

- (4) The remedy of specific performance was a discretionary remedy guided by certain basic principles; one of which required the plaintiff to plead that it was ready, able and willing to complete the relevant agreement. There was no evidence of this readiness and willingness on the part of the plaintiff. The plaintiff had not suggested or explained as to why damages were not otherwise an adequate remedy and why the agreement must be specifically enforced. Given that the court did not find any valid and enforceable agreement, this remedy was not available.
- (5) The plaintiff had not pleaded for an order of damages in lieu of specific performance. Given that the claim was fraught with not just lack of fundamental pleas, but inconsistencies and more, it would require this court to exercise moral justice on the facts of this case. That was not the function of the court. Since the plaintiff itself was uncertain as to what the agreement between the parties was, the court was not able to make any order, let alone a pronouncement that the agreement was not valid or enforceable. An order for the return of any benefits received under Section 66 of the Contracts Act 1950 required the court to first make that finding before proceeding to order that relief. The court was impeded and constrained in making such an order on the present facts and circumstances.

Constitutional rights

Nik Nazmi Bin Nik Ahmad v. Public Prosecutor [2014]4 CLJ 944

The Court of Appeal in *Nik Nazmi Bin Nik Ahmad v. Public Prosecutor* (B-09-303-11/2013) delivered a pioneering decision on the constitutional right of freedom of assembly in Malaysia.

The Appellant had been charged for an offence under section 9(1) of the Peaceful Assembly Act 2012 (“the PAA”), which is punishable under section 9(5) of the said Act. The Appellant was alleged to have violated section 9(1) of the PAA by failing to provide a ten (10) day notice of an assembly which he had organized at a stadium in Petaling Jaya in the wake of the 2013 General Elections. The Appellant applied to the High Court for orders to declare sections 9(1) and 9(5) of the PAA as unconstitutional and, further, that the charge against him be set aside and that he be acquitted and discharged accordingly. The High Court dismissed the application and upheld the constitutionality of sections 9(1) and 9(5) of the PAA.

The Appellant appealed against the High Court decision and argued, amongst others, that sections 9(1) and 9(5) of the PAA were unconstitutional as it represented an excessive and an unreasonable restriction to the right of freedom of assembly as guaranteed under Article 10 of the Federal Constitution.

Section 9(1) of the PAA requires an organizer of an assembly to provide a ten (10) day notice of the said assembly, whilst section 9(5) of the PAA prescribes a penal sanction of a RM10,000.00 fine for the breach of section 9(1).

The Court of Appeal unanimously allowed the appeal and set aside the charge against the Appellant and acquitted and discharged him of the same. In view of the constitutional importance of the appeal, each of the three presiding judges prepared separate written grounds of their respective decisions.

Justice Mohamad Ariff Bin Yusoff held section 9(1) of the PAA to be constitutionally valid as the ten (10) day notice requirement represented a reasonable restriction to the right of free assembly. Justice Ariff proceeded to find section 9(5) of the PAA to be unconstitutional as it created a “conceptual difficulty” in purporting to criminalise an act which was prima facie lawful under the PAA. In this regard, his Lordship held that the PAA does not stipulate that an assembly held without the provision of the required notice was unlawful (i.e. a strict reading of section 9(1) provides that a public assembly remains valid despite the non-provision of a ten (10) day notice). Therefore, Justice Ariff held that the dichotomy between sections 9(1) and 9(5) of the PAA rendered section 9(5) unconstitutional and ordered the said provision to be struck down.

Justice Hamid Sultan Abu Backer did not find section 9(1) of the PAA to be unconstitutional on the premise that the ten (10) day notice requirement was not excessive as it does not prohibit the convening of peaceful assemblies. However, his Lordship held section 9(5) to be unconstitutional as its penal provisions were inconsistent with Article 10(2) of the Federal Constitution as it operated to criminalise assemblies that are peaceful in nature (such as the assembly organized by the Appellant).

Justice Mah Weng Kwai went further than either of his Lordship’s two judicial brethren by declaring as unconstitutional and striking down both sections 9(1) and 9(5) of the PAA. Justice Mah held that the aforesaid provisions represented an unreasonable encroachment onto one’s Article 10 right to free assembly and, further, were a disproportionate legislative response to the purported security concerns in question. In this respect, his Lordship held that the Public Prosecutor had failed to demonstrate that the ten (10) day notice requirement was necessary to maintain public order when an assembly is held. Justice Mah further held that sections 9(1) and 9(5) of the PAA were unconstitutional as it rendered as illusory the right to hold urgent and spontaneous assemblies in Malaysia.