**IN THE FEDERAL COURT OF MALAYSIA**

**(APPELLATE JURISDICTION)**

**CIVIL APPEAL NO. 01(f)-44-11/2025(B)**

**BETWEEN**

**The Government of Malaysia ... APPELLANT**

**AND**

**Heidy Quah Gaik Li**
**(NRIC No. 940521-10-5044) ... RESPONDENT**

In the Court of Appeal of Malaysia

(Appellate Jurisdiction)

Civil Appeal No. 01(f)-44-11/2025(B)

Between

Heidy Quah Gaik Li
(NRIC No. 940521-10-5044) ... Appellant

And

The Government of Malaysia ... Respondent

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[In the Matter of High Court of Malaya at Shah Alam
Originating Summon No. BA-24-18-08/2021

Between

Heidy Quah Gaik Li
(NRIC No. 940521-10-5044) ... Plaintiff

And

The Government of Malaysia ... Defendant]

**CORAM:**

**WAN AHMAD FARID BIN WAN SALLEH, CJ**
**NALLINI PATHMANATHAN, FCJ**
**CHE MOHD RUZIMA BIN GHAZALI, FCJ**
**NAZLAN BIN MOHD GHAZALI, FCJ**
**COLLIN LAWRENCE SEQUERAH, FCJ**

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## GROUNDS OF JUDGMENT

### Introduction

[1] This is an appeal by the Government of Malaysia ('the Appellant') against the decision of the Court of Appeal, which held that the words 'offensive' and 'annoy' ('the impugned words') within **section 233(1)(a) of the Communications and Multimedia Act 1998 ('CMA')** are unconstitutional and struck them down.

[2] **Section 233(1)(a) CMA**, as it was then worded, read as follows:

> "***233. Improper use of network facilities or network service, etc.***
>
> *(1) A person who—*
>
> *(a) by means of any network facilities or network service or applications service knowingly—*
>
> *(i) makes, creates or solicits; and*
>
> *(ii) initiates the transmission of,*
>
> *any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or **offensive** in character with intent to **annoy**, abuse, threaten or harass another person; ...*
>
> *commits an offence."*
>
> [emphasis added]

[3] The effect of contravening the provision includes a penal consequence.

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[4] The Respondent in this appeal, Heidy Quah, was charged under **section 233(1)(a) CMA** in July 2021 in the Sessions Court at Kuala Lumpur. A month later, in August 2021, during the pendency of the proceedings in the Sessions Court, the Respondent initiated a separate originating summons in the High Court, seeking an order that the impugned words in **section 233(1)(a) CMA** be struck out under **art 4(1) of the Federal Constitution ('FC')**, as those words were null and void for inconsistency with the **FC**.

[5] This issue of unconstitutionality warranting the impugned words being struck down, was not raised in the Sessions Court, although such an avenue was open to the Respondent (see: ***Ah Thian v Government of Malaysia*** **[1976] 2 MLJ 112**). It begs the question why the originating summons was initiated separately in the High Court under **art 4(1) FC** when the issue could have been dealt with in the course of the proceedings in the Sessions Court. A further application was also made in the High Court to refer the same issue to the Federal Court for interpretation under **section 84 of the Courts of Judicature Act 1964 ('CJA 1964')**.

[6] On 25 April 2022, the Sessions Court granted the Respondent a discharge not amounting to an acquittal ('DNAA') on the grounds that the charge against her was flawed. This discharge was followed by an affidavit by the Investigating Officer in the matter, affirming that the Deputy Public Prosecutor

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('DPP') had directed that the charge was not to be proceeded with against the Respondent and the case be closed. The consequence of such a direction was that as of 25 April 2022, there were no pending proceedings against the Respondent.

[7] Notwithstanding the DNAA, the proceedings in the High Court were continued, resulting in a decision on 12 September 2023. In other words, although there was no pending charge against the Respondent, she continued to pursue the issue of the constitutionality of the impugned words in **section 233(1)(a) CMA**.

[8] This is relevant because the absence of a charge against the Respondent meant that there was no live issue, and no pending factual matrix before the High Court and the Court of Appeal when the constitutionality or otherwise of the impugned words were interpreted and construed.

[9] The net result is that the Respondent was effectively adjudged to be exonerated from any future charge under **section 233(1)(a) CMA** in relation to a communication that was 'offensive' with intent to 'annoy', on the basis that the charge might possibly be re-opened at some point in the future.

[10] On the issue of constitutionality, as stated above, the Court of Appeal found the two words 'offensive' and 'annoy' within **section 233(1)(a) CMA** to be unconstitutional, for infringing the right to freedom of speech and expression under

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**art 10(1)(a) FC**, because those words did not fall within the permitted restrictions under **art 10(2)(a) FC**. In relation to the permissible restrictions outlined in **art 10(2)(a) FC**, it was found that communications which were 'offensive' with intent to 'annoy' related primarily to civility in discourse and were largely in issue between individuals. As such, the impugned words could not affect 'public order' within the permissible restrictions, and were unconstitutional. It was further held that the penal consequences that could potentially arise did not fall within the bounds of the doctrine of proportionality as housed in **art 8 FC**.

[11] We move on to consider the constitutionality of the phrase 'offensive with intent to annoy' within **section 233(1)(a) CMA**. In order to determine this issue, the purpose and object of the **CMA** are relevant.

**The CMA**

[12] The **CMA** regulates the improper use of network facilities or network services. The consequence of the determination that the words 'offensive' and 'annoy' within **section 233(1)(a) CMA** are unconstitutional is that a communication which is offensive **with intent to** annoy is no longer a permissible basis for regulation or enforcement.

[13] The removal of the impugned words does not have the effect of solely excising those two words within the section. Communication which is 'offensive' **with intent to** abuse,

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threaten or harass is also affected by the removal of the word ‘offensive’.

[14] As such, a range of communications are caught by the striking out of the impugned words and cannot be regulated under this section. This will leave a segment of users vulnerable to the improper use of network facilities or network services in relation to the deliberate transmission of such communications under the **CMA**.

[15] This significant repercussion of the decision of the Court below, which had not been considered by the parties in their written submissions, was put to counsel at the hearing of this appeal. In response, learned counsel for the Respondent conceded that the word ‘offensive’ should not be denuded in relation to the other offences in **section 233(1)(a) CMA** and should therefore remain in the section.

[16] Learned counsel then advised us that the Respondent had not advocated the striking out of the word ‘offensive’ and further that the Court of Appeal had not intended to do so. Learned counsel argued that the issue in the Court below was only in so far as the word ‘offensive’ was used in conjunction with the word ‘annoy’ to create an offence, but the constitutionality of the word ‘offensive’ itself was not in issue.

[17] With respect, we are unable to agree with this contention. The Court of Appeal, in its judgment, made extensive references

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to the constitutionality of the word 'offensive' in **section 233(1)(a) CMA** and had quite plainly struck down both the words 'offensive' and 'annoy' in that section. This appeal therefore requires us to consider the effect of removing both the impugned words from **section 233(1)(a) CMA**.

## The Regulation of Communications in the Digital World

[18] The regulation of network facilities and services is a fundamental aspect of the digital age in the 21st century. The late 20th and 21st centuries have witnessed unparalleled and transformative changes in communication. The digital revolution has transcended physical boundaries, creating a global digital ecosystem and virtual world which mimics or impersonates the physical world, yet functions discretely within its digital globalised environment. These fundamental changes have brought about numerous benefits, allowing for greater cross-cultural understanding as well as access to knowledge across borders at all levels. Equally however, these transformational changes have given rise to serious ethical challenges.

[19] These challenges often require the law to adapt to meet the new dynamic and sometimes disruptive technological advances both at the national and international level. Regulation and law enforcement are as necessary in the digital world as they are in the physical world, given the growing incidence of wrongdoing and crime there.

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[20] The **CMA**, amongst other recently enacted legislation, has served this purpose since 1998. It regulates online content under **section 233**. As pointed out earlier, its purpose is to prevent the improper use of network facilities or network services, with a view to providing a safe online environment. It serves to protect individuals, groups of individuals and institutions from suffering harm as a consequence of such improper use.

[21] The questions for the Court in this appeal include the following: do the impugned words infringe the right to freedom of speech and expression under **art 10(1)(a) FC**? This article is conditional in that it is subject to **art 10(2)(a) FC**, which sets out restrictions. Do the impugned words in **section 233(1)(a) CMA** fall outside the purview of these restrictions?

[22] In order to answer these questions, the impugned words have to be interpreted and construed in the context of the digital world, more particularly, the world of social media, which is a form of mass media communication on the internet through which users communicate, as well as share ideas, personal messages and other content.

[23] Consider how the following scenarios can be dealt with in terms of regulation in social media.

[24] For example, how is the repeated posting of a private individual's photo with demeaning, non-factual remarks about

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their life or personal tragedies to be dealt with in the virtual world? What if this form of expression is posted repeatedly, targeting the individual's self-worth with a view to provoking a reaction and causing harm, both mentally and possibly physically?

[25] What about what is known as "doxxing", which is the publishing of private or identifying information about an individual on the internet, typically with personal ill intent? An example would be posting a person's home address or private phone number coupled with a distressing message, finishing with a phrase like *"this person should end his own life as he is garbage".*

[26] And what about malicious pranks or hoaxes conducted online that are deliberately false, and designed to cause panic or distress?

[27] What recourse is available when the content of communication in our plural nation is racist, or attacks religious sensitivities in a derogatory manner with intent to cause anger, dissatisfaction or annoyance?

[28] These are real-life scenarios in the virtual world today which need to be dealt with by way of regulation in order to ensure that participants in the virtual world feel safe and protected. In other words, regulation is an inherent necessity in the virtual world.

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[29] While regulation is necessary, it cannot encroach on the right to freedom of speech and expression as provided under **arts 10(1)(a) and 10(2)(a) FC**. It is seeking this balance that comprises the crux of this appeal.

**Statutory and Constitutional Interpretation**

[30] It is trite that in interpreting and construing legislation, like the CMA, the entirety of the impugned provision has to be looked at and considered holistically, in terms of both the section and the Act as a whole, to determine the intention of Parliament in enacting the provision. This is evident from **section 17A of the Interpretation Acts 1948 and 1967** (see: ***Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)*** **[2020] 4 MLJ 721**; ***Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain*** **[2022] 3 MLJ 450)**; ***Mohd Najib bin Hj Abd Razak & Anor v Government of Malaysia and another appeal*** **[2023] 6 MLJ 483**).

[31] Another issue that arises is how **art 4(1) FC** is to be applied in the context of the present appeal. **Art 4(1) FC** allows for any legislation that is inconsistent with the **FC** to be held to be void. **Art 4(2) FC** imposes restrictions on questioning the validity of a law relating to **art 10(2)(a) FC**. It is therefore necessary to consider how **arts 4(1) and 4(2)** are to be

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construed, in relation to **art 10(2)(a)**. To what extent do these restrictions take effect in relation to the freedom of speech and expression in **art 10(1)(a) FC**? How then are **arts 10(1)(a) and 10(2)(a)** to be read in light of **arts 4(1) and 4(2)**?

[32] The salient provisions of the **FC** are reproduced below for ease of reference:

> "***Article 4. Supreme law of the Federation***
>
> *(1)* ***This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void****.*
>
> *(2)* ***The validity of any law shall not be questioned on the ground that*****—**
>
> *(a) it imposes restrictions on the right mentioned in Clause (2) of Article 9 but does not relate to the matters mentioned therein; or*
>
> *(b)* ***it imposes such restrictions as are mentioned in Clause (2) of Article 10 but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article****.*
>
> ...
>
> ***Article 10. Freedom of speech, assembly and association***
>
> *(1)* ***Subject to Clauses (2)****, (3), (3A) and (4)—*

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(a) ***every citizen has the right to freedom of speech and expression***;

(b) *all citizens have the right to assemble peaceably and without arms;*

(c) *all citizens have the right to form associations.*

(2) ***Parliament may by law impose***—

(a) ***on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other 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***;

(b) *on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;*

(c) *on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.*

…"

[emphasis added]

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[33] It is an accepted principle of statutory interpretation that a presumption of constitutionality applies, as referred to by the Court of Appeal. Was the principle of constitutionality adequately rebutted? If so, was the doctrine of 'reading down' considered to narrowly define the impugned words and retain the object and purpose of **section 233(1)(a) CMA** as intended by Parliament? Striking out should generally be employed only when these measures have failed to save the impugned legislation or part of the legislation.

[34] Before addressing these and other issues, we set out the salient background facts relating to this appeal.

**Background Facts**

[35] On 5 June 2020, at the height of the Covid-19 pandemic, the Respondent, a human rights activist, uploaded a Facebook post drawing attention to the spread of the Covid-19 virus at Malaysian immigration detention centres, which she attributed to inadequate health and safety precautions, as well as the cramped living conditions at such centres.

[36] About a year later on 27 July 2021, the Respondent was charged in the Sessions Court under **section 233(1)(a) CMA** for knowingly making and initiating the transmission of a communication which was 'offensive' in character with intent to 'annoy' another person. The offence was punishable with a fine

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not exceeding RM50,000, or imprisonment for up to one year, or both, along with a further fine of RM1,000 for each day the offence continues after conviction.

[37] On 14 April 2022, the Respondent raised a preliminary objection in the Sessions Court on the grounds that the charge preferred against her was defective. On 25 April 2022, the Sessions Court ruled in her favour and granted her a DNAA.

**The High Court**

[38] There were two applications filed by the Respondent in the High Court. In the first, the Respondent moved the High Court to strike out the impugned words in **section 233(1)(a) CMA** under **art 4(1) FC**. This application was rejected by the High Court, but allowed by the Court of Appeal, and comprises the subject matter of this appeal. In the second application, the Respondent sought to refer the issue of the constitutionality of the impugned words to the Federal Court under **section 84 of the CJA 1964**. This application was dismissed both by the High Court and the Court of Appeal. The timeline in relation to these applications is set out in further detail below.

[39] As highlighted earlier, even before the Respondent had raised her preliminary objection in the Sessions Court, she had on 30 August 2021, filed an originating summons in the Shah Alam High Court, seeking an order that the impugned words in **section 233(1)(a) CMA**, which make it an offence to knowingly

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make any comment that is 'offensive' in character with the intent to 'annoy' another person by means of an applications service, are null and void under **art 4(1) FC** on the grounds that those words are inconsistent with **art 10** read with **art 8 FC**.

[40] Two weeks later on 13 September 2021, the Respondent filed a second application pursuant to **section 84 of the CJA 1964** to refer questions on the constitutionality of the impugned words to the Federal Court. The application was dismissed by the High Court. The Respondent's appeal against that decision to the Court of Appeal was also dismissed.

[41] On 16 June 2023, the Investigating Officer in the Respondent's case affirmed an affidavit stating that he had received instructions from the DPP that the file is to be closed on the grounds that "No Further Action" ('NFA') was necessary.

[42] On 12 September 2023, the High Court dismissed the originating summons filed by the Respondent with no order as to costs. The decision was premised on the grounds that the Respondent's argument, that the impugned words are void for vagueness *per se*, because they are not defined in the **CMA**, was fundamentally misguided.

[43] The High Court placed emphasis on the doctrine of presumption of constitutionality, as well as the principle that the words in a statute are not to be interpreted *in vacuo*, but should

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instead be construed purposively in light of the statutory and factual context.

[44] The Court also relied on earlier High Court decisions which held as follows:

(i) In interpreting **section 233 CMA**, the Court must be guided by the local context in Malaysia based on the objective, surrounding circumstances and the principles on which the **CMA** was drafted; and

(ii) There is no merit in the argument that **section 233 CMA** is vague, too broad, did not give fair notice as to the prohibited activity or is open to abuse.

**The Court of Appeal**

[45] Aggrieved, the Respondent appealed to the Court of Appeal on 28 September 2023 against the dismissal of her originating summons by the High Court.

[46] While the hearing of the appeal was ongoing, **section 233(1)(a) CMA** was amended by way of the **Communications and Multimedia (Amendment) Act 2025**, which came into force on 11 February 2025. The amendment had substituted the word 'offensive' in **section 233(1)(a) CMA** with the phrase 'grossly offensive'.

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[47] On 19 August 2025, the Court of Appeal allowed the Respondent's appeal and set aside the order of the High Court in respect of the dismissal of the originating summons filed by the Respondent.

[48] In its decision, the Court of Appeal took note of the recent amendment to **section 233(1)(a) CMA**, but nonetheless declined to comment on the constitutionality of the amended term as the Respondent's appeal only related to the pre-amendment position under the **CMA**.

[49] At the hearing before the Court of Appeal, the learned Senior Federal Counsel ('SFC') objected to the Respondent's *locus standi* to pursue her constitutional challenge on the basis that her file had been classified as NFA. The Court of Appeal disagreed, holding that an accused person who has been given a DNAA order may be charged at any time in the future and that the NFA classification, which is an internal matter between the DPP and the police, does not prevent the accused from being charged again for the same offence. As the charge was still hanging over her head, the Respondent was found to have the requisite *locus standi* to pursue a challenge on a matter affecting her constitutional rights.

[50] The Court of Appeal held that the High Court had misappreciated the Respondent's argument as it had only considered whether the impugned words were void for vagueness, but had failed to consider the central question

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raised in the case, namely, whether those words were consistent with **art 10** read with **art 8 FC**.

[51] The Court of Appeal held, in essence, that the impugned words within the entirety of **section 233(1)(a) CMA** were inconsistent with **arts 10(1)(a) and 10(2)(a)** read with **art 8 FC**. The impugned words, namely 'offensive' and 'annoy', were found not to be a permissible restriction under **art 10(2)(a) FC**, which permits Parliament to restrict the right to freedom of speech and expression on several grounds, including in the interest of public order or morality.

[52] The Court of Appeal so concluded for the following stated reasons:

(a) The Court of Appeal found that the primary issue for consideration is whether the impugned words in **section 233(1)(a) CMA**, namely 'offensive' and 'annoy', and the offence created of 'offensive' speech 'with intent to annoy' would be one affecting public order. If it did not affect public order, then it would not amount to a permissible restriction under **art 10(2)(a) FC**;

(b) The Court determined that the impugned words do not amount to acceptable restrictions under **art 10(2)(a) FC** because those words only concern individual sensibilities which, at most, only affect 'law and order'

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and do not rise to a level that threatens the public order of society;

(c) The Court of Appeal looked to Indian authorities relating to preventive detention legislation for the purposes of construing the definition of 'public order' in **art 10(2)(a) FC**. It focused on the distinction between 'law and order' and 'public order' to conclude that public order required a higher threshold and, in the context of **art 10(2)(a) FC**, meant speech or conduct which would consume "*a whole community, causing them to take to the streets or igniting a mass protest that disturbs the even keel of life and disrupts the proper ordering of society as a whole*";

(d) The Court agreed with counsel for the Respondent that **section 233(1)(a) CMA** made no reference to the preservation of public order. This was important because other statutes made specific reference to, and linked the offence to, public order. As the **CMA** did not expressly draw a nexus between the relevant communication which was 'offensive with intent to annoy' and how it could affect public order, it could not be concluded that such a form of communication could adversely affect public order;

(e) It was also observed that **section 233(1)(a) CMA** makes no distinction as to whether a communication is made to a person or to a group of persons, and it is thus

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sufficient for a single communication to a single person that is offensive and made with the intention to annoy to constitute an offence. The Court of Appeal did not consider that such an offence could have been aimed at preserving public order;

(f) The Court of Appeal utilised the dictionary meanings of 'offensive' and 'annoy' in isolation to interpret and construe **section 233(1)(a) CMA**;

(g) The Court adopted and followed the decision of the Indian Supreme Court in ***Shreya Singhal v Union of India*** **[2015] 3 MLJ 162 ('*Shreya Singhal*')**, where the entirety of **section 66A of the Information Technology Act 2000** was struck down on the grounds that the entirety of the section did not fall within the permissible restrictions under **art 19(2) of the Indian Constitution** which is similar to our **art 10(2)(a) FC**;

(h) The Indian Supreme Court in ***Shreya Singhal*** held that the content of the entirety of **section 66A of the Information Technology Act 2000** did not affect public order and therefore struck out the same for being unconstitutional. **Section 66A** is reproduced below for ease of reference:

> "***66A. Punishment for sending offensive messages through communication service, etc.***

*Any person who sends, by means of a computer resource or a communication device,*

*(a) any information that is grossly offensive or has menacing character; or*

*(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device;*

*(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,*

*shall be punishable with imprisonment for a term which may extend to three years and with fine.*

*Explanation.*
*For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.*"

(i) The Court of Appeal chose to accept the reasoning in ***Shreya Singhal*** to strike down only the words 'offensive' and 'annoy' on the grounds that these two words were

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not protected by the permissible restrictions under **art 10(2)(a) FC** in that they were incapable of adversely affecting public order. However, the Court of Appeal did not accept the reasoning in ***Shreya Singhal*** in relation to the other facets of **section 233(1)(a) CMA**, namely, communications which are obscene, indecent, false or menacing in character with intent to abuse, threaten or harass. These words were found to be constitutional, implicitly, as they were not struck out. While there is no reasoning afforded as to why these terms can affect public order, it can only be presumed that these latter terms, which were found to be constitutional, can indeed adversely affect public order so as to fall within the permissible restriction of endangering public order under **art 10(2)(a) FC**;

(j) The Court singled out and utilised the words 'offensive' and 'annoy' in their semantic sense to conclude that these terms were too trivial to give rise to any form of incursion into public order so as to fall within the permissible restrictions under the **FC**;

(k) The Court of Appeal reasoned that an offensive communication with intent to annoy could not possibly affect public order and the criminalising of such an act would amount to an overreach by the State, notwithstanding the permissible restrictions relating to, *inter alia*, public order;

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(l) The Court found that the intent and object of **section 233(1)(a) CMA** was to "*regulate the civility of the discourse over the internet"*. Criminalising offensive speech with the intent annoy did not have a rational nexus to that objective. The Court of Appeal then concluded that this did not meet the proportionality test as set out in ***Sivarasa Rasiah v Badan Peguam Malaysia & Anor*** **[2010] 2 MLJ 333** in relation to the restriction of fundamental liberties. The Court of Appeal applied a three-stage test on proportionality to reach the conclusion above (see: ***Nyambirai v National Social Security Authority*** **[1996] 1 LRC 64**, which was approved by the Privy Council in ***Elloy de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing & Ors*** **[1998] UKPC 30**). In summary, there was no rational nexus between the offence in **section 233(1)(a) CMA** and the objective of the CMA. In so concluding, the Court of Appeal considered the offence within **section 233(1)(a) CMA** and the object of the CMA. The Court of Appeal did not consider the offence in **section 233(1)(a) CMA** against the relevant constitutional provision relating to restrictions on the freedom of speech and expression, namely **art 10(2)(a) FC**, which is necessary to establish inconsistency with the **FC** under **art 4(1)**;

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(m) It was noted that **section 233(1)(a) CMA** carried heavy penalties, including imprisonment, yet contained no available defence or exception, such as truth or fair comment. Consequently, factually accurate speech could still be deemed 'offensive' and attract criminal liability, since the test focuses on whether a person feels offended rather than whether the speech is true. To silence speech which is true just because some may find it offensive and annoying would be disturbingly disproportionate and, in the words of the Court of Appeal, "*would be to use a sledgehammer to a [sic] kill a fly*";

(n) The Court of Appeal also criticised the lack of an objective standard under the **CMA** and held that as such, the impugned words amounted to a substitute for policing and censorship of speeches considered undesirable by the authorities, resulting in a chilling effect over the freedom of speech and expression as enshrined under **art 10(1)(a) FC**.

[53] Accordingly, the Court of Appeal allowed the Respondent's appeal and struck out the words 'offensive' and 'annoy' in **section 233(1)(a) CMA** as being unconstitutional under **art 4(1) FC**.

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**The Federal Court**

[54] Dissatisfied with the decision of the Court of Appeal, the Appellant sought leave to appeal to the Federal Court. On 13 November 2025, leave was granted in respect of the following questions of law:

**Question 1**: What is the effect of **art 4(2) FC** in the circumstances of this case?

**Question 2**: In the light of the trite position that if certain provisions of law, construed in one way, would make them consistent with the Constitution and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction, whether the interpretive approach enunciated by the English House of Lords in ***DPP v Collins*** **[2006] UKHL 40** and other subsequent decisions, *inter alia*, in ***Connolly v DPP*** **[2008] 1 WLR 276,** ***Scottow v CPS*** **[2021] 1 WLR 1828,** ***Attorney General's Reference (No. 1 of 2022)*** **[2023] 2 WLR 651**, ***DPP v Cobban*** **[2025] 2 All ER 168***,* ***R v Casserly*** **[2025] 1 All ER 82** and ***R v Jordan*** **[2024] EWCA Crim 229** pertaining to **section 127(1) of the UK Communications Act 2003, sections 1(1) and 1(4) of the UK Malicious Communications Act 1988** and **art 10 of the European Convention of Human Rights**, has any relevance in interpreting **section 233(1) CMA and art 10 FC**, considering the striking similarity shared by the equipollent provisions found in the respective legislations; and

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**Question 3**: Whether the object of **section 233(1)(a) CMA**, including the words "offensive" and "annoy" therein, is to prevent the misuse of public electronic communications network and to protect the basic standards of our society; thus, it is in the interest of public order and morality under **art 10(2) FC**.

## Issues

[55] In light of the foregoing questions of law, the following issues fall for consideration:

(i) How is **art 4(1) FC** to be interpreted and construed in light of **art 4(2) FC**?

(ii) How is **art 10 FC** to be interpreted and construed in light of **arts 4(1)** and **4(2) FC**? In other words, how is the power to strike out under **art 4(1)** read with **art 4(2)** applied in the context of **arts 10(1)** and **10(2)**?

(iii) What is the intent and object of the **CMA**, and more particularly, **section 233(1)(a)** of the same?

(iv) How is **art 10(1)(a) FC** to be interpreted and construed? What is the meaning of freedom of speech and expression?

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(v) Does the right to freedom of speech and expression in **art 10(1)(a) FC** encompass communications which are 'offensive with intent to annoy' or which are 'offensive with intent to abuse, threaten or harass'?

(vi) Should legislation or impugned words within legislation be struck out under **art 4(1) FC** by reason of an unwarranted prosecution?

(vii) In determining whether a statute or part of a statute is to be struck down under **art 4(1) FC**, is the court bound to consider whether the statute or the impugned words in the statute can be read down so as to preserve the same?

(viii) Are the impugned words in **section 233(1)(a) CMA** unconstitutional?

(ix) Was the Court of Appeal correct in determining that the impugned words in **section 233(1)(a) CMA** did not fall within the permissible restrictions on the freedom of speech and expression under **art 10(2)(a) FC**?

(x) Was it proper for the Respondent to take her constitutional challenge before the High Court, rather than in the Sessions Court?

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(xi) Can the Respondent take a constitutional challenge in the absence of a subsisting factual matrix?

**Issue (i): How is art 4(1) FC to be interpreted and construed in light of art 4(2) FC?**
**Issue (ii): How is art 10 FC to be interpreted and construed in light of arts 4(1) and 4(2) FC? In other words, how is the power to strike out under art 4(1) read with art 4(2) applied in the context of arts 10(1) and 10(2)?**

[56] These issues will be considered together.

[57] **Art 4(1) FC** has been interpreted and construed so as to entrench the position in law that constitutional supremacy prevails in the interpretation and construction of the **FC**. As such, where a law or parts of a law are inconsistent with the **FC**, such law is void to the extent of the inconsistency. This means that the law, being void, is struck out by the Courts.

[58] As has been pointed out in ***Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors*** **[2022] 3 MLJ 356 (‘*Dhinesh Tanaphll*’)**, the role of ensuring that void legislation is struck out or removed lies with the Judiciary. To this end, the Judiciary only strikes out legislation to ensure that constitutional supremacy prevails. This principle has been established in Malaysian jurisprudence, in a slew of cases from this Court, including ***SIS Forum (M) v Kerajaan Negeri***

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***Selangor (Majlis Agama Islam Selangor, intervener)*** **[2022] 2 MLJ 356** and ***Dhinesh Tanaphll***.

[59] The essence of **art 4(1) FC** stipulates that:

(i) The Constitution of the nation state is supreme, making this a constitutional supremacy;

(ii) The supremacy of the Constitution is safeguarded and given 'teeth', as it were, by the existence of the power to strike out legislation which is inconsistent with the **FC**. Operationally, this takes the form of constitutionally entrenched judicial review to ascertain whether or not a provision does indeed conform or not with the **FC**;

(iii) The safeguard accorded in **art 4(1) FC** is executed by the Judiciary. As such, the Judiciary is vested with the power of constitutional judicial review, which includes the striking down of federal law where it is inconsistent with the **FC**. Therefore, the touchstone and source of judicial power cannot be confined to **art 121(1) FC** solely, nor can the Judiciary's powers be restricted to that conferred 'by or under federal law';

(iv) **Art 4(1) FC**, by stipulating that any law that is inconsistent with the **FC** is void, ensures that the fundamental features of the **FC** are not abrogated.

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This is because the **FC** in itself contains those fundamental features that limit constitutional amendments that are inconsistent with the **FC**; and

(v) The doctrine of the separation of powers is similarly contained in this article as it provides for the Judiciary, as the guardian of the **FC**, to act as a check and balance against the Legislature and Executive. In this context, the **FC** is not self-executory and therefore cannot act to protect itself.

[60] It should also be noted that **art 4(1) FC** has been, and ought always to be applied with great caution and prudence, to ensure that constitutional supremacy prevails. It is notable that the courts have struck down legislation or parts of legislation under **art 4(1) FC** only in rare cases. In this regard, most of the case law relate to instances where the legislation has sought to eliminate the constitutional power of the courts to scrutinise and determine whether the right to liberty under **art 5(1) FC** has been contravened. In other words, the courts have struck down ouster clauses which purport to excise the function of the courts under the **FC**. This is effectively an elimination of judicial power.

[61] In this context, the courts have applied the power of striking out under **art 4(1) FC** in relation to preventive detention cases. This is because, in the absence of the scrutiny of the courts, detainees who *prima facie* did not pose a threat in terms of terrorism or crime, which was likely to affect the security of

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the nation, were held without trial for what was often an indeterminate period of time with no expectation of release or being charged for the alleged offence. This was in direct conflict with the right to life, which encompasses the liberty of a person. There was no recourse in respect of such indeterminate detention. However, **art 4(1) FC** allowed the courts to ensure that **art 5(1) FC**, namely the right to life and liberty, was complied with. Purporting to take away the function of the courts under **art 4(1) FC** through the means of an ouster clause defied the essence of **art 4(1) FC**. It was in this circumstance that the courts were compelled to invoke **art 4(1) FC** and strike out such ouster clauses.

[62] This underscores the necessity for a clear inconsistency with the provisions of the **FC** before this power is resorted to. It should equally be said that where such an inconsistency is clear, the courts should not hesitate to employ **art 4(1) FC**.

[63] Other instances where the courts have utilised **art 4(1) FC** have involved a very clear contravention of fundamental liberties, such as in ***Lai Hen Beng v Public Prosecutor*** **[2024] 1 MLJ 225**. It is therefore worth reiterating that the power to strike out under **art 4(1) FC** is to be exercised with care and only where the legislation in question cannot be saved.

[64] **Art 4(1) FC** ensures that amendments to the **FC** do not have the effect of altering or removing essential components of

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the Constitution. Examples of such essential or core components include:

(i) the features of the supremacy of the Constitution as enshrined in **arts 4(1) and 121 FC**;

(ii) Islam as the religion of the Federation as set out in **art 3 FC**;

(iii) the constitutional monarchy;

(iv) the unique position of the Malay Rulers;

(v) the division of powers between the Legislature, Executive and the Judiciary, with the Yang di-Pertuan Agong ('YDPA') as the head;

(vi) the role of the YDPA and Malay Rulers as the heads of religion;

(vii) the national language of the Federation as set out in **art 152 FC**;

(viii) the special position of the Malays and natives of Sabah and Sarawak as stated in **art 153 FC**;

(ix) citizenship of the State as provided under **Part III of the FC**; and

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(x) the written guarantee of fundamental rights as well as their protection as found in **Part II of the FC**.

(See also: ***Dhinesh Tanaphll*** at para [123])

[65] The protection afforded to these core features of the **FC** do **not** mean that the **FC** cannot be amended at all. It is a misconception to apprehend the above as precluding the State from amending the **FC** where it is necessary to meet the evolving needs of the nation. That is the role of the Legislature and Executive, and **art 4(1) FC** ought not to be utilised to abrogate or take away from their core functions. This would not be consonant with the doctrine of the separation of powers.

[66] Therefore, what is protected under **art 4(1) FC** are the features comprising the core of the **FC**, which define the nation as it now stands, and as it did at independence. It does not function to stultify or preclude the State from developing and progressing to meet the needs of its citizens.

**The effect of art 4(2) FC**

[67] Reverting to the issue at hand, the question that arises is how **art 4(1) FC** is to be construed in light of **art 4(2) FC**, in the context of the challenge by the Respondent, Heidy Quah, in relation to **arts 10(1)** and **10(2) FC**.

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[68] It should be emphasised that in none of the cases where the courts have utilised **art 4(1) FC** previously was it necessary to construe **art 4(1) FC** in light of **art 4(2) FC** because, as stated above, those cases dealt largely with **art 5(1) FC**, which relates to the right to life and liberty.

[69] **Art 4(2) FC** in sub-paragraph (b) provides that the validity of any law shall not be questioned on the ground that it imposes restrictions on the right to freedom of speech and expression, the right to assemble peaceably without arms and the right to form associations, but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in **art 10(2) FC**. In the present context, we are concerned with **art 10(1)(a) FC**, namely the right to freedom of speech and expression, in relation to **arts 4(1) and 4(2) FC**.

[70] When **arts 4(1), 4(2), 10(1)(a) and 10(2)(a) FC** are interpreted in concert, what it means is that the power to strike out legislation or parts of legislation under **art 4(1)** for inconsistency with the **FC** is subject to the express restriction or fetter set out in **art 4(2).** What then are the express restrictions or fetters set out in **art 4(2)** which limit **art 4(1)?**

[71] The restrictions under **art 4(2) FC** that limit the courts under **art 4(1) FC** from striking out legislation or parts of legislation which are inconsistent with the **FC**, in relation to the freedom of speech and expression, are:

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Legislation enacted by Parliament which imposes restrictions on the right to freedom of speech and expression in the interest of,

(i) the security of the State;
(ii) friendly relations with other countries;
(iii) public order or morality;
(iv) the protection of Parliamentary or Legislative Assembly privilege; or to provide for
(v) laws against contempt of court, defamation or incitement of any offence,

**where those restrictions were deemed necessary or expedient by Parliament for the above purposes**.

[72] The areas where there are restrictions on the ability to invoke **art 4(1) FC** are clearly set out in **art 4(2) FC**, specifically in relation to the freedom of speech and expression. What do the words "**where those restrictions were deemed necessary or expedient by Parliament for the above purposes**" mean or convey? In simpler terms, it means that such laws as falling within the purview of **arts 4(2) and 10(2)(a) FC** cannot be invalidated simply because a court disagrees with Parliament's intent and judgment that the restriction was necessary or expedient for reasons like national security or public order.

[73] In other words, the courts are not to interfere with the purpose, object or goals that Parliament sought to achieve when it enacted a particular law, which in the instant case is **section**

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**233(1)(a) CMA**. To that extent, the intent of Parliament is neither the private nor subjective opinion of individual lawmakers or the body itself, but an objective purpose to be determined from the language of the relevant statute as well as the mischief the law was designed to address. The judgment of Parliament refers to the final decision made by Parliament after going through its formal legislative process. Under **art 4(2) FC**, the role of the court is to interpret and apply the law as passed and not to question the wisdom of Parliament's decision. This would therefore fetter, in theory, the ability of the court to strike down a statute which falls within the purview of the permitted restrictions as outlined above.

[74] Does it then follow that all laws falling within these restrictions are completely shielded or immunised from judicial scrutiny? This cannot be the case in a constitutional supremacy as set out in **art 4(1) FC**. If **art 4(2) FC** were to be read as conferring or embodying a **complete fetter** on the particular liberties set out in **art 4(2) FC**, then this would mean that a citizen could not challenge, and a court would be proscribed from examining, any statute relating to any one of the subject matters set out in **art 10(2)(a) FC**. It would amount to subscribing to the doctrine of parliamentary sovereignty.

[75] The net result would also give rise to the consequence that the right to freedom of speech and expression, as constitutionally guaranteed under **art 10(1)(a) FC**, would be completely abrogated.

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[76] Is such an interpretation consonant with the express and underlying purpose and spirit of the **FC**, which embodies the doctrine of constitutional supremacy? It is not. As the Constitution reigns supreme, any specific restriction on the fundamental liberties, which are expressly conferred in **Part II of the FC**, should only be interpreted so as to limit the particular liberty strictly to the extent specified. That, in turn, means that while Parliament's intent or judgment in respect of specific restrictions relating to the nation's interests are not to be challenged in terms of the judgment or intent of Parliament, the legislation in question can still be questioned in relation to whether it falls within the purview of the permitted restrictions stipulated under **art 10(2)(a) FC**. In short, the limitations in **art 4(2) FC** ought not to be construed so as to nullify a fundamental liberty expressly conferred by the **FC**, as this would contravene the doctrine of constitutional supremacy.

[77] This conclusion is fortified by the case of ***Public Prosecutor v Pung Chen Choon*** **[1994] 1 MLJ 566 (*'Pung Chen Choon'*)**, where the then Supreme Court considered the interpretation and construction to be accorded to **art 4(2) FC** in relation to **arts 10(1) and 10(2) FC**. This is what the Court said:

> "*By cl (2)(a) of art 10, challenge to any law is restricted by art 4(2)(b) which says: 'The validity of any law shall not be questioned on the ground that it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes*

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*mentioned in that Article.' This means that it is not open to any court to enquire into the question whether Parliament deems or does not deem anything. Nevertheless, as has been aptly put by Prof LA Sheridan and Prof Harry E Groves in their book on the Constitution of Malaysia (4th Ed) at pp 74 and 74 [sic],* ***a law which purports to have been passed under cl (2) is open to challenge on the ground that it is not in any of the interests set out in the clause since any other, more extensive meaning to be assigned to art 4(2)(b) would render art 10(2) otiose****."*

[emphasis added]

[78] This means, in effect, that the fetter in **art 4(2) FC** permits a restriction in respect of **arts 9 and 10 FC** to be imposed by Parliament for specific reasons, but does not extend to abrogating the fundamental liberties in **arts 9 and 10 FC**. Such restrictions are limited and for specific purposes only. This does not derogate from the striking out of legislation that is inconsistent with the **FC**, save for the permitted restrictions, under **art 4(1) FC**. It also does not derogate from **art 4(1) FC** establishing the **FC** as the supreme law of the Federation. As such, constitutional supremacy remains the cornerstone of the **FC**.

[79] What **art 4(2) FC** does, however, is to limit the ability of the Courts to question or challenge Parliament's intention or judgment that the restriction was 'necessary or expedient' for the specified grounds set out in **art 10(2)(a) FC**, or **art 9(2) FC** as may be the case.

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[80] This means that it is open to a Court to still judicially review the impugned legislation to ascertain whether it falls within those specified grounds set out in **art 10(2)(a) FC** and referenced in **art 4(2) FC**.

**The Appellant's arguments on art 4(2) FC**

[81] Having interpreted and construed the effect of **art 4(2) FC**, we turn to consider the arguments advanced by the learned SFC, which may be summarised as follows:

(i) The original intent of **art 4(2)(b) FC** is to immunise both questions of whether a restriction relates to a permissible ground under **art 10(2) FC** and whether the restriction is reasonable in the circumstances from judicial scrutiny;

(ii) Since the immunity afforded under **art 4(2)** also forms part of **art 4 FC** alongside **art 4(1), art 4(2)** should be afforded the same paramountcy **as art 4(1)**;

(iii) The decision of the Supreme Court in ***Pung Chen Choon*** should be revisited in light of the minutes and reports of the Federation of Malaya Constitutional Commission and the Working Party;

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(iv) Insofar as **art 4(2) FC** is engaged, the principle of proportionality does not apply; and

(v) Based on the drafting history of **art 4(2) FC**, the test laid down in Indian cases on whether a restriction on the right to freedom of speech and expression is valid has no application in the local context.

[82] The learned SFC produced historical records comprising minutes and reports of the Federation of Malaya Constitutional Commission and the Working Party in support of their contention that the original intent of the framers underlying **art 4(2) FC** was that it expressly immunises laws made by Parliament under **arts 9(2) and 10(2) FC** which are in derogation of the rights set out in **arts 9(1) and 10(1) FC**.

[83] The historical records produced before us may be summarised as below.

[84] Our present **art 10 FC** finds its origins in article 10 of the draft Constitution for the Federation of Malaya ('the draft Constitution') as proposed by the Reid Commission. The wording of this provision was largely modelled after **art 19(2) of the Indian Constitution**. Article 10(1) of the draft Constitution read as follows:

> "*Every citizen shall have the right to freedom of speech and expression, subject to* ***any reasonable restriction*** *imposed by federal law in the interest of the security of the Federation,*

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> *friendly relations with other countries, public order, or morality, or in relation to contempt of court, defamation, or incitement to any offence.*"
>
> [emphasis added]

[85] Similarly, the right to assemble peaceably and without arms under article 10(2) and the right to form associations under article 10(3) of the draft Constitution were "*subject to any reasonable restriction imposed by federal law*" on specified grounds.

[86] The report of the Reid Commission was accompanied by a Note of Dissent by Mr. Justice Abdul Hamid of the West Pakistan High Court, who was the most junior of the five members of the Reid Commission. Justice Abdul Hamid proposed for the word 'reasonable' to be removed in relation to the rights to freedom of speech, assembly and association under article 10 of the draft Constitution. He reasoned that any restriction imposed by the Legislature on these rights should not be challengeable in a court on the grounds that the restriction is not reasonable and that the Legislature alone should be the judge of what is reasonable under the circumstances.

[87] The dissent of Justice Abdul Hamid on this point was considered by the Working Party at a meeting held on 8 March 1957. An excerpt from the minutes of the meeting is reproduced below:

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"*Article 10*

*The Working Party discussed the proposal of Mr. Justice Abdul Hamid that the word "reasonable" wherever it appeared before the word "restriction" should be deleted.* ***If, however, this word were to be omitted there would be no limit on the power of the Federation Government to impose restrictions limiting the right of citizens to freedom of speech and expression, freedom to assemble peaceably and without arms and freedom to form associations****. On the other hand if the word were retained it would be left to the Courts to decide what was a reasonable restriction in the interests of the security of the Federation, friendly relations with other countries, etc.*"

[emphasis added]

[88] The Working Party ultimately proposed the deletion of the word 'reasonable' from article 10 of the draft Constitution, and the insertion of the words 'in the opinion of Parliament' in the three sub-clauses of the article. It was also agreed for the views of constitutional experts in the United Kingdom to be obtained on these proposals.

[89] Thereafter, article 3 of the draft Constitution, which is the precursor to our present **art 4 FC**, was redrafted by the Attorney-General by inserting a new proviso as follows:

"*Article 3*
*Clause (1)*

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> *This Constitution shall be the supreme law of the Federation and any provision of the Constitution of any State or of any law which is repugnant to any provisions of this Constitution shall to the extent of the repugnancy and subject to the provisions of this Constitution be void:*
>
> ***Provided that it shall not be competent for any Court to question or to entertain proceedings which question, on the grounds that it is contrary to the provisions of Article 9(2) or Article 10 or 11, any Federal law****...*"
>
> [emphasis added]

[90] The new draft articles 3 and 10, as proposed by the Working Party and redrafted by the Attorney General, were subsequently discussed in London with the involvement of the Federation of Malaya delegation and the UK government. The finalised terms were recast by UK Parliamentary counsel in the form of **art 4**, particularly **art 4(2), and art 10**, which appeared in the final Constitutional Proposals for the Federation of Malaya, or the so-called 'White Paper' in 1957. Both articles remain unchanged in our present **FC**.

**Our analysis of the Appellant's arguments**

[91] A close examination of the historical records set out above reveals that **art 4(2) FC**, as it appears in the present form, does not mirror the version drafted by the Attorney-General on behalf of the Working Party. While the draft article 3 as drafted by the Attorney-General appears to completely

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prevent the courts from entertaining any challenge against a restriction imposed by Parliament on the right to freedom of speech and expression, the wording of **art 4(2)(b) FC**, as interpreted and construed earlier, only limits the courts from questioning the intent or judgment of Parliament in relation to the 'necessity' or 'expediency' of such a restriction. The issue of whether that restriction falls under one of the permissible grounds in **art 10(2)(b) FC** can nonetheless be challenged before the courts.

[92] Notwithstanding the clear distinction in wording between the proviso drafted by the Attorney-General and the present **art 4(2)(b) FC**, the learned SFC argued that **art 4(2)(b) FC** ought to be interpreted to reflect the original intent of the Working Party, as recorded in the draft proviso prepared by the Attorney-General.

[93] The argument advanced by the learned SFC subscribes to the theory of 'originalism', which is one of two broad schools of constitutional interpretation in the United States. On the other end of the spectrum of constitutional theory is 'living constitutionalism'.

(See: D.Y. Chandrachud, *Why the Constitution Matters: Selected Speeches* (Penguin Random House India, 2025) at pages 3-4; Lawrence B. Solum, 'Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great

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Debate' (2019) 113(6) *Northwestern University Law Review* 1243).

[94] Originalism, in essence, contends that the meaning of the constitutional text is fixed at the time it was framed. That said, there is substantial disagreement between various judges and scholars about the exact nature and scope of originalism. Judge Robert Bork, for instance, argues that originalism gives effect to the *original intent* of the framers of the constitution. This does not require the courts to determine what the framers would have felt about the application of a particular constitutional provision. Instead, the courts should discern a core value that the framers intended to protect and then apply that core value to the issue at hand (see: Robert H. Bork, 'The Constitution, Original Intent, and Economic Rights' (1986) 23 *San Diego Law Review* 823).

[95] Meanwhile, Justice Antonin Scalia was of the view that originalism refers to the *original meaning* of the constitutional text and not what the framers originally intended (see: Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann ed., Princeton University Press, 1997) at page 38). The original meaning is to be determined based on how a reasonable person belonging to the historical context in which the constitution was made will construe the words in that constitution (see: Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 *University of Cincinnati Law Review* 849).

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[96] It follows that even in the United States, where the theory of originalism first emerged, there is no consensus on what it actually means. An inquiry into the original intent of the framers of the Constitution, as advanced by the learned SFC, is but one method of interpretation espoused by originalism. In our view, this is not necessarily the correct approach to interpreting and construing the **FC**.

[97] On the other hand, the theory of 'living constitutionalism' emphasises that the constitution is a living document which can and should evolve in response to changing circumstances and values. It calls for a reasonably flexible interpretation of the constitution so that it suits the changing needs of society. As eloquently stated by Justice Oliver Wendell Holmes Jr in *Missouri v Holland* 252 U.S. 416 (1920):

> "*When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.*"

[98] Under this theory, courts cannot disregard the constitutional text, but are required to apply the text in the current context, instead of the context in which it was enacted (see: William H. Rehnquist, 'The Notion of a Living Constitution' (2006) 29(2) *Harvard Journal of Law and Public Policy* 401).

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[99] The theory of living constitutionalism ties into the prismatic approach adopted by Malaysian courts in relation to the interpretation of fundamental liberties guaranteed under the **FC** (see: ***Lee Kwan Woh v Public Prosecutor*** **[2009] 5 MLJ 301**). In this regard, it is a well-established position in this jurisdiction that the **FC** is a living document and its provisions, especially those pertaining to the protection of fundamental rights under **Part II of the FC**, ought to be interpreted and construed in a generous and prismatic fashion.

[100] In ***Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal*** **[2011] 6 MLJ 297**, this Court cited with approval the following passage from the Court of Appeal decision in ***Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*** **[1996] 1 MLJ 261**:

> "*And perhaps it is opportune here to be reminded that 'the courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of constitutional interpretation. They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution…*"

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[101] In other words, living constitutionalism is the prevailing approach in Malaysian jurisprudence. The meaning of the provisions of the **FC** is not fixed or frozen at the time of enactment of the **FC**, but is capable of development and adaptation as the Malaysian society evolves.

[102] The framers of the **FC** could not, in 1957, have envisaged the technological developments that would come about in the following decades, nor could they have foreseen the exponential growth of social media. The proper method of constitutional interpretation would thus be to apply the provisions of the **FC** in a manner consonant with the current context.

[103] The historical records produced by the learned SFC are no doubt important in construing the meaning of the provisions of the **FC**, but are not, by any means, determinative for that purpose. **Art 4(2) FC**, as it exists in the present form, cannot be read in the same manner as suggested by Justice Abdul Hamid in his Note of Dissent. This is especially so since the current wording of **arts 4(2) and 10 FC** do not entirely reflect the changes proposed by both Justice Abdul Hamid and the Working Party. In fact, the minutes of the Working Party as reproduced above shows that the Working Party itself was alive to the concern that Justice Abdul Hamid's proposal would give rise to a situation where there would be no limit on the government's power to impose restrictions limiting the right of citizens to freedom of speech, assembly and association.

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[104] We also find it necessary to emphasise that great care should be taken before one can state that a particular position was one 'intended' by the 'framers' of the **FC**. The drafting history of the **FC** shows that it was a product of multiple compromises. Thus, while we can look to the intention of certain parties based on written records, it is impossible to ascertain one common and defining intention of the framers of the **FC** on the meaning of its provisions.

[105] Although the original wording and the stated intention of some of those who were responsible for drafting the **FC** merit respect, they are merely the starting point in interpreting the provisions of the **FC**. The overarching principles of constitutional interpretation that ought to be applied are those that have been established and affirmed in Malaysian constitutional jurisprudence, particularly in relation to the protection of fundamental liberties which have been expressly guaranteed under the **FC**.

[106] The provisions of the **FC** ought to be read harmoniously so as to not dilute the effect of any one provision in relation to another. That said, there is nothing in **art 4(2) FC** that detracts from the overarching principle of constitutional supremacy as established under **art 4(1) FC**. The effect of **art 4(2) FC**, as interpreted and construed in this judgment, upholds the right to freedom of speech and expression guaranteed under **art 10(1)(a) FC**. Contrary to the argument of the learned SFC, this

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interpretation does not in any way diminish the importance of **art 4(2) FC** vis-à-vis **art 4(1) FC**.

[107] On the other hand, the reading of **art 4(2) FC** as advanced by the learned SFC, which would have the effect of immunising any restrictions imposed by the Legislature on the right to freedom of speech and expression from judicial scrutiny, would put **art 4(2) FC** in conflict with **art 4(1) FC**, as it would give free rein to Parliament to restrict the right in whichever way it sees fit without any judicial oversight on the matter. This would render the right to freedom of speech and expression as protected under the **FC** nugatory.

[108] It follows that the Supreme Court case of ***Pung Cheng Choon***, which we have adopted in our reasoning above in interpreting and construing the effect of **art 4(2) FC**, was correctly decided. As such, there is no need to revisit the decision.

[109] The final argument raised by the learned SFC questions the relevance of the Indian case of ***Shreya Singhal***, which was adopted by the Court below in its reasoning, to the present appeal. As we have alluded to earlier, that case is distinguishable from the present appeal, as the Indian Supreme Court there had struck down the entirety of **section 66A of the Information Technology Act 2000** for being unconstitutional, while the Respondent here has only challenged the constitutionality of the two impugned words in the **CMA**.

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Therefore, the reliance placed by the Court below on the reasoning in ***Shreya Singhal*** was, with respect, not appropriate. This, however, has to do with the different issues raised in that case and is not due to the drafting history of **art 4(2) FC**, as contended by the learned SFC. In any event, it is trite that courts should interpret and construe the provisions of the **FC** in light of local circumstances and values, and should take care when relying on any decision from a foreign jurisdiction.

**How are arts 4(1) and 4(2) FC to be utilised in practice?**

[110] In order to strike out legislation or part of such legislation under **arts 9** and **10 FC**, it is necessary to satisfy the following conditions:

(a) The impugned legislation should infringe **art 10(1)(a) FC**;

(b) It should not fall within the express restrictions set out in **art 10(2)(a) FC**;

(c) If the particular impugned provision infringes **art 10(1)(a) FC** but falls within the restrictions in **art 10(2)(a) FC**, then it remains protected from challenge in so far as the intention and judgment of Parliament in enacting the particular law is concerned;

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(d) However, the limitations imposed by **arts 4(2) and 10(2)(a) FC** **do not** preclude judicial review to determine whether a particular piece of legislation **falls within or outside of the ambit of restrictions that can be imposed by Parliament under art 10(2)(a) FC**;

(e) If the legislation or provision **does fall** within the purview of the restrictions specified, then it is protected. This is because such legislation is consistent with **arts 4(2) and 10(2)(a) FC** (which are the relevant provisions in this appeal) and therefore cannot be said to be inconsistent with the **FC**;

(f) If the legislation or provision **does not fall** within the ambit of the restrictions specified, then such legislation is open to challenge or may be struck out under **art 4(1) FC**. This is because it would then be inconsistent with the **FC**, taking into account **arts 4(2) and 10(2)(a) FC**.

**How is the constitutionality of a provision that purportedly infringes art 10(1)(a) FC to be construed?**

[111] It is evident from the foregoing analysis that if legislation or a provision within legislation, such as **section**

**233(1)(a) of the CMA**, is said to infringe **art 10(1)(a) FC**, the starting point to determine the constitutionality of that provision is **art 4(1)** read together with **art 4(2) FC**.

[112] As the validity of the legislation is challenged, **art 4(1) FC** is the correct provision to consider. However, as the impugned words in the legislation relate to freedom of speech and expression, it is necessary to have recourse to **art 4(2) FC**, as explained above. It is only after the limits imposed upon **art 4(1)** by **art 4(2)** are appreciated as detailed above, that **arts 10(1)(a) and 10(2)(a) FC** are considered and an analysis undertaken in relation to **section 233(1)(a) CMA**.

[113] The Court of Appeal, in its analysis, interpreted and construed the impugned words in **section 233(1)(a) CMA** against **art 10(2)(a) FC**:

(i) firstly, without considering **arts 4(1) and 4(2) FC** together; and

(ii) secondly, without consideration as to whether **art 10(1)(a) FC** was contravened.

[114] The consequence is that the scope of judicial review as set out in (a) to (f) above in respect of freedom of speech and expression under **art 10 FC** was not fully considered. There was also an assumption made that the right to freedom of speech and expression was violated.

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[115] When the constitutionality of a fundamental liberty under **art 10 FC** is examined, it is necessary to undertake an analysis which begins with **arts 4(1) and 4(2) FC** together, followed by a juxtaposition of the impugned legislation and the relevant article in its entirety. This is consonant with the **FC**.

[116] Having interpreted and construed the foregoing articles, the next matter for consideration is the purpose and object of the **CMA**. This is necessary in order to undertake an analysis of whether the impugned words in **section 233(1)(a) CMA** violate **arts 10(1)(a) and 10(2)(a) FC.**

**Issue (iii): What is the intent and object of the CMA, and more particularly, section 233(1)(a) of the same?**

[117] The intent and object of the **CMA** may be gleaned from a consideration of, amongst others, its short title, **section 3** which deals with the objects of the Act as well as its contents, looked at holistically. The short title stipulates that it is to provide for and to regulate the converging communications and multimedia industries. Its objects in **section 3** encompass a range of purposes including the promotion of national policy objectives for the communications and multimedia industry.

[118] **Section 3(2**) **CMA** sets out those national policy objectives which include:

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(i) To establish Malaysia as a major global centre and hub for communications and multimedia information and content services (see: **section 3(2)(a) CMA**);

(ii) To promote a civil society where information-based services will provide the basis of continuing enhancements to quality of work and life (see: **section 3(2)(b) CMA**);

(iii) To regulate for the long-term benefit of the end-user (see: **section 3(2)(d) CMA**); and

(iv) To create a robust applications environment for end-users (see: **section 3(2)(g) CMA**).

[119] **Section 3(3) CMA** further provides that nothing within the CMA shall be construed as permitting the censorship of the internet. This subsection, by expressly prohibiting censorship, precludes, in principle, a violation of **art 10(1)(a) FC**. It means that in promoting the object of the **CMA**, the intent is not to allow censorship. Censorship and **art 10(1)(a) FC** are closely connected in that a statute which expressly precludes censorship would equally not have the object of infringing on the freedom of speech and expression under **art 10(1)(a) FC**.

[120] **Section 3(3),** being an object of the entire **CMA**, instils or promotes the spirit of non-intrusion into the sphere of freedom of speech and expression.

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[121] As for **section 233(1)(a) CMA**, it regulates online content to prevent the *"improper use of network facilities or network services".* Improper use of network facilities would be use that has the predominant purpose of resulting in or causing harm or injury to another user or users. This section serves to safeguard or protect individuals from harm, safeguard public order, and ensure the responsible use of communication technologies such that all participants or users will be confident of a safe environment.

[122] It is in the context of the 'misuse of networks' that offences have been set out, so as to enforce and maintain a safe environment on networks, for the protection of users. The offences in **section 233(1)(a) CMA** seek to stop a range of behaviours, from abuse, harassment, menacing and offensive conduct, each of which is undertaken with the specific intent to annoy, abuse, threaten or harass another user or users. Therefore, each of these behaviours amounts to a misuse of the networks. In the appeal before us, the dispute centres on whether the use of the word 'offensive' in conjunction with the other types of conduct named and with express intent to annoy can be said to amount to a misuse.

[123] The Court of Appeal in determining that communication which is 'offensive' or with an intent to 'annoy' contravened **art 10(1)(a) FC**, failed to consider whether such conduct, could amount to misuse of the network facilities. If such conduct

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amounted to misuse it would have a direct bearing on the ultimate object of the **CMA**, namely to protect and safeguard users of these networks. Moreover, as such conduct causes harm to other users, it would not fall within the definition of 'freedom of speech and expression' as envisaged in **art 10(1)(a) FC**. The net result is that such communications may continue to be made by users, causing harm and injury to other users, without any recourse being available under the **CMA**.

[124] Having understood the purpose and object of the **CMA**, and keeping the specific limits on review as articulated under **arts 4(1) and 4(2) FC**, we now turn to construe **art 10(1)(a) FC**, followed by **art 10(2)(a) FC**.

**Issue (iv): How is art 10(1)(a) FC to be interpreted and construed? What is the meaning of freedom of speech and expression?**

[125] **Art 10(1)(a) FC** provides for "freedom of speech and expression". What do those words mean in the context of the **FC** and what is the scope or ambit of the same?

[126] T.M. Cooley in his textbook entitled *A Treatise on the Constitutional Limitations* while defining 'freedom of speech and press' has stated thus:

> *"...the constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against*

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> *any responsibility for the publication,* ***except so far as such publications, from their blasphemy, obscenity or scandalous character may be a public offence or as by their falsehood and malice and they may injuriously affect the private character of the individuals****. Or to state, the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish but complete immunity for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards, we must look to the common law rules which were in force when constitutional guarantees were established."*
>
> [emphasis added]

(See: *Commentary on the Constitution of India* by Durga Das Basu, 9th Edition by Justice S. S. Subramani, Former Judge, Madras High Court at page 3650, Part III-Fundamental Rights, which references T.M. Cooley, A Treatise on Constitutional Limitations, 1st Indian Edn., 2005, Chapter XII, 'Liberty of Speech and of the Press, page 422)

[127] For the relevant standards, the learned author also makes reference to the European Convention for the Protection of Human Rights and Fundamental Freedom, highlighting that:

> "*....the exercise of the freedom of speech and expression carries with it duties and responsibilities and may be subject to such formalities conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interest of national security, territorial integrity or public*

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> *safety for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.*"

[128] The essence of these passages embodies the principle that freedom of speech and expression is not absolute, but inherently qualified to exclude communications which are harmful in character. **Art 10(1)(a) FC** does not afford blanket permission to say anything whatsoever but is circumscribed by the nature and purpose of the speech or expression. It is intended to serve a constructive purpose to advance democratic participation, individual views and opinions which are sought to be shared, as well as expressions which are premised on fact or advanced in an effort to search for the truth.

[129] In other words, the liberty afforded under the article is not an unlimited licence and is subject to inherent restrictions, even without written laws. What does **not** fall within the purview of free speech and expression is the utterance or expression of words **intended** to offend, insult, annoy and cause harm or injury. This is because such expressions do not further dialogue or expression in the furtherance of democratic principles nor serve to disseminate information or express opinions or promote communications as envisaged under the article. It should also be made clear that discontent or anger arising from speech or the expression of political views, and more controversial issues do **not** constitute harm as envisaged in **art**

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**10(1)(a) FC**. Such communications comprise free speech as that is the essence of freedom of speech and expression. It promotes dialogue to enhance the existing system of government or democracy.

[130] In short, the constitutional right contained in **art 10(1)(a) FC** envisages the use of that liberty in a coherent and regulated manner. Such regulation is inherent or built into the grant of the right itself. The **FC** protects genuine expression, not communication which is intended to cause injury or harm. It protects speech as a social good, not as a tool, the dominant purpose of which is for disruption or harm.

[131] The fact that **art 10(1)(a) FC** itself has inherent boundaries or is regulated is spelt out in the case of ***Public Prosecutor v Ooi Kee Siak & Ors*** **[1971] 2 MLJ 108**, a decision of Raja Azlan Shah J (as His Majesty then was) when adjudicating on a case relating to the Sedition Act 1948 in the High Court:

> *"It is of course true, as a general statement, that the greatest latitude must be given to freedom of expression. It would also seem to be true, as a general statement, that free and frank political discussion and criticism of government policies cannot be developed in an atmosphere of surveillance and constraint. But as far as I am aware,* ***no constitutional state has seriously attempted to translate the 'right' into an absolute right. Restrictions are a necessary part of the 'right' and in many countries of the world freedom of speech and***

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***expression is, in spite of formal safeguards, seriously restricted in practice****. In the United States all types of speech "can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (See New York Times Co v Sullivan 376 US 255 (1964)). The Supreme Court of India too has conceded that fundamental rights are subject to limitations in order to secure or promote the greater interests of the community. If I may quote a passage from AK Gopalan v State of Madras AIR 1950 SC 27:*

> *"There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights ... are subject to such reasonable conditions as may be deemed to be, to the governing authority of the country, essential to the safety, health, peace and general order and moral of the community .... **What the Constitution attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control**."*

*In England too, there is no unrestricted freedom of expression. Dicey's summary of the situation still holds good:*

> *"Freedom of discussion in England is little else than the right to write or say anything which a jury of 12 shopkeepers think it expedient should be said or written. Such 'liberty' may vary at different times from unrestricted licence to severe restraint ... the amount of latitude conceded to the expression of opinion has in fact varied greatly according to the condition of popular sentiment."*

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*(See Law of the Constitution, 3rd edition, p. 231). In this connection it is not out of place if I quote the well-known words of Sir Samuel Griffith C.J. in Duncan v State of Queensland (1916) 22 CLR 536 576, which were quoted in the Privy Council case of Freightlines, etc Ltd v State of New South Wales [1967] 2 All ER 436:*

> *"But the word 'free' does not mean extra legem any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law."*

*My purpose in citing these cases is to illustrate the trend to which freedom of expression in the constitutional states tends to be viewed in strictly pragmatic terms.* ***We must resist the tendency to regard right to freedom of speech as self-subsistent or absolute. The right to freedom of speech is simply the right which everyone has to say, write or publish what he pleases so long as he does not commit a breach of the law****."*

[emphasis added]

[132] The excerpt catches the essence of what amounts to free speech and expression that is emphasised here.

[133] In other parts of the world, this inherent quality of self-contained regulation when interpreting the meaning of free speech has been recognised. In the case of ***Chaplinsky v New Hampshire*** **(1942) 315 US 568 ('*Chaplinsky*')**, the Supreme Court of the United States held that the utterance of "*fighting words*" used face to face that are annoying and that plainly tend

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to excite the person addressed to a breach of the peace, is not protected by the freedom of speech.

[134] In this context, fighting words were defined as *"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"*.

[135] What may be drawn from this case is that such words which cause or inflict injury or tend to incite an immediate breach of the peace do not even constitute speech as envisioned under the liberty of freedom of speech and expression. Put another way, such words do not fall within the purview of the fundamental right.

**Further submissions by amicus curiae for the Malaysian Bar on the interpretation and construction of art 10(1)(a) FC**

[136] It was submitted by amicus curiae on behalf of the Malaysian Bar that the concept of inherent restrictions within freedom of speech is one that is primarily found in the legal discourse in the United States and that such restrictions should not be read into the right to freedom of speech and expression in **art 10(1)(a) FC**.

[137] Amicus curiae on behalf of the Malaysian Bar did not agree that the inquiry into whether a provision in a statute is constitutionally valid should commence with the query as to whether the impugned speech is protected or not under **art**

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**10(1)(a) FC**. Instead, it was contended that the default rule should be that 'all' speech is protected under **art 10(1)(a) FC**, and it is for the Legislature to show that any form of restriction is to be pigeonholed into one of the permissible heads of restriction under **art 10(2)(a) FC**.

[138] Put another way, amicus curiae's position is that the starting point into any such inquiry should be on the basis that 'all' speech is protected. There is an assumption read into **art 10(1)(a) FC** that all speech, including hate speech and speech which offends religious sensitivities, comprise protected speech. It is not apparent on what basis such an assumption is to be read into **art 10(1)(a) FC**.

[139] The conceptual difference between the two approaches lies in the recognition in our analysis that the right to freedom of speech and expression is not unlimited, and freedom of speech is not an absolute right. There are categories of speeches which simply fall outside the protection of **art 10(1)(a) FC** to begin with. On the other hand, the approach advocated by amicus curiae presupposes that 'all' speech is protected under **art 10(1)(a) FC** unless the proposed restriction is justified under one of the heads of exceptions enumerated in **art 10(2)(a) FC**.

[140] Amicus curiae submits that the position accepted in Malaysian law is that all speech amounts to freedom of speech, save for the restrictions specified in **art 10(2)(a) FC**. As such,

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amicus curiae urged the Court not to add categories of restricted speech that are not envisaged in **art 10(2)(a) FC**. The submission is that in construing **art 10(1)(a) FC**, no issue of whether the speech falls within or outside of the general definition of free speech should be entered into. The starting point, according to amicus curiae, is that all speech, including hate speech and speech which offends religious sensitivities, are to be accepted as comprising protected speech under **art 10(1)(a) FC**.

[141] Is that a tenable proposition? A scrutiny of **arts 10(1)(a) and 10(2)(a) FC** discloses that the matters in respect of which the Constitution lays restrictions are matters relating to the interests of the security of the nation, friendly relations with other countries, public order or morality, restrictions to protect privileges of Parliament or any Legislative Assembly, or to provide against contempt of court, defamation or incitement to any offence. It is evident that these categories of restrictions relate to matters in respect of which Parliament is best qualified to determine in the interests of the nation. These restrictions do not infringe the fundamental liberty of individuals to express their views or opinions freely and robustly in respect of the system of democracy practised by the nation, nor restrict their views and opinions on matters in general within the nation. Therefore, **art 10(2)(a) FC** merely defines the restrictions, but does not define what amounts to freedom of speech in **art 10(1)(a) FC**.

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[142] It cannot be inferred from these restrictions that all other speech and expression fall within the ambit of freedom of speech and expression in **art 10(1)(a) FC**. This is further borne out by the phrase at the beginning of **art 10(2)(a) FC**, namely, "*on the rights conferred by paragraph (a) of Clause (1)*". This phrase underlines the position that the rights in **art 10(1)(a) FC** remain undefined.

[143] That brings us back to **art 10(1)(a) FC**, which stipulates that "*every citizen has the right to freedom of speech and expression*". Freedom of speech and expression is not defined in **art 10(1)(a) FC**. Can it therefore be said that, simply because it is not defined, all speech and expression fall within **art 10(1)(a) FC**? In the absence of a definition, does it mean that anything and everything a citizen says amounts to freedom of speech and expression?

[144] That cannot be the case because it is an accepted tenet of this liberty that freedom of speech and expression is not absolute, as is recognised both in our jurisdiction and every other jurisdiction. Limitations to the definition of freedom of speech and expression under the **FC** need not be expressly stipulated in the Constitution in order to arrive at this conclusion. This is apparent from the very definition that we quoted at the beginning of this section of the judgment.

[145] Our analysis does not follow the American approach of looking at whether a particular form of speech is 'protected' or

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'unprotected'. In that jurisdiction, the concept of 'protected' and 'unprotected'' speech is necessary in view of their Constitution which confers freedom of speech without any restriction. Notwithstanding this, the American courts themselves have recognised that the liberty conferred by their Constitution is itself regulated or fettered, as we have pointed out in cases like ***Chaplinsky***, referred to at the outset of this section. Therefore, even where a Constitution does not express specific restrictions and precludes the abridgement of freedom of speech, it is recognised that the liberty in itself contains inherent restrictions. As recognised by the article cited by amicus curiae, namely, 'Free Speech in the United States' (Harvard, 1946) by Professor Chafee, the learned author acknowledges that the difficulty that arises in this context is to define what amounts to free speech and what does not amount to free speech.

[146] The answer to that lies both in the general definition accorded to free speech and the acceptance of the principle that free speech is not absolute. So, as stated in the definition at the outset, the obvious examples of speech that do not amount to free speech in this jurisdiction include hate speech and speech which offends religious sensitivities.

[147] To put the contention of amicus curiae into context, consider, for example, a situation where an online communication is posted which seriously agitates religious sensitivities of one of the major religions in our plural society. Does this constitute free speech under **art 10(1)(a) FC**, which

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can only be subject to regulation if it falls within one of the restrictions stipulated in **art 10(2)(a) FC**? Further, if it does not result in public disorder or fall into any of the other restrictions stipulated in **art 10(2)(a) FC**, is it to be concluded that such speech falls within **art 10(1)(a) FC** simply because it is not restricted by **art 10(2)(a) FC**?

[148] For this reason, the approach suggested by amicus curiae, namely, that all speech fall within **art 10(1)(a) FC** is, with respect, untenable. The preferred approach would be to accept the fundamental principle that freedom of speech in itself is not absolute, meaning that there are inherent restrictions when interpreting and construing that liberty. Therefore, to construe **arts 10(1)(a) and 10(2)(a) FC** such that there is no recognition of this principle is not, with respect, a reasonable approach to adopt.

[149] In none of the Malaysian cases have the courts precluded adopting an approach which gives consideration to what amounts to free speech, given its inherent limitations. The judges in each case determine whether the impugned words or phrases fall within or outside the freedom of speech (see: ***PP v Azmi Sharom*** **[2015] 6 MLJ 751**; ***Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri & Anor and Another Appeal*** **[2015] 2 CLJ 328**).

[150] It is important to reiterate that the court is not imposing restrictions when it determines whether particular words,

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phrases or expressions fall within or outside the parameters of free speech. The court is merely ascertaining and analysing whether such speech falls within the inherent restrictions in **art 10(1)(a) FC** or not.

[151] The approach advocated by amici curiae allows for hate speech, speech seriously offending religious sensitivities and a range of other offensive speech to amount to freedom of speech and then only being subject to civil or criminal sanctions if it results in a disturbance to public order or morality or any of the restrictions in **art 10(2)(a) FC**. If such speech does not fall within those restrictions, it amounts to a valid exercise of the liberty of the right to free speech. This approach goes against the definition of what truly amounts to free speech.

[152] Our analysis is amply supported by case law. The rationale for this, in short, lies in a proper understanding of the normative value and underlying purpose which the right to freedom of speech and expression seeks to protect. It also stems from the fact that the value of free speech in a particular case must be measured in specifics, since not all types of speech have an equal value (see: ***R v Secretary of State for the Home Department, ex parte Simms*** **[1999] 3 All ER 400**). The following cases illustrate this point.

[153] Although the United Kingdom does not have a written constitution, the UK courts are required to give effect to the provisions of the European Convention on Human Rights. The

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Convention sets out a framework for fundamental rights. A parallel may thus be drawn to a written constitution.

[154] In the UK Court of Appeal case of ***R v Casserly*** **[2024] EWCA Crim 25**, the appellant, Thomas Casserly, was convicted after trial on a single count of "*sending an indecent or grossly offensive electronic communication with intent to cause distress or anxiety*" contrary to **section 1(1)(b) of the UK Malicious Communications Act 1988**. The appellant had been convicted for sending an email to an elected town councillor, in which he challenged her ability to perform her public role. He appealed against his conviction.

[155] In a unanimous judgment, Lady Carr held that **the right to freedom of expression is not absolute and some forms of expression will fall outside its scope of protection**:

> "***Some forms of self-expression will fall outside the scope of the free speech right, because they amount to no more than vulgar abuse and convey no ideas and no meaningful information, or for other reasons***. *At the other extreme, information and ideas which aim at the destruction of democracy, or its fundamental freedoms are not protected: see Article 17 of the Convention. But the law does not require courtesy. It is trite law that speech does not lose protection just because the information or ideas that it conveys are offensive, disturbing or even shocking. Communications of that kind are within the scope of the right.*"
>
> [emphasis added]

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[156] That amounts to a clear acceptance of the fact that free speech and expression is not unrestricted, by definition.

[157] Lady Carr further cited the case of ***in re Abortion Services (Safe Access Zones) (Northern Ireland) Bill*** **[2022] UKSC 32; [2023] AC 505**, where the UK Supreme Court identified three broad categories of criminal law that regulate politically motivated speech or behaviour:

> (i) **those in which, on a proper analysis, the applicable criminal law does not interfere with fundamental rights at all, so that there is no need for any proportionality assessment**;
>
> (ii) those in which the criminal law does or may interfere with such rights but proof of the ingredients of the offence will, without more, be sufficient to render a conviction proportionate; and
>
> (iii) those in which the law does or may interfere with fundamental rights but the ingredients of the offence do not of themselves meet the proportionality requirement, so that the court is required to address it.

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[158] It is the first category that is relevant in the present context. It was explained that the first category encapsulates cases in which the defendant's conduct falls outside the scope of fundamental rights, including the right to freedom of expression, because it "*involves violent intentions, or incites violence, or otherwise rejects the foundations of a democratic society*". In other words, communications which involve or incite violence are not covered by the right to freedom of speech and expression, and the right is thus inherently limited to that extent.

[159] Amicus curiae on behalf of the Malaysian Bar also cited the majority decision of the Indian Supreme Court in ***Kaushal Kishor v State of Uttar Pradesh*** **(2023) 4 SCC 1** as authority for the proposition that no additional restrictions can be read into the right to freedom of speech and expression under **art 10(1)(a) FC** beyond the grounds expressly stated in **art 10(2)(a) FC**. This case involved a writ petition filed under **art 32 of the Indian Constitution**. The primary issues that arose for the consideration of the Indian Supreme Court were the right to freedom of speech on sensitive matters that are under investigation and whether it offends an individual's right to a dignified life.

[160] The majority of the Indian Supreme Court found that the grounds set out in **art 19(2) of the Indian Constitution** for restricting the right to free speech are exhaustive and the court cannot impose any additional restrictions on that right by invoking any other fundamental rights. It is to be noted,

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however, that the majority decision did not state or even touch upon the issue of whether freedom of speech in itself is not absolute by definition. Their concern was whether it was competent for a court to impose further restrictions to the exhaustive set of restrictions stipulated in **art 19(2) of the Indian Constitution**, which is in *pari materia* to our **art 10(2)(a) FC**. When viewed in its proper perspective, therefore, this does not support the proposition that any and all speech amounts to free speech unless it falls within the restrictions set out in **art 19(2)** in India, and accordingly, by analogy, **art 10(2)(a) FC** in this jurisdiction.

[161] Of interest to us, however, is the partly dissenting opinion authored by Justice Nagarathna in that case. It is important to note that the dissent did not relate to the issue at hand, namely whether freedom of speech and expression is to be construed as being unlimited and absolute unless it falls within one of the specified categories in **art 19(2) of the Indian Constitution**. Justice Nagarathna went on to endorse the principle that self-restraint or inherent restraints are to be read into the right to freedom of speech and expression, notwithstanding the permissible grounds set out in **art 19(2) of the Indian Constitution**. In the words of Justice Nagarathna:

> *"… **in respect of speech that does not form the content of Article 19(1)(a), the State has no duty to abstain from interference and therefore, speech such as hate speech, defamatory speech, etc. would lie outside the protective perimeter within which a person can exercise his right to***

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***freedom of speech. Such speech can be subjected to restrictions or restraints. While restrictions on the right to freedom of speech and expression are required to be made only under the grounds listed under Article 19(2), by the State, restraints on the said right, do not gather their strength from Article 19(2). Restraints on the right to freedom of speech and expression are governed by the content of Article 19(1)(a) itself; i.e., any kind of speech, which does not conform to the content of the right under Article 19(1)(a), may be restrained.*** *Questions pertaining to the voluntary or binding nature of such restraint, the force behind the same, the persons on whom such restraints are to be imposed, the manner in which compliance thereof could be achieved, etc., are aspects left to be deliberated upon and answered by the Parliament.* ***However, the finding made hereinabove is only to the extent of clarifying that any kind of speech, which does not form the content of Article 19(1)(a), may be restrained as such speech does not constitute an exchange of ideas, in a manner compatible with the ethos cultivated in a civilised society. Such restraints need not be traceable only to Article 19(2), which exhaustively lists eight grounds on which restrictions may be imposed on the right to freedom of speech and expression by the state.****"*

[emphasis added]

[162] Relevant to the present appeal, Justice Nagarathna, in paragraph 30 of Her Ladyship's opinion, acknowledged the role of the internet in giving rise to a communication revolution, which has enabled individuals to communicate with millions of people worldwide, but equally noted the irony that the very

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qualities of the internet that have revolutionised communication are those that are amenable to misuse. In that context, Her Ladyship observed as follows:

> "***Every citizen of India must consciously be restrained in speech, and exercise the right to freedom of speech and expression under Article 19(1)(a) only in the sense that it was intended by the framers of the Constitution, to be exercised. This is the true content of Article 19(1)(a) which does not vest with citizens unbridled liberty to utter statements which are vitriolic, derogatory, unwarranted, have no redeeming purpose and which, in no way amount to a communication of ideas.*** *Article 19(1)(a) vests a multi-faceted right, which protects several species of speech and expression from interference by the State. However, it is a no brainer that the right to freedom speech and expression, in a human-rights based democracy does not protect statements made by a citizen, which strike at the dignity of a fellow citizen. Fraternity and equality which lie at the very base of our Constitutional culture and upon which the superstructure of rights are built, do not permit such rights to be employed in a manner so as to attack the rights of another.*"
>
> [emphasis added]

[163] Flowing from the above, it can be concluded that the content of **art 10(1)(a) FC** itself inherently governs the restraints on the right to freedom of speech and expression. Any speech which does not conform to the content of **art 10(1)(a) FC** would fall outside the protective perimeters of free speech and may be

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restrained, as such speech does not constitute the furtherance of dialogue, expression of opinions or dissemination of information in a democratic society. Such restraints need not be traceable only to the permissible restrictions on the right to freedom of speech and expression as set out in **art 10(2)(a) FC**.

[164] Case law from South Africa also supports the proposition that there are certain types of speech which are inherently restricted by the right to freedom of speech and expression. It should be noted, however, that the South African Constitution expressly precludes advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm, from what amounts to the right to freedom of expression.

[165] In ***Islamic Unity Convention v Independent Broadcasting Authority and others*** **[2003] 1 LRC 149**, the Constitutional Court of South Africa held that the irreducible core of the right to freedom of expression is the freedom to receive or impart information or ideas, and that the free exchange of ideas in an open and democratic society serves an important public interest. However, implicit in the right to freedom of expression is the acknowledgement that certain expressions do not deserve constitutional protection because they had the potential to impinge adversely on the dignity of others and cause harm.

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[166] It was held that the pluralism and broadmindedness that is central to an open and democratic society can be undermined by speech which seriously threatens democratic pluralism itself. The constitutional right to freedom of expression does not protect expression or speech that amounts to advocacy of hatred which is based on race, ethnicity, gender or religion, and which amounts to incitement to cause harm. The State had a particular interest in regulating this type of expression because of the harm it might pose to the democratic objective of building a just and equal society.

[167] In ***Qwelane v South African Human Rights Commission and another*** **[2021] 5 LRC 561**, the Constitutional Court of South Africa considered the intrinsic democratic value of the right to freedom of expression as comprising the search for truth, as well as unfettered public and political discourse. It was held that such democratic political discourse is the cornerstone of democracy, and that such right requires tolerance by society of different political views. It also requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.

[168] However, the Court noted that the dictates of pluralism, tolerance and open-mindedness in allowing a free and open exchange of ideas do not mean that it is absolute. There are expressions which are outright unprotected under the right to freedom of expression. Hate speech is one such instance. It is the antithesis of the values envisioned by the right to free

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speech. While the latter advances democracy, hate speech is destructive of democracy. Examples given by the Court include racist remarks addressing others as a "*swart man* (black man)" or "*monkeys, baboons or kaffirs*", and comments which impugn one's "*intellectual and leadership capabilities as inherently inferior by reason only of [their] skin colour*".

[169] These observations apply with equal force to the right to freedom of speech and expression under **art 10(1)(a) FC**, which does not protect speech that amounts to advocacy of hatred on the basis of race or religion, and which amounts to incitement to cause harm. The regulation of these types of speech will not interfere with **art 10(1)(a) FC**.

[170] Parliament has, in **section 233(1)(a) CMA** included the words 'abuse, threaten or harass' in relation to the impugned words, because a consideration of the section in its entirety reveals that communication which is offensive may also be coupled with intent to annoy, abuse, threaten or harass.

[171] It should be noted that it is not only communication which is 'offensive with intent to annoy' that was surgically excised by the Court below as being unconstitutional. The effect of holding those two words, namely 'offensive' and 'annoy', unconstitutional was to also remove from the purview of the **CMA**, communications which are 'offensive' with a view to 'abuse, threaten or harass'. As such, it is any combination of the words in the last limb of **section 233(1)(a) CMA** that are

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considered to be an improper use of the network facilities. This means there is no recourse for the regulation of such communications, which are, in reality, likely to inflict injury and harm to a person or a group of persons.

**Issue (v): Does the right to freedom of speech and expression in art 10(1)(a) FC encompass communications which are 'offensive with intent to annoy' or which are 'offensive with intent to abuse, threaten or harass'?**

[172] Does communication which is 'offensive with intent to annoy' under **section 233(1)(a) CMA** comprise **"speech and expression" which is protected under art 10(1)(a) FC**? Given the analysis above, the conclusion to be drawn is that **art 10(1)(a) FC** does **not** encompass communication with intent to harm or cause injury to another individual or group of persons.

[173] The next question that then arises is whether **section 233(1)(a) CMA** merely gives effect to the true meaning of "freedom of speech and expression" by precluding communication with specific intent to injure or harm an individual or individuals, and which does not serve the purpose of advancing or allowing for democratic participation in the form of criticism of government, the search for the truth, or the dissemination of information or opinion?

[174] The mischief targeted by **section 233(1)(a) CMA** is to prohibit such communication which, in any event, does not fall

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within the purview of **art 10(1)(a) FC**. It does not seek to prevent or preclude free speech and expression. Neither was it enacted to encroach onto the fundamental liberty afforded there.

[175] If that is the proper or true construction of **section 233(1)(a) CMA**, it then follows that the thrust and intent of the section, cannot be said to intrude or violate **art 10(1)(a) FC**. The provision including the impugned words preclude the use of social media to violate freedom of speech and expression. Such a construction is bolstered by the purpose and object of the legislation which is to prevent the misuse of media networks.

[176] When the purpose and object of **section 233(1)(a) CMA** is to preserve and protect **art 10(1)(a) FC**, which itself does not protect communication undertaken with intent to annoy so as to cause harm or injury, can it then be said to be violative of that very liberty? The answer is no.

[177] Can the two impugned words 'offensive' and 'annoy' within the section then be said to be unconstitutional? Equally, a reading of the entirety of **section 233(1)(a) CMA** with the inclusion of the words 'offensive' with intent to 'annoy' ought not logically, to be said to be unconstitutional because the very purpose and object of the impugned words, within the section, is to shield **art 10(1)(a) FC** and not to violate the same.

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**Issue (vi): Should legislation or impugned words within legislation be struck out under art 4(1) FC by reason of an unwarranted prosecution?**

[178] Against the construction adopted above, it may be argued, in the context of the present appeal, that **section 233(1)(a) CMA** does encroach onto the freedom of speech and expression as provided for in **art 10(1)(a) FC**, because the words used there are broad and vague, more specifically the two words 'offensive' with intent to 'annoy', although in point of fact, most of the words in the section can be viewed as being broad. And that may well result in incorrect or unfair prosecutions as was the case with the Respondent, Heidy Quah, here.

[179] It is evident from a reading and consideration of the facts in Heidy Quah's case that **section 233(1)(a) CMA** simply **does not** apply to those facts or that given scenario.

[180] As is outlined in the factual matrix, the charge brought against Heidy Quah was premised on **section 233(1)(a) CMA**, more particularly, that the communication she had made relating to uninhabitable and dangerous conditions in immigration facilities as posing a threat to the spread of Covid-19, amounted to a communication that was 'offensive with intent to annoy'.

[181] The clear answer to that contention is that the prosecution was unwarranted and incorrect, because the

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prosecuting authorities did not comprehend the purpose and object of **section 233(1)(a) CMA**. They failed to comprehend that Heidy Quah was disseminating information (albeit hearsay), with a view to highlighting what she saw as a dangerous situation, which she considered was relevant public information in the context of the then Covid-19 situation within immigration facilities.

[182] Heidy Quah's communication amounted to an expression of fact, opinion and criticism against the authorities in an ongoing situation of public concern. Such speech and expression fall **within** the definition of freedom of speech and expression under **art 10(1)(a) FC**, by reason of its content and purpose. It therefore did **not** fall within the purview of any part of **section 233(1)(a) CMA**. Accordingly, the prosecution was unwarranted.

[183] There was a failure on the part of the prosecuting and enforcement authority to recognise the pivotal part of that section, namely that the sender or user had to satisfy the *mens rea* element, namely an intent to annoy, abuse, threaten or harass the recipients. Prior to prosecution, the need for clear evidence of intent to annoy within the context of **section 233(1)(a) CMA** was needed. The possibility of any such intent was negatived by the fact that no person or persons were harmed or injured by that communication. There was therefore no basis on which to bring the charge against Heidy Quah in respect of the communication then made.

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[184] But that leads to the more important question in relation to the constitutionality of the two impugned words within **section 233(1)(a) CMA**. **Does the fact that the prosecuting authorities erred in bringing a charge against Heidy Quah under section 233(1)(a) CMA warrant a striking out of the two impugned words within the legislation?**

[185] Therefore, the real concern is that the indeterminate language in the section allows unwarranted prosecutions to be brought so as to attach criminal penalties to numerous instances of common place conduct. The primary issue is not the unconstitutionality of the impugned words within **section 233(1)(a) CMA**.

[186] In such an instance, it is incumbent on the courts to undertake the following inquiry as laid down by this Court in ***Mohd Najib bin Hj Abd Razak & Anor v Government of Malaysia and another appeal*** **[2023] 6 MLJ 483**:

(i) What is the true scope and implication of the relevant provision of the **FC** which is alleged to be transgressed?

(ii) What is the substance and effect of the impugned words on their true construction?

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(iii) Can the impugned words, construed in the context of the section and the statute as a whole, be read consistently with the constitutional provision?

(iv) If the impugned words can be so read, no contravention arises. Alternatively, if the impugned words appear to confer untrammelled powers when construed, the words should be read down first, in order to uphold the same. It is only where the construction of the impugned words lends itself to only one meaning that the power to strike down under **art 4(1) FC** should be utilised;

(v) To that extent, constitutional judicial review of a statute or parts of a statute under **art 4(1) FC** is an iterative process.

[187] The principles of statutory interpretation require that the courts apply the principle of 'reading down' or narrowing the definition in the statute so as to give effect to the legislation and the mischief the statute was directed at. Such an approach which results in:

(a) the narrowing of the types of cases falling within the purview of the section; as well as

(b) setting the requisite thresholds or standards to warrant the bringing of a prosecution,

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would address the problem of unnecessary and unwarranted or improper prosecutions. Striking out the relevant parts of a statute by reason of an unwarranted prosecution is not the ideal approach to adopt because it may well leave segments of the network users open to the mischief of communications made with the specific intent to cause annoyance, harm or distress which cannot be regulated or enforced.

[188] In summary, **art 4(1) FC** ought not to be utilised to respond to incorrect or unwarranted prosecutions which have failed to appreciate the purpose and object of the Act, but should only be resorted to when the legislation or a part of the legislation is found to be unconstitutional.

**Guidelines on prosecutions**

[189] The answer to incorrect prosecutions is for the Courts to interpret, construe and distill the meaning of the particular legislation in question or the impugned parts of the legislation, so that it is only in instances where there is a real contravention of the statute that prosecutions are brought. Guidelines as to the threshold boundaries and standards that should be met prior to initiating a prosecution should be issued from the Attorney-General, based on the principles honed down by the Courts. The relevant case-law and guidelines should then be made available to prosecutors such that they comprehend the high threshold that is to be met before proceeding with a prosecution. The

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mischief that the statute seeks to punish through criminal sanctions should be made clear and construed narrowly by the courts. It is only if such an exercise to narrow down fails, that the courts should proceed to strike out legislation.

[190] In summary, two points arise from the analysis above. First, if the purpose and object of the legislation is to shield freedom of speech and expression as explored and defined above, it then follows that by precluding communications which are 'offensive' with the express *mens rea* or intention to cause 'annoyance' or harm to other users, there is no infringement or contravention of **art 10(1)(a) FC**. This is because such communications fall outside the purview of the freedom of speech and expression, as defined and are therefore unprotected. This fundamental right has its own bounds which are expressly recognised.

[191] If there is no contravention of **art 10(1)(a) FC**, then **art 4(1) FC** does not come into play, or cannot be invoked because of a lack of any inconsistency with the **FC**. It follows that the relief of 'striking out' for inconsistency under **art 4(1) FC** is not then available.

[192] In the present context, it would then follow that the impugned words or phrase namely 'offensive with intent to annoy' in **section 233(1)(a) CMA**, which seeks to prohibit communication which falls outside the purview of the fundamental liberty in **art 10(1)(a) FC** ought not to be viewed as

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being inconsistent with that article or any other provisions of the **FC**. As such, that part of the statute containing the impugned words when read as a whole has the purpose and object of protecting users of network facilities, and ought not to be stultified by the removal of the impugned words.

[193] It may be argued that the provision was not struck out in its entirety, as only two words were struck out. As stated earlier, the removal of the impugned words has the effect of removing not only offensive content with intent to annoy, but also offensive content with intent to abuse, threaten or harass.

[194] In any event the answer to the contention that the two words are vague, is that if the impugned words are broad or vague and appear to be of somewhat indeterminate applicability or reach, then the recourse is not to immediately strike out those impugned words, but to first consider an interpretation and construction of those words to ascertain whether they are inconsistent with any provisions of the **FC**. If indeed that is the purpose, then those words can be 'read down', so as to define the conditions or threshold to be met before a prosecution is undertaken in respect of a communication bearing such features. Striking down is a last measure, if that part of the statute cannot be saved.

[195] It is in this context that the doctrine of vagueness avoidance comes into play.

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[196] A second and important aspect of this appeal is that it concerns impugned words in a statute which are said to infringe **art 10(1)(a) FC** and fall outside the purview of the permissible restrictions in **art 10(2)(a) FC**. If the impugned words within the statute are inconsistent with these provisions, then striking out could follow under **art 4(1)** read together with **art 4(2) FC**.

[197] However, a determination of unconstitutionality and the striking out of portions of legislation under **art 4(1) FC**, are not the correct legal consequence or answer to incorrect and unwarranted prosecutions, as occurred in the instant case. If that were the case, then an innumerable number of statutes, or portions of the same, would have been struck out to date, as incorrect and unwarranted prosecutions do occur.

[198] The answer is to clarify and narrow (for the understanding of the enforcement agencies) the scope of the area of prosecution available under the terms ‘offensive’ with intent to ‘annoy’. This involves delineating the thresholds to be reached, and the conditions met, to warrant prosecution. There is a duty to consider whether striking out might leave a body of users unprotected against the mischief sought to be addressed by Parliament. The first step therefore is to construe the impugned words to comprehend the nature of cases that fall within the category of those words.

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**Issue (vii): In determining whether a statute or part of a statute is to be struck down under art 4(1) FC, is the court bound to consider whether the statute or the impugned words in the statute can be read down so as to preserve the same?**

[199] It is a fact that the Legislature often enacts broad and less than definitive penal statutes. Such legislation delegates considerable enforcement discretion to the prosecution and other law enforcement agencies. **Art 4(1) FC** serves as a check against legislation that effectively compromises a fundamental right by the use of far-reaching and indeterminate language statutes, such that the legislation does not give citizens fair notice of the conduct it punishes, or allows for arbitrary enforcement.

**The 'reading down' of statute to avoid unconstitutionality**

[200] When interpreting and construing indeterminate language in a statute which carries penal consequences, the first matter that is referred to is the principle of constitutionality (see: ***Public Prosecutor v Datuk Harun bin Haji Idris & Ors*** **[1976] 2 MLJ 116**). This principle is premised on the assumption that legislatures do not generally intend to enact statutes that will be held to be unconstitutional.

[201] In cases where the issue of infringement and therefore inconsistency is less clear, the courts should first construe

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statutory language which appears to be indefinite, narrowly and in line with the purpose and object of the legislation, before striking down a statute for being inconsistent with the **FC**. In short, judicial restraint for the purposes of preserving Parliament's will, should be considered first.

[202] A court should consider whether the statute, or the impugned part of the statute is amenable to a more limiting construction, so as to save it and give effect to the legislative intent of the statute. If it is so amenable, then that construction ought to be undertaken and clarified as the applicable law.

[203] It is only when there is no alternative reading that would save the impugned provision or statute, and where the impugned words or provision are so unconstitutionally vague that it is not capable of giving fair notice to persons of the conduct that is punished, or it is so devoid of standards that it invites arbitrary enforcement, that the impugned provision needs to be struck out (see: ***Johnson v United States*, 576, U.S. 591 595 (2015)**).

[204] There are several means by which such clarifying construction can serve to save legislation that is broad, but not inconsistent with the **FC**.

[205] One such tool is the 'vagueness avoidance' doctrine, which is used to limit the seemingly broad scope of penal

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statutes by reading down the relevant impugned provisions to save the statute.

**The 'vagueness avoidance' doctrine**

[206] The doctrine is an accepted mode of interpretation and construction of statutes, particularly in relation to the issue of constitutionality in the United States (see: ***Skilling v United States* 561 US 358,405-406**; ***Dubin v United States*, 143 S Ct 1557,1572 (2023)**, avoiding construction that would give federal aggravated identity theft statute "*incongruous breadth*" and noting a "*concern that a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed*").

[207] The vagueness avoidance doctrine typically avoids the conclusion that a statute is vague, by narrowly construing indefinite statutory language.

[208] A statute which is, or appears to be broad and vague, typically has an identifiable core comprising the essence of the offence. This allows courts to legitimately craft a judicial construction of the text of the statute that retains only the core, while excising the indeterminate penumbra or uncertainty.

[209] In undertaking this exercise, the court is not encroaching on the function of the legislature to define crime

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and determine punishment, because by adopting a narrowing construction, it seeks to retain or save the legislation.

[210] The identification of the core and penumbra cuts through to the identifiable core within the linguistic meaning of the vague term enacted by the legislature. By confining the legal effect of the vague term, the court effectively hews the legislation to its essence or core, while declining to endorse the outer peripheries of the statute. The court recognises that the core of the statute is constitutionally valid and it remains in force. The periphery is effectively excised by limiting the scope of the impugned words or statute.

[211] This narrowing construction is undertaken by considering the 'vague' statutory language in the statute and ascertaining whether there is an identifiable core to such language. If there is, the court then legitimately crafts a judicial construction of the text that encompasses the core, while excising the penumbra of borderline cases. What happens in effect is that by constraining the legal effect of the vague term to its identifiable core, there is severance of the borderline cases.

[212] In the instant case, the relevant statutory language in **section 233(1)(a) CMA** that falls for consideration is the phrase 'offensive with intent to annoy'. It cannot be just the two words in isolation, namely 'offensive' and 'annoy', that are inconsistent with the **FC**, because the impugned words have to be read

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contextually, both in terms of the provision in which they appear as well as the context of the statute.

[213] **Applying the core-penumbra narrowing construction to the phrase 'offensive with intent to annoy', it follows that the core of the phrase is the *mens rea* portion of the phrase, namely, 'with intent to annoy'. This means that it is only when 'offensive' communication is undertaken with an express intent to annoy another user or a body of users, is there sufficient basis to prosecute for a transgression. Put another way, where communication is made without the requisite *mens rea* element of the intent to annoy, the threshold to justify prosecution is not met. By focusing on the *mens rea* part of the phrase ('with intent to annoy') rather than the *actus reus* (the post itself which is 'offensive'), it follows that the provision is not criminalising 'offensive' content, nor 'annoyance' as a result or consequence, but situations where the intention to cause annoyance is used as a targeted weapon.**

[214] The predominant purpose of the communication must be the intention to cause annoyance, harm or insult. Such a construction respects the legislature's goal of maintaining a safe digital world which in no manner encroaches on the right of freedom of speech and expression under **art 10(1)(a) FC**.

[215] Such a 'test', which looks to the primary purpose of the communication and requires vexatious intent as a basis to even

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consider a prosecution, serves as a safeguard for freedom of speech within the digital world. The question to be asked is whether the user was engaging in political discourse, or expressing content for an educational or artistic or satirical purpose, or to express an opinion, or to participate in the marketplace of ideas – all of which fall within the purview of free speech; or was the user using the communication with the clear and vexatious intent of causing distress, insult or injury through the offensive content posted? In other words, was the primary or dominant purpose to inflict annoyance or harm? The words 'with intent to annoy' provides a boundary for the court to distinguish between free speech and an act which is criminal and attracts penal consequences.

[216] The Court of Appeal concluded that the words used were too vague and inadequate to warrant criminal prosecution under the section. To avoid the concern of vagueness in respect of a plethora of cases that could fall within or on the borderline of 'offensive', the court narrowly construes the statute to apply only to communication of offensive matters with the requisite *mens rea* element of the 'intent to annoy'.

[217] This requires that sufficient evidence of such a specific intent is clear and apparent, in order for a prosecution to be brought under the section. It is neither sufficient nor permissible to simply 'infer' such intent from the nature of the 'offensive' communication itself. The evidence of such intent should be apparent from the surrounding circumstances of the posting,

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such as repeated targeting of a recipient-user or body of users, bombarding the recipient-user with personal attacks or attacks on the recipient-user's personal life, workplace, or business.

[218] In legal terms, the requirement of a specific intent to cause annoyance by means of the 'offensive' communication saves the impugned words from the charge of unconstitutionality on the grounds of vagueness.

[219] How would this work in practice? When applied to the factual matrix relating to the Respondent, it is evident that a prosecution could not be brought under the narrowed down construction of the impugned words 'offensive with intent to annoy' because there is no evidence whatsoever of any intent to annoy any user/s or institutions, in the Respondent's communication.

[220] To reiterate, it was a communication that sought to share information of conditions in the Immigration facilities housing immigrants during the Covid period, with a view to procuring an improvement in the conditions of the facilities, so as to prevent the further spread of the disease. This amounted to a statement of fact as well as an expression of the Respondent's views and opinions on the subject, all of which fall within the purview of **art 10(1)(a) FC**.

[221] As such it, could not comprise the basis for a prosecution under **section 233(1)(a) CMA**, more specifically,

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the charge of a communication that was 'offensive with intent to annoy' as the section shields freedom of speech. As the Respondent's content falls within the right to freedom of speech and expression under **art 10(1)(a) FC**, it could not comprise any basis for the institution of any such charge. It is only if the primary goal is to cause harm to a user that the communication loses its character as 'protected speech'. By applying the need for a vexatious intent or *mens rea* the statute is effectively stipulating that the extent of the 'annoyance' is not the primary concern. Of concern is whether the user's dominant reason for sending it was to hurt another user. Such a construction protects free speech and opinions notwithstanding that they might cause alarm, anger or annoyance. Where a post is sent as a joke or as an expression of opinion, the *mens rea* for annoyance or harassment of a particular user is missing. It cannot then form the basis for a prosecution under **section 233(1)(a) CMA**.

[222] It is only when the said speech has no plausible purpose other than to annoy and harass a particular user or body of users that it loses protection and may be amenable to prosecution under the sub-section.

**How are the terms 'offensive' and 'grossly offensive' to be construed in the context of section 233(1)(a) CMA?**

[223] Turning to the term 'offensive' or even 'grossly offensive', as the statute was amended during the course of the hearing before the Court of Appeal, a further question that

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necessitates discussion is how is the word ‘offensive’ to be construed in the context of **section 233(1)(a) CMA**?

[224] First, as outlined above, the word ‘offensive’ (and ‘grossly offensive’) is subject to the *mens rea* element of the offence. This means that while ‘offensive’ may be a broad term covering a wide spectrum of terms, such communications carry penal consequences only if the requisite ‘intent to annoy’ or ‘intent to abuse, threaten or harass’ are made out as described above.

[225] The legal definition of ‘offensive’ or ‘grossly offensive’ has to be considered in the context of network communications because that is the subject matter of concern in the instant case. It is insufficient to make reference to the term in a general or dictionary context because such a definition encompasses scenarios primarily in the physical world.

[226] In relation to network communications, ‘offensive’ is defined in two distinct contexts: the legal regulation of content and cybersecurity strategy. Here, we are concerned with the legal definition of ‘offensive conduct’. More than that, it is the legal definition within the **CMA** that requires definition.

[227] The term ‘offensive’ in the context of the **CMA** refers to the character of a message or material communicated through networks. It encompasses a number of categories of communications, which makes it broad:

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(a) Communications which are indecent or obscene, meaning material that is improper, sexually degrading or that violates behavioral standards;

(b) Communications that, in their content, threaten harm, encourage crime or incite public disorder; and

(c) False or malicious communications, such as knowingly spreading false or distorted information with the intent of causing annoyance, distress or anxiety.

[228] Again, it is worth reiterating that in order for the penal consequences to apply, the intention of the sender, namely to annoy, abuse, threaten or harass the recipient, must subsist.

[229] The fact that the word 'offensive' is broad does not mean that it is vague. It covers a wide range of communications such that it would be untenable to attempt to define it exhaustively within a statute. The fact that a definition is not feasible does not automatically lead to the conclusion that the word 'offensive' is unconstitutional. It means that in determining whether a crime has been committed for purposes of enforcement, the 'offensive' content is scrutinised to ascertain whether it falls within these categories or amounts to an equivalent form of harmful content and that the content is

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coupled with the requisite intent to annoy, abuse, threaten or harass.

[230] In the context of Malaysia which is a plural and multi-racial society, the issues of race and religion are of primary concern. **Section 233(1)(a) CMA** serves to ensure that communications which are **intended** to offend the sensitivities of each of the plurality of races that comprise its population are prohibited.

[231] It must be said that while freedom of speech and expression allows for a discussion of these subjects freely, **art 10(1)(a) FC** does not allow for content which has the primary or dominant intent of offending the religious or racial sensitivities of each of the plurality of races in the country. And such content which is excluded from the fundamental liberty of freedom of speech and expression is encapsulated in **section 233(1)(a) CMA**.

[232] Furthermore, the constitutional monarchy system in Malaysia comprising the nine Malay Rulers is an essential and fundamental feature of the **FC**, which is defined and revered. Communications targeted at attacking the constitutional role of this institution with intent to annoy, abuse, threaten or harass would also fall within the purview of **section 233(1)(a) CMA**.

[233] It is worth reiterating that the provision is not intended, from an objective construction of the same, to stifle freedom of

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speech and expression. However, it is in the enforcement of **section 233(1)(a) CMA** that problems arise. If there is insufficient evidence to establish firstly that the content itself is offensive, and secondly that the requisite *mens rea* threshold is met, as is the case in the present appeal, then the prosecution is misplaced, inappropriate and ill-founded. As it can result in serious penal consequences, the concern about the use of this provision incorrectly is a genuine concern. But that is insufficient to make the provision unconstitutional. As explained earlier, the answer is to educate and provide the requisite guidelines for prosecution under this section of the **CMA**.

[234] In terms of applicability, the term 'offensive' utilised in the **CMA** is to be interpreted from an objective perspective. It is a question of fact to be determined objectively by reference to the content and context of the communication. The introduction of the term 'grossly' next to the word 'offensive' under the recent amendment to the **CMA** does little to alter the meaning and application of the section. It clarifies the fact that the threshold to warrant falling within the word 'offensive' is high. However, it does not address the criticism of the word 'offensive' itself being vague. This issue of vagueness has been answered at the outset of this part of the judgment.

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**How is the term 'annoy' to be construed in the context of the phrase 'intent to annoy' in section 233(1)(a) CMA?**

[235] Similarly, what does the term 'annoy' mean in the context of the **CMA**? Does it have the same meaning as the semantic use of the term?

[236] In the normal semantic context, 'annoy' means to irritate or cause displeasure. It is generally understood to refer to a minor form of emotional disturbance.

[237] The term 'annoy' in the **CMA**, which regulates online communication, does not carry exactly the same meaning because the word has to be read in conjunction with the context in which it is used, as well as the purpose and object of the statute. In the **CMA**, the word 'annoy' is used as a part of the *mens rea* requirement to trigger the criminal sanctions in the section. The term denotes the threshold level to trigger the sanctions in **section 233(1)(a) CMA**, but not in isolation, with intent to annoy.

[238] It is criticised as being 'vague' in the sense that it is subjective and variable and may therefore interfere with freedom of speech. However, from a *mens rea* perspective, the words with 'intent to annoy' are usually read together with 'abuse, threaten or harass', which shifts the focus to the user's purpose.

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[239] This begs the question – why use the word 'annoy' at all? The answer is as stated at the outset that the word should not be construed in isolation but in the context of the purpose of the network communications statute which is to curtail and prohibit a spectrum of disruptive and harmful communications.

[240] The answer to the criticism that the term 'annoy' is subjective and vague and therefore gives rise to a curtailment of freedom of speech and expression is that there should not be an infringement of free speech and communication as the purpose of the **CMA** is to regulate content **which falls outside of the purview of free speech and expression under art 10(1)(a) FC**.

[241] As highlighted in ***DPP v Collins*** **[2006] UKHL 40**, the network facilities comprise a public service funded by the public for the purposes of facilitating communication. Governments have a duty to protect the public from harassment, nuisance and disruption in the use of such communication networks.

[242] The word 'annoy' serves to deal with situations like trolling, doxxing and nuisance which results in emotional distress and unhappiness.

[243] This is of significance in this jurisdiction by reason of the inherent plurality of the state where matters related to race, religion and royalty have to be managed with care. For example, an online communication which demeans, humiliates or puts

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down a particular racial segment of society and which is sent with the intent to annoy one or more members of that racial grouping, falls squarely within the term ‘offensive’ or ‘grossly offensive’ with ‘intent to annoy’. Such a communication made with intent to annoy may well escalate into a public furore, thereby adversely affecting public order. Therefore, the criminalisation of such communications which are offensive and communicated with an intent to annoy cannot be dismissed out of hand as relating to standards of civility in public discourse or as referring to minor irritations with no real repercussions, as interpreted and construed by the Court of Appeal.

[244] The position is even clearer in relation to communications relating to religion. A communication which is inflammatory on the subject of religion in a plural society, and which is made with the specific intent to annoy is more than likely to give rise to annoyance, anger and distress. It also has the potential to spiral out of control into the physical world so as to adversely affect public order.

[245] Individuals are not spared. When a communication which is offensive is made with the intent to annoy an individual repeatedly over a course of time, escalating to a call to that individual to harm or injure himself, then **section 233(1)(a) CMA** becomes entirely relevant and necessary.

[246] In each of these cases however, the test to be applied is the dominant purpose or vexatious intent test. This requires

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that the intent and purpose must be to cause annoyance and detriment in the form of emotional or psychological distress. If this test is not met, then it cannot be said that the communication was targeted to cause annoyance in the form of actual distress, and the communication would not be caught by the section.

[247] There would be no misuse of **section 233(1)(a) CMA** if the requirement of ensuring that the sender, fulfilled the *mens rea* element of an intent to annoy and abuse, on an objective basis. This protects the threshold requirement and ensures that the section is narrowly construed and utilised. In essence, **section 233(1)(a) CMA**, when construed correctly, does not criminalise free speech and expression in the context of **art 10(1)(a) FC**. It bears repeating that it is enforcement that is misguided and unwarranted that is the core problem, rather than the law itself.

**Summary**

[248] To summarise the position of 'reading down' by using the vagueness avoidance theory, the standard or threshold required to warrant the bringing of a criminal charge is that:

(a) the dominant or primary purpose of the communication is that the user sent the same with the *mens rea* or vexatious intent of causing

annoyance which encompasses emotional distress or harm;

(b) If the communication was for the purpose of political, social or personal grievance intended for public discourse, the fact that the communication may be viewed as ‘offensive’ or even ‘grossly offensive’ to the recipient does not warrant prosecution as the *mens rea* element of criminal intent is absent;

(c) In the context of (b), the annoyance caused to the recipient would be secondary, and a side effect to the primary purpose of sending the communication, which is to discuss or bring a social issue to light;

(d) Even where such annoyance is reasonably foreseeable, but is secondary to the primary purpose of the communication which falls within the compass of free speech and expression, it is insufficient that the user knew the post would offend or annoy some persons, because again, the requisite vexatious intent to harm or cause hurt and distress is absent. It is recognised that robust debate may well cause annoyance to some users but that is a side-effect of the fundamental right to freedom of speech and expression.

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[249] **Section 233(1)(a) CMA** cannot be utilised as a shield for corporations or public figures in respect of legitimate grievances. Where there is a good *bona fide* reason for the communication, it would be difficult to establish that such communication was made solely with the intent to annoy. It is only if the high burden of a clear/plain and objective 'intent to annoy' *mens rea* is met, that a prosecution should ensue.

[250] The net result of the 'reading down' construction by applying the vagueness avoidance doctrine, is that the phrase 'offensive with intent to annoy' would apply largely to trolls or stalkers, or communications that are sent with content relating to religion, race or royalty where the primary or dominant, if not sole purpose, is to annoy, harm or cause emotional distress.

**Issue (viii): Are the impugned words in section 233(1)(a) CMA unconstitutional?**

[251] In conclusion, **section 233(1)(a) CMA** is not unconstitutional in terms of the use of the words 'offensive' or 'grossly offensive' (under the recent amendment) with intent to 'annoy'. It targets communications that fall outside of the definition of freedom of speech and expression under **art 10(1)(a) FC**. It is trite that freedom of speech has its own bounds.

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[252] To that extent, the impugned words and section do not infringe on **art 10(1)(a) FC** because the primary purpose of the **CMA** is to protect and safeguard users of network communications from content that falls outside of the definition of freedom of speech and expression. This is the case as expressly borne out in the debates relating to the amendment Bill where the word 'grossly' was inserted so as to be read in conjunction with 'offensive'. It was expressly stated that the section was enacted not to infringe on freedom of speech and expression under the **FC**, but to ensure the online safety of network communications users.

[253] It is in the interpretation, construction and prosecution of **section 233(1)(a) CMA** that a balance has to be achieved between the online safety of network communication users and the fundamental freedom of speech and expression in **art 10(1)(a) FC**. And that balance is secured by the fact that it is imperative that the *mens rea* element of the penal provision is established clearly, before a prosecution is brought, as explained in detail above.

[254] It has been concluded in this judgment that neither the **CMA** nor **section 233(1)(a)** of the same have the effect of stifling or infringing the fundamental freedom of speech and expression in **art 10(1)(a) FC**. **Section 233(1)(a) CMA** instead targets communications that fall outside the purview of the freedom of speech and expression, as this fundamental liberty has its own inherent boundaries.

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[255] It has been emphasised here that these boundaries preclude or prohibit speech or communication which has as its primary purpose the intention to cause harm, injury or distress. Therefore, the impugned words, when read in the context of the entirety of **section 233(1)(a) CMA** and the statute as a whole, do not infringe **art 10(1)(a) FC**. In point of fact, such communications which are 'offensive with intent to annoy' or 'offensive with intent to annoy, abuse, threaten or harass' simply do not fall within **art 10(1)(a) FC**.

**Issue (ix): Was the Court of Appeal correct in determining that the impugned words in section 233(1)(a) CMA did not fall within the permissible restrictions on the freedom of speech and expression under art 10(2)(a) FC?**

[256] The Court of Appeal below proceeded on the basis that the impugned words in **section 233(1)(a) CMA did contravene art 10(1)(a) FC**, without considering whether communications targeted in **section 233(1)(a) CMA** with the impugned words, fell within or outside the boundaries of free speech and expression.

[257] Even if it is postulated that the words 'offensive' and now 'grossly offensive' as well as 'annoy' in **section 233(1)(a) CMA** are inconsistent with **art 10(1)(a) FC**, in that they are too wide or vague as well as trivial, such that they offend **art 4(1) FC**, it is still necessary to consider the restriction to **art 4(1)** in

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**art 4(2) FC**, followed by **art 10(2)(a) FC** which specifies those restrictions.

[258] As has been explained earlier, the effect of **art 4(2) FC**, with respect to **arts 9 and 10 FC**, is to protect from challenge the intention or judgment of Parliament in enacting a law restricting the freedoms in **arts 9 and 10 FC**. However, it remains open to the courts to judicially review a statute to ascertain whether a particular series of facts falls within the permitted restrictions in **art 10(2)(a) FC**.

[259] If the statute or a part of the statute does not fall within the permitted restrictions, then it may be struck out under **art 4(1)** for inconsistency with the **FC**, more particularly **art 10(1)(a) FC** in the instant case. If, however, the statute or part of the statute falls within the permitted restrictions then it cannot be struck out under **art 4(1) FC**.

[260] For completion, namely, to address the issues raised in the judgment of the Court of Appeal, and on the assumption that there has in fact been an infringement of **art 10(1)(a) FC** by reason of the impugned words, it is now necessary to ascertain whether the impugned words (or more correctly phrases) in the **CMA** fall within the permitted restrictions or not. Needless to say, it is not possible to ascertain whether two words in a statute, namely ‘offensive’ and ‘annoy’ do or do not fall within a permissible restriction. Instead it falls to be considered whether the phrases ‘offensive with intent to annoy’ and ‘offensive with

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intent to annoy, abuse, threaten or harass' fall within any of the permissible restrictions outlined in **art 10(2)(a) FC**.

[261] There are several permissible restrictions in the section. In the instant case, the relevant restriction is "*in the interest of public order or morality*". The question that then arises is whether a communication which is 'offensive with intent to annoy' or 'offensive with intent to annoy, abuse, threaten or harass' can affect public order such that it is 'in the interest of public order' to preserve the impugned provision. In such event, the impugned provision would fall within the permitted restriction. If the impugned provision does not or cannot affect public order, then it does not fall within a permitted restriction and may be struck out under **art 4(1) FC** for inconsistency with **art 10(1)(a) FC**.

[262] This requires a consideration of whether a communication which is offensive and sent out with the requisite *mens rea* or intention, can affect public order. The Court of Appeal concluded that such a communication could not, as it would be too trivial to have an effect on public order. In this context, reliance was placed on the Indian cases of ***Dr. Ram Manohar Lohia v State of Bihar and Others*** **AIR 1966 SC 740 (*'Dr. Ram Manohar'*)** and ***Arun Ghosh v State of West Bengal*** **AIR 1970 SC 1228 (*'Arun Ghosh'*)**, which concerned preventive detention under the Defence of India Act 1962 and the Preventive Detention Act 1950 respectively, and where the term 'public order' was considered and defined in the context of those

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statutes. This definition of 'public order' was applied by the Federal Court in ***Darma Suria bin Risman Saleh v Menteri Dalam Negeri, Malaysia & Ors*** **[2010] 3 MLJ 307**, also in the context of preventive detention law.

[263] In ***Dr. Ram Manohar***, the Indian Supreme Court drew a distinction between the terms 'law and order', 'public order' and 'the security of the State'. It was explained that 'law and order' represents the largest of three concentric circles, within which lies the next circle of 'public order' and the smallest circle representing 'the security of the State'. In other words, an act may affect 'law and order' without necessarily disturbing 'public order', and another act may affect 'public order' but not 'the security of the State'.

[264] In ***Arun Ghosh***, the Indian Supreme Court laid out the following observations in relation to the difference between 'public order' and 'law and order':

(i) Public order is the even tempo of the life of the community, taking the country as a whole or even a specified locality;

(ii) Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity; and

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(iii) It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order, or a disturbance of public order.

[265] Public order as described above refers to the general security and stability of society and communities ensured by compliance with laws and the ultimate purpose of protecting the physical and moral integrity of communities, individuals and their property. Public order in the digital age, however, is not confined to the traditional understanding of the phrase as it applies in the physical world.

[266] As stated at the outset, the internet is a distinct 'society' that has distinct and separate rules where a new type of mass interaction takes place. This means that not only are the physical aspects of safety to be taken into consideration but also digital ones. Online communications can destabilise society and generate panic, social tension and even social dysfunctionality. The rapid flow of information can lead to the rapid escalation of public order problems. In short, public order in the digital age is no longer confined to maintaining physical safety in public spaces.

[267] While freedom of speech and expression remains a fundamental liberty that must be protected, it is also necessary to recognise that it can be abused and that the online world or

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cyberspace, with its absence of a physical presence, is fertile ground for the abuse of freedom of speech and expression. It is in this context that the relevant laws seeking to protect public order ought to be construed.

[268] We refer to the earlier examples of the abuse of the freedom of speech and expression in relation to race and religion. Cyberspace allows for information flow at great speed or instantaneously together with verbal interaction. The speed at which such information flows can influence public opinion on a large scale as well as cause annoyance (as defined in the digital space) and incite emotional distress as well as anger on scales unprecedented in the physical world.

[269] In this context, disruptive, demeaning or derogatory communications in relation to race or religion, intended primarily to cause distress, anger or harm in the online world can lead to grave repercussions in the physical world. For example, consider communications with derogatory content that demeans or marginalises a group based on ethnicity or faith, or communications that are insulting to religions practiced in Malaysia, which are posted with the specific intent to cause harm or emotional distress. Such communications can, by reason of their instantaneous transmission, trigger retaliatory communal violence. This would fall within the definition of the preservation of public order, a permitted restriction under **art 10(2)(a) FC**.

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[270] Such communications would fall within the purview of a communication which is 'offensive with intent to annoy or abuse'. It would not immediately fall within the other words in **section 233(1)(a) CMA**, namely, 'obscene, indecent, false or menacing'.

[271] This goes to show that the absence of the impugned words may well leave a vacuum in respect of such disruptive and even dangerous communications by use of the network facilities.

[272] For these reasons, even if it is considered that the impugned words in the **CMA** infringe **art 10(1)(a) FC**, it follows in the particular circumstances prevailing in our jurisdiction that those words read in totality within **section 233(1)(a) CMA** comprise a permissible restriction under **art 10(2)(a) FC** and are therefore not inconsistent with the **FC**. The impugned words should not therefore have been struck out under **art 4(1) FC**.

**The doctrine of proportionality**

[273] The submissions of learned counsel for the Respondent, in essence, are that the doctrine of proportionality is to be invoked in assessing whether there is a nexus between the impugned legislative measure and the legislative aim and also whether the measure itself, which infringes upon a fundamental right, is proportionate to the legitimate legislative objective. If these two limbs are not met, then the impugned provision is liable to be struck out under **art 4(1) FC**. This

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argument does not appear to take into consideration **art 4(2) FC**.

[274] Learned counsel for the Intervener, the Malaysian Communications and Multimedia Commission, took the position that the doctrine of proportionality has no room for application given the existence of **art 4(2) FC**. It was submitted by learned counsel that the doctrine should not be invoked, so as to effectively reinstate the word 'reasonable' in **art 10(1)(a) FC** that was expressly removed on the suggestion of the Working Party when finalising article 10 of the draft Constitution in 1957.

[275] The learned SFC took a more extreme position in submitting that the doctrine of proportionality could not apply because **art 4(2) FC** precluded any restraints on Parliament in terms of legislating on the freedom of speech and expression.

**Our analysis**

[276] We are of the view that the doctrine of proportionality does not come into play in determining whether the impugned words are constitutional or unconstitutional. This is because, as alluded to earlier, when determining whether or not the impugned phrase ought to be struck out, it is necessary to first consider the effect of **art 4(2) FC**.

[277] We have concluded that this article amounts to a carving out or fetter on the fundamental right to freedom of

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speech and expression in **art 10(1)(a) FC**. However, we have also concluded that in enacting restrictions on the fundamental liberty, Parliament ought to be cognisant of the fact that **art 10(2)(a) FC** has to be read in light of the supremacy of the Constitution itself which affords a substantive fundamental freedom in **art 10(1)(a) FC**. In other words, **art 4(2) FC**, in limiting or placing a fetter on **art 10(1)(a) FC**, does not, by reason of the principle of constitutional supremacy as contained in **art 4(1) FC**, permit an abrogation, either complete or substantive, of **art 10(1)(a) FC**.

[278] In short, **art 4(2) FC** is subject to **art 4(1) FC** which provides for constitutional supremacy. Equally, **art 10(2)(a) FC**, which places a fetter on **art 10(1)(a) FC**, cannot abrogate the fundamental liberty afforded by the latter. In these circumstances, a careful interpretation and construction of **arts 4(1), 4(2), 10(1)(a) and 10(2)(a) FC** provides the answer as to how both **arts 4(2) and 10(2)(a) FC** are to be read and applied.

[279] Put another way, how can **art 4(2) FC** override **art 4(1) FC** which stipulates that the Constitution is the supreme law of the land? The answer is that it cannot. In like manner, how can **art 10(2)(a) FC** be construed so as to override **art 10(1)(a) FC**? It cannot, as the right to freedom of speech and expression will be effectively abrogated. That is a perverse conclusion which cannot be justifiably reached.

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[280] There is therefore no need to invoke the doctrine of proportionality as **arts 4(1) and 4(2) FC** read together with **arts 10(1)(a) FC and 10(2)(a) FC** provide the basis on which to construe whether a statute or parts of a statute are constitutionally valid or invalid. The doctrine of proportionality, in this framework, affords no greater assistance in arriving at a conclusion on constitutionality. These articles prevail over the doctrine of proportionality, which cannot amount to a substitute.

[281] As such, there is no necessity to have recourse to the doctrine of proportionality. The **FC** in itself provides the requisite answers to the issue at hand.

**Issue (x): Was it proper for the Respondent to take her constitutional challenge before the High Court, rather than in the Sessions Court?**
**Issue (xi): Can the Respondent take a constitutional challenge in the absence of a subsisting factual matrix?**

[282] Having determined the above issues, we find it necessary to clarify two further points that, taken together, concern whether the High Court and the Court of Appeal below should have determined the constitutional challenge raised by the Respondent in the first place.

[283] There are three grounds on which a court may review the constitutionality of legislation under **art 4(1) FC**, as

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explained by Suffian LP in the seminal case of ***Ah Thian v Government of Malaysia*** **[1976] 2 MLJ 112 (‘*Ah Thian*’)**:

> *“The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.*
>
> ***Under our Constitution written law may be invalid on one of these grounds**:*
>
> *(1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which [sic] respect to which the State legislature has no power to make law, article 74; or*
>
> *(2) **in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1)**; or*
>
> *(3) in the case of State written law, because it is inconsistent with Federal law, article 75.*
>
> *The court has power to declare any Federal or State law invalid on any of the above three grounds.*
>
> ***The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual.**”*
>
> [emphasis added]

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[284] A constitutional challenge based on the first of the three grounds in ***Ah Thian***, namely, that a law made by Parliament or by a State Legislature relates to a matter with respect to which the relevant Legislature has no power to make law, can only be filed in the original jurisdiction of the Federal Court, as stipulated under **art 128(1) FC**. This type of action is broadly termed an 'incompetency' challenge (see: ***Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor*** **[2021] 2 MLJ 323**; ***Wong Shee Kai v Government of Malaysia*** **[2022] 6 MLJ 102**).

[285] The above is to be contrasted with an 'inconsistency' challenge, which arises when the relevant Legislature has power to make a law, but the law itself is in excess of the limits demarcated by the **FC** or violates the fundamental liberties guaranteed under **Part II of the FC**. This is the second ground in ***Ah Thian*** under which a law may be invalidated. The third ground is where a law enacted by a State Legislature is in conflict with a law made by Parliament. As was made clear by Suffian LP in ***Ah Thian***, a challenge based on these latter grounds, unlike the first, can be commenced in any court in this jurisdiction.

[286] In the present case, the Respondent had challenged the validity of the impugned words as found in **section 233(1)(a) CMA** on the basis that the words are inconsistent with **art 10** read with **art 8 FC**. Her challenge calls for the court to exercise its power of constitutional judicial review under the second

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ground in ***Ah Thian***. This power, premised on ***Ah Thian***, could be exercised by any court of law.

[287] As will be recalled, the starting point of this case was when the Respondent was charged in the Sessions Court under **section 233(1)(a) CMA**. Following ***Ah Thian***, the proper forum for the Respondent to raise her constitutional challenge against the impugned words in **section 233(1)(a) CMA** would therefore have been the Sessions Court, where it would have been a relevant question in the context of the charge against her.

[288] Had she done so, the learned Sessions Court judge could have proceeded to either determine the question himself or refer it to the High Court in accordance with **section 30 of the CJA 1964** (see: ***Public Prosecutor v Chew Choon Ming & Ors*** **[1987] 2 MLJ 522** at page 526).

[289] However, instead of taking up her complaint of constitutionality in the Sessions Court, where she was facing criminal proceedings pursuant to **section 233(1)(a) CMA**, about a month after she was charged, the Respondent filed an originating summons in the High Court, seeking an order that the impugned words in **section 233(1)(a) CMA** are unconstitutional. Thereafter, she sought for her constitutional question to be referred to the Federal Court pursuant to **section 84 of the CJA 1964**, but was unsuccessful in her attempt to do so. It was only after her application for the **section 84** reference was rejected by the High Court did she raise a preliminary

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objection in the Sessions Court on the grounds that the charge against her was defective.

[290] Based on the timeline of events as set out above, it can reasonably be surmised that the Respondent had circumvented the proper forum to raise her constitutional question in an attempt to have the question determined by the Federal Court by way of a constitutional reference from the High Court. This would explain why she filed her constitutional challenge in the High Court rather than in the Sessions Court as she ought to have done.

[291] These actions by the Respondent contravene the scheme and design of the **FC** which, as explained in ***Ah Thian***, empowers all courts in this jurisdiction to determine 'inconsistency' challenges. The Federal Court, in the context of the decentralised model of constitutional adjudication practised in Malaysia, "*is not a constitutional court, but as the final court of appeal on all questions of law, is the final arbiter on the meaning of constitutional provisions*" (see: Andrew Harding, *Law, Government and the Constitution in Malaysia* (The Hague Kluwer Law International, 1996) at p 138). Any backdoor attempt by a litigant to bypass the hierarchy of courts in order for their constitutional issue to be determined directly by the Federal Court necessarily amounts to an abuse of process.

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[292] It is well-established that a constitutional question should be raised at the earliest possible opportunity. As stated by the US Supreme Court in ***Yakus v US*** **(1944) 321 US 414**:

> *"...a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."*

[293] The Sessions Court below, being the court of first instance, was the proper forum for the Respondent to raise the issue of the constitutionality of the impugned words in **section 233(1)(a) CMA**. It was not ideal for the Respondent to raise the question *in vacuo* before the High Court and to subsequently attempt to refer the same to the Federal Court. In doing so, the Respondent effectively mounted a collateral attack against the Sessions Court proceedings, which were still ongoing at the time. On this ground alone, the High Court ought to have struck out the originating summons filed by the Respondent as it constituted an abuse of process of the court.

[294] A corollary to the above is the general rule that Malaysian courts do not determine an 'inconsistency' challenge under **art 4(1) FC** in the absence of a factual matrix. This is clearly stated under the **FC** and the **CJA 1964**.

[295] The power of the Federal Court to determine a constitutional question by way of reference from a lower court is provided for under **art 128(2) FC**:

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> "*Without prejudice to any appellate jurisdiction of the Federal Court, where* ***in any proceedings before another court*** *a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.*"
>
> [emphasis added]

[296] **Section 84 of the CJA 1964**, in turn, sets out the jurisdiction of the High Court to refer a constitutional question to the Federal Court:

> "*Where* ***in any proceedings in the High Court*** *a question arises as to the effect of any provision of Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.*"
>
> [emphasis added]

[297] The phrase "*in any proceedings*" in both **art 128(2) FC** and **section 84 of the CJA 1964** envisions pending or subsisting proceedings in the High Court where a constitutional question is raised. Thus, the net effect of **art 128(2) FC** and **section 84 of the CJA 1964** gives rise to the general rule that any question of constitutionality raised in the High Court and subsequently referred to the Federal Court, as the case may be, should arise in the course of pending proceedings before the

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High Court. Otherwise, the court ought not determine the question.

[298] This general rule, however, is subject to an important proviso, namely, that the court still retains a discretion to hear a matter in the absence of a factual context in exceptional cases. The circumstances where such a discretion may be exercised include cases which raise important questions of public law, a situation which does not involve detailed considerations of fact, or a situation where a large number of similar cases need to be resolved. This discretion, even in the area of public law, should not be exercised unless it is in the public interest to do so (see: ***Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor*** **[2020] 4 MLJ 133 (‘*Anwar Ibrahim*’)** at para [261], citing ***Bar Council Malaysia v Tun Dato’ Seri Arifin bin Zakaria & Ors (Persatuan Peguam-peguam Muslim Malaysia, pencelah) and another case*** at paras [59]–[60]).

[299] In ***Anwar Ibrahim***, the majority of the Federal Court held that the courts can only entertain a constitutional challenge brought on the basis of the mere existence of a law in rare and exceptional cases, such as where the law specifically targets a particular group, or where there is a real and credible threat of the law being used against a party, as these factors can potentially give rise to an actual controversy affecting the rights of the party. As stated by the Federal Court:

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> "*... In our model of concrete review, courts would not ordinarily treat the mere existence of a law as an actual controversy suitable for determination. However, in the face of an exceptional law specifically targeted against a minority group, the very existence of which amounts to a real and credible threat to their rights — Holocaust-type laws would be an extreme example — the courts are not obliged to stand idly by until the threat materialised. In the words of Lord Woolf (Droit Public — English Style, (1995) Public Law 57 at p 68), 'If Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which was without precedent'.*"

[300] Generally speaking, the **FC** does not contemplate a question of constitutionality being brought *in vacuo* under its provisions, as such a question can ordinarily only be referred to in the context of pending proceedings. The constitutional question cannot be split from the proceedings from which it arises and should, in the ordinary course of action, be taken up within the same proceedings. To circumvent this design of the **FC** and do otherwise would amount to an interference with the fundamental doctrine of the separation of powers.

[301] The **FC** envisions that the three branches of government work together harmoniously, and each branch acts as a check and balance in respect of the others where necessary. This is to ensure that every time a statute is enacted by Parliament, the courts do not embark on an exercise of interpretation *in vacuo*. It is not the Judiciary's function to carry out an audit in respect of every piece of legislation enacted by Parliament. The **FC** is framed in such a way to ensure that when the court

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undertakes an interpretive function in relation to legislation, it does so in the context of **art 4(1) FC**, which requires a factual matrix.

[302] This is unlike the position in India, as borne out by the facts in the Indian Supreme Court case of ***Shreya Singhal***, which was referred to by the Court of Appeal below. As explained earlier in this judgment, the primary issue for determination in that case was the constitutionality of **section 66A of the Information Technology Act 2000** in light of the right to freedom of speech and expression guaranteed under **art 19(1)(a) of the Indian Constitution**. The Indian Supreme Court in that case determined the constitutionality of the challenged provision on the basis of a series of writ petitions filed by various parties pursuant to **art 32 of the Indian Constitution** and in the absence of any underlying factual matrix.

[303] The jurisdiction of the Indian Supreme Court to determine the constitutional question *in vacuo* was conferred by the unique nature of **art 32 of the Indian Constitution**, which grants individuals the right to directly move the Indian Supreme Court for the enforcement of their fundamental rights as guaranteed under the **Indian Constitution**. In other words, **art 32 of the Indian Constitution** allows individuals to challenge the constitutional validity of any legislative provision that potentially infringes their fundamental liberties on that ground alone before the Indian Supreme Court, in the absence of any pending proceedings in any court.

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[304] That is not the position in Malaysia. There is no equivalent of **art 32 of the Indian Constitution** in our **FC**. In this jurisdiction, for the reasons outlined above, any constitutional challenge brought under **art 4(1) FC** should generally be raised in the context of a live factual matrix.

[305] In the present case, the Sessions Court below had granted a DNAA to the Respondent in respect of the charge against her under **section 233(1)(a) CMA** on the grounds that the charge was defective. In other words, the charge against the Respondent had been struck out by the Sessions Court. Subsequently, in the course of the proceedings in the High Court, the Investigating Officer in the Respondent's case had given an undertaking to the court that there will be no further prosecution against the Respondent since her file had been classified as NFA. The net effect of these developments was that, during the point at which the issue of the constitutionality of the impugned words in **section 233(1)(a) CMA** arose for determination in the High Court, there were no pending proceedings against the Respondent in respect of **section 233(1)(a) CMA**, nor was there any realistic prospect of prosecution against her for the same offence in the future.

[306] Notwithstanding these developments, the High Court below went on to determine the question of the constitutionality of the impugned words in **section 233(1)(a) CMA** *in vacuo* without reference to any concrete set of facts in relation to any

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pending legal dispute involving the Respondent. The Court of Appeal below similarly undertook an examination of the constitutionality of the impugned words in the absence of any factual matrix, on the grounds that it could not rule out the possibility of the Respondent being charged again for the same offence in the same future.

[307] This was, with respect, not the correct inference to draw in the circumstances of this case. Based on the series of events that transpired in the courts below, there was no basis for the Court of Appeal to conclude that there was a real threat for the Respondent to be charged again in the future under **section 233(1)(a) CMA**. Any such possibility was too remote to warrant the exercise of the court's power under **art 4(1) FC**. As such, the present case did not fall within the exceptional category of cases, as set out in ***Anwar Ibrahim***, where the court can exercise its discretion to hear a matter which has been become abstract or academic. In the absence of a clear factual matrix, both the High Court and the Court of Appeal below ought to have declined to determine the constitutionality of the impugned words in **section 233(1)(a) CMA**.

## The Questions of Law

[308] We now turn to the questions of law before us:

**Question 1: What is the effect of art 4(2) FC in the circumstances of this case?**

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Answer: **Art 4(2) FC** does not derogate from **art 4(1) FC** in establishing the **FC** as the supreme law of the Federation. As such, constitutional supremacy remains the cornerstone of the **FC**. What **art 4(2) FC** does, however, is to limit the ability of the Courts to question or challenge Parliament's intention or judgment that any restriction imposed on the right to freedom of speech and expression under **art 10(1)(a) FC** was 'necessary or expedient' for the specified grounds set out in **art 10(2)(a) FC**. This means that it is open to a Court to still judicially review the impugned legislation to ascertain whether it falls within those specified grounds set out in **art 10(2)(a) FC** and referenced in **art 4(2) FC**.

**Question 2: In the light of the trite position that if certain provisions of law, construed in one way, would make them consistent with the Constitution and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction, whether the interpretive approach enunciated by the English House of Lords in *DPP v Collins* [2006] UKHL 40 and other subsequent decisions, *inter alia*, in *Connolly v DPP* [2008] 1 WLR 276, *Scottow v CPS* [2021] 1 WLR 1828, *Attorney General's Reference (No. 1 of 2022)* [2023] 2 WLR 651, *DPP v Cobban* [2025] 2 All ER 168, *R v Casserly* [2025] 1 All ER 82 and *R v Jordan* [2024] EWCA Crim 229 pertaining to section 127(1) of the UK Communications Act 2003, sections 1(1) and 1(4) of the UK Malicious Communications Act 1988**

**and art 10 of the European Convention of Human Rights, has any relevance in interpreting section 233(1) CMA and art 10 FC, considering the striking similarity shared by the equipollent provisions found in the respective legislations.**

Answer: The constitutionality of the impugned words in **section 233(1)(a) CMA** is to be determined with reference to the provisions of the **FC** and the effect of those provisions. The English cases referred to in the question, although most useful, were not necessary in light of our preceding analysis in this judgment. We therefore decline to answer the question.

**Question 3: Whether the object of section 233(1)(a) CMA, including the words "offensive" and "annoy" therein, is to prevent the misuse of public electronic communications network and to protect the basic standards of our society; thus, it is in the interest of public order and morality under art 10(2) FC.**

Answer: We answer the question in the affirmative.

**Decision**

[309] We are of the unanimous view that the words 'offensive' and 'annoy' in **section 233 (1)(a) CMA** are not unconstitutional in that:

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(a) the impugned words do not contravene **art 10(1)(a) FC**; and

(b) further and alternatively, the impugned words fall within the purview of a permitted restriction under **art 10(2)(a) FC**.

[310] We are also of the view that the prosecution against the Respondent was unjustified and ought not to have been commenced, as her Facebook post did not fall within the ambit of **section 233(1)(a) CMA**. The post that was uploaded was not offensive as it related to a matter of fact and opinion. More significantly, it was not sent with intent to annoy. The *mens rea* element being absent, there was no basis to warrant a prosecution.

[311] The Respondent's Facebook post fell within the ambit of **art 10(1)(a) FC**, meaning that its content amounted to the exercise of the Respondent's right to free speech and expression.

[312] In conclusion, we allow the appeal in part, in that we reverse that part of the judgment of the Court of Appeal that struck out the words 'offensive' and 'annoy' from **section 233(1)(a) CMA** for being inconsistent with **arts 10(1)(a) and 10(2)(a) FC**. The impugned words are reinstated in **section 233(1)(a) CMA**. We affirm the Court of Appeal's decision that there was no basis to prosecute the Respondent on the grounds

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that her post was offensive and communicated with intent to annoy.

[313] Since this appeal concerns a matter of public interest, we make no order as to costs.

*-signed-*
**NALLINI PATHMANATHAN**
Judge
Federal Court of Malaysia

Dated: 6 February 2026

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