Dynamic of Ethnic Relations in Southeast Asia

Dynamic of Ethnic Relations in Southeast Asia

Edited by

Mohd Azizuddin Mohd Sani, Rie Nakamura
and Shamsuddin L. Taya

CAMBRIDGE
SCHOLARS
PUBLISHING

Dynamic of Ethnic Relations in Southeast Asia,
Edited by Mohd Azizuddin Mohd Sani, Rie Nakamura and Shamsuddin L. Taya

This book first published 2010

Cambridge Scholars Publishing

12 Back Chapman Street, Newcastle upon Tyne, NE6 2XX, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN (10): 1-4438-2115-2, ISBN (13): 978-1-4438-2115-5

TABLE OF CONTENTS

Part 2: The Process of Conflicts Resolution and Democratization

ACKNOWLEDGEMENTS

This book was the outcome from a book project organized by College of Laws, Governments and International Studies (COLGIS), Universiti Utara Malaysia. Our aim is to bring together new ideas, approaches and discussions about the topic of ethnic relations in Southeast Asia. In here, we would like to thank the Vice Chancellor of Universiti Utara Malaysia, Dr. Nordin Kardi and Assistance Vice Chancellor for COLGIS, Associate Prof. Dr. Asmah Laili Haji Yeon for encouraging us to pursue this project. Their supports have given us motivation in completing this project and publish it as a book.

This book was made possible with people's interests in the topic of ethnicity and ethnic politics. Various people took their interests in our book project and agreed to send their manuscripts. Many thanks to my co-editors, Rie Nakamura and Shamsuddin L. Taya. Without you efforts and hard work, this book project will be unsuccessfully managed. We are grateful to Dr. Curtis Andressen, Prof. Donald L. Horowitz, Prof. Joel S. Kahn, Dr. Peter Kreuzer, Tan Siang Yang and our colleague, Dr. Abubakar Eby Hara and Ahmad Amir Abdullah for their contributions to this book. We also thank for section of International Studies of College of Law, Government and International Studies, at Universiti Utara Malaysia for its academic support and encouragement. Finally we thank to the publisher, Cambridge Scholars Publishing, for its willingness to publish this volume.

—Mohd Azizuddin Mohd Sani

CONTRIBUTORS

Joel S. Kahn, Ph.D. is an Emeritus Professor at School of Social Sciences, La Trobe University, Australia.

Donald L. Horowitz, Ph.D. is the James B. Duke Professor of Law and Political Science at Duke University, the United States.

Mohd Azizuddin Mohd Sani, Ph.D. is a Senior Lecturer in Politics and International Relations (specialized on Human Rights and Malaysian politics) at College of Laws, Government and International Studies (COLGIS), Universiti Utara Malaysia. He is also a Chairman of the Studies of National Resilience at Dr. Mahathir Mohamad Institute of Thoughts, Universiti Utara Malaysia.

Rie Nakamura, Ph.D. is an Associate Professor of Anthropology (specialized on ethnicity and identities particularly on Vietnamese issues) at College of Laws, Government and International Studies (COLGIS), Universiti Utara Malaysia.

Shamsuddin L. Taya, Ph.D. is a Senior Lecturer in International Relations (specialized on conflict and conflict-resolution and Philippine politics) at College of Laws, Government and International Studies (COLGIS), Universiti Utara Malaysia.

Curtis Andressen, Ph.D. is a Senior Lecturer (specialized on Migration and Settlement Issues) in the School of Political and International Studies at Flinders University, Australia.

Abubakar Eby Hara, Ph.D. is a Senior Lecturer in International Relations (specialized on Democratisation and Indonesian politics) at College of Laws, Government and International Studies (COLGIS), Universiti Utara Malaysia.

Tan Siang Yang obtained an Honours Degree in history from the National University of Singapore, in conjunction with its Southeast Asian Studies Programme. He also holds an MA (International Relations of Economy and Trade) degree from Flinders University, Australia.

Ahmad Amir Abdullah is a Lecturer in Strategic Studies at College of Laws, Government and International Studies (COLGIS), Universiti Utara Malaysia

Peter Kreuzer, Ph.D. is a Senior Research Fellow of Democratization and Domestic Peace at the Peace Research Institute Frankfurt, Germany.

INTRODUCTION

MOHD AZIZUDDIN MOHD SANI,
RIE NAKAMURA AND SHAMSUDDIN L. TAYA

An opportunity to teach ethnic relations in one of national universities, Universiti Utara Malaysia, in Malaysia has made us realize and understand about ethnic relationships with Malaysian students who have grown up in a multi-ethnic society. One recurrent theme in students' assignments and classroom discussion is Malaysia's uniqueness due to its multi-ethnic population; 'Malaysia is unique because we have many different ethnic groups like Malay, Chinese and Indian, and we live together in harmony and peace'. Students argued that Malaysia can provide a model to those countries suffering from problems of ethnic conflicts. Yet those same students also told us that actual ethnic relations in the country especially matter of religion and affirmative action are something 'sensitive' that we should not be discussed. Most of the students tell us about their daily ethnic experiences personally. Their comments are critical and emotional. One of them said that there is a lack of public space for ethnic discourse in Malaysia as discussed by Mohd Azizuddin in this volume. This dual attitude toward ethnic relations in Malaysia, while being proud of pluralism in the country, silence about 'sensitive issues' or whispering their gut feelings toward other groups, eloquently explains stigmatized ethnic relations and ethnic policies of Malaysia.

One of the challenges that we face in the class room is to differentiate the concept of race and ethnic groups. In Malaysia the Malay word 'bangsa' is used to indicate ethnicity and also nationality, however it is translated as 'race'. Most students used this word in their class activities. The concept of race which is an attempt to classify people into different groups by their physical appearance has been questioned, criticized and contested. Now majority agreed that race is a human invention that aimed to legitimize colonial regime's domination.

The concept of race has been brought by British colonial government to Malaysia and this concept still constitutes ethnicity in Malaysia. When we asked students' groups to explain various ethnic groups in Malaysia,

majority includes description of skin color of the groups, 'Malay has olive tone of skin'. Physically and genetically understood ethnicity created erroneous perception of ethnic groups. *The Malay Dilemma* by Mahathir published after 1969 ethnic conflict defended Malay privilege position by using this racial argument. If the race is based on physical and genetic categorization of the people, it should be universal categories. However, this classification of three *bangsa* (race) can only make sense in the context of Malaysia and in its history. Seeing ethnic groups as fixed physical classification of racial groups therefore, cannot explain highly contextualized identity as ethnic groups. It is also unable to understand dynamism and malleability of ethnic identity.

Ethnic identity is highly contextualized and interactional identity. As T. H. Eriksen noted, 'If a setting is wholly mono-ethnic, there is effectively no ethnicity, since there is nobody there to communicate cultural difference' (Eriksen, 1993: 34). Ethnic boundaries only exist when there are presumed contacts with 'others'. Ethnicity is consciously recognized and expressed in relations to 'others'. Constitution of 'Orient' analyzed by E. Said elaborates interactional nature of construction of identity. The West needed to have oppositional image of 'Orient' to constitute they (Said, 1979). G. Dru argues how national minorities hold significant place as an oppositional pole for majority to constitute their identity. The majority identity which often utilized to represent a national identity has been constructed through interaction with minorities (Dru 1998). A. Milner (1998) pointed out how Malay identity has been constituted in opposition to Chinese. The reason, why the Muslim Chinese are not recognized as an ethnic group while Muslim Indian are, can be explained by Milner's argument of construction of ethnicity by polarization. If the Chinese are at the opposite pole of Malay, who are by constitutional definition, habitually speaking Malay language, practice Malay custom, and being Muslim, there should not be any Chinese who profess Islam. In this volume, the chapter by Joel S. Kahn demonstrate contextuality of Malay-ness by inclusion (us) and exclusion (them) dichotomy.

Interactional nature of ethnicity must be also examined in the context of modern nation-state. B. Williams argues that the concept of ethnicity was most useful when it was used as a label for a dimension of the identity formation process in a single political unit, the nation-state. She explains that ethnicity emerged at the creation of modern nations when ethnic sentiments arose in opposition to nationalism (Williams, 1989). Similarly, C. Geertz describes how the people of the new states are simultaneously animated by two powerful motives, ethnicity and nationalism, which are

thoroughly interdependent, yet distinct and often actually opposition to each other. He further mentiones that the tension between ethnicity and nationalism is one of the central driving forces in the construction of the new state and at the same time one of the greatest obstacles (Geertz, 1963). Nation-building which is an effort to create a putative homogeneity out of heterogeneous populations, places ethnicity in an on-going negotiation of internal ethnic identity and external ethnic labeling. Also ethnicity became a sensitive element in nation-building since ethnic discontent may result in a threat to partition or merger of nation while other civil discontent, class or intellectual disaffection may result in seizing state apparatus legally or illegally without changing nation as an entity (Geertz, 1963). The role of the nation-state is indispensable to understanding the formation of ethnic groups and ethnicity. In this volume, Shamsuddin L. Taya discusses the tension between ethnic identity and nationalism in the Philippines.

The chapter by Tan Siang Yang & Curtis Andressen, in this volume discusses ethnic identity and ethnic relationships in a 'shrinking world'. The recent development of capitalism and technological advancement have brought nations and societies so close together that the world has become 'smaller.' Multinationals and mass electronic communications have little regard for ethnic or national boundaries (Hutchinson & Smith, 1996:13). The intense multiplication of contacts and the constant flow of people, information and commodities have destroyed distinctiveness of the individual culture and are homogenizing cultures throughout the world. Yet this homogenizing force met local resistance which was expressed as ethnic revival.

Globalization intensifies social contacts which evoke national and at the same time ethnic identities. A. Appadurai describes ethnic revival in globalization as the result of entanglement of two different kinds of disjuncture between nations and states. Nations and states are each others' projects. Nations seek to capture states and state power, while states seek to capture and monopolize ideas and nationhood. In other words all the separatist movements exemplify nations in search of their states and the multi-cultural nation-buildings are states' attempt to mach between nation and state. In this way the idea of nationhood crossing existing state boundaries appear to be steadily increasing in scale and regularity (Appadurai, 1990: 304).

Ethnic identity is multi-dimensional interactional identity. Ethnicity is understood in relations to others and some unfortunate case, such interactions are confrontational. This is one of the reasons that the term ethnic, or ethnicity bear nature of being problems; ethnic conflicts, ethnic

disputes, ethnic discriminations, ethnic cleansing, ethnic wars and so on. Ethnic differences have been treated as if they were the cause of conflicts and this has become another challenge for us in the classroom to show students alternative explanation. The ethnic differences themselves do not cause the conflicts but, when the differences are politicized, they became of issues of confrontation. This book was thought to examine such process of politicization of ethnic differences and to capture the dynamism of ethnic relation in the region of Southeast Asia, and aims to address the issues of changing ethnic relationships in changing societies.

The book has two parts. The first part entitled ethnic and identity politics. The second part entitled process of conflicts resolution and democratization. The Part I has 5 chapters. Chapter 1 is about appropriation of ethnic discourse in Malaysia by Mohd Azizuddin Mohd Sani. He examined Malaysian federal constitution and the Sedition Act originated during the British colonial era regarding freedom of expression and prevention of hate speech on ethnic relations. He concludes that current regime utilize the ban of hate speech to silence oppositions and also criticism toward the government. He warns that as a result, Malaysian political system is becoming less democratic.

Chapter 2 by Shamsuddin L. Taya is about the ethnic politics of the Philippines. By examining the situation and the Muslim secessionist movements in the southern Philippines, he argues that the emergence of the secessionist movements are by-product of structural inequalities of the Philippines. Having been trapped in the structural inequality and marginalization, the Muslim people have little choices other than seeking their own state to protect their rights and preserve their identity.

The chapter 3 by Abdullah Ahmad Amir discussed Malay Muslim people in southern Thailand, particularly provinces of Patani, Yala and Narathiwat. The ethnic conflicts in Southern Thailand tend to be seen as religious problems, Buddhists vs. Muslims. However, in this chapter southern problems are explained in the process of building modern nation of Thailand. The project of modern nation building was initiated by the monarchs in Thailand in which production of Thai-ness through language and religion and royalty to the Thai monarchy and the nation are stressed. In such process, Malay people in three provinces of southern Thailand are marginalized.

Chapter 4 by Joel S. Kahn studies Malay communities in three countries of Southeast Asia, namely Indonesia, Malaysia, Singapore and Vietnam He examines how migration influenced their ethnic identity and their position in the societies where they settled. He looks at the ways in which Malay-ness has been linked to the process of inclusion and

exclusion that operate insiders (native) and outsiders (settlers). He thinks that Malay-ness may describe a highly fluid interactive space, and argues that emergence of ethno-religious conflict depends establishing of a sense of solidarity between relatively immobile, localized 'indigenous' cultivators and political elites on one hand and more mobile, commercially-oriented outsiders or more universalistic orientation on the other.

Chapter 5 is written by Tan Siang Yang and Curtis Andressen. They examine the migration from China to Southeast Asia historically. They, however, focus on post World War II development and point out the emerging new labor market of Southeast Asia after its shift from its outdated import substitution strategy to export-oriented economies. That quickly increased demand for labor in all sectors in Southeast Asia. Because of geographical proximity, existing of local and also overseas Chinese communities, and China's direct investment in Southeast Asia Chinese people, who are going through dramatic social changes since China has shifted toward capitalistic open market system, come to Southeast Asia for works legally or illegally. They concern that such influx of Chinese people to Southeast Asia may stir delicate ethnic balance of this region.

The part II, the process of conflicts resolution and democratization, has three chapters. The first chapter of the Part II, chapter 6 by Donald. L. Horowitz is about the constitutional process of post-conflicts societies. Horowitz examines how democratic system as a formal institution can reconcile the post-conflicts societies. Drawing from his rich experiences of studying severely divided societies in the world, Horowitz examines two fundamental questions: What are the best configuration of institutions to be adapted? What should be the process of such configuration of institutions that are responsible for constitutional process He introduces two models of configuration process, the consociational approach and the centripetal approach and discusses pros and cons of these two models. This chapter reveals the difficulties the societies have to face during the constitutional process due to their distinctive history and social situation.

The chapter 7 by Peter Kreuzer on comparative studies of ethnic conflicts in Malaysia and the Philippines, two considered to be the most prominent and long-standing democratic countries in Southeast Asia. He examines on-going ethnic conflicts in two national peripheries, namely Sabah in Malaysia and the southern Philippines. He argues the significance of good governance and a specific type of political culture shared with the population rather than formal democratic institutions and constitutional guarantees of civil and political rights.

The chapter 8 by Abubakar Eby Hara further discusses the significance of utilizing local knowledge as a peace-keeping strategy. He draws various examples from case studies in Indonesia, West Kalimantan, Maluku and Poso. He discusses how the concept of 'peace' in Indonesia has shifted from no-war or no-conflicts situation to a part of state security and stability under the President Suharto's New Order authoritarian system. He argues that the definition of security must be changed from state-centric to people-defined one. Abubakar explains how the new definition of security would help understanding peacebuilding and how would people participate in the peace process by utilizing their tradition.

References

Appadurai, A. (1990). 'Disjuncture and difference in the global culture economy.' In *Theory, Culture, and Society.* 7: 295-310.

Eriksen, Thomas H. (1993). *Ethnicity and Nationalism: Anthropological Perspectives*. London: Pluto Press.

Dru, G. (1998). 'Introduction: Making and Making Majorities' in G. Dru (Ed.) *Making Majorities Constituting the Nations in Japan, Korea, China, Malaysia, Fiji, Turkey and the United State*. Stanford: Stanford University Press. pp 1-12.

Geertz, C. (1963). 'The Integrative Revolution' in C. Geertz (Ed.) *Old societies and New States: The Quest for Modernity in Asia and Africa*. London: Free Press of Glencoe. pp108-113.

Hutchinson, J. & A. D. Smith, (Eds.). (1996). *Ethnicity*. Oxford: Oxford University Press.

Mahathir bin Mohamad. (1970). *The Malay Dilemma*. Singapore: D. Moore for Asia Pacific Press.

Milner, A. (1998). 'Ideological Work in Constructing the Malay Majority' in G. Dru (Ed.) *Making Majorities Constituting the Nations in Japan, Korea, China, Malaysia, Fiji, Turkey and the United State*. Stanford: Stanford University Press. pp151-172

Said, E. (1978). *Orientalism*. New York: Pantheon Books.

Williams, B. F. (1989). 'A Class Act: Anthropology and Race to Nation across Ethnic Terrain' in *Annual Review of Anthropology* 18:401-404.

PART 1:

ETHNIC AND IDENTITY POLITICS

CHAPTER ONE

CONSTITUTIONAL AND LEGISLATION PRACTICES IN PROTECTING ETHNIC RELATIONS IN MALAYSIA: RESTRICT HATE SPEECH, NOT LEGITIMATE POLITICAL SPEECH

MOHD AZIZUDDIN MOHD SANI

Many contemporary commentators feared that Malaya and later Malaysia were bound to fail as a peaceful multi-ethnic country. Surprisingly, according to Peter Kreuzer (2006: 5-6), the Malaysian (or Malayan) polity has survived tremendous inter-ethnic challenges: the basically Chinese-based Communist insurgency, which was eventually put down in the early 1960s and ended in 1989; the integration of Malaya with the ethnically completely different British colonies on Borneo (Sabah, Sarawak) and Singapore in 1963; the dropout of Singapore only two years later; the *Konfrontasi*-policy engineered by neighbouring Indonesia between 1963 and 1967; and emergency law between 1969 and 1971 in the wake of inter-ethnic riots in Kuala Lumpur, to name a few. Inter-ethnic violence was the exception to the rule of peaceful negotiated settlements. With the exception of the riots of 1969, no single significant inter-ethnic conflict turned violent. Thus for decades, Malaysia could boast a peaceful and violence-free society, and developing at a pace surpassed in the region only by the city-state of Singapore.

National unity is an elusive concept. While racial or ethnic problems provide the breeding ground for communal politics and conflict between groups, the politics of alliances or consociational politics has been implemented in uniting the society. Tun Abdul Razak, former Prime Minister, described Malaysian democracy as ‘a democracy which is suitable for a developing country with different communities’ (Norma, 1990: 30). It is a democracy that takes into account ‘Malaysian realities’,

Malay – non-Malay (particularly Chinese and Indian) animosities, where democratic practices must not jeopardise the fragile stability, and political contestation therefore is acceptable only as long as this condition is preserved. A power-sharing arrangement has existed since Malayan independence; and although the National Front (BN, *Barisan Nasional*) coalition government is dominated by United Malay National Organisation (UMNO), and Malaysia's Executive authority lies mainly with the Malay leadership, other non-Malay parties, notably the Malaysian Chinese Association (MCA) and Malaysian Indian Congress (MIC), participate in the Cabinet and enjoy a degree of influence over government policy. Indeed, political stability requires that Malays maintain political power in the country.[1] The electoral system, the party system, the nature of political contestation and even the constitution have changed several times to ensure that Malays retain political power. Furthermore, since UMNO is the party that represents Malay interest, this means that Malay political power is preserved under its leadership.

'Democracy ala Malaysia' (Chandra, 1989) or 'democracy according to our own mould' (Saliha, 1997) as asserted by the BN government, as it is argued, enables Malaysia to maintain its ethnic harmony, political and social stability and internal security without compromising its economic resilience or being 'over-zealous about the democratic system' (Saliha, 1997:10). Mahathir Mohamad, former Prime Minister of Malaysia, defended his record on the eve of his final parliamentary appearance on October 2003 in regard to democracy and reiterated his position that too much freedom could lead to anarchy and the destruction of Malaysia's multi-ethnic society.[2] Measures such as detention without trial of terrorist suspects and the banning of the Communist party from participating in the elections are essential to maintain democracy and harmony. Whilst believing in free speech the government had to ensure that ethnic sentiment in the country would not be inflamed. He further added:

> If an individual or a small group tried to incite a (an ethnic) riot they are actually rejecting democracy and the right of majority…That is why actions that seem undemocratic towards the individual or the minority need to be taken to protect real democracy…Anarchy can take place because of an obsession with democratic. (SUARAM, 2004: 21)

Mahathir's successor, Abdullah Ahmad Badawi, in his first speech to the Parliament on assuming his appointment as the Prime Minister in November the same year, pledged to uphold democracy while fighting terrorism and corruption. He also expressed his conviction that democracy is the best system of governance, and the government must be open and

ready to accept criticism and contrary views if the culture of democracy is to thrive. He added however that:

> Democracy does not mean absolute freedom. Issues that inflame religious, racial (ethnic), and cultural sentiments should not be sensationalised, while attempts to undermine national security must be dealt with firmly. (SUARAM, 2004: 21)

Abdullah seems to continue to take responsibility in managing and ruling the country, ensuring ethnic harmony and stability, and also continue Mahathir's policy of restricting hate speech that are deemed to be a threat to national security, public order and the government's position in power.

The success of Malaysia as a nation has depended on its political stability and ethnic harmony. Malaysian government claims that one of the reasons for this success is its ability to implement its policy to limit people's right to freedom of speech, especially hate speech. The government sees hate speech as one of the elements that can undermine national unity. The Federal constitution (especially under Article 10) and other laws have provisions that seek to punish those who are found to be exceeding their right of expression by expressing controversial views on issues such as the special rights of the Malays and other indigenous people (*bumiputera*), Islam as national religion, the rights of immigrant ethnics (especially Chinese and Indians) to citizenship, the position of the King, and the status of the Malay language as the national language and a host of other issues that could potentially be sensitive in the context of the fragile ethnic relations in the country. It is argued that Malaysia as a multiethnic society, liable to ethnic conflict, requires such laws to prohibit the propagation of ethnic prejudice and religious bigotry. The constitution also prohibits speech that advocates the forcible overthrow of the government. Political speech, it is argued, must be circumscribed by the need for national stability and ethnic harmony. However, many critics argue that Malaysia also restricts legitimate political speech expressed by the opposition which is crucial for any democracy. There is suggestion that restriction on political speech by the government is in order for it to dominate and maintain the political power, not so much in protecting ethnic harmony. Therefore, this chapter will explore this debate by looking the legal aspects of the restriction and the arguments made by the government and the opposition in supporting and rejecting the restriction on political speech.

Ethnicity and its management have been at the centre of politics on all levels. For Malaysia, the quest for a constructive management of multi-ethnic becomes the foundation stone of the whole polity, from the federal

level downward to the local level. Therefore, this chapter will discuss about the concept of hate speech and how does Malaysia react against this concept as a way of preventing ethnic conflict. This chapter will also try to strike a balanced argument between a need for national stability vis-à-vis a freedom of political speech in Malaysia.

Hate Speech

Hate speech can be defined as insults and characterisations that are directed against an individual's or a group's race, religion, ethnic origin, or gender, which may incite violence, hatred or discrimination (Rud and Sexton, 1999: 1). In the United States (US), hate speech is a broad term that may include a great variety of expression, but according to *Nelson v. Streeter* 1994, it generally refers to words or symbols that are 'offensive, hurtful, and wounding' and are directed at racial or ethnic characteristics, gender, religious affiliation, or sexual preference (Trager and Dickerson, 1999: 124). The United States (US) courts usually consider hate speech part of the 'rough and tumble' of discourse that is part of a democratic and open society. On the contrary, some contend that hate speech is deliberately hurtful, morally no better than physical aggression, and should not be permitted in civilised societies. Hate speech is a form of speech that goes to the core issues in society, for example, racism, homophobia, and women's rights. In many countries including Canada, France, the Netherlands, and Germany, as well as Malaysia, it is not protected. In the past ten years, too, there has been a movement in the US to have hate speech removed from its place at the core of protected speech, arguing that it is dangerous and damages individuals and society. Many support the view that hate speech may be legitimately restricted because it is not essential to democracy and indeed, it often undermines the equal respect that is essential to democracy as well as causing other social harms. For instance, it encourages feelings of inferiority, destroys self-esteem as well as personal security and emotion (Matsuda et al., 1993). Thus, a number of minority and female writers argue that the US approach to hate speech is inadequate and that it should be subject to criminal or civil penalties.[3]

Several theorists criticise the proposal to restrict hate speech, primarily for two reasons. First, there is an idea that speech should be allowed and tested by the people without restriction. One leading supporter of this idea is Henry Louis Gates (1993: 37-38), who decries the effort of critical ethnic theorists who support the punishment of those who engage in hate speech. He claims that the theory behind hate speech codes – if you banish the speech, you banish the hate – is not only simplistic but also unrealistic.

Equality, justice, and human dignity, if allowed to remain unchallenged and untested by racists and bigots of every stripe, will not prosper but become Mill's 'dead dogma'. Gates says that American hate speech codes, which target vulgar language and epithets, do nothing to halt carefully worded bigotry.[4] Gerald Gunter (1994: 76) agrees with Gates and argues that opinion expressed in debates and arguments about a wide rage of political and social issues should not be suppressed simply because of disagreement with the content or form of the expression. He stresses that speech should not and cannot be banned simply because it is 'offensive' to substantial parts of, or a majority of, a community. The proper answer to bad speech is usually more and better speech – not new laws, litigation and repression.[5]

Second, there is also an argument that the restriction of hate speech will harm the democratic system and public discourse. Robert Post (1991: 267-328) argues that the banning of hate speech would sacrifice other important values served by the freedom of speech such as exchange of ideas and open debate. Democracy serves the value of self-determination by establishing a communicative structure within which the varying perspectives of individuals can be reconciled through reason. If the state were to forbid the expression of particular ideas, the government would become, with respect to individuals holding those ideas, suppressive and non-democratic. Although Post argues that all opinions should be tolerated so long as their protagonists urge their acceptance by legal methods, the notion that racist ideas ought to be forbidden within public discourse because of the offensiveness is thus fundamentally irreconcilable with the rationale for freedom of speech. He thinks that the case has not yet been made for circumscribing public discourse to prevent the kind of pre-emptive silencing that occurs when members of victim groups experience 'fear, rage, (and) shock'. If the empirical claim of systematic pre-emptive silencing is accepted, in his view, it is directly the result of the social and structural conditions of racism, rather than of specifically racist speech. This is the logic of the argument from pre-emptive silencing does not impeach the necessity of preserving the free speech of ideas, public discourse could at most be regulated in a largely symbolic manner so as to purge it of outrageous racist epithets and names. Post concludes that it is highly implausible to claim that such symbolic regulation will eliminate the pre-emptive silencing that is said to justify restraints on public discourse, and deliberative self-government is not compatible with such restriction on free speech (Arthur, 1997: 231-232).

However, the arguments of Gates, Gunter and Post for allowing the expression of hate speech are rather dangerous. Joel Feinberg (1984; 1985)

argues that when fighting words are used to provoke people who are legally prevented from using a fighting response, the offence is profound enough to allow for prohibition. However, Feinberg also suggests that a variety of factors need to be taken into account when deciding whether speech can be limited by the offence principle. These include the extent, duration and social value of the speech, the ease with which it can be avoided, the motives of the speaker, the number of people offended, the intensity of the offence, and the general interest of the community at large. In a multicultural and multiracial society where the risk of violence and disorder is real and can undermine the nation's political stability, the restriction of hate speech should be allowed. Speech influences action and hate speech can spark aggression and violent behaviour. A society that wants to encourage tolerance between races and ethnic groups must choose a policy that creates political stability and not one that promotes enmity, and hostility even in the name of marketplace of ideas. The idea of associating hate speech with democracy and self-government is also unconvincing, as a democratic political system can still flourish in the absence of hate speech. This is clear from the numerous democracies where hate speech is restricted.

Public hate speech can be argued to violate the rights of some members of the community itself. As we have seen, political discourse is often understood on Alexander Meiklejohn's (1965) model of the town meeting. Free speech is essential to reach informed decisions on matters of common concern. At the same time, Meiklejohn stresses that speakers can be required to observe certain rules of order. These rules do not violate freedom of speech, but rather make free deliberation possible. In particular, he observes that if a speaker is abusive or in other ways threatens to defeat the purpose of the meeting, he may be and should be declared out of order. It would seem to follow from this view that public hate speech should not be protected under the constitution. Like abusive speech in a town meeting, hate speech violates the integrity of the deliberative process by undermining the possibility of reasoned discourse. As Meiklejohn observes, such discourse cannot take place except on the basis of mutual respect among citizens who regard one another as capable of engaging in rational self-government. Of course, public debate in a large modern society differs in many ways from Meiklejohn's town meeting, and a great deal of speech that would be improper in that setting is considered acceptable within the polity at large. However, Meiklejohn's basic insight is valid. Democratic self-government is impossible in the absence of a minimal degree of civility and mutual respect among citizens. Although that minimum standard will differ depending on the nature, size,

customs, and values of each society, its members must observe some standard or they cease to constitute a democratic community. Thus, however minimal our society's version of that standard is taken to be, it will be violated by speech that denies recognition to others on the basis of race, ethnicity, gender, or religion (Heyman 1999: 1380-1383).

Malaysia: The Federal Constitution

Freedom of speech is formally assured by Part II of the Federal Constitution under Article 10(1) entitled 'Freedom of Speech, Assembly and Association'. Article 10(1) allows a) every citizen has the right to freedom of speech and expression; b) all citizens have the right to assemble peaceably and without arms; and c) all citizens have the right to form associations. However, although citizens have a right to freedom of speech, Section 2 of the Article limits the right where Parliament may by law impose:

> (a) On the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence; (Federal Constitution, 1999).

Based on the provision above, the government has sought to protect institutions i.e. the Parliament, Courts, and federal and states government from a loss of credibility and confidence arising from criticism facilitated by the practice of freedom of speech. The Barisan Nasional (BN) government has tried to prevent the exploitation of freedom of speech by citizens or foreigners that could embarrass the country, and in particular the government. For instance, the Malaysian government supported the twelve weeks' imprisonment (reduced on appeal to six weeks) of Murray Hiebert, a 'Far Eastern Economic Review' journalist, on 4 September 1997 for his article entitled *See You in Court*, which scandalised the court and threatened to undermine the credibility of judicial institutions (Hilley, 2001: 228). Hiebert sentenced to imprisonment after he wrote a 'defamatory' article about the speedy processing of a lawsuit brought by the wife of a prominent Appeal Court judge. Addressing the growing level of spurious litigation in the Malaysian courts, Hiebert highlighted the RM6 million damages being sought by the mother of Govind Sri Ram against the International School of Kuala Lumpur for 'unfairly dropping' her son

from the school debating team. Noting the student's father as Court of Appeals judge Gopal Sri Ram, Hiebert commented that 'many are surprised at the speed with which the case ethnicd through Malaysia's legal labyrinth'. Awaiting appeal, Hiebert had his Canadian passport held for two years (Hilley, 2001: 228).

Article 10(4) of the constitution explains the reason for restricting freedom of speech:

> In imposing restrictions in the interest of the security of the Federation or any part of 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 provisions of Part II, Article 152, 153 and 182 otherwise in relation to the implementation thereof as may specified in such law. (Federal Constitution, 1999: 12)

The provision of Article 10(4) was part of the amendment of the Federal Constitution in 1971 and was enforced on 10 March 1971 as a reaction to the ethnic conflict of 13 May 1969. In this incident, the Perikatan blamed the opposition of using freedom of speech to inflict ethnic sentiments and dissatisfaction among non-Malays, particularly Chinese and Indians, over the special rights of Malays with respect to particular occupations and higher posts in the public sector (Comber, 1983: 63). A State of Emergency was declared after the ethnic clash. Thus, the Federal Constitution had been amended to prohibit citizens and non-citizens alike, including Members of Parliaments (MPs) during Parliamentary sessions, from questioning Part III of the Federal Constitution on Citizenship, Article 152 on National Language, Article 153 on Malay special rights and Article 181 on Saving for Rulers' sovereignty (Rais, 1995: 168). In overall, the Malaysian political system is based on the Westminster system that makes members of Executive body also members of the Parliament. The party holding a two third majority seats in the Parliament can create, amend, and even terminate any provisions of the constitution without needing the votes from the opposition. The fact that two thirds of the *Dewan Rakyat* members including the oppositions voted to support the 1971 amendment, even though the Perikatan government that time did not have a two third majority in Parliament (Suffian, 1987: 324-325), proved that the ethnic issues should not be politicised because these issues were sensitive in ethnic relations and could cause violence and political instability. The Malaysian government justified the 1971 amendment to the constitution in the following terms:

> It is clear that if no restriction on public discussion about sensitive issues, interethnic fright and fear are surely unavoidable. If no action being taken to assure peoples' rights and interest in the constitution, this country could face another racial conflict or even more devastating crisis. (Malaysia 1971: 2)

In many Commonwealth constitutions, like those of Malta, Jamaica and India, Parliament is empowered to enact 'reasonable regulations' on free speech. The significance of the word 'reasonable' is that courts are invested with the power to review the validity of legislation on the grounds of reasonableness, harshness or undemocratic nature of the curbs. However, the drafters of Malaysia's basic charter deliberately excluded the word 'reasonable' from the law. Article 10(2) states that 'Parliament may by law impose…such restrictions as it deems necessary or expedient' on a number of prescribed grounds (Shad, 2002). Article 4(2)(b) makes Parliament the final judge of the necessity or expediency of a law and bars judicial review on the ground of lack of necessity or expediency. In Articles 10(2), 10(4), 149 and 150 Parliament is authorised to restrict free speech on 14 broad grounds. So wide is its sweep of power that the government has no difficulty in defending laws like the Sedition Act (SA), Official Secret Act (OSA), Internal Security Act (ISA) and Printing Presses and Publications Act (PPPA) as fully in accord with the basic charter. Even, a number of existing statutes like the PPPA, Sections 3(3), 6(1) and 12(2), confer on the Minister 'absolute discretion' to grant, refuse or revoke a licence or permit. Section 13A makes the Minister's decision final and not questionable in a court of law (Shad 2002). However, Parliament is not supreme. The Constitution supplies the ultimate yardstick against which every law can be measured. In *Dewan Undangan Negeri v. Nordin Salleh (1992)* it was held that Parliament may restrict free speech only on the grounds specified in the Constitution. Similarly, *Madhavan Nair v. Public Prosecutor (1975)* ruled that any condition limiting freedom of speech not falling within the four corners of Article 10 clauses (2), (3) and (4) cannot be valid. Thus, the general grounds of 'public interest', 'good government', 'state necessity', 'public policy', 'efficiency' and 'common sense' are not constitutionally permitted grounds for depriving a citizen of his right. Restrictions on free speech must be confined to those articulated in the Constitution (Shad, 2002).

The protection of Article 10 of the Constitution is available to citizens only. A non-citizen or a foreign company or news agency cannot lay claim to this right: *Attorney General v. Wain (No. 1) (1991).* Article 10(1)(a) of the Constitution which guarantees the right to speech and expression must be read in the light of other Articles of the Constitution which curtail this

freedom. For instance, Article 126 empowers the courts to punish speech or action that amounts to contempt of court. Articles 63(4) and 10(4) subject Parliamentary proceedings to the law of sedition. Mark Koding, a MP, found this out to his discomfort when he was convicted for a Parliamentary speech demanding the closure of Chinese and Tamil schools. Under Article 25(1)(a) an order to deprive a person of his citizenship can be based on his disloyal conduct as manifested in his speeches irrespective of the fact that free speech was his constitutional right (Shad, 2002).

In addition to the justification for restricting freedom of speech in the constitution, Part XI under Article 149 lists subversive conducts and activities in detail. According to the Article 149(1) of the Constitution, those conducts and activities are actions taken or threatened by any substantial body of persons, whether inside or outside the Federation:

1. to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
2. to excite disaffection against Yang di-Pertuan Agong or any Government in the Federation; or
3. to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
4. to procure the alteration, otherwise than by lawful means, of anything by law established; or
5. which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
6. which is prejudicial to public order in, or the security of, the Federation or any part thereof.

Article 149 gives Parliament the power to create law as a response to subversive actions with or without a state of emergency being declared. Mohamed Suffian Hashim (1987: 316) argues that in the event of serious subversion or organised violence, Parliament may pass laws that are repugnant to the fundamental rights safeguarded elsewhere in the Constitution. Laws, which intent to stop and prevent subversive acts, are legal even though they are against certain provisions in the Constitution under Article 5 (personal freedom), Article 9 (prohibit citizen from expelled and freedom of movement), Article 10 (freedom of speech, assemble, and establish an association), or Article 13 (right to have property) and its out from Parliament legislative power. Article 149 (formerly Article 137) was criticised by one of the drafters of the Constitution. A member of Reid Commission, Judge Abdul Hamid condemned the Article:

> If there exists any real emergency, and that should only be emergencies of the type described in Article 138 (now Article 150), then and only then should such extraordinary powers be exercised. It is in my opinion unsafe to leave in the hands of Parliament power to suspend constitutional guarantees only by making a recital in the Preamble that conditions in the country are beyond reach of the ordinary law. Ordinary legislation and executive measures are enough to cope with a situation of the type described in Article 137 (now Article 149). (SUARAM, 1998: 217-218)

What concerned Judge Abdul Hamid most was that Article 149 gave power to Parliament to abrogate any laws pertaining to human rights as well as freedom of speech. That concern became a reality when the controversial law of ISA that allows detention without trial was created under Article 149 (Suffian, 1987: 317). In addition to the Internal Security Act (ISA), there are also several laws either created or amended under Article 149 purposely to restrict freedom of speech such as the Sedition Act (SA). We shall look at the SA in detail.

The Sedition Act

The Sedition Act (SA) 1948 (Act 15) was originally effected by the British colonial government in Malaya in 1948. It was known as the Sedition Ordinance 1948, and was designed to limit opposition to the colonial administration. Chandra (2000: 1) argues that the reason behind the creation of this law was not only to contain communist militancy but also to restrain rising nationalist movements, especially from the UMNO, seeking to free Malaya from British colonisation. After the events of 13 May 1969, the SA was tightened for purposes of national stability. Since the amendment of the Act in February 1971, the government strictly enforced the law and prosecuted anyone who questioned a number of policies, including the citizenship status of the non-Malays, the national language and other communities' languages, Malay special rights, ethnic policy generally, and the sovereignty of the Malay Rulers (Malaysia, 1971: 3). A seditious tendency is then defined in Section 3 as follows:

(1) A 'seditious tendency' is a tendency:
   (a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;
   (b) to excite the subjects of the Ruler or the inhabitants of any territory governed by any government to attempt to procure in the territory of the Ruler or governed by the Government,

the alteration, otherwise than by lawful means, of any matter as by law established;

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

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

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

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

Section 2 defines 'Seditious' as anyone who does or attempts to do, or makes any preparation to do, or conspires with any person to do any act which has or would have a seditious tendency, who utters any seditious words, or who prints, publishes or imports any seditious publication. Furthermore, it is a crime to have in one's possession, without lawful excuse, any seditious publication (SA, 1998: 391). Seditious acts include organising a public hearing or publishing an article which could create public disorder or instability, i.e. picketing, strikes, demonstrations, riots, and undermining the credibility of government bodies such as the judiciary and the police.

As a result of the ethnic riots of 13 May 1969, the SA has been used to prevent the media from publishing news that could create anger or disharmonious relations between ethnics in Malaysia (Aziz Zariza, 1988: 147). The SA was used in 1971 to prosecute the opposition Democratic Action Party (DAP) Parliamentarian Fan Yew Teng and party member Ooi Kee Saik. Fan had published an article entitled *Alliance Policy of Segregation: Evidence Galore* in the DAP newsletter 'The Rocket'. This was the text of a speech by Ooi, alleging that the ruling coalition policies in a number of sectors were ethnically discriminatory. In 1975, he was found guilty, fined RM2,000 or a six months' prison sentence and automatically lost his Parliamentary seat (Amnesty International, 1999).

Shad Faruqi (1989: 3) reviewed the SA in his paper entitled *Laws Relating to Press Freedom in Malaysia*, observing that the concept of sedition in Malaysia was much broader than in the United Kingdom (UK), Ireland, India, and Australia. A Malaysian lawyer was, therefore, unable to give a clear definition of what constitutes free speech and what constitutes