The Comparative Constitutional Law of Freedom of Expression in Asia

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Constitutional protection of freedom of expression is virtually universal. (Barendt 2005; Krotoszynski 2006; Rishworth et al 2003; Currie and de Waal 2005; Stone 2005). While freedom of expression has particularly strong roots in the Western liberal political tradition, the arrival of constitutionalism in Asia has brought constitutional protection of freedom of expression with it. Most Asian constitutions, reflecting the international consensus evident in the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* (which were either in existence or in the pipeline at the time most Asian constitutions were adopted) afford explicit protection, in one form or the other, to the right to speech and expression.

However, just as Western forms of constitutional law have been adapted to the particular contexts of Asian countries, understandings of freedom of expression too have been shaped by the distinctive political contexts and traditions of Asia. As in the West, the scope and reach of the right varies greatly across Asian nations, on paper as well as in its actual enforcement on the ground (Thio 2003, Zhang 2010, Chen 2010 (for an exploration of the effect of historical contingencies on the actualization of constitutional rights in Asia)).

Despite these variations, there are significant common factors across many Asian countries. A majority of Asian nations gained independence from foreign rule only in the twentieth century. Governance is generally weaker, the strength of enforcement of formally entrenched constitutional rights often varies widely (Chen

2010) and these features can significantly affect the protection afforded to the freedom of expression. Common accounts of Asian approaches to legal relations often emphasize that Asian legal cultures have fewer formal legal rules (Kahler 2000). Speaking generally, Asian cultures tend to prefer cultural expectations or principles and customary codes of conduct over strict obligations. Where disputes arise between parties, informal negotiation and mutual agreement is preferred over recourse to adversarial adjudication of disputes by a third party.

Although this account is necessarily general, these broad preferences are reflected in both the political culture of expression and in the legal rules protecting freedom of expression in Asian countries. Alongside the sometimes uncertain enforcement of constitutional rights, there are particular sensitivities that are relevant to the right to freedom of expression. Social and cultural values often vary significantly from Western ones, and this affects both the conceptualization and the enforcement of the freedom of expression in certain contexts (Thio 2003, Zhang 2010).

The Chapter will review how the distinctive political and constitutional cultures of four Asian countries – Japan, Singapore, Malaysia and India – affect the articulation of freedom of expression principles by courts in those countries. Rather than attempting an exhaustive analysis of particular categories of freedom of expression protection and limitations in each of these four jurisdictions, our analysis will draw out particular aspects of protections and limitations that help to illustrate the broader constitutional cultures in each of these jurisdictions. Before doing so, we will review the fundamental elements of any constitutional principle of freedom of expression (including its formal manifestation, structural elements and doctrinal forms), noting some particularities evident in Asian countries.

I. Fundamental Elements of Freedom of Expression Rights

1. Constitutional Text

As elsewhere in the world, there is some variation among Asian constitutions in the nomination of 'speech', 'expression' and 'communication' as the subjects of constitutional protection. The *Constitution of India* protects 'freedom of speech and expression' (Article 19(1)(a)) as do the Constitutions of Malaysia and Singapore; the *Bill of Rights Ordinance* of Hong Kong refers to 'freedom of opinion and expression'; and the *Constitution of Japan* (in the translation provided by the Ministry of Justice) refers to 'speech, press and all other forms of expression'.

Most commonly, these provisions are expressed as a declaration that all persons hold a certain right, following the model of the *International Covenant on Civil and Political Rights*, which provides that 'everyone shall have the right to freedom of expression'. The form of the First Amendment to the *Constitution of the United States*, which is expressed as a limitation on government ('Congress shall make no law … abridging the freedom of speech') is not common in Asia. One clear counter example, which reflects the American influence on Filipino constitution-making, is provided by Art III s 4 of the *Constitution of the Republic of the Philippines* which provides: 'No law shall be passed abridging the freedom of speech, of expression, or of the press …'. This low level of influence is consistent with the generally waning influence of the wording of the US Constitution (Law and Versteeg, 2012)

In Asia, as in other parts of the world, freedom of expression guarantees are often accompanied by related guarantees, typically of rights of assembly and association and protection for the press, though these too vary somewhat. To provide

two examples: the *Constitution of the Republic of Korea* protects 'freedom of assembly and association' along with 'freedom of speech and the press' (Article 21) and the *Constitution of the Republic of the Philippines* (Article III s 4) similarly guarantees freedom 'of the press, [and] the right of the people peaceably to assemble …'. These textual details are no doubt important in some contexts but there are more significant points of convergence and divergence among rights of freedom of expression and the law derived from them.

2. The Structure of a Freedom of Expression Principle

The shape of any constitutional right of freedom of expression will depend on at least three structural issues: (1) the coverage of the principle (the acts or things to which the principle applies,); (2) the nature and degree of limitations permitted and (3) whether the right has a positive aspect; and/or a horizontal aspect. *(a) What is Expression?*

Any guarantee of freedom of expression contains, at least implicitly, some conception of 'expression' or 'speech'. In Asia, as elsewhere, it is usually accepted that a right of freedom of expression extends to speaking and writing, as well as many non-linguistic means of communication, and to expressive conduct. For instance, the recognition that flag burning is a form of expression covered (though not necessarily protected) by freedom of expression rights is widespread (Stone 2011) and extends to some Asian jurisdictions. Flag desecration, for instance is recognized as expression in Hong Kong (*H.K.S.A.R. v Ng Kung Siu* [2001] 1 HKC 117 (Hong Kong Court of Final Appeal)). On a somewhat different note, the Supreme Court of India has invalidated extremely restrictive guidelines that prohibited the common citizen from displaying the national flag, reasoning that displaying the national flag is a facet of a

citizens' right to expression under the Constitution (*Union of India v Naveen Jindal* ((2004) 2 SCC 510).

(b) Limiting Freedom of Expression

Because all rights of freedom of expression are subject to limits, determining the 'coverage' of a right of freedom of expression is only the first step in resolving a question about its application. As a general proposition, Asian legal systems are, in varied contexts, willing to restrict speech to an extent that would be impermissible in many Western nations. Laws criminalizing blasphemy or proselytization in certain Islamic nations, including Malaysia, Indonesia and Pakistan, form one example, while another illustration is the controversial *lèse-majesté* law in Article 112 of Thailand's *Criminal Code* that criminalizes defaming, insulting or threatening the Monarchy (and by extension the Thai government: Harding and Leyland, 237–247).

The reasons for this willingness to limit freedom of expression will be explored more fully in Part II of this Chapter. For the moment, we simply note a few pertinent issues of constitutional structure prevalent in Asia. In most Asian constitutions, limitations on freedom of expression are explicitly or implicitly delineated by the constitutional text itself. Sometimes limitations are expressed in general terms such as through a provision for 'reasonable restrictions', such as Article 19(2) of the *Indian Constitution*, or a general limitation applicable to most or all rights listed in the constitution, as seen in Articles 12 and 13 of the *Japanese Constitution*. Indeed, constitutional rights of freedom of expression are universally limited and thus all constitutional systems must address the question of how, and in what circumstances, freedom of expression can be restricted.

(c) The Application of Freedom of Expression Guarantees

Positive and Negative Application

A final set of structural considerations relates to the application, or scope, of a right of freedom of expression. Conceptually, like other rights, rights of freedom of expression might be 'positive', entitling the rights holder to demand that enjoyment of the right be ensured, or 'negative', protecting the rights holder only from interference. Although the drawing of this distinction is much criticized (Sunstein 2006, p. 207), it remains significant in the constitutional law of freedom of expression.

In the common law world, constitutional rights are usually thought to have an exclusively negative cast. However, in many other countries, there is no general reticence about positive constitutional rights and in some countries the recognition of a positive duty of protection has influenced even free speech jurisprudence.

Several Asian constitutions guarantee 'duties of protection' (see for instance the reading of Article 21 of the Indian Constitution in *Francis Coralie Mullin v Administrator, Union Territory of Delhi* (1981) 1 SCC 608). However, the effect of the recognition of such positive obligations on the part of the State on the conceptualization of free speech is not always clear.

In India, the concept of a duty of protection has helped justify outright proscriptions on freedom of expression in certain situations. For example, in upholding the ban on a work of fiction alleged to offend the religious sentiments of a particular community, the Supreme Court reasoned that the State had an obligation to protect and safeguard the interests of minorities. (*Baragur Ramachandrappa v State of Karnataka* (2007) 5 SCC 11). Such limitations on expression are fairly common in other Asian countries too. (For example, Thio 2003 (an analysis of the community-

oriented approach of the Singapore judiciary in interpreting the constitutional guarantee of freedom of speech)).

II. Comparative Conceptions of Freedom of Expression in Asia

The structural issues analyzed above are undoubtedly important when considering the law governing freedom of expression in Asian jurisdictions. But the most interesting points at which Asian constitutions have departed from the more widely studied Western systems of constitutional protection of freedom of expression are found in the clear differences in the conceptions of substantive values — about freedom of expression specifically, and rights more generally — that underlie Asian constitutions.

There are certain underlying characteristics common to a large number of countries that are important to bear in mind while engaging in such a comparative exercise. For one thing, democratic norms are undoubtedly weak in many Asian nations. While some countries are *per se* undemocratic on any fair understanding (North Korea and China) (Chen 2010, pp. 882-884, Zhang 2010, p. 915), others are democracies but susceptible to coups or the imposition of martial law (for example, Pakistan) (Qureshi 2010), and still others are formally democratic but not always accompanied by strong democratic institutions or norms (Sri Lanka) (Coomaraswamy and Reyes 2004). Others are functioning democracies, but ones that see their governments change rarely (Japan) or never, or at least not yet (Malaysia and Singapore). The weakness of democratic norms is the first and foremost challenge to the enforcement of rights that might be formally entrenched in a written constitution.

The challenge for judicial bodies in Asia will often be that the indifferent commitment to democratic values is often accompanied by a lack of respect for judicial independence. Therefore, even where courts have a strong normative

commitment to certain civil liberties, it would be necessary for them to act strategically to advance those values without jeopardizing their long-term institutional viability. Interestingly, however, there is scholarship that suggests that courts have been performing reasonably well on that score in certain East Asian countries (Ginsburg 2003, Chang 2010).

We now turn to the particular Asian countries that we propose to explore in greater detail. As we said above, the aim is not to flesh out every detail of constitutional jurisprudence pertaining to this right in any of these nations. It is, rather, to try to obtain a better and deeper understanding of the core themes that play out in this sphere of constitutional law, in different though related forms, in much of Asia.

1. Japan

Even before the decline of democracy in the 1930s, civil liberties in Japan were regarded as quite weak: those political rights that were enumerated in the Meiji *Constitution* had long been subject to stringent 'public order' regulations used to suppress civil unrest. Pre-war rights guarantees were not constitutionally entrenched, and there was no mechanism for judicial review of legislation (Chen 2010, 853; Krotoszynski, 139). In contrast, the post-war Constitution has been held up as a 'success story' of transplanting western liberal constitutional democracy into an Asian context (Chen 2010, 855, cf Law). Since 1946, Japan has had a robust democratic constitutional system, with relatively strong constitutional rights and courts with strong, if infrequently exercised, powers of judicial review under Article 81 of the *Japanese Constitution* (Oda, 88; Matsui, 2011a).

In relation to freedom of expression, Article 21 of the Japanese *Constitution* provides that:

> Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

Article 19 provides that 'Freedom of thought and conscience shall not be violated'. However, Articles 12 and 13 limit all constitutional rights and freedoms, including freedom of expression and conscience, on the basis of a broad 'public welfare' limitation. Article 12, the principal limiting clause in freedom of expression cases, reads:

> The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavour of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilising them for the public welfare.

That clause is implemented through a 'balancing of interests' test that weighs the value of the right against the value achieved by restricting that right, and requires that any restriction be 'reasonable and necessary' (Oda, 92–3). The doctrinal development of this test resembles some aspects of United States law: where prior-restraint of speech is involved (as in censorship), the Court applies the most exacting standard of scrutiny; where a content-based restriction is challenged, the government must show that it is narrowly tailored to achieve a compelling interest, or that there is a clear and present danger of significant harm that the law avoids; and content-neutral restrictions require the government to show that it is the least restrictive means to achieving an important objective (Matsui, 2011a, 196–7; Matsui, 2011c, 1398; Oda, 91).

However, this superficial similarity looks quite different in context. In Asian courts as elsewhere, formal doctrine does not always fully reveal the values that actually animate judicial decision-making. Most significantly in the Japanese case, the Supreme Court has never applied these tests to rule a law invalid. This aspect of Japanese constitutional law reflects a more general feature: the rarity of judicial overruling. Indeed, the Court has only exercised its power to strike down

unconstitutional legislation on eight occasions since 1946 (Matsui, 2011a, p. 146). Thus, although the Court apparently takes a United States-style approach to investigating questions of the constitutional permissibility of limitations on expression, it is somewhat difficult to make any clear statement of what would constitute an impermissible restriction on speech. Whether or not this means the Court is hostile or unsympathetic towards individual rights, or should be labeled 'conservative', is a matter of contention amongst Japanese legal scholars and judges (Fujita, 2011, contra Watanabe, Etoh and Odanaka). The more general question of how the justices of the Supreme Court consider their own role in constitutional adjudication is likewise contentious (see Krotoszynski, 142–145; Matsui 2011b, 1375). These constitutional practices can perhaps be fully understood only in the context of the broader political and constitutional culture. The traditional view of Japanese social and political culture is that social harmony and consensus are prioritized and promoted over individual freedoms and strong dissent (Matsui 2011a, 210–211).) though it is also contended, to the contrary, that strong opinions are held and voiced, but through non-individual channels that are unfamiliar to Western observers (Beer, Law 2011).

The picture is further complicated when the nature of judicial review in Japan is taken into account. When assessing the Japanese Supreme Court's approach to freedom of expression it is important to bear in mind that the failure to formally invalidate any legislation on the ground of violation of Article 21 does not imply that judicial decisions in this realm have had no effect on free expression in Japan. Significantly, in several decisions, the Supreme Court has employed the guarantee of free expression in Article 21 to inform its interpretation of the statute in question. In the *Tokyo Metropolitan Security Regulation Case* (20 July 1960, *Keishu* 14-9-1243),

for instance, a majority of the Court interpreted a statute governing public assembles, to require that an application be rejected only 'under very rare circumstances', such as where 'the mass movement is recognized as clearly and directly dangerous to the maintenance of the public peace'. Similarly, in the *Narita Airport Case*, the Supreme Court considered a law that granted the Minister of Transport a power to prohibit free expression near a controversial airport development. In upholding the power, the Court again read the law narrowly as apply only where 'violent and destructive activities' were 'highly likely' (Krotoszynski, 153–4).

A strong emphasis on consensus, order and communal values is detectable in the Japanese case law in the realm of free expression, consistent with the social norms highlighted earlier. Two cases, both decided in 2011, and both relating to limitations on expression connected with the national anthem, are illuminating. The first case, Case No 2008 (A) No 1132 ('*Obstruction Case*'), involved a person indicted under Article 234 of the Penal Code, which makes it a criminal offence to forcibly obstruct the business of another. The accused, who had served as a teacher at a Tokyo high school, arrived before a graduation at the school, distributed leaflets to parents, ignored the principal's request to stop, voiced his opposition to the requirement to stand and sing the national anthem and shouted loudly when confronted.

The Supreme Court held that Article 21 of the Constitution did not preclude the accused from being held criminally responsible under Article 234 of the Penal Code. Characterizing the accused's actions as 'rough speech and behavior' that caused 'uproar', the Court concluded '[t]he acts of the accused in question were performed in an inappropriate manner that was unsuitable to the occasion, and caused interference with the smooth implementation of the graduation ceremony, which is supposed to be held in a peaceful and quiet atmosphere, to the extent that such

interference could not be overlooked'. (Notably however, the Supreme Court upheld the lower court's imposition of a fine even though a prison sentence was sought by the prosecutor.)

Case No 2010 (O) No 951 ('*Anthem Case*') involved similar circumstances. By way of protest, a group of teachers and an official employed at various Tokyo Metropolitan high schools refused to comply with official orders issued by the principals at those schools to stand, face the national flag and sing the national anthem during official ceremonies. The Supreme Court held that the orders did not violate Article 19 (freedom of thought and conscience) because they did not force the appellants 'to have a particular thought or prohibit them from having an objection thereto, nor … compel the [appellants] to confess whether they have or do not have a particular thought'. The 'indirect' constraint involved in forcing the appellants to perform actions at odds with 'their views of history' was held to be 'necessary and reasonable' as the orders were directed to securing the 'well-ordered' and 'smooth' procession of official school events and to the performance of the appellants' legal duties as public servants.

This emphasis on public order over individual rights can be seen as far back the *Tokyo Metropolitan Security Regulation Case* (1960) in which a majority of the Court upheld the constitutional validity of a Tokyo city ordinance prohibiting the use of a park for a May Day assembly on the basis of the 'public welfare' served by maintaining the public peace within the park. While this attention to public order distinguishes the Japanese Supreme Court's approach from that of the Supreme Court of the United States, however, it is not obviously far outside the international mainstream. Courts have given considerable weight to concerns of this kind in Western countries too. They are especially notable in decisions of the courts in the

United Kingdom upholding s 5 of the *Public Order Act* (*Hammond v DPP* [2004] EWHC 69; *Norwood v DPP* [2003] EWHC 1564) and have received widespread, though not yet dominant, judicial attention in Australia (*Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013); *Coleman v Power* (2004) 220 CLR 1). However the recent cases drive home the strength of that commitment and the distinctiveness of the contexts in which it can be invoked in Japan. In those cases, laws aimed at public order at official events were upheld as 'necessary and reasonable' even though they were directed to disruptions that preceded the events, and even where they involve conduct primarily involving abstaining from participation in the ceremony.

2. Singapore

Article 14 of the *Constitution of Singapore* provides 'every citizen of Singapore … the right to freedom of speech and expression' subject to any restriction contained in a law of the Parliament that it

> 'considers necessary or expedient in the interest of the security of Singapore … friendly relations with other countries, public order or morality, and restrictions designed to protect the privileges of Parliament or t o provide against contempt of court, defamation or incitement to any offence'.

Article 14(1)(b) grants 'all citizens of Singapore … the right to assemble peaceably and without arms' subject to any restriction contained in a law of the Parliament. 'Special powers' relating to subversion and emergencies may also operate to further limit free expression (Articles 149, 150).

Article 14 is to be read in the context of an unusually well-defined, explicit state ideology. Since the first Singaporean elections in 1959, the People's Action Party (PAP) has held unassailable control of the government, and opposition parties have never held more than three seats at any one time (Tey 2011, 235). The PAP's ideology — and hence the legal and political culture of Singapore — is often broadly

described as neo-Confucianist or 'communitarian', meaning that there is a greater emphasis on community values and social harmony through respect for hierarchical relations, which trumps individual rights and plural conceptions of the good (as evident in the 1991 Parliamentary Report 'White Paper on Shared Values'). The Singaporean government embraces and frequently re-affirms its commitment to 'Asian values' though some commentators discern a gradual shift away from its tight restrictions on expression, and towards permitting 'disagreement without being disagreeable or treating critics as rebels' (Tan and Thio, 2010, p. 984–-85).

When considering limitations on freedom of expression, the central test for Singaporean courts grants Parliament 'an extremely wide discretionary power and remit that permits a multifarious and multifaceted approach towards achieving any of the purposes specified in Article 14(2) of the *Constitution*' (*Chee Siok Chin v Minister for Home Affairs* [2005] 1 Sing L. R. 582). When called upon to interpret the powers of Parliament to limit Article 14, Singapore's courts 'have tended to defer to the government's assessment of the needs of public order, without requiring that the restrictions be informed by substantive standards of reasonableness, proportionality, or necessity within a democratic society' (Thio, 516).

An array of laws restrict both the content and mode of expression, many of them justified on 'public morality' grounds. Various statutes provide for the censorship of obscene or indecent films, books, music, advertisements and posters. Others create offences relating to 'unlawful' public assembly, nuisance offences, and offences against public order (Tan and Thio, 2010, 991). Consequently, the power of censorship boards to effect prior-restraints on expression by banning particular material is not meaningfully constrained by Article 14. To take one example, the Board of Film Censors is empowered under the *Films Act* to ban 'party political

films', defined as films that it considers to be 'sensationalistic', not 'factual and objective' or presenting a 'dramatised' or 'distorted picture' of political issues.

In addition, the news media are subject to significant restrictions in Singapore that are not typical of other democracies. Foreign press ownership and licenses to operate or distribute foreign newspapers are especially strictly controlled at the Attorney-General's discretion. In *Dow Jones Publishing Company (Asia) Inc v Attorney General* (1989), the Court of Appeal upheld a decision to reduce the circulation of the *Asian Wall Street Journal* from 5000 to 400 after the paper had questioned the government's intentions in establishing a second stock exchange and refused to print a Government reply.

This sensitivity to criticism of government is evident also in the law of defamation and in the robust interpretation of the common law offence of 'scandalizing the court'. Like much of the rest of the world, the Singaporean Courts have considered, but not adopted, the United States Supreme Court's decision in *New York Times v Sullivan* (Stone and Williams, 2000) but in Singapore the position is more than usually permissive of defamation actions. Singaporean courts have considered and rejected the approaches to political defamation in the US, UK and Australia that limit defamation law in the interests of freedom of expression (Tan). In *Review Publishing Co Ltd v Lee Hsien Loong*, the Court of Appeal declined to adopt either the House of Lords' approach to responsible journalism (established in *Reynolds v Times Newspapers* [2001] 2 AC 127), or the Australian rules (established in *Lange v Australian Broadcasting Corporation* (1997) 182 CLR 520) (Thio, 2003, 523). Also, damages awards are quite high, and have been described as 'crippling' and no PAP politician has ever lost a defamation suit (Tey, 458). There is some suggestion (Tan), however, that Court of Appeal might apply the House of Lords' test

in the future in defamation cases involving Singaporean citizens (as opposed to foreigners who are not entitled to Article 14 protections: *Review Publishing Co Ltd v Lee Hseien Loong* [2010] 1 Sing L. R. 52). As to criticisms of judges or the courts generally, any speech that 'scandalises' the judiciary is criminalized, and can be prosecuted by the Attorney-General. The offence does not require that any 'real risk' of prejudicing the administration of justice be proven, rather it requires only proof that the speech has the 'inherent tendency to interfere with the administration of justice' (*Attorney-General v Wain* [1991] SLR 383) without any need for proof of an intention to do so. (*Chee Soon Juan's Case*, Lia Siu Chiu J).

One recent development, indicative of prevailing attitudes to freedom of expression, is the establishment of a 'Speakers' Corner' in 2000. The *Public Entertainments (Speakers Corner) (Exemption) Order of 2000* creates a 'free expression' area within Singapore's central business district. However, use of the area is still strictly controlled: potential speakers must be Singaporean citizens, must apply for a government-issued permit 30 days prior to speaking, must not use amplification, must only address the audience in an official language, and must only speak for a limited time on administration-approved subjects (Thio, 517–520). Speakers who violate the conditions may be suspended for 30 days from using the corner, and may be charged with violating the *Public Entertainments and Meetings Act*, which carries a maximum penalty of a $10,000 fine. Several speakers have been prosecuted for violating the regulations. In one such instance, *Chee Soon Juan's v Public Prosecutor* a speaker was fined $3,000 for breaching regulations aimed at preventing social unrest, after he spoke critically of Singapore's ban on wearing a particular form of Muslim headscarf, the *tudung*, in schools, which had led to the suspension of four primary school girls.

Judge Kow Keng Siong held that ‘some members of the public’ believed the speech to be ‘racially and religiously divisive’ and stated that ‘any disturbance to the delicate equilibrium in our multi-racial and multi-religious country can have potentially catastrophic consequences’ (Thio, 521–522).

In conclusion, then, freedom of expression in Singapore is tightly controlled both through political culture and legal restrictions. Any valid statute is capable of curtailing expression, and courts take a permissive and deferential approach to limitations on free expression.

3. Malaysia

Malaysia and Singapore share a close and intertwined political and cultural history and hence many constitutional similarities. Since the state’s inception in 1957, Malaysia’s constitutional system has provided for a strong central federal executive, and is said to be typical of the ‘East Asian developmental states’ that aimed at strong economic progress and later the development of democracy over time (Harding, ch 2). It has also been dominated by a single political party: the National Alliance coalition, which has obtained a clear majority in each of the twelve elections held so far, and its Chairman — who has in each instance also been the President of the largest political party in the coalition, the United Malays National Organisation (UMNO)) — has each time been appointed Prime Minister.

While in this context, broad restrictions on freedom of expression are not surprising, the breadth of permissible limitations on expression contained in the *Constitution* itself is especially notable. While Article 10 of the *Constitution* outlines the freedom of expression, and guarantees ‘every citizen … the right to freedom of speech and

expression'. In Article 10(2) that right is significantly qualified by a provision that Parliament may impose by law, any restriction

> 'it deems necessary or expedient in the interest of the security of the Federation … friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament … or to provide against contempt of court, defamation, or incitement to any offence'.

Moreover the Constitution explicitly requires courts to take a deferential approach to the interpretation of limitations on expression by limiting the power of the Courts to inquire into the necessity for laws directed at restrictions mentioned in Article 10(2). (Article 4(2)(b); Vohrah, Kohn and Ling, 108). In addition, Article 10(4) allows content-based restrictions on 'sensitive issues': it provides that as to restrictions to free expression on the grounds of national security or public order, 'Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative protected by the provisions of Part III [citizenship], article 152 [national languages], 153 [duties, responsibilities and powers of the Monarch] or 181 [savings for the powers of the Ruling Chiefs of various states] …'. Article 10 is also further limited by executive emergency powers (Article 150), legislation aimed at combating 'subversion' or 'action prejudicial to public order' (Article 149) even absent a state of emergency being declared (Harding, 164). Finally, as the text of Article 10 suggests, free expression rights are enjoyed only by Malaysian citizens. (Tan and Thio (2010) p 989.)

In the regulation of freedom of expression in Malaysia, matters of race and religion have proved to be particularly sensitive flashpoints. Sedition and security laws extend to matters that in other jurisdictions would come under the banner of hate speech regulation. Section 22(1) of the *Internal Security Act 1960* empowers the Minister to prohibit any publication that the Minister considers likely to cause violence, disobedience, a breach of the peace, or hostility between races or classes of the

population. Section 4 of the *Sedition Act 1948* criminalizes making, preparing or conspiring to do a 'seditious act', which includes uttering seditious words or producing or importing any seditious publication. The definition of sedition in s 3 is wide, and extends to exciting hatred or contempt against the government or judiciary, fomenting revolt, discontent, disaffection, ill-will or hostility among the citizenry and there is no requirement speaker intended to incite violence, tumult or public disorder (*Public Prosecutor v Ooi Kee Saik* [1971] 2 MLJ 108 (High Court of Malaysia) [16]). Strict limits on criticizing the judiciary, derived from Article 125 of the Constitution, also exist (*Majlis Peguam Malaysia v Raja Segaran a/l Krishnan* [2005] 1 MLJ 15; Harding 2012, 219).

Limitations on religious expression — in particular strict curtailment of blasphemy and certain forms of proselytization — have take upon especially high prominence in Malaysian law. Articles 295–298A of Malaysia's Penal Code make it an offence to utter words that are intended to offend another's religion. The States have enacted a wide range of specific prohibitions relating to religious offence, some applicable only to Muslims, and other applicable to both Muslims and non-Muslims alike. For Muslims, certain statutes prohibit apostasy, worshipping in an incorrect manner, defying religious authorities, and falsely claiming to be a religious authority. Blasphemy offences, which protect only Islam, apply to all persons, and include insulting, bringing into contempt or ridiculing the religion of Islam, Islamic ceremonies or practices, Islamic religious authority figures or the verses of sacred Islamic texts. These offences can carry penalties of heavy fines and severe prison sentences (Masum; Marican and Adil).

Propagation of religious belief is likewise heavily regulated. Nine of Malaysia's fourteen states have enacted laws that limit the ability of non-Muslims to propagate

their religious beliefs. These include outlawing the conversion of Muslims, and, in certain states, an offence of subjecting a Muslim to speech or literature concerning a non-Islamic religion, including distributing that literature in public (see, eg, *Enactment for Malacca No 1 of 1988*, *Kedah No 11 of 1988*, cited in Tan and Thio, 1339). In the context of religions whose practice includes a duty to proselytize, the regulation of proselytizing may in fact amount to a regulation on practice, to which art 11(4) does not extend (Tan and Thio, 2010, 1339).

The extensive regulation of expression in Malaysia has been somewhat limited by the courts. Typically, however, limitations on religious expression have been struck down on federalism grounds, rather than to preserve constitutional rights. In *Mamat bin Daud v Government of Malaysia* [1988] 1 MLJ 119, the Federal Court struck down s 298A of the *Penal Code*, which prohibited a wide range of offensive acts aimed at causing 'religious disunity' (including making the imputation that another person was an apostate). The Court held that the substance of s 298A did not relate to 'public order' but rather religious matters or affairs; that legislative power is reserved to the States alone.

In an important 2011 decision, however, there appears to be some strengthening of judicial approaches to Article 10. In previous cases, it had been held that that while a law that limits Article 10(1) 'must be sufficiently connected' to the subjects enumerated under Article 10(2)(a), the courts would not inquire into the reasonableness of the restriction (*Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566). However, in a significant recent case, the Federal Court (Malaysia's highest court) read a 'reasonableness' requirement into Article 10. In *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLF 333, the Federal Court held that an act aimed at preventing conflicts of interest in the legal profession did not infringe Article

10's guarantee of freedom of association. In doing so, the Court held that Article 10 required a standard of 'reasonableness' because, as a general matter, limits to constitutional rights were to be read restrictively. In addition, the Court appeared to adopt a 'basic structure' doctrine finding that 'certain features that constitute [the *Constitution's*] basic fabric', and that '[u]nless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional'. Part II rights guarantees constituted one part of that basic fabric (*Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLF 333, 342). These principles were applied to Article 10's freedom of expression guarantee in *Muhammad Hilman bin Idham* [2011] 6 MLJ 507, in which a majority of the Court of Appeal struck down a provision that curtailed university students from expressing or doing anything that could be reasonably construed as supporting, sympathizing with, or opposing any political party, on the basis that, following *Sivarasa Rasiah* and reading the word 'reasonable' into the provisions of Article 10, the statute unreasonably restricted freedom of expression and did not serve the Government's alleged 'public order' interest. (*Muhammed Hilman* is also of considerable methodological interest. In contrast to the general reluctance among Malaysian judges to consider foreign materials in constitutional cases, Mohd Hishamudin JCA in *Muhammad Hilman* quoted two United States cases, including Justice Brandeis' famous opinion in *Whitney v California*, 274 US 357 (1927).)

In keeping with this overall trend, a recent lower court decision overruled the Home Minister's rejection of an application for a print publishing license as a violation of the freedom of the press, which the Court read into Article 14. The case is yet to go on appeal, but it marks a possible landmark expansion in freedom of expression in

Malaysia ('Malaysiakini: We maintain editorial independence', New Straits Times, 24 September 2011).

India

India is an especially interesting case for freedom of expression in Asia (as well as generally). An independent republic since the end of British Rule in 1950, India has a well-developed constitutional jurisprudence; a long standing commitment to democracy (albeit with a significant question mark with respect to the two-year period when a proclamation of emergency was made by Prime Minister Indira Gandhi in the 1970s); and a commitment to liberal constitutional values that sits alongside deep-rooted societal and cultural norms and values that affect freedom of expression.

Protection for freedom of expression is found in Part III of the *Constitution of India*, which sets out the fundamental rights of the people of the country. Many though not all of these rights are enjoyed against the State, but there are other rights that are enforceable against private persons too (at least in certain contexts).

The right to freedom of speech and expression is to be found in Article 19 of the Constitution. Article 19(1)(a) states that all citizens shall have the right 'to freedom of speech and expression', part of a set of rights contained in Article 19 which also include the right of peaceable assembly, the right to form associations and unions, and the right to move freely throughout and to reside in any part of India.

Like many constitutions, express limitations are found in the same article. Clauses (2) to (6) delineate 'reasonable restrictions' that can lawfully be imposed on the exercise of each of these rights. As it stands today, Article 19(2) states that the State shall not, by virtue of Article 19(1)(a), be prevented from making any law imposing 'reasonable restrictions on the exercise of the right ... in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with

foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence'.

When the Constitution first came into being, the exception carved out in Article 19(2) was worded differently, and pertained to 'any law relating to libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow the State'. In response to an early Supreme Court judgment (*Romesh Thapar v Union of India* AIR 1950 SC 124) that invalidated certain statutes authorizing broad measures to ensure public safety and the maintenance of public order, the *Constitution (First Amendment) Act 1951* was passed, enlarging the heads of permissible restrictions to include 'friendly relations with foreign States', 'public order', and 'incitement to an offence'. However, and very significantly, the word 'reasonable' was inserted before the word 'restrictions'.

As in the case of the other Asian jurisdictions analyzed in this Chapter (although perhaps not to the same extent), the Indian Supreme Court has been willing to defer to the executive with respect to restrictions on the right to free expression in different contexts, and most of all in the realm of speech on sensitive topics such as religion. The *Indian Penal Code 1860* contains a number of provisions imposing limitations on the exercise of free speech in various contexts, including the type of limitations that would fall within the category of content-based (and viewpoint based) restrictions. Section 153A of the *Indian Penal Code 1860* criminalizes the promotion, 'on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between

different religious, racial, language or regional groups or castes or communities'. The provision further criminalizes the commission of 'any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquility'. Section 95 of the *Criminal Procedure Code 1973* permits the forfeiture of any book or written material that appears to the State Government to contain material that is punishable inter alia under s 153A or s 153B.

The Court has upheld the constitutional validity of these penal provisions, reasoning that they fall within the ambit of 'reasonable restrictions' on the constitutional right. While upholding the power of forfeiture in s 95, the Court has held that, in order for the provision to be compatible with the constitutional right to free speech, it must be interpreted restrictively. The Court has noted that the power to order forfeiture of a book is a drastic power that has a direct impact upon a cherished right, and as such ought to be construed narrowly, and the exercise of the power must be strictly in accordance with the procedure envisaged in the statutory provision (*State of Maharashtra v Sagharaj Damodar Rupawate* (2010) 7 SCC 398).

Bijoe Emmanuel v State of Kerala (1986) 3 SCC 615 is another significant case, and one of the most pro-speech decisions given by the Indian Supreme Court. In this case, a school had expelled three children belonging to the Jehovah's Witnesses faith, on account of their failure to join in the singing of the national anthem. The Supreme Court set aside the expulsion of the children, holding that their refusal to participate in the singing of the national anthem was on account of genuine religious objections.

Hence, the action taken was violative of their constitutional right to practice their religion as also their right to freedom of speech and expression under Article 19(1)(a).

In the relatively recent case of *S Khushboo v Kanniammal* (2010) 5 SCC 600, the appellant was a well-known actress who had commented on the increasing incidence of pre-marital sex in the State of Tamil Nadu, and expressed an opinion that there was no harm caused. A number of criminal complaints were filed against her, alleging that the statements were offensive and defamatory in nature. Quashing the criminal complaints, the Supreme Court held that notions of societal morality were inherently subjective, and the criminal process could not be used to interfere unduly with the domain of personal autonomy. The remarks have to be judged keeping in mind the average, prudent reader, and the law ought not to be employed in a manner that would have a chilling effect on free expression. Hence, the Court concluded that even a prima facie case was not made out against the appellant, and accordingly quashed the criminal complaints.

In the context of the law of defamation, the Supreme Court has recognized the possible adverse impact effect on freedom of expression of permitting public officials to sue too readily for libel. In the landmark case of *R Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632, the Supreme Court approved the *New York Times v Sullivan* rule, and held that a case for defamation would not be made out 'even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made … with reckless disregard for truth.' Nonetheless, from a practical perspective, defamation in India appears to be less relevant to the constitutional jurisprudence governing free speech than in other

jurisdictions such as the United States (or Singapore, as discussed earlier). This is possibly on account of particular features of the Indian legal system. While defamation is a civil wrong, defamation suits (like most civil cases) take inordinately long in the Indian court system. Further, heavy damages are rarely imposed and so the prospect of civil defamation does not perhaps have the same 'chilling effect' on free speech as is the case in other jurisdictions (such as Malaysia). Defamation is also a criminal offence under the *Indian Penal Code 1860* and this is probably a greater deterrent to controversial speech. Even in the context of criminal law, though, the penal provisions relating to causing offence to different classes of persons appear to be more frequently invoked in the context of controversial political or artistic speech, and it is these that are most significant for the exercise of the right to free expression in India.

Contempt of court law in India is also extremely relevant to a discussion of a possible 'chilling' of the right to free speech and expression. Arguably, the Supreme Court has been less than consistent in this sphere. In cases such as *In Re: Mulgaonkar* (1978) 3 SCC 339, the Supreme Court has advocated cautious resort to the contempt jurisdiction, observing that judges should not be hyper-sensitive and that the press should be given free play within reasonable limits. However, in *In Re: Arundhati Roy* (2002) 3 SCC 343, the Court sentenced Ms Roy to a day's imprisonment, holding that she had committed contempt of court by stating on affidavit (in pending contempt proceedings) that the Court displayed a 'disquieting inclination … to silence criticism and muzzle dissent, to harass and intimidate those who disagree with it'. In this case, the Court acknowledged that outspoken criticism of the courts is permissible, but

concluded that the contemnor has exceeded her constitutional right to speech by imputing motives to the Court, and therefore convicted her for contempt of court.

While freedom of the press is not independently guaranteed in Article 19(1)(a) or elsewhere, the Supreme Court has held it to be an integral part of the broader constitutional right to free speech and expression (Sorabjee, Soli J. 2000, p. 335). A number of interesting cases in the 1970s dealt with situations where ostensibly neutral regulatory measures were alleged to be intended to coerce the press. In *Bennett Coleman & Co v Union of India* AIR 1973 SC 106, the Supreme Court held that a policy significantly restricting the import of newsprint would be violative of Article 19(1)(a), since it would directly affect the circulation (and viability) of the newspaper in question.

It is hard to assess the extent to which any of the cases discussed above are indicative of a real and meaningful trend in the context of free expression jurisprudence in India. Generalizing too broadly from a few landmark decisions is always hazardous. This is particularly the case with a constitutional court consisting of a large number of justices, like the Indian Supreme Court. (In response to mounting arrears, Parliament has increased the strength of the Supreme Court several times since 1950, and the Court today comprises of a Chief Justice and a maximum of thirty other justices. The Court ordinarily conducts judicial business in panels of two or three justices, with five or more justices sitting together only rarely, normally for constitutional questions of first impression.)

Inconsistency in Indian constitutional jurisprudence is a very real phenomenon (Seervai, pp. 2964–65), and there is no reason to believe that this sub-set of constitutional law is left unaffected. The contrasting approach of the Court in two cases highlighted above, *Bijoe Emmanuel* and *Baragur Ramachandrappa*, is revealing. While efforts to reconcile the decisions doctrinally could perhaps be made, the more plausible explanation may well be the one advanced by the legal realist, that the judicial ideology and personal predilections of the justices in question played a significant role.

In conclusion, India presents an interesting study of the often uneasy meshing of liberal constitutional values with significantly more conservative religious and social values. A further complicating factor is India's judicial structure (particularly the phenomenon of a high number of panels in the Supreme Court) and the uncertainty and fluidity of Indian constitutional jurisprudence. The cumulative effect of this is a constitutional structure and jurisprudence that values and protects the constitutional right to free expression, but far from perfectly.

III. Conclusion: Comparativism and Freedom of Expression in Asia

Comparative constitutional law analysis in the Asian context poses its own, distinctive challenges. The 'elephant in the room', of course, is the overarching debate regarding the universality or otherwise of human rights principles and norms (including the right to free speech), and the question of whether principles generally developed in liberal Western democracies are well-suited to transplantation in Asian jurisdictions (Lee, 2007 (analyzing but ultimately rejecting such concerns)).

But the challenges are both greater and more varied than that. The temptation to view Asia as a monolithic entity must be scrupulously avoided. Indeed, Asia within itself arguably contains all the complexities and variations that are to be seen on a survey of the globe as a whole. One analysis of five Asian nations classifies their constitutional practices, over time, as falling within one of three types: Classical Constitutionalism, Party-State and Hybrid Constitutional Practices (Chen, 2010). Chen concludes that there is reason for cautious optimism about the 'prospects of constitutionalism in Asia and its adaptability to Asian soil' (Chen, 2010, p. 884).

Related to the caveat about Asian nations themselves varying widely with respect to constitutional institutions and practices, there is a need to consider comparative constitutional law within Asia. As a matter of practice, do Asian nations borrow more willingly from other Asian nations than from the outside world? Normatively, should they?

Future scholarship on comparative constitutional law in Asia generally, and free speech jurisprudence in particular, might also consider whether Asian countries can or should look differently upon constitutional principles that might have originated outside Asia, but have since been 'tested' in other Asian jurisdictions. For an Asian country that is similar in institutional structure or cultural norms to another Asian nation, it might be easier to incorporate constitutional principle or doctrine that has already been adopted by the latter.

In any event, this debate regarding the potential use of comparative insights in Asian constitutional law goes only to one use of comparative analysis in constitutional law: the use of foreign law as an interpretive resource. There remain of course many other circumstances in which comparative inquiry may be useful. Constitutional design is one obvious instance, and the process of framing of new constitutions in

Asian countries such as Afghanistan and Iraq drew heavily on comparative insights. Comparative inquiry will also be required in cases that do not involve the straightforward application of freedom of expression principles. For instance, courts may consider foreign law on freedom of expression under choice of law rules where expression originating in one jurisdiction causes or is alleged to have caused harm in other jurisdictions or when questions arise as to the enforceability of foreign judgments.

Comparativism in one context or another is, therefore, an almost inevitable element of constitutional analysis in all legal systems, and one that Asian nations cannot avoid. This fact poses a challenge for constitutionalists to which comparativists are well placed to respond. Successful comparativism within the field of freedom of expression, as elsewhere, requires a deep and critical engagement with foreign law that encompasses critical legal and philosophical literature on freedom of expression as well as case law. In the case of Asia, it also requires close attention to the ways in which the countries in question differ from those to which comparative constitutional law scholarship has thus far primarily addressed itself, and the manner in which such differences can be accounted for without sacrificing the core values of free speech.

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