

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations
Promoting human rights by protecting those who defend them

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Thursday, March 06, 2014

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Dear Sirs,

Re: In The Matter Of Karpal Singh: Malaysia Violates International Human Rights Obligations

1. This letter of support is provided by Lawyers' Rights Watch Canada ("LRWC"). LRWC is a committee of lawyers that promotes human rights and the rule of law internationally through education, legal research and advocacy for lawyers and other human rights defenders in danger because of their advocacy. LRWC has special consultative status with the Economic and Social Council of the United Nations. More information about the work of LRWC is available at <http://www.lrwc.org>.

BACKGROUND

2. In 2009, Karpal Singh, prominent human rights lawyer, Member of Parliament and head of the Democratic Action Party, voiced his opinion that the summary removal of a minister (Menteri Besar) by the Sultan of Perak was ultra vires the Sultan's authority and could be reviewed by a court. For expressing that opinion, Mr. Singh was charged under section 4(1) (b) of the *Sedition Act 1948* (Sedition Act) and was convicted on 21 February 2014 by the High Court in Kuala Lumpur with sentencing adjourned to 11 March. The Act provides for a maximum sentence of 3

years in jail and/or a fine of RM 5,000. A jail sentence of more than one year or a fine of more than RM 2,000 would disqualify Mr. Singh from continuing to be a Member of Parliament. The International Commission of Jurists condemned the conviction as contrary to international law and as a signal that lawyers in Malaysia are not free to express opinions on legal matters. Karpal Singh is widely respected as a knowledgeable, articulate and effective lawyer, human rights advocate and Member of Parliament. Because of his advocacy, Karpal Singh has been targeted with removal from his profession in the past. In October 1987 Mr. Singh was jailed under *Internal Security Act* and held without charge until March 1988. In 2000 while representing the former Deputy Prime Minister in a criminal trial that garnered attention around the world, he was charged with sedition based on statements made in court in the course of representing his client. On that occasion, LRWC intervened by sending a representative to monitor the trial and by providing Malaysia authorities with an analysis questioning the legitimacy of the prosecution. The charges were withdrawn on the first day of the trial. The LRWC analysis, [*Lawyers and the Rule of Law on Trial: Sedition in Malaysia*](#)¹ and other LRWC work on the 2000 prosecution can be viewed online.

3. The above cited LRWC analysis contains a review of Malaysia's requirements to comply with International law, including the Universal Declaration of Human Rights, and its own domestic law.

SUMMARY

4. The prosecution and conviction of Karpal Singh for voicing his opinion about a legal matter of public concern violate Malaysia's legal obligations arising from both domestic and international law to protect freedom of expression and participation in government that are fundamental to a democratic society and to the integrity of the Malaysian legal system. By voicing his opinion, Mr. Singh was exercising rights protected by the *Universal Declaration of Human Rights* (UDHR) to: freedom of expression (art. 19); freedom to take part in government (art. 21); and his duty as a lawyer and a parliamentarian to impart information about issues of public interest. By seeking to impose criminal punishment and professional restrictions on Mr. Singh for peacefully exercising his right as a citizen and his duty as a lawyer and a parliamentarian, Malaysia is contravening the international law obligations it has assumed as a member of the United Nations, of the Commonwealth and of ASEAN.
5. LRWC calls on the Court and other authorities involved to consider the above noted international law obligations and ensure that Karpal Singh is not deprived of his liberty, his licence to practice law or his qualification to be a Member of Parliament, as a result of these criminal proceedings.

INTERNATIONAL LAW OBLIGATIONS

As a Members of the United Nations

6. Malaysia has been a member of the United Nations since 17 September 1957. Membership in the United Nations imposes obligations to respect human rights obligations contained, *inter alia*, in the United Nations Charter (Charter) and the UDHR². The Charter requires states to “establish

¹ *Lawyers and the Rule of Law on Trial: Sedition in Malaysia*, Gail Davidson, Tami Friesen and Michael Jackson QC, LRWC, July 2000 (Vancouver) and Criminal Law Forum 12:1-23, 2001.

² G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”³ The UDHR is the principle source of international legal norms with respect to human rights and articulates the rights and freedom referred to in the Charter. The UN Human Rights Council conducts an assessment of each state’s fulfillment of human rights obligations every four years through the Universal Periodic Review (UPR).

7. The UDHR protects the right to criticize political leaders as a key component of freedom of expression.

The right to freedom of expression cannot be exercised passively, but requires a lasting commitment by States to ensure the mechanisms that guarantee and protect it. Mechanisms for criticism, including of political leaders, are deemed important to hold individuals accountable.⁴

8. Malaysia’s failure to adequately protect freedom of expression was noted during the first UPR of Malaysia in 2009. The Sedition Act was identified as a tool used to restrict freedom of expression in Malaysia in a manner inconsistent with international standards and Malaysia’s international law commitments. Canada recommended that Malaysia, “review and amend laws such as the Sedition Act... to enable its citizens to exercise fully the right to freedom of opinion and expression...”⁵ The Sedition Act was again identified during the 2nd UPR in 2013 as a statute that restricts the exercise of freedom of expression in Malaysia in contravention of international law standards and of Malaysia’s international commitments. The UN Country Team (UNCT) for Malaysia noted that Malaysia “continued to use ... the Sedition Act 1948...to silence dissent...” The UNCT further noted that although the Prime Minister had announced on 11 July 2012 that the Sedition Act 1948 would be repealed and replaced by a National Harmony Act, no such action has been taken. UNESCO recommended that Malaysia, “continue with its positive efforts to repeal the Sedition Act and the Internal Security Act, which represent significant obstacles to freedom of expression.”⁶

As a Member of the Commonwealth

9. As a member of the Commonwealth since 1957, Malaysia had committed generally to promoting and maintaining the rule of law and specifically to protecting freedom of expression and other fundamental freedoms for all individuals. Malaysia has joined other Commonwealth members in specifically endorsing the UDHR. Malaysia has further committing to ensuring freedom of expression through the 1971 Declaration of Commonwealth Principles, the 1991 Harare Principles, the Latimer House Guidelines and the 2012 Charter of the Commonwealth.

³ Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S.993, Bevans 1153, entered into force 24 October 1954, articles 1(3), 55, 56.

⁴ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, 11th session, Agenda item 3, A/HRC/11/4, 30 April 2009, para 41, online at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.4.pdf>

⁵ Report of the Working Group on Universal Periodic Review, A/HRC/11/30/Add.1, 5 October 2009, para. 15. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/163/60/PDF/G0916360.pdf?OpenElement>

⁶ Compilation prepared by the Office of the High Commissioner of Human Rights, A/HRC/WG.6/17/MYS/2, 9 August 2013, paras. 27, 28, 30.

10. The 1971 Declaration of Commonwealth Principles, the 1991 Harare Declaration and the 2012 Charter of the Commonwealth affirm the duty of Malaysia as a member state to ensure freedom of expression and the “inalienable right to participate in political processes.”
11. The prosecution and conviction of Karpal Singh violates Malaysia’s obligation to ensure the following protection for parliamentarians.

In the discharge of their functions, members [of Parliament] should be free from improper pressures and accordingly:

- (a) the criminal law and the use of defamation proceedings are not appropriate mechanisms for restricting legitimate criticism of the government or the parliament;⁷

As a Member of ASEAN

12. As a member of ASEAN, Malaysia again affirmed its commitment to the UDHR, the Charter and the Vienna Declaration. The ASEAN Human Rights Charter enshrines the right to freedom of expression in article 23 which reads,

Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to see, receive and impart information whether orally, in writing or through any other medium of that person’s choice.”

COMMON-LAW JURISPRUDENCE

Freedom of Expression

13. The importance of the state duty to ensure the right of all individuals—including political opponents—to freedom of expression was clearly and succinctly expressed in the case of *Halton Hills et al. v. Kerouac*, 2006 CanLII 12970 (ON SC), at para. 25:

Without free speech, there is no free press. Without a free press, there is no free political debate. Without free political debate, there cannot be true democracy. Freedom of speech, writ large, is a pillar of democracy.

14. It is now universally recognized in countries that are considered to be governed by the rule of law, and which adhere to the principles of democracy and free speech, that limits on freedom of expression (including free speech) are to be very narrow, and in the case of political dissent, must not restrict the ability of citizens to criticize their own government.

Criticism of Government

15. Regarding the criticism by a citizen of his government, the only restrictions that are tolerable in a democratic society governed by the rule of law are those that prevent a citizen from advocating the use of violence to overthrow the government. From *Halton Hills, supra*, at para. 26:

⁷ Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach) eds John Hatchard and Peter Slinn (1999) London: Cavendish, The Independence of Parliamentarians, article 2. 15-19 June 1998.

Laws against sedition may limit free speech that advocates the violent overthrow of the state.

16. The principle that the public right to criticize the government is absolute was also enunciated in *Halton Hills et al. v. Kerouac*, as summarized in the headnote of the case:

Expression about public affairs in general, and government in particular, lies at the core of freedom of expression. Any legal restriction on freedom of expression about public affairs has a chilling effect on freedom of expression generally, and infringes s. 2(b) of the Canadian Charter of Rights and Freedoms. Infringements of s. 2(b) may be justified under s. 1 of the Charter. Laws against sedition, for example, may be justified, since society must guard against its own violent overthrow. Laws against hate speech may be justified to protect the victims of hate speech. The common law tort of defamation may be justified on the basis that private persons (including public servants) are entitled to protect their personal reputations. There is no countervailing justification to permit governments to sue in defamation. Governments have other, better, ways to protect their reputations. Any restriction on the freedom of expression about government must be in the form of laws or regulations enacted or authorized by the legislature. The common law position, in the absence of such legislation, is that absolute privilege attaches to statements made about government. "

[emphasis added]

17. The court concluded (para. 54 and 58):

I agree that defamation actions by government are "constitutionally unsound".

Speech about government is absolutely privileged: The reason for the prohibition of defamation suits by government lies not with the use of taxes, or with some abstruse theory about the indivisibility of the state and the people who make up the state. Rather, it lies in the nature of democracy itself.

18. These principles have been applied consistently in common-law jurisdictions. For example, the House of Lords in 1993, in the case of *Derbyshire County Council v. Times Newspapers Ltd.*, [1993] A.C. 534, [1993] 1 All E.R. 1011, at p. 547 A.C. (H.L.) stated:

It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of civil action for defamation must inevitably have an inhibiting effect on freedom of speech.

19. The governments of New South Wales and South Africa adhere to the same principles. The Supreme Court of New South Wales, in the case of *Council of the Shire of Ballina v. Ringland* (1994), 33 N.W.S.L.R. 680, [1994] NSW LEXIS 14010 (C.A.) at pp. 76-77, noted that allowing actions such as the one against Mr. Singh would "open the way to oppression of the most serious kind". In South Africa, the court in *Die Spoorbond and Another v. South Africa Railways*, [1946] A.D. 999, at p. 1014 held that claims of defamation (which include both libel and slander) by a public authority should no longer be recognized.

20. In Canada, these protections have been enshrined in the *Charter of Rights and Freedoms*, which is an integral part of the Constitution of Canada. As stated by the Ontario Supreme Court in *Corp. of Canadian Civil Liberties Assn. v. Canada*, 1992 CanLII 7518 (ON SC),

It must be concluded that the "lawful advocacy, protest or dissent" that are referred to in s. 2 of the Act are forms of political and social debate, and fall within the sphere of conduct protected by the freedom of expression.

The Sedition Act

21. The use of the Sedition Act to punish the free expression of opinions on matters of legal and political interest has been rejected as illegitimate by the courts in many common-law countries. While Mr. Singh may have been convicted of sedition, the term "sedition" as it is understood in Malaysia and as reflected in the Sedition Act in Malaysia is defined in a manner that is contrary to the definition of "sedition" in other common-law countries.

22. To understand this distinction, it is necessary to review the pertinent sections of Malaysia's Sedition Act, which are as follows: The pertinent sections of Malaysia's Sedition Act are as follows:

2. Interpretation

"seditious" when 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;

3. Seditious tendency.

(1) a "seditious tendency" is a tendency--

- (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; or
- (e) to promote feelings of ill-will and hostility between different races or classes of the population of Malays; or
- (f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions, of Part III of the Federation Constitution or Article 152, 153 or 181 of the Federal Constitution.

23. By all standards adopted in other common law jurisdictions, the provisions of Malaysia's Sedition Act under which Mr. Singh has been convicted would be characterized as laws in the nature of criminal defamation (e.g. libel). They do not deal with advocating violence to overthrow a government; rather, they purport to prohibit and criminalize criticism of the government.
24. As such the Sedition Act contravenes Malaysia's international law obligations to promote democracy and the rule of law and to ensure the enjoyment by all individuals, including lawyers and parliamentarians, of the rights to freedom of expression and to participate in political debate.

CONCLUSION

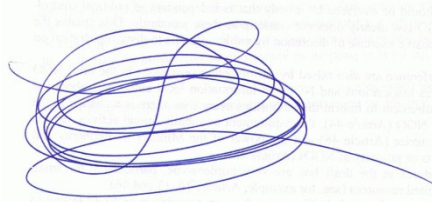
25. Jurists and other human rights specialists have condemned the prosecution of Karpal Singh and criticized the Sedition Act as "draconian" and a "relic of colonial era laws"⁸ LAWASIA and the Law Society of New Zealand noted that the prosecution—carried out after the Sedition Act was slated for repeal—smacks of selective prosecution.
26. The prosecution and conviction of Karpal Singh contravenes Malaysia's legal obligations to ensure the rights of all individuals to freedom of opinion and expression and the freedom to take part in government through public debate. Mr. Singh had a right as a citizen to voice an opinion about the legitimacy of the dismissal of the minister and the extent to which that matter could be reviewed by the courts. As a lawyer and a Member of Parliament he arguably had a duty to do so. Mr. Singh has been convicted of peacefully exercising fundamental freedoms that Malaysia has committed to protecting since becoming a member of the United Nations in 1957. Human rights monitors have called on Malaysia to repeal the Sedition Act in order to comply with international law obligations. In apparent agreement, the Prime Minister has announced its repeal.
27. Imposition of a sentence that prevents Mr. Singh from continuing to act as a parliamentarian or to practice law, will not only diminish the Court's stature, it will risk bringing the government of Malaysia into disrepute.
28. LRWC respectfully calls on the Court and other authorities involved to consider and comply with the above noted international law obligations and ensure that Karpal Singh is not deprived of his liberty, his licence to practice law or his qualification to be a Member of Parliament, as a result of these criminal proceedings.

All of which is respectfully submitted:



⁸ Conviction of Karpal Singh undermines the Rule of Law in Malaysia, The Australian Bar Association, 24 February 2014; Lawasia Concern at Karpal Singh Conviction on Sedition Charges, LAWASIA, 26 February 2014; Law Society [of New Zealand] Shares Concern at Conviction of Karpal Singh, 27 February 2014; and, Malaysia: Conviction of Karpal Singh a setback for the rule of law and freedom of expression, FIDH and SUARAM, 24 February 2014.

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