CONSTITUTIONAL LAW LECTURE SERIES

"FREEDOM OF SPEECH & EXPRESSION IN A FUNCTIONING DEMOCRACY"

by Christopher Leong

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Good evening ladies and gentlemen,

It is an honor for me to have this opportunity to address you in this 6th Lecture of the Constitutional Law Lecture Series. The title of the lecture this evening, "Freedom of Speech & Expression in a Functioning Democracy", was one that was chosen for me. Although I am pleased to speak on the topic, it has however given me pause and left me in a slight quandary as I had hoped to speak on the topic in the context of Malaysia.

First, let me begin by stating that this is a huge topic, there is much that can discussed but it would not be possible to cover the width and breath of the subject matter this evening. It is my hope that in speaking my mind on the topic from selected perspectives, I will nevertheless be able to engage yours in a conversation.

Democracy & Freedom of Speech

The title as presented sets the topic of freedom of speech and expression in the context of a functioning democracy. So the question is begged - Is Malaysia a functioning democracy?

A democracy is defined by, amongst other things, the political freedoms and civil liberties accorded or guaranteed to, enjoyed and exercised by its citizens.

The Merriam-Webster Dictionary defines "democracy" as a government by the people or a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections.

Collins Dictionary has as one of its definitions of "democracy" as the practice or spirit of social equality, or the principle of equality of rights, opportunity and treatment, or the practice of this principle.

The Cambridge Dictionary defines it as the belief in freedom and equality between people, or a system of government based on this belief, in which power is either held by elected representatives or directly by the people themselves.

And finally, the Oxford Dictionary defines it as a system of government by the whole population or by all the eligible members, and the practice of social equality.

The key elements of a democracy in my view are:

1. A system of government chosen by the people and is representative of them;
2. There are free and fair elections held regularly;
3. The elected government and representatives are accountable to the people, and accountability is a continuous process and not a one off electoral event;
4. The people have a right to participate in and address issues concerning the economic, social, political and civic life of their community, society, country and overall environment;
5. The fundamental liberties, in particular the freedom of speech and expression, and right of equality, are afforded to the people;
6. The rule of law is recognised and adhered to.

One would discern that the concepts of democracy, equality and liberty or freedom are intertwined and interdependent. Hence, Abraham Lincoln in his seminal Gettysburg Address had fashioned the American Civil War as the struggle for the preservation of the

democratic Union and as one for the establishment of social and human equality. He famously said,

> *"Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal…that this nation, under God, shall have a new birth of freedom-and that government of the people, by the people, for the people, shall not perish from the earth."*[1]

In similar sentiment, it was four score and 14 years later on the occasion of the birth of our own nation in 1957 that it was

> *"…hereby proclaim and declare on behalf of the people…that the Persekutuan Tanah Melayu…is and with Allah's blessing shall be for ever a sovereign democratic and independent State founded upon the principles of liberty and justice and ever seeking the welfare and happiness of its people and the maintenance of a just peace among all nations."*[2]

[1] Source Abraham Lincoln Online – Bliss copy
[2] Proclamation of Independence 31th August 1957

Having proclaimed and declared ourselves as a democratic state, where are we on the democracy barometer after 60 years of that proclamation? Are we a functioning democracy? The word "functioning", meaning it is in actuality or reality a democracy, merely added to my predicament. Suffice to say for now that we have entrenched discrimination in our Constitution, we have numerous pieces of legislation which oust or displace the jurisdiction of the judiciary, we have detention without trial provisions, and we have numerous pieces of legislation which impinge on the freedom of speech and expression. We have seen authorities arrest and charge people for expressing their views, for satires and cartoons, and for allegedly causing insult. Such actions create an environment of fear and self censorship.

By this measure, there may be doubt as to whether Malaysia is a functioning democracy. I will thus have to approach the definition from the other end.

The word or concept "democracy" may also be defined by its antonym, that is, it's opposite. The antonyms of "democracy" are authoritarianism, totalitarian government, dictatorship or tyranny.
In this regard, Malaysia has been ranked 65th out of 167 jurisdictions in the Democracy Index 2016 by The Economist

Intelligence Unit. The Democracy Index is measured on five categories, namely; electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture. Based on these categories, the jurisdictions are then classified into 4 broad types of regimes, namely "full democracies", "flawed democracies", hybrid regimes", and "authoritarian regimes". Malaysia's score puts it in the "flawed democracies" basket.[3]

As a matter of juxtaposition, the definition of "full democracies" and "flawed democracies" are set out below[4] :

"Full democracies" are *"Countries in which not only basic political freedoms and civil liberties are respected, but which also tend to be underpinned by a political culture conducive to the flourishing of democracy. The functioning of government is satisfactory. Media are independent and diverse. There is an effective system of checks and balances. The judiciary is independent and judicial decisions are enforced. There are only limited problems in the functioning of democracies."*

[3] Democracy Index 2016, A report by The Economist Intelligence Unit, page 1
[4] Democracy Index 2016, A report by The Economist Intelligence Unit, page 54

"Flawed democracies" are *"countries which have free and fair elections and, even if there are problems (such as infringements on media freedom), basic civil liberties are respected. However, there are significant weaknesses in other aspects of democracy, including problems in governance, an underdeveloped political culture and low levels of political participation."*

It is thus discerned that there can be no democracy without fundamental civil liberties, chief amongst these being the right to freedom of speech and expression. How democratic or undemocratic a nation is can be measured on how this basic or fundamental right and liberty is recognised and permitted, or circumscribed and denied.

A democracy is dependent on the freedom of choice and determination. In order to have true choice and determination, it must be an informed choice and determination. For this to happen, there must be a fundamental right to information. The right to information is predicated on the right to communication which means the right to speech and expression. In coming full circle, we see that the freedom of speech and expression is therefore fundamental and essential to a functional democracy.

Federal Constitution and the limits

Freedom of speech and expression is the fundamental right which underpins the advocacy for all other rights. It is the one right which gives expression to them all. In a very real or practical sense, the values of liberty and freedom themselves are dependent on the right to free speech and expression. When we speak of the right to life, right to livelihood and dignity, right to equality or non-discrimination, right to freedom of religion, right to freedom of thought and belief, right to freedom of association and assembly, we speak of our right to advocate, assert and advance these freedoms. Every struggle, oppression, deprivation, despair and injustice is exposed and given voice by the freedom of speech and expression. Deny this right and we effectively deny the door to the other fundamental liberties.

It is in recognition of this that the United Nations Universal Declaration of Human Rights 1948 has in its Preamble given prominence of place to the freedom of speech and belief as one of the highest aspirations of the common people. Then at Article 19, it provides that:

> *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."*

Section 4 of the Human Rights Commission of Malaysia Act, 1999 ("SUHAKAM Act") provides that for the purposes of the SUHAKAM Act regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.

The courts have thus far interpreted this provision of the SUHAKAM Act to mean that the courts would only have regard to the Universal Declaration of Human Rights 1948 in the process of interpretation and where there is an absence of clear constitutional provisions in the Federal Constitution. The court further commented that given that the facts of the appeals in question required the court to have regard to the express provisions in Article 10, 8 and 5 of the Constitution, there was no compelling need to directly apply international law rules to supplement our domestic provisions.[5] It is

[5] *Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor* [2015] 2 CLJ 328 COA

hoped that there would be future opportunities to re-visit this comment, which in my view was made obiter dicta.

In the flawed democracy that we are, our Federal Constitution provides for the freedom of speech and expression in Article 10 of the Federal Constitution as follows:

"(1) Subject to Clauses (2), (3) and (4) –

(a) every citizen has the right to freedom of speech and expression…"

(2) Parliament may by law impose –

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

(4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2)(a), Parliament may pass law prohibiting the questioning of any matter,

right, status, position, privilege, sovereignty or prerogative established or protected by the provision of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law."
*[*emphasis added]*

It is apparent that the freedom conferred is immediately circumscribed. It is provided that the restrictions on the freedom of speech and expression which Parliament may impose must be 'necessary or expedient'. The requirement by itself of that which is 'necessary' would have set a high bar to be satisfied for any restrictions to circumscribe the fundamental right.

It is however unfortunate that two contradictory terms have been used in the same provision. The Oxford Dictionary defines "necessary" as that which is indispensable, or essential, or which is required for a situation. The word "expedient" on the other hand is defined as fit, proper or suitable to the circumstance. The elasticity of this latter term is obvious, and our freedoms have fundamentally struggled for decades because of this.

Malaysia has several pieces of legislation passed by Parliament which restricts freedom of speech and expression. These are the

Penal Code (Act 574), Sedition Act 1948, Communication & Multimedia Act 1998, Printing Presses & Publications Act 1984 to name but a few.

The Internal Security Act 1960 ("ISA") was a piece of legislation previously used by the authorities to clamp down on dissenting voices. The ISA permitted the authorities to arrest and detain people for an initial period of 60 days, and thereafter for periods up to 2 years, and which detention was renewable for infinite times. Such arrest and detention was without the need for trial or to prove commission of a criminal offence in a court of law. The infamous *"Ops Lalang"* is remembered as one such incident where the ISA was used to crack down on politicians, academics, students, artists, scientists, civil society activists and 2 national newspapers. The ISA was repealed on 31 July 2012.

Another favourite tool for suppression of speech and expression is the Sedition Act 1948. This may be said by some to be the legislation referred to in Article 10(4), although the Act predates our Constitution. The Sedition Act 1948 is particularly pernicious because its provisions which criminalises speech and expression are couched in vague terms and thereby lending itself to subjectivity and abuse. There is no requirement to prove criminal intent and the

truth or falsity of what is said or expressed is irrelevant to a conviction.[6]

In Malaysia, even the Houses of Parliament are not consecrated and hallowed ground for the freedom of speech and expression. We had a case where a Member of Parliament, Mark Koding, was convicted for sedition for a speech made in Parliament questioning the government policy in allowing Chinese and Tamil schools to continue and the use of these vernaculars on road signs as being inimical to national unity. He commented that if the closure of such schools and removal of such road signs would contravene Article 152 of the Constitution, then the said Article ought to be amended. He was found not guilty for his speech on the abolition of the vernacular schools and road sign boards, but was found guilty of sedition for advocating that Article 152 of the Constitution be amended.[7]

It is important to note that Article 63 of the Federal Constitution which provides for parliamentary privilege and immunity against court proceedings for anything said or done in the course of proceedings in Parliament has a provision which takes away the said privilege and immunity for anything said or done in contravention

[6] *PP v. Ooi Kee Saik & Ors* [1971] 2 MLJ 108
[7] *PP v. Mark Koding* [1983] 1 MLJ 111

of Article 10(4) or the Sedition Act. In other words, there is limited freedom of speech even in our august Houses of Parliament.

An examination of our case law with regards to how our courts have viewed the primacy of our fundamental rights under the Constitution and what would amount to permitted restrictions of those rights is a frustrating and agonising exercise.

The Malaysian case authorities had for decades taken the strict application approach, namely, the courts will not interfere with laws imposed by Parliament restricting fundamental rights if the restrictions so enacted are in pith and substance related or connected to the subject matter identified in the Constitution.[8]

In the early 90's, the Supreme Court case of *Public Prosecutor v. Pung Chen Choon* applied the 'pith and substance' test when deciding on the question of whether section 8A(1) of the Printing Presses and Publications Act 1984, which criminalised malicious publication of false news, was a restriction on the right of freedom of speech and expression which was inconsistent with Article 10(1)(a) and (2)(a) of the Federal Constitution.

[8] *PP v. Ooi Kee Saik & Ors* [1971] 2 MLJ 108; *PP v. Pung Chen Choon* [1994] 1 MLJ 566

The Supreme Court there held that so long as Parliament states that the legislation is enacted in the interest of one or more of the permitted subject matters, for example, national security or public order, the courts will not examine as to whether the restrictions therein so enacted were necessary or expedient for the purpose.[9] This was the "*pith and substance"* test.

The Supreme Court expressly rejected the proposition that laws passed by Parliament in restricting the fundamental right of freedom of speech and expression must be reasonable for the purpose or objective sought to be achieved. It however accepted what has subsequently been described as the 'proportionality' test.[10] The context in which this arose was with regards to the challenge by counsel that the restriction enacted on the right of freedom of speech was such that the prohibited act or acts, namely, malicious publication of false news, would not necessarily always cause or result in public disorder or fall within one of the other subject matters justifying restriction. Given that the restriction was not confined to only instances where for example public disorder would arise, the restriction was thus argued to be unconstitutional. In rejecting this contention, the Supreme Court stated, *"…in deciding whether a particular piece of legislation falls within the orbit of the*

[9] Article 4(2)(b) Federal Constitution; *PP v. Pung Chen Choon* [1994] 1 MLJ 566 at 575 & 578
[10] *PP v. Azmi bin Sharom* [2015] 6 MLJ 751

permitted restrictions, consideration must be given to the question whether such law is directed at a class of acts too remote in the chain of relation to the subjects enumerated under art 10(2)(a). In other words, the objects of the impugned law must be sufficiently connected to the subjects enumerated under art 10(2)(a). The connection contemplated must be real and proximate, not far-fetched or problematic."

This was a complicated way of saying that the court will not look into the matter. The argument by counsel was in pith and substance simply that the restriction was a blanket restriction. Although there may be some instances where the prohibited act could be envisaged to result in disorder or be against the security of the Federation or morality, nevertheless the restriction applied generally even in many instances where the prohibited act would not result in public disorder or have anything to do with or fall within one of the other subject matters justifying restriction. It is therefore a misnomer to call it a proportionality test. If at all a name is to be tagged to it, it may be referred to as the 'it is never too remote' test.

The above approach coupled with the court's reluctance to objectively examine and test a subjective exercise of discretion by the executive pursuant to such laws meant that the right of freedom

of speech and expression under Article 10, which is fundamental to a functioning democracy, for example as a probe for accountability and as a check and balance of governmental action, may be rendered largely illusory, and subject to the whim and vagaries of executive discretion.

However, in the last decade or so, the courts have been willing to look at both the constitutionality of legislation or of particular legislative provision which seek to restrict a fundamental right through the prismatic test of reasonableness and proportionality, as well as to examine the exercise of executive discretion on this basis. [11]

This test evolved from the principle that provisions establishing fundamental liberties under the Constitution must be given its widest interpretation and application, and conversely any provisions restricting such fundamental rights must be construed strictly and narrowly.[12] I take the liberty of setting out a quote capturing this principle. It is found in the Privy Council case of *Prince Pinder v*

[11] *Siva Rasiah v. Badan Peguam Malaysia* [2010] 2 MLJ 333 at para 30; *Dr. Mohd Nasir bin Hashim v. Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 para 5, 8 & 9; *Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor* [2015] 2 CLJ 328 COA

[12] *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21; *Attorney General of St. Christopher, Nevis and Anguilla v. Reynolds* [1979] 3 All ER 129 at 136; *Ong Ah Chuan v. PP* [1981] 1 MLJ 64; *Siva Rasiah v. Badan Peguam Malaysia* [2010] 2 MLJ 333 at para 3 & 5

The Queen [2002] UKPC 46, and which was cited with approval by our Court of Appeal.[13]

> *"It should never be forgotten that courts are the guardians of constitutional rights. A vitally important function of courts is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford. Provisos derogating from the scope of guaranteed rights are to be read restrictively. In the ordinary course they are to be given 'strict and narrow, rather than broad, constructions'"*

The formulation *"such restrictions as it deems necessary or expedient"* which appears in Article 10(2)(a), (b) and (c) of the Constitution came up for consideration in the Court of Appeal case of *Dr. Mohd Nasir bin Hashim v. Menteri Dalam Negeri Malaysia* when deciding whether section 7(1) of the Societies Act 1966 and the Registrar of Societies policy arising there from were restrictions permitted under Article 10(2)(c) of the Constitution.

[13] *Dr. Mohd Nasir bin Hashim v. Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 at para 5

The Court of Appeal held that any and all restrictions permitted to be imposed by Parliament pursuant to Article 10(2), which includes the right to freedom of speech and expression, must be reasonable restrictions. The Court of Appeal in setting out Article 10(2) asked itself the question *"Does this mean that Parliament is free to impose any restriction however unreasonable that restriction may be?"*. The Court of Appeal answered that question in the negative, and read into Article 10(2) the word *"reasonable"*.[14]

In coming to its decision, the Court of Appeal had considered that any restriction of a fundamental right, whether by legislation or by executive action, must be objectively fair, proportionate to the object sought to be achieved, must not render the Article 10 rights illusory and must therefore be reasonably necessary.[15] The Court of Appeal referred to this as the 'doctrine of rational nexus'. This approach and test was later affirmed by the Federal Court in *Siva Rasiah v. Badan Peguam Malaysia [2010]* 2 MLJ 333.

It is to be noted however that in the subsequent case of *Public Prosecutor v. Azmi Bin Sharom*[16] in 2015, wherein a challenge was made as to the constitutionality of section 4 of the Sedition Act and as being in contravention of the right to freedom of speech and

[14] *Dr. Mohd Nasir bin Hashim v. Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 at para 9
[15] *Dr. Mohd Nasir bin Hashim v. Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 at para 8, 9, 10 & 11
[16] [2015] 6 MLJ 751

expression in Article 10, a different bench of the Federal Court had rejected the 'reasonable' test as propounded by the Court of Appeal in the *Dr. Mohd Nasir bin Hashim* case and affirmed by the Federal Court in the case of *Siva Rasiah.* The Federal Court in *Azmi bin Sharom* stated that the 'reasonable' test was erroneously applied because:

(a) the Court of Appeal in *Dr. Mohd Nasir* had mis-construed the reasoning in *Ooi Ah Pua v. Officer-in-Charge Criminal Investigation, Kedah/Perlis*, and it did not justify the insertion of the word 'reasonable' in Article 10(2) because that case concerned the interpretation of Article 5(3) of the Constitution and not Article 10;

(b) the Court had failed to consider the decision in *Public Prosecutor v. Pung Chen Choon* where the reasonable test was rejected; and

(c) unlike the equivalent provision in the Indian Constitution where the word 'reasonable' appears, the said word was deliberately omitted from our Article 10.

However, in rejecting the 'reasonable' test, the Federal Court in Azmi bin Sharom accepted and affirmed with approval the 'proportionality' test as propounded in *Dr Mohd Nasir* and affirmed in *Siva Rasiah.*

In dealing with the 'reasonable' and 'proportionality' test as two distinct and separate tests, it appears that the Federal Court may have fallen into error.[17] A reading of the decision and reasoning in *Dr. Mohd Nasir* would show that they are not two separate tests, but are part and parcel of the one test which the Court of Appeal calls the doctrine of rational nexus. This may be discerned from paragraphs 8, 9, 10 and 11 of the case where after the Court of Appeal explains the doctrine of rational nexus and citing a passage from *Siva Segara v. Public Prosecutor,* which states that an interpretation of a legislation must meet the legislative purpose of the enactment and that the court must ensure that any restrictions with regards to constitutional rights and liberties must not amount to a total prohibition of the basic right so as to nullify or render meaningless the right guaranteed, went on to state:

> *"There it is. The court must not permit restrictions upon the rights conferred by art 10 that render those rights illusory. In*

[17] *PP v. Azmi bin Sharom* [2015] 6 MLJ 751 at para 32-34

other words, Parliament may only impose such restrictions as are reasonably necessary. To emphasise, only proportionate legislative response is permissible under art 10(2)(c).”

The Federal Court in *Siva Rasiah* had stated that the ‘proportionality’ test is a threefold or three stage test, namely, where a fundamental right is to be restricted:-

(a) the restriction must have an objective that is sufficiently important to justify limiting the right in question;
(b) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective;
(c) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve;
(d) The Federal Court therein stated that the test applies to both legislation and executive action. It is clear that the reasonableness of a restriction is part of the threefold ‘proportionality’ test. Put another way, a restriction of a fundamental right must not be disproportionate to the objective sought to be achieved, such as to render such right illusory or completely ineffective, and hence the restriction must be only to the extent reasonably necessary.

The Court of Appeal in the recent case of *Mat Shuhaimi Shafiei v. Kerajaan Malaysia*[18] in finding that section 3(3) of the Sedition Act 1948 as being unconstitutional and in breach of Article 10 had effective recognised the conflation of reasonableness and proportionality. This decision of the Court of Appeal is a significant decision with regards to our right of freedom of speech and expression. As stated earlier, the Sedition Act criminalised speech and expression without the need to show and prove seditious or criminal intent, irrespective of whether what was said was the truth or not, and irrespective of whether ill will or public disorder occurred or was likely to occur. For all intents and purposes, the offences in the Sedition Act were strict liability offences. This decision now requires seditious or criminal intent to be proved, and a person cannot now be guilty of sedition for merely voicing one's views.

This decision in *Mat Shuhaimi Shafiei* was appealed to the Federal Court, and is now pending its decision. The outcome should be fairly predictable depending on whether the approach is to uphold the primacy of the rights to equality and freedom of speech under Articles 8 and 10 of the constitution, or whether to rationalise

[18] [2017] 1 CLJ 404

legislation and executive action which impinges on these fundamental rights.

In reality, there ought to be no need to spend too much time arguing and agonising as to whether our laws are or ought to be reasonable and rational, or whether we are to imply it or read it to be such. We must by principle necessarily take it to be so. The contrary would be unthinkable. It must never come to pass that our laws are required to be reasonable only where the constitution expressly stipulates the requirement.

Our country was proclaimed to be established as a democracy based on the principles of justice and liberty. We cannot be heard to argue that in the absence of clear express words, our laws are not required to be reasonable or rational. It boggles the mind to even contemplate such that our laws and system of laws do not need to abide by and pass the test of objective fairness and reasonableness unless expressly stated. The principles of fairness and justice must necessarily form the basis and bedrock of our laws and justice system.[19] We are a nation premised on the rule of law.

[19] *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; *Dr. Mohd Nasir bin Hashim v. Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 at 219

The recent development of the law with regards the exercise of fundamental rights, in particular concerning the right to the freedom of speech and expression and permissible legislative restrictions and executive action on the exercise of those rights, has provided some measure of optimism.

However, the authorities have lately changed tack. They have resorted to using the Communication & Multimedia Act 1998 as a means to stifle and prosecute free speech. There are increasingly cases of people being arrested or charged with an offence under section 233 of the Communication & Multimedia Act 1998 for allegedly causing insult or humiliation. One such case involved a person being charged for publishing a sketch of the prime minster as a clown. A challenge has been made by the defendant in that case that the charge under section 233 was unconstitutional as being inconsistent with the fundamental right to freedom of speech and expression under Article 10(1)(a). This is pending in the Federal Court.[20]

The authorities have also resorted to the Immigration Act 1959/63 to impose travel bans on citizens going abroad. A few of these persons are opposition politicians, social activists and a cartoonist

[20] *Mohd. Fahmi Redza Mohd Zarin v. PP* [2017] MLJU 516

who were wishing to travel to attend speaking events or meetings. They are not terrorists or criminals. The courts have been most resistant to judicially review executive action in immigration matters, and ultimately holding that the exercise of ministerial discretion in such matters is absolute and not reviewable.

The Immigration Act 1959/63 provides in section 59 that no person has the right to be heard before the Minister or Director General makes any order against the person, and section 59A provides that there shall be no judicial review of any act done or decision made by the Minister or Director General. These provisions should have no place in a democracy. The provisions clearly abrogate the fundamental rights of a person's freedom of speech in making representations and to be heard, of the right to be treated fairly, justly and with dignity, of the right of access to justice and of the right to livelihood.

These provisions have been challenged by Zulkiflee SM Anwarul Haque, also known as Zunar, as being unconstitutional and an application has been made to refer these constitutional questions to the Federal Court. Decision on this application is scheduled to be delivered on 28th November 2017.

It is pertinent to note that the Sedition Act was amended in 2015 to insert a provision whereby the court is obliged, upon the application of the public prosecutor, to issue a travel ban or restriction on a person charged under the Sedition Act.

Although the right to freedom of speech and expression is constitutionally provided for, there are many hazards and obstacles presented by executive action on the exercise of that right. Perhaps we will remain a flawed democracy for some time to come.

National Harmony

One of the constant debates in recent past and present concerns the issue of managing the delicate social fabric and diverse community of Malaysia. It has been said that the racial, religious and cultural diversity of Malaysia has given rise to sensitivities which require particular management. It would be fair and safe to say that most people would agree with such a statement of recognition and concern.

However, some quarters have advocated this as the reason for criminalising speech and expression. For example, the amendments made to the Sedition Act in 2015 to make it more onerous and

draconian. Although the amendment has removed criticisms of the government and of the judiciary as seditious offences, the amendments have introduced, amongst other things, the offence of promoting ill will, hostility and hatred between persons on the ground of religion. Previously, the penalty for a seditious offence was a fine of not more than RM5,000 or imprisonment for a term not exceeding 3 years or both, and for a subsequent offence, to imprisonment of a term not exceeding 5 years. The amendment has now brought in mandatory imprisonment of a minimum of 3 years for any offences under the Act. We must remember that all of this is in the context of an Act which does away with the usual safeguards or ingredients in criminal offences. It must be noted that the amendments have not yet been gazetted into force.

There is no denying that there are many things which could be said and have been said, and easily said in this age of the internet and world wide web, which could cause misunderstandings, intolerance, ill will, hatred, and hostilities.

Examples of these are : The labeling of certain groups of Malaysians as “pendatangs”; the online posting of a non-Muslim couple wishing Muslims happy Ramadhan whilst eating what was said to look like pork; a statement made on tweeter that Friday sermons approved by JAKIM were promoting extremism;

comments were reported to have been made by a politician calling for the burning of bibles; the use of the word 'Allah' by non-Muslims; comments or complaints that the public call to prayer was too loud (a politician was detained under the ISA); demonstrations using a cow's head – an animal deemed sacred to Hindus; inappropriate and offensive remarks of women made by a politician in Parliament; the banning of beer festivals. There are other incidents, some of which were so vitriolic that it amounted to hate speech.

At first blush, one can see why criminalising such speech and expression may seem attractive; perhaps it is because some see it as the fastest way to defuse a situation and an easy way to deal with the matter. Just clamp down, put a lid on it or sweep it under the carpet. It is a quick fix.

The question to ask is whether criminalising such speech and expression adequately addresses the problem giving rise to such speech in the first place. I am of the view that it does not. It merely punishes people for their views and beliefs, whether these views are expressed by way of discourse, shouted across a room or by way of caricature. The punishment would in many instances not serve to address the underlying issue, nor to educate, persuade or convince

one to a contrary view. Criminal penalties may serve as a superficial panacea; it certainly will not serve as a cure. Punishment may instead serve to engender bitterness and harden views.

Permit me to recall what I had previously said:

> *"In genuinely wanting peace and harmony, we should be honest with ourselves as to what the real causes of disharmony are in Malaysia. In many instances, disharmony arises from insecurity, the exploitation of such insecurity, and the inability or unwillingness to deal with questions, criticisms or differing views in a mature manner.*
>
> *There are quarters in Malaysia who have created an environment of disharmony – misinterpreting and abusing the Federal Constitution, distorting our history, exploiting insecurities, and resorting to scare-mongering and threats of, incitement to violence against property or persons, as a response to questions, criticisms or differing views. These people are not brought to account by the law. Instead, the Sedition Act 1948 is used against the persons who raise questions, concerns or criticisms.*

In maintaining the Sedition Act 1948, we would be playing into the hands of, and caving to, pressure by these irresponsible quarters. It is not peace and harmony that would be achieved through the maintenance of the Sedition Act 1948, but a perpetuation of disharmony. Recent events, the abuse of the Sedition Act 1948, and the current disharmony in Malaysia directly inform us of this.

Achieving real and lasting peace and harmony requires commitment and hard work, and not criminalisation of criticisms and expressions of thought."[21]

"Instead of fostering moderation and understanding, or safeguarding national harmony, the effect of the Sedition Act 1948, [and laws criminalising speech and expression,] would ensure that people perpetually walk on eggshells."[22]

It is easy to criminalise speech and expression which we do not agree with or like as it deals physically with the person, which is, we make him pay a fine or lock him away; it does not deal with the contents of the person's grievances, thoughts and beliefs. But it is in dealing with the latter which would have long term benefits for our democracy.

[21] "Repeal of Sedition Act 1948: A Promise Unfulfilled" 28th November 2014, Malaysia Bar Press Release
[22] "Cease Use of Sedition Act 1948: We Should Not Have to Walk on Eggshells in Malaysia" 15 January 2015, Malaysian Bar Press Release

Ladies and gentlemen,

We must not criminalise speech and expression, even hate speech, unless it is an incitement to violence to persons and damage to property.

For so long as our nation continues to show heavy dependence on laws restricting the exercise of the right to freedom of speech and expression, that our constitution permits such legislation and continue to carve out areas prohibited from discourse, ours would continue to be a democracy lacking in maturity.

Thank you for your kind indulgence.