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FREEDOM OF SPEECH: A COMPARATIVE ANALYSIS BETWEEN MALAYSIA AND INDIA

BY

DECLARATION OF AUTHOR'S IDENTITY

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ABSTRACT

Freedom of speech, despite its Constitutional protection, does not fly high in the horizons of Malaysia for various reasons. The absence of academic and judicial contributions are badly felt in this area of law.

Article 10 of the Federal Constitution, guaranteeing the right to free speech, was borrowed from article 19 of the Indian Constitution.

However, the application of the two articles differ. Indian courts, unlike their Malaysian counterparts, have given more liberal interpretation to the right to free speech.

The approach of the writer was to start each chapter with a general introduction followed by the law on the subject. Comparative approach was adopted throughout the work. Besides India, frequent references were also made to the United States, especially with respect to the electronic media, as the country provides a wealthy source of literature on this subject. Suggestions for further improvements are made at the end of each Chapter.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws.



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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended

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Signature

Date 1/8/1197

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Dedicated to my Family

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Selangor Administration of Islamic Muslim Law Enactment, 1962.

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Abbreviations

A.I.R.	All India Reporter
AC	Appeal Cases
All E.R.	All England Law Report
e.g.	for example
ed.	edition
Ed.	editor
Eds.	editors
Ibid.	in the same
LAWSIA	Law - Association for Asia and the Pacific
lock cit.	in the place cited
M.L.J.	Malayan Law Journal
Mal. L.R.	Malaya Law Review
Malay Mail	The Malay Mail (newspaper)
Net	The Internet
NST	New Straits Times (Malaysia)
op. cit.	in the work cited
PC	Personal Computer
QB	Queen's Bench Division
SC	Supreme Court
Star	The Star (newspaper)
Sun	The Sun (newspaper)
Times	Times Magazine
trans.	translation
v.	versus

Chapter I

Importance of Freedom of Speech

1. Meaning of Free Speech

~~Freedom of speech is a human ideal incapable of exact expression.~~¹

Nevertheless an attempt is made to define it in conformity with customary practice. Paul L. Murphy² defined it as "an innate instinctive desire of man for the right of self-expression and for the right to commune freely with his fellow men. This desire is a natural one and hence this freedom is a natural right."³

This "natural right" has grown tremendously in the past century. The immediate reasons were the communicational developments along with judicial activism. The framers of the First Amendment of the United States Constitution did not foresee the communicational revolution that has taken place since. In these circumstances any unquestioned acceptance of earlier definitions would further widen the gulf between the law and the society. Therefore it is not surprising that scholars and judges in this highly developed area of law opt for

¹ Per Giles J., quoted by Paul L. Murphy, The Meaning of Freedom of Speech, (Connecticut: Greenwood Publishing Company, 1983) p. 11.

² Ibid.

³ Ibid.

broader definitions. Thomas Emerson, perhaps the most well-known First Amendment scholar, defined freedom of speech to include “the right to form and hold beliefs and opinions on any subject, and to communicate ideas, opinions, and information through any medium-in speech, writing, music, article or in other ways.”⁴

While Basu⁵ defined free speech as “the right to express one’s convictions and opinions freely, by word of mouth, writing, printing, picture, or in any other manner (addressed to the eyes or the ears).

These definitions are broad enough to include the right to speak, to write, to listen, and the right to remain silent. It would also cover the conduct,⁶ (e.g. wearing black armband as a sign of protest.) as well as the right to information. This later category is particularly close to free speech. In fact the freedom of information derives its legitimacy from free speech.⁷ Hence the two are supplementary and complementary.

⁴ Emerson, Thomas I, The System of Freedom of Expression, (New York: Vintage Books, 1971) p. 3.

⁵ Basu, Durga Das, Shorter Constitution of India, 10th ed. (New Delhi: Prentice-Hall of India, 1989) p. 109.

⁶ For an interesting case on the point, see Spence v. Washington 418 U.S. 566 (1974) where a university student attached a peace symbol to the National Flag. The Supreme Court of the United States upheld his act under the First Amendment clause which guarantees, among other things, freedom of speech. Quoted by Cox, Archibald, Freedom of Expression, (Massachusetts: Harvard University Press, 1982) p. 60.

⁷ Fenwick, Helen, Civil Liberties, (London: Cavendish Publishing Ltd., 1994) p. 191.

The traditional concept of free speech, dictated by *laissez-faire*, envisaged, an abstentionist role for the state. The modern concept, on the other hand, goes beyond the imposition of limits on the power of state authority to interfere with or abridge this constitutionally enshrined right. It requires the state to play a more active role and lays an affirmative duty to maintain and promote the free speech and expression in the society.⁸ The government is under obligation to furnish facilities, eliminate distortions in the media, and make information available to the public. Likewise it should not hesitate to use force wherever and whenever necessary to protect individuals and groups seeking to exercise their God-given and constitutionally buttressed right from governmental or non-governmental interference.⁹

2. Origin¹⁰

The concept of freedom of speech was born in Athens, Greece, during - 800-600 BC). Its personal freedom was so outstanding that

⁸ Emerson, Thomas I, The System of Freedom of Expression, op. cit., p. 627.

⁹ Ibid., p. 3-4.

¹⁰ It is not intended to venture into historical expedition of free speech. Suffice to say that free speech is an old doctrine which could be even traced as far as the Prophethood. Prophet Moses struggled against the censorship of his views. So did the Jesus, Mohammed and others. In fact, the Holy Prophet is reported to have said "The most excellent *Jihad* is when one speaks a true word in the presence of a tyrannical ruler." Mishkat Al-Masabih (trans.) James Robson, vol. 1 (Lahore: Sh. Muhammad Ashraf).

artists, philosophers, teachers, and statesmen were drawn from afar to this city-state.¹¹

However the modern form of free speech originated from the Anglo-American struggle to achieve free debate in the Parliament.¹² In fact the phrase "freedom of speech" is derived from this struggle.¹³ Therefore not surprisingly in its early stage of development the word "freedom of speech" did not imply the right of the citizen to speak his mind.¹⁴ The struggle resulted in the conclusion of the famous Magna Carta¹⁵ which Lord Coke called "Charter of the Liberties of the Kingdom" because it made the people free.¹⁶ However even this magnificent document lacked any provision in particular relating to

¹¹ Tedford, Thomas L, Freedom of Speech in the United States, 2nd ed., (New York: McGraw-Hill, 1993) p. 4. Despite the high degree of freedom of speech permitted in Athens, liberty was not absolute, for its exercise was reserved for adult male citizens. Juveniles, women, and resident aliens were not considered "citizens" and did not, therefore, have the right of free speech. Socrates, for example, was put to death for "corrupting the youth" by his denunciations of Athenian democracy - a charge that amounted to sedition. see above.

¹² McCrudden, Christopher & Gerald Chambers (Ed.) Individual Rights and the Law in Britain. (Oxford: Clarendon Press, 1995) p. 213. Bill of Rights of 1689 (UK) removed the members of Parliament from any liability for contempt in what they said in the Parliament.

¹³ Levy, Leonard W, Constitutional Opinion: Aspects of the Bill of Rights, (New York: Oxford University Press, 1986) p. 4.

¹⁴ Ibid.

¹⁵ Peck, Robert S. & Ralph S. Pollock (Ed.) The Blessings of Liberty - Bicentennial Lectures at the National Archives. (Chicago: American Bar Association, Commission on Public Understanding About the Law, 1985) p. 11.

¹⁶ Brennan, William J., "Rededication Address: The American Bar Association's Memorial to the Magna Carta," Justice Loyola of Los Angeles Law Review, 19 (1985) 55.

freedom of speech.¹⁷ Nevertheless the subsequent reaffirmation and liberal interpretations of the Charter gave support to the evolution of political liberty, including freedom of speech.¹⁸

Despite any lack of provision on free speech, the Magna Carta had great influence on the American Revolution¹⁹ which led to the framing of the American Constitution - a document which not only laid the foundation but also revolutionized the modern concept of fundamental rights - including the right to free speech.²⁰ The fact that this right was spelled out in the American Constitution for the first time does not mean that it did not exist before. The Constitution merely declared the

¹⁷ Chapter 39 and 40. are the closest to this right. Chapter 39 provides "No free man shall be taken, imprisoned, seized, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers by the law of the land." Chapter 40 provides "To no one will we sell, to none will we deny, or delay, right or justice." Quoted by Adams, Burton, George & H. Morse Stephens, (Eds.) Selected Documents of English Constitutional History, (London: Mackmillan & Co. Ltd., 1911) p. 41.

¹⁸ Thomas, *op. cit.*, p. 5.

¹⁹ *Ibid.*, Magna Carta is recognised as the foundation for the constitutional liberty for both England and the United States. See also Justice William J. Brennan, Jr., *op. cit.*, 55. At page 58 his Lordship observed that "the first eight amendments to our Federal Constitution, our explicit Bill of Rights, owes its parentage to Magna Carta." For an extensive discussion on Magna Carta and its influence, See, Jennings, Ivor Magna Carta and its Influence in the World Today, (Central Office of Information, 1965).

²⁰ Murphy, *op. cit.*, p. 12. The First Amendment provides "The Congress shall make no law abridging the freedom of speech, or of the press,". Besides this there are other Constitutional provisions which have important bearing on the freedom of speech and expression. They are the Fourth Amendment (protection against the search and seizures), the Fifth Amendment (privilege against self-incrimination and the due process rules). Although the First Amendment refers specifically to Congress it has been interpreted as applying to all branches of the federal and state governments. See, Burke, Marshall, (Ed.) The Supreme Court and Human Rights, p. 67. However contrary to the conventional belief Leonard Levy argues that the framers of the First Amendment were little concerned about the freedom of speech. He concluded that they left a "legacy of suppression." For a critical evaluation of Levy's work, See, "The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History," (Book Review) David M. Rabban, Stanford Law Review, 37: [1985], p. 795.

inborn and inherent rights of man.²¹ As John Milton observed "Our liberty is not Caesar's. It is a blessing we have received from God himself. It is what we are born to. To lay this at Caesar's feet, which we derive not from him, which we are not beholden to him for, were an unworthy action, and degrading of our very nature."²²

In a study of free speech one must remember that prior to the 18th century suppression of speech was the rule rather than the exception.²³ As late as 1593, Queen Elizabeth, in granting the privilege of free debate to the Parliament warned the members "Privilege of Speech is granted, but you must know what privilege you have; not to speak everyone what he listenth or what cometh in his brain to utter that; but your privilege is Aye or No."²⁴ Things, however, changed with the French and the American Revolutions.²⁵ The

²¹ Gouch, J. W., Fundamental Law in English Constitutional History, (Oxford: Clarendon Press, 1955) p. 40. Edward Coke also subscribed to this view. While discussing the Magna Carta he observed that "this statute (Magna Carta) is but a confirmation or restitution of the Common Law." In other words the English Parliament did not grant any new or novel right to the people. It merely confirmed and declared the existing ones.

²² Per Milton, quoted by Salhany, Roger E., The Origin of Rights (Toronto: Carswell, 1986), p. 1.

²³ Felkenes, George T., Constitutional Law for Criminal Justice (New Jersey: Prentice-Hall, Inc., 1978), p. 121.

²⁴ Salhany, op. cit., p. 35.

²⁵ Felkenes, lock cit.

process was accelerated with the decolonisation of the British and other empires.²⁶

3. Importance of Free Speech

The importance of free speech and expression in a democratic society is undeniable. It is "the great Bulwark of Liberty",²⁷ "the matrix of nearly every other form of freedom."²⁸ It is "the principal pillar in a free Government. When this support is taken away, the Constitution is dissolved, and tyranny is erected on its ruins."²⁹ David Flint called free speech and the press as the "fourth estate - the watchdog of the Parliament." In fact the combination of the free speech and the press constantly check all the other three organs of the government. They are essentials of organized society and mark the progress from barbarism to civilization. Without their existence, individuality of man is suppressed. Without the right to acquire and impart information, knowledge becomes static, and subsequent generations can learn

²⁶ The Indian independence movement, according to Tripathi, was largely based on the freedom of speech, press and association. See, Tripathi, Pradyumna K. "Free Speech in the Indian Constitution: Background and Prospect," 67 Yale Law Journal, (1958) 393.

²⁷ per Cato, quoted by Levy, op. cit., p. 149.

²⁸ per Justice Benjamin Cardozo in Palko v. Connecticut quoted by Haiman, Franklyn S., Freedom of Speech, (New York: National Textbook Company, 1972) p. 199.

²⁹ Quoted by Levy, op. cit., p. 131.