RIGHT TO FREEDOM OF SPEECH, FROM FREEDOM TO RIGHT: IS THE MALAYSIAN JUDICIARY READY TO RAISE THE STANDARD?

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ABSTRACT

The aim of this paper is to look into the judicial approach adopted by the Malaysian courts in interpreting the constitutional provisions in respect of the right to freedom of speech and expression. Judicial approach is legal principles within which a judge finds support to his reasoning in formulating his decision, and it may vary over a series of periods. The courts could play an important role by adopting a proper approach in tandem with established theories and principles on human rights in order to realise a real and meaningful protection to freedom of speech in its fullest extent. Are the Malaysian courts ready and up to the task? This paper will focus on the aspect of freedom of speech and inevitably it will deal with the basic concepts and theories and the state of affairs of the right in Malaysia. The first part provides the constitutional background in order to provide the framework for the discussion. The second part deals with some previous studies related to the title. Thirdly, the paper will contemplate on the various judicial approaches that the Malaysian courts may consider to actualize a real protection to the right. The paper hopes to reveal that the adoption of appropriate judicial approach to political speech may suggest solutions that lead to a more meaningful protection of the right. The materials in the paper may also assist to a greater extent in charting the direction and prospect of protection to different type of speech against the various competing interests.

Keywords: Constraints, Judicial approach, Liberty, Limitations, Meaningful Protection, Right , Right to freedom of speech and expression, ,

PRELIMINARY REMARKS

The paper is focussed on freedom of speech and expression in relation to the Malaysian judicial approach of interpretation of the right as suggested by the title. As such, the writer will examine, but not restricted to, the relevant provisions in the Malaysian Constitution; the nature and scope of protection to the freedom; the judicial approach of interpretation adopted by the Malaysian Courts; and, the direction and prospect of the protection of the right to freedom of speech in particular in Malaysia.

In the context of this paper approach is defined as 'a way dealing with person or thing"[2], and judicial act is to mean as, "An act resulting from the exercise of judicial power".[3] The combined effects of these definitions is 'judicial approach' can be taken to mean as a legal principle or principles within which a judge finds support to his reasoning in formulating his decision,[4] and it may vary over "a series of periods".[5] While speech is meant to include expression. It can be defined as, "communication by word of mouth, signs, symbols and gestures through works of art, music, sculpture, photographs, films, videos, books, magazines and newspapers".[6] As with right, it is defined as "an interest recognised and protected by the law, respect for which is a duty and disregard of which is wrong".[7]

In respect of the use of words 'freedom of speech' and 'freedom of expression', the paper observes that there is inconsistency. The European Convention on Human Rights provides, "Everyone has the right to freedom of expression."[8] Meanwhile, the Universal Declaration of Human Rights has a provision, "Everyone has the right to freedom of opinion and expression".[9] The Constitution of USA uses "freedom of speech".[10] In Malaysia, the Constitution contains words 'speech' and 'expression' in the very same clause.[11] The inconsistency in the usage to Barendt, however, is of little significance.[12] Thus in the paper, unless the context requires, the words are used interchangeably.

THE CONSTITUTIONAL FRAMEWORK: AN INSIGHT

The notion of human rights in Malaysia is closely related to a 'highly qualified'[13] version of fundamental liberties. It is noteworthy to say that inclusion of provisions on fundamental liberties, in the beginning, was shrouded with controversy,[14] and the Reid Commission[15] was of the view that inclusion of such provisions was not necessary.[16]

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[2] Allen, R.E. (ed). (1990). The concise Oxford dictionary. Oxford: Clarendon Press.
[3] Curzon, L.B. (1983). *A dictionary of law*. Plymouth: Macdonald and Evans.
[4] For example in cases related to software copyright protection the trend, in China, is for relying on judicial protection than administrative enforcement. See Yi, Z. (2010). *A judicial approach to software copyright protection*. Retrieved from http://www.chinaipmagazine.com/en/journal-show.asp?id=601 downloaded on March 23, 2011.
[5] See Lepofsky, M.D. (1992). *The Canadian judicial approach to equality rights: Freedom ride or roller coaster?* From http://www.jstor.org/pss/1191762 downloaded on March 23, 2011.
[6] Faruqi, S.S. (2008). *Document of destiny: The Constitution of the Federation of Mala*ysia. Kuala Lumpur: Star Publications (Malaysia) Berhad, p. 284.
[7] Rutherford, L. and Bone, S. (Ed.). (1993). *Osborn's concise law dictionary*. London: Sweet & Maxwell, p. 293, citing the definition as originated from Salmond. In Curzon, L.B., fn. 2, p. 326, citing the same jurist but the texts are different as, "An interest which will be recognized and protected by a rule of law, respect for which is a legal duty, violation of which is a legal wrong".
[8] The European Convention on Human Rights, Article 10(1).
[9] The Universal Declaration of Human Rights, Article 19.
[10] The Constitution of the United States of America, the First Amendment.
[11] The Constitution of Malaysia, Article 10(1).
[12] Barendt, E. (1985). Freedom of speech. Oxford: Clarendon Press, p 6. The same approach has been adopted by Dziyauddin, H. A doctoral thesis submitted to the University of Newcastle Upon Tyne in 2005. See also Wragg, Paul, Martin. (2009). Critiquing the UK judiciary's response to Article 10 post-HRA: Undervaluing the right of freedom of expression? Doctoral thesis, Durham University. Available at Durham E-Theses Online: http://etheses.dur.ac.uk/68/, p. 14.
[13] Sheridan, L.A. and Groves, H.E. (1979). *The Constitution of Malaysia*. Singapore: MLJ (Pte.) Ltd., p. 11.
[14] Sheridan, LA., and Groves, H.E., fn. 12, p. 11.
[15] The proposal to form a commission with a task to devise a constitution for a fully self-governing and independent Federation of Malaya was mooted in a constitutional conference held in London from 18 January to 6 February 1956. The conference was attended by delegations from the Federation of Malaya and Britain. The

Eventually a compromise was reached by which a group of civil liberties was included under a heading of 'Fundamental Liberties' as Chapter II of the Constitution.[17]

Against this backdrop, Article 10 which provides the right to freedom of speech and expression crept into the Constitution. It provides, "Every citizen has the right to freedom of speech and expression". The Constitution contains no further elaboration on the right, and thus it creates considerable vagueness as regards the nature, scope and extent of the right.[18]

From the outset the Constitution is seemed to contemplate formidable protection to every citizen when words 'right' and 'freedom' are assembled to form a fortress that can provide solid defence against any form of violation. In this respect, right bears an ideal, in relation to individuals, relates to an interest duly recognised and protected by law. When it is provided in the constitution as a matter of right, the state is duty bound to respect it.

Nevertheless, in Malaysia, remarkably the strength of protection is corroded when the provision is placed within the four corners of barbed-wires of qualifications built around it. For instance, Clause (2) of Article 10 permits Parliament to enact law restricting the right for the interest of security, friendly relations with other countries, public order or morality and to protect the privileges of Parliament or any of the Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence.[19]

It seems that the validity of the restricting legislation can be challenged if it falls outside the scope of interest listed therein. But this is not the position as Article 4 (2) clearly provides that the validity of such law cannot 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 mentioned in that Article".[20] As such, so to speak, whatever protection that Article 10 (1) (a) might be able to provide has been rendered, though arguably, as illusory.[21]

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proposal was accepted by Queen Elizabeth II and the Malay Rulers; hence a commission was set up in March 1956 and chaired by Lord Reid, a distinguished British judge. Other members were Sir Ivor Jennings (an expert on Commonwealth constitutional law), Sir William McKell (a former Governor General of Australia), Mr. B. Malik (a former Chief Justice of the Allahabad High Court) and Mr. Justice Abdul Hamid (a judge of the West Pakistan High Court). See further Hickling, R.H. (1991). *Essays in Malaysian law*. Selangor Darul Ehsan: Pelanduk Publications, pp. 91-96. See also Imran, S. (2007). The Reid Commission. Retrieved from http://kudaranggi.blogspot.com/2007/12/reid-commission.html downloaded on April 13, 2011; and, Faruqi, S.S. (2011). *Bold road to freedom*. Retrieved from http://www.sun2surf.com/article.cfm?id=15378 downloaded on April 13, 2011.

[16] Bari, A.A. (2003). *Malaysian Constitution: A critical introduction*. Kuala Lumpur: The Other Press, p. 143.

[17] Sheridan, L.A., and Groves, H.E., fn. 12, p. 11.

[18] Bari, A.A. (2003). Malaysian Constitution: A critical introduction. Kuala Lumpur: The Other Press, p. 143.

[19] By virtue of the above provision, Parliament enacted a number of legislation including Printing Presses Act 1948 (revised as No. 58 of 1971); *Cinematography Films (Censorship) Act 19*52 *(revised as No. 35 of 1971); Control of Imported Publications Act 1958 ((revised as No. 63 of 1972); and, Preservation of Books Act 1966 (No. 35),* amended by *the Preservation of Books (Amendment) Act 1972 (No. A138).* In 1984, Parliament enacted *Printing Presses and Publications Act to replace Act 58/1971* and *Act 63/19*72, which has been further amended in 1987 to provide an ouster clause preventing actions of the Home Minister from being called into question by the courts of law.

[20] *Malaysian Constitution*, Article 4 (2) (b).

[21] "It can be argued that the combined effect of article 10(2) (a) and article 4(2) is to remove completely any restrictions on Parliament's interference with freedom of speech and expression, and to the declaration of that right in article 10(1) to the category of an expression of what the founders of the Constitution thought Parliament ought not do.": per Ibrahim, A., and Joned, A. (1995). *The Malaysian legal system (Revised by Ibrahim, A.).* Kuala Lumpur: DBP, p. 174.

According to Bari, "Although the essence of the legitimacy of these laws could be accepted what has triggered uneasiness and criticism has been the way the laws have been used".[22] The argument in its true sense is arguably one-dimensional, the least that can be said. Only to require the executives to act in conformity with laws passed by Parliament in order to guarantee citizens of their rights against violation is certainly not sufficient. It is submitted that such laws, in the first place, must be soundly laid down within authentic conceptual framework where promotion of justice for individuals is the prime consideration. In other words, legal concepts upon which such laws grounded must truly promote freedom as a right and not only a liberty.

PREVIOUS STUDIES RELATED TO FREEDOM OF SPEECH

Freedom of speech is a soul to human rights; it is a centerpiece of democracy and, as it were, it should be occupying the greatest importance in the hierarchy of academic writings and researches. But, as a matter of fact, the local literatures experience at present a sort of drought in this respect.

The review is to begin with a study conducted by Yatim which is entitled *Freedom under Executive Power in Malaysia: A Paper of Executive Supremacy*.[23] The main concern of the study examines the role played by the executive in dominating over and dictating the nature, direction and exercise of freedom in Malaysia. Role of the executive is viewed from and within the framework of rule of law. In the paper, freedom canvasses all fundamental liberties as provided in Part II of the Malaysian Constitution.

The study resorted to 'Volume-Pressure Methods of Analysis' where, volume can be equated to the contents related to legal infrastructures and pressure is the role played by the executive. In this regard, it claims that the executive, relying on the majority rule and parliamentary supremacy, maneuvers its way in the construction and application of rule of law to have 'permanent overriding power' over the freedom of individuals. This is implemented through creation and maintenance of emergency rule (even though the physical threat of emergency is long gone), detention without trial and the denial of judicial review in liberty of persons' cases. In overview, the study contends that the rise in the power of the executive will pressurize promotion of rule of law and human rights subservient to the supremacy of the executive.

The predicament is further compounded by the courts inability to reverse the situation and their lax and restrictive attitude in dealing with emergency and fundamental rights cases in the past. The study observes that in the past there were ample opportunities for the Malaysian courts to resort to judicial activism but they were irresponsive despite of the present of sufficiently compelling reasons.

Due to the nature and scope of the study, this aspect which relates to judicial activism is clearly excluded, and it may possibly inspire further studies in the future.

The second study is conducted by Dziyauddin which is entitled *A Comparative Study of Freedom of Expression and Right to Privacy in Relation to the Press in Malaysia and the United Kingdom*.[24] This is a comparative study on freedom of expression and right to privacy

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[22] Bari, A.A. (1998). *Freedom of speech and expression in Malaysia after forty ye*ars – part 1. Retrieved from http://anwarite.tripod.com/freespeech.html downloaded on September 9, 2009.

[23] A doctoral thesis submitted to the University of London in 1994.

[24] A doctoral thesis submitted to the University of Newcastle Upon Tyne in 2005.

relating to the press in Malaysia and UK. However, the review is only concerned with materials that relate to Malaysia. The study is launched on the premise that "the issue of privacy is not a matter of culture or nationality but of rights and needs". This is done against a backdrop of freedom of expression that so frequently enough relied by the press in disseminating information to the public. On this premise, the study questions the effectiveness of the existing legal measures (or the lack of it), in Malaysia as compared to UK, in the protection of privacy of individuals from being a subject matter of exposure by the press. Within the context, the study accepts the notion that freedom of expression and rights of privacy are widely recognized as fundamental human rights. This is distinguishable, as far as a study of freedom of expression in Malaysia is concerned, bearing that the vagueness surrounding Article 10 of the Constitution which provides the right.

From there, the study proceeds with examining a relationship between public and private interest that relates to freedom of expression, and treating the competing interest between freedom of expression and privacy. With this in purview, the study examines the various relevant provisions in the Constitution and legislation. The study also examines the exercises of judicial activism within the judicial circle in the protection of individual rights and liberties. For the purpose of the study, judicial activism is defined as "the pro-active role of the judiciary in ensuring that rights and liberties are protected beyond the normal constraints". As it were, the study focuses on issues related to freedom of expression within the context of safeguarding individual privacy vis-à-vis freedom of the press to disseminating information to the public.

As such, issues related to judicial activism within the context of promoting freedom of speech as a right has not been addressed in its entirety, and not to mention the requisite to properly differentiate between judicial activism and judicial approach of interpretation.

Next, a study conducted in UK by Wragg which is entitled *Critiquing the UK Judiciary's Responses to Article 10 Post-HRA: Undervaluing the Right to Freedom of Expression?*[25] The principal concern of the study is the approach adopted by the judiciary in UK towards the jurisprudence underlying Article 10 of the European Convention on Human Rights after the enactment of the Human Rights Act (HRA) 1998 in UK. The study is a critical study as the approach is essential to enable the study to probe beyond the statutory texts of HRA. It observes that judicial attitude before HRA toward freedom of speech was inconsistent, and this required addressing. In view of this, the study observes that one of the obstacles to the fullest protection for freedom of speech in UK was the absence of constitutional measures that allowed the judiciary to protect the right. The common law, with its attitude toward the right, has been proved to be impotent to provide fullest protection. With the enactment of HRA, the judiciary is provided with the legal infrastructure to provide maximum protection.

As it were, the object of the study is to ascertain whether the judiciary has realized protection for freedom of speech in its fullest term. In other words whether the judiciary in UK "has become acclimatized to the language of rights in a free speech context" which, theoretically, underlies the jurisprudence of Article 10. In a nutshell, it is concerned with the fact whether the judiciary is ready and willing to absorb the Article 10 jurisprudence in interpreting provisions in HRA, if so to what extent, and accordingly raising the standard of freedom of speech from a liberty to a right.

Lastly, a study done by Saeed which is entitled *Freedom of Speech: A Comparative Analysis between Malaysia and India.*[26] The study is a comparative study about the state of freedom of speech in Malaysia and India. Though descriptively done, the study is able to

[25] A doctoral thesis submitted to Durham University, UK in 2009.
[26] A master thesis submitted to the International Islamic University of Malaysia in 1997.

cover the relevant constitutional provisions of the Malaysian and Indian Constitutions respectively. Points to ponder, somehow, is Chapter 4 (Judicial Approach) of the study where the study analyses (rather explains) the approach adopted by the Malaysian judiciary in interpreting Article 10 of the Constitution. The study observes that in interpreting the relevant provision on freedom of speech, the judiciary takes into consideration matters related to multi-racial society, sensitive issues, lack of democratic tradition and economic factors. In comparison, the paper covers Article 19 of the Indian Constitution.

Is the Malaysian Judiciary Ready to Adopt Theoretically Coherent Approach of Interpretation?

It is inevitably when comes to the tasks of interpreting the law, reliance is placed on the part of the courts. In this regard the writer observes that the Malaysian courts can play an important role by adopting judicial approach of interpretation in tandem with established theories and principles related to human rights in order to advocate freedom of speech as a right. A vexed question in relation to this is whether the Malaysian courts are ready to adopt theoretically coherent approach in realising protection of freedom of speech in its fullest extent.

In order to have a more conducive legal environment that can promote freedom of speech as a right, the courts must be able to draw a definitive nature and scope of protection to the right against the various competing interests under the Malaysian law. Secondly, the courts must be able, while facing various issues and constraints that circumvent their approach of interpretation, to embark on judicial approach that can give effective safeguards to the right as far as possible as allowed by the law. In this respect, while interpreting the relevant constitutional clauses, the courts may consider principles and practices in other jurisdictions as guides.

It is the view of the writer that a close examination on the background, scope and nature of Article 10 of the Malaysian Constitution, and the jurisprudence underlying the provision is necessary. Inevitably the wider issues relating to the historical background on how and what factors that the Reid Commission had considered when framing the said provision must be taken into account when interpreting the provision. This is necessary to establish the fact that the Commission had not gone through thoroughly theories and rationales upon which the right is grounded.[27] In this regard, the examination of the underlying theories and justification to free speech is relevant as it could determine the character, scope and types of speech. From there, it possibly sets the parameter of protection to different type of speech against the competing interests. Consequently, the paper suggests that the indifferent attitude of the Commission has left considerable effects in charting the narrow approach of interpretation adopted by the Malaysian judiciary towards the right to freedom of speech in Malaysia.

In the same context, in-depth deliberations are equally important on the attitude of the judiciary on the restrictive clauses, and its approach and methodology of interpretation on the 'guaranteed rights' in light of violation by the executives. The paper seeks to argue that, unlike the position in the United States of America,[28] right to freedom of speech in Malaysia is placed subject to Parliament's authority to impose restrictions. As such, the effectiveness of those rights might be well circumvented by law.

[27] Bari argues that the Commission had given a little emphasis on the rights and this attitude was well reflected in the Commission's Report. See Bari, A.A., fn. 21.

[28] According to the First Amendment to the US Constitution that the Congress shall make no law 'abridging' the freedom of speech.

Therefore, the judiciary should not confine itself with conservative interpretation that is to determine the constitutionality of certain laws only but it must prepare to advocate principles of justifiability. In other words, while confronting the restrictive clauses, the paper seeks to examine to what extent the Malaysian judiciary is ready to raise the standard of freedom of speech from mere 'fundamental liberty' to a 'right', in principle and practice, properly protected by the Constitution.

Within the context, the paper observes that there is a change in the approach of the judiciary as regards 'the methodology of interpretation of the guaranteed rights', in particular the fundamental liberties. Gopal Sri Ram FCJ., in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*,[29] is of the opinion that constitutional provisions on fundamental liberties contain concepts that house within them several separate rights. In dealing with allegation of violation, "The duty of a court interpreting these concepts is to discover whether the particular right claimed as infringed by state action is indeed a right submerged within a given concept."[30] He further observes, in such cases, the Federal Court[31] adopts 'generous interpretation and a prismatic approach to interpretation'.

Given the importance of judicial approach in the advocacy of freedom of speech as right, can the judgments be construed to embrace principled shift in the judiciary's approach of interpretation of the right? Is this an indication of willingness on the part of the judiciary to depart from the conservative approach to regard any restriction to the right which is provided in law passed by Parliament as not unconstitutional?[32]

The paper argues, even within the realm of conservative approach of interpretation, the judiciary should adopt cautious approach when it comes to deal with vague but very fundamental constitutional provisions meant to safeguard basic 'human right' of individual citizens from being violated.

Particularly in relation to freedom of speech, the suspicious conceptual understanding on the part of the judiciary is exemplified by legal actions to challenge with regard to either the constitutionality of restrictive laws[33] or the administrative measures.[34] Unsurprisingly, none of the challenges was successful because the judiciary had not construed the relevant provision theoretically and rather proceeded to adjudicate the infringing measures based upon the principle of constitutionality, not justifiability.[35]

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[29] [2009] CLJ Buletin 12/2010.

[30] Per *Gopal Sri Ram in Sivara Rasiah v Badan Peguam Malaysia & Anor*, fn. 31.

[31] His lordship cited three judgments of the Court i.e. *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 1 CLJ 521, *Lee Kwan Woh v PP* [2009] 5 CLJ 631 and *Shamim Reza v Public Prosecutor* [2009] 6 CLJ 93.

[32] See Sheridan, L.A. and Groves, H.E., fn. 12, pp. 70-74.

[33] For example the constitutionality of *the Printing Presses and Publication Act 1984* has been called into question in *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566.

[34] In *Madhavan Nair v Public Prosecutor* [1975] 2 MLJ 264, a condition attached to a licence to make a public speech that "substance of the speech should not touch on matters relating to the M.C.E. results and the status of Bahasa Malaysia as the official language as laid down in the Federal Constitution" had been challenged as unconstitutional.

[35] Claims of infringement was dealt with in line of principles of constitutionality, see further per Chang MingTat J. in *Madhavan Nair v Public Prosecutor*, p. 265, "Any condition limiting the exercise of the fundamental right to freedom of speech not falling without the four corners of Article 10 clause (2), (3) and (4) of the Federal Constitution cannot be valid."; and per Mohamed Azmi J. in *Lau Dak Kee v Public Prosecutor* [1976] 2 MLJ 229, 230, "…Article 10(1) of the Federal Constitution guarantees the rights of every citizen to freedom of speech, assembly and association. These rights are, however, subject to any law passed by Parliament."

Challenges to the constitutionality of restrictive laws persist[36] but all were dealt with by the judiciary in line with the principle of constitutionality.[37]

After failing with legal efforts, a different approach was invoked when a Non Governmental Organisation (NGO) came out with 'Malaysian Charter on Human Rights' in 1994.[38] It proposes that some legal provisions to be made available, among others, "Everyone has the right to freedom of opinions and responsible exercise of the freedom of expression without interference and persecution".[39] The NGO claims that the Charter marks the emergence of a consensus amongst a substantial number of diverse Malaysian NGOs on key human rights principles and standards.

The significance of the Charter is when it makes reference to International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.[40] It is proposed by endorsers of the Charter that the Malaysian Government to ratify those covenants as the endorsers believe the effective implementation of standards established by those covenants is vital to the promotion of human rights in Malaysia.[41] The proposal is worth a close scrutiny because it can influence the mind of the legislators to provide laws that enable the judiciary to adopt pragmatic approach to advocate freedom not as a liberty, but as a right.

Subsequently, when Parliament passed a law[42] to provide for the establishment of the Human Rights Commission of Malaysia for the protection and promotion of human rights in the country, so much expectation has been generated towards it. But the high hope is short-lived by the fact that, notwithstanding its noble purpose, the Act preserves the narrow approach to the right. This is evidenced, for example, when the Act specifically provides that human rights must be referring to fundamental liberties as provided in the Constitution,[43] and any regard to the Universal Declaration of Human Rights 1948 is only permitted to the extent that it is not inconsistent with the Constitution.[44]

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[36] The latest is in the case of *Sivara Rasiah v Badan Peguam Malaysia & Anor* [2010] CLJ Buletin 12/2010. See also Thomas, T. (No date). Human rights in 21st. century Malaysia. Retrieved from http://www.aliran.com/oldsite/hr/ttl.html downloaded on April 13, 2011. Thomas observes that there are three statutes seriously undermine freedom of speech and expression, namely: *The Sedition Act, the Official Secret Act and the Printing Presses and Publications Act.* Social activists and politicians were prosecuted under those statutes including Fan Yew Teng, Param Cumaraswamy, Lim Guan Eng, Karpal Singh, Lim Kit Siang and journalists Sabry Sharif and James Clad.

[37] For instance, among others, are *AG v Manjeet Singh Dhillon* [1991] 1 MLJ 167, *PP v Lim Guan Eng* [1988] 2 CLJ 623, *Fan Yew Teng v PP* [1975] 2 MLJ 235, *PP v Param Cumaraswamy* [1986] 1 MLJ 512.

[38] SUARAM. (1994). *Malaysian charter on human rights*. Petaling Jaya: SUARAM. The charter has been endorsed by 50 local NGOs.

[39] SUARAM. (1994). Malaysian charter on human rights, Article 14.

[40] It also refers to some conventions of the United Nation such as Convention Against Torture, Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the United Nations Convention on the Rights of the Child. The Malaysian Government has not ratified these covenants.

[41] The approach has been resorted to by Dziyauddin when he argues that though the European Convention on Human Rights (ECHR) is not binding on Malaysia, its positive obligation relating to freedom of expression could be emulated by Malaysia. He justifies the claim as the right is well protected in the Constitution, therefore the strong commitment by ECHR in upholding it must be commensurately reflected in the Constitution. Dziyauddin, H. (2005). *A comparative study of freedom of expression and right to privacy in relation to the press in Malaysia and the United Kingdom*. A doctoral thesis submitted to the University of Newcastle Upon Tyne, p. 6.

[42] *Human Rights Commission of Malaysia Act 1999 (Act 597)*.

[43] Act 597, section 2.

[44] Act 597, section 4(4).

With that kind of response from Parliament, it is not surprising to find that the arrival of the Commission is marked with a bold challenge to abolish the Sedition Act 1948. A memorandum[45] proposing the abolishment of the law claims that the law could not be justified as a restriction on freedom of expression because it is excessively vague, serves no legitimate aim sanctioned by international law and unnecessary in a democratic society.

In relation to this, responses from the judiciary towards the demand for a liberalisation of such laws require further analysis and examination. Is the judiciary willing to realign its approach of interpretation? If so, to what extent the judiciary is ready to embrace and uphold the notion of freedom of speech as a right and thus detach from being a disciple of Diceyean approach?[46]

Does a decision of Gopal Sri Ram FCJ in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*,[47] mark a new horizon? In that case, the learned Federal Court Judge, in dealing with allegation of violation, said, "The duty of a court interpreting these concepts is to discover whether the particular right claimed as infringed by state action is indeed a right submerged within a given concept."[48] His Lordship further observes, in such cases, the Federal Court[49] adopts 'generous interpretation and a prismatic approach to interpretation'.

The Constitution lays down the provision on freedom of speech in broad terms, rather vaguely, and grouped it together with other fundamental liberties. The writer is puzzled as why the Reid Commission coiled the word 'right' together with 'freedom of speech and expression', and it is placed together with other liberties under a theme of 'Fundamental Liberties'. The paper argues that the drafters had slipped out and not addressed their mind to theoretical differences between a right and a freedom, and what more, put them under the same group with other liberties.[50]

Though right, freedom and liberty are meant to be accorded to individual citizens; they vary, between one and the other, in term of theory and principle. This is alone should be big enough a concern to the judiciary in its approach of interpretation. However, the paper observes that the judiciary is well engrossed with a notion of 'qualified fundamental liberty'; and it seems that, though arguably, when it comes to interpretation, the judiciary would adjudicate claim of infringement from the view of constitutionality, not justifiability, of infringing laws.[51]

[45] A memorandum entitled "The Memorandum on the Malaysian Sedition Act 1948" was submitted by Article 19, an NGO, to the government in 2003.

[46] According to Dicey, in English law, the right to freedom of speech is largely residual. Said Barendt, "In other words the freedom exists where statute or common law rules do not restrict it". (Barendt, E. (1985). *Freedom of speech*. Clarendon Press: Oxford, p. 29). Bari said, "So the right to free speech is basically what is left after the law has had its say" (Bari, A.A., fn. 17).

[47] [2009] CLJ Bulletin 12/2010.

[48] Per Gopal Sri Ram in *Sivara Rasiah v Badan Peguam Malaysia & Anor*, fn. 28.

[49] His lordship cited three judgments of the Court i.e. *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 1 CLJ 521, *Lee Kwan Woh v PP* [2009] 5 CLJ 631 and *Shamim Reza v Public Prosecutor* [2009] 6 CLJ 93.

[50] See Bari, A.A., fn. 21.

[51] See commentaries on the court's decision in *Madhavan Nair v Public Prosecutor* [1975] 2 MLJ 264 per Chang MingTat J.; *Lau Dak Kee v Public Prosecutor* [1976] 2 MLJ 229 per Mohamed Azmi J.; *Public Prosecutor v Ooi Kee Saik* [1971] 2 MLJ 108 per Raja Azlan Shah J., in Sheridan, L.A., and Groves, H.E., fn. 12, pp. 70-72.

SIGNIFICANCE OF THE PAPER

In its own way, the paper reveals the importance of adopting appropriate judicial approach of interpretation, so much so as to enable the courts to identify the intrinsic human values that the freedom of speech serves. It is settled that the right is regarded as a key human right common in all democracies, [52] thus, the courts should be able to provide purposeful construction on the constitutional texts to serve the purpose, in principles and practices.[53] Free speech must be embraced for this purpose as a right rather than a liberty that requires legal protection in law; and in Malaysia, the highest law of the land is the Constitution. In order to sanctify the right, the constitutional provisions relate to the right, must be appropriately interpreted so that it is to reflect the true intrinsic value of the freedom of speech to democracy. Otherwise, the provision is only there in the Constitution as an empty slogan. In a nutshell, with findings of the paper, the courts are presented with an opportunity to realise the theoretical misgiving of Article 10, if remains untreated, would ultimately destroy the sanctity of the right embodied in it.

The paper also submits that Parliament is more than justified to effect review on Article 10. In this respect, the least that Parliament can do is to rephrase Article 10 in such a way that the core intrinsic human value of freedom of speech is really and effectively so reflected in it. But the more preferable means of doing it is to introduce a legislative measure providing legal access to the judiciary to have regard to the fullest extent without restriction to the established principles and practices of human rights in other jurisdictions. This is undoubtedly essential, bearing citizens' participation in a democracy is essential; thus having a permanent legal certainty of the right could encourage healthy and responsible participation from citizens. It is definitely in the long run, avoids unnecessary constitutional crisis or, the least, less meaningful litigations.

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[52] Bari, A.A., fn. 17, p. 153. See also Dziyauddin, H., fn. 25, pp. 25-28, for in-depth deliberation on the importance of freedom of speech in giving the true value of participation to citizens in a democracy. For deliberation on the theory, see further Barendt, E., fn. 11, pp. 20-23.

[53] See further Barendt, E., fn. 11, pp. 1-8. The writer discusses various approaches to construe the constitutional texts to give a purposeful interpretation related to a meaningful exercise of freedom of speech.

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