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Kerajaan Malaysia v Mat Shuhaimi bin Shafiei

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-6–03 OF 2017(W)
AHMAD MAAROP CJ (MALAYA), RAMLY ALI, BALIA YUSOF, AZIAH ALI AND PRASAD ABRAHAM FCJJ
8 JANUARY 2018

C

Civil Procedure — Res judicata — Principles — Whether same issues challenged in earlier proceedings

D *Constitutional Law — Legislature — Constitutionality of statute — Sedition Act 1948 ('Act 15') — Application for declaration s 3 of Act 15 violated art 10 of the Federal Constitution — Whether s 3(3) of Act 15 breached guarantee of equality under Federal Constitution — Whether s 3(3) of Act 15 contravened art 10 of the Federal Constitution — Whether challenge to constitutionality of s 3 of*
E *Act 15 made in civil proceedings which was determined by Court of Appeal in criminal appeal involving same applicant amounted to abuse of process of court — Whether challenge to constitutionality of s 3 of Act 15 made in civil proceedings res judicata — Whether s 3(3) of Act 15 contravened art 10 of the Federal Constitution — Whether valid and had effect in law*

F

The respondent was charged at the sessions court under s 4(1)(c) of the Sedition Act 1948 ('Act 15') for publishing an article online entitled 'Pandangan saya berasaskan Undang-Undang Tubuh Kerajaan Negeri Selangor, 1959'. The respondent claimed trial to the charge. However, before
G the commencement of the trial, the respondent had, by a notice of motion filed in the High Court, sought certain orders, inter alia, for the charge against him to be struck off on the grounds that s 4 of Act 15 was inconsistent with art 10 of the Federal Constitution ('the FC'). The motion was dismissed by the High Court and the respondent's appeal to the Court of Appeal was also dismissed.
H The respondent's application for leave to appeal to the Federal Court was subsequently withdrawn in the light of the decision in *Siow Chung Peng v Public Prosecutor* which held that the Federal Court had no jurisdiction to entertain any further appeal that arose in relation to a criminal case filed in the sessions court. At the High Court, via an originating summons ('OS'), the
I respondent sought for the declaration that s 3 of Act 15 read together with s 4 of Act 15, was in violation of or inconsistent with a citizen's right to freedom of speech and expression as enshrined in art 10(1)(a) of the FC ('encl 1'). The

High Court dismissed the respondent's OS on the ground that the application was an abuse of the process. However, upon appeal at the Court of Appeal, the High Court's decision was reversed. The Court of Appeal declared that s 3(3) of Act 15 contravenes art 10 of the FC and was therefore invalid and had no effect in law. Hence the present appeal. The issues that arose were: (a) whether a challenge to the constitutionality of s 3 of Act 15 made in civil proceedings when the same had been determined by the Court of Appeal in a criminal appeal involving the same applicant amounts to an abuse of the process of the court; (b) whether a challenge to the constitutionality of s 3 of Act 15 made in civil proceedings was res judicata in view of a prior similar challenge in criminal proceedings by the same applicant; and (c) whether s 3(3) of Act 15 contravened art 10 of the FC and was therefore invalid and of no effect in law.

Held, allowing the appeal:

(1) The Court of Appeal erred in not holding that encl 1 was an abuse of the process. The crucial issue as to whether encl 1 was an abuse of the process was not considered at all by the Court of Appeal in its judgment. This must be done by the Court of Appeal before embarking on the consideration of the merits of the motion. If, upon due consideration, encl 1 was found to be an abuse of the process, then encl 1 could not stand, and the appeal must be dismissed without the need of going to the merits of the substantive motion. The Court of Appeal had considered the issue of res judicata, but not the applicability or otherwise of the doctrine of the abuse of the process. On the law, res judicata, in the form of cause of action estoppel or issue estoppel was separate and distinct from the doctrine of abuse of the process although both rest on the same underlying public interests — namely, that there should be finality in litigation and that a party should not be vexed twice in the same matter (see para 41).

(2) The constitutionality of s 3(3) of Act 15 was clearly part of the subject of the litigation in the notice of motion in the criminal proceeding and so clearly could have been raised. The respondent should have challenged the constitutionality of s 3(3) in the notice of motion in the criminal proceeding. There was nothing in the affidavit filed in support of encl 1 in the notice of motion to explain why this issue was not raised in the criminal proceeding. There was also nothing akin to fresh evidence which might warrant the raising of this issue only in encl 1. Enclosure 1 was an abuse of the process. On this ground alone encl 1 should be dismissed. The Court of Appeal erred in allowing the respondent's appeal and in considering the merits of the application in encl 1 (see para 69).

(3) The doctrine of res judicata does apply to a challenge upon the constitutionality of a statute. The basis on which the doctrine of res

judicata rested was founded on the consideration of public policy that it was in the public interest that there should be finality in litigation and decisions made by courts of competent jurisdiction, and that no one should be vexed twice for the same kind of litigation. Therefore, there was no reason why the doctrine of constructive res judicata should not apply to a challenge on the constitutionality of a statute (see para 72).

(4) Enclosure 1 should be dismissed without the need to consider the merits of the application. In the circumstances, it was unnecessary to answer the first and the second questions. In view of the finding that encl 1 was an abuse of the process, there was also no necessity for the court to consider the third question. The decision of the Court of Appeal in respect of encl 1 was set aside. The decision of the High Court in respect of encl 1 was reinstated. The court ordered that the trial of the respondent in respect of the charge under s 4(1)(c) of Act 15 in sessions court to proceed (see paras 79 & 82).

[Bahasa Malaysia summary

Perayu, ADUN kerusi Negeri bagi kawasan Sri Muda pada ketika itu, dipertuduh di mahkamah sesyen di bawah s 4(1)(c) Akta Hasutan 1948 ('Akta 15') kerana menerbitkan sebuah artikel dalam talian dengan tajuk 'Pandangan saya berasaskan Undang-Undang Tubuh Kerajaan Negeri Selangor, 1959'. Perayu mohon dibicarakan bagi pertuduhan tersebut. Walau bagaimanapun, sebelum perbicaraan bermula, perayu, melalui notis usul yang difailkan di Mahkamah Tinggi memohon perintah tertentu, antara lain, bagi pertuduhan terhadapnya dibatalkan atas alasan bahawa s 4 Akta 15 tidak konsisten dengan perkara 10 Perlembagaan Persekutuan ('PP'). Usul tersebut ditolak oleh Mahkamah Tinggi dan rayuan perayu di Mahkamah Rayuan turut ditolak. Permohonan perayu untuk kebenaran merayu ke Mahkamah Persekutuan kemudiannya ditarik balik berdasarkan keputusan dalam kes *Siow Chung Peng v Public Prosecutor* yang memutuskan bahawa Mahkamah Persekutuan tiada bidang kuasa mempertimbangkan apa-apa rayuan lanjut yang timbul berkaitan kes jenayah yang difailkan di mahkamah sesyen. Di Mahkamah Tinggi, melalui saman pemula ('SP'), responden memohon pengisytiharan bahawa s 3 Akta 15 dibaca bersekali dengan s 4 Akta 15, melanggar perkara 10(1)(a) PP ('lampiran 1'). Mahkamah Tinggi menolak SP responden atas alasan permohonan tersebut adalah salah guna proses. Walau bagaimanapun, pada peringkat rayuan di Mahkamah Rayuan, keputusan Mahkamah Tinggi diakas. Mahkamah Rayuan memutuskan s 3(3) Akta 15 bercanggah dengan perkara 10 PP dan dengan itu tidak sah dan tiada kesan undang-undang. Oleh itu rayuan ini. Isu-isu yang berbangkit adalah: (a) sama ada cabaran terhadap keperlembagaan s 3 Akta 15 yang dibuat dalam prosiding sivil sedangkan isu sama telah diputuskan oleh Mahkamah Rayuan

dalam rayuan jenayah melibatkan pemohon yang sama, terjumlah sebagai salah guna proses mahkamah; (b) sama ada cabaran terhadap keperlembagaan s 3 Akta 15 yang dibuat dalam prosiding sivil adalah res judicata memadangkan cabaran yang sama dibuat terlebih dahulu dalam prosiding jenayah oleh pemohon yang sama; dan (c) sama ada s 3(3) Akta 15 bercanggah dengan perkara 10 PP dan dengan itu, tidak sah dan tiada kesan undang-undang.

Diputuskan, membenarkan rayuan:

(1) Mahkamah Rayuan terkhilaf apabila tidak memutuskan lampiran 1 adalah salah guna proses mahkamah. Isu penting sama ada lampiran 1 adalah salah guna proses tidak dipertimbangkan langsung oleh Mahkamah Rayuan dalam penghakimannya. Ini mesti dilakukan oleh Mahkamah Rayuan sebelum memulakan pertimbangan merit usul. Jika selepas pertimbangan wajar, lampiran 1 didapati satu salah guna proses, maka lampiran 1 tidak boleh dikekalkan dan rayuan mesti ditolak tanpa perlu melihat merit-merit dalam usul substantif. Mahkamah Rayuan telah mempertimbangkan isu res judicata tetapi bukan pemakaiannya atau sebaliknya doktrin salah guna proses. Berdasarkan undang-undang, res judicata, dalam bentuk kausa tindakan estoppel atau isu estopel adalah berasingan dan berbeza daripada doktrin salah guna proses walaupun kedua-duanya bersandar pada kepentingan awam — khususnya bahawa terdapat kemuktamadan dalam litigasi dan bahawa satu-satu pihak tidak boleh disusahkan dua kali dalam perkara yang sama (lihat perenggan 41).

(2) Keperlembagaan s 3(3) Akta 15 jelas membentuk sebahagian perkara litigasi dalam notis usul dalam prosiding jenayah dan jelas patut dibangkitkan. Responden sepatutnya mencabar keperlembagaan s 3(3) notis usul dalam prosiding jenayah. Tiada apa-apa dalam afidavit yang difailkan yang menyokong lampiran 1 dalam notis usul untuk menjelaskan kenapa isu ini tidak dibangkitkan dalam prosiding jenayah. Tiada apa-apa juga yang serupa dengan keterangan baharu yang mungkin mewajarkan bangkitan isu ini hanya dalam lampiran 1. Lampiran 1 adalah salah guna proses. Berdasarkan alasan ini sahaja, lampiran 1 sepatutnya ditolak. Mahkamah Rayuan terkhilaf dalam membenarkan rayuan responden dan dalam mempertimbangkan merit pemakaian lampiran (lihat perenggan 69).

(3) Doktrin res judicata terpakai pada cabaran terhadap perlembagaan statut. Asas di mana doktrin res judicata bersandar diasaskan pada pertimbangan polisi awam bahawa berasaskan kepentingan awamlah mesti terdapatnya kemuktamadan dalam litigasi dalam keputusan yang dibuat oleh mahkamah dalam bidang kuasa kompeten dan tiada siapa-siapa yang patut disusahkan dengan litigasi yang sama sebanyak

dua kali. Oleh itu, tiada sebab mengapa doktrin konstruktif res judicata tidak terpakai dalam cabaran terhadap keperlembagaan statut (lihat perenggan 72).

(4) Lampiran 1 patut ditolak tanpa perlu mempertimbangkan merit-merit permohonan. Berdasarkan hal-hal keadaan ini, tidak perlu untuk menjawab soalan pertama dan kedua. Berdasarkan dapatan bahawa lampiran 1 adalah salah guna proses, tiada keperluan juga untuk mahkamah menjawab soalan ketiga. Keputusan Mahkamah Rayuan bagi lampiran 1 diketepikan. Keputusan Mahkamah Tinggi berkenaan lampiran 1 dihidupkan semula. Mahkamah mengarahkan perbicaraan responden dalam pertuduhan di bawah s 4(1)(c) Akta 15 di mahkamah sesyen diteruskan (lihat perenggan 79 & 82).]

Notes

For cases on constitutionality of statute, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 3007–3009.

For cases on principles, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8462–8466.

Cases referred to

Arnold and others v National Westminister Bank plc [1991] 2 AC 93, HL (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Bradford & Bingley Building Society v Seddon Hancock and Others (Third Parties) [1999] 1 WLR 1482, CA (refd)

Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2) [1966] 2 All ER 536, HL (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346; [2001] 2 CLJ 321, CA (refd)

Chua Wee Seng v Fazal Mohamed [1971] 1 MLJ 106 (refd)

Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122, CA (refd)

Fan Yew Teng v PP [1975] 2 MLJ 235, FC (refd)

Government of Malaysia v Dato Chong Kok Lim [1973] 2 MLJ 74 (refd)

Greenhalgh v Mallard [1947] 2 All ER 255, CA (refd)

Henderson v Henderson [1843–60] All ER Rep 378; (1843) 3 Hare 100 (refd)

House of Spring Gardens Ltd and others v Waite and others [1990] 2 All ER 990, CA (refd)

Hoystead & Others v Commissioner of Taxation [1926] AC 155, HL (refd)

Hunter v Chief Constable of West Midlands and Another [1981] 3 All ER 727, HL (refd)

Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1, HL (folld)

Lau Dakkee v PP [1976] 2 MLJ 229 (refd)

Madhavan Nair & Anor v PP [1975] 2 MLJ 264 (refd)
Mat Shuhaimi bin Shafiei v PP [2014] 2 MLJ 145, CA (refd)
Nand Kishore v State of Punjab [1995] SCC (6) 614, SC (refd)
PP v Azmi bin Sharom [2015] 6 MLJ 751; [2015] 8 CLJ 921, FC (refd)
PP v Ooi Kee Saik & Ors [1971] 2 MLJ 108 (refd)
PP v Param Cumaraswamy [1986] 1 MLJ 512 (refd)
Reichel v Magrath (1889) 14 App Cas 665, HL (refd)
Siow Chung Peng v PP [2014] 4 MLJ 504, FC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507, FC (refd)
State of Haryana v State of Punjab And Anr (2004) 12 SCC 673, SC (refd)
Stuart v Goldberg Linde (a firm) and others [2008] 1 WLR 823, CA (refd)
Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494, SC (refd)
Tong Lee Hwa & Anor v Lee Yoke San [1979] 1 MLJ 24, FC (refd)
Toronto (City) v CUPE Local 79 2003 SCC 63, SC (refd)
Tractors Malaysia Bhd v Charles Au Yong [1982] 1 MLJ 320, FC (refd)
Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and Another [1975] AC 581, PC (refd)

Legislation referred to

Code of Civil Procedure [IND] O 23 rr 1, 6
Constitution of India [IND] art 262
Courts of Judicature Act 1964 s 87(1)
Federal Constitution arts 4, 4(1), 8, 8(1), 10, 10(1)(a), (2), (2)(a), (4), 162, 162(6), (7)
Inter-State Water Disputes Act 1956 [IND] s 14
Punjab Reorganisation Act 1966 [IND] s 78
Rules of Court 2012 O 14A
Sedition Act 1948 ss 2, 3, 3(1), (1)(a), (1)(d), (2), (2)(a), (2)(b), (2)(c), (3), 4, 4(1), (1)(a), (1)(b), (1)(c), (1)(d), (2)
Supreme Court Rules 1966 [IND] O 32 r 2, O 47 r 6

Appeal from: Civil Appeal No W-01(1A)-115–04 of 2015 (Court of Appeal, Putrajaya)

Noorbahri bin Baharuddin (Awang Armadajaya bin Awang Mahmud, Nadia Hanim bt Mohd Tajuddin, Norinna bt Bahadun, Muhammad Azmi bin Mashud and Shaiful Nizam bin Shahrin with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.
Gopal Sri Ram (Latheefa Koya, Melissa Sasidaran and David Yii with him) (Daim & Gamany) for the respondent.

Ahmad Maarop CJ (Malaya):

[1] This case concerns an appeal from the decision of the Court of Appeal reversing the decision of the High Court, which had, on 23 December 2015 dismissed the respondent's application in Originating Summons No 24–36–09 of 2014 (encl 1). In encl 1, the respondent applied for a declaration that s 3 of the Sedition Act 1948 ('Act 15') read with s 4 the same Act was inconsistent with (*bercanggah dengan*) art 10(1)(a) of the Federal Constitution. In dismissing the respondent's application in encl 1, the High Court held that the respondent's application was an abuse of the process. The Court of Appeal set aside the High Court decision, considered the merits of encl 1, and made the following declaration:

> Section 3(3) of the Sedition Act 1948, contravenes Article 10 of the Federal Constitution and therefore is invalid and of no effect in law.

[2] This court granted leave to the appellant to appeal on the following questions of law:

(1) Sama ada tindakan mencabar keperlembagaan seksyen 3 Akta Hasutan 1948 (Akta 15) yang dibuat dalam prosiding sivil di mana persoalan tersebut telah diputuskan oleh Mahkamah Rayuan dalam Rayuan Jenayah yang melibatkan pemohon yang sama terjumlah kepada penyalahgunaan proses Mahkamah?
(Whether a challenge to the constitutionality of section 3 of the Sedition Act 1948 (Act 15) made in civil proceedings when the same had been determined by the Court of Appeal in a criminal appeal involving the same applicant amounts to an abuse of the process of the court).

(2) Sama ada tindakan mencabar keperlembagaan seksyen 3 Akta Hasutan 1948 (Akta 15) yang dibuat dalam prosiding sivil adalah res judicata memandangkan tindakan mencabar yang sama telah dibuat dalam prosiding jenayah oleh pemohon yang sama?
(Whether a challenge to the constitutionality of section 3 of the Sedition Act 1948 (Act 15) made in civil proceedings is res judicata in view of a prior similar challenge in criminal proceedings by the same applicant).

(3) Sama ada seksyen 3(3) Akta Hasutan 1948 (Akta 15) bercanggah dengan Fasal 10 Perlembagaan Persekutuan dan oleh itu adalah tidak sah dan tidak mempunyai kesan undang-undang?
(Whether section 3(3) of the Sedition Act 1948 (Act 15) contravenes Article 10 of the Federal Constitution and is therefore invalid and of no effect in law).

[3] The background facts leading to the present appeal are these. On 7 February 2011, the respondent was charged in the Sessions Court Shah Alam

with an offence of publishing a seditious publication, an offence under s 4(1)(c) of the Act. The charge reads as follows: A

> Bahawa kamu pada 30 Disember 2010, di Pusat Khidmat Rakyat, 6/2, Jalan Anggerik Vanilla R 31/R, Kota Kemuning, 40460 Shah Alam di dalam negeri Selangor Darul Ehsan, telah menerbitkan satu penerbitan menghasut di laman web srimuda.blogspot yang mempunyai alamat web http://srimuda.blogspot.com satu artikel bertajuk 'Pandangan saya berasaskan Undang-Undang Tubuh Kerajaan Negeri Selangor 1959' seperti Lampiran 'A' yang mengandungi ayat-ayat yang menghasut seperti yang digariskan; dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(c) Akta Hasutan 1948 (Akta 15) yang boleh dihukum di bawah seksyen 4(1) Akta yang sama. B C

[4] The words in *Lampiran A* in the aforesaid charge which were alleged to be seditious, and which were underlined, are as follows:

> Mengapa di peringkat persekutuan SPB Yang di-Pertuan Agong perlu bertindak mengikut nasihat YAB Perdana Menteri dalam perkara yang secara tersurat tidak pula menyebut baginda perlu mendapat nasihat YAB Perdana Menteri tetapi di Negeri Selangor, seolah-olah DYMM Sultan Selangor boleh bertindak tanpa mendapat nasihat YAB Dato' Menteri Besar hanya dengan alasan bahawa peruntukan undang-undang tubuh tidak menyatakan secara jelas baginda perlu merujuk kepada YAB Dato' Menteri Besar? Adakah SPB Yang di-Pertuan Agong sahaja Raja Berperlembagaan di dalam Negara ini? D E
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> Begitu juga dalam pelantikan Setiausaha Kerajaan Negeri yang lain. Mengikut amalan dan konvensyen, ianya akan dirujuk dan dibincangkan antara Ketua Negeri dan Ketua Kerajaan. Tetapi, apabila Negeri Selangor yang diperintah Pakatan Rakyat, amalan dan konvensyen ini tidak dibuat. Saya yakin dan percaya rakyat Selangor mahu YAB Dato' Menteri Besarnya dihormati oleh semua pihak termasuk pihak istana. Rakyat akan menolak sebarang tindakan 'beraja di mata, bersultan di hati' oleh mana-mana pihak yang bertindak sewenang-wenangnya, tidak kira sama ada oleh raja yang berjiwa rakyat atau rakyat yang berjiwa raja. F
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> Janganlah kerana hendak menegakkan benang yang basah, institusi negeri yang dihormati rakyat dijadikan perkakas oleh mana-mana pihak berkepentingan. Saya meneliti juga kenyataan Setiausaha Sulit tersebut yang menyatakan baginda DYMM Sultan Selangor seorang sultan yang tegas dan tidak berganjak dari keputusan yang telah dibuat. Bagaimana sekiranya keputusan yang dibuat atau cara keputusan itu dibuat adalah salah? Adakah baginda masih tidak akan berganjak? Harapan saya supaya ketegasan tidak dikelirukan dengan ego. G H
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> Dalam sejarah telah terbukti, apabila rakyat bangkit menentang Raja, biarpun beribu tahun kebangkitan itu berlangsung akhirnya kebenaran akan menghenyak ketidakadilan. Rakyat akan menang dalam peperangan menentang ketidakadilan! Didoakan agar ia tidak berlaku di Selangor. I

[5] The respondent pleaded not guilty and claimed trial to the charge. Before the commencement of the trial, the respondent filed a criminal application in

the High Court, Shah Alam by way of a notice of motion dated 1 April 2011. In the amended notice of motion pursuant to the order of the High Court dated 21 July 2011, the respondent sought the following prayers:

(1) Bahawa pendakwaan jenayah terhadap Pemohon di Mahkamah Sesyen Shah Alam Kes Tangkap No 61-1-2011 dibatalkan ('strike out') dan/atau diketepikan ('set aside') dan/atau dibatalkan ('quash') dan/atau digantung ('stay');

(2) Satu Perintah bahawa seksyen 4 Akta Hasutan 1948 adalah tidak konsisten dengan Perkara 10 Perlembagaan Persekutuan dan justeru itu adalah tidak sah;

(3) Susulan dari itu bahawa Mahkamah yang Mulia ini memerintahkan agar Pemohon dibebas dan dilepaskan;

(4) Lain-lain perintah atau perintah selanjutnya yang dianggap sesuai dan wajar oleh Mahkamah yang mulia.

[6] The English translation reads as follows:

(1) That the criminal prosecution instituted against the appellant before the Sessions Court at Shah Alam in arrest case number 61-1-2011 be struck out and/or set aside and/or quashed and/or stayed.

(2) An order that section 4 of the Sedition Act is inconsistent with Article 10 of the Federal Constitution and is therefore void.

(3) Pursuant thereto, this Honourable Court is to acquit and discharge the appellant from the charge.

(4) Any other order which this Honourable Court deems fit and suitable.

[7] On 19 January 2012, Noor Azian Shaari J held that s 4(1)(c) of Act 15 was not ultra vires the Federal Constitution and dismissed the respondent's application in the notice of motion. The respondent appealed to the Court of Appeal. On 26 December 2013, the Court of Appeal dismissed the respondent's appeal and upheld the decision of the High Court. The Court of Appeal directed that the respondent appear before the sessions court on 5 June 2013 for mention to enable the sessions court judge to hear the case on its merits.

[8] Learned counsel for the respondent applied for a stay, submitting that as a matter of public interest, the questions of law which were raised need to be argued before the Federal Court. The Court of Appeal granted stay.

[9] The respondent then filed an appeal to this court. However, before the appeal could be heard on 20 October 2014, the respondent withdrew the

appeal. The withdrawal was in consequence to the decision in the case of *Siow Chung Peng v Public Prosecutor* [2014] 4 MLJ 504, where this court held that pursuant to s 87(1) of the Courts of Judicature Act 1964, the Federal Court's jurisdiction did not extend to decisions of the High Court made in respect of a case tried or to be tried by a subordinate court.

[10] On 25 September 2014, the respondent filed Originating Summons No 24–36–09 of 2014 (encl 1) (which is the subject of the present appeal), praying for the following relief:

(a) a declaration that s 3 of the Sedition Act 1948 read with s 4 thereof violates art 10(1)(a) of the Federal Constitution and is accordingly null and void;

(b) that there be no order as to costs; and

(c) that such further or other relief or orders or directions be granted or made as this honourable court deems just.

[11] At the outset of the appeal, we directed parties to firstly, submit on the first two questions of law referred to at para 2 of this judgment. We indicated to parties that we would proceed to hear submissions on the third question if the first two questions were decided against the appellant.

THE APPELLANT'S SUBMISSION

[12] Relying on his written submission, the thrust of the argument of the learned senior federal counsel ('SFC') submitting for the appellant is as follows. What was in issue before the court in the originating summons which is the subject matter of the present appeal is ss 3 and 4 of Act 15. The crux of the matter had been decided by the High Court pursuant to the notice of motion filed in Criminal Application No 44–72 of 2011, and the decision was affirmed by the Court of Appeal in Criminal Appeal No B-09–212–09 of 2011 reported as *Mat Shuhaimi bin Shafiei v Public Prosecutor* [2014] 2 MLJ 145 ('Shuhaimi I'). In the notice of motion in *Shuhaimi I*, the focus was on the constitutionality of s 4(1)(c) of Act 15. However, according to the learned SFC that section could not be read in isolation but must be read with s 3 of Act 15. The latter section must be invoked to interpret s 4 of Act 15. There are four paragraphs to s 4(1) of Act 15 which includes s 4(1)(c). One cannot challenge ss 4(1)(a), (1)(b), (1)(c), and (1)(d) of Act 15 separately. In this case the whole of s 4 was held to be constitutional by the Court of Appeal in *Shuhaimi I*. It was argued that when the respondent challenged the constitutionality of s 4, since that section must be read with s 3, the respondent should not withhold the challenge and the argument on the constitutionality of s 3(3) to be taken up later. One cannot present one's case by instalments. It was contended that it was

not proper for the respondent to use the motion in the civil proceeding to circumvent the decision of the court made in the criminal proceeding (*Shuhaimi I*). Referring to para 18 in the Court of Appeal's judgment in *Shuhaimi I*, the learned SFC pointed out that learned counsel for the respondent submitted in the Court of Appeal that s 4(1)(c) of Act 15 read with the definition of 'seditious tendency' in s 3 of the same Act amounts to an unreasonable restriction of the appellant's right to 'freedom of speech and expression' under art 10(1)(a) of the Federal Constitution and that being the case, s 4(1)(c) of the same Act is rendered unconstitutional and should be struck out. According to the learned SFC, the Court of Appeal responded to that submission by holding that Act 15 was still good and valid law. It falls squarely within the framework of art 10(2) of the Federal Constitution and its validity and constitutionality could not be challenged. The court also held that s 4(1) of Act 15 did not infringe the reasonable and the proportionality test by virtue of s 3(2) of Act 15, and hence it is constitutional. Paragraphs 115–117 of the Court of Appeal's judgment were referred to by the learned SFC. Therefore, he submitted the respondent should not be allowed to litigate the constitutionality of s 3(3) of Act on the same facts and point of law. In support of his submission, the learned SFC relied on *Hunter v Chief Constable of West Midlands and another* [1981] 3 All ER 727; *Tractors Malaysia Bhd v Charles Au Yong* [1982] 1 MLJ 320, *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783.

THE RESPONDENT'S SUBMISSION

[13] Starting his submission, learned counsel for the respondent contended that the validity of Act 15 was not in issue before the Court of Appeal, in so far as the criminal case was concerned. Any comment by the Court of Appeal as to the constitutionality of Act 15 as a whole was entirely obiter dicta. Learned counsel referred to s 3(3) of the Sedition Act which provides that:

> (3) For the purpose of proving the commission of any offence against this Act *the intention* of the person charged at the time he did or attempted to do or made any preparation to do or conspired with any person to do any act or uttered any seditious words or printed, published, sold, offered for sale, distributed, reproduced or imported any publication or did any other thing *shall be deemed to be irrelevant* if in fact the act had, or would, if done, have had, or the words, publication or thing had a seditious tendency.

Learned counsel then submitted that provision was never the subject of any argument in *Shuhaimi I*, or under consideration by the court.

[14] Learned counsel next submitted that the doctrine of constructive res judicata had no application to a challenge upon the constitutionality of a statute. In support of his argument he referred to the judgment of the Indian Supreme Court in *Nand Kishore v State of Punjab* [1995] (6) SCC 614.

[15] On the requirement for res judicata, learned counsel submitted that to constitute a res judicata, the earlier judgment must 'necessarily and with precision' determine the point in issue. In support, he referred to the following passage in the judgment of Chang Min Tat FJ in *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24:

> At the hearing of the appeal, it was put to counsel for the appellants that to constitute a res judicata, the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993; [1964] MLJ 49, 'necessarily and with precision' determine the point in issue, and he was asked to indicate to the court how the earlier judgment did necessarily and with precision determine the liability of the appellants to pay the respondent for work done for them at their request. He did not do so. We do not, with respect, see how he could succeed.

[16] Referring to para 3 in the Court of Appeal's judgment in *Shuhaimi I*, learned counsel submitted that what was directly challenged was s 4 of the Sedition Act. The constitutionality of s 3(3) of the Sedition Act was not challenged. He contended that the Court of Appeal in *Shuhaimi I* did not 'necessarily and with precision' determine the issue on the constitutionality of s 3(3) of the Sedition Act. He pointed out that in *Shuhaimi I*, the Court of Appeal declared s 4(1)(c) of the Sedition Act to be constitutional. Referring to paras 18–21 in the judgment of the Court of Appeal, learned counsel submitted that whilst ss 4(1), 3(1) and (2) of the Sedition Act were referred to, s 3(3) of the same Act was never referred to by the court. Nowhere in the judgment of the Court of Appeal was the issue of intention being irrelevant as provided under s 3(3) was mentioned. He submitted that it is a constitutional requirement that mens rea (intention) shall be an element of every offence created by law. Contrary to this requirement, s 3(3) of the Sedition Act deems intention to be irrelevant. According to learned counsel it is on this basis that the respondent contends that s 3(3) of the Sedition Act is unconstitutional.

[17] Hence, learned counsel submitted that the originating summons is not vexatious or an abuse of the court process, nor is it governed by res judicata. On the elements of res judicata, learned counsel relied on *Chua Wee Seng v Fazal Mohamed* [1971] 1 MLJ 106, where Sharma J held:

> To constitute a matter res judicata the following conditions must be fulfilled:
>
> (1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.
>
> (2) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.
>
> (3) The parties as aforesaid must have litigated under the same title in the former suit.

(4) The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.

(5) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.

[18] In this regard, learned counsel argued that except for the fourth condition, the other conditions for res judicata were not fulfilled.

OUR DECISION

[19] The Latin term 'res judicata' literally translated means 'a matter adjudged'. The full maxim is *res judicata pro veritate accipitur* which means 'a matter adjudged is taken as truth'. In explaining what is res judicata, in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, the Supreme Court said:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation — interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.
>
> Since a res judicata creates an *estoppel per rem judicatum*, the doctrine of res judicata is really the doctrine of *estoppel per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say the res judicata is a rule of procedure and that an *estoppel per rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.
>
> The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v Henderson* (1843) 3 Hare 100 at p 115 which is:
>
> > The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

[20] There are in fact two kinds of estoppel per rem judicatum. The first is cause of action estoppel and the second is issue estoppel, which is a development from the first. Explaining on the two types of estoppel, the court

said:

> The *cause of action estoppel* arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, ie the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is res judicata.
>
> In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel per rem judicatum and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence. ... On the other hand, *the issue estoppel* literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson J in *Lawlor v Gray* [1984] 3 All ER 345 at p 350, who said: 'Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action'.
>
> It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment ... There is one school of thought that issue estoppel *applies* only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds *the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata, ie doctrine of estoppel per rem judicatum*.
>
> *We are of the opinion that the aforesaid contrary view is to be preferred*; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel per rem judicatum. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

[21] On the question whether, an *estoppel per rem judicatum* has to be pleaded, in holding that it need not, the Supreme Court said:

Another source of small confusion is the rule that generally an estoppel, of which an estoppel per rem judicatum is a kind, as the name implies, has to be pleaded. But in Superintendent of *Pudu Prison v Sim Kie Chong* [1986] 1 MLJ 494 at p 498, Abdoolcader SCJ held to the effect that the court has the inherent jurisdiction to dismiss an action by applying the doctrine of res judicata against a party even if it has not been pleaded. We venture to think the reason for the ratio is that an estoppel or exclusion of evidence based on a question of public policy, ie in this case, the question of public policy that there should be finality in litigation, is more vigorous in excluding evidence and need not be pleaded, unlike an ordinary estoppel which should be pleaded.

[22] The application of the principle of issue estoppel as explained in *Asia Commercial Finance (M) Bhd* can be seen in many cases, including the Court of Appeal decision in *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122. The headnote of the case reveals the following facts. Lembaga Pembangunan Perumahan dan Bandar Sabah ('LPPB') owned a piece of land ('the said land'). The appellant and one Dato' Paduka Khairuddin Abu Hassan ('KAH') negotiated with LPPB with a view to securing a joint venture agreement ('the JV agreement') between LPPB and the respondent to develop the said land into a housing project ('the project'). It resulted in a shareholders' agreement ('the agreement') entered into by the appellant, KAH, the respondent, Datuk Hoe Tze Fook ('HTF') and Lee Fuei Siong ('LFS') both of whom were the shareholders and directors of the respondent. The agreement was, expressed to be conditional upon execution of the JV agreement between LPPB and the respondent. The agreement also contained a stipulation that if the JV agreement was not executed in the stipulated manner, both the appellant and KAH were required to refund to the respondent the refundable deposit forthwith. Following the execution of the agreement, HTF paid Cosmotine Sdn Bhd ('Cosmotine') a sum of RM2.3m being the refundable deposit. In return, Cosmotine deposited its CIMB Bank Bhd cheque in the same amount ('the said cheque') with HTF. However, the appellant and KAH failed to secure the JV agreement between LPPB and the respondent and HTF thereupon presented the said cheque to the bank for payment but was dishonoured. The respondent demanded the refund of the sum of RM2.3m from the appellant and KAH. The appellant and KAH failed to refund the amount. HTF thus commenced an action against Cosmotine ('the HTF suit') for the recovery of the sum of RM2.3m and entered summary judgment against Cosmotine. The respondent meanwhile, commenced the present action against the appellant and KAH for the recovery of the sum of RM2.3m and obtained summary judgment against KAH. With regard to the action against the appellant, the respondent applied for a question of law to be determined pursuant to O 14A of the Rules of Court 2012. The questions proposed were in the following manner: whether in view of the HTF suit, the

respondent's cause of action against the appellant was prohibited by the principle of estoppel, res judicata and doctrine of merger of cause of action. The learned judge answered the questions posed in the negative and proceeded to enter judgment against the appellant. In allowing the appellant's appeal, the Court of Appeal said:

> [25] In the present appeal, since the present action would undoubtedly involve going over precisely the same facts as in the previous HTF suit, and accepting the broader approach and the wider sense of res judicata as the preferred and correct legal position, the fact that the parties to this suit are different from the HTF suit does not disentitle the appellant to invoke the doctrine of issue estoppel to bar the respondent from relitigating a specific issue that had been decided in the prior separate action. *The doctrine also applies to a non-party. It is therefore not necessary for parties to be the same in both actions.* What the doctrine seeks to prevent is an abuse of the process of the court by attempting to make a double claim as well as allowing the plaintiff to relitigate its cause for the same relief and based on the same subject matter for which judgment had successfully been obtained in the HTF suit and to produce the same set of facts, the same witnesses and the same documents (see *Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Pahang Darul Makmur*).
>
> [26] We would emphasise at this juncture that the present action could have been included in the HTF suit by reason of the fact that the relief, evidence relied on and the witnesses are the same. In truth, the claims and relief sought in both suits share one common object which is the refund of RM2.3m from Cosmotine, the appellant and KAH which amount became liable to be refunded as a result of the alleged breach of the agreement. The only difference lies in the cause of action. ...
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> ...
>
> [28] ... what the respondent had done in effect was to divide its case into two separate claims and in the process proceed in two stages in order to suit its convenience while in actuality it was claiming for the same relief based on the same facts for which judgment had already been obtained earlier in the HTF suit. It cannot be denied that both claims arose from the same one and only transaction and were undoubtedly interrelated. Therefore it would be unjust to permit the respondent to make double claim by filing two separate actions for the same relief. In our judgment the instant action is an abuse of the process of the court (see also *North West Water Ltd v Binnie & Partners (a firm)*).
>
> [29] We would further add at this point that, even if there has been no actual decision as to the issues involved in the instant action, but if the respondent did not raise these issues in the earlier proceedings which it could and should have done so, in our view the plea of this doctrine of res judicata in its amplified and wider sense is available to the appellant to prevent an abuse of the process of the court. We would refer to the Supreme Court decision in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494; [1986] CLJ Rep 256:
>
> It would suffice in this regard to refer to the judgment of the Privy Council in

Brisbane City Council and Myer Shopping Centres Pty Ltd v Attorney-General for Queensland [1979] AC 411 at p 425:

> The second defence is one of 'res judicata'. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the Board, there described in these words:
>
> ... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.
>
> The attempt by way of the instant proceedings to relitigate and re-open the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the court ...

[30] The present suit as we have said earlier could have been included in the HTF suit and the issue in the present case could have been ventilated there for it to be specifically determined. The respondent chose not to do so and it is now estopped from coming to the court to seek to raise the issue which might have been put but was not raised in the HTF suit at their option (see *OCBC Bank (M) Bhd v Kredin Sdn Bhd* [1997] 2 MLJ 544; [1997] 2 CLJ 534 and *Arnold v National Westminster Bank Plc* [1991] 2 AC 93). The plea of res judicata in this appeal is, without question, well taken and is supported by authority. In the end, we have no hesitation in accepting it.

[23] It has been said that the principle underlying the doctrine of abuse of process was applied in *Reichel v Magrath* (1889) 14 App Cas 665 (see *Hunter v Chief Constable of West Midlands and Another* [1981] 3 All ER 727). In *Reichel v Magrath*, the headnotes of the case reveal the following facts. The appellant brought an action against his Bishop and the patrons of a benefice claiming a declaration that he was vicar of the benefice, and that an instrument of resignation which he had executed was void, and an injunction to restrain the Bishop from instituting and the patrons from presenting any other person to the benefice. Judgment was given against the appellant. Later the respondent, having been duly appointed to the benefice as the appellant's successor, brought an action against the appellant claiming a declaration that

the respondent was vicar and a perpetual injunction to restrain the appellant from depriving the respondent of the use and occupation of the house and lands. In his statement of defence the appellant set up the same case as that on which he lost in the action in which he was plaintiff. The statement of defence was struck out. The House of Lords held, affirming the decision of the Court of Appeal, that there was an inherent jurisdiction in the court to strike out the statement of defence as frivolous and vexatious and an abuse of the procedure, and to enter judgment for the plaintiff with a declaration and injunction as claimed. In his judgment, Lord Halsbury LC said as per p 668:

> My Lords, *I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again. …*
>
> … *I believe there must be an inherent jurisdiction in every Court of Justice to prevent such an abuse of its procedure and* I therefore think that this appeal must likewise be dismissed.

[24] The doctrine of the abuse of the process was attributed to the following passage in the speech by Sir James Wigram VC in *Henderson v Henderson* [1843–60] All ER Rep 378 at pp 381–382; (1843) 3 Hare 100 at pp 114–115:

> I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, *the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case*. The plea of res judicata applies, except in special-case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but *to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time*.

[25] The passage was approved by the House of Lords in *Hoystead & Others v. Commissioner of Taxation* [1926] AC 155, where Lord Shaw delivering the judgment of the House held:

> if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. *But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision.* The rule on this subject was set forth in the leading case of *Henderson v Henderson (1)* by Wigram VC.

[26] Then came *Greenhalgh v Mallard* [1947] 2 All ER 255. In that case, the plaintiff failed in an action for conspiracy to injure (conspiracy for an unlawful

purpose). Later he brought an action on the same facts for conspiracy to injure by unlawful means. Somervell LJ held that the facts in the case gave rise to only one cause of action for conspiracy:

> The present statement of claim admittedly deals with the same transactions. ...
>
> ... Counsel for the plaintiff says that this is a different cause of action. It is, of course, true that in the authorities dealing with conspiracy it is pointed out that there are cases in which the conspiracy is unlawful in that *its purpose is unlawful*, viz, to injure the plaintiff, in a way which cannot be justified by any legitimate purpose of the defendants in what they do, and that in other cases the conspiracy may give rise to a cause of action because the *means used are unlawful*. In other words, a conspiracy may give rise to a claim for damages if either the end or the means, or both, are wrongful, but, in my opinion, a plaintiff who believes he has a cause of action in conspiracy must make up his mind whether he is going to rely on one or other or both of these allegations — whether he is going to say that the purpose was unlawful, but he does not suggest that the means are unlawful, or that the means were unlawful, but he does not suggest that the purpose was unlawful; or that both are unlawful. But if he has chosen to rely on, and put his case in, one of those ways, he cannot, in my view, thereafter bring the *same transactions* before the court and say that he is relying on a new cause of action.

[27] More importantly, in the context of the doctrine of the abuse of the process, His Lordship further held that res judicata applied to the later action. His Lordship also invoked the principle in *Henderson*:

> That, I think, would be enough to dispose of this case, but counsel for the defendants put his case in two ways, and I will deal with them. *He relied, first, on res judicata, and then said that, if there was any doubt about that, he was entitled to succeed on the ground that it would be vexatious and an abuse of the process of the court to allow this transaction to be brought before the court again on the basis of the present statement of claim. I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is* not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

[28] In holding so, His Lordship had expanded and indeed amplified the phrase 'every point which properly belonged to the subject of litigation' in Wigram VC's famous statement in Henderson (see *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and Another* [1975] AC 581 per Lord Kilbrandon at p 590, *Asia Commercial Finance* at p 793).

[29] At this juncture, it is opportune to add that in the *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74, the wider rule of res judicata as expanded in *Henderson* which sometimes is referred to constructive res judicata, was succintly explained by Sharma J at p 76 in the following

manner:

> The rule is that a matter *which might and ought to have been made a ground of attack or defence becomes a matter which was constructively in issue*. A matter *which might and ought to* have been made a ground of attack or defence in the former application but which was not alleged as such a ground of attack or defence is for the purposes of the plea of res judicata deemed to have been a matter directly and substantially in issue in the former application, that is to say, though *it may not have been actually directly and substantially in issue it is still regarded as, having been constructively, directly and substantially in issue. There can be no distinction between a claim that was actually made and a claim which might and ought to have been made*. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and to pronounce its judgment thereupon but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision *cannot be constructively res judicata. The rule of constructive res judicata is really a rule of estoppel*.

[30] The application of the doctrine of the abuse of the process and its apparent relationship with res judicata can be seen in *Hunter v Chief Constable of West Midlands and Another*. The appellant was one of the six persons accused of bombing of two public houses in Birmingham. In the criminal trial, the appellant and the other accused alleged that they had been beaten up by the police to make them confess and that therefore their confessions which were heavily relied upon by the Crown was inadmissible. The trial judge and the jury found the confessions to be voluntary, and the appellant and the other accused were convicted. Later, the appellant brought civil action against the police for damages for assaults causing physical injuries on him which had been inflicted while he was in police custody. The House of Lords held that it was an abuse of the process of the court to attempt to relitigate the same issue, and the civil action was struck out. Lord Diplock stated at pp 729 and 733–734:

> ... *this is a case about abuse of the process of the High Court*. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power. ...
>
> ... The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another

court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made. ...

... collateral attack on a final decision of a court of competent jurisdiction may take a variety of forms.

[31] In this regard, Lord Diplock also referred to the following statement in the speech of Lord Halsbury LC in *Reichel v Magrath*:

... I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.

[32] In deciding the case on the basis of the abuse of the process, the House of Lords declined to endorse Lord Denning's attempt in the Court of Appeal to extend issue estoppel to cover the particular instance of the abuse of the process presented by the case before the court. This is what Lord Diplock said at p 732:

Lord Denning MR and Sir George Baker were also in favour of extending the description 'issue estoppel' to cover the particular example of abuse of process of the court presented by the instant case, a question to which much of the judgment of Lord Denning MR is addressed. Goff LJ, on the other hand, expressed his own view, which had been shared by Cantley J, that such extension would involve a misuse of that expression. But if what Hunter is seeking to do in initiating this civil action is an abuse of the process of the court, as I understand all Your Lordships are satisfied that it is, the question whether it also qualifies to bear the label 'issue estoppel' is a matter not of substance but of semantics. Counsel for Hunter was therefore invited to address this House first on the broader question of abuse of process and to deal in particular with the reasoning contained in the judgment of Goff LJ who dealt with the matter more closely than the other members of the court and based his decision solely on that ground. In the result, counsel for Hunter, who argued the case with their accustomed ability and diligence, were quite unable to persuade any of us that there was any error in the reasoning of Goff LJ in what proved to be the last judgment that he prepared before his much lamented and untimely death. In the result it became unnecessary to call on counsel for the police. So the debate on semantics did not take place. It could not possibly affect the outcome of the appeal or justify the public expense that would have been involved in prolonging the hearing any further.

[33] Further Lord Diplock said at p 733, that in order to avoid confusion, it would be best 'if the use of the description 'issue estoppel' in English law ... were restricted to that species of estoppel per rem judicatam that may arise in civil actions between the same parties or their privies'.

[34] The doctrine of the abuse of the process was restated by the House of Lords in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1. In his leading judgment Lord Bingham of Cornhill said:

> The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court: *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, 590 per Lord Kilbrandon, giving the advice of the Judicial Committee; *Brisbane City Council v Attorney General for Queensland* [1979] AC 411, 425 per Lord Wilberforce, giving the advice of the Judicial Committee). This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is, as Lord Diplock said at the outset of his speech in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536, an
>
> > inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power ...

[35] Lord Bingham referred to *Hunter*, and several authorities which explored the forms of the abuse of the process doctrine which had its root in *Henderson v Henderson* to demonstrate the development of the doctrine in recent years, at the end of which His Lordship made the following crucial speech on the issue at p 31 which contained instructive approach in considering whether there is an abuse of the process:

> But *Henderson v Henderson* abuse of process, as now understood, although *separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter*. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. *The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus* being on the party alleging abuse) *that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive*, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to *what should in my opinion be a broad, merits-based judgment which takes account of the public and private*

> *interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before*. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, *it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse* than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice ...

[36] Reverting to the present appeal, upon hearing the argument of the learned senior federal counsel ('SFC') who challenged encl 1 as an abuse of the process and on the ground of res judicata, and upon reply by the respondent's counsel, the High Court dismissed encl 1 with costs, having found it to be an abuse of the process of the court.

[37] In its judgment reversing the aforesaid decision of the High Court, the Court of Appeal approached the appeal under the following issues:

(a) whether the appellant (the respondent before us) was precluded by the doctrine of res judicata from the declaration sought in the originating summons;

(b) what was the position in law in respect of the test of 'proportionality' with reference to the legislative restrictions which might be imposed to meet the objectives of art 10(2) of the Federal Constitution; and

(c) what was the legal effect of s 3(3) of Act 15 as presently worded and found in the statute book.

The Court of Appeal next set out the provisions under arts 8 and 10 of the Federal Constitution. Then under the heading 'res judicata issue', the court stated that the doctrine of res judicata is not an inflexible rule; that the court could still decline to apply it where to do so would lead to unjust result, and that the doctrine is ... 'merely equity in action in procedural arena' (*Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 2 CLJ 321, quoting Gopal Sri Ram JCA (as His Lordship then was), *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 536, *Arnold and others v National Westminister Bank plc* [1991] 2 AC 93). The court then said:

> From a perusal of the various authorities referred to us it was clear that s 3(3) of Act 15 had not hitherto before specifically been the subject of a constitutional

challenge in any of those previous proceedings, that is, on similar lines as mounted in the saman pemula here by the appellant. This was conceded in as much by learned SFC. The criminal application questioned the validity of s 4(1)(c) of Act 15 on the grounds that it unfairly restricted a person's right to freedom of speech and expression. There was in the judgment of the Court of Appeal in the criminal application (*Mat Shuhaimi bin Shafiei v Public Prosecutor* [2014] 2 MLJ 145; [2014] 5 CLJ 22), a comment with regard to the relevance of the 'proportionality test' but this was merely in general terms and with reference to the purpose of Act 15 and the permissible laws for the maintenance of public order as allowed under art 10(2) of the Federal Constitution.

[38] Reference was then made to the Federal Court's decision in *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921, which according to the Court of Appeal, only confined its consideration on whether s 4(1) of Act 15 fell within the scope of s 3(3) of Act 15 did not feature at all in the Federal Court's finding. With regard to *Public Prosecutor v Ooi Kee Said & Ors* [1971] 2 MLJ 108 and *Public Prosecutor v Param Cumaraswamy* [1986] 1 MLJ 512 referred to by the learned SFC in support of the submission that s 3(3) of Act 15 had been previously considered by our courts and any issue as to its validity had been put to rest, the Court of Appeal held that apart from being decisions of the High Court, the two cases were given in the context of criminal charges unlike in the case before it, where a declaration was being sought in the originating summons. Further, according to the Court of Appeal, there was no discussion or assessment by the High Court in those two cases as to the constitutionality of s 3(3) of Act 15 on the basis of reasonableness or the 'proportionality principle' in the context of art 10(2) of the Federal Constitution.

[39] The Court of Appeal also held that the High Court was in error in stating that an 'identical question' had been considered and decided by the courts. This is what the Court of Appeal said:

> [23] The learned judge was, in our respectful view, also clearly in error when stating that an 'identical question' had been considered and decided upon by the courts. That was not so. What was before the court by way of the saman pemula was a substantive challenge separately brought on the constitutional validity of s 3(3) of Act 15 which ought to have been considered on its merit; the court's failure to do so had no doubt, resulted in a miscarriage of justice which warranted our intervention.
>
> [24] It was our view that the appellant ought not to be summarily shut out of this novel constitutional challenge now mounted which principally focussed on the validity in law of s 3(3) of Act 15 as tested against the principle of 'proportionality' of any restriction availed of under art 10(2)(a) of the FC; the specifics of which had never been adjudicated upon previously. In any event, it was in the interest of justice, not merely to the appellant, but also to the public at large, that this issue now been canvassed be heard and determined by the courts.

[40] The Court of Appeal then proceeded to consider the merits of the substantive motion and eventually allowed the appeal by the appellant (the respondent before us), set aside the decision of the High Court, allowed prayer 1 in the originating summons and made the declaration that (Act 15), contravenes art 10 of the Federal Constitution and therefore is invalid and of no effect.

[41] For reasons which we will set out shortly, we find that the Court of Appeal erred in not holding that encl 1 is an abuse of the process. Indeed, it is clear that the crucial issue as to whether encl 1 is an abuse of the process was not considered at all by the Court of Appeal in its judgment. This must be done by the Court of Appeal, before embarking on the consideration of the merits of the motion. If, upon due consideration, encl 1 is found to be an abuse of the process, then encl 1 could not stand, and the appeal must be dismissed without the need of going to the merits of the substantive motion. The Court of Appeal had considered the issue of res judicata, but not the applicability or otherwise of the doctrine of the abuse of the process. On the law that we have set out at some length, res judicata (in the form of cause of action estoppel or issue estoppel), is separate and distinct from the doctrine of abuse of the process although both rest on the same underlying public interests — namely, that there should be finality in litigation and that a party should not be vexed twice in the same matter (see *Johnson* per Lord Bingham of Cornhill at p 31, *Toronto (City) v CUPE Local 79* 2003 SCC 63. The abuse of the process doctrine ... 'is untrammelled by the technicalities of estoppel' (see *House of Spring Gardens Ltd and others v Waite and others* [1990] 2 All ER 990 at p 1000). In *Bradford & Bingley Building Society v Seddon Hancock and others (third parties)* [1999] 1 WLR 1482 at pp 1490–1491, Auld LJ said:

> In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the courts' subsequent application of the above dictum (of Sir James Wigram V-C in *Henderson v Henderson* (1843) Hare 100). The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in 'special cases' or 'special circumstances': see *Thoday v Thoday* [1964] P 181 at pp 197–198, per Diplock LJ, and *Arnold v National Westminster Bank plc* [1991] 2 AC 93. *The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter* ... Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata (either or both because the parties or the issues are different) for example, where liability between new parties and/or determination of new issues should have been resolved in the earlier proceedings. It may also arise where there is such an inconsistency between the two that it would be unjust to permit the later one to continue.

[42] The speech by Abdoolcader SCJ in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 at pp 498–499, is also instructive on the application of the doctrine of the abuse of process:

> *There is moreover the inherent jurisdiction of the court in cases where res judicata is not strictly established, and where estoppel per rem judicatam has not been sufficiently pleaded, or made out*, but nevertheless *the circumstances are such as to render any reagitation of the questions* formally adjudicated upon a scandal and *an abuse*, *the court will not hesitate to dismiss the action*, or stay proceedings therein, or strike out the defence thereto, as the case may require. It would suffice in this regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and another v Attorney General for Queensland* [1979] AC 411 at p 425:
>
> > The second defence is one of 'res judicata'. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which *a party may be shut out from raising in a subsequent action an issue which he could, and should*, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wilgram V-C in *Henderson v Henderson* (1843) 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the Board, there described in these words:
> >
> > ... there is a wider sense in which the doctrine may be appealed to, so that *it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. (p 590).*
>
> The attempt by way of the instant proceedings to relitigate and reopen the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police & Ors* [1982] AC 529 at p 542.

[43] So, even if res judicata is not applicable to bar encl 1, it still cannot stand if it is found to be an abuse of the process. The question is it an abuse of the process?

[44] This brings into focus again the approach on the determination of an abuse of the process distilled from the speech by Lord Bingham in *Johnson*, which we apply. The approach should be:

> (a) broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question *whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before*.

[45] The 'merits' in the phrase 'broad merits-based judgment' were not the substantive merits or otherwise of the actual claim, but those relevant to the question whether the claimant could or should have brought his claim as part of the earlier proceeding (see *Stuart v Goldberg Linde (a firm) and others* [2008] 1 WLR 823 at p 840, per Lloyd LJ).

[46] We should also bear in mind that:

> one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.

[47] Applying the approach explained in *Johnson*, we begin determining whether encl 1 in the originating summons is an abuse of the process by examining the notice of motion filed in the criminal proceeding. In the notice of motion, what the respondent wanted was to have the criminal prosecution on the charge for an offence under s 4(1)(c) of Act 15, instituted against him be struck out and/or set aside and/or quashed (prayer (1)). He also wanted the court to acquit and discharge him of the said charge (prayer 2). Those were the purposes. To achieve those purposes, he prayed for an order that s 4 of Act 15 be held to be inconsistent with art 10 of the Federal Constitution and therefore void. The grounds supporting the respondent's application in the notice of motion are as follows:

> (i) The charge against the appellant under the Sedition Act is contrary or not consistent with art 10 of the Federal Constitution read together with art 5 and art 9 of the Federal Constitution and it is therefore void and invalid by virtue of art 4 and/or art 162 of the Federal Constitution.
>
> (ii) The Sedition Act does not comply with art 10 cl (2)(a) of the Federal Constitution (which permits law that restricts the freedom of expression for several objectives) and it cannot objectively be said to be a reasonable restriction nor does it fulfill the objective in art 10 cl (2)(a) of the Federal Constitution and it is wholly disproportionate to the valid reason permitted by law to restrict the fundamental right of the appellant under the Federal Constitution.

[48] The Shah Alam High Court dismissed the motion. The court held that s 4(1)(c) of Act 15 is not ultra vires the Federal Constitution. In the Court of Appeal, learned counsel for the respondent (the appellant before the Court of Appeal) submitted that:

> That s 4(1)(c) of the Sedition Act 1948 (Act 15) read with the definition of 'seditious tendency' in s 3 of the same Act amounts to an unreasonable restriction of the appellant's right to 'freedom of speech and expression' under art 10(1)(a) of the Federal Constitution and that being the case, s 4(1)(c) of the same Act is rendered unconstitutional and should be struck out.

[49] The Court of Appeal held that being a pre Merdeka law, Act 15 is

governed by art 162 of the Federal Constitution. Section 4(1) of Act 15 was not caught within the purview of art 4(1) of the Federal Constitution. Since Act 15 was enacted in 1948, any application to declare the impugned law null and void for being inconsistent with art 4 of the Federal Constitution must be dismissed and it was grounded on the wrong premise.

[50] The court then considered the provisions under ss 4(1)(c), 3(1) and 3(2) of Act 15 and art 10(1)(a) and art 10(2)(a) and (4) of art 10. The court held that the right to freedom of speech and expression under art 10(1)(a) of the Federal Constitution is only accorded to the citizens and it is not absolute. No one can deny that there must be some restrictions to this right. Reference was made to several authorities including *Madhavan Nair & Anor v Public Prosecutor* [1975] 2 MLJ 264, *Lau Dakkee v Public Prosecutor* [1976] 2 MLJ 229, *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108 and *Fan Yew Teng v Public Prosecutor* [1975] 2 MLJ 235.

The court stated that art 10(2)(a) of the Federal Constitution allows Parliament to impose 'such restrictions as it deems necessary or expedient'. These constitutional restrictions impugned on the freedom of speech and expression.

[51] The court then said, it is an offence to act, speak, or publish statements with 'seditious tendency' (as provided in s 2 of Act 15). The prosecution need not prove that the words were true or otherwise. Then referring to s 3(3) of Act 15, the court said that:

> Act throws the net wider in favour of the prosecution. In the present form under section 3(3) of the Sedition Act, the intention of the maker of the statements in making those statement is irrelevant. It is also not an essential ingredient of the offence under section 4(1)(c) of the Sedition Act for the prosecution to prove that the statements made will incite [or had incited] violence or public disorder ...
>
> ... Based on the authority of *Public Prosecutor v Ooi Kee Saik*, the truth of the statement is also irrelevant.

[52] It is opportune at this stage to reproduce the submission of learned counsel for the respondent in the Court of Appeal:

> [49] Learned counsel for the appellant complained that a person who makes a statement which:
>
> (a) is not seditious; and
>
> (b) made in good faith with a bona fide intention; or
>
> (c) contains the truth of the matter;
>
> would still be liable to be convicted for sedition under the Sedition Act.
>
> [50] Learned counsel for the appellant lamented that the position is absurd, untenable and unreasonable.

A [51] ... the Sedition Act does not distinguish between two categories of individuals, namely:

(a) those who are genuine in their speech and who speak the truth; and

(b) those who are not genuine and who wish to incite hatred and violence.

B [52] ... the sting of the Sedition Act contravened arts 8 and 10 of the Federal Constitution following the guidelines of the Federal Court cases in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507 (FC); and *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 (FC).

C [53] ... the crux of the legal challenge centred on s 4(1)(c) of the Sedition Act which is said to be inconsistent with art 10(1)(a) of the Federal Constitution read with the right to equal protection of the law as encapsulated in art 8(1) of the Federal Constitution thereby rendering the said s 4(1)(c) to be unreasonable and/or disproportionate to the mischief it seeks to

D **[53]** It was argued on behalf of the appellant that whether the Sedition Act 1948 is considered to be a pre-Merdeka law or a post-Merdeka law, the tests to be applied in a constitutional challenge of the kind as advanced by the appellant would be the same. It was submitted that the appropriate tests to be E applied would be by way of considering the following questions:

(a) whether s 4(1)(c) of the Sedition Act 1948 restricts a person's right to freedom of speech and expression?

(b) if the question is answered in the affirmative, then the next question to F pose would be whether the restriction is unreasonable and/or disproportionate to its objective? and

(c) should the answers to both questions be in the affirmative, then the court is empowered under art 162(6) and (7) of the Federal Constitution to repeal the pre-Merdeka legislation which is inconsistent G with the Federal Constitution. The court too, it is said, is empowered under art 4(1) of the Federal Constitution to strike down the Sedition Act 1948 if it is considered to be a post-Merdeka law.

H **[54]** The Court of Appeal held that 'the Sedition Act is a pre-Merdeka law ...' All pre-Merdeka laws or described as 'existing laws' shall continue in force or after Merdeka day. The court continued:

While Article 162(1) of the Federal Constitution stipulates as follows:

162 Existing laws

I (1) Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by federal or State law.

[71] This is followed by art 162(6) of the Federal Constitution which states as follows:

> 162(6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

[72] Where there is a conflict between the existing law and the Federal Constitution, the latter must prevail. This simple proposition of the law was set by Lord Denning in *B Surinder Singh Kanda v Government of the Federation of Malaya* [1962] 1 MLJ 169 (PC) at p 172 (MLJ); p 334 in these trenchant terms:

> It appears to Their Lordships that, in view of the conflict between the existing law (as to the powers of the Commissioner of Police) and the provisions of the Constitution (as to the duties of the Police Service Commission) the Yang di-Pertuan Agong could himself (under art 162(4)), have made modifications in the existing law within the first two years after Merdeka Day. (The attention of Their Lordships was drawn to modifications he had made in the existing law relating to the railway service and the prison service.) But the Yang di- Pertuan Agong did not make any modifications in the powers of the Commissioner of Police, and it is too late for him now to do so. In these circumstances, Their Lordships think it is necessary for the court to do so under article 162(6). It appears to Their Lordships that there cannot, at one and the same time, be two authorities, each of whom has a concurrent power to appoint members of the police service. One or other must be entrusted with the power to appoint. In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution. The necessary modification is that since Merdeka Day it is the Police Service Commission (and not the Commissioner of Police) which has the power to appoint members of the police service. And that is just what has happened. The Police Service Commission has in fact made the appointments. And Their Lordships are of opinion that they were lawfully made.

[73] And according to art 162(7) of the Federal Constitution, the word 'modification' includes amendment, adaptation and repeal.

[55] The Court of Appeal then said that in *Surinder Singh Kanda*, the Privy Council held that inconsistent existing law must give way to the Federal Constitution even when an article of the Federal Constitution is expressed to be 'subject to existing laws'. The court observed that there are a string of authorities that applied art 162(6) of the Federal Constitution generously. There are also cases which did not apply art 162(6) of the Federal Constitution because the existing laws were found to be consistent with the Federal Constitution. In this regard, learned counsel for the respondent submitted that s 4(1)(c) of the Sedition Act must conform to the 'reasonable restriction test' in art 10(1)(a) of the Federal Constitution. It was submitted that if found to be unreasonable, then this court must make the necessary modifications under

art 162(6) or 162(7) of the Federal Constitution and that modifications may include:

(a) a repeal; or

(b) a declaration of unenforceability; or

(c) an adaptation by adding into the offence the additional elements of 'intention to threaten or incite violence or public disorder' (this means that mere tendency would not suffice to support the offence).

[56] According to the Court of Appeal, the court was urged to hold that Act 15 is unconstitutional for two main reasons:

(a) that the violation of art 10(1)(a) and 10(2)(a) of the Federal Constitution offends the 'reasonableness test'; and

(b) that the violation of the equality provision in art 8(1) of the Federal Constitution offends the 'proportionality test'.

[57] On the reasonableness test, the Court of Appeal held:

> [90] In considering the 'reasonableness test', we took into account the scheme of the Sedition Act which is all encompassing. It criminalises speech and expression in different forms. *Under the said Act, intention is irrelevant. As long as the speech or publication had a seditious tendency, an offence is committed. It is akin to an offence of strict liability.* We reiterate the principles established by *Public Prosecutor v Ooi Kee Saik & Ors* to the effect that the truth or falsity of the words uttered is immaterial and it is not a defence to a charge for sedition. And whether the words complained of could have the effect of producing or did in fact produce any of the consequences listed in s 3(1)(a)–(f) of the Sedition Act is immaterial. ...
>
> ...
>
> [98] Article 4(2)(b) of the Federal Constitution states that the validity of any law shall not be questioned on the ground that it imposes such restrictions as are mentioned in art 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article. Thus, it clearly ruled out the prerogative of even the courts to question the validity of those laws that fall within the scope of art 10(2)(a) of the Federal Constitution. In this context, it is germane to refer to the Supreme Court case of *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 at p 575, where Edgar Joseph Jr SCJ delivering the judgment of the Supreme Court aptly said:
>
> > So, for example, if the impugned law, in pith and substance, is a law relating to the subjects enumerated under the permitted restrictions found in cl 10(2)(a), the question whether it is reasonable does not arise; the law would be valid.
>
> [99] In *Public Prosecutor v Param Cumaraswamy (No 2)* [1986] 1 MLJ 518, NH Chan J (later JCA) correctly held the view that the Sedition Act is constitutional within the purview of art 10(2) of the Federal Constitution. At p 519 of the report, His Lordship had this to say and it is still good law until today:

> In this country, just as in every country, there cannot be absolute freedom when we speak of fundamental rights (or human rights). In all common law countries, whether we have the Dicey Rule of Law or a Bill of Rights (as in the United States) or a written constitution, freedom is not an absolute right. Lord Denning calls it: freedom under the law. This telling phrase was coined by him in 1949; he was 'the first and true inventor' of it: see The Family Story pp 177–8.

[100] *In our judgment, the Sedition Act is constitutional and it does not violate* arts 10(1)(a) and 10(2)(a) of the Federal Constitution. *It does not offend the reasonableness test*. It is reasonable to maintain the Sedition Act because, 'The Government has a right to preserve public peace and order, and therefore, has a good right to prohibit the propagation of opinions which have a seditious tendency' (to borrow the words of His Majesty in *Public Prosecutor v Ooi Kee Saik & Ors*).

[58] In respect of the proportionality test, the Court of Appeal held that s 4(1)(c) is constitutional and it passed the proportionality test with flying colours. The court said:

> [101] It is the duty of the court to ascertain whether s 4(1)(c) of the Sedition Act is proportionate to the objective it seeks to achieve. This test of proportionality was enunciated by the Federal Court in *Sivarasa Rasiah*.
>
> [102] Statements having 'seditious tendency' *without regard to the intention of the maker making those statements and* whether the words expressed are true or otherwise and whether the statements made will incite violence or public order are all caught within the purview of the Sedition Act. *The proportionality test must be viewed in the context of the purpose of the Sedition Act, namely the prevention of public disorder and the maintenance of public order*.
>
> [103] *The Sedition Act is proportionate to the necessity to safeguard the security of the federation and to maintain law and order as well as to avoid incitement. In particular, the impugned provision does not overreach* art 10(2)(a) of the Federal Constitution *and it is substantively fair and proportionate and thus it does not violate the equality provision in* art 8(1) of the Federal Constitution. In *Shri Ram Krishna Dalmia and 3 Others v Shri Justice SR Tendoikar and 3 Others AIR* 1958 SC 538, the Indian Supreme Court speaking through Chief Justice SR Das at pp 547–548 held as follows:
>
> > (b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;
> >
> > (c) that it must be presumed that the Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;
> >
> > (e) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

[59] In conclusion, the Court of Appeal said that:

> We were invited to hold that the Sedition Act be declared null and void. We declined the invitation ...
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> ...
>
> [115] In our judgment, the Sedition Act being a pre-Merdeka law is good law and it is still valid up to this very day. The validity of the Sedition Act comes under the saving provisions of art 162 of the Federal Constitution.
>
> [116] The Sedition Act falls squarely within the framework of art 10(2) of the Federal Constitution and its validity and constitutionality cannot be challenged.
>
> [117] In open court, after anxiously listening to the oral submissions of the parties, we announced our unanimous decision as follows:
>
> > *We have deliberated at length and we are of the considered view that* s 4(1)(c) of the Sedition Act does not infringe the reasonable test and the proportionality test by virtue of s 3(2) of the same Act. Hence, we conclude that s 4(1)(c) of the same Act is constitutionally enacted by Parliament and remain a valid and enforceable law until today. We accordingly dismiss the appeal and we direct that the appellant is to appear before the Sessions Court on 5 June 2013 for mention to enable the Sessions Court Judge to hear the case on its merits.

[60] In encl 1, the respondent prayed for a declaration that s 3 of Act 15 read with s 4 thereof violates art 10(1)(a) of the Federal Constitution, and is accordingly null and void. The ground given in the originating summons in support of the application is that s 3 of Act 15 when read as a whole and together with s 4 of the same is upon its true construction inconsistent with art 10(1)(a) of the Federal Constitution. The brief affidavit filed by the respondent in support of the application which was stated in the originating summons to contain the grounds supporting the application, also does not contain anything material apart from stating that on 7 February 2011, the respondent was charged in the Sessions Court Shah Alam under s 4(1)(c) of Act 15, and 'that ss 3 and 4 of Act 15 when read as a whole violate the fundamental liberty of freedom of speech guaranteed by art 10(1)(a) of the Federal Constitution'. No reasons or particulars relating to the alleged constitutional violation were given.

It is only in the written submission by the respondent's counsel filed for High Court hearing that the reasons for the constitutional violation was given, namely, that s 3 of Act 15 read with s 4 of the same is unconstitutional for the following reasons:

(a) s 3(3) of the Act which makes the offence of sedition one of strict liability in respect of a fundamental right guaranteed by the Constitution in art 10(1)(a) is incapable of being modified under; and

(b) s 3 when read as a whole and together with s 4 of the Act, on its true construction, renders the freedom of speech guaranteed under art 10(1)(a) illusory.

[61] Elaborating on the first reason, it was contended that s 3(3) of Act 15 renders the offence of sedition a strict liability offence (para 26, p 169 appeal record Vol 2(2)). A person exercising a fundamental right guaranteed by art 10(1)(a) of the Federal Constitution can be guilty of sedition despite not having the intention to commit such an offence. It is a settled principle that mens rea is a requirement of all offence — be it under common law or statute. Section 3(3) of Act 15 cannot be read in accord with the Constitution because it imposes an absolute bar on the basis of strict liability. Therefore, the alternative is that s 3(3) of Act 15 be struck down altogether leaving the offence of sedition as one requiring intention. In respect of the second reason, it was contended that Act 15 is not a reasonable restriction on the test enumerated in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507, because s 3 of Act 15 read with s 4 of the same Act failed the test. The respondent's challenge pursuant to his application in encl 1 became more specific to the constitutionality of s 3(3) of Act 15 as was revealed in the written submission filed on his behalf in the Court of Appeal. According to his learned counsel, the question to be decided is whether s 3(3) of Act 15, which renders the 'intention' irrelevant is in breach of arts 10(2)(a) and 8 of the Federal Constitution. He submitted that, put in another way, the question is whether s 3(3) of Act 15 is disproportionate legislative response, repugnant to the principle of proportionality housed in art 8, thus rendering the right to freedom of speech in art 10(1)(a) illusory (see p 216, appeal record, Vol 2(2)). If the restriction is not proportionate it ought to be struck down as unconstitutional. Then, from the respondent's skeletal submission filed for the hearing before us, the gist of the argument on the challenge to the constitutionality of s 3(3) is as follows:

> ... Section 3(3) is unconstitutional because it is absolute in terms and is therefore a disproportionate legislative response. It would not have been disproportionate had section 3(3) included a mental element. This is because there is a right vested by the common law of England in every accused that that mens rea shall be an element of every offence created by law. ... This right is to be found within Article 5(1) through the interpretive process of reading Article 160(2) with section 66 of Part II of the Consolidated Interpretations Acts 1948 and 1967, whereby a right at common law

becomes a right protected by Article 5(1). ... Section 3(3) cannot be saved under Article 162 because it cannot be brought to accord with the Constitution. It cuts across or renders the right under Article 10(1)(a) illusory being a disproportionate law. ... Under Article 162(6) the Court may modify and perform a legislative function. That would mean re-writing the subsection by deleting the words 'deemed to be irrelevant' and inserting the word 'relevant' after the words 'shall be'. The other way to modify it is for Court to delete the whole subsection acting under Article 162(6) read with (7). The result will be the same because intention will become relevant. And that is all that the Constitution requires.

[62] So, actually of the constitutional challenge in encl 1 is the constitutionality of s 3(3) of Act 15, under which intention is deemed to be irrelevant for the purpose of proving the commission of any offence against Act 15. However, for that purpose, s 3(3) cannot stand and be taken alone. This is because of the interplay between s 4 (in particular s 4(1)(c), in the context of the charge against the respondent), ss 2 and 3(1), 3(2) and 3(3) of Act 15. On the scheme of Act 15 as it stands, in considering whether the offence under s 4(1)(c) of Act 15 is made out, that section must be considered with ss 2 and 3 of Act 15. In order to establish the charge against the respondent under s 4(1)(c) of Act 15, the prosecution has to prove the *act of publishing a seditious publication*.

[63] Section 4(1) of Act 15 provides:

4 Offences

(1) Any person who —

(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act which has or which would, if done, have a seditious tendency;

(b) utters any seditious words;

(c) prints, publishes, sells, offers for sale, distributes or reproduces any *seditious publication; or*

(d) imports any seditious publication, shall be guilty of an offence and shall, on conviction, be liable for a first offence to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both, and, for a subsequent offence, to imprisonment for a term not exceeding five years; and any seditious publication found in the possession of the person or used in evidence at his trial shall be forfeited and may be destroyed or otherwise disposed of as the court directs.

[64] The answer to the question as to what is *a seditious publication* is found under s 2 of Act 15. Section 2 provides as follows:

'seditious' when applied to or used in respect of any act, speech, words, publication or other thing qualifies the act, speech, words, publication or other thing as one

having a *seditious tendency*;

[65] In order to prove a 'seditious tendency', the prosecution has to rely on s 3(1) of Act 15 which provides:

3 Seditious tendency

(1) A 'seditious tendency' is a tendency —

(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;

(b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;

(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State;

(e) to promote feelings of ill will and hostility between different races or classes of the population of Malaysia; or

(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution.

[66] In the context of the charge against the respondent, the tendency under s 3(1)(a) and the tendency under s 3(1)(d) are relevant.

[67] In considering whether any act, speech, words, publication or other thing has any seditious tendency under s 3(1), regard must be had to the exception under s 3(2) of Act 15 which provides that an act, speech, words, publication or other thing shall not be deemed to be seditious by reason only that it has a tendency provided under ss 3(2)(a), (2)(b) and (2)(c) of the same Act.

[68] For the purpose of proving the commission of an offence under s 4(1)(c) of Act 15, (or indeed any offence under the Act), s 3(3) of the Act must come into play because once the elements under s 3(1) read with s 2 of Act 15 are established, namely, that the publication published by the respondent *in fact had a seditious tendency*, then the intention of the respondent shall be deemed to be irrelevant. This is clear from s 3(3) of Act 15 which provides:

(3) For the purpose of proving the commission of any offence against this Act *the*

intention of the person charged at the time he did or attempted to do or made any preparation to do or conspired with any person to do any act or uttered any seditious words or printed, *published*, sold, offered for sale, distributed, reproduced or imported any publication or did any other *thing shall be deemed to be irrelevant if in fact the act had, or would, if done, have had*, or the words, *publication or thing had a seditious tendency*.

[69] In other words, once it is proven that the publication published by the respondent had a seditious tendency as provided under s 3(1) by Act 15, read with s 2 of Act 15, the offence under s 4(1)(c) of Act 15 against the respondent will be established, and by virtue of s 3(3), the respondent's intention of publishing the publication shall be deemed irrelevant. The deeming of the intention of the person charged as being irrelevant in s 3(3) of Act 15 is the target of the respondent's challenge on the constitutionality of that section. Because of the interplay between ss 4(1)(c), 2, 3(1), (2) and (3) of Act, bearing in mind the criminal charge preferred, in the criminal proceeding, when the respondent challenged the constitutionality of s 4(1) of Act 15 for the purpose of the impugning the charge, he could not leave out the constitutionality of s 3(3) of Act 15 which deems intention to be irrelevant once seditious tendency is proven as explained in s 2 read with s 3. In fact s 3 of Act 15 was referred to by learned counsel for the respondent in *Shuhaimi I*. As would be recalled, in *Shuhaimi I*, in raising the main point raised in the Court of Appeal, he submitted that 's 4(1)(c) of Act 15 *read with the definition of 'seditious tendency' in s 3* of the same Act amounts to an unreasonable restriction' to the respondent's right of freedom of speech and expression under art 10(1)(a) of the Federal Constitution, and hence s 4(1)(c) of Act 15 is rendered unconstitutional and should be struck out. He must have in mind s 3(2) of Act 15 which explains 'seditious tendency'. However, he fell short of s 3(3). He should have raised the constitutionality of s 3(3) of Act 15. In our view, considered in the context we have explained, the constitutionality of s 3(3) of Act 15 is clearly part of the subject of the litigation in the notice of motion in the criminal proceeding and so clearly could have been raised therein. The respondent should have challenged the constitutionality of s 3(3) in the notice of motion in the criminal proceeding. There is nothing in the affidavit filed in support of encl 1 in the notice of motion to explain why this issue was not raised in the criminal proceeding. There is also nothing akin to fresh evidence which might warrant the raising of this issue only in encl 1. Having considered all the circumstances, we hold that encl 1 is an abuse of the process. On this ground alone encl 1 should be dismissed. Thus, the Court of Appeal erred in allowing the respondent's appeal and in considering the merits of the application in encl 1. In our view, this clearly warrants our interference.

[70] We come now to the contention of learned counsel for the respondent that the doctrine of res judicata had no application to a challenge upon the constitutionality of a statute. In support of his argument he referred to the

following passage in the judgment of the Indian Supreme Court in *Nand Kishore v State of Punjab* 1995 6 SCC (6) 614:

> 18. Bearing the above principles in mind what at best was said by the State of Punjab was that failure to raise the constitutionality of Rule 5.32 in the writ petition preferred by the appellant would imply, on the principle of 'might and ought', that the opportunity of controverting the matter had been lost and that it should on the principles of constructive res judicata be taken that the matter had been actually raised and adversely decided. But in *Forward Construction Co and Others v Prabhat Mandal and Others* [1986 (1) SCC 100], this Court has taken the view that where a matter has been constructive in issue it cannot be said to have been actually heard and decided. It could only be deemed to have been heard and decided.
>
> 19. It would then have to be seen the twin play of the notion of deemed constitutionality and bar of constructive res judicata. Raising the constitutionality of a provision of law, as it appears to us, stands on a different footing than raising a matter on a bare question of law, or mixed question of law and fact, or on fact. There is a presumption always in favour of constitutionality of the law. The onus is heavy on the person challenging it. It is by the discharge of onus that the presumption of constitutionality can be crossed over. When a person enters a Court for relief and does not challenge the constitutionality of the law governing the matters directly and substantially in issue, it only means and implies that he goes by the presumption of constitutionality. He cannot on this stance be deemed to have raised the question of constitutionality and the question of constitutionality to have been decided against him and such matter to have been directly and substantially in issue. The constitutionality of the Rule relating to compulsory retirement cannot be deemed to have been questioned and decided against the appellant on the principles of 'might and ought' or it being 'directly and substantially in issue'. It cannot be taken as a rule that one of the pleas, either by the plaintiff or the defendant, in every suit or proceeding, must of necessity relate to the constitutionality of the law on which the cause is founded or defended in order to obviate the plea of constructive res judicata being raised in an eventuality. It cannot also be taken as a rule that constitutionality of the law involved is a matter directly and substantially in issue, and if not raised renders a mute decision in favour of its constitutionality barring the plea being raised in a subsequent suit. If there be read such a rule in all civil litigation, it would, to our mind, be against public policy vexing and burdening the courts to go into the constitutionality of provisions of law in every case. When under the impugned rule, the Government assumed to itself the power to compulsorily retire a permanent government servant after ten years of qualifying service, the court's act of striking that Rule as unconstitutional is the law which appeared on the scene, not only to break the presumption of constitutionality but to declare it void. In a sense the offending provision was never there and in the other it was henceforth not there. In either event, it would be within the ambit of the emphasised words in *Mathura Prasad*'s case.

[71] According to learned counsel, only the point which was raised and challenged was deemed raised. The other presumptions which were not raised were deemed constitutional. For that reason he argued, constructive res judicata did not apply. We are unable to agree.

[72] We do not subscribe to the view that the doctrine of res judicata does not apply to a challenge upon the constitutionality of a statute. The basis on which the doctrine of res judicata rests is founded on the consideration of public policy that it is in the public interest that there should be finality in litigation and decisions made by courts of competent jurisdiction, and that no one should be vexed twice for the same kind of litigation. Therefore, we see no reason why the doctrine of constructive res judicata should not apply to a challenge on the constitutionality of a statute. To support this, we refer to the decision of the Supreme Court of India in *State of Haryana v State of Punjab And Anr* (2004) 12 SCC 673. In this case the State of Punjab was barred by res judicata in a later action from challenging the constitutionality of a statute which it could have challenged in an earlier action but did not do so. To demonstrate the point we will set out the essential facts derived from the judgment of the Supreme Court. The case concerns the Sutlej-Yamuna Link Canal Project covering about 214km. Following the creation of the State of Haryana from the erstwhile State of Punjab, question arose as to apportionment of the river waters made available to the erstwhile State of Punjab between Haryana dan Punjab. On 24 March 1976, a notification was issued by the Union of India under s 78 of the Punjab Reorganisation Act 1966, inter alia, dividing the river waters between the two states. Out of the 214km, 122km were to run through the territory of Punjab and 92km through Haryana. The cost of the project was to be borne by the central government. Haryana's portion was completed by June 1980. The State of Punjab had not completed its share of the canal although it had been paid the amount necessary for the purpose. In 1979, the State of Haryana filed Suit No 1 of 1976 seeking completion of the project. The State of Punjab filed Suit No 2 of 1979 challenging among other things, s 78 of the Punjab Reorganisation Act and the notification dated 24 March 1976. During the pendency of the suits, on 31 December 1981, an agreement was made between the States of Haryana, Punjab and Rajasthan. The agreement provided that the project would be implemented within specified time frame. The canal works in the Punjab territory was to be completed within a period of two years from the date of the agreement. Following the agreement, on 12 February 1981, the Supreme Court allowed the suits to be withdrawn. On the expiry of the period for the completion of the project by Punjab, its portion of the agreement remained not completed. On 24 July 1985, a settlement (the Punjab Settlement) was reached between Haryana and Punjab. Clause 9 of the settlement provides:

> 9. Sharing of river waters
>
> 9.1 The farmers of Punjab, Haryana and Rajasthan will continue to get water not less than what they are using from the Ravi-Beas system as on 1 July 1985; waters used for consumptive purposes will also remain unaffected. Quantum of usage claimed shall be verified by the Tribunal referred to in para 9 February below.

> 9.2 The claims of Punjab and Haryana regarding the shares in their remaining waters will be referred for adjudication to a tribunal to be presided over by a Supreme Court Judge. The decision of this Tribunal will be rendered within six months and would be binding on both parties. All legal and constitutional steps required in this respect be taken expeditiously.
>
> 9.3 The construction of SYL Canal shall continue. The canal shall be completed by 15.8.1986.

[73] Pursuant to cl 9.1 and 9.2 of the settlement, s 14 was added to the Inter-State Water Disputes Act 1956. Issues regarding usage, share and allocation of the Ravi-Beas waters were referred to the adjudication by the Union of India under notification dated 2 April 1986. On 30 January 1987, the tribunal submitted its report, inter alia, allocating the Ravi-Beas waters between Punjab and Haryana. Pursuant to cl 9.3 of the settlement which continued to operate, Punjab completed about 90% of the construction of the canal. However, 10% of the construction remained not completed. Haryana filed Suit No 6 of 1996 praying for:

> (a) a decree declaring that the order dated 24 March 1976, the agreement of 31 December 1981 and the settlement of 24 July 1985 are final and binding inter alia on the State of Punjab casting an obligation on Defendant No 1 to immediately restart and complete the portion of the Sutjej-Yamuna Link Canal Project as also make it usable in all respects, not only under the aforesaid order of 1976, agreement of 1981 and settlement of 1985 but also pursuant to a contract established by conduct from 1976 till date.
>
> (b) a decree of mandatory injunction compelling Defendant 1 (failing which Defendant 2 by or through any agency) to discharge its/their obligations under the said notification of 1976, the agreement of 1981 and the settlement of 1985 and in any case under contract established by conduct, by immediately restarting and completing that portion of the Sutlej-Yamuna Link Canal Project in the State of Punjab and otherwise making it suitable for use within a time bound manner as may be stipulated by this Hon'ble Court to enable the State of Haryana to receive its share of Ravi and Beas waters.

[74] The State of Punjab filed a written statement questioning the jurisdiction of the court under art 262 of the Constitution and that the suit was barred under O 23 r 1 of the Code of Civil Procedure and under O 32 r 2 of the Supreme Court Rules 1966. On 15 January 2002, the Supreme Court decreed the suit in favour of Haryana and issued a mandatory injunction directing the State of Punjab to complete the construction of the canal and make it functional within one year. The State of Punjab did not comply with the court's decree. On 18 December 2002, Haryana filed an application (IA No 1 of 2002 in Suit No 6 of 1996), to implement the judgment and decree dated

15 January 2002.

[75] On 13 January 2003, the State of Punjab filed Suit No 1 of 2003 praying for several reliefs which include:

> (c) *To declare that Section 14 of the Act, 1956 is ultra- vires the Constitution of India;*
>
> (d) To declare that Section 14 of the Act 1956 is no longer enforceable for the reasons set out in the plaint.
>
> (e) To declare that the Punjab Settlement (Rajiv-Longowal Accord) is not enforceable under the changed circumstances as set out in the plaint.

[76] In response, Haryana filed an application (IA in OS No 1 of 2003) for rejection of the plaint; alternatively for summary dismissal of the suit under O 23 r 6 read with O 47 r 6 of the Supreme Court Rules 1966.

[77] The court proceeded to consider Haryana's application in IA in OS No 1 of 2003 first because its outcome would decide the fate of Punjab's application challenging the decree dated 15 January 2002 (OS No 1 of 2003) and Haryana's application for enforcement of the decree dated 15 January 2002.

[78] In challenging Suit No 1 of 2003, filed by Punjab, Haryana, inter alia, submitted that prayers (c)–(f) in that suit were barred by res judicata. Prayer (c) is the prayer to declare that s 14 of the Act, 1956 is ultra vires the Constitution of India. In its judgment, the Supreme Court said at pp 701 and 703–704:

> 67. Can the State of Punjab raise these issues again? Or is it barred by the principles of res judicata assuming that the principles of res judicata are 'law' within the meaning of Order 26 Rule 6(b)?
>
> 68. The doctrine of res judicata and Order 32 Rule 2 are not technical rules of procedure and are fundamental to the administration of justice in all courts that there must be an end of litigation. Thus, when this Court was called upon in *Daryao v State of UP*, to hold that res judicata could not apply in connection with proceedings before this Court under Article 32 because of the extraordinary nature of the jurisdiction, it was said: (AIR pp 1461-62, para 9)
>
> > 9. But, is the rule of res judicata merely a technical rule or *is it based on high public policy? If the rule of res judicata itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity*. Now, the rule of res judicata as indicated in Section 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance *the rule of constructive res judicata* may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. *It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice* over with the same kind of litigation. If these two principles form

A the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32.

The binding character of judgments pronounced by courts of competent jurisdiction is itself an essential part of the rule of law, and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis. …

B

…

71. *Since the doctrine of res judicata is an 'essential part of the rule of law'*, it follows that if the issues raised in the suit are barred by res judicata ex facie then this Court is required to reject the plaint in terms of Order 32 Rule 6(b).

C

…

78. *Similarly the challenge to Section 14 of the 1956 Act must be ejected at the threshold*. The section reads:

D

14. Constitution of Ravi and Beas Waters Tribunal —

(1) Notwithstanding anything contained in the foregoing provisions of this Act, the Central Government may, by notification in the Official Gazette, constitute a Tribunal under this Act, to be known as the Ravi and Beas Waters Tribunal for the verification and adjudication of the matters referred to in paragraphs 9.1 and 9.2 respectively of the Punjab Settlement.

E

(2) When a Tribunal has been constituted under sub-section (1), the provisions of sub-sections (2) and (3) of Section 4, sub-section (2), (3) and (4) of Section 5 and Section 5-A to 13 (both inclusive) of this Act relating to the constitution, jurisdiction, powers, authority and bar of jurisdiction shall, so far as may be, but subject to sub-section (3) hereof, apply to the constitution, jurisdiction, powers, authority and bar of jurisdiction in relation to the Tribunal constituted under sub-section (1).

F

(3) When a Tribunal has been constituted under sub-section (1), the Central Government alone may suo motu or at the request of the State Government concerned refer the matters specified in paragraphs 9.1, and 9.2 of the Punjab Settlement to such Tribunal.

G

Explanation. — For the purpose of this section 'Punjab Settlement' means the Memorandum of Settlement signed at New Delhi on the 24th day of July, 1985.

79. In paragraph 51 of Punjab's written statement in OS No. 6 of 1996, it was admitted that the issues referred to in paragraphs 9.1 and 9.2 of the Punjab Settlement were referred to the Ravi-Beas Tribunal by Government notification dated 2 April 1986 and the affirmation of the continued availability of water from the Ravi-Beas system as on 1 July 1985 referred to in the notification was relied upon. The notification dated 2 April 1986 was issued under Section 14 of the Inter-States Water Disputes Act. As far as the report of the Tribunal is concerned, paragraph 8 of the written statement says that it could not be relied upon because it had not become final and that Punjab did not accept the correctness of 'most of its findings'. *There was no dispute raised as to the constitutionality of Section 14 at any stage. Even in the course of arguments, when Section 14 was specifically referred to in*

H

I

elaborate written notes on the scope, purport and effect of Section 14, it was submitted that the effect of Section 14 is fourfold:

(A) To overcome procedural hurdles that no dispute had been raised and to bypass the mandatory requirement of negotiations.

(B) To deem matters referred under Section 14 to be a 'water dispute' and place this beyond challenge.

(C) To constitute this special Section 14 Tribunal under this Act and not any other provision or statute and make the other provisions applicable.

(D) To oust the jurisdiction of all courts including the Supreme Court by making Section 11 applicable to this dispute.

(E) To leave all other disputes relating to the Punjab Settlement to be decided under the amended Act of 1956.

80. This Court in the judgment dated 15 January 2002 considered the arguments of the parties relating to Section 14 and negatived Punjab's submission as to the construction of Section 14. *Punjab could have challenged the constitutional validity of Section 14 in its written statement. It did not then. It cannot do so now being barred by the doctrine of res judicata.*

CONCLUSION

[79] What we have decided thus far is sufficient to dispose of the appeal. We conclude that encl 1 is an abuse of the process. As such encl 1 should be dismissed without the need to consider the merits of the application. In the circumstances we find it unnecessary to answer the first and the second leave questions as framed.

[80] In view of our finding that encl 1 is an abuse of the process as aforesaid, there is also no necessity for this court to consider the third leave question.

[81] In the upshot, the appeal is allowed. The decision of the Court of Appeal in respect of encl 1 is set aside. The decision of the High Court in respect of encl 1 is reinstated.

[82] We order that the trial of the respondent in respect of the charge under s 4(1)(c) of Act 15 in Shah Alam Sessions Court to proceed. The respondent is to appear before the Shah Alam Sessions Court for mention on 10 January 2018 to fix the trial date.

[83] We make no order as to costs.

Order accordingly.

Reported by Afiq Mohamad Noor