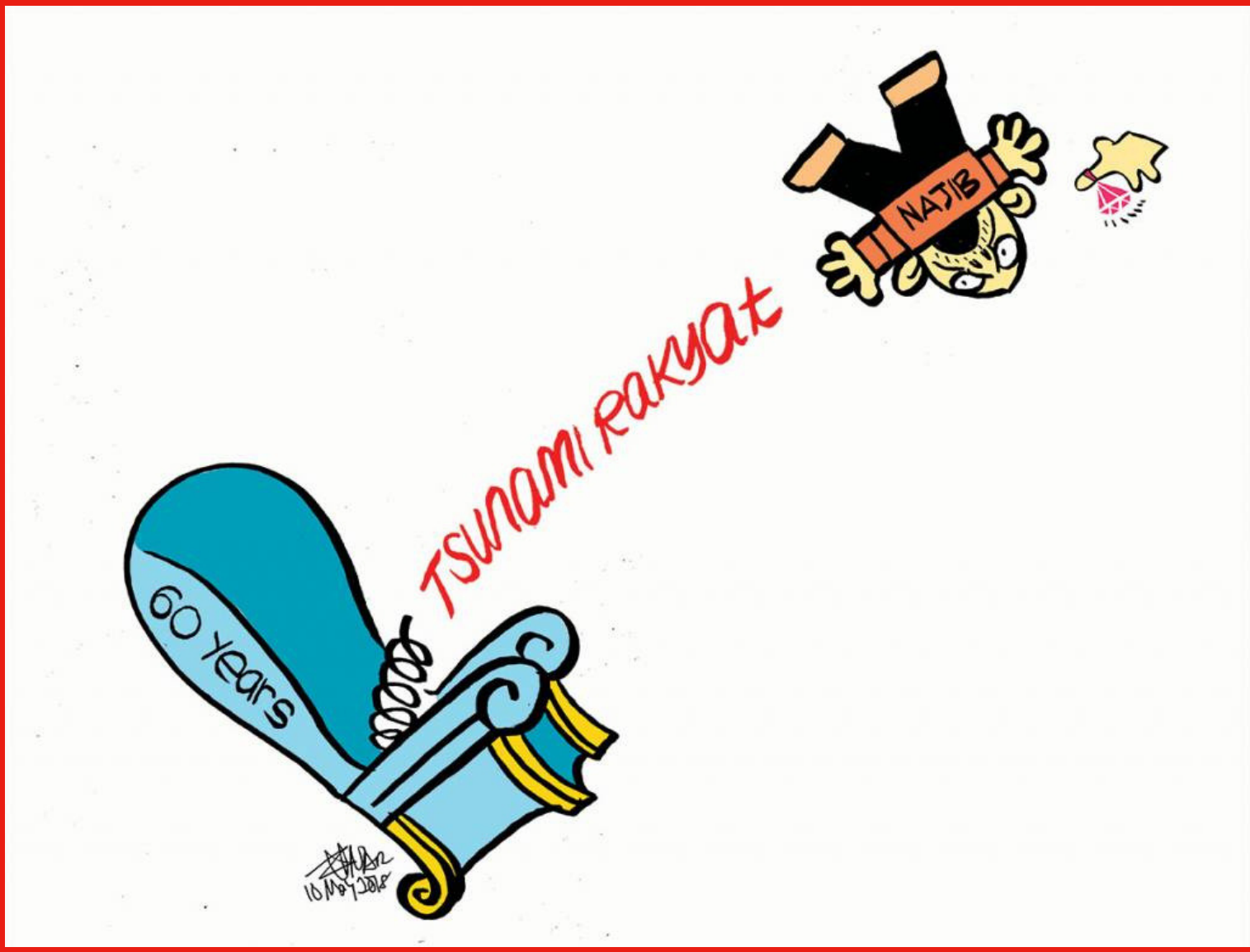
Fighting for media reform in the "New Malaysia"

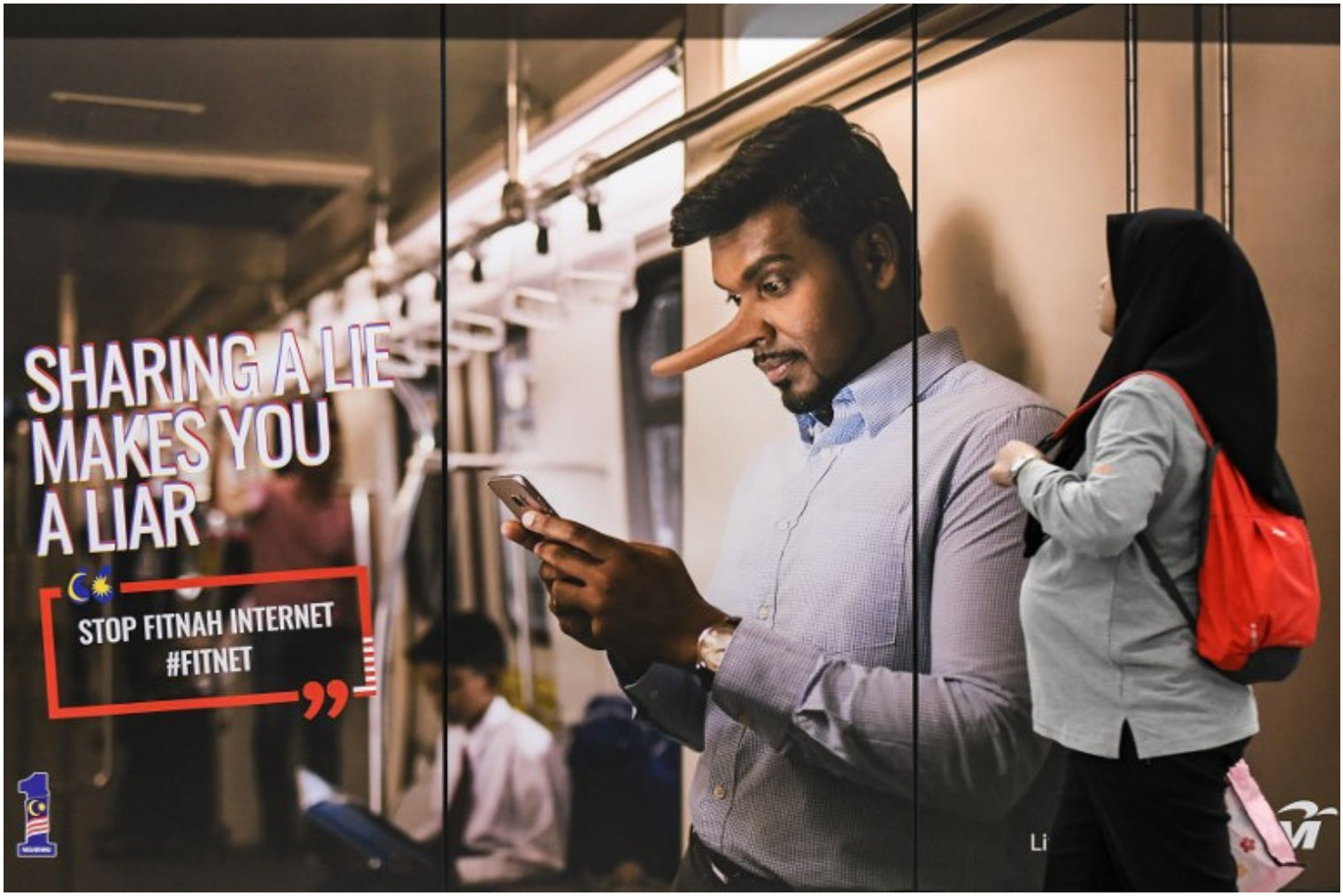


IFJ Situation Report
September 2018

The overthrow of Malaysia's authoritarian ruler Najib Abdul Razak this year was celebrated across Malaysia and the world. After decades of ever-tightening controls and ongoing violation of free speech under Malaysia's ruling UMNO party, the election of the Mahathir-led Pakatan Harapan government signaled a real prospect for positive change.

In this situation report, the IFJ probes the situation. If Dr Mahathir is truly committed to reopening freedom of expression in the "new Malaysia", then change must swiftly and it must delve deeply and effectively to break the many legislative binds that have stifled free speech and democracy in the country for too long.

On May 9th 2018 the authoritarian, corrupt government of Najib Abdul Razak's UMNO in Malaysia was roundly defeated in an election which the world - wrongly - believed would provide only a minor speed bump in the steady march of his Malaysian kleptocracy. The regime, which had become arrogant and complacent, looked on in disbelief as the voters turned on it. The anticipation of a stolen result in the event of the unlikely drift of votes away from UMNO was confounded, and, to the outside world's astonishment, decades of authoritarianism were dealt a blow.



One of the advertisements put out by the Malaysian Government in the lead up to the General Elections in May 2018, following the passing of the Anti Fake News legislation. Credit: Mohd RASFAN/AFP

Cover: Cartoon by Malaysia cartoonist Zunar following the ousting of Prime Minister Najib Razak. Credit: Zunar

An international pattern of creeping authoritarianism had seemed, by May 2018, to have foreclosed optimism and any real expectation of a democratic resurgence. It is worth noting that Malaysia was one of the pioneers in the slide into authoritarianism. In his prescient 2012 book ‘The Dictator’s Learning Curve: Inside the Global Battle for Democracy’, American journalist William Dobson used Malaysia as a key case study in the new authoritarianism taking hold globally.

The template for this new authoritarianism has now been emulated by a host of what might be termed the new ‘postmodern’ authoritarians - to name but a few of the most notorious, Turkey’s Recep Tayyip Erdoğan, Hungary’s Viktor Orban and Egypt’s General Abdel Fattah el-Sisi. Most distressing however is that these ‘populist’ enemies of democracy who parade as champions of the people have a soul mate in the present occupant of the White House who derides the free press as ‘fake news’ and ‘enemies of the people’. Each mirrors a similar pattern of steady encroachment upon freedoms and democratic institutions.

Malaysia had, if not perfected this model, raised its techniques to a high art form. Its mainstream press and media was, and is, limited to control by regime cronies. Government registration of publications meant that media diversity was severely restricted at its discretion.

The courageous and celebrated Malaysiakini existed as an outlier with a few other independent outlets - mainly bloggers - some of whom were forced to escape the country for fear of arrest or crippling law suits. On September 21 some long-awaited welcome news came when Judge MM. Edwin Paramjothy directed the acquittal of Malaysiakini and KiniTV directors, editor-in-chief Steven Gan and chief executive officer Premesh Chandran, over several charges of uploading an offensive video on former attorney-general Mohamed Apandi Ali. They had been charged under Section 233(1) of the Communications and Multimedia Act 1998 (CMA).

Newly elected Malaysia Prime Minister Mahathir Mohamad celebrates his victory. Credit: Manan VATSYAYANA / AFP

Events in Malaysia have also moved swiftly and dramatically and, as anticipated, the arrest of Najib on July 3rd - on corruption charges - came just 56 days after the election. Then on September 19, he was arrested on new charges over RM2.6 billion of the 1MDB funds.

UMNO'S LEGISLATIVE LEGACY

But still there remains the UMNO's long legacy of control that will take some care, effort and energy to see dismantled.

Among a suite of repressive laws, the Sedition Act, a relic from the colonial era, was regularly deployed against political opponents of the regime. Little wonder that by 2018, Malaysia languished at position 150 out of 180 countries in the World Press Freedom Index issued by Reporters Without Borders. Malaysia also ranked 62 among 180 countries in the Corruption Perceptions Index (CPI) 2017 with a score of 47 out of 100, sharing the same spot as Cuba!

In perhaps its final gesture of contempt for its electorate Najib enacted his very own Anti Fake News Act, just in time for the 2018 election - and after the publication of the election manifesto of the opposition coalition Pakatan Harapan on 8 March 2018.

Dr Mahathir Mohamad has undergone a 'conversion' to democracy and his former protégé and later sworn enemy Anwar Ibrahim is his de facto leader from outside Parliament along with his wife Dr. Wan Azizah binti Wan Ismail, now the first female Deputy Prime Minister of Malaysia.

The Pakatan Harapan government has committed itself to the repeal of the whole raft of repressive laws but, as ever, the devil will be in the detail. As the Barisan Nasional (National Front) government developed the template for modern authoritarianism, it is fitting that a template for contemporary democracy may now be fashioned in the new Malaysia to replace it.

SILENCING UNDER LAW

While Article 10 of the Constitution of Malaysia on the surface guarantees Malaysian citizens the right to freedom of speech, freedom of assembly and freedom of association, there is an immediate qualification of all of these freedoms where they may easily be restricted by government fiat. Major qualifications of these ephemeral 'rights' are contained in a variety of legislation, the most notorious being the Official Secrets Act (1972), the Sedition Act (1948), and the Printing Presses and Publications Act (1984).

The **Sedition Act** prohibits speech and conduct deemed as seditious and criminalises speech which 'excites disaffection against" the government or engenders "feelings of ill-will and hostility between different races". In 2015, despite previous promises of reform, Malaysia's parliament approved amendments to the sedition law, which gave the government broad new powers to censor online media. It also increased the penalties for these 'crimes'. These changes faced international condemnation by journalists, press freedom and human rights organisations - to no avail.

The **Official Secrets Act** prohibits the dissemination of any information classified as an 'official secret' whereas the Printing Presses and Publications Act curtails freedom of speech and the press by giving total control of the press to the Home Affairs Ministry by licensing all printed media. Both Acts have been used by the government to suppress the transparent reporting of government corruption. Under section 8of the Act, the jail term for a breach (i.e. 'communicating a secret') is imprisonment for a term not less than one year but not more than seven years.

No amount of fiddling with these statutes will cure their fundamental flaws. They need complete repeal and, so far, that is what the new government has promised.

For the 2018 elections ['GE14'] Pakatan Harapan issued a detailed manifesto. It stated that 'Malaysia's legal system is frequently abused by the leaders of UMNO and Barisan Nasional to achieve their political interests. Some of these laws were inherited from the British colonial era without amendment to improve weaknesses. There are also tyrannical laws that were enacted by UMNO and Barisan Nasional'.

FREEDOM OF EXPRESSION UNDER CONTROL: Malaysia's Problematic Legislation

Sedition Act 1948

Official Secrets Act 1972

Printing Presses and Publications Act 1984

Communications and Multimedia Act 1998

Film Censorship Act 2002

Security Offences (Special Measures) Act 2012

Peaceful Assembly Act 2012

Prevention of Terrorism Act 2015

Prevention of Terrorism Act 2015

Of particular importance for Journalists, Pakatan Harapan unambiguously promised in its manifesto that if elected, it would revoke (not amend): the **Sedition Act 1948**, and the **Printing Presses and Publications Act 1984.** A Pakatan Harapan Government will also abolish 'draconian provisions' in the **Communications and Multimedia Act 1998**, the **Security Offences (special measures) Act 2012** (SOSMA), the **Peaceful Assembly Act 2012** and the **Prevention of Terrorism Act (POTA) 201**5.

The Pakatan Harapan Government has also promised to revoke all laws that prevent independent judicial review of decisions of the Government.

Pakatan Harapan promised to ensure that media would have the freedom to check and balance its administration and to review all laws and regulations related to the media so that media freedom is guaranteed. It has also promised to 'take steps to improve the independence and professionalism' of Radio Television Malaysia (RTM) and BERNAMA, the Malaysian National News Agency.

Malaysian artist Fahmi Reza was also one of those charged under the Sedition Act for his caricature of Najib as a clown back in 2016.

He wrote in June that “although the government has changed hands, the #HurtFeelingsAct still applies,” in reference to the section of the Communications and Multimedia Act which prohibits any offensive messages online. “You can still be arrested and investigated just for a tweet.”

Although there are grounds for optimism with the recent ‘acquittals of *Malaysiakini* mentioned above, there are still outstanding defamation cases against *Malaysiakini* which save as a reminder that crippling legal costs and damages awards associated with such cases represent a threat to journalism just as serious as some criminal charges. The civil defamation laws need a comprehensive overhaul in any programme of reform.

A FREE PRESS AND MEDIA COUNCIL

The Pakatan Harapan Government has promised to establish a Media Council, consisting of media representatives, which will be responsible to develop and implement a code of ethics on reporting and function as a ‘hisbah’ (accountability) body for public complaints.

Journalists and press freedom activists in Malaysia will inevitably look to the democracies in the region to mould these new laws.

In her recent article in *Malaysiakini* American SE Asia media expert Professor Janet Steele reviewed 20 years for reform in Indonesia and celebrated the extraordinary victory of the establishment of a free press in that country. She stresses - correctly - that the free press is the indispensable foundation for the growth and preservation of democratic institutions.

There are a few basic lessons to be drawn from the so far (relatively) successful reforms in the direction of increased press freedom in Indonesia and Timor Leste. The experience of both countries has provided a relevant contemporary field test of new press and media laws and exposed their weaknesses. The broad brush has been welcome but the ‘fine point’ needs serious attention.

Both counties recent experience shows that without entrenched legal rights enforced by a confident and well trained judiciary, clearly expressed laws and overriding public interest defenses, important freedoms risk being eroded.

Although criminal defamation was abolished in Timor Leste, its continuing presence in Indonesia remains a cause for significant concern. The Press Council has done a great job in achieving the diversion of complaints which arise under the criminal defamation law into the Press Council’s complaints mechanism. This is far from ideal and leaves the decision about which ‘track’ complaints will take, uncertain. The blurred lines between press complaints and complaints arising out of the simple exercise of free speech leads to artificial jurisdictional arguments about the reach of Press Law protections.

In addition, mediation by the Press Council may be rejected and the matter then goes to a criminal court with possible imprisonment of the 'offending' journalists. Erosion of the Press law indirectly by parallel legislation such as the Electronic Communications ['ITE'] law has demonstrated how once assumed protections can be easily circumvented - in the case of the ITE legislation by the pretence that the law was only about the regulation of 'e-commerce' whereas its terms are wide enough to cover the whole of the terrain sought to be covered by the Press law so long as the 'offending publication' occurred by the use of electronic means. In the age of the internet, this is no restriction at all. The ITE law even adds blasphemy to its catalogue of offences and provides harsher penalties than the criminal defamation law to boot!

DEFAMATION BY ANY OTHER NAME

Similar, unintended consequences have been encountered with the new press law in Timor Leste. Notwithstanding the 'elimination' of the former Criminal Defamation law in Timor Leste, a little noticed provision in the revised Criminal Code preserved a form of criminal defamation in the form of a law against 'calumnus denunciation'. This is another outdated transplant from the colonial legal system.

Of its equivalent law in Portugal, the Vienna based International Press Institute (IPI) has observed that these provisions: '… reflect an outdated, authoritarian tendency to shield the State from criticism and stand in contrast to the ECHR's oft-repeated maxim that freedom of expression includes the freedom to express views that "shock, offend, and disturb". Moreover, in less democratic countries around the world, similar provisions are subject to abuse to protect the government and/or majority positions."

The 2017 trial and acquittal of Timor Leste journalist Raimondos Oki for the alleged 'criminal denunciation' of the former Prime Minister, has demonstrated powerfully how a legal anachronism like this can be deployed against the free press. Equally, the result - acquittal - demonstrated the importance of the rule of law and an independent and fearless judiciary.

Reforms to Press freedom laws in Malaysia are necessary and urgent. The other significant area of law reform for journalists who wish to organise collectively is the law relating to trade unions and their activities. Not only should those persons pursuing a profession as journalist be able to join a bona fide trade union organisation of their choice, but strong and effective laws protecting freedom of association, and union rights of organisation are as important as other related reforms relating to topics such as press freedom, transparency and accountability, and freedom of information.

The increasing prevalence of freelance work in journalism is not just a feature of the first world. Regulation of the so-called gig economy' is ripe for consideration where the casualisation of the world of journalists is growing. Platforms such as witness.id Indonesia provide an imaginative and promising approach to monetise the work of freelance journalists. These need regulation and encouragement.

Because of the restrictions placed upon the press and media in Malaysia, the pattern of union activity and coverage has tended to mirror the restricted scope of the industry in general. The laws dealing with union organisation and freedom of association must be liberalised to foster collective rights for journalists in all media.

Malaysia has yet to ratify many key human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR). Although the previous government accepted recommendations to consider ratification of the ICCPR during its Universal Periodic Review (UPR) at the UN Human Rights Council, it made no progress toward this goal and instead advanced laws and policies which further undermine the rights enshrined in the treaty.

Where to now Dr Mahathir?

Malaysian journalists face significant challenges to build and entrench protections for press freedom in this new environment. They must be at the forefront of this campaign and not rely on promises from politicians however genuinely offered. In the first 100days some pleasing achievements can be checked off. The new Parliament sat for the first time on July 16. A bill to repeal the Fake News Act passed the lower house of the Parliament on August 16. However on September 20 this hit a snag when the Malaysian Senate rejected the repeal Bill. In doing so, the Senate was described as 'creating history' when it rejected the repeal. This means that the bill will have to retabled with amendments

Important as well, has been the dropping of pending criminal charges under the Sedition Act, the most signifiant being the, 31 July, abandonment of nine sedition charges against Malaysia's most famous political cartoonist Zulkiflee Anwar Ulhaque, known as Zunar. Zunar, was awarded the Committe to Protect Journalist's 2015 International Press Freedom Award. Under the charges he could have been jailed for up to 43 years.

Notwithstanding this apparent change of policy, police inquiries have continued against a small number of activists under the the Sedition Act although it is unclear whether these will proceed.

Promised reforms for the 'New Malaysia'

In the lead up the GE14, Pakatan Harapan released its manifesto for change in Malaysia, with 10 promises in the first 100 days and 60 promises in five years. Under Pillar 2, Promise 27, PH promised to abolish repressive laws, including several relating to the restriction of press freedom and freedom of expression in Malaysia.

Acts to be revoked:

- Sedition Act 1948
- Printing Presses and Publications Act 1984

It also promised to abolish draconian provisions in the following Acts:

- Penal Code 1997 especially on peaceful assembly and activities harmful to democracy
- Communications and Multimedia Act 1998
- Security Offences (special measures) Act 2012 (SOSMA)
- Peaceful Assembly Act 2012
- Prevention of Terrorism Act (POTA) 2015

Pakatan Harapan also said: "The Pakatan Harapan Government will ensure that media has the freedom to check and balance our administration. We will review all laws and regulations related to the media so that media freedom is guaranteed. We will also take steps to improve the independence and professionalism of entities such as Radio Television Malaysia (RTM) and BERNAMA.

The Pakatan Harapan Government will also set up a Media Council, comprising its media figures, which will be responsible to develop and implement a code of ethics on reporting and function as a hisbah body for public complaints."

A related and important development came with the joint resignations of the two most senior judges in Malaysia and the appointment of the new chief justice Richard Malanjum and new Court of Appeal president Ahmad Maarop. The restoration of the doctrine of the separation of powers overseen by a judiciary that is not a creature of the executive and the prime minister, will reinforce a commitment to democratic values and a free press.

Much remains to be achieved and certain fundamental protections must become non negotiable. These will include:

- The urgent abolition of any law or regulation which permits any kind of press censorship or could chill the practice of journalists;
- Comprehensive defamation law reform
- The ability for journalists to join and form unions;
- No criminalisation of journalists' activities;
- The swift establishment of a Media/Press Council which embodies significant and robust press freedom protections;
- Media/Press complaints to be handled by a Media Council drawn from the industry with community representatives;
- Complaints to the Media Council be judged by reference to a recognised journalists' Code of Ethics (similar to those operating in Indonesia, Timor Leste and Australia);
- Robust legal protection for whistle blowers and investigative journalism;
- Freedom of Information laws with access to government information being the absolute priority and any (minimal) exceptions subject to judicial review;
- Any National Security laws being tightly drawn and subject to public interest exceptions.

Malaysia's former prime minister Najib Razak speaks to the media after being questioned at the Malaysian Anti-Corruption Commission (MACC) office in Putrajaya on May 22, 2018. Credit: MOHD RASFAN / AFP