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FREEDOM OF EXPRESSION

Introduction

There is an argument that the right to free expression can be potentially used to stir national security. Former Prime Minister of Malaysia, Najib Tun Razak admitted that race and religious issues are sensitive in Malaysia, and stressed that “(We need) political management (which) includes race relations. If we can refrain from uttering words or committing acts which can offend other races, then *temperature-raising incidents* can be avoided” (*The Star* 2010, p. 4). In objection, Anwar Ibrahim, the main opposition leader back then, implied that the Barisan Nasional (BN) government, led by the United Malays National Organisation (UMNO) as the most dominant political party in the coalition, was behind the tensions. He argued that “This is the last hope—to incite racial and religious sentiments to cling to power ... immediately since the disastrous defeat in the March 2008 election, they have been fanning this” (Mydans 2010, p. 4). It seems ironic when Malaysia has Article 10 of the Federal Constitution that protects people’s right to free expression and many laws such as the Sedition Act (SA) and Penal Code against religious and racial hatred but hate speech is still being exploited to further the political agenda and interests of certain political groups and parties. This raises a question: can we curb free expression for national security in Malaysia?

One more crucial issue, which needs to be addressed, is on the restrictive laws which are essential for political stability, racial harmony and economic prosperity. Are these laws merely used as tools for the government to cling to power and restrict any political contestation and people's mobilization against it? So far, there have been mixed responses on this issue and the debate is worldwide. The government argues in favour of the restrictive laws in sustaining racial and religious harmony in Malaysia. This chapter will argue about the processes in implementing freedom of expression in Malaysia.

Freedom of Expression in Malaysia

According to Andrew Tan (2004), national security in Malaysia has several objectives, in particular:

1. Preserving the Federal Constitution, including the position of the Malay rulers, Islam as the religion of the Federation, the special rights of the Malays in maintaining Malay political supremacy, and the legitimate rights of the other races.
2. Protecting national unity and racial harmony in realization that any internal ethnic conflict would be detrimental.
3. Sustaining the economic development in a multiracial society in order to strengthen internal resilience and especially the survivability of Malays in the globalized world.
4. Guarding against internal security threats such as the communist insurgency, racial conflict and extremist groups.
5. Safeguarding national sovereignty and territorial integrity of the Federation.
6. Preserving a stable and peaceful environment in the areas of strategic interests domestically, regionally and globally.

These objectives could change due to changes in political, economic and social circumstances.

To the Malaysian government, the country has to be protected from threats such as racial and religious conflicts and economic recession.

Thus, it allows for certain restrictions of freedom of expression in the name of national security. In Malaysia, freedom of expression is assured by Part II of the Federal Constitution under Article 10 (1) entitled “Freedom of Speech, Assembly and Association”. Article 10 (1) states that (a) every citizen has the right to freedom of speech and expression; (b) all citizens have the right to assemble peacefully and without arms; and (c) all citizens have the right to form associations. Citizens have the right to freedom of speech, but Section 2 of the Article limits the right where Parliament may allow by law imposed:

(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

The government has sought to protect institutions i.e. the Parliament, courts, and federal and state governments from scandalous criticism by citizens and foreigners practising freedom of expression. For instance, the Malaysian government welcomed the twelve weeks’ imprisonment (reduced to six weeks on appeal) of Murray Hiebert, a *Far Eastern Economic Review* journalist, on 4 September 1997 for his article entitled “See You in Court”, which scandalized the court and threatened to undermine the credibility of judicial institutions (Hilley 2001, p. 228). Hiebert was sentenced to imprisonment after he wrote a “defamatory” article about the speedy processing of a lawsuit brought by the wife of a prominent Court of Appeals judge. Addressing the growing level of spurious litigation in the Malaysian courts, Hiebert highlighted the Malaysian Ringgit (RM) 6 million damages being sought by the mother of Govind Sri Ram against the International School of Kuala Lumpur for “unfairly dropping” her son from the school debating team. Noting that the student’s father is Court of Appeals judge Gopal Sri Ram, Hiebert commented that “many are surprised at the speed with which the case

raced through Malaysia's legal labyrinth". Awaiting appeal, Hiebert had his Canadian passport held for two years (Hilley 2001, p. 228).

Furthermore, Article 10 (4) explains the reasons for restricting freedom of expression:

In imposing restrictions in the interest of the security of the Federation or any part of thereof or public order under Clause (2) (a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part II, Article 152, 153 and 182 otherwise in relation to the implementation thereof as may specified in such law.

The provision of Article 10 (4) was part of the amendment of the Federal Constitution in 1971 and was enforced on 10 March 1971 as a reaction to the racial conflict of 13 May 1969. In this incident, the government blamed the opposition for manipulating freedom of expression to inflict racial sentiments and dissatisfaction among the non-Malays, particularly Chinese and Indians, over the special rights of Malays with respect to particular occupations and higher posts in the public sector (Comber 1983, p. 63). A State of Emergency was declared after the racial clash. Thus, the Federal Constitution had been amended to prohibit citizens and non-citizens, including members of parliament during Parliamentary sessions, from questioning Part III of the Federal Constitution on Citizenship, Article 152 on National Language, Article 153 on Malay special rights and Article 181 on Saving for Rulers' sovereignty (Yatim 1995, p. 168). The Malaysian government justified the 1971 amendment to the Constitution on the following terms:

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

The protection of Article 10 of the Constitution is available to citizens only. Based on the *Attorney General versus Wain (No. 1)*

(1991), a non-citizen or a foreign company or news agency cannot lay claim to this right. Article 10 (1)(a) must be read in the light of other articles of the Constitution which curtail this freedom. For instance, Article 126 empowers the courts to punish expressions or actions that amount to contempt of court. Articles 63 (4) and 10 (4) subject Parliamentary proceedings to the law of sedition. Mark Koding, a member of parliament, found this out to his discomfort when he was convicted for a Parliamentary speech demanding the closure of Chinese and Tamil schools. Under Article 25 (1)(a), an order to deprive a person of his citizenship can be based on his disloyal conduct as manifested in his speeches irrespective of the fact that free expression is his constitutional right (Faruqi 2002).

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

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

Article 149 gives Parliament the power to create law as a response to subversive actions with or without a state of emergency being declared. Mohamed Suffian Hashim (1987, p. 316) argues that in the event of

serious subversion or organized violence, Parliament may pass laws that are repugnant to the fundamental rights safeguarded elsewhere in the Constitution. Laws, which intent to stop and prevent subversive acts, are legal even though they are against certain provisions in the Constitution under Article 5 (personal freedom), Article 9 (prohibition of citizens from expulsion and freedom of movement), Article 10 (freedom of speech, assemble, and establishing an association), or Article 13 (the right to own property) and those outside of Parliament's legislative power. Article 149 (formerly Article 137) was criticized by one of the drafters of the Constitution. A member of Reid Commission, Judge Abdul Hamid condemned the Article:

If there exists any real emergency, and that should only be emergencies of the type described in Article 138 (now Article 150), then and only then should such extraordinary powers be exercised. It is in my opinion unsafe to leave in the hands of Parliament power to suspend constitutional guarantees only by making a recital in the Preamble that conditions in the country are beyond reach of the ordinary law. Ordinary legislation and executive measures are enough to cope with a situation of the type described in Article 137 (now Article 149) (SUARAM 1998, pp. 217–18).

What concerned Judge Abdul Hamid most was that Article 149 gave power to Parliament to abrogate any laws pertaining to human rights as well as freedom of expression. That concern became a reality when the controversial law of the Internal Security Act (ISA) that allows detention without trial was created under Article 149 (Hashim 1987, p. 317). In addition to ISA, there are also several laws either created or amended under Article 149 purposely to restrict freedom of expression such as the Official Secret Act (OSA), the Sedition Act (SA), and the Printing Presses and Publications Act (PPPA).

Since the 11 September 2001 terrorist attack in New York, the government has sought to emphasize the seriousness of terrorist threats and Malaysia's potential vulnerability to terrorism to justify taking special measures for national security. In his Budget Speech on 20 September 2002, Mahathir said:

Today, there are Muslims who have become fanatical to the extent of using violence, including bombing and resorting to murder as well as plotting to overthrow the Government. If they had been successful in executing their plans, the nation will plunge into instability and utter chaos, resulting in the deterioration of the economy. We have spared the nation from this turmoil with the rule of law practised by the Government. The ISA has indeed saved the Nation (Fritz and Flaherty 2003, p. 2).

Clearly, the government tries to justify the existence of the ISA on grounds of national security.

From a national security's point of view, the government argued that they managed to curb subversive elements in the country that intentionally seek to disturb national security. As reinforced by Mahathir on 28 October 1996: "The threat is from inside ... So we have to be armed, so to speak. Not with guns, but with the necessary laws to make sure the country remains stable" (Mendes 1994).

There are two political arguments that strongly support the restriction of free expression in Malaysia. First, Malaysia is obsessed with social stability. Due to the large gap in economic well-being within society, communal politics are potentially explosive. Cultural sensitivities, especially concerning race and religion, are the main obstacles to the implementation of political freedom in Malaysia. Great care is taken not to impinge on the religious sensitivities of various groups. Given the fact that Islam is the religion of the Federation, care is taken not to publish articles that cast a slur, intended or otherwise, on Islam or its adherents. The media, including those operated by the opposition, follow this policy. Malays, by constitutional definition, are Muslims and with the inclusion of some aspects of Chinese, Indian, and tribal culture, no media can publish articles that question or ridicule faith (Moses 2002).

Mahathir criticized Western liberal democracy for tolerating hate speech:

Malaysian democracy is not a liberal democracy and not bound to accept every new interpretation of democracy in the West where democratic fanatics have pushed devotion to a pedantic notion of democracy to include the protection of neo-fascists or the empowering of a vocal

minority of political activists over the silent majority of ordinary citizens (Leigh and Lip 2004, p. 320).

The government has taken the initiative to restrict hate speech in order to maintain peace and stability in a communally divided society like Malaysia. This includes expression advocating the overthrow, forcibly or even peacefully, of the ruling government. There are two court cases that are in line with Mahathir's decision to restrict hate speech. Justice Raja Azlan Shah, in *Public Prosecutor versus Ooi Kee Saik & Ors* (1971), adopts a strict interpretation of free expression. He observes that freedom of expression should be given the greatest latitude, but "free and frank political discussion and criticism of government policies cannot be developed within an atmosphere of surveillance and constraint" (Yatim 1995, p. 170). He further argues against the "absolutism" approach by saying that:

But as far as I am aware, no constitutional state has attempted to translate the 'right' into an absolute right. Restrictions are a necessary part of the right ... The dividing line between lawful criticism of government and sedition is this—if upon reading the impugned speech as a whole the court finds that it was intended to be a criticism of government policy of administration with a view to obtain its change or reform, the speech is safe. But if the court comes to the conclusion that the speech used naturally, clearly and indubitably has the tendency of stirring up hatred, contempt or disaffection against the government, then it is caught within the ban of paragraph (a) of section 3 (1) of the (Sedition) Act (Yatim 1995, p. 170).

The Federal Court sets out the principal guidelines to determine if criticism transgresses the limits of freedom of expression and constitutes sedition within the ambit of the SA. In this case, Justice Wan Sulaiman, in *Public Prosecutor versus Oh Keng Seng* (1977), maintained that a speech stating that "the army is composed of one hundred percent of one ethnic group consequent on the government's policy to favour that ethnic group to ensure political hegemony" is clearly illegal under the SA because the speaker intentionally incites

hatred between races or contempt or to excite disaffection against the government. He explains that:

words having a tendency to bring about hatred or contempt of any ruler or against any government, or promote feelings of ill-will and hostility among the various ethnic groups can be uttered before a handful of persons and yet be seditious under our law (Yatim 1995, p. 171).

Hate speech has had negative impacts in Malaysia. On 30 September 2005, hate speech became a global issue when the daily newspaper *Jyllands-Posten* (The Jutland Post) published an article which consisted of cartoons of the Prophet Muhammad, one of them showing the Prophet wearing turban in the shape of a bomb. They were perceived by many Muslims as an attempt to intentionally depict him as the source of terrorism. These cartoons triggered worldwide protests and a ban on Danish products especially in Muslim countries. In Malaysia, the fifth Prime Minister, Abdullah Ahmad Badawi closed a Borneo-based paper, the *Sarawak Tribune*, indefinitely for reprinting the cartoons. Lester Melanyi, an editor of the newspaper, was forced to resign from his post for allowing the reprinting of the cartoons. Abdullah described their publication as insensitive and irresponsible and had also declared possession of the cartoons illegal. The paper apologized for what it called an editorial oversight. Malaysia's third-largest Chinese-language daily, *Guang Ming*, was also suspended from publication for two weeks for one of the cartoons in its 3 February 2006 edition (BBC 2006; *Media Guardian* 2006).

The setback of press freedom in Malaysia is that all mainstream media were controlled by the government or companies that have close links with the government. For instance, *Utusan Melayu* and *Utusan Malaysia* newspapers were published by Utusan Melayu (M) Berhad, which had a special relationship with UMNO. In October 2006, a business deal between the Malaysian Chinese Association (MCA), one of BN component parties, and media tycoon Tiong Hiew King solidified the monopoly of the Chinese press, with all top four Chinese dailies—*Sin Chew Jit Poh*, *Guang Ming*, *China Press* and *Nanyang Siangpau*—concentrated

in the hands of a firm political-business alliance. In 2007, Media Prima Berhad, with close links to UMNO, acquired all the private television stations including *TV3*, *NTV7*, *8TV* and *TV9*. It also has a 43 per cent equity interest in The NST Press (Malaysia) Berhad (NSTP), one of Malaysia's largest publishing groups that publishes leading newspaper titles such as the *New Straits Times*, *Berita Harian* and *Harian Metro*. The group also owns two radio networks, *Fly FM* and *Hot FM* (Azizuddin 2010).

Second, the government utilizes the ISA as a device to quell dissent and bypass the due process of law in protecting public security. Mahathir, in the budget speech in September 2002, hailed the ISA as the main instrument that "saved" the country and further asserted that liberal Western countries have now realized (since 11 September 2001) the importance of such preventive laws in safeguarding the security of the nation (SUARAM 2003). The US-led war on terror has undoubtedly been a major setback for human rights struggle in Malaysia. In the past, the US State Department's annual human rights report criticized Malaysia's use of detention without trial. These days, with the United States itself detaining hundreds of individuals without trial under the PATRIOT Act, the State Department's report on Malaysia appears hypocritical and is viewed by some Malaysian human rights activists with disdain because of its double standards (Netto 2004, p. 94). The UK has also implemented detention without trial under the Anti-terrorism, Crime and Security Act 2001. Although the ISA is designed to counter subversive activities in Malaysia, the law is also disproportionately prejudiced against those who engage in opposition politics, or groups that oppose government policies and as such are deemed "political" by the Attorney General. Section 3 of the ISA also empowers the home minister to prohibit organizations and associations of a political or quasi-military character. Once prohibited, an organization is incapacitated from applying for a licence to hold an assembly or procession. Section 7 forbids training or drilling for the use of arms. Section 8 permits prohibition, in the national interest, of flags, banners, badges, emblems and uniforms. Under Section 47, the Yang di-Pertuan Agong (King) may proclaim any area in Malaysia as a "security area". Restrictions may then be imposed on entering or remaining in this

area (Sections 48–50). The Officer in Charge of a Police District may exclude any person from this area (Section 51) and may put the area under curfew (Section 52) (Faruqi 2002, p. 22).

There is generally less scope for spontaneous protest because of legal prohibition and the requirement for police permits for any public gathering. The Police Act 1967 effectively circumvents the rights to free expression and free assembly, and confers wide discretionary powers on the police to regulate assemblies, meetings and processions in both public and private places. Under the Act all public assemblies of three or more persons require a police permit. The Act gives the police the power to stop and use force against participants in thwarting these events, whether in public or private places. The Act, in addition, provides the police with powers to regulate the playing of music in public places and to prohibit the display of flags, banners, emblems or placards and the use of loud speakers, amplifiers and other devices. The police can also confiscate the offending items. Violators, including those participating in illegal assemblies, can be fined between RM2,000 and RM10,000 and can be imprisoned for up to one year (SUARAM 2003, p. 93). The Penal Code also places restrictions on the right to peaceful assembly. The Code defines “unlawful” gatherings and riots, police powers of dispersal and penalties upon conviction. Under Section 141 of the Code, an assembly of five or more persons is designated an “unlawful assembly”.

Freedom of Expression and the Critiques

Many question the intentions of the Malaysian government in restricting free expression. Vitit Muntarbhorn (1994, p. 4) argues that many ASEAN governments, particularly the Malaysian government, restrict political and civil rights not to promote prosperity, but “to perpetuate the longevity of the regime in power”. A critic of the West’s human rights campaign, Chandra Muzaffar (1993, pp. 30–31) laments that:

southern elites deprive their people of their basic human rights ... The arbitrary exercise of unlimited power which is not checked by strict adherence to the principles of accountability must lead inevitably to the suppression of the masses.

Such criticisms suggest that unlimited state power to restrict civil liberties can be detrimental to the very quality of life such control is supposed to protect. Anwar Ibrahim (1996a, p. 28) said: “it is altogether shameful, if ingenious, to cite (national security) as an excuse for autocratic practices and denial of basic rights and civil liberties”. At the same time, this debate cannot be seen in crude terms merely as a tool manipulated by a political or capitalist regime, or an artificial screen behind which to hide a wilfully illiberal government. The debate of the last two decades is an episode in the long-term post-colonial politico-cultural project.

In many Commonwealth constitutions, such as in India, Jamaica and Malta, Parliament is empowered to enact “reasonable regulations” on free expression. The significance of the word “reasonable” is that courts are invested with the power to review the validity of legislation on the grounds of reasonableness, harshness or undemocratic nature of the restrictions. However, the drafters of Malaysia’s basic charter deliberately excluded the word “reasonable” from the law. Article 10 (2) states that “Parliament may by law impose ... such restrictions as it deems necessary or expedient” on a number of prescribed grounds (Faruqi 2002). Article 4 (2)(b) makes Parliament the final judge of the necessity or expediency of a law and bars judicial review on the ground of lack of necessity or expediency. Therefore, Parliament is authorized to restrict free expression on fourteen broad grounds under Articles 10 (2), 10 (4), 149 and 150. It is so wide and the government has no difficulty in fully defending laws like the SA, OSA, ISA and PPPA in accord with the basic charter. For example, Sections 3 (3), 6 (1), 12 (2) and 13A of the PPPA confer on the minister “absolute discretion” to grant, refuse or revoke a licence or permit and makes the minister’s decision final and unquestionable in a court of law (Faruqi 2002).

Parliament, however, is not supreme. The Constitution supplies the ultimate yardstick against which every law can be measured. In *Dewan Undangan Negeri versus Nordin Salleh* (1992), it was held that Parliament may restrict free expression only on the grounds specified in the Constitution. Similarly, *Madhavan Nair versus Public Prosecutor* (1975) ruled that any condition limiting freedom of expression not falling within the provisions of Article 10, clauses (2), (3) and (4) cannot be

valid. Thus, the general grounds of “state necessity”, “public policy”, “public interest”, “good government”, “efficiency” and “common sense” are not constitutionally permitted grounds for depriving a citizen of his right. Restrictions on free expression must be confined to those articulated in the Constitution (Faruqi 2002).

There is a new development with regard to the “reasonable regulation” in the Constitution. In the *University Kebangsaan Malaysia 4 (UKM 4)* case on 1 November 2011, the Court of Appeal ruled that Section 15 (5) of the Universities and University Colleges Act (UUCA), which prohibits students from involving in politics, is unconstitutional and violates freedom of expression. Judge Mohd Hishamuddin Mohd Yunus, in his twenty-one pages written judgement, argues that:

... the restriction on freedom of speech is permitted by Clause (2)(a) of Article 10 ... in the interest of ‘public order or morality’. ... In addition, the restriction must also be reasonable. Any restriction imposed on freedom of speech by Parliament must be a reasonable restriction, and the Court if called upon to rule ... has the power to examine whether the restriction so imposed is reasonable or otherwise. ... I fail to see in what manner that section 15 (5)(a) of the UUCA relates to public order or public morality. I also do not find the restriction to be reasonable. ... Clearly the provision is not only counter-productive but repressive in nature (Court of Appeal of Malaysia 2011).

With this preceding case, the government has to amend the UUCA and accept the principle of “reasonable regulation” as part of Article 10 for future legislation and legal proceedings.

There were pressures from the opposition, civil society movements, the Malaysian Human Rights Commission (SUHAKAM), and some dissenting leaders in the ruling BN to reform the mainstream media. For example, Khairy Jamaluddin, UMNO Youth deputy chief, advocated for the repeal of the PPPA (*The Star* 2008) and Koh Tsu Koon, acting president of Gerakan (one of the BN component parties) and former chief minister of Penang, suggested abolishing the ISA (*The Star* 2008, p. 27). Besides aiming towards a new mandate for his leadership and ruling party in the 13th General Election in 2013, Prime Minister Najib Tun Razak has taken

drastic measures to reform the Malaysian legislation. He surprisingly made his argument based on the equilibrium between national security and liberty. Najib argued that a balance between national security and individual freedom is needed in a modern democracy. The government should take this responsibility, argued Najib, to ensure the welfare and well-being of the people. Interestingly Najib further stressed:

For instance, the freedom of speech guaranteed by the Federal Constitution does not mean that anyone is free to spread slander and incite the flames of hatred. To illustrate a simple example, the government is responsible for preventing false alarms about a bomb in a packed stadium. This is because such freedom only causes panic that might lead to injury and loss of lives (Najib 2011, p. 64).

This argument is similar to the judgement of Judge Oliver Wendell Holmes in *Schenck versus United States* (1919) regarding the First Amendment of free speech:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent (Hargreaves 2002, p. 259).

The only difference from Najib's statement is that Holmes' judgement was based on the suspension of free expression during war, and not during peacetime like currently in Malaysia.

However, the argument above has given Najib, as announced in his Malaysian Day address on 16 September 2011, a justification to pledge for transformation under the National Transformation Policy (NTP) (2011–20) by setting up a parliamentary select committee on electoral reforms, announcing the repeal of the ISA, abolishing the annual renewal policy for the press under the PPPA, tabling a new bill to replace and amend the UUCA as well as doing away with Section 27 of the Police Act that requires all public gatherings to have a police permit (*New Straits Times* 2012, p. 2; *The Star* 2011). Najib also promised to repeal

the SA, but later decided to retain and strengthen the law. These changes in policy are relatively new to Malaysia. However, there is no clear indication that these changes will bring more freedom of expression to the people.

However, in the 13th General Election on 5 May 2013, the BN won with a reduced majority of 133 parliamentary seats from 140 seats in the previous 12th General Election in 2008. Meanwhile the Pakatan Rakyat (PR), a pact of three parties namely the Malaysian Islamic Party (PAS), People's Justice Party (PKR) and DAP, managed to get 89 seats compared to 82 seats in the 2008 general election. Unexpectedly soon after the 2013 general election, the police arrested six PR leaders and NGO activists—Tian Chua, Thamrin Ghafar, Haris Ibrahim, Muhammad Safwan Anang, Hishammuddin Rais and Adam Adli Abd Halim—under the SA for allegedly calling for street demonstrations to topple the government. Moreover, home ministry officers on 23 May 2013 seized 1,408 copies of PKR's *Suara Keadilan*, 1,602 copies of PAS' *Harakah*, and 70 copies of DAP's *The Rocket* for violating their publishing permit by selling to the public, instead of parties members only (*The Star* 2013, pp. 1–3).

The Home Ministry also announced that from 2008 until June 2015, 409 cases have been investigated under the Sedition Act 1948. In terms of charging rate, it stands at only 6 per cent of the total cases investigated. There were 138 investigations later classified as no further action (NFA). Meanwhile, there were 99 cases under investigation, while 116 cases were returned by the Attorney-General's Chambers requesting for further probe. Only 30 cases had been referred to the Deputy Public Prosecutor (Anand 2015). In the Parliamentary sitting in April 2015, the provision of detention without trial, used to be enforced under the ISA, was reintroduced through the Prevention of Terrorism Act 2015 (POTA), and used to retain and strengthen the SA. Recently, Human Rights Watch (2015, p. 2) produced a report entitled "Creating a Culture of Fear: The Criminalization of Peaceful Expression in Malaysia", which states that

a spiraling corruption scandal involving the government-owned 1 Malaysia Development Berhad (1MDB), whose board of advisors is chaired by Prime Minister Najib, led the government to block websites

and suspend newspapers reporting on the scandal and to announce plans to strengthen its power to crack down on speech on the Internet.

These actions taken by the government especially after the 2013 General Election have raised doubts on the transformation agenda promoted by Najib. This later led to the defeat of Najib's government by the opposition Pakatan Harapan (PH) in the 2018 General Election, the first defeat for BN since Malaysia's independence.

Human Dignity

There are constant debates between the concepts of human rights or human liberties with human dignity. However, "human rights" as a concept is dubious or rather confusing. As we observe a debate between liberal universalists and relativists, there are disagreements especially on the issues involving culture and religion. Basically, there are two theories of human rights i.e. universalism and relativism. The idea of universalism is "Human Rights, because they rest on nothing more than being human, are universal, equal, and inalienable. They are held by all human beings, universally ... Human rights, being held by every person against the state and society, provide a framework for political organisation and a standard of political legitimacy" (Donnelly 2001). Meanwhile relativism focuses on the cultural perspective. Relativists argue that:

Relativism (or cultural relativism) is the assertion that human values, far from being universal, vary a great deal according to different cultural perspectives. Some would apply this relativism to the promotion, protection, interpretation and application of human rights which could be interpreted differently within different cultural, ethnic and religious traditions. In other words, according to this view, human rights are culturally relative rather than universal (Ayton-Shenker 1995).

Shad Saleem Faruqi (2004a) explains that there is a sort of "human rights epidemic" that is sweeping many lands, meaning that:

The human rights argument is so much in vogue that a lot of causes, though highly contentious in nature and not central to the dignity of human beings, are brought under the umbrella of a human rights claim.

Homosexuality, pornography, blasphemy, abortion on demand and same sex marriages are all being treated as human rights issues. Homosexual couples are seeking to adopt children in the like manner of their heterosexual counterparts. Children are seeking a right to divorce their parents. A publication from the Law School in Exeter lists the right to outdoor recreation, the rights of the unborn and freedom from unwanted publicity as fundamental liberties. Clearly there is an over-zealousness in some human rights claims and a failure to distinguish ordinary civil claims from fundamental human rights (Faruqi 2004a, p. 14).

When arguing about freedom of expression, it is always in conflict with some other rights such as the right to privacy, for example the right to sing loudly at home can disturb the right to privacy of a neighbour. Sometimes, the amorality of the human rights concept makes others uncomfortable, particularly regarding the issues of hate speech and pornography. That is why in searching for a better concept to protect the people and common good, human dignity is a choice that can resolve the confusion in the concept of human rights. That is also the reason why European and African states, particularly Germany and South Africa, embedded the concept of human dignity in their constitutions.

Historically and contemporarily, the term “human dignity” has theological origins that may affect its interpretation and understanding. The concept of human dignity has deep roots in many religions, as well as in moral and political philosophy (Clifford and Huff 2000, p. 334). Human dignity played a historical part in the development of religious and philosophical approaches to human rights (Kretzmer and Klein 2002). Human dignity is foundational for the tradition’s understanding of distributive justice, the common good, and the right to life. Other perspectives, both religious and secular, may conceive of human dignity in similar terms with a similar sense of its inherent worth or value and other implications, but may posit different sources for that dignity (Kamali 2002, p. 67). Human dignity is one of the most emphasized themes in the Holy Qur’an (Aramesh 2007). For example:

“We have honoured the sons of Adam; provided them with transport on land and sea; given them for sustenance things, good and pure; and conferred on them special favours, above a great part of Our creation” (17:70). And: “Proclaim! (Or read!) In the name of Thy Lord and

Cherisher, who created- Created man, out of a (mere) clot of congealed Blood- Proclaim! And Thy Lord is Most Bountiful- He who taught (the use of) the pen- Taught man that which He knew not.” (96:1–5). According to teachings of the Holy Qur’an, God (Allah) gave human beings the best shape and form: “O Iblis! What prevents thee from prostrating thyself to one whom I have created with my hands? Art thou haughty? Or art thou one of the high (and mighty) ones?” (95:4) Not only that He created human being by His hands and gave humans the best form, but He called the spirit of human being His spirit to give honour and dignity to human beings: “I breathed into him my spirit.” (15:29; 38:72) He taught him all the names. And He taught Adam the names of all things; then He placed them before the angels, and said: “Tell Me the names of these if ye are right.” (2:31) And behold, we said to the angels: “Bow down to Adam.” and they bowed down: not so Iblis: he refused and was haughty: he was of those who reject Faith. (2:34) He gave human being intellect and freedom of the will. (16:78; 23:78; 32; 9; 46:26; 67:23) And He made human being His Khalifah (Representative) in the earth. (2:30; 33:72) (Aramesh 2007).

Malaysia has always had the intention to protect Islam. Therefore, when arguing about human dignity, the concept is always interpreted from an Islamic perspective, particularly for the Malay community.

Within the community and in traditions, the Malays have strongly applied human dignity where Malay customs (*adat*) co-exist comfortably with Islam. Malay culture has been described by Western observers as valuing “refined restraint”, cordiality, and sensitivity while Malays themselves are described as courteous and charming (and less positively, as fatalistic and easy to take offence). In comparison with other cultures and peoples such as the Chinese and Europeans, the Malay’s proper conduct of speech generally tend to be regarded by themselves as *halus* (soft) and others as *kasar* (rough) (Wilson 1967, p. 132). This is to stress that *halus* behaviour applies also to non-verbal behaviours such as removing the shoes before entering a home, consuming some of whatever refreshment is offered, adopting a specific posture when passing between people who are seated, using only the right hand when eating or in passing things, avoiding physical contact with the opposite sex, and beckoning in a certain way (Goddard 1997). Malay

culture is richly verbal, with a large stock of sayings (*peribahasa*), short evocative verses (*pantun*), and narrative poems (*syair*). The importance of speech (*percakapan*) to proper conduct is because it has a secondary meaning of “courtesy, manners”. For instance, the collocation *tahu bahasa* (know speech) is explained by Hussain Abdullah (1990, p. 26f.) as *sopan santun* “well mannered”. Other similar expressions are *melanggar bahasa* (attack speech) “breach etiquette” and *kurang bahasa* (less/under-speech) “ill-mannered” (Goddard 1996). Malays believe that proper speech will affect manners, and manners will definitely affect the dignity of a person.

One important concept in Malays’ psyche and interaction is the social emotion of *malu* “shame, propriety”. It is usually glossed in bilingual dictionaries as “ashamed”, “shy”, or “embarrassed”. However, these translations do not convey the fact that Malays regard a sense of *malu* as a social good, somewhat akin to a “sense of propriety” (Goddard 1996). Michael G. Swift (1965, p. 110) equals *malu* with “hypersensitiveness to what other people are thinking about one”. As identified by some anthropologists that the need to avoid *malu* has been the primary force for social cohesion—not to say conformism—in the Malay village. *Malu* is largely a negative reaction to the idea that other people could think something (anything) bad about one, a prospect which is powerfully unpleasant to Malay sensibilities (Goddard 1996).

What is interesting to the Malays is that *malu* is also related to the social concept of a person’s dignity or *maruah*. Other meanings of *maruah* are “self-respect”, “pride”, and the like. *Maruah* involves both what others think about one and what one thinks about oneself. It is a notion resonant with moral implications in which a person with *maruah* would not lower himself or herself to knowingly do something wrong. This portrays *maruah* as a kind of wholesome confidence in one’s moral standing in the eyes of others. Other closely related concepts are *harga diri* “self esteem” (*harga* “value”, *diri* “self”) and *nama baik* “(one’s) good name”. This cluster of concepts is of primary concern to Malay social ideology. As Nen Vreeland et al. (1977, p. 113) remarks: “an individual’s *amour propre* [is] in many respects his most treasured and jealously defended possession”. *Maruah* and a concern for one’s *harga diri* bear a clear relationship to the emotion of *malu*. Feeling *malu*

“shame” implies a threat to one’s *maruah* “dignity”, because *malu* is induced by the prospect that other people are thinking bad things about one; conversely, maintaining one’s *maruah* will largely pre-empt any unpleasant sense of *malu*. The relationship is similar to that remarked by Mario Jacoby (1991, p. 24) in a discussion of the psychology of shame, “shame-anxiety”, and dignity in the European context: “... one could regard shame as a ‘guardian’ of dignity. Shame-anxiety puts us on guard against ‘undignified’ behaviour, sensitising us to whether or not a given event will be experienced as ‘degrading’.”

What do such concepts have to do with characteristic Malay speech patterns? These concepts of shame and dignity are clearly explained in the Malays tradition as among the most essential values embedded in the Malay psyche. For instance, the relations between the ruler and the ruled are based on the idea of a social contract that emerged from the concepts of “sovereign” (*daulat*) and “disloyal” (*derhaka*) (Zainal 1970, p. 20). The social contract was believed to have existed from a myth or dialogue between Sang Sapurba representing the ruler and Demang Lebar Daun representing the ruled in a classical literature called *Sejarah Melayu* (The Malay Annal) written by Tun Sri Lanang. In the dialogue as discussed by C.C. Brown (1970), the concepts of shame and dignity are so crucial in guiding the relation between the ruler and the ruled. The Malay political system can collapse if both sides disobey the rule as shown in the dialogue below:

Sri Tri Buana said; “What is it that you wish me?” And Demang Lebar Daun replied: “All my descendants shall be your highness subjects and they must be properly treated by your highness’ descendants. If they do wrong, however greatly, let them not be disgraced or insulted with evil words: if their offence is grave, let them be put to death, if that is in accordance with Muhammadan (Islamic) law.” And the King replied, “I will give an undertaking as you wish but in return I desire an undertaking from you ... that to the end of time your descendants shall never be disloyal to my descendants, even if my descendants are unjust to them and behave evilly”. And Demang Lebar Daun replied, “So be it, your highness”. And that is why it has been granted by Almighty God to all Malay rulers that they shall never put their subjects to shame: however

greatly they offend, they shall never be bound or hanged or insulted with the evil word. If any ruler puts his subjects to shame, it is a sign that his kingdom will be destroyed by Almighty God. Similarly it has been granted by Almighty God to Malay subjects that they shall never be disloyal or treacherous to their rulers, even if their rulers should behave evilly or inflict injustice (Brown 1970, p. 16).

As observed by Vreeland et al. (1977, p. 117), this is to suggest that “The social value system is predicated on the dignity of the individual and ideally all social behaviour is regulated in such a way as to preserve one’s own *amour propre* and to avoid disturbing the same feelings of dignity and self-esteem in others.” That is to say, in ordinary conversations, Malays cooperate to assist the safeguarding of each other’s *maruah* “dignity” and to steer away from the possibility of incurring or inducing *malu* “shame” (Goddard 1997). Therefore, the concept of human dignity is not something new in the Malay tradition. It, however, needs to be further strengthened and developed in order to make it relevant to Malaysia’s current context and practice for the common good.

It has been argued that although the Malays face rapid development and modernization, they still embrace and prioritize certain values closely linked with human dignity. The Malay values of patience, respect and togetherness are applied through tactful actions in everyday social interactions, but more importantly, they are also achieved through linguistic indirectness, hedges and other “positive politeness strategies”. According to Lim Beng Soon, by avoiding disagreements, criticisms, complaints and any other face-threatening acts (FTAs) that might reduce the desirability of the addressee and using hedges or even white lies to avoid conflicts, one shows forbearance, achieves harmony and demonstrates togetherness, thus meeting the essential requirements of Malay etiquette (Yuan 2003, p. 1). For example, Malays are warned to guard against speaking in a direct manner as it may lead to serious consequences: “*berapa tajam pisau parang, tajam lagi lidah manusia*” [knives and machetes are not as sharp as human tongues]. Malay culture has significant implications for negotiation processes and outcomes. In negotiations, the Malays’ compromising and obliging conflict-handling styles are probably manifestations of their collective nature, which prioritizes group over

personal interests. In compromising and obliging styles, negotiators are more concerned with maintaining relationships and safeguarding their partner's feelings, hence the seemingly perceived "weak-styles" in goal-oriented negotiations. To the Malays, even though achieving their goals in a negotiation is important, their values in preserving harmony and respect for elders take precedence in the negotiation process (Lailawati 2005, p. 8). This, for the Malays, will preserve their integrity and dignity in human relations.

It is clear that Asian countries, particularly Malaysia, should have a strong argument on human dignity and place it in the national constitution and legislation. This is not limited to the Malays only, but should involve other multireligious communities as well. This is because the protection of human dignity will make the people better off for the common good. I agree with Guy E. Carmi (2008) that, despite several possible understandings of human dignity, this understanding is most common among legal systems that utilize human dignity as a central constitutional tool, and serves as the basis for the Malaysian model. Under this understanding, the regulation of speech to promote social norms is warranted. In particular, the regulation of speech that is perceived as infringing upon dignity is advanced. Thus, the ban on hate speech is perceived as advancing the human dignity and equality of minorities, and the regulation of pornography is often perceived as promoting the same values for women. But this conception of dignity also comes into expression in maintaining the dignity and honour of individuals via defamation laws and, in some cases, via criminal insult laws. These characteristics of human dignity explain the ideology and motivation of virtually all Western democracies, with the exception of the United States, to regulate hate speech and libel, and, in some cases, to restrict pornography and promote civility (Carmi 2008).

Conclusion

As the "slippery slope" argument would suggest that any restrictions on political expression, once permitted, have a sinister and nearly inevitable tendency to expand. Allowing the practice of one kind of

restriction means that many other acts of censorship are allowed as well. The risk of censorship is serious and omnipresent because it can be perceived as acts of repression. Malaysia imposes some additional restrictions on civil liberties. Under the banner of “national security”, the Malaysian government limits free expression by arguing from the context of safeguarding race relations and national stability. While democracy as a political ideal is sought, restrictions may be imposed on political processes as necessary to protect other fundamental values. The perceived need of a strong government that is able to deal with competing demands of an ethnically diverse society may be seen as undemocratic and denying people their legitimate rights (Ahmad 1989, p. 17). In Malaysia, unlike in the West, it is not the restriction of free expression that is being questioned but rather government domination of the channels of political expression to weaken opposition and eliminate criticism.

The problem with freedom of expression in Malaysia is that the ruling government exploits the fragile political situation to its benefit. Through policies and the exercise of power, it is able to suppress dissent and criticism from political oppositions, NGOs and the public. Although opposition parties, trade unions, professional associations and other cause-oriented groups are allowed to operate, systematic actions have been taken to curb their activities and their rights to free expression. Permits are denied for public gatherings organized by the opposition parties. Laws such as the ISA, OSA, PPPA, SA, and the Penal Code are invoked to limit political expressions and hinder opposition parties, NGOs, and the public from freely communicating their views and mobilizing their constituencies. These actions gravely impede the opposition’s effectiveness in contesting equally in the political arena. Respecting the right to free expression and tolerating dissent and criticism are crucial, as long as hatred and intolerance toward different races, religions, and cultures and deliberate attempts to undermine national security and social stability are avoided. In Malaysia, the right to free expression has been limited by the government, not just on these grounds but to insulate it from criticism and to preserve its power. This is clearly in contrary to democratic values as the limitation on free expression aims not only at the common good

but also to neutralize political contestation and opposition. Therefore in the next chapters, the discussion will focus on the issue of religious expression in Malaysia. Before that, the policy of Islamization and the roles of Islamic bureaucracy will be explored in order to understand the practices of religious expression in Malaysia.