FREE SPEECH, CONSTITUTIONAL INTERPRETATION AND SEDITION IN MALAYSIA: TAKING A RIGHTS-EXPANSIVE APPROACH

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Abstract

The fundamental liberty of free speech and expression enshrined in the Malaysian *Federal Constitution* is subject to restrictions imposed by the legislature. The restriction in the article takes the form of the *Sedition Act 1948* which has been challenged as being unconstitutional and inconsistent with the provision restricting this freedom under the Constitution. One vehement challenge was made in the case of *Public Prosecutor v Azmi bin Sharom* ('*Sharom*'). This article examines how the Federal Court tested the constitutionality of the *Sedition Act 1948* by interpreting the clauses of article 10, in particular, the approaches to constitutional interpretation adopted by the Court in *Sharom*. Hence, the first aim of this article is to examine the approach undertaken by the Court in the interpretation of article 10 vis-à-vis the Act in determining the extent freedom of speech and expression is protected, in particular the type and nature of the originalist approach tradition adopted and the continued commitment to the 'four walls' approach and strict legalism. The second aim of the article is to set out the approach that the Courts may adopt in the interpretation of article 10 which presents an opportunity for the furtherance of Malaysian jurisprudence in promoting this fundamental right. Propositions will be proffered that other variations of the originalist approach could be favoured such as the rights-expansive variation, which may embrace the prismatic approach. Only when constitutional rights are interpreted broadly, and the qualifications of these rights are sufficiently restricted, will the true intention of the framers of the Constitution be put into effect.

Keywords: Free speech, freedom of speech and expression, *Federal Constitution*.

I INTRODUCTION

One of the vital characteristics of a functioning democracy is the respect for and protection of the freedom of speech and expression. Whilst enshrined and accorded by the supreme law of the land in Malaysia - the *Federal Constitution* in article 10(1) - this freedom struggles to ingeminate its position against its erosion by the Executive and the Legislature. In the case of the latter, the schism is between the Constitution and a plethora of Acts of

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Parliament. These Acts have been challenged as being unconstitutional and inconsistent with the provision restricting this freedom under the Constitution. One such Act is the *Sedition Act 1948* ('the Act') and one such challenge is the case of *Public Prosecutor v Azmi bin Sharom* ('*Sharom*').[1] In determining its repugnancy with the Constitution, parties turn to the vertex of the courts of the land, namely the Federal Court ('the Court'), which has to undertake the exercise of interpreting the Constitution's provision of the said freedom. Herein lies the arena of discontentment and the claim that the courts are not in favour of adopting a method in its interpretation exercise that advocates the protection of this freedom or upholding the freedom in the face of restrictions. It is an issue that is frequently raised in Malaysia particularly in recent years where there has been an increased call from the citizenry for greater democratic discourse, and, freedom of speech is viewed as sacrosanct amongst Malaysians.

According to Jain, constitutional interpretation is a matter of judicial attitude, which may result in either 'judicial passivism' or 'judicial activism', depending on the 'predisposition of judges as well as the type of legislations being considered by them.'[2] Hence, an examination of prevailing judicial attitudes in interpreting article 10 in the context of the challenges raised against the Act is essential. In the examination of these attitudes, the courts may be viewed as judicially passive in adopting a mechanistic approach to constitutional interpretation whereby declaring the law within the 'Four Walls' of the Constitution and adopting strict legalism. Alternatively, the Constitution may be viewed as a living instrument that is to be interpreted in accordance with the changing needs of society in a democratic state.

Central to this article is, firstly, the judgment in *Sharom* and, secondly, the approach to constitutional interpretation taken by the Malaysian courts, in particular, the originalist approach and the 'Four Walls' approach.

The former provides the background to an issue which the Malaysian appellate courts have had to address innumerable times, that is the constitutionality of the Act and the extent to which the Act erodes free speech in Malaysia. The rationale for making this case the starting point of the article lies in the position taken by the Court which elicited much chagrin, towards an Act that is viewed as having a chilling effect on free speech. This article reviews the judgment in relation to the first of the two questions raised in the defendant's application, in that, whether s 4(1) of the Act is inconsistent with article 10(2) of the Malaysian *Federal Constitution* ('the Constitution'). The Court in *Sharom* disregarded the reasonable test in favour of the proportionality test.

For the latter, the use of the originalist approach of constitutional interpretation in Malaysia requires an examination led by the scholarship of Tew[3] whose analysis and findings in relation to constitutional interpretation traditions of the Malaysian courts is essential to this article. Whilst Tew alludes to the variety of accounts of how originalism is viewed and takes a number of forms, its origins and roots are American. The originalist

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1 *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 75 (Federal Court) ('*Sharom*').

2 MP Jain, *Indian Constitutional Law* (NM Tripathi Private Ltd, 4th ed, 1987) 833.

3 Yvonne Tew, 'Comparative Originalism in Constitutional Interpretation in Asia' (2017) 29 *Singapore Academy Law Journal*, 719-742; Yvonne Tew, 'Originalism at Home and Abroad' (2014) 52 *The Columbia Journal of Transnational Law* 781.

theory's practise is detectable in Malaysian decisions where the courts were faced with the task of constitutional interpretation of fundamental liberties. Owing to the varied approaches to the originalist theory, the resulting consequences of interpretation are equally varied. These will be integrated in the article.

The first aim of this article is to examine the approach undertaken by the Court in the interpretation of article 10 of the Constitution vis-à-vis the Act in determining the extent to which freedom of speech and expression is protected. Reference will be made to the type and nature of the originalist approach tradition of constitutional interpretation adopted by the Court in *Sharom* and the continued commitment to the 'Four Walls' approach and strict legalism.

The second aim of the article is to set out the approach that the Courts may adopt in the interpretation of article 10 of the Constitution which presents an opportunity for the furtherance of Malaysian jurisprudence in promoting this fundamental right. Propositions will be proffered that other variations of the originalist approach could be favoured such as the rights-expansive variation, which may embrace the prismatic approach.

To enable the above aims, this article is structured in the following manner. First, in Part II, the background to the framing of the *Federal Constitution* in relation to article 10 and the approach adopted in the interpretation of the said article is set out. Part III then lays down the general background in the manner in which the Courts have approached the question of the constitutionality of the Act. Part IV proceeds to set the context of the prosecution in the *Sharom* case. The article then, in Part V, reviews the application of the various tests adopted by the Court in interpreting article 10 and determining the constitutionality of the Act, and the consequences that follow. Finally, in Part VI, the article sets out the approaches that perhaps are viewed as advocating a more rights-based approach to constitutional interpretation.

II CONSTITUTIONAL INTERPRETATION OF ARTICLE 10

The framers of the *Federal Constitution*, the Reid Commission (the Commission), were given the responsibility to 'make recommendations for a federal form of constitution' for Malaysia.[4] One of the two objectives considered by the Commission in making its recommendations was 'that there must be the fullest opportunity for the growth of a united, free and democratic nation'.[5] The Commission found it 'usual and…right' that the Constitution should 'define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life'.[6] Whilst the guarantee of these rights may be 'subject to limited exceptions in conditions of emergency', the Commission in the same breath emphasized the supremacy of the Constitution and the role of the Courts. The Commission's report states:

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4 *Report of the Federation of Malaya Constitutional Commission* 1957 (HMSO Colonial No. 330) [13] ('*Report of the Federation of Malaya Constitutional Commission*').

5 Ibid [14].

6 Ibid [161].

> The guarantee afforded by the Constitution is the supremacy of the law and the power and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise.[7]

The Commission clearly vested the duty of guardianship of these fundamental rights with the courts, which includes the task of constitutional interpretation of these rights. When reviewing the courts' duty, there is a view that the courts 'have not fully lived up to the expectation of the Reid Commission', and, that the 'courts have pursued the path of strict legalism and have adopted a deferential approach in the face of aggressive exercises of power by the executive or legislature'.[8] The pursuit of this "strict legalism" is felt most in the interpretation of the breadth and scope of the protection of free speech and expression enshrined in article 10 of the Constitution and is often invoked in relation to the constitutionality of the *Sedition Act 1948*.

Article 10 is also deemed by the courts as the 'most controversial provision'[9] in the Constitution in comparison to the other provisions related to fundamental liberties. The relevant clauses in article 10 related to freedom of speech and expression are as follows:

> (1) Subject to Clauses (2), (3) and (4)—
> (a) every citizen has the right to freedom of speech and expression; …
> (2) Parliament may by law impose—
> (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

Clause 2(a) allows a restriction to be imposed on this freedom when it is deemed 'necessary or expedient' in the interest of the objectives listed therein. The word "reasonable" before the word "restrictions" in this clause was removed by the drafters of the Constitution. In the Report of the Federation of Malaya Constitutional Commission 1957, reference is made to the dissent by Mr Justice Abdul Hamid,[10] one of the members of the Reid Commission where Justice Hamid commented that the inclusion of the word 'reasonable' would "lead to legal and constitutional complications." Justice Hamid added that the "Legislature alone should be judge of what is reasonable under the circumstances." Justice Hamid was of the view that the inclusion of the word will lead to challenges in the courts on the ground that the restrictions imposed by the legislature are not reasonable and will lead to uncertainty.

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7 Ibid.

8 HP Lee, 'Human Rights in Malaysia' in Randall Peerenboom, Carole J Petersen and Albert HY Chen (eds), *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions, France and the USA* (Routledge, 2006) 195.

9 See *Mat Shuhaimi bin Shafiei v Public Prosecutor* [2014] 2 MLJ 145 (Court of Appeal), 156 [27] ('*Mat Shuhaimi*").

10 *Report of the Federation of Malaya Constitutional Commission* (n 4) [13(ii)].

The removal of the word 'reasonable' in my view has led to the said restrictions being constructed widely by the courts of the land. The omission of any explicit qualification on the restriction in the wordings of the Constitution has been taken by the courts as leaving the courts with minimal jurisdiction to review the constitutionality of a legislation which acts as a restrictive mechanism. This attitude has allowed the Act and more specifically, prosecutions under the said Act, to be successful (discussed in Part III). In the context of the hopes and aspirations of the framers of the Constitution, the manner in which the courts have interpreted article 10 is viewed as adopting an approach that is not consistent with the true intention of the framers of the Constitution when referring back to the Commission's position on the role of the courts to prevent any subversion of these rights through legislative or executive restrictions.[11]

To add, the Malaysian legal system's main feature of constitutional supremacy has been devalued. In *Ah Thian v Government of Malaysia*,[12] Tun Suffian (the then Lord President) commented:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and the State Legislatures in Malaysia is limited by the Constitution and they cannot make any law they please.[13]

In light of this feature, the treatment by the courts of clause 1(a) to article 10 by Parliament vide the Act appears to water down the supremacy of the Constitution by interpreting clause 1(a) restrictively and in a manner that is averse to the aspirations of the framers of the Constitution.[14] The approaches in constitutional interpretation adopted by the Courts require an inquiry and leads us naturally to the question of whether there ought to be a shift in the approaches to interpretation. The article will look at the trends of the courts when interpreting the Constitution – firstly, through the application of the originalist approach; secondly, through the 'Four Walls' of the Constitution approach; and finally, the literal and strict legalism approach.

The originalist approach to constitutional interpretation made popular by American constitutional scholars – interchangeably referred to as "originalism" - is defined by Brest as 'the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.'[15] Whilst a critique of the varied approaches to originalism, Berger puts forth his 'good, old-fashioned kind' which he states '…by original intention, the explanation that draftsmen gave of what their words were designed to accomplish, what their words mean.'[16] He adds that the authority of judges is derived from the founders 'that conferred that authority, and it is confined by

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11 Ibid [161].

12 [1976] 2 MLJ 112 (Federal Court) 113.

13 The relevant articles that give credence to His Lordship's pronouncement are articles 4(1) read together with articles 128 and 162(6) of the *Federal Constitution*.

14 *Report of the Federation of Malaya Constitutional Commission* (n 4) [14].

15 Paul Brest, 'The Misconceived Quest for the Original Understanding', 60 *Boston University Law Review* 204, 234.

16 Raoul Berger, 'Originalist Theories of Constitutional Interpretation' (1988) 73(2) *Cornell Law Review* 350, 350.

their written restrictions.'[17] He further adds that the use of original intention 'is required if only because some words in the Constitution are susceptible of an enormous range of meaning.'[18]

To meander through the historical development of the theory as well as the merits and demerits of the approach is beyond the scope of this article. However, to frame the discussion that is viable for the aim of this article, reference is made to a number of variations to the originalist approach to interpretation laid down by Tew.[19] These are intention or meaning; expectations or purpose;[20] pluralist or dispositive;[21] interpretation or rhetoric;[22] or rules or standards. The article will focus on the first and the last variation as the use of these approaches has been evidenced in *Sharom* and the cases related to the interpretation of article 10.

Within the first variation, when interpreting a constitutional provision, the question is whether an inquiry into historical understandings ought to 'focus on the original intentions of the drafters or the meaning of the constitutional text'.[23] The method preferred by the Malaysian courts is to reference constitutional history and the intent of the framers, hence leaning towards original intent.

Within the fifth variation of rules or standards, constitutional provisions may state clear and determinate rules or alternatively, expressed as a standard or a general principle.[24] The former may be espoused in such a manner 'to limit discretion in future application' of the provisions; and the latter, 'tend to be stated in broader, abstract terms as standards or principles' which require construction and development – a more rights-expansive approach.[25]

Turning to the 'Four Walls' of the Constitution approach, this approach can be traced back to the Malaysian Supreme Court judgment in *Government of Kelantan v. Government of the Federation of Malaya*:[26]

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17 Ibid 350-51.

18 Ibid 351.

19 Yvonne Tew, 'Comparative Originalism in Constitutional Interpretation in Asia' (2017) 29 *Singapore Academy Law Journal* 719, 720.

20 The second variation is between expectations and purpose. In the context of the former, constitutional history is referenced to 'identify the specific expectation that members of an earlier generation had' in the manner in which the constitution would apply. Alternatively, the latter refers to constitutional history in identifying 'the broader purposes of values' that premises the motivation of the Constitution or specific provisions: see Tew (n 19) 722-23.

21 The third variation refers to the pluralist or dispositive. The pluralist adopts a number of other methods alongside the historical context of the Constitution such as 'text, doctrine, prudential reasoning, or prior precedent.' Alternatively, the dispositivist regards 'historical analysis as dispositive or deserving of greater weight in interpretation: see Tew (n 19) 724.

22 The fourth variation is either an approach that is interpretive or rhetorical. This variation speaks to the invocation of historical analysis that serves to ensure the legitimacy of the judicial institutions endures on the strength of the articulation of the values and the weight assigned to these values: see Tew (n 19) 724.

23 Tew (n 19) 721.

24 Ibid 725-26.

25 Ibid 726.

26 [1963] 29 MLJ 355 (Supreme Court).

> The Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia.[27]

This approach was further reiterated in *Loh Kooi Choon v Government of Malaysia* ('*Loh Kooi Choon*').[28] The 'Four Walls' approach is inward-looking and insular, disregarding the wisdom of the courts in other jurisdictions, including those which have a written constitution tradition. In *Merdeka University Berhad v Government of Malaysia* ('*Merdeka University Berhad*'), the court clarified this position when Lord President Suffian commented that '…while it may be useful on occasion to draw on the practice and doctrine of other countries - cases from the United States, Canada, England and India were cited to us - it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other constitutions.'[29]

Inextricably linked with the above is the strict literalism and formalism approach taken by Malaysian courts, adopting a formalistic approach, as opposed to a purposive constitutional interpretation approach. This strict constructionist approach comes into conflict with one that favours a rights-expansive approach which falls within the fifth variation discussion set out by Tew above.

Reference will be made to the judgment in *Sharom* in the following parts where the various approaches have been adopted and where there was an opportunity for a different approach to be adopted.

III THE RIFT – THE CONSTITUTION, SEDITION AND DEMOCRATIC DISCOURSE

One of the most controversial legislation in force in Malaysia is undoubtedly the criminal sedition legislation. The *Sedition Act 1948* is a pre-independence[30] law which was first enacted as the Sedition Ordinance of 1948 by the then Federal Legislative Council.[31] Whilst an inheritance from the British Colonial times, there is continued attachment to the Act as seen in its 1970 amendments[32] where the aim was to restrict 'public discussion' of 'sensitive' issues',[33] and the fact that the Act continues to remain in the statute books. The Act is an illustration of restrictions that Parliament may impose on free speech under

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27 Ibid 369.

28 [1977] 2 MLJ 187 (Federal Court), 188-89.

29 [1982] 2 MLJ 243 (Federal Court), 251.

30 The Federation of Malaysia gained independence from the British on 31 August 1957.

31 Under the Federation of Malaya Agreement of 1948, legislative authority was vested in the Federal Legislative Council.

32 Following the 1969 racial rights in Malaysia, the amendments to the *Sedition Act 1948* (Malaysia) was affected by the *Emergency (Essential Powers) Ordinance 45 of 1970* (Malaysia) and matters of seditious nature included, *inter alia*, the special position and privileges of the Malays, the national language and the sovereignty of rulers.

33 HP Lee, *Constitutional Conflicts in Contemporary Malaysia* (Oxford University Press, 1995) 11.

the authority of article 10 clause 2 and further by clause 4 of the Constitution which was inserted in 1971.[34]

The Act defines that an act is "seditious" when it is 'applied to or used in respect of any act, speech, words, publication or other thing qualifies the act, speech, words, publication or other thing as one having a seditious tendency'. "Publication" includes 'all written or printed matter and everything whether of a nature similar to written or printed matter or not containing any visible representation or by its form, shape or in any other manner capable of suggesting words or ideas, and every copy and reproduction or substantial reproduction of any publication.'[35] Section 3(1) of the Act enumerates what may be tantamount to "seditious tendency" and the provisions within the section are quite general and widely worded.[36]

Former Prime Minister of Malaysia Najib Razak had announced in June 2012 that the Act would be abolished and replaced with a National Harmony Act.[37] However, it appeared that the Act was here to stay in view of the amendments made to the Act in April 2015,[38] which although did not come into force, suggested its continued relevance, strengthening its position in view of the increased number of prosecutions.[39] The new government elected into Parliament in May 2018, had taken the position to repeal it but the legislation remains on the books.

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34 By virtue of s 2(b) of the *Constitutional (Amendment) Act 1971* (Malaysia), clause 4 was inserted with effect from 10 March 1971. Clause 4 reads: 'In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under paragraph (a) of Clause (2), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.'

35 *Sedition Act 1948* (Malaysia) s 2.

36 These include the following: '(a) to bring into hatred or contempt or to excite disaffection against any Ruler [or against any Government]*; (b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established; (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State; (d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State; (e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia; or (f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the *Federal Constitution* or Article 152, 153 or 181 of the *Federal Constitution*.'

* The phrase "or against any Government" in s 3(1)(a) was deleted by the *Sedition (Amendment) Act 2015* [PN (U2) 2961].

37 'Malaysia PM Najib Razak makes sedition pledge', *BBC News* (online, 2 July 2013) <http://www.bbc.co.uk/news/world-asia-23145379>; Kate Mayberry 'Sedition returns to Malaysia's legal toolbox', *Al Jazeera* (online, 16 May 2015) <http://www.aljazeera.com/indepth/features/2015/04/sedition-returns-malaysia-legal-toolbox-150423120557023.html>.

38 'Malaysia passes amendments to controversial Sedition Act', *Channel News Asia* (online, 9 April 2015) <http://www.channelnewsasia.com/news/asiapacific/malaysia-passes/1774810.html>; Agence France-Presse 'Malaysia strengthens sedition law in a 'black day' for free speech' *The Guardian* (online, 10 April 2015) <http://www.theguardian.com/world/2015/apr/10/malaysia-strengthens-sedition-law-in-a-black-day-for-free-speech>.

39 SUARAM, an NGO in Malaysia, in a memorandum to the Attorney General of Malaysia dated 25 November 2015 stated that since 2013, an increase of 1700 percent has been seen in terms of sedition charges made in comparison to the period between 2007 and 2012; <http://www.suaram.net/?p=7407>. The number of cases has been reported to have increased from 18 cases in 2013, 44 in 2014 and 220 cases in 2015. See 'SUARAM Human Rights Report 2015 Overview: Civil and Political Rights' <http://www.suaram.net/wordpress/wp-content/uploads/2015/12/SUARAM-HR-OVERVIEW-2015-combined-ver1.pdf>, 5.

The concern with the use of sedition law to silence free speech and opposing views lies in the restricted approach adopted by the courts in the constitutional interpretation of article 10(1) of the Constitution in protecting free speech and expression. Without a change in the interpretation approach, article 10(1) will become redundant and this will lead to a chilling effect on free speech and expression.

Its controversy arises from the fact that the Act has been firmly entrenched by the top courts of the land as validly restricting freedom of speech and expression as enshrined in article 10(1)(a) of the Constitution in spite of consistent constitutional challenges of the Act.[40] The Act has been utilised to silence legitimate dissent. The justification of the provisions of the Act in the context of the conditions of the time were clearly set out by the courts in the 1970s in cases such as in *Public Prosecutor v Ooi Kee Saik*,[41] *Melan bin Abdullah v Public Prosecutor*,[42] *Public Prosecutor v Oh Keng Seng*[43] and *Fan Yew Teng v Public Prosecutor*[44] as needful for the socio-political climate of the nation. It is not favourable to the liberal exercise of the freedom of speech if the court adopts a literal approach in interpreting statutes.[45]

The judgment of the Court in *Sharom*[46] is therefore noteworthy as it illuminates on the currency of the Court's jurisprudence and attitude in dealing with arguments of the constitutionality of the Act against article 10(1) of the Constitution.

IV THE BACKGROUND: THE PROSECUTION

The defendant, an Associate Professor of Law, was charged and was to be tried for an offence under s 4(1)(b) and alternatively, under s 4(1)(c) of the Act.[47] The basis of the charges against the defendant was in relation to an article published in the online version

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40 For more recent judgments, see *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47 (Court of Appeal); *Mat Shuhaimi* (n 9).

41 In *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108 (Federal Court) 112, Raja Azlan Shah J (as he then was) clarified the position of the Government:
'The Government has a right to preserve public peace and order, and therefore, has a good right to prohibit the propagation of opinions which have a seditious tendency. Any government which acts against sedition has to meet the criticism that it is seeking to protect itself and to keep itself in power. Whether such criticism is justified or not, is, in our system of Government, a matter upon which, in my opinion, Parliament and the people, and not the courts, should pass judgment. Therefore, a meaningful understanding of the right to freedom of speech under the Constitution must be based on the realities of our contemporary society in Malaysia by striking a balance of the individual interest against the general security or the general morals, or the existing political and cultural institutions. Our sedition law would not necessarily be apt for other people but we ought always to remember that it is a law which suits our temperament.'

42 [1971] 2 MLJ 280 (Appellate Criminal Jurisdiction).

43 [1977] 2 MLJ 206 (Federal Court).

44 [1975] 2 MLJ 235 (Federal Court), 238 (Lee Hun Hoe CJ): 'In any civilised society there must be law and order which are the prerequisites to the advancement of harmonious living and human happiness. It is important to bear in mind that Malaysia has a plural society. Therefore, it is the primary and fundamental duty of every Government to preserve law and order. It is in connection with this function of the Government that the offence of sedition must be looked at.'

45 Abdul Aziz Bari, *Malaysian Constitution: A Critical Introduction* (The Other Press, 2003) 154.

46 *Sharom* (n 1).

47 The charged were withdrawn by the Attorney General of Malaysia in February 2016.

of a Malaysian newspaper, *The Malay Mail*, on 14 August 2014.[48] The article was in relation to a crisis unfolding in the state of Selangor pertaining to the planned removal of the Chief Minister. The article contained the defendant's comments that such removal would lead to a constitutional crisis wherein he referenced a crisis that had previously enveloped the politics in the state of Perak where the Chief Minister of the state was removed by the state's Sultan. The comment referred to 'a secret meeting' that had taken place, that it was 'legally wrong', and that 'The best thing to do is do it as legally and transparently as possible.' The case ascended to the Federal Court upon application by the defendant to the Kuala Lumpur Criminal Sessions Court for the matter to be referred to the High Court on the question of the constitutionality of the Act.[49] The High Court on the authority of s 84 of the *Courts of Judicature Act 1964*[50] referred the application as a special case to the Federal Court comprising of two questions for the apex court to address.[51]

The question this article will address is the first question that is - whether s 4(1) of the Act contravenes article 10(2) of the *Federal Constitution* and is it then void under article 4(1) of the *Federal Constitution*.[52]

V THE DECISION

The decision of the Court in *Sharom* is set out below in three headings. They cover first, the restrictions to the rights under article 10(1) and the tests adopted in determining whether the restrictions are constitutional; secondly, the Court's application of these tests and finally, the approaches in constitutional interpretation that can be drawn from *Sharom*.

A *Restrictions to the Rights under article 10(1) and the Tests to be Adopted in Determining Constitutionality*

The Court at the outset made two pronouncements – first, that it is 'commonly acknowledged' that the rights provided by article 10(1) of the Constitution are not absolute. The Court cited the decision of the Federal Court in *Public Prosecutor v Ooi Kee Saik &*

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48 *Sharom* (n 1) [3]; The title of the article published in the daily was 'Take Perak crisis route for speedy end to Selangor impasse, Pakatan told', Zurairi AR, *The Malay Mail Online* (online, 14 August 2014), http://www.themalaymailonline.com/malaysia/article/take-perak-crisis-route-for-speedy-end-to-selangor-impasse-pakatan-told#sthash.mV6JVWjd.dpuf.

49 *Sharom* (n 1) [1]; Section 4(1) reads as follows: 'Any person who - (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act which has or which would, if done, have a seditious tendency; (b) utters any seditious words; (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or (d) imports any seditious publication, shall be guilty of an offence…'

50 Under this section, the High Court may make an order for a reference of a constitutional question to the Federal Court; see s 84(1). The High Court may state that the question that has arisen relates to the effect of the Constitution and is treated as a special case; see s 84(3). The special case will then be transmitted to the Federal Court; see s 84(4).

51 *Sharom* (n 1) [4].

52 Ibid.

Ors[53] and *Madhavan Nair & Anor v Public Prosecutor*.[54] Second, the Court stated that it is 'clear' that article 10(1) is subject to article 10(2).

Referring back to *Ooi Kee Saik*, it is a case affirmed by the Supreme Court in *Public Prosecutor v Pung Chen Choon*,[55] and is a judgment relied upon commonly by the apex court and by the Court of Appeal. Raja Azlan Shah J (as His Royal Highness then was) firmly stated in *Ooi Kee Saik* that in His Lordship's view, 'the right to free speech ceases at the point where it comes within the mischief of s 3 of the Sedition Act.'[56]

His Lordship added that the Indian Supreme Court 'has conceded that fundamental rights are subject to limitations in order to secure or promote the greater interests of the community.' His Lordship quoted *AK Gopalan v State of Madras*:[57]

> There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights … are subject to such reasonable conditions as may be deemed to be, to the governing authority of the country, essential to the safety, health, peace and general order and moral of the community …. What the Constitution attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.[58]

His Lordship's comments justify the need to attach limitations to freedoms, and the Indian Supreme Court authority relied on to support this justification is clearly demonstrative of this need.

The Court in *Sharom* was concerned primarily with the "kind" of restriction which may be imposed on article 10(1).[59] The court deduced from the wording of clause 2 (a) to article 10 that Parliament has the constitutional authority to impose restrictions as it deems necessary or expedient in the interest of the security of the Federation as well as other grounds set out in the said provision. The Court referred to these grounds as the "parameters" within which Parliament must exercise its limiting power.[60] The Court then proceeded to address the constitutionality of the restriction by considering two tests – the first is the "real and proximate" test and the second, the "reasonable" and "proportionality" test. I will first proceed to set out the tests in the manner undertaken by the Court.

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53 *Ooi Kee Saik* (n 41).

54 [1975] 2 MLJ 264 (Federal Court) ('*Madhavan Nair*').

55 [1994] 1 MLJ 566 (Supreme Court) ('*Pung Chen Choon*').

56 *Ooi Kee Saik* (n 41) 111.

57 AIR 1950 SC 27 (Supreme Court of India) ('*AK Gopalan*').

58 Ibid.

59 *Sharom* (n 1) [29].

60 *Sharom* (n 1) [30]. The Court cited the famous passage from the judgment of Chang Min Tat J in *Madhavan Nair & Anor v Public Prosecutor* where His Lordship stated: 'Any condition limiting the exercise of the fundamental right to freedom of speech not falling within the four corners of Article 10 Clauses (2), (3) and (4) of the Federal Constitution cannot be valid.'; see *Madhavan Nair* (n 54) 265.

1. *The "real and proximate" test*

The source of the "real and proximate" test is the Supreme Court's[61] decision in *Pung Chen Choon* - a case that dealt with the constitutionality of s 8A(1) of the *Printing Presses and Publications Act 1984* (PPPA). The Court in *Sharom* set out its approach in three prongs. Firstly, that there is a strong presumption of the constitutionality of the impugned law (the law that is being challenged for being unconstitutional).[62] Secondly, the party seeking for the court to declare it to the contrary bears the burden of proving the impugned law's unconstitutionality.[63] Thirdly, in determining whether the impugned law falls within the "orbit" of permitted restrictions, the court must consider whether the said law 'is directed at a class of acts too remote in the chain of relation to the subjects' prescribed under article 10(2)(a).[64] The Court summarised this as the "real and proximate" test that is, 'the connection contemplated must be real and proximate, not far-fetched or problematical.'[65] As proffered by Edgar Joseph Jr SCJ in *Pung Chen Choon*, it must be 'necessary for the court to determine whether this impugned provision is in *pith and substance (emphasis added)* a law passed by Parliament to restrict such Right as Parliament deems necessary or expedient' and determine whether it is 'in the interest of any subject-matter enumerated in the first part of art 10(2)(a)'.[66]

2. *The "reasonable" and "proportionality" test*

In relation to the second test, the Court applied the "reasonable" and "proportionality" tests in determining whether the impugned law is consistent with the Constitution.[67] The test was introduced by the Court of Appeal in *Dr Mohd Nasir Bin Hashim v Menteri Dalam Negeri Malaysia* ('*Dr Mohd Nasir*').[68] The Court referred to the judgement of Gopal Sri Ram (Judge of the Court of Appeal, as he then was) in *Dr Mohd Nasir* where His Lordship emphasised the need to bear in mind several principles when interpreting the Constitution, namely the "reasonable" test and the principle of substantive proportionality imported by article 8(1) of the *Federal Constitution* which provides that 'All persons are equal before the law and entitled to the equal protection of the law.' These tests were

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61 The Supreme Court was the apex court in Malaysia from 1 January 1985 by virtue of the *Constitutional (Amendment) Act 1984* (Malaysia). On 24 June 1994, it was renamed as the Federal Court by virtue of the amendments to Article 121 of the *Federal Constitution*. The amendments were as a result of the reorganisation of the court hierarchy, in particular, the historic introduction of the Court of Appeal.

62 *Sharom* (n 1) [31].

63 Ibid.

64 Ibid.

65 Ibid.

66 *Pung Chen Choon* (n 55) 578.

67 *Sharom* (n 1) [32].

68 [2006] 6 MLJ 213 (Court of Appeal) ('*Dr Mohd Nasir*'). Referred by the Court of Appeal in *Nik Nazmi Bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157 ('*Nik Nazmi*'); *Mat Shuhaimi* (n 9); *Arumugam a/l Kalimuthu v Menteri Keselamatan Dalam Negeri & Ors* [2013] 5 MLJ 174. Followed by the Court of Appeal in *Nik Noorhafizi Bin Nik Ibrahim & Ors v Public Prosecutor* [2013] 6 MLJ 660 and the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333. Referred by the Federal Court in *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285 ('*Badan Peguam Malaysia*').

confirmed by the Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor ('Sivarasa Rasiah')*[69] and are considered in detail below.

(a) The "reasonable" limb

In setting out the "reasonable" test, Gopal Sri Ram JCA in *Dr Mohd Nasir* posed a question – 'Does this mean that Parliament is free to impose any restriction however unreasonable that restriction may be?' His Lordship proceeded to rely on principles of interpreting constitutional provisions.[70] His Lordship explained that the courts ought to interpret constitutional provisions in tandem with their role as 'guardians of constitutional rights' and their function 'to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford.'[71] His Lordship cautioned that any derogating provisions are to be read restrictively in a 'strict and narrow, rather than broad, constructions'.[72] This sits squarely with the message of His Lordship both at the Court of Appeal in *Dr Mohd Nasir* and at the Federal Court in *Sivarasa Rasiah*, that rights are not "illusory". In the former case, His Lordship stated that the court "must not permit restrictions upon the rights conferred by art 10 that render those rights illusory."[73]

Further, in *Sivarasa Rasiah*,[74] His Lordship relied on the Supreme Court judgment in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* ('*Dewan Undangan Negeri Kelantan*')[75] and stated:

> In testing the validity of the state action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory.[76]

His Lordship concluded that the restrictions which Parliament can impose in article 10(2) must be reasonable restrictions and that the word "reasonable" must be read into the provision. This exercise of reading words into the constitution was supported by the authority of the Federal Court in *Ooi Ah Phua v Officer in Charge Criminal Investigations Kedah/Perlis*.[77]

The reiteration of the test by Gopal Sri Ram in *Sivarasa Rasiah*,[78] is convincing and sound. His Lordship explains that any '…Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively' and that 'the word 'reasonable' should

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69 [2010] 2 MLJ 333 (Federal Court), [5].

70 *Dr Mohd Nasir* (n 68) [5].

71 Ibid. His Lordship referred to the joint dissent of Lord Nicholls of Birkenhead and Lord Hope of Craighead in the Privy Council case of *Prince Pinder v The Queen* [2002] UKPC 46 para [61].

72 Ibid.

73 *Dr Mohd Nasir* (n 68) [11].

74 *Sivarasa Rasiah* (n 69) [6].

75 [1992] 1 MLJ 697 (Supreme Court) ('*Dewan Undangan Negeri Kelantan*').

76 Ibid 712.

77 [1975] 2 MLJ 198 (Federal Court), 200 ('*Ooi Ah Phua*').

78 *Sivarasa Rasiah* (n 69).

be read into the provision to qualify the width of the proviso', referring to the Court of Appeal's judgment in *Dr Mohd Nasir*. His Lordship stressed that 'the question for determination is whether the restriction that the particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article.'

The thrust of this polemic, in short, is that there must be a higher threshold when restricting freedoms provided to the citizens by a constitution that is the supreme law of the land.

(b) The "proportionality" limb

Turning to the "proportionality" limb, in *Dr Mohd Nasir*, reference was made to article 8 as Gopal Sri Ram felt that one of the aspects of interpretation of the Constitution requires the courts to bear in mind that the said article guarantees fairness of all forms of State action.[79] Additionally, article 8(1) imports into Malaysian legal jurisprudence the principle of substantive proportionality.[80] His Lordship explained the position succinctly:

> In other words, not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved. This is sometimes referred to as 'the doctrine of rational nexus'… A court is therefore entitled to strike down State action on the ground that it is disproportionate to the object sought to be achieved.[81]

In *Sivarasa Rasiah*, His Lordship sets out the test for challenging state action as violating a fundamental right by first categorising the types of state action that exist.[82] State action, according to His Lordship, is either, an executive or administrative action, or a form of primary or secondary legislation.[83] If a state action is the former, then the constitutionality of the said action is measured from two aspects. First, the action must be as a result of fair procedure; and two, it must be in substance fair, in that, it must meet the test of "proportionality".[84] If a state action is the latter, the test is based only on substantive fairness.[85]

On the method of measuring "proportionality", His Lordship expounded on the test:

> …The test here is whether the legislative state action is disproportionate to the object it seeks to achieve. Parliament is entitled to make a classification in the legislation it passes. But the classification must be reasonable or permissible. To paraphrase

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79 *Dr Mohd Nasir* (n 68) [8]. His Lordship relied on *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 (Court of Appeal).

80 *Dr Mohd Nasir* (n 68) [8]. His Lordship referred to Indian Supreme Court decision of *Om Kumar v Union of India* AIR 2000 SC 3689 and the judgment of Mohd Ghazali JCA in the Court of Appeal decision of *Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493.

81 *Dr Mohd Nasir* (n 68).

82 *Sivarasa Rasiah* (n 69) [19].

83 Ibid.

84 Ibid.

85 Ibid. His Lordship states that 'the doctrine of procedural fairness does not apply to legislative action of any sort.' Reference was made to *Bates v Lord Hailsham of St Marylebone & Ors* [1972] 1 WLR 1373 and *Union of India v Cynamide India Ltd* AIR 1987 SC 1802 (Indian Supreme Court).

> in less elegant language the words of Mohamed Azmi SCJ in *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165, the classification must (a) be founded on an intelligible differentia distinguishing between persons that are grouped together from others who are left out of the group; and (b) the differentia selected must have a rational relation to the object sought to be achieved by the law in question. And to quote that learned judge: 'What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.' In short, the state action must not be arbitrary…[86]

In clarifying how the nexus is to be measured,[87] His Lordship referred to the exposition set out by Gubbay CJ in *Nyambirai v National Social Security Authority*[88] which was approved by the Privy Council in *Elloy de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing & Ors*.[89] Lord Clyde in *Elloy de Freitas* set out Gubbay CJ's proposition[90] which is a threefold criteria in determining whether a limitation is arbitrary or excessive. Firstly, it must be asked whether 'the legislative objective is sufficiently important to justify limiting a fundamental right; secondly, whether 'the measures designed to meet the legislative objective are rationally connected to it'; and finally, whether 'the means used to impair the right or freedom are no more than is necessary to accomplish the objective.' The threefold test is helpful in determining whether any form of state action is proportionate. The Court in *Sharom*[91] referred to Gopal Sri Ram's test of "proportionality" set out in *Sivarasa Rasiah*.[92] The question therefore is whether the prosecution against the words published in *Sharom* is disproportionate to the potential harm that could have occurred under one of the objects set out in article 10(2)(a), or, whether the restriction in the form of the Act is disproportionate to the object it seeks to achieve.

B *The Court's Application of the Tests*

The manner and extent in which the Court in *Sharom* approached the various tests and applied them will be addressed in the following sub-headings.

1. *Treatment of the "real and proximate" test*

On the issue whether the three prongs of the 'real and proximate' test were addressed individually by the Court, there was some reference to the Court determining the constitutionality of the provision by applying the 'proportionality' test[93] but there was no cohesive application of the three prongs. With reference to the third prong, there was

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86 *Dr Mohd Nasir* (n 68) [27].
87 *Sivarasa Rasiah* (n 69) [28]-[30].
88 [1996] 1 LRC 64 (Supreme Court of Zimbabwe) ('*Nyambirai*').
89 [1998] UKPC 30.
90 *Nyambirai* (n 88) 80. This was approved by Lord Steyn in *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [27].
91 *Sharom* (n 1) [32]-[34].
92 *Sivarasa Rasiah* (n 69) [19] and [27].
93 *Sharom* (n 1) [42]-[44].

no determination of a 'real and proximate' connection contemplated which is 'not far-fetched or problematical'.[94] Further, the test requires their Lordships to consider whether the impugned law is in 'pith and substance *a law passed by Parliament*' (emphasis added) to restrict such right as Parliament deems necessary or expedient and in the interest set out in article 10(2)(a). The Court when dealing with the second question posed by the defendant held that the Act albeit being a pre-Merdeka (independence) law was saved by article 162(1) of the Constitution.[95]

This position, however, appears to contradict the test laid down by Edgar Joseph Jr SCJ in *Pung Chen Choon*. As a pre-Merdeka (independence) law, how could "Parliament" prior to the coming into force of the *Federal Constitution*, foresee that in pith and substance the Act *was a law passed by Parliament* to restrict such right which was enshrined in the constitution and proceeded to determine that it is in the interest of the subject matter of article 10(2)(a)? Could the framers of the Act in 1948,[96] the British colonial government, be deemed to be the institution of "Parliament" referenced by Edgar Joseph Jr SCJ in the test? The Court did not reconcile the raising of this test with the argument in the second question posed before it.

To undertake a review of the manner in which the Court considered the power vested in it by virtue of article 162(6) would be extending the discussion beyond the scope of this article.[97]

2. *Treatment of the "reasonable" and "proportionality" test*

(a) Treatment of the "reasonable" test

Relying heavily on the precedent in *Pung Chen Choon*, the Court dismissed the "reasonable" test. Favouring the arguments presented by the counsel for the Public Prosecutor, the Court was convinced that the "reasonable" test could be disregarded on premises of four points. Firstly, the Court was of the opinion that the Federal Court in *Sivarasa Rasiah* did not consider the precedent in *Pung Chen Choon* which held that the "reasonable" test ought not to apply to the restrictions imposed.[98]

Secondly, the Court held that the framers of the Constitution had dropped the word "reasonable" from the final draft of article 10(2). The Federal Court in *Pung Chen Choon* made the distinction between the wording of article 10(2) and article 19(2) of the Indian Constitution wherein the latter there is clearly an inclusion of the word "reasonable".[99]

Thirdly, the Court proceeded to hold that it is in agreement with *Pung Chen Choon* on the point that it is not for the courts to determine whether the restriction imposed is

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94 *Pung Chen Choon* (n 55).

95 *Sharom* (n 1) [16]. Article 162(1) provides: Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by federal or State law.

96 The *Sedition Ordinance* came into force on 19 July 1948.

97 Article 162(6) provides: 'Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution'. See *Sharom* (n 1) [19]-[27].

98 *Sharom* (n 1) [35]; *Pung Chen Choon* (n 55) 576.

99 *Pung Chen Choon* (n 55) 576.

reasonable or otherwise and that the imposition of any form of restriction falls strictly within the discretion of the legislature and not the purview of the Court.

Finally, the Court disagreed with the judgment of Gopal Sri Ram JCA in *Dr Mohd Nasir* when His Lordship rationalised the reading of the word "reasonable" into the constitutional text of article 10(2)(a). The Court felt that it was "flawed" and "fallacious" to use the reasoning in *Ooi Ah Phua*.[100] The exercise of reading words into the Constitution as per Suffian LP's judgment in *Ooi Ah Phua* does not render the same exercise as justifiable in *Dr Mohd Nasir*. The Court clarified its position stating that the justification for reading the word "reasonable" into article 5(3)[101] as undertaken by Suffian LP in *Ooi Ah Phua* turns on the wording 'as soon as may be' found in the said article.[102] The Court departed from *Dr Mohd Nasir* and its own decision in *Sivarasa Rasiah* which had affirmed *Dr Mohd Nasir*.

(b) Treatment of the "proportionality" test

The Court set out the "proportionality" test as established into Malaysian jurisprudence in both *Dr Mohd Nasir* and *Sivarasa Rasiah*.[103] The Court agreed with the need for article 10(2) to measure up to the test.[104] Hence, the Court proceeded to do so and found that the restrictions imposed by s 4(1) of the Act were neither too remote nor insufficiently connected to the subjects in article 10(2)(a). Therefore, they fell within the "ambit or parameter" of the said article on two bases. First, that s 4 is directed to any act, word or publication having a "seditious tendency" as stated in s 3(1) of the Act, and second, that there are exceptions found in s 3(2) as to instances which may not tantamount to being seditious.[105]

The Court did not address in turn each of the three elements laid down by Gubbay CJ. The measuring-up exercise by the Court was not clear nor expansive but rather cursory.

C *Approaches in Constitutional Interpretation Drawn from Sharom*

One cannot dispel the feeling that the right of free speech and expression in Malaysia has been reduced to obscurity whilst the statutory derogation of free speech and expression prevails with minimal judicial control. These rights indeed appear to be illusory or perhaps the Court has remiss in its duties - those duties which their Lordships - Lord Nicholls of Birkenhead and Lord Hope of Craighead[106] - had set out in their joint dissent as being the duty of the courts as 'the guardians of constitutional rights' which includes their function 'to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford.' Their Lordships further emphasised that the provisions derogating the 'scope of

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100 *Sharom* (n 1) [40].

101 Article 5(3) provides: Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

102 *Sharom* (n 1) [40].

103 Ibid [41]-[42].

104 Ibid [43].

105 Ibid.

106 *Prince Pinder v The Queen* [2002] UKPC 46.

guaranteed rights are to be read restrictively' – in a 'strict and narrow, rather than broad, constructions'.[107] This disregard of the approach in *Prince Pinder* aligns the Court's interpretation with the 'Four Walls' approach.

In any case, even if the Court was to adopt a "Four Walls" approach, there was adequate jurisprudence to interpret article 10(2)(a) restrictively. In *Pung Chen Choon*, a decision favoured by the Court in *Sharom*, Edgar Joseph Jr SCJ proposed that the individual may contend that a particular penal law is 'aimed at *directly* restricting any one or more of this Rights guaranteed under art 10(1).'[108] The outcome of this, His Lordship stated, 'depended upon the particular circumstances of each case.'[109] His Lordship added that if the individual 'is deprived of his personal liberty by *due process of the law*, no question of his enforcing such Rights can arise.'[110] An additional aspect of the guidance set out by His Lordship, which was not considered by the Court in *Sharom*, was the manner in which the impugned law is to be tested:

> In so doing, we were of the view that it was impossible to lay down an abstract standard applicable to all cases. It would be the duty of the court to consider each impugned law separately, regard being had to the nature of the Right alleged to have been infringed, the underlying purpose of the restriction, the extent and the urgency of the evil sought to be remedied, not forgetting the prevailing conditions of the time. We hasten to add that it is not that the meaning of the words in the impugned law changes with the prevailing conditions of the time but that the changing circumstances illustrate and illuminate the full import of that meaning.[111]

In not accepting the reading of the word "reasonable" into the text of article 10(2)(a), the Court has taken the position of the framers when the said qualification was dropped by referencing the original intentions of the framers.

Further, the Court stated that its rationale for disregarding the "reasonable" test in *Sharom* was on the basis that the judgment in *Sivarasa Rasiah* was made without regard to precedent. The question arises whether the normal rules of precedent apply when the question before the court is one of constitutional interpretation. I will answer this question when discussing the alternative approaches the Court could have taken in adopting a rights-expansive approach under Part VI.

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[107] The judgment of *Prince Pinder* has been referred to in a number of Malaysian judgments. See the Court of Appeal judgment in *Dr Mohd Nasir* (n 68) 218-219 [5], where Gopal Sri Ram JCA (as he then was) commented that: 'The proper approach to the interpretation of our Federal Constitution is now too well settled to be the subject of argument or doubt' and that the approach 'is to be found in the joint dissent of Lord Nicholls of Birkenhead and Lord Hope of Craighead' in *Prince Pinders* case.' This quote was further referred to by the Federal Court in *Badan Peguam Malaysia v Kerajaan Malaysia* (n 68) 317 [85]. Gopal Sri Ram, re-affirms the approach as a FCJ in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 (Federal Court), 313 [13]. The Court of Appeal revisited and reaffirmed Gopal Sri Ram's approach to the interpretation of restrictions – see *Nik Nazmi* (n 68) 186 [90].

[108] *Pung Chen Choon* (n 55) 575-B.

[109] Ibid.

[110] Ibid 575-C.

[111] Ibid 577-B.

VI TAKING A RIGHTS-EXPANSIVE APPROACH

In *Sharom*, the Court demonstrated a general disregard of the tests that the apex court had developed, resulting in a substantial account of jurisprudence on the "reasonableness" test being expunged. However, two aspects can be positively drawn from *Sharom*. One is that the Court had clearly enumerated the various tests applicable in determining the validity of restrictions to the constitutionally accorded freedom of speech and expression; and second, it highlighted by omission, the need for Malaysian courts to re-position themselves and recalibrate the approach towards freedom of speech and expression, the interpretation of article 10 and the restriction of the derogatory effect the *Sedition Act 1948* has on the said freedom.

There is a need for a fresh and vigorous approach as to how the courts view these rights which have only been far too docile in the past. The courts need to be robust in pronouncing that part of the freedom to speak and to express one's opinion is essential in a democratic society where differing viewpoints exist. Sedley LJ articulated this in the case of *Redmond-Bate v DPP*:[112]

> Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having. What Speakers' Corner (where the law applies as fully as anywhere else) demonstrates is the tolerance which is both extended by the law to opinion of every kind and expected by the law in the conduct of those who disagree, even strongly, with what they hear.

In the need for a move in this direction, I wish to proffer several propositions. I wish to first return to the judgment of the Court and the jurisprudence that has arisen from this decision. On the point of the "reasonable" test, there is still a strong foundational basis for its resurrection. It will take a progressively minded tribunal to allow the right approach to constitutional methods of interpretation to prevail by highlighting the weaknesses of the Court's approach in *Sharom* and strengthening the rich legal pronouncements made prior to this decision. The Court in relying on the original intentions of the framers of the Constitution could have moved from the textual analysis. The Court could have instead, relied on the sentiments of the Reid Commission when it emphasised the role of the courts to enforce the rights espoused in the Constitution and to avoid subversion by legislative action by giving the restrictions a more rights-expansive reading.[113]

Perhaps a good starting point in taking a rights-expansive approach is to heed the guidance delivered by Raja Azlan Shah (Lord President, as His Royal Highness then was) in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* ('*Dato Menteri Othman*').[114] Two points are to be noted from this case – first, that the normal rules of binding precedent are not to be applied dogmatically when a case

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[112] [2000] HRLR 249, 260. See also [99] Crim LR 998, 7 BHRC 375.

[113] *Report of the Federation of Malaya Constitutional Commission* (n 4) [162].

[114] [1981] 1 MLJ 29 (Federal Court), 32 ('*Dato Menteri Othman*').

involves the exercise of constitutional interpretation. Secondly, the method to be adopted when interpreting the Constitution is one that requires a broad construction. His Lordship commented as follows:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way with less rigidity and more generosity than other Acts (see *Minister of Home Affairs v Fisher* [1979] 3 All ER 21). A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms. The principle of interpreting constitutions with less rigidity and more generosity was again applied by the Privy Council in *Attorney-General of St Christopher, Nevis and Anguilla v Reynolds* [1979] 3 All ER 129, at p 136.

Raja Azlan Shah favoured an approach that allows a construction that is less rigid, and this provides a strong premise to adopt a rights-expansive approach.

With reference to the above statement from Raja Azlan Shah, the Court's dismissal in *Sharom* of Gopal Sri Ram's approach of the "reasonable" test as being "flawed" and "fallacious" is questionable. The application of the "reasonable" test by Gopal Sri Ram disregarding the Federal Court's own decision in *Pung Chen Choon* can be seen in terms of the first point made by Raja Azlan Shah where direct application of precedent may not be seen as a flaw but rather the Court is to be reminded that the basis of the test cannot be disregarded as it is in line with the manner in which the courts ought to approach the interpretation of restrictions of constitutional provisions – in line with the second point made by Raja Azlan Shah. The essence of the "reasonableness" test was established in *Dr Mohd Nasir* at the Court of Appeal which became the premise of Gopal Sri Ram's rationale for the test in *Sivarasa Rasiah* at the Federal Court. The test was based on two authorities from which His Lordship imputed the need for the restriction to article 10(2) to be reasonable. These were the Privy Council's decision in *Prince Pinder v The Queen* and Raja Azlan Shah in *Dato Menteri Othman*.

The weight to be attached to the guidance by Raja Azlan Shah and the continued reiteration of this guidance as being the cornerstone of judicial interpretation of the Constitution cannot be ignored - neither can the importance placed on the "reasonable" test which has been applied by the appellate courts with rigour and respect.

Secondly, the courts will have to move away from the 'Four Walls' approach. There has been sufficient shifting to a more rights-expansive approach as seen from the decisions in *Dr Mohd Nasir* and *Sivarasa Rasiah*. The Court will have to revisit the foundational basis of the right to free speech and expression – and fervently hold that these rights are vested rights in all citizens and cannot be seen as "illusory". As seen in *Dewan Undangan Negeri Kelantan*[115] the Supreme Court relied on a host of authorities from India. Firstly, the Supreme Court relied on the authority of Dr Anand in *Mian Bashir Ahmad & Ors v The State* ('*Mian Bashir Ahmad*')[116] where the court set out the correct approach to adopt when faced with an impugned law that violated a fundamental right (in this case, the Indian article 19(1)(c)). The notable guidance reads as follows:

> …the legislation can be, of course, struck down if it directly infringes the fundamental rights of a legislator but *it can also be struck down if the inevitable consequences of the legislation is to prevent the exercise of the fundamental rights guaranteed under* art 19(1)(c) *or to make the exercise of that right 'ineffective or illusory'*. (Emphasis added.) …that the impugned action would be struck down if either it directly affects the fundamental rights or its inevitable effect on the fundamental rights is such that it makes their exercise 'ineffective or illusory'.[117]

The Supreme Court summarised Dr Anand's approach in explaining the expression "direct and inevitable effect" as follows:

> …that in testing the validity of state action with regard to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise 'ineffective or illusory'.[118]

My final proposition is the need for the courts to develop rules of constitutional interpretation that will require a seismic shift from literalism to the prismatic approach. The argument is even more convincing when dealing with fundamental liberties. I wish to reiterate three strands of thought from Gopal Sri Ram's article[119] which are compelling, and which resound my sentiments.

The first is related to the time-honoured Indian authority of *AK Gopalan v State of Madras*,[120] often cited as the underlining authority to justify restriction of the freedom of speech and expression as done in the *Sharom* judgment. Gopal Sri Ram opines that it 'reflects the lowest ebb in the field of interpretation of human rights guaranteed by a written Constitution.'[121] In the said case, the Indian Supreme Court was given the task

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115 *Dewan Undangan Negeri Kelantan* (n 75) 712.

116 AIR [1982] Jammu & Kashmir 26 (Jammu & Kashmir High Court, India), 59 [101] ('*Mian Bashir Ahmad*').

117 Ibid [101]. Dr Anand had, in turn, relied on the judgment of the Indian Supreme Court of India in *Smt Maneka Ghandi v Union of India* 1978 AIR 597, 632-33.

118 *Mian Bashir Ahmad* (n 116).

119 GS Ram, 'The Dynamics of Constitutional Interpretation' [2017] 4 *Malayan Law Journal* i.

120 *AK Gopalan* (n 57).

121 GS Ram (n 119) v.

of interpreting article 21 of the Indian Constitution. The said article was interpreted restrictively by the majority holding that the word "law" in the said article meant enacted law and did not include the rules of natural justice.[122] Gopal Sri Ram is of the view that the position of the Indian Supreme Court in *AK Gopalan* was a result reached by judges who had 'a predilection to the so-called rule of literal interpretation'[123] resulting in the restrictive construction of the article.[124] This approach is no longer the favoured one in India as the Indian Supreme Court has now adopted a more liberal interpretation of the word 'law' in article 21, holding that a procedure prescribed by law cannot be 'arbitrary, unfair or unreasonable' and that on principle the concept of reasonableness must be projected in the procedure contemplated by article 21.[125]

Secondly, the courts when interpreting constitutional provisions cannot rely on rules of interpretation utilised by the courts when interpreting Acts of Parliament. Advice from judicial pronouncements that claim that the same rules apply when interpreting the constitution must be dismissed as taking a rather erroneous approach.[126] This view is supported by Lord President Suffian (as he then was) in *Government of Malaysia and ors v Loh Wai Kong* ('*Loh Wai Kong'*).[127] When given the task to interpret "personal liberty" in article 5(1) of the *Federal Constitution*, Lord President Suffian provided some guidance:

> It is well-settled that the meaning of words used in any portion of a statute - and the same principle applies to a constitution - depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it.

In his article, Gopal Sri Ram directs our attention to two convincing authorities of the English courts, breaching the "Four Walls" approach, namely, *Hinds and others v The Queen* ('*Hinds*')[128] and *Minister of Home Affairs v Fisher* ('*Fisher*').[129] In *Hinds*, a decision made prior to *Loh Wai Kong*, Lord Diplock found it misleading for the courts to apply canons of construction which are applicable to ordinary legislation to constitutional provisions.[130] Very close to the heels of the decision in *Hinds*, is the Privy Council decision of *Fisher*. In *Fisher*, Lord Wilberforce provides a sound direction in the approach to be taken. His Lordship stated that on the question whether the same rules of interpretation applicable to Acts of Parliament should apply, there are two possible answers:

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122 Ibid v-vi.

123 Ibid vi.

124 Ibid x. Ram cites several instances where the words in Article 5 of the Malaysian Federal Constitution have been given the strict constructionist interpretation by the Federal Constitution whereby the words were given their natural and ordinary meaning. See *Loh Wai Kong* [1979] 2 MLJ 33 (Federal Court) ('*Loh Wai Kong*') and *Ketua Polis Negara v Abdul Ghani Haroon* [2001] 3 CLJ 853 (Federal Court).

125 *Maneka Gandhi v Union of India* AIR 1978 SC 597; GS Ram (n 119) xi.

126 GS Ram (n 119) xii.

127 *Loh Wai Kong* (n 124) 34.

128 [1976] 1 All ER 353 (Privy Council) ('*Hinds*').

129 [1979] 3 All ER 21 (Privy Council) ('*Fisher*').

130 *Hinds* (n 128) 360.

> The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the court to accept as a starting point the general presumption that 'child' means 'legitimate child' but to recognise that this presumption may be more easily displaced. The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.[131]

Lord Wilberforce stressed that the approach to be taken must be one of generous interpretation so as to avoid 'the austerity of tabulated legalism'.[132]

The Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*[133] rejected the Court of Appeal's approach of adopting a broad approach, and reaffirmed the literal and restrictive approach. This is in spite of the guidance laid down by the Federal Court, in following Lord Wilberforce's guidance in *Fisher*. Raja Azlan Shah, Lord President (as he then was) in *Dato Menteri Othman Baginda v Dato Ombi Syed Ali*,[134] provided guidance in the Federal Court citing *Fisher* when setting out considerations to be taken into account.[135] This again demonstrates that there is adequate jurisprudence to take a rights-expansive adoption of constitutional interpretation but there appears to be a restraint or an impediment in its adoption.

Thirdly, when interpreting the rights guaranteed under the *Federal Constitution*, the courts should take a prismatic approach.[136] Lord Hoffman in the Privy Council judgment of *Boyce v The Queen* ('*Boyce*'),[137] spoke of this approach in a case involving the interpretation of the Constitution of Bahamas. His Lordship categorised provisions in the Constitution as being expressed in general and abstract terms or in concrete and specific terms. Where the terms are general and abstract, these 'invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions.'[138] Lord Hoffman expanded on the role of the judges in this exercise when His Lordship commented that:

> The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges,

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131 *Fisher* (n 129) 26.

132 *Fisher* (n 129) 25. The phrase "the austerity of tabulated legalism" is attributed to Professor SA De Smith. See Stanley A de Smith, *The New Commonwealth and Its Constitutions* (Stevens & Sons, 1964) 194. Cited with attribution *in Matthew v The State (Trinidad and Tobago)* [2004] UKPC 33, [2005] 1 AC 433 [34]; and, *Mist v The Queen* [2005] NZSC 77 (New Zealand Supreme Court) [45].

133 *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72, 101. See GS Ram (n 119) xiii.

134 *Dato Menteri Othman* (n 114) 32; see GS Ram (n 119) xiv. See also reference made by the Federal Court to *Fisher* in *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir* [2010] 2 MLJ 285, 298 [25].

135 See *Dato Menteri Othman* (n 114).

136 GS Ram (n 119) xv.

137 [2004] UKPC 32.

138 Ibid [28]-[9].

> in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning. The text is a "living instrument" when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life.[139]

His Lordship noted that the role of the judge is muted when the terms of the Constitution is concrete and specific and are not allowed to be 'judicially adapted to changes in attitudes and society in the same way.'[140] Lord Hoffman's view is in line with the fifth variation of standards suggested by Tew which allows a construct and development that embraces a rights-expansive approach. The prismatic approach will facilitate this outcome of adopting standards in broader terms.

VII FINAL THOUGHTS

The sentiment towards the current state of the judiciary's standpoint on the *Sedition Act 1948*, can be summarised by a quote by Thomas Paine, who said that 'A long habit of not thinking a thing wrong gives it a superficial appearance of being right.' This cannot be truer in the case of how the courts have exercised their determination in the constitutionality of the *Sedition Act 1948*. The question of constitutionality continues to be raised only to be struck down by the courts. The courts are the engineers of our law. The Malaysian judiciary needs, therefore, to be more rigorous in its attempt at a true interpretation of the *Federal Constitution* in line with the intention of the framers of the Constitution – the original intention of the drafters – to ensure a robust interpretation of constitutional liberties. The Reid Commission report evidences this intention. Stepping out of the 'Four Walls' construct and the strict literalism and formalism approach requires the courts to revert to the jurisprudence prior to *Sharom* where there is a generous foundation to structure a rights-expansive approach. Only by limiting the rights-enabling provision in a broad constructive – prismatic – manner, and in turn, qualifying the restriction to constitutional rights, can we resuscitate the rights conferred on us by the Constitution. The development of our jurisprudence relies solely on the courage of our judiciary. A great amount of work needs to be done in building a comprehensive set of approaches to constitutional interpretation that has the prospect of breathing life into the Constitution and reiterating its regal supremacy in our legal system.

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[139] Ibid [28].
[140] Ibid [29].