

UPHODLING THE PRINCIPLE OF PROPORTIONALITY IN MALAYSIAN HATE SPEECH LAW¹

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Abstract

The uprising of right-wing populism trend has grown rapidly and influenced the thoughts and actions of political leaders around the world. This phenomenon brings about concerns from the public fearing that there is no longer space for justice and equality as a unifying symbol to govern the concept of peaceful co-existence among all citizens. At the same time, the reaction from others – minority purportedly believing that their identity will be diluted will drag the debate into unnecessary conflicts without any signs of solution. As a result, elements of hateful and violent act and speech in the society had increased particularly with the advent of social media. This paper firstly looks at the main factors causing hate speech and the laws available in Malaysia used to curb hateful speech which encompasses the element of blasphemy. Secondly the paper highlights the need from the authorities to consider applying the doctrine of proportionality in order to ensure the preservation of the elements of justice, reasonableness and equality when imposing punishments. Thirdly, the paper outlines the need for the National Harmony Bill as an amicable solution to ensure that the element of proportionality will be enforced in applying restrictive laws curbing the freedom of speech.

Key words: freedom of expression, hate speech; proportionality; legal and constitutional right, right wing, national harmony bill

Introduction - The Value of Freedom of Speech

When it was proposed that the Commonwealth Parliament of Oliver Cromwell should retrain the liberty of printing by issuing licenses for books, John Milton (1608-1674) made a famous protest,³ in a form of speech known as the *Areopagitica*.⁴ “Give me the liberty to know, to utter, to argue freely according to conscience, above all liberties. Though all the winds of doctrine were let loose

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³ Wu Min Aun & Hickling, R.H, Hickling’s Malaysian Public Law, Longman, 1976, 175

⁴ Areopagitica: **A speech of Mr. John Milton for the Liberty of Unlicenc'd Printing, to the Parliament of England** in 1644 https://www.dartmouth.edu/~milton/reading_room/areopagitica/text.html

to play upon the Earth, so Truth be in the field we do injuriously misdoubt her strength. Let her and Falsehood grapple. Whoever knew Truth put to the worse in a free and open encounter?"

Milton's word expressed the spirit of freedom of speech that is recognized as one of the rights accepted universally in this democratic world. Article 19 of the Universal Declaration of Human Rights stated that *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"*.⁵

Global Far-Right Sentiment

In multiracial and multireligious countries, hate speech or blasphemy law is always perceived negatively as a political tool to oppress the minority group of people. This perception comes together with the issue of selective prosecution that has always been addressed by human rights defenders, when the authorities do not seem to take action justly and equally to all citizens from either the majority or minority group who commit offensive remarks.

Furthermore, undemocratic actions such as misusing of power by countries heavily influenced by the far-right trend are worrying, given that the right-wing trend causes fear on the part of the government of losing its power if they are reluctant to submit to the demands of the fundamentalist groups.

This is what was said by a Nobel Peace Prize Laureate -

*"It is not power that corrupts but fear. Fear of losing power corrupts those who wield it and fear of the scourge of power corrupts those who are subject to it."*⁶

The quote implies that fear is the ultimate destruction of our core values in society to promote justice and equality. Observations in many multi religious countries can make us understand more in depth over the question of how fear can corrupt.

India, for instance, as a country ruled by the Hindu Fundamentalist - Nationalist Bharatiya Janata Party (BJP) led by Narendra Modi, successfully orchestrated the "religiopolitical" agenda to gain full support from the majority. By playing 'social inversion' sentiments portraying the majority to be under threat, they succeeded in gaining tremendous support from the majority when the agenda to stifle rights of the minority was put forth.

The right-wing-directed action was done to the extent of abrogating Article 370 of Indian Constitution which gave the special status to Jammu and Kashmir. The abrogation is clearly contradicting to United Nations Security Council Resolutions #122 (January 24th 1957), #123 (February 21st 1957) and #126 December 2nd 1957 which prohibit any unilateral action to change the status of Kashmir.

⁵ See Article 19 Universal Declaration of Human Rights

⁶ Aung San Suu Kyi

Since the trend is there, there is no way for the government to redirect to the right track to respect the rule of law and equality when enforcing the law, knowing that they will be voted out by the fundamentalist in the majoritarian democracy system of India.

Hate Speech & Blasphemy Laws in Malaysia

The issues addressed above undermine the credibility of laws used to govern the plural society particularly relating to hateful speech passed by Parliamentarians who represent the aspirations of the people, though undoubtedly such laws are needed to conserve a peaceful environment in the society.

The Federal Constitution of Malaysia has enshrined the protection of free speech in Article 10 by stating that, subject to certain restrictions, every citizen has the right to freedom of speech and expression to assemble peaceably and without arms as well as the right to form association.⁷

The provision of Malaysian Federal Constitution is tantamount to the notion that both the citizen and authority are given constitutional rights, ie the fundamental right to free speech on the part of citizens and the right on the part of authority to impose restrictions.

As far as regulating the hate speech is concerned, Malaysia is subscribing to the principle of offence brought by Jeremy Waldron where we have a set of laws and offences defined by the laws, and the government is justified in limiting individual liberty in order to prevent such offenses to others.

In contrast, the principle of harm promoted by Ronald Dworkin, that is to allow citizens to practice their rights freely without a set of rules unless there are harmful consequences as a result of the freedom, seems less suitable in Malaysia by looking at the multi-cultural, multi-religious, and multi-racial context of the society.

The principle of offence can be found through Article 10 (2) (a) of Federal Constitution which enables the Parliament to impose any laws pertaining to certain offences. The Article said that *“Parliament may by law impose - 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;”*

Furthermore, in 1971 Article 10 of Federal Constitution was amended after careful consideration of the May 13 racial riot. The outcome of amendment can be seen in Article 10 (4) of Federal Constitution.⁸

⁷ See Art 10 of Malaysian Federal Constitution

⁸ Wu Min Aun & Hickling, R.H, Hickling's Malaysian Public Law, 1976, 176

The Article said that *“In imposing restrictions in the interest of the security of the Federation or any part 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 III, article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law”*

The constitutional amendment has enabled the Parliament to amend Sedition Act 1948 to add the new definition of *“seditious tendency”* including four sensitive matters; right to citizenship under part III of Federal Constitution, status of the Malay language, positions and privileges of the Malays and the natives of Sabah and Sarawak, and prerogatives of the Malay Sultans.⁹ Apart of that, Malaysia also has Section 298A of the Penal Code and Section 233 of the Communications and Multimedia Act (CMA) 1998.

Nevertheless, at this juncture, the debate is always stuck to limiting the freedom of citizens in practicing the right to have freedom of expression, without a further note that there is a need to limit the rights of authorities to impose restriction as well.

This brings to the main subject of the discussion where the principle of proportionality should always be adopted whenever the authorities wish to infringe the fundamental rights of citizens and in this case by imposing hate speech laws.

Definition & Test of Proportionality

The definition of proportionality is basically similar in each country that incorporates the doctrine in its legal system, that is to confer rights and justice when imposing restrictions; but diverse in terms of application based on the context of the state. In Germany, proportionality is based on the *‘Rechtsstaatsprinzip’* according to which a citizen is entitled to a fundamental right or freedom against the state and is considered to pertain to the essence of fundamental rights themselves in that the principle restricts the limitations imposed upon such rights.¹⁰

In the area of administrative acts, proportionality is mainly used to control discretionary powers regarding which the Germany Constitutional Court held that:

*“the rule of law requires that the administration can interfere with the rights of an individual only with the authority of law and that the authorization is clearly limited in its contents, subjects, purpose and extent so that the interference is measurable to a certain extent foreseeable and calculable by the citizen”*¹¹

⁹ *Ibid*,

¹⁰ Gerven, Walter Van, The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe. - The Principles of Proportionality In The Laws of Europe, 44

¹¹ *Ibid*, 46

As far as the issue of limiting fundamental rights is concerned, the doctrine of proportionality has been widely used in many democratic countries. In Malaysia for example through certain precedent cases, it marked the development of proportionality doctrine in our administrative law principles when the judges embrace the doctrine in their writing judgments.

This positive development reflects the significant role played by the Malaysian judiciary to interfere if any decisions made by the executive are perceived as disproportionate. In the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*¹² quoting several English cases, the Federal Court judge Gopal Sri Ram had stated that:

*“In other words all forms of state action – whether legislative or executive – that infringe a fundamental right must (i) have an objective that is sufficiently important to justify limiting the right in question; (ii) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (iii) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve”*¹³

In other words, the doctrine of proportionality is a mechanism to balance out between the objective and the means of the action taken by the government. Having said so, it is understood that any action or punishment taken must be in line with the objective of the laws.

The illustration can be seen in the case of hate speech. When a person utters any kind of hate speech, the convicted person needs to be punished so that he will learn a lesson through the punishment that he is serving. But if the punishment is too heavy that transcends the objective of educating the person and at the same time can cause another problem, it is thus disproportionate as the punishment has gone overboard and beyond the objective that is to give lesson but not to harm his body and emotions and affect his daily life.

Recently in Malaysia, there were cases involving hate speech through social media when several individuals shared a posting insulting religion.

The holder of Facebook account 'Ayea Yea' was sentenced by the Kuching Sessions Court to a jail term of 10 years and 10 months after pleading guilty to 10 charges under Section 298A of the Penal Code and Section 233 of the Communications and Multimedia Act (CMA) 1998. The sentences were criticized by many quarters as disproportionate and beyond the objective of the punishment.

Way Forward

In the application of laws prohibiting insult of religion, we must strive for balance with the protection of freedom of expression, while being mindful of religious sensitivities of our multi-religious communities. This is why the element of proportionality is paramount in the context of

¹² [2010] 3 CLJ 507

¹³ [2010] 3 CLJ 507 at 527

our legal system. It is an ideal way to strike balance since the law must protect fundamental liberties while ensuring peace and harmony amongst citizens of different races and religions.

Besides, education should be the priority over punishment in order to achieve the objective of the punishment. Heavy punishment without any space for education to educate the offenders will render the law meaningless.

Furthermore, there are certain lacunae in our laws regulating hate speech that need to be addressed. For instance, there still is a problem of ambiguity and uncertainty with regards to the legal definition of “sedition” reflecting the failure of the legislation to protect or even to comprehend the interests of the people.

The “Taman Medan cross protest” in 2015 was an explicit example where two main figures in our legal enforcement institution vehemently disagreed with one another.

Then Inspector-General of Police (IGP) Khalid Abu Bakar said that the protest against the church was not seditious and no charge would be taken against the protestors but then Home Minister, Datuk Seri Ahmad Zahid Hamidi unequivocally took a different position, interpreting the protest as seditious.

The incident had uncovered a fundamental difference of understanding about sedition and now people are left scratching their heads over the definition of such crimes. By looking at previous cases, the law still fails to draw boundaries between what remark or publication that is tantamount to being seditious and what is not.

Last but not least, the newly-proposed legislation of National Harmony and Reconciliation Commission Bill can be one of the answers to the issues addressed in this paper to ensure that justice, reasonableness, and equality are always preserved.

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