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FREEDOM OF POLITICAL SPEECH IN MALAYSIA

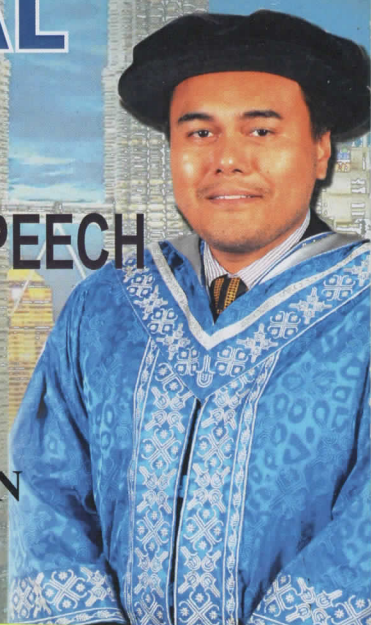
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Prof. Dr. Mohd Azizuddin Mohd Sani

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FOREWORD

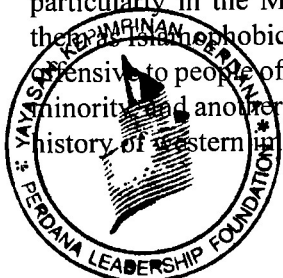
The core idea of freedom of speech is the freedom to express and communicate ideas and thoughts without fear of the consequences. In political contexts, such freedom includes the freedom of the press, the right to peaceable assembly, the right to petition the government for redress of grievances, the right of free association and open access to public information. However, the legitimate extent of freedom of speech and what are good grounds for restricting it, are highly controversial issues, especially when other key values are threatened, and when different cultures confront each other.

For instance on 30 September 2005, the daily newspaper *Jyllands-Posten* (The Jutland Post) published a piece entitled 'Muhammeds ansigt' (The face of Muhammad). The article consisted of twelve cartoons (of which only some depicted Muhammad) and three of these twelve cartoons were illustrated by *Jyllands-Posten*'s own staff, including the 'bomb' and 'niqaab' cartoons. Supporters of the cartoons argued that they illustrated an important issue in a period of Islamic terrorism and that their publication is a legitimate exercise of the right of free speech, and self-conscious refusal to exercise self-censorship in the face of violent threats. In response, Danish Muslim organisations publicly protested about the cartoons and intentionally promulgated knowledge of *Jyllands-Posten*'s publication thereby igniting a near worldwide controversy. As it grew, examples of the cartoons were reprinted in newspapers in more than fifty other countries, which led to numerous death threats, attempted murder, bounties placed upon the heads of the cartoonists by Islamic leaders and numerous protests both peaceful and violent, and some riots, particularly in the Muslim world. Critics of the cartoons described them as Islamophobic or racist, and argued that they were gratuitously offensive to people of the Muslim faith, intended to humiliate a Danish minority and another insensitive manifestation of ignorance about the history of western imperialism.

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This is but one example of the many difficulties to which the freedom of speech can give rise. These difficulties are likely to be especially serious in multicultural and multireligious societies, such as Malaysia. In such contexts there is a need to weigh the importance of freedom of political speech for an effective democracy against the need to maintain social order and the conditions of political civility that are also essential to democratic dialogue. This is the challenge that Prof. Azizuddin addresses in his ambitious new book for his Inaugural Professorial Lecture.

Prof. Azizuddin argues that freedom of political speech in Malaysia has too often been sacrificed for inappropriate political purposes, to protect the government and leading politicians from legitimate criticism and being held properly accountable for their actions, even though the right to freedom of political speech is notionally protected by the Malaysia constitution. However, he does not think that the answer lies in supporting a near absolute primacy afforded to freedom of political speech, as for example in the US Constitution. Instead, through his theory of social responsibility he seeks to articulate an approach to freedom of political speech that allows political criticism, dissent and opposition, but also insists on respect for religious and cultural differences and the conditions of civility. He discusses the strengths and weaknesses of both liberal arguments and the Asian values thesis, in developing his own account of how and why freedom of political speech is really important. He then sketches some implications of his argument for Malaysian political practice, suggesting some specific reforms to enhance the openness of Malaysian politics.

In this book, Prof. Azizuddin has made a major contribution to thinking about the practice of freedom of political speech in the Malaysian context. His theory of social responsibility is a bold attempt to do justice to the legitimate criticism of the Malaysian government that it is too ready to restrict freedom of speech to protect its own political dominance and to the legitimate claims of the government that the unrestricted exercise of freedom of political speech cannot be allowed to undermine social cohesion and national prosperity, and this is a book that should engage everyone interested in enhancing the democratic culture of Malaysia.

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ACKNOWLEDGEMENT

My interest on this topic of freedom of speech began in 1998 when I was an undergraduate student majoring in political science in Universiti Kebangsaan Malaysia (UKM). Back then, I was a student leader performing my duty as President of Political Science Student Association, President of Faculty of Social Science and Humanities Student Association, and Deputy President for a pro-establishment student movement called the United Student Action (Tindakan Siswa Bersatu) group observed the *Reformasi* movement in the 1998-1999 against the removal of Anwar Ibrahim as Deputy Prime Minister and later the imprisonment of Anwar Ibrahim. I saw many demonstrations organised by *Reformasi* movement in Kuala Lumpur especially in Merdeka Square and Tunku Abdul Rahman Road. For me, it was a new phenomenon that enlightened me when people especially the Malays protesting what they considered injustice treatment given to Anwar by the government and those who struggled for him and against the BN government. This triggered the idea for me to see that peaceful assembly is essential for democracy in Malaysia. Most importantly, freedom of speech is so crucial as a fundamental human right for all Malaysians embracing mature democracy to be realised in Malaysia.

After completed my study in 1999, I was decided to pursue a Master degree in Social Science specialising in political science also in UKM. *Reformasi* movement overwhelmingly influenced my thoughts on democracy and human rights, therefore I made my decision to research more about freedom of expression for my Master dissertation. I passed with distinction the dissertation which let me to continue further to study about freedom of speech for my doctoral degree in 2003. Thus, for my PhD in Keele University, United Kingdom, I researched on the political expects of freedom of speech. I graduated in 2007 and since then I expand my researches on freedom of political

speech that cover on many particularly new grounds such as media politics, social media, religious expression, Islamisation, deliberative democracy, democratisation, public deliberation, political marketing, freedom of religion, election, youth and social media, terrorism and social media etc. With my works published internationally and locally, academic community know me as an expert on civil and media liberties which include freedom of speech in Malaysia.

Throughout my career, I want to express my gratitude to a number of peoples who contributed scholarly to my life as an academic. Special thanks go to Emeritus Prof. John Horton, Saliha Hassan, Distinguished Prof. Datuk Dr. Shamsul Amri Baharuddin, Datuk Dr. Ahmad Faiz Abdul Hamid, Prof. Datuk Seri Dr. Mohamed Mustafa Ishak, Lef. Kol. (Rtd.) Ahmad Ghazali Abu Hassan, Ghazali Mahyudin, Mahfudzah Mustafa, Ambassador (Rtd) Tan Chin Tiong, Dr. Ooi Kee Beng, Dr. Lee Hock Guan, Prof. Dr. Norshuhada Shiratuddin, Prof. Dr. Shahizan Hassan, Assoc. Prof. Dr. Norhafezah Mohd Yusof, Dr. Ummu Atiyah Ahmad Zakuan, Azahar Kasim, Assoc. Prof. Dr. Nor Sulastry Yurni Ahmad, and Prof. Dr. Sivamurugan Pandian. My deepest appreciation is also to the Universiti Utara Malaysia particularly the academic and administrative staffs of the School of International Studies (SOIS), College of Law, Government and International Studies (COLGIS), and Research and Innovation Management Centre (RIMC). Finally, I wish to acknowledge and thank my family – Fida, Nusra, Amni, Ariez and Adelia – including my parents Nor Azian and Mohd Sani and siblings with love for supporting whatever I do. I always feel grateful for that.

PREFACE

As Mahathir Mohamad said in the ‘Far Eastern Economic Review’ dated 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”. Najib Tun Razak also admitted that race and religious issues are critical issues in Malaysia, and stressing 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’.” Under these auspices condition, it would therefore be justifiable for a government to restrict freedom of speech. However, many have questioned the intentions of the Malaysian government in this regard restricting free speech. For example, Vitit Muntarbhorn argues that many ASEAN governments, particularly the Malaysian government under Barisan Nasional (BN) and the United Malay National Organisation (UMNO), restrict political and civil rights not to promote prosperity, but “to perpetuate the longevity of the regime in power”. Likewise, Chandra Muzaffar laments that: “[S]outhern elites deprive their people of their basic human rights [and that ...]... 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”. It could be argued that Najib was becoming more repressive after the IMDB scandal and ensuing challenged for power by his former mentor, Mahathir Mohamad, and his former deputy premier Muhyiddin Yassin. This is all occurring despite that the Article 10 of the Federal Constitution protects people’s right to freedom of expression because many laws such as the Sedition Act (SA) and Communication and Multimedia Act (CMA), that limit the people’s right to political speech. Parliament in Malaysia is not supreme. Instead, the Constitution supplies the ultimate yardstick against which every law can be measured. This book will address the contemporary perspective of freedom of political speech during the premiership of Najib Razak. It will also compare such practices of free expression between under Najib and his mentor cum predecessor, Mahathir. Main discussion is about whether restrictive laws are indeed essential for political stability, racial harmony, and economic

prosperity, or whether they are just used as tools for the governments to cling in power and restricting any political opposition contestation, besides preventing popular dissent and people's mobilisation against it. The current dynamic of political speech under the Pakatan Harapan (PH) government will be analysed as well. This book will explore the theories of freedom of political speech and will argue whether political speech deserves protection by the constitution compared to non-political speech. Finally, this book will obviously propagating the PH government to practise the theory of social responsibility that can ensure political speech be implemented fairly for the common good.

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1.0 Introduction

It is argued that freedom of political speech is a precondition for democracy. In this context, the right to freedom of political communication also takes us into an argument for the right to access information, as well as the opportunity to disseminate it. According to Tom Campbell (1994: 39), the public good is best attained by a government that allows people's right to freedom of political discussion. Unlike in the West, where there appears to exist widespread understanding about the essential role of political speech, the need for political speech in Asian society is always overshadowed by wider political considerations. This book seeks to understand the situation of political speech in Malaysia and the argument in favour of restrictions on political speech and the problems that prevent political speech from being practised effectively. Thus, for example, two particularly sensitive issues – ethnic rivalry and religion are considered as taboo and discussion of these issues is severely restricted. Article 10 of the Malaysian Constitution protects freedom of expression particularly political speech. The use of the word “expression”, according to Shad Saleem Faruqi (2018) expands “the perimeters of the right to cover communication by word of mouth, signs, symbols, gestures, works of art, music, sculpture, photographs, films, videos, cartoons, computer art, architecture, print media and cyber speech”. However, in reflecting the sensitiveness of these issues, specifies a list of restrictions, which limit the right to free speech on the grounds of guarding political stability and racial harmony. Furthermore, freedom of political speech and the political rights of individuals are secondary to the goals of national prosperity and national development, and the government is predisposed to impose some form of political discipline in order to serve the greater social good. State elites pursuing the national interest are able to shape policies without having to deal with conflict over public policy and between interests groups (Connors 2004: 209).

Previously, Malaysian Prime Minister, Najib Tun Razak, admitted in 2010 that race and religion were critical issues in the country, stressing that:

[We need] political management
[which] includes race relations. If we
can refrain from uttering words or

committing acts which may offend other races, *temperature-raising incidents* can be avoided (The Star, 2010: 4).

It is under these auspices, therefore, that the administration believes restrictions on freedom of political speech are not only justified but necessary. However, many question the intentions of the Malaysian government in this regard. For example, Viti Muntarhorn (1994: 4) argues that several ASEAN governments, particularly the Malaysian regime under Barisan Nasional (BN) and the United Malay National Organisation (UMNO), restrict political and civil rights not to promote prosperity, but “to perpetuate the longevity of the regime in power.” Likewise, a critic of the West’s human rights record, Chandra Muzaffar (1993: 30-31) laments that:

[S]outhern 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.

These 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. At the same time, however, this debate should not be couched so crudely, either as a tool to be manipulated by political or capitalist regimes, or as an artificial screen to shield wilfully illiberal governments. Rather the debate of the last two decades should instead be seen as an episode in a long-term post-colonial politico-cultural project.

Although freedom of political speech in Malaysia is protected by Article 10 of the Federal Constitution, other laws, such as the Sedition Act (SA) and the Communication and Multimedia Act (CMA), simultaneously limit the right. Notwithstanding, parliament in Malaysia does not reign supreme. Instead, it is the Constitution that supplies the ultimate yardstick against which every law must be measured. For example, in *Dewan Undangan Negeri v Nordin Salleh* (1992),¹ it was held that parliament may restrict freedom of political speech only on

1 *Dewan Undangan Negeri Kelantan v Nordin Bin Salleh* [1992] 1 MLJ 343.

grounds specified by the Constitution. Similarly, *Madhavan Nair v Public Prosecutor* (1975)² ruled that any condition limiting freedom of political speech not falling within Arts 10(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 this right. As such, it is imperative that restrictions on freedom of political speech be confined to those articulated in the Constitution (Faruqi, 2001: 22). This is not dissimilar with what the House of Lords declared in *James v Commonwealth of Australia* [1936] AC 578 that: “Free speech does not mean free speech: it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth. It means freedom governed by law” (Salleh, 2019).

This book will address the state of freedom of political speech theoretically and practically especially in the case of Malaysia. It will trace the practices during the premiership of prime minister, Najib Razak. Comparisons will also be made between Najib and his predecessor, Mahathir Mohamad, who, as the country’s longest serving premier, has been accused of many suppressions of freedom of political speech during his leadership. However, the bulk of this book will debate whether restrictive laws are essential for political stability, racial harmony, and economic prosperity, or whether such tools are opportunistically used by governments to cling to power by restricting political opposition and popular dissent. This book will analyse the newly introduced laws, especially those created by Najib, to examine their impact on current freedom of political speech practices. With the change of government since the end of 14th General Election on 9 May 2018, this book observes the prospect of freedom of political speech under the Pakatan Harapan (PH) government led again by Mahathir Mohamad.

2.0 Political Speech (Public Speech) vis-à-vis Non-Political Speech (Private Speech)

Political speech, even though it is crucial for democracy, raises complex questions about how to define it and distinguish it from non-political speech. One approach to the question of how to identify a distinctive

category of political speech has been to establish an ideal concept of political speech. Alexander Meiklejohn (1965: 36-37), in developing his theory of absolute freedom for political discussion, declares that the United States (US) constitution applies protection only to speech that directly or indirectly bears upon issues with which voters have to deal and relates to matters of public interest. He also argues that freedom of political speech should be absolute, with no restrictions, and that it is the only speech that should be protected by the constitution. For this reason, it should not be abridged even on grounds of national security. Political speech merits heightened protection because it is vital to a democratic society. Meiklejohn (1965: 26-28) derives this notion from his understanding of American democracy – that the constitution only protects political speech for the purpose of self-government. Meiklejohn compares the function of self-government to that of a debate in a town meeting where voters, before deciding community issues, are informed on political issues by means of free and robust discussion. Non-political speech or private speech is not protected by the constitution, and therefore may legitimately be regulated and abridged by the law where there are good grounds to do so.

Frank Morrow (1975: 238), in advancing a similar view, argues that political speech is concerned with the public interest (*res publica*) covering issues such as policy, government, education and the organisation of society – speech that deals with political matters, distinguished in a broad sense from personal or individual matters. Morrow (1975: 238) also argues that speech such as an opinion on Beethoven's piano concertos, or the discussion of one's neighbour's ancestry falls under the category of private or non-political speech. Political speech would also exclude most scientific topics, commercial and business matters, literary expression, non-political libel and non-political pornography. The use of pornography as a medium to criticise the prime minister however would constitute political speech. 'Symbolic speech' may fall within the category of either political or private speech. Free speech in 'private' matters has no special connection with politics and democracy (Narveson 1994: 79-80). People are simply pursuing their own interests or concerns when they chat about music or their daily lives, utilising assorted speech activities in the process. Through the process of exchanging ideas and utilising speech activities, one may ponder the good life and hope in the process



to achieve a clearer and more satisfying conception thereof, regardless of whether such things involve sophisticated philosophical activities or otherwise. They are just normal activities that one would perform in everyday life.

In assessing these arguments, one question that must be raised here is how can one draw a clear and valid distinction between public political speech and private non-political speech? This question appears problematic to some theorists because the notion of political speech is seemed very broad, as it includes speech which is necessary to prepare for political life (the life of the citizen) – that is, general intellectual and moral education (Morrow 1975: 238). Meiklejohn, for instance, argues that art and literature, even though both could be considered as private speech, deserve protection because citizens may need them in order to develop and discuss their political views. His concern, though, is tightly linked to the actual processes of self-governance, and that is precisely why his claims about the importance of Beethoven and Bo Diddley on a par with the issue of tariff regulation seem strained (Balkin 1995: 1935-1990). Cass Sunstein (1993), on the other hand, believes that art and literature help individuals deliberate about social norms in general. He avoids Meiklejohn's problem which requires a direct and significant relationship between protected speech and government processes. Nevertheless, he justifies the special protection of political speech on the grounds of government's greater incentives for self-interested political action. When the government regulates political speech it 'is most likely to be biased or to be acting on the basis of illegitimate, venal, or partial considerations'. Moreover, 'government is rightly distrusted when it is regulating speech that might harm its own interests; and when the speech at issue is political, its own interests are almost always at stake' (Sunstein 1993: 134). Although Sunstein requires that both speaker and receiver must understand that the speech is political in his sense, he does not press this point too hard. It is enough if 'a few' understand it as such. It is not even necessary that the artist herself understands or intends her work to be 'political', at least in the ordinary sense of that word. It is plausible to argue that political speech occupies the entire range of speech and that no speech is private in the sense applied to the term here (Balkin 1995: 1948-1949).

However, Robert Bork (1971: 1-35) criticises the idea of absorbing private speech within the category of political speech. He

contends that the most important feature of the category of protected political speech is that it should consist of speech concerned with government behaviour, policy or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative. Explicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda. Bork explains that protected political speech should not cover scientific, educational, commercial or literary expression as such. A novel may have an impact upon attitudes that affect politics, but it should not for that reason receive judicial protection. He further explains that we have to return to speech that is explicitly political such as criticism to public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions, and speech addressed to the conduct of any governmental unit. Steven Shiffrin (1990: 48) too, criticises Meiklejohn's idea, the claim that private speech, such as literature, to constitutional protection is relevant to political life, as pure fiction. If art and literature are protected on the grounds that they have political impact, private speech is protected *a fortiori*. Shiffrin argues that if the classics of literature are to be characterised as political speech, it is hard to see how any speech could be called non-political.

It is widely agreed that the distinction between political speech and non-political speech is unavoidably blurred. The two are, however, basically different. As elucidated by Meiklejohn and Morrow, political speech is only concerned with the affairs of the public and political organisations. It deserves constitutional protection, as it is essential for the democratic process. Democracy requires the equal division of fundamental political power within the society; and everyone is entitled to it as much as anyone else, neither more nor less. Moreover, overlapping political speech, consisting of political and non-political elements such as art, literature, and music, can also be considered as political speech. Although there is truth in the arguments forwarded by Zachariah Chafee (1941) and Meiklejohn (1965) in proposing that non-political speech is important, they are also right that it may not weigh as heavily as political speech that deals with public and social interests. Meiklejohn illuminatingly compares private speech or non-political speech to property rights, which might legitimately be infringed by the government.

Based on the above discussion, in my view, speech containing political ideas in its content, be it in art, literature, science and music should be categorised as political speech. Private non-political speech has obviously no direct connection in its content with political ideas and the democratic process. It normally deals with such as personal and commercial matters. I defend the manner in which political views can be expressed should be open in all kinds of ways, provided that it is not seriously detrimental to the society. Citizens should have an unrestricted right to political speech as long as that right is not used to cause harm to the society. Although the government may have the legislative authority to determine the extent and limitation on speech, the interpretation of the legislation should be left entirely to the courts, and not the government. Political speech, therefore, should be seen as a safeguard the democratic system rather than a shield that seeks to protect the rights of individuals. As claimed by Thomas Emerson (1966: 6), 'freedom of expression, while not the sole or sufficient end of society, is good in itself, or at least an essential element in a good society'. Emerson persuasively points out that the right to free speech is immensely important and may even be regarded as a basic human right. Free speech in general, however, does not rank on a par with political speech which should be protected by the constitution due to its special importance to the democratic system.

2.1 Theories of Freedom of Political Speech

Although freedom of political speech performs an integral role in the democratic process, the question that needs to be asked here is whether regulation of political speech can in some respects still be justified? This is a highly controversial issue. Writers, such as Meiklejohn, who reject any regulation to political speech, argue that democracy and politics concern the attempt to discuss and solve any disagreement and conflict of values among the people. For people to respond to their differences and conflicts intelligently they need an unregulated political speech to explore these differences and to find the best solution in resolving the conflicts. Both levels of society – society as a whole and a separate segment, e.g. religious, racial, sexual, occupation and subgroups – and individuals are important here. Not only in the society as a whole but also within any group,

there will be different viewpoints and uncertainties about both values and strategies. Within a group, there will be disagreement about how to relate to other societal groups and how to define one's own group. Therefore, democracy and freedom of political speech are essential in order for the people to have a right in exploring these alternative views. Freedom of political speech should allow different channels, including media outlets, political parties and NGOs, to champion one or another view on issues involving either societal or subgroup identity and about either group or national policies. For instance, according to C. Edwin Baker (2003: 6), press freedom means that the media must be able to engage in extreme partisan speech directed either to society as a whole or, sometimes, to members of a particular segment of society, and to recommend how either that particular societal segment or society as a whole should define itself.

There is also an argument that political speech, even if worthless or harmful, must be tolerated and unregulated because of the risks created by suppression. According to Justice John Harlan, an attempt to purge public discourse from offensive and obnoxious expression would drastically impair 'robust and uninhibited' public debate. There is also force in Harlan's argument that it is risky to make any exceptions on this point, lest there be no principled stopping place. But is he justified in his faith that society is strong enough to shrug off the side effects of allowing even the most debased messages in the marketplace of ideas (Harlan and Shapiro 1969, Farber 1980: 283)? Harlan's view is similar to the view of several writers such as William O. Douglas and Hugo Black who advocate the idea of 'strong liberalism'. They reject any regulation of political speech by the government. They believe that the government is the enemy of freedom of political speech and any effort to regulate speech by the government threatens the principle of free speech. Government may not draw any lines between speech it likes and speech that it hates: all speech stands on the same footing. The protection given to speech extends equally to the well-known extremists and racists like the Communists, Nazis, and Ku Klux Klan. The government, in their view, should ensure that broadcasters, newspapers, and others may say what they wish, constrained only by the imperatives of the marketplace of ideas. 'Strong liberals' also accept the 'slippery slope' argument, where any restrictions on political speech, once permitted,

have a sinister and nearly inevitable tendency to expand. To allow one kind of restriction is in practice to allow many other acts of censorship as well. The risk of censorship is so serious and omnipresent because seemingly small and innocuous acts of repression can turn quickly into a regime of repression that is anything but innocuous. Judges should not uphold restrictions on speech simply because government seems to have good reasons for the restriction in a particular case. Neither should they examine ‘the value’ of the speech at issue, compare it against the ‘harm’ of that speech, and announce a judgement based on weighing value against harm. In any such judgements, there is far too large a risk of bias and discrimination. ‘Strong liberals’ argue that if judges were to balance harm against value, they would be likely to uphold a wide range of laws censoring political dissent, literature, and other forms of speech. However, the ‘strong liberals’ are not only advocating complete freedom of political speech, but also the constitutional protection of all speech including commercial speech, sexually explicit speech, libel, publication of the names of rape victims, advocacy of crime, the violent overthrow of the government and flag-burning (Sunstein 1993: 5-8).

However, many are critical to the argument of ‘strong liberals’. Most of the criticisms come from the advocates of ‘reasonable regulation’, who call for a form of balancing between the interest in free speech and the likely harms in some particular cases in the US. The opponents were led most vigorously by Felix Frankfurter, who waged a challenge for balancing and against ‘strong liberals’, especially in the area of constitutional law (Sunstein 1993: 7). Frankfurter, in *Bridges v. California* (1951) and *Beauharnais v. Illinois* (1952), and, later, others, such as Bork (1971) and Alexander Bickel (1976) argue that balancing is a healthy and even an inevitable part of a sensible system of free speech and political speech. Judges should take into account the various conflicting interests that are inevitably at stake. Speech that threatens real harm may legitimately be prohibited. This category includes political speech calling for violently overthrow the government, libel of racial groups, and publishing a threatening message to a judge with reprisal if he rules against one of the parties. These thinkers argue that ‘reasonable regulation’ should not protect the advocacy of crime, commercial speech⁴, hate speech, obscenity, and the libel of individuals and groups. The government is not an

enemy of free speech, in fact, it should be allowed to maintain a civilised society. This principle means that government may guard against the degradation produced by, for example, obscenity, the risk to social order posed by speech advocating to overthrow the government through violent means, and the threats to equality and civility produced by racial hate speech. This is parallel with John Stuart Mill's (1859/1974) view that states censorship is 'only a prima facie wrong', recognising as well that censorship can be justified on the basis of protecting others from harm. Edmund Lambeth (1986), after reviewing Mill's arguments for free speech, pointed out that all aspects of liberty can be limited to prevent harm to the interests of others.

The importance of political speech for the democratic system means that we need protection from political speech as well as protection for it, and both are consistent with the ideal of freedom of speech. Judith Lichtenberg (1987: 329-355) explains that the commitment to freedom of speech has two different strands: The first is an opposition to censorship, based on a belief that 'one should not be prevented from thinking, speaking, reading, writing, or listening as one sees fit'; the second, equally fundamental, is our conviction that the purposes of freedom of speech are realised when expression and diversity of expression flourish. While government intervention seems to intrude upon the first principle, it may advance the second. Based on this argument, the state has a duty and responsibility to protect the right to political speech. However, restrictions or regulations in these areas are only permitted if they are prescribed by law and are necessary in a democratic society. The restrictions must also pursue a legitimate aim and be proportionate to the public interests pursued.

2.2 Special Protection on Political Speech

This section considers whether political speech deserves special constitutional protection because of its essential role for democracy. Meiklejohn's views on absolute protection for political speech are not entirely plausible in that there are many types of political speech that are worthless and harmful to the society, and do not deserve protection by democratic constitution. As we have seen, the notion of absolute protection has been rejected by Sunstein (1993), who

argues that although restrictions on political speech may be politically biased, and have the distinctive feature of impairing the channels for political change, and thus have damaging effects on public debate, not all forms of political speech should be protected by the constitution. Perjury, attempted bribery, threats, misleading or false advertising, criminal solicitation and libel of private persons are not entitled to constitutional protection. For the sake of democratic stability and the public good of society, a distinction between ‘good’ and ‘bad’ political speech must be invoked. Bork (1971), too, shares this view, stating that speech that advocates for the forcible overthrow of the government is excluded from the category of political speech and should be prevented; and thus has no right to constitutional protection. Although I agree with Bork’s view that revolutionary speech should be prevented or restricted by the constitution, I think that this kind of speech can still be considered as political speech because advocating the violent overthrow of the government is certainly political in a straightforward sense. I hold, rather, with the argument that we should distinguish between acceptable and unacceptable political speech, and speech advocating the forcible overthrow of the government is one example of unacceptable political speech.

It follows from the above argument that political speech must be divided into what should be constitutionally protected and that which should be unprotected. Constitutionally protected political speech is speech that is special from a democratic perspective because it contributes to the significance of the democratic process and serves the social and public interests, which include political criticism, and checks and balances the power of the state. Freedom of political speech is vital to democracy. The only way to ensure it is by granting special protection, to shield it from encroachment, even from democracy itself. Freedom of speech must be protected not only out of concern for the critic, but because it is essential to the well-being of all the members of the community who must in some way pass judgment upon the issue with which that critic is concerned. Where any opposition whatever is silenced, the depth of the participation of the entire community is impaired and the political system is turned toward autocracy. Participation in decision-making calls for joint intellectual activity, and therefore relies upon the continuing expression and communication of facts, ideas, and argument. The freedom to

present and discuss these publicly, therefore, is a condition of the democratic process, especially changing the government, determining public policy, and voting. A system of free speech should increase the likelihood that political outcomes will be responsive to the will of the public. Thus the protection accorded to political speech is designed to allow the polity's judgments to emerge through general and informed discussion and debate.

However, not all political speech should be protected by the constitution because some political speech does not promote the goals for which speech is protected – especially speech that does not contribute to the democratic process or the public interest, and that causes serious social harms. According to Sunstein (1993: 250), the current doctrine of free speech does not sufficiently serve the central goal of producing a deliberative democracy among free and equal citizens because it also protects violent and inflammatory speech which should not be protected. Similarly, Chafee (1941) criticises Meiklejohn's idea of the absolute protection of political speech, and says that the true boundary of freedom of speech should be determined by balancing against each other two very important social interests, in public safety and in the right to free speech. He explains further that:

“Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperilled, and not, as most men believe, when it is barely conceivable that it may be slightly affected. In war time, therefore, speech should be unrestricted by the censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war.” (Chafee 1941: 35)

Furthermore, Greenawalt (1989: 57) argues that ‘verbal and written utterances whose aim is something other than expression’, even if the word expression is given a broad definition, do not come within free speech protection. Some expressions are meant to alter situations rather than ‘transmit information’ or ‘assert values’. Speech may be regulated if the government legitimately can demonstrate that the speech at issue is likely to lead to sufficiently bad consequences, such as blackmail, inciting an angry crowd to cause a riot, revealing

military secrets to threaten national security or blowing up a building to make a political statement (Sunstein 1993: 125-126). In certain circumstances, the government can also restrict political speech that is less valuable for the good of the society. In a multiracial and multicultural society, intemperate speeches on immigration, for instance, even though it is an important issue for national policy, can be stopped to protect racial sensitivities and to control racial hatred. This kind of political speech may have some value, such as reinforcing group solidarity, but may be overridden by other political goods, such as security and racial harmony. The debate, dialogue, and discussion of sensitive issues (such as race and religion) must be held in a civil manner, and compromise between parties is needed to prevent political instability and racial hatred. However, the government must give a justification for any restriction it makes and the decision has to reflect the people's interests or public good.

Allowing the government to intervene and prevent constitutionally unprotected speech leads to the danger of a 'slippery slope' of restriction. As mentioned earlier, the slippery slope argument is that we should not limit free speech because once we start we will not know where to stop, and at the extreme risk a slide into tyranny and censorship. Such arguments assume that we can be on or off the slope. In fact, however, no such choice exists: we are necessarily on the slope whether we like it or not, and the task is always how far up or down we choose to go, not whether we should step off altogether. It is also worth noting that the slippery slope argument can be used to make the opposite point; one could argue with equal force that we should never absolutely prohibit government intervention in relation to any actions because once we do we are on the slippery slope to chaos or disorder.

The public good of political speech suggests a reason for predicting that the struggle over political speech would be central in the actual development of freedom of speech. Those whom the government wishes to punish for their political speech often represent a highly visible cause. Although people's understanding of the public good (or bad) varies from one society or community to another, political speech should correspond with the civic conception of politics and contribute to the public interest. Thus, a clear distinction should be drawn between political speech that contributes to the good

of the society and that which does not. Speech such as pornography, which certain societies may value as important for individual rights and freedom of choice, is not included under special constitutional protection because it does not contribute positively to the democratic process, thus restricting it cannot be seen as a breach of civil liberties or free speech. The constitutionally protected political speech has value for the community as a whole, beyond its value to the speaker, and consequently ought to be specially nurtured. Suppression may be especially justifiable because ‘evil’ speech is not just a private wrong to another individual but a public bad that may lead to harm to the whole community (Baker 1989: 35).

In setting the boundaries of freedom of political speech, the best thought is to make a distinction between politically worthwhile and, therefore, constitutionally protected speech, on the other hand, and speech which does not contribute to democracy or public interest and need not be constitutionally protected on the other. Even though this approach is unpopular with the supporters of absolute freedom of political speech, to have political stability and prosperity, certain rulers and regulations are necessary to control and monitor the practice of political speech, especially violent and hate speech.

2.3 Religious Expression versus Secular Expression

In the international human rights regime, the freedom to ‘manifest one’s religion or belief in teaching, practice, worship and observance either in public or in private’ is clearly recognised. Article 18 of the Universal Declaration of Human Rights (UDHR) provides the right of every individual to the freedom of thought, conscience and religion. A similar, albeit more detailed right is also espoused in the International Covenant on Civil and Political Rights (ICCPR). The United Nations Human Rights Committee’s (HRC) General Comments to article 18 of the ICCPR sheds some light in understanding what is contemplated by the international human rights regime as a whole.

The HRC (1993) recognises that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts, including ritual and ceremonial acts, as well as customs like the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in



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