THE COURTS AND THE ENFORCEMENT OF HUMAN RIGHTS

This article examines how the Malaysian courts have dealt with substantive human rights issues in the cases that have come before them, focusing particularly on the last ten years. It highlights cases where the courts demonstrated greater willingness to review executive action and parliamentary legislation and test them against constitutional provisions that protect fundamental liberties such as the right to life, and freedom of expression, association and assembly. It also looks at cases which have taken a less flexible approach on these issues. The article also touches on the issues of access to justice, *locus standi* and justiciability of cases involving human rights issues before the Malaysian courts.

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> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people …[2]

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2 From the Preamble to the Universal Declaration of Human Rights (10 December 1948).

I. Universality of human rights

1 Human rights are inalienable and they belong to every human being. The Universal Declaration of Human Rights ("UDHR") was adopted by the United Nations ("UN") General Assembly on 10 December 1948. The 10th of December is now celebrated the world over as "Human Rights Day".

2 The UDHR was born out of the atrocities of the Second World War by the recognition of nations that it was necessary to articulate a set of values that uphold the rights and dignity of man. This idea was not a new one and had been expressed in documents such as the French "Declaration of the Rights of Man and of the Citizen", which was crafted amidst the French Revolution on the basis that "men are born and remain free and equal in rights". Likewise, the US Declaration of Independence states: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights …."

3 Since the UDHR, several core UN instruments have emerged such as the International Convention on the Elimination of All Forms of Racial Discrimination[3] ("ICERD") in 1965, the International Covenant on Civil and Political Rights[4] in 1966 and the International Covenant on Economic, Social and Cultural Rights[5] in 1966. There are also other core declarations involving human rights, which are not legally binding.

4 Human rights instruments merely articulate and recognise that human rights exist; they do not create them.

II. Background on Malaysia and human rights

A. Fundamental liberties

5 Malaysia has had a rich history of co-operation with the UN. It was also an active member of the Commission on Human Rights for three terms, up till the time the Commission was dissolved and the Human Rights Council ("HRC") was set up. Malaysia has been a member of the HRC from 2006–2009 and 2010–2013.

3 660 UNTS 195 (7 March 1966; entry into force 4 January 1969).
4 999 UNTS 171 (16 December 1966; entry into force 23 March 1976).
5 993 UNTS 3 (16 December 1966; entry into force 3 January 1976).

6 Malaysia's Federal Constitution protects fundamental liberties such as the right to life, equality, freedom of expression, association and assembly, and freedom of religion.[6] The protected fundamental liberties echo some of the provisions found in the UDHR. The Malaysian Constitution, however, allows for Parliament to impose restrictions on certain freedoms as it deems necessary in the interests of, *inter alia*, national security, public order or public morality.[7]

7 These fundamental liberties are clearly recognised by the Malaysian government who in the "Aide Memoire" dated 3 May 2010 in support of Malaysia's bid for membership of the HRC in 2010 stated:[8]

> At the national level, Malaysia is actively seeking to promote and protect human rights through efforts in various fields.
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> Since independence in 1957, our efforts to promote and protect human rights have been reflected in our laws and regulations. These include:
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> > Federal Constitution of Malaysia – provisions under Part II of the Constitution forms the basis for the promotion and protection of human rights … Articles 5 to 13 further reinforce the rights of personal liberty; prohibition against slavery and forced labour; protection against retrospective criminal laws and repeated trials; equal protection under the law; freedom of movement; rights to speech, assembly and association; freedom of religion; rights in respect of education and rights to property.

8 There is no doubt whatsoever that the supreme law of the land, the Federal Constitution, provides the underpinnings for human rights in Malaysia.

B. Oppressive laws

9 When the UDHR was signed in 1948, the territories which now make up Malaysia were under British colonial rule. Malaya (Peninsular Malaysia) achieved independence in 1957 and the nation state Malaysia was born in 1963.

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6 Federal Constitution (2010 Reprint) Arts 5–13.

7 Federal Constitution (2010 Reprint) Art 10(2).

8 Annex to the letter dated 23 April 2010 from the Permanent Representative of Malaysia to the United Nations addressed to the President of the General Assembly – Malaysia's pledges and voluntary commitments for its candidature to the Human Rights Council for the term 2010–2013 (UN Doc A/64/765) (3 May 2010) at paras 13–14.1.

10 The British left behind a slew of draconian laws, which include the Sedition Act 1948,[9] official secrets laws, and preventive detention laws which were later consolidated in the Internal Security Act 1960 ("ISA").[10]

11 Malaysia also enacted draconian laws of its own which required newspapers to obtain government licences to operate,[11] curbed student political participation[12] and made it illegal to assemble in public without a police permit.[13] It extended the application of the death penalty and made it a mandatory punishment for drug trafficking in 1983.[14]

12 The advent of the Internet was accompanied by repressive laws specific to the online environment. It is criminal to post offensive content online with the intent of merely annoying others[15] while an amendment to the Evidence Act 1950[16] presumes that any online publication with a person's name or photograph on it, or that originated from his or her computer, was published by that person.

13 Another series of repressive laws were enacted in the last years of Prime Minister Najib Razak's leadership, following revelations of massive corruption in the now infamous sovereign wealth fund 1Malaysia Development Berhad. Amongst these laws was the National Security Council Act 2016[17] which gives unfettered powers to a national security council headed by the prime minister and allows him or her to make declarations establishing "security areas". Much like an emergency

9 Act 15.

10 The Internal Security Act 1960 (Act 82) was repealed in 2012. Other laws were amended, however, to provide for detention without trial, which is still carried out under the Security Offences (Special Measures) Act 2012 (Act 747), Prevention of Crime Act 1959 (Act 297) and Prevention of Terrorism Act 2015 (Act 769).

11 Printing Presses and Publications Act 1984 (Act 301).

12 Universities and University Colleges Act 1971 (Act 30) ("UUCA"). Section 15(5)(a) of the UUCA prohibited students from expressing support for, sympathy with, or opposition to any political party, whether in or outside Malaysia. This section was declared unconstitutional by the Court of Appeal in the case of *Muhammad Hilman bin Idham v Kerajaan Malaysia* [2011] 6 MLJ 507; [2011] MLJU 768 and subsequently repealed by Parliament. Section 15(2)(c) of the UUCA which barred students from taking part in political party activities within campus was repealed by Parliament in December 2018.

13 Police Act 1967 (Act 344) s 27. The section was subsequently repealed and replaced by the Peaceful Assembly Act 2012 (Act 736).

14 A November 2017 amendment to s 39B of the Dangerous Drugs Act 1952 (Act 234) allows the court to exercise its discretion whether or not to impose the death penalty if the convicted person had assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

15 Communications and Multimedia Act 1998 (Act 588) ss 211 and 233.

16 Evidence Act 1950 (Act 56) s 114A.

17 Act 776.

situation, the operation of the ordinary laws of the land would be temporarily suspended within these areas. The Government also enacted the Anti-Fake News Act 2018, a broadly worded law that could have been easily abused, but for its recent repeal.[18]

14 Many have suffered under these laws. Government critics have been detained without trial, including in 1987, when over 100 opposition leaders and activists were arrested overnight under the ISA.[19] Three newspapers had their printing licences revoked at the same time, putting thousands of jobs at risk.[20]

15 Following former Deputy Prime Minister Anwar Ibrahim's arrest in 1998, protesters faced violent crackdowns by the riot police who used tear gas and water cannons against them. Similar tactics were used against protesters at the Bersih 2.0 rallies in 2011 and 2012, which called for electoral reform. A public inquiry by the Human Rights Commission of Malaysia ("SUHAKAM") on the 2012 rally found that the police used disproportionate force and had misconducted themselves during the rally. Protesters testified that they were punched, strangled, slapped, kicked and stomped on by police personnel.

16 Since then, however, the Peaceful Assembly Act 2012[21] has been passed. Though not ideal, it was a marked improvement on the then existing legislation.

17 Malaysia was waking up to a new scenario of an empowered public, intent on their voices being heard. This finally resulted in the historic, peaceful change of government in May 2018, despite the numerous challenges faced by the people in the electoral process.

C. Access to justice

18 Having rights would be meaningless unless there is an accessible avenue to enforce them. All persons who have legitimate grievances must have access to a system of adjudication that can provide them with an effective remedy.

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18 "Dewan Rakyat Passes Bill to Repeal Anti-Fake News Law" *Bernama* (9 October 2019).

19 "Operation Lalang Revisited" *Aliran Monthly* (December 2008).

20 Thor Kah Hoong, "The Day the Malaysian Press Was Muzzled" *The Malaysian Insight* (27 October 2017).

21 Act 736.

19 Human rights abuses must be investigated and appropriate redress provided, failing which the fundamental liberties under the Federal Constitution will become meaningless.

20 Malaysia has seen an increase in the number of public interest litigation cases, including class actions before the courts, and almost all of them involve some aspect of human rights:[22]

> Public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights …

D. Locus standi

21 Closely linked to public interest litigation are the issues of *locus standi* and justiciability. These issues are frequently raised against litigants which often thwart access to the courts.

22 One of the earliest and most prominent public interest cases was the 1988 case, *Government of Malaysia v Lim Kit Siang*[23] ("*Lim Kit Siang*"), involving the former Opposition leader. Lim opposed the privatisation of the North/South Highway project to United Engineers (M) Bhd ("UEM"), alleging that there were improprieties in the tender exercise and a conflict of interest.

23 In his capacity as a member of Parliament, Lim filed suit for a declaration that the Government's letter of intent issued to UEM in respect of the North/South Highway contract was invalid and sought an interim injunction to restrain UEM from signing the contract. An *ex parte* interim injunction was refused by the High Court, but on appeal to the then Supreme Court, the interim injunction was granted with liberty to apply.

24 UEM then applied to set aside the injunction, *inter alia*, on the grounds that Lim had no *locus standi*. This application failed at the High Court but succeeded in the then Supreme Court, where a majority of the panel took a restricted view of cause of action and *locus standi*.

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22 *Malik Brothers v Narendra Dadhiah* AIR 1999 SC 3211. Cited with approval in *QSR Brands Bhd v Suruhanjaya Sekuriti* [2006] 3 MLJ 164; [2006] 2 CLJ 530.

23 [1988] 2 MLJ 12.

25 Two strong dissenting judgments, however, were delivered by George Seah SCJ and Eusoffe Abdoolcader SCJ. Abdoolcader SCJ held that to deny *locus standi* in this case would be a "retrograde step".[24]

26 The threshold *locus standi* test was broadened in the 2006 case of *QSR Brands Bhd v Suruhanjaya Sekuriti*[25] ("*QSR Brands*"). Gopal Sri Ram JCA (as he then was) recognised the importance of public interest litigation, and held that for *certiorari* applications under O 53 of the Rules of Court 2012 and other public law remedies, a far more liberal threshold *locus standi* test should be applied. He distinguished *Lim Kit Siang* on the basis that that was a case involving standing to obtain a private law remedy in a public law context. Order 53 of the Rules of Court at that time stated that the applicant should be "adversely affected" by the decision of any public authority before the party could launch an application for judicial review. The judge held that the phrase "adversely affected" called for a flexible approach.[26]

27 Order 53 was subsequently amended to further broaden the threshold *locus standi* test. Where previously, only those adversely affected by a public authority's *decision* would qualify to apply, this was extended to a public authority's *actions and omissions* as well. The current O 53 r 2(4) reads as follows:

> Any person who is *adversely affected by the decision, action or omission* in relation to the exercise of the public duty or function shall be entitled to make the application. [emphasis added]

28 The intention to include the words "action or omission" in O 53 r 2(4) was clearly to make the ambit of reviewable matters much wider.

29 In 2014, the Federal Court in the case of *Malaysian Trade Union Congress v Menteri Tenaga, Air dan Komunikasi*[27] ("*MTUC*") affirmed the *QSR Brands* decision that the threshold *locus standi* test for public law remedies was whether the applicant had been "adversely affected".

30 The case involved an application by the Malaysian Trade Union Congress ("MTUC") to have access to a concession agreement and an audit report following the relevant Minister's decision to increase water tariffs in Selangor and the Federal Territory.

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24 *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at 45.
25 [2006] 3 MLJ 164; [2006] 2 CLJ 532.
26 *QSR Brands Bhd v Suruhanjaya Sekuriti* [2006] 3 MLJ 164; [2006] 2 CLJ 532 at [16].
27 [2014] 3 MLJ 145.

31 The court held that in applying for access to the documents and in wanting to demonstrate a lack of transparency in the decision to increase the water tariffs, only MTUC (and not the other parties) had a real and genuine interest in the documents and was adversely affected by the Minister's decision. The court recognised that this constituted public interest litigation and distinguished *Lim Kit Siang* on the same ground as in *QSR Brands*, namely, that that was a case brought in private law.[28]

32 It must be noted that the courts in *MTUC* and *QSR Brands* also made a distinction between threshold *locus standi*, namely, whether a party is "adversely affected", and substantive *locus standi*, namely, where the facts do or do not justify the relief sought.

E. Justiciability

33 The issue of justiciability was a factor in the case of *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia*.[29] The appellant, an Opposition member of Parliament, had applied for and been denied Special Constituency Allocations by the Director of the Perak State Development Office. His application for leave for judicial review was granted in the High Court but set aside in the Court of Appeal. He subsequently failed in his application to obtain leave to appeal to the Federal Court.

34 The Federal Court held that the courts did not possess the knowledge of policy considerations that underlie the decision and that therefore it was non-justiciable. However, they reserved the position thus:[30]

> 16 We have no hesitation in accepting that the executive's discretion, whether by statute or prerogative is amenable to judicial review. …
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> …
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> 21 Of course, in appropriate cases the courts as the custodian of law and justice must not remain idle. Where the policy or action of the executive is inconsistent with the Constitution and the law or in any manner arbitrary, irrational or there are elements of mala fides and abuse of power, the court is duty bound to interfere. …

28 Malaysian Trade Union Congress, however, failed to obtain the reliefs sought on the substantive facts of the case.

29 [2013] 2 MLJ 321.

30 *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321 at [16] and [21].

35 The Federal Court has since gone on to rule in several cases that decisions made in Parliament[31] or the Legislative Assembly[32] were justiciable, if they violated the law or the Federal Constitution.[33] Likewise, there were cases that went the other way.[34]

36 The most recent decision of *Peguam Negara Malaysia v Chin Chee Kow*[35] even went so far as to hold that the Attorney-General's power to give consent or otherwise under s 9(1) of the Government Proceedings Act 1956[36] was not absolute and subject to legal limits. Zawawi Salleh FCJ stated: "We hasten to add that unfettered discretion is contradictory to the rule of law."[37] The court had no hesitation in intervening to provide redress.

37 The Malaysian courts have shown that they are, in appropriate cases, willing to take a more flexible approach on issues of *locus standi* and justiciability. In fact, we have also observed an increasing flexibility by the courts in allowing watching briefs and *amicus* briefs in public interest cases and in making "no costs" orders on the grounds that a matter is a public interest case. Since 2018, it has also been a common practice for the Federal Court to feature seven- or nine-member benches for cases of constitutional importance, indicating the seriousness with which the Judiciary views such cases. This augurs well for the future of public interest litigation.

III. Malaysia and international human rights law

38 To date, Malaysia has only ratified three out of the nine core international human rights treaties. In 1995, Malaysia ratified the Convention on the Elimination of All Forms of Discrimination against Women[38] ("CEDAW"), with reservations, and the Convention on the

31 *Yang Dipertua, Dewan Rakyat v Gobind Singh Deo* [2014] 6 MLJ 812.
32 *Dewan Undangan Negeri Selangor v Mohd Hafarizam bin Harun* [2016] 4 MLJ 661.
33 In 2017, the Federal Court, however, ruled that a declaration by the Speaker of the Selangor State Legislative Assembly that a constituency seat was vacant due to the assemblyperson having been absent from assembly meetings for more than six months without leave was non-justiciable, despite the declaration having been made outside assembly proceedings. *Teng Chang Khim v Badrul Hisham bin Abdullah* [2017] 5 MLJ 567.
34 *Teng Chang Khim v Badrul Hisham bin Abdullah* [2017] 5 MLJ 567.
35 [2019] 3 MLJ 443.
36 Act 359.
37 *Peguam Negara Malaysia v Chin Chee Kow* [2019] 3 MLJ 443 at [83].
38 1249 UNTS 13 (18 December 1979; entry into force 3 September 1981) ("CEDAW"). Malaysia has entered reservations on Arts 9(2), 16(1)(a), 16(1)(f) and 16(1)(g). It has also stated that Malaysia's accession is subject to the understanding that the

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Rights of the Child[39] ("CRC"), with reservations, and in 2010, it ratified the Convention on the Rights of Persons with Disabilities.[40]

39 In the 23 years since ratifying CEDAW and CRC, Malaysia has only reported twice to the CEDAW Committee[41] and once to the Committee on the Rights of the Child.[42]

40 In 1999, the Government established SUHAKAM to further the protection and promotion of human rights in Malaysia. Under its enabling legislation, SUHAKAM is to submit annual reports to Parliament. Until 2019, however, SUHAKAM's reports had never been debated in Parliament[43] and were tabled for the first time for debate in December 2019.[44]

41 In the last several years we have seen leaders condemn human rights as an ideology called "human right-ism", claiming these rights rejected the values of religion and etiquette.[45] Very often the charge is that human rights is a "western concept" and not relevant in the Asian context. Unfortunately, those making these claims ignore completely that these fundamental rights are enshrined and guaranteed in the Federal Constitution.

42 The courts have been ambivalent about applying international law principles as aids to interpretation. This is despite the enactment of the Human Rights Commission of Malaysia Act 1999[46] ("SUHAKAM Act") which specifically states in s 4(4) that regard shall be had to the UDHR "to the extent that it is not inconsistent with the Federal Constitution".

43 Eminent law professor Shad Saleem Faruqi has opined that: "Ever since the passing of this Act, no doubts should exist about the

provisions of CEDAW do not conflict with the provisions of the Islamic Shariah law and the Federal Constitution (2010 Reprint).

39 1577 UNTS 3 (20 November 1989; entry into force 2 September 1990). Malaysia has entered reservations on Arts 2, 7, 14, 28(1)(a) and 37.

40 2515 UNTS 3 (13 December 2006; entry into force 3 May 2008).

41 Reports submitted in 2006 and 2018. State parties are meant to submit a report every four years.

42 Report submitted in 2006. State parties are meant to submit their first report two years after ratification, then every five years.

43 Mei Mei Chu, "Suhakam: Parliament Has to 'Own' Human Rights in Malaysia" *The Star* (4 April 2017).

44 Anabelle Lee, "Parliament to Finally Debate Suhakam's Report" *Malaysiakini* (12 September 2019).

45 Ong Han Sean, "Najib: 'Human Rights-ism' Goes Against Muslim Values" *The Star* (13 May 2014).

46 Act 597.

applicability and enforceability of the UDHR to Malaysia." He stated that the SUHAKAM Act "had given a kiss of life and of validity to the UDHR".[47]

44 The Malaysian Federal Court in 2002 held that the UDHR is declaratory in nature and not a binding document. It interpreted the words "regard shall be had" in the SUHAKAM Act to mean that it is an invitation to look at the UDHR "if one is disposed to do so, consider the principles stated therein and be persuaded by them if need be" and that beyond that, there was no obligation to be bound.[48] Nevertheless, there was a recognition that the UDHR could be referred to by the courts where appropriate.

45 Since the case of *Mohamad Ezam Mohd Noor v Ketua Polis Negara*[49] ("*Ezam*"), there has been an increasing openness demonstrated by judges in referring to international human rights standards and in interpreting the Constitution in a manner consistent with those standards.

46 In the 2011 High Court case of *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun*[50] ("*Noorfadilla*"), the court recognised its duty to take into account the Government's obligations at an international level, especially under an international convention that it has ratified. In deciding whether there was gender discrimination when a woman's employment with the Government as a relief teacher was terminated after she became pregnant, Zaleha Yusof J (as she then was) stated that "the court has no choice but to refer to CEDAW in clarifying the term 'equality' and gender discrimination under Art 8(2) of the Federal Constitution".[51] Applying the CEDAW definition of "discrimination", she found that the termination of employment due to pregnancy was a form of gender discrimination. It was a basic biological fact that only women had the capacity to become pregnant and thus discrimination on the basis of pregnancy was a form of gender discrimination.[52]

47 International law was also relied on in the 2005 Court of Appeal case of *Kerajaan Negeri Selangor v Sagong bin Tasi*.[53] The case recognised the right of an indigenous tribe ("the Temuan tribe") to customary title of their land which had been acquired by the Selangor State Government

47 Shad Saleem Faruqi, "Human Rights, International Law and Municipal Courts" *SUHAKAM* (24 October 2009).
48 *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara* [2002] 4 CLJ 309 at 386.
49 [2002] 4 CLJ 309.
50 [2012] 1 MLJ 832.
51 *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun* [2012] 1 MLJ 832 at [28].
52 *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun* [2012] 1 MLJ 832 at [32].
53 *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289.

to construct a highway. The court ruled that under common law, the Temuan tribe had a right to the land itself, and not just to use it. This meant that the Temuan tribe had to be paid compensation for the land itself, and not just their fruit or rubber trees on the land. In coming to its decision, the Court of Appeal relied on international cases such as *Mabo v State of Queensland*[54] ("*Mabo No 2*").

IV. Human rights in the Malaysian courts

48 How have the Malaysian courts dealt with substantive human rights issues in the cases that have come before them?

A. Conservative beginnings and ouster clauses

49 The Malaysian courts have tended to be conservative in the past when called upon to measure government action against the standard of human rights. The courts have previously declined to rule that laws that restricted the fundamental liberties protected under Pt II of the Federal Constitution, were unconstitutional.[55]

50 In the Supreme Court case of *Public Prosecutor v Pung Chen Choon*[56] ("*Pung Chen Choon*"), reported in 1994, it was found that it was not the court's duty to decide on whether legislation that restricted fundamental liberties was reasonable (in this case s 8A of the Printing Presses and Publications Act 1984),[57] but only whether the law came within the orbit of the permitted restrictions.[58] Edgar Joseph Jr SCJ stated:[59]

> But with regard to Malaysia, when infringement of the right to freedom of speech and expression is alleged, the scope of the court's inquiry is limited to the question whether the impugned law comes within the orbit of the permitted restrictions … 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) [of the Constitution], the question whether it is reasonable does not arise, the law would be valid.

51 He also went on to state that there should be a presumption of the constitutional validity of any law that is questioned and the burden

54 (1980) 64 ALR 1.
55 *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566.
56 [1994] 1 MLJ 566.
57 Act 301.
58 *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 at 575.
59 *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 at 575.

of proof would lie on the party seeking to establish the contrary.[60] Some of the court's conservatism was also by legislative design – the courts' jurisdiction to review certain actions of the Executive is excluded in several Acts of Parliament.[61] These clauses are commonly referred to as ouster clauses.

52 In 1988, for instance, the Government notoriously introduced amendments to the ISA to state that:[62]

> … there would be no judicial review … of any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

53 The discretion of the Minister included being able to make two-year detention orders, renewable indefinitely, if he or she was satisfied that the detention of any person was necessary to prevent them from acting in any manner prejudicial to national security, the maintenance of essential services, or economic life.[63]

54 Applications for *habeas corpus* for ISA detentions were therefore confined to the courts merely examining whether the correct procedure had been followed in arrests under the Act. Even in *habeas corpus* applications for unlawful detention, the courts have been accused of showing "deference" to the Government in ISA cases.[64]

55 This deference could be observed in the courts' reluctance to assume jurisdiction to review the exercise of police powers under the ISA. Section 73 of the ISA allowed the police to detain anyone for up to 60 days in respect of whom they had "reason to believe" there were grounds to justify their detention under s 8 of the Act and who had acted or was likely to act in any manner prejudicial to national security.

56 In a 1988 case, the Supreme Court in *Theresa Lim Chin Chin v Inspector General of Police*[65] declined to examine the validity of the police's

60 *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 at 576 following the decision in *Public Prosecutor v Datuk Harun bin Haji Idris* [1976] 2 MLJ 116.

61 See, for example, s 11(c) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316); s 48 of the Film Censorship Act 2002 (Act 620); s 59A(1) of the Immigration Act 1959/1963 (Act 155); s 23(1) of the Witness Protection Act 2009 (Act 696); and s 19(1) of the Prevention of Terrorism Act 2015 (Act 769).

62 Internal Security Act 1960 (Act 82) s 8B.

63 Internal Security Act 1960 (Act 82) s 8.

64 "Detained Without Trial: Abuse of Internal Security Act Detainees in Malaysia" (2005) 17(9) *Human Rights Watch* (September 2005).

65 [1988] 1 MLJ 293.

grounds of belief in detaining a suspect. The court applied the subjective test to s 73 of the ISA, stating that "the court would not be in a position to review the fairness of the decision-making process by the police and the Minister because of the lack of evidence, since the Constitution and the law protect them from disclosing any information and materials in their possession upon which they based their decision".[66]

57 This approach changed, however, in the Federal Court case of *Ezam* where it was held that the police power to detain for 60 days under the ISA was separate from the exercise of the Minister's discretion to issue a two-year detention order and that the court was entitled to review the police's grounds of belief in detaining a person under the Act. The court also held that the police had to demonstrate that the preconditions for detention under s 73 had been satisfied.[67]

58 This was an important decision at that time which signified a turning point within the Judiciary in 2002, demonstrating their willingness to examine the reasonableness of executive action and to hold them to account, even where there is an ouster clause.

59 The landmark Federal Court case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*[68] ("*Semenyih Jaya*"), however, must be cited for clearing the uncertainties on the issue of judicial power and reclaiming for all time, judicial independence. It further breathed life back into the doctrine of separation of powers, so vital to the rule of law. It reiterated the "basic structure" doctrine.

60 It was held in that case that the judicial power of the court resided in the Judiciary and no other, as set out in Art 121(1) of the Federal Constitution.

61 This was part of the basic structure of the Federal Constitution which establishes the three arms of government, namely, the Executive, the Legislature and the Judiciary, to ensure that there is sufficient check and balance. Any law that usurped this judicial power could thus be declared unconstitutional, which was the case here.

62 The decision in *Semenyih Jaya* was relied upon in a recent case involving the interpretation of s 13 of the Security Offences (Special Measures) Act 2012[69] ("SOSMA"), which states that no bail may be

66 *Theresa Lim Chin Chin v Inspector General of Police* [1988] 1 MLJ 293 at 293.
67 *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara* [2002] 4 CLJ 309 at 314.
68 [2017] 3 MLJ 561.
69 Act 747.

granted for those charged with security offences. The High Court held that s 13 of the Act was unconstitutional "because it divests from the courts the judicial discretionary power to evaluate whether or not to grant or refuse bail applications".[70]

63 Other cases of judicial review before the courts involving ouster clauses have also adopted the rationale in the UK House of Lords case of *Anisminic Ltd v Foreign Compensation Commission*[71] which held that ouster clauses cannot remove the jurisdiction of the courts to intervene in situations where an adjudicator, person, authority or tribunal had made a "jurisdictional error" or to examine an executive decision to determine whether or not an error of law had been made which would render the decision a nullity.

B. Protecting fundamental liberties

64 Following *Ezam*, there has emerged particularly, in the past ten years, a string of court decisions that have demonstrated a greater willingness to review executive action and parliamentary legislation and to test them against the relevant constitutional provisions. There have also been cases which have taken a less flexible approach, which will be discussed below.[72]

65 In *Sivarasa Rasiah v Badan Peguam Malaysia*[73] ("*Sivarasa*"), the Federal Court revisited the issue of whether the court could examine the reasonableness of a restriction imposed by Parliament on a fundamental liberty protected by the Federal Constitution.

66 The case examined the constitutionality of a law that prohibited, amongst others, members of Parliament from becoming elected members of the Bar Council. The appellant in the case maintained that the prohibition violated his right to freedom of association guaranteed under Art 10(1)(c) of Malaysia's Federal Constitution. The Constitution, however, also states that Parliament may impose restrictions on the right "as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality".[74]

67 In testing the constitutionality of the relevant law against the Constitution, the Federal Court held that "[p]rovisos or restrictions that

70 "Saminathan Allowed to Apply for Bail" *The Star* (30 November 2019).
71 [1969] 2 AC 147.
72 See paras 102–129 below.
73 [2010] 2 MLJ 333.
74 Federal Constitution (2010 Reprint) Art 10(2)(c).

limit or derogate from a guaranteed right must be read restrictively".[75] The Federal Court adopted a much-quoted decision of former Lord President Raja Azlan Shah (as he then was) in *Dato' Menteri Othman bin Baginda v Dato' Ombi Syed Alwi bin Syed Idrus*[76] which provided guidance on constitutional interpretation, stating thus:[77]

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – 'with less rigidity and more generosity than other Acts' … A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation.

68 The court in *Sivarasa* then went on to hold that any restrictions imposed by Parliament on fundamental liberties guaranteed in the Constitution, such as the freedom of expression, assembly and association, must be reasonable. The court adopted the reasoning of an earlier Court of Appeal decision in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia*[78] ("*Dr Mohd Nasir Hashim*") where it was held that:[79]

> 7 The long and short of it is that our Constitution – especially those articles in it that confer on our citizens *the most cherished of human rights* – must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become.
>
> 8 … not only must the legislative or executive response to a state of affairs be objectively fair, it must also be *proportionate* to the object sought to be achieved. This is sometimes referred to as 'the doctrine of rational nexus'.
>
> [emphasis added]

69 The court in *Dr Mohd Nasir Hashim* went on to say:[80]

> The court must not permit restrictions upon the rights conferred by art 10 [of the Federal Constitution] that renders those rights illusory. In other words, Parliament may only impose such restrictions as are reasonably necessary. To emphasise, only proportionate legislative response is permissible ….

75 *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333 at [5].
76 [1981] 1 MLJ 29.
77 *Dato' Menteri Othman bin Baginda v Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 at 32.
78 [2006] 6 MLJ 213.
79 *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 at [7] and [8].
80 *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 at [11].

70 The Federal Court also held in *Sivarasa* that Pt II of the Federal Constitution, which guarantees fundamental liberties, was part of the basic structure of the Constitution and that Parliament could not enact laws that violated that basic structure.[81] Gopal Sri Ram FCJ stated as follows:[82]

> … it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional … Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution.

71 Despite the fact that Sivarasa failed in his challenge, the Federal Court decision in *Sivarasa* was a step forward in the upholding of fundamental liberties in Malaysia. As stated above, there are numerous legislation that curtail fundamental rights such as the freedom of expression, assembly and association, which have often been used by the authorities to investigate and charge human rights defenders and activists. The fact that the court indicated a willingness to examine whether these laws were reasonable and proportionate was a departure from the earlier reluctance to do so.

C. Reasonable and proportionate

72 The Federal Court decision in *Sivarasa* regarding the need for parliamentary restrictions on fundamental liberties to be reasonable and proportionate was applied in the following cases that upheld various fundamental liberties.

(1) Freedom of expression

73 In the Court of Appeal case of *Muhammad Hilman bin Idham v Kerajaan Malaysia*[83] ("*Muhammad Hilman*"), the court was asked to determine whether s 15(5)(a) of the Universities and University Colleges Act 1971[84] ("UUCA") was unconstitutional. The section prohibited university students from expressing or doing anything "which may reasonably be construed as expressing support for or sympathy with or opposition to any political party, whether inside or outside Malaysia".

81 *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333 at [7].
82 *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333 at [8].
83 [2011] 6 MLJ 507; [2011] 9 CLJ 50.
84 Act 30.

74 Three students had been charged by their universities under the section for being present at a by-election and having in their possession election paraphernalia.

75 In applying the test in *Sivarasa*, the majority of the Court of Appeal held that s 15(5)(a) was unconstitutional as it was found to have violated the fundamental right to freedom of expression without a clear nexus to any threat to public order or morality. Hishamudin Mohd Yunus JCA, in his judgment, stated that he was "unable to find any explanation as to the link between prohibiting university students from expressing support for or opposition against a political party and the maintenance of public order or public morality".[85]

76 The court also affirmed the importance of the freedom of expression as a fundamental human right stating by reference to international law as follows:[86]

> Freedom of expression is one of the most fundamental rights that individuals enjoy. It is fundamental to the existence of democracy and the respect of human dignity. This basic right is recognised in numerous human rights documents such as article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights. Free speech is accorded pre-eminent status in the constitutions of many countries.

77 The judgment also expressly stated that the more conservative view espoused in *Pung Chen Choon* was no longer good law.

(2) Freedom of assembly

78 The requirement for restrictions imposed by Parliament on fundamental freedoms to be reasonable and proportionate was also followed in the Court of Appeal case of *Nik Nazmi bin Ahmad v Public Prosecutor*[87] ("*Nik Nazmi*"), which examined the constraints placed on the freedom of assembly by ss 9(1) and 9(5) of the Peaceful Assembly Act 2012[88] ("PAA").

79 Section 9(1) required organisers to provide notice to the police ten days in advance of a planned assembly and s 9(5) stated that failure to comply with the notice requirement was an offence, attracting a fine not exceeding RM10,000.

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85 *Muhammad Hilman bin Idham v Kerajaan Malaysia* [2011] 6 MLJ 507 at [52]; [2011] 9 CLJ 50 at [21].

86 *Muhammad Hilman bin Idham v Kerajaan Malaysia* [2011] 6 MLJ 507 at [55]; [2011] 9 CLJ 50 at [24].

87 [2014] 4 MLJ 157; [2014] MLJU 436.

88 Act 736.

80 The Court of Appeal held that the criminalisation of the failure to provide adequate notice was not reasonable nor proportionate to justify limiting the freedom of assembly, and that there must be a "rational nexus between the restriction and the objective and the means used by the authorities must be proportionate to the objective",[89] in this case of protecting national security and public order. The fact that a failure to provide notice would constitute an offence, even if the assembly in question was peaceful, was found to be an unreasonable restriction and a disproportionate legislative response.

81 In view of the above, s 9(1) requiring a ten-day notice to be given was allowed to stand but the criminalisation of such failure in s 9(5) was declared unconstitutional and therefore struck down.

82 A subsequent and conflicting Court of Appeal decision on the same point was later made, which will be discussed subsequently.[90]

83 Following the decisions in *Muhammad Hilman* involving the right of university students to express their support for or opposition to political parties, and the above decision in *Nik Nazmi*, the Executive and Parliament responded by abolishing s 15(5)(a) of the UUCA in 2012 and amending the PAA in 2019.

84 The amended s 9 of the PAA still requires organisers of an assembly to give the police notice, but the notice period has been reduced to five days, instead of ten. Failure to notify is still an offence but the police, with the Public Prosecutor's consent, may instead offer a compound fine not exceeding RM5,000, which would not constitute a criminal offence.

(3) Right to life, equality, freedom of movement and expression

85 One of the most ringing affirmations of the primacy of the fundamental liberties protected in Pt II of the Federal Constitution and the requirement for legislation to be subject to that principle can be found in the 2015 Court of Appeal decision in the case of *Muhamad Juzaili bin Mohd Khamis v State Government of Negeri Sembilan*[91] ("*Muhamad Juzaili*").

86 The Court of Appeal examined the constitutionality of a Negeri Sembilan state enactment[92] that made it an offence for a male Muslim

89 *Nik Nazmi bin Ahmad v Public Prosecutor* [2014] 4 MLJ 157 at [110].
90 *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47.
91 [2015] 3 MLJ 513.
92 Negeri Sembilan Syariah Criminal Enactment 1992 s 66.

to wear a woman's attire or pose as a woman in a public place. The offence attracted a fine not exceeding RM1,000 and/or imprisonment of up to six months. The three appellants in this case had been repeatedly detained, arrested and prosecuted by religious authorities in Negeri Sembilan under this enactment.

87 In coming to its decision, the court affirmed Art 4 of the Federal Constitution which states that the Constitution is the supreme law of the Federation and that any law passed after independence which is inconsistent with it shall, to the extent of the inconsistency, be void. This meant that "all state laws, including Islamic laws passed by State legislatures, must be consistent with Part II of the Federal Constitution (which guarantees the fundamental liberties of all Malaysians)".[93]

88 The ban on cross-dressing on Muslim males was found to have breached several Articles of Pt II of the Constitution, namely, the right to life and personal liberty,[94] the right to equality before the law and equal protection of the law,[95] the right not to be discriminated against on the grounds of gender,[96] the freedom of movement,[97] and the freedom of expression.[98]

89 On this basis, s 66 of the Negeri Sembilan Syariah Criminal Enactment was found to be unconstitutional and void.

90 The decision was subsequently overturned in the Federal Court in 2015 on procedural grounds.[99] However, the rationale for that Federal Court decision was then rejected in 2019 by a different panel of the Federal Court in *Alma Nudo Atenza v Public Prosecutor*[100] ("*Alma Nudo Atenza*"), discussed below.

93 *Muhamad Juzaili bin Mohd Khamis v State Government of Negeri Sembilan* [2015] 3 MLJ 513 at [34].
94 Federal Constitution (2010 Reprint) Art 5(1).
95 Federal Constitution (2010 Reprint) Art 8(1).
96 Federal Constitution (2010 Reprint) Art 8(2).
97 Federal Constitution (2010 Reprint) Art 9(2).
98 Federal Constitution (2010 Reprint) Art 10(1)(a).
99 *State Government of Negeri Sembilan v Muhammad Juzaili bin Mohd Khamis* [2015] 6 MLJ 736.
100 [2019] 4 MLJ 1. This case also relied on *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333 and *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 to establish that legislative and executive responses must be proportionate to the object sought to be achieved, see *Alma Nudo Atenza v Public Prosecutor* [2019] 4 MLJ 1 at [118].

(4) Right to life and equality

91 The test of proportionality for state actions was also affirmed in the Federal Court case of *Alma Nudo Atenza*.

92 The court held that s 37A of the Dangerous Drugs Act 1952,[101] which allowed for a double presumption in drug trafficking cases, was unconstitutional as it violated the presumption of innocence and right to a fair trial that are derived from Art 5(1) of the Federal Constitution which states that: "No person shall be deprived of his life or personal liberty save in accordance with the law."

93 The court interpreted the challenge to s 37A in the light of Art 8(1) of the Federal Constitution which requires that "not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved".[102]

94 In delivering the court's judgment, Richard Malanjum CJ affirmed the court's role in upholding the fundamental liberties that are protected in the Federal Constitution, stating:[103]

> 98 … art 5(1) [of the Constitution] is the foundational fundamental right upon which other fundamental rights enshrined in the FC draw their support. Deprive a person of his right under art 5(1) the consequence is obvious in that his other rights under the FC would be illusory or unnecessarily restrained … But at the same time art 5(1) is not all-encompassing and each right protected in Part II has its own perimeters. Hence, the provisions of the FC should be read harmoniously. Indeed the fundamental liberties provisions enshrined in Part II of the FC are parts of a majestic, interconnected whole and not each as lonely outposts.
>
> …
>
> 100 Since the right to life is 'the most fundamental of human rights', the basis of any state action which may put this right at risk 'must surely call for the most anxious scrutiny' (per Lord Bridge in *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 at p 531). The courts' role is given added weight where the right to life is at stake.

101 Section 37A of the Dangerous Drugs Act 1952 (Act 234) stated that any person found in custody of any dangerous drug would be presumed to be in possession of the drug and be deemed to have known the nature of the drug, until the contrary is proved. It goes on to state that any person found in possession of quantities of dangerous drugs above certain specific amounts would be presumed to be trafficking in those drugs, until the contrary is proved.

102 *Alma Nudo Atenza v Public Prosecutor* [2019] 4 MLJ 1 at [118].

103 *Alma Nudo Atenza v Public Prosecutor* [2019] 4 MLJ 1 at [98] and [100].

D. Jurisdiction in constitutional matters –Indira Gandhi

95 The Federal Court, in exercising its jurisdiction to hear *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak*[104] ("*Indira Gandhi*"), was asked to judicially review the registration of three children, born to a Hindu couple, as Muslims by the Registrar of Muallafs and the issuance of certificates of conversion by the Director of the Perak Islamic Department. The conversion of the three children had been unilaterally initiated by their father who had converted from Hinduism to Islam and the registrations were conducted without the children being present.

96 It was contended that the court had no jurisdiction to hear the appellant's judicial review application as conversion was an Islamic matter that fell under the Shariah Court's jurisdiction and, by virtue of Art 121(1A), the civil court had no jurisdiction to hear the matter.

97 This argument was rejected by the Federal Court. In her judgment, Zainun Ali FCJ relied on the Federal Court case of *Semenyih Jaya* to assert that judicial power is vested exclusively in the High Courts by virtue of Art 121(1) of the Federal Constitution and this judicial power is "inextricably intertwined with [the courts'] constitutional role as a check and balance mechanism".[105] She also found that "the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the Constitution. It cannot be abrogated or altered by Parliament by way of a constitutional amendment".[106]

98 It was therefore clear that:[107]

> … if the relief sought by a plaintiff is in the nature of the 'inherent powers' of the civil court (for example judicial review) or if it involves constitutional issues or interpretation of the law, then the civil courts would be seised with jurisdiction to determine the issue, regardless of its subject matter and especially if it comes within the scope and ambit of judicial powers as outlined above.

99 In the court's view, Art 121(1A) did not oust the jurisdiction of the civil courts nor did it confer judicial power on the Shariah Court.

104 [2018] 1 MLJ 545.
105 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 at [42].
106 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 at [48].
107 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 at [72].

The civil courts' power to interpret the Constitution was not removed by virtue of the amendment to insert cl 1A. The judgment stated:[108]

> The inherent judicial power of civil courts in relation to judicial review and questions of constitutional or statutory interpretation is not and cannot be removed by the insertion of cl (1A).

100 The judgment also stated:[109]

> We take a firm stand on this – in that before a civil court declines jurisdiction premised on the strength of art 121(1A), it should first examine or scrutinise the nature of the matter before it. If it involves constitutional issues, it should not decline to hear merely on the basis of no jurisdiction.

101 This judgment was a reaffirmation of the courts' role in constitutional interpretation, and a welcome decision in the face of previous decisions where the court had declined to rule on subject matters relating to Islam such as conversion, which had involved possible violations of constitutional guarantees.[110]

E. The less robust approach

102 The cases discussed above are certainly encouraging in terms of the protection of human rights by the courts, at least in so far as they are protected by Pt II of the Federal Constitution. However, there has also emerged a competing strand of cases that has limited, overturned or sought to overrule the above judgments.

(1) Sivarasa *re-examined*

103 The 2015 Federal Court case of *Public Prosecutor v Azmi bin Sharom*[111] ("*Azmi bin Sharom*") adopted a different approach to the one in *Sivarasa* with regard to examining restrictions on fundamental rights imposed by Parliament.

104 The case was brought by an associate professor of law who had been charged under the Sedition Act 1948 for questioning the Sultan of Perak's role in the sacking and replacement of the Menteri Besar (Chief Minister) of Perak.

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108 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 at [98].

109 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 at [105].

110 *Hj Raimi bin Abdullah v Siti Hasnah Vangarama bt Abdullah* [2014] 3 MLJ 757.

111 [2015] 6 MLJ 751; [2015] 8 CLJ 921.

105 The Sedition Act is one of the most notorious acts limiting the freedom of speech and expression in Malaysia. It prohibits doing or saying anything with a "seditious tendency" which includes bringing into hatred or contempt or exciting disaffection against any Ruler or against any Government.[112] A challenge was brought against the constitutionality of the Sedition Act for violating the freedom of speech and expression in Art 10(1)(a) of the Federal Constitution.

106 The approach of this panel of Federal Court judges towards fundamental rights was markedly different from those discussed above. Arifin Zakaria CJ stated that "[i]t is, however, commonly acknowledged that the rights conferred by [Art 10(1)(a), which provides for freedom of speech, assembly and association] are not absolute".[113]

107 He went on to examine the reasonableness test required for any limitations imposed by Parliament on the freedom of speech as set out in *Sivarasa* and *Dr Mohd Nasir Hashim*,[114] and roundly rejected it. He contrasted the Malaysian Constitution with the Indian Constitution, which has a similar provision protecting the freedom of speech and expression, but unlike the Malaysian version, expressly stipulates that Parliament may only impose reasonable restrictions. After examining an earlier case where the distinction was made, he concluded as follows:[115]

> 36 Having regard to the legislative history of art 10(2), it would appear that in the initial draft the 'restriction' was to be qualified by the word 'reasonable', as in the case of art 19(2) of the Indian Constitution. The word was however omitted from the final draft by the working committee …
>
> 37 For those reasons, we are inclined to agree with the view of the Supreme Court in *Pung Chen Choon*, that it is not for the court to determine whether the restriction imposed by the Legislature pursuant to art 10(2) is reasonable or otherwise. That, in our opinion, is a matter strictly within the discretion of the Legislature and not within the purview of the court.

108 It would appear that the Federal Court unfortunately chose to resurrect the restrictive reasoning in *Pung Chen Choon*, which had been discarded in *Sivarasa* and *Muhammad Hilman*.

112 Sedition Act 1948 (Act 15) s 3.
113 *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921 at [29].
114 *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213.
115 *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921 at [36] and [37].

109 Reading the word "reasonable" before the word "restriction" in Art 10(2) of the Federal Constitution was, in the court's view, tantamount to "rewriting the provisions" of the Constitution.[116]

110 The court, however, accepted the need for restrictions imposed by Parliament to be proportionate to the object sought to be achieved and that restrictions imposed are not without limit.

111 However, it appears that the nexus required by the court was a wide one as in applying the proportionality test to the Sedition Act 1948, it found that the Act was consistent with the Constitution, despite the exceedingly broad wording of s 4(1) of the Sedition Act. The court found that "it cannot be said that the restrictions imposed by s 4(1) [of the Sedition Act] are too remote or not sufficiently connected to the subjects/objects enumerated in art 10(2)(a)".[117] The court pointed out that there were exceptions provided in the Act; for example, it was not seditious to show that any Ruler had been misled or mistaken in any of his measures, or to point out errors or defects in any Government or Constitution as by law established. On that basis, the Sedition Act was found to be valid and constitutional.

(2) Freedom of assembly

112 The Federal Court decision in *Azmi bin Sharom* echoed an earlier decision by the Court of Appeal in *Public Prosecutor v Yuneswaran a/l Ramaraj*[118] which, like the *Nik Nazmi* case discussed earlier, also dealt with s 9(5) of the PAA, which criminalised the failure of organisers to give ten days' notice of an assembly.[119]

113 As the requisite section in the PAA had been declared unconstitutional and void by the Court of Appeal in *Nik Nazmi*, the fine imposed on the organiser of an assembly was set aside by the High Court. This panel of the Court of Appeal, however, took a different view from the decision in *Nik Nazmi,* and found that s 9(5) was valid and constitutional and that there should be a presumption in favour of constitutionality of statutes.

114 Raus Sharif JCA (as he then was) was of the view that the PAA was procedural in nature and merely set out a series of procedural steps

116 *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921 at [40].
117 *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921 at [43].
118 [2015] 6 MLJ 47.
119 The Court of Appeal was the final court in this case as the case commenced in the lower courts.

to be taken to ensure and facilitate the exercise of a constitutional right. As a result, in his view, the PAA did not affect the substantive rights to assemble peaceably.[120]

115 He went on to state that "the requirement for the ten-day notice is crucial and reasonable to enable the police to make the 'necessary plan and preparation' to satisfy their legal obligation under the PAA, particularly to facilitate the lawful exercise of one's right to assemble peaceably as well as to preserve public order and protecting the rights and freedoms of other persons. This position is consistent with the position in the European Union".[121]

116 On the criminalisation of the failure to provide sufficient notice under s 9(5) of the PAA, the court's view was that nothing in Art 10(2) of the Federal Constitution could be construed as prohibiting the imposition of criminal sanctions for non-compliance.[122]

117 The court demonstrated deference to Parliament's power to legislate stating:[123]

> Article 74 of the Federal Constitution clothes Parliament with power to legislate. Internal security, which includes public order, is within the legislative competence of Parliament under List 1, Item 3 of the Ninth Schedule of the Federal Constitution. Read with s 40(1) of the Interpretation Acts 1948 and 1967, it is plain that Parliament may criminalise any act.

118 The Court of Appeal likewise rejected the reasonableness test propounded in *Sivarasa* for restrictions placed upon fundamental freedoms, and followed the decision in *Pung Chen Choon*. The court's view was that to read the word "reasonable" into Art 10(1)(b) of the Federal Constitution would be in effect "usurping the law-making powers of the Parliament".[124]

119 As a result of this reasoning, s 9(5) of the PAA was declared "entirely constitutional, valid and enforceable"[125] and the conviction and sentence of a RM6,000 fine in the Sessions Court was upheld.

120 These cases demonstrate the competing strands of thought in the Judiciary – one that is more willing to take up the court's role as

120 *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47 at [28].
121 *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47 at [42].
122 *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47 [53].
123 *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47 [57].
124 *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 at [67].
125 *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 at [85].

a check and balance on the powers of the Executive and the Judiciary – and another that adopts a more deferential role towards the other two branches of government and is more conservative in its approach.

121 Although the maintenance of the proportionality test still leaves room for courts to find that the restrictive legislation goes beyond the objective it purports to achieve, the absence of the reasonableness test may narrow the circumstances in which such laws may be found to be unconstitutional.

(3) Application of international law

122 Other decisions have demonstrated similar conservatism on other aspects involving human rights.

123 In the 2014 Court of Appeal case of *AirAsia Bhd v Rafizah Shima bt Mohamed Aris*[126] ("*Rafizah Shima*"), the court declined to follow the reasoning in *Noorfadilla* in choosing to adopt the CEDAW definition of discrimination in interpreting Art 8(2) of the Federal Constitution which prohibits discrimination on several grounds, including gender.

124 The court followed a 2004 Federal Court case, *Beatrice AT Fernandez v Sistem Penerbangan Malaysia*,[127] which adopted a narrow interpretation of constitutional law, finding that it only addresses the contravention of an individual's right by a public authority, and not by a private company, such as Air Asia.

125 The court was emphatic in its insistence that CEDAW "does not have the force of law in Malaysia because the same is not enacted into any local legislation".[128] The Malaysian legal system practises a dualist approach where international obligations have to be incorporated into domestic law. The court thereby passed up an opportunity to affirm the utilisation of CEDAW, even as an aid to the interpretation of the Constitution, despite Malaysia being a signatory to the convention.

(4) Native customary rights

126 The majority in a Federal Court case in 2016 also took a narrow view regarding a case involving native customary rights in Sarawak.[129] Although the majority accepted that the common law recognised native

126 [2014] 5 MLJ 318.
127 [2004] 4 MLJ 466.
128 *AirAsia Bhd v Rafizah Shima bt Mohamed Aris* [2014] 5 MLJ 318 at [38].
129 *Director of Forest, Sarawak v TR Sandah ak Tabau* [2017] 2 MLJ 281.

customs as law, it held that native customary rights in this case were only established with regard to cleared and settled land (*temuda*) and not land that was used to derive food, medicines, wildlife and other forest produce (*pulau*).[130]

(5) Judicial power

127 In 2019, the majority of a nine-member bench in the Federal Court in the case of *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd*[131] distinguished the case of *Semenyih Jaya*, and as a result, may have inadvertently diluted its impact.

128 Section 57 of the Central Bank of Malaysia Act 2009[132] stated, *inter alia*, that the courts would be bound by the Shariah Advisory Council's rulings on Shariah matters in relation to Islamic financial business, that were referred to it under the Act.

129 The appellant, JRI Resources Sdn Bhd, argued that this amounted to a usurpation of judicial power and that the section should be declared unconstitutional. The Federal Court by a majority of five to four held that the Shariah Advisory Council's rulings were not, in fact, final judicial decisions but constituted an expert opinion on matters regarding Islamic finance. The section requiring courts to be bound by the Council's rulings was therefore declared valid.

IV. GOING FORWARD

130 Malaysia, as a whole, stands at a crossroads. The Pakatan Harapan government swept to power in May 2018 on a ticket of change and reform. Its manifesto promised to make Malaysia's human rights record respected internationally, repeal repressive laws and ratify the remaining international human rights treaties that it has not signed. Just over a year after it resumed power, the new coalition government has faced setbacks in its reform process.[133]

130 An application for this decision to be reviewed was filed, *inter alia*, on the ground that the Federal Court decision was actually split 2:2 on the legal principles of the case and that there was no outright majority. The majority of the Federal Court, however, declined four to one to exercise its power of review: *TR Sandah ak Tabau v Director of Forest, Sarawak* [2019] 6 MLJ 141.

131 [2019] 3 MLJ 561.

132 Act 701.

133 Since the writing of the article, the Pakatan Harapan government has lost power due to a change of allegiance from members of Parliament from within its component parties. The Malaysian government is now led by a different group of parties in a loose coalition called Perikatan Nasional.

131 No previous government has openly declared such commitments to protecting human rights in the country, although whether or not it will be effective in implementing its own reform agenda remains to be seen. Already, the Government has backtracked on its pledge to ratify the ICERD and pulled out of the Rome Statute of the International Criminal Court,[134] barely a month after ratifying it.

132 Judicial decisions regarding matters involving human rights, or fundamental liberties enshrined in the Constitution, are at a similar crossroads. It is open for judges to interpret the Constitution in a manner that involves them playing a more active role in protecting the fundamental liberties of citizens, or to adopt a more conservative approach.

133 It is encouraging that Malaysia's first woman Chief Justice, Tengku Maimun Tuan Mat, affirmed the court's vital role in giving true meaning to constitutionalism at a law conference on 5 October 2019. In her address, she stated that "efforts must be taken to ensure [the Judiciary's] independence and its authority as one of the three branches of government to check and balance the powers of the executive and legislative".[135] Referencing *Indira Gandhi*, she stated as follows:

> The notion expressed in *Indira Gandhi*, that the entrenchment of the principle of separation of powers within the basic structure [of the Constitution], gives true meaning to the core preserve of constitutionalism. The nett effect of true separation of powers ensures that there is in existence a system of check and balance. The judiciary plays a vital role in supervising public institutions, and to ensure that each organ does not trespass in any way, the limits placed on their powers by the Constitution. [emphasis added]

134 It is hoped that future judgments will continue with this trend. The signs look encouraging.

135 In September 2019, the Court of Appeal granted an application to quash Shariah charges against a book publisher, Mohd Ezra Mohd Zaid, in relation to a book published by his company that was deemed offensive to Islam.[136] Reports indicate that the decision related to the fact that charges, if any, should have been directed at Mohd Ezra's company, and not himself, and that a company, not being able to profess any

134 17 July 1998; entry into force 1 July 2002.

135 Yiswaree Palansamy, "Chief Justice: Courts Should Have Power to Review Executive, Legislative" *Malay Mail* (5 October 2019).

136 "Ezra Zaid Succeeds in Quashing Case Involving Banned Book" *The Star* (25 September 2019). The grounds of judgment are not available at the time of writing of this article.

religion, should not be subject to Shariah law, which in Malaysia, only applies to Muslims.[137]

136 Two recent bold decisions have established the court's willingness to wrest back the judicial power to oversee executive action. The first was the SOSMA case mentioned above.[138]

137 The second is *Tony Pua Kiam Wee v Government of Malaysia*[139] ("*Tony Pua*").

138 The plaintiff, Tony Pua, brought a suit against former Prime Minister Najib Razak and the Government of Malaysia based on the common law tort of misfeasance in public office in relation to the 1MDB sovereign wealth fund.

139 The issues that were central to the appeal before the Federal Court were whether the Prime Minister was a "public officer" within the elements of the tort, whether a valid cause of action subsisted and whether the Government was vicariously liable for the Prime Minister's actions if the tort was proven against him.

140 The High Court and Court of Appeal had allowed the claim to be struck out on the ground that the former Prime Minister was not a "public officer" or a "person holding public office" as contemplated under the tort of misfeasance. They held that they were limited by the definition in the Interpretation Acts 1948 and 1967, read together with Arts 132 and 160 of the Federal Constitution. A related question of *locus standi* was also considered.

141 The Federal Court disagreed and overturned the decision, finding that the Prime Minister and any other minister is a public officer for the purposes of the tort of public misfeasance in public office. The following parts of the judgment of Nallini Pathmanathan FCJ bear repeating verbatim:[140]

> 141 … the tort of misfeasance in public office is grounded on the rule of law. Amongst the fundamental aspects of the rule of law is that: The law is supreme over the acts of both government and private persons. That law is one

137 Emmanual Santa Maria Chin, "Appellate Court Quashes Shariah Charges against Ezra Zaid, Ends Islamic Trial" *Malay Mail* (25 September 2019).

138 See para 62 above.

139 [2019] 12 MLJ 1. The appeal was heard by a seven-member bench and the judgment was prepared pursuant to s 78(1) of the Courts of Judicature Act 1964 (Act 91), as Alizatul Khair Osman Khairuddin J had since retired.

140 *Tony Pua Kiam Wee v Government of Malaysia* [2019] 12 MLJ 1 at [141]–[142], [146], [183] and [185].

> and it is applicable to all. To that end, no man is above the law and all are equal before the law.
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> 142 It is beyond argument that the rule of law is a fundamental feature of the constitutional framework of this country (see *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545). …
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> …
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> 146 The doctrines of the rule of law and the separation of powers underpin and comprise the 'internal architecture' of our Constitution (as so aptly put by the Supreme Court of Canada). So, to conclude that the definition of public officer in Malaysia excludes members of the administration such as Prime Minister, so that members of the administration like the defendant/respondent in the instant appeals, may allegedly act with impunity, so as to knowingly and/or recklessly dissipate public funds and remain immune to civil action under this tort, is anathema to the doctrine of the rule of law and the fundamental basis of the Federal Constitution. Such a construction of the term 'public officer' which erodes the rule of law, is repugnant and cannot prevail.
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> …
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> 183 The quintessence of the rule of law is that no man is above the law and that all men are equal before the law. This tort [of misfeasance in public office] therefore serves to protect citizens against abuse of power by public officials. To that extent, it is distinctive in that it combines both public and private law elements, unlike other torts which are wholly private in nature.
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> …
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> 185 It is therefore an intentional tort. The element which receives the most emphasis is that of bad faith, ie the abuse of power and the targeted malice or the complete indifference to the effect of the abuse of power on the plaintiff or a class of such persons. …

142 Above all, this case not only re-establishes the elements of the rule of law but also emphasises the importance of holding public officers to account.

143 With the recent Federal Court decisions in *Semenyih Jaya, Indira Gandhi, Alma Nudo Atenza* and *Tony Pua*, the rule of law, separation of powers and the court's important roles in preventing abuse of power and upholding fundamental rights are firmly established.

144 The challenges for protecting and promoting human rights remain the world over. With these pivotal decisions, the Malaysian courts

are well placed to play its vital role in serving as a check against human rights violations and abuses of power.
