall within the ground of public morality or public order to circumvent the fundamental right guaranteed under S 10 (1). This can be viewed as an added ground to render the offending S 15 unconstitutional and void.

Now reverting to the facts of the present case and the issue before this Court, in my judgment, I fail to see in what manner that section 15(5) (a) of the UUCA relates to public order or public morality. I also do not find the restriction to be reasonable. I am at a loss to understand in what
manner a student who expresses support for or opposition against a political party could harm or bring about an adverse effect on public order or public morality? Are not political parties’ legal entities carrying out legitimate political activities? Are not political leaders, including Ministers and members of federal and state legislature members of political parties? I read intensely the affidavits of the respondents ....searching for a clear explanation on the nexus between the exercise of the right of a university student to express support for (or opposition against) a political party and public order or public morality but with respect not surprisingly, I find none. The impugned provision is irrational. Most university students are of the age of majority. They can enter into contracts. They can sue and be sued. They can marry. Become parents and undertake parental responsibilities. They can vote in the general elections if they are 21 years old. They can become directors of company. They can be office bearers of societies. Yet- and herein lies the irony – they are told that legally they cannot say anything that can be construed as supporting or opposing a political party. In my mind such a provision such as section 15(5) (a) of the UCCA impedes the healthy development of the critical mind and original thoughts of students- objectives that seats of higher learning should strive to achieve. Universities should be the breeding ground of reformers and thinkers and not institutions to produce students trained as robots. Clearly the provisions is not only counterproductive but repressive in nature.

Upon perusing and also incorporating the speech of the Minister as reported in Hansard (as part of his judgment) to explain the rationale for the provision Mohd Hishamuddin Yunus JCA also failed to find the same and in fact found contrary evidence.

To the contrary the Minister spoke of preservation of fundamental rights of the students as provided by the Federal Constitution and in accordance with international best practices...With respect I find what the Minister said in Parliament about preserving the freedom of speech of students and what section 15(5) (a) provides to be irreconcilable or contradictory.

As a result of the decision of the Court of Appeal the government has amended the Acts in relation to S 15 of the UCCA and also of the identical provision in the like legislations under Private Higher Educational Institutions Act 1996 and Educational Institutions (Discipline) Act 1976 that relate to private and other institution of higher learning on an identical platform. The provisions have come into force as at 1st August 2012.

The impact of the change to section 15 of the UCCA and like provisions in other legislation is to introduce changes seen under (c) and (d) while maintaining the existing restrictions under (a) and (b) below.

1. To allow student to become members of any society, organization, body or groups of persons or political party whether within or outside Malaysia. The limitation imposed is that the student shall not
(a) Be a member of unlawful society, organization, body or group of persons within or outside Malaysia or

(b) Be a member of a society, group of persons, organization or body, not being a political party which the Board determines to be unsuitable to the interest and wellbeing of students. There are slight differences in the official who determines the list and the manner of determination in the other legislation. It is to be noted that in Private Higher Education Act the Registrar General specifies in writing to the Chief Executive of the Private Higher Education Institution. Under the Educational Discipline Educational Institution Act the list is determined by the Minister in consultation with the Executive Head.

(c) stand in election or hold any post in any society, organization, body or group of persons in campus if he hold a post in political party or

(d) Be involved in political activities within campus

2. The student or any society, organization, body or group of students shall not express or do anything which may reasonably construed as expressing support or showing sympathy or opposition to the category mentioned under (a) and (b) above.

3. The student will not be in violation of expressing support or opposition if the

(a) It is related to a statement on a academic matter which relates to a subject on which he is engaged in study or research or

(b) Expressing himself on the subject referred in para (a) at a seminar, symposium or similar occasion that is not organized or sponsored by any of the group under (a) or (b) above.

4. The savings section provides that all disciplinary action pending under the Act when the amendment becomes operative is to be discontinued.

It is evident that the change to allow student to be members of political parties and show support for and opposition against political parties outside campus is a positive step. Constraints on being members and expressing support or opposition to unlawful (and now nonpolitical) entities identified as undesirable groups remain. However students need to be on guard against being involved in any political activities within campus or hold office or stand for election while holding a post in a political party. It is envisaged that one cannot campaign or express support or opposition to political parties within campus. The finer perimeters being involved in political activities and the scope of the same is an area subject to future definition.
It is envisaged that the conduct of students who in campus sold party badges (Sonia Randhawa article), publishing newsletters and political debates within campus is liable to be in breach of the Act.

There is also a nagging question as to whether the suggested amendments addresses the question of whether there has been evidenced a public policy or morality justification to impose the restriction. The notes to the bill however state that the restriction to prohibit involvement of political party activities within campus as needed to maintain neutrality.

It is a step forward perhaps reflecting the cautionary stand of the government and the loosening but not an unbridled release with respect to students’ right when it comes to political involvement.

Bibliography

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Legislation referred to.

Federal Constitution Art 4 (1), S 10(1) (a), (c) (2) (a) (c)
University and University Colleges Act 1971 S 15 (5) (a) (not amended version)
Law of Malaysia Act A1433: University and University Colleges Act (Amendment) Act 2012
Law of Malaysia Act A1435: Educational Institutions (Discipline) Act (Amendment) Act 2012