

# **LAWYERS AND THE RULE OF LAW ON TRIAL: SEDITION IN MALAYSIA**

**An analysis of Malaysia's Sedition Act**

**Prepared**

**by**

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**for**

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**in response to the prosecution for sedition of Karpal Singh**

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## The Lawyer Charged with Sedition

On January 14, 2000, Karpal Singh, prominent human rights lawyer, Deputy Chairman of the opposition Democratic Action Party (DAP) and former opposition Member of Parliament,<sup>2</sup> was arrested on a charge under Malaysia's *Sedition Act 1948*. The sedition charge against Karpal Singh is unprecedented in that it is based on words alleged to have been spoken by Karpal Singh in court while conducting the defense of his client, Anwar Ibrahim, former Minister of Finance and Deputy Prime Minister of Malaysia.<sup>3</sup> Mr. Singh has been released on bail. The trial of the sedition charge is set for May 7<sup>th</sup> to 18<sup>th</sup> 2001 in the High Court of Malaysia at Kuala Lumpur before Mr. Justice Augustine Paul.

## The Issues Raised by Sedition Prosecution

This article examines the validity of the charge against Karpal Singh and of the *Sedition Act* within the contexts of:

- I The political background and circumstances of the sedition charge;
- II The history of *Sedition Act* prosecutions in Malaysia;
- III The history and development of the law of sedition in common law jurisdictions;
- IV Malaysian national law and the rights guaranteed by the Malaysian Constitution;
- V Common law principles including lawyers' privilege and the rule of law; and
- VI International laws and standards.

LAWYERS' RIGHTS WATCH CANADA views the charge against Karpal Singh as a grave violation of the privilege that protects lawyers, judges and litigants from criminal and civil liability for words spoken during court proceedings. The charge constitutes an alarming precedent that not only undermines Mr. Singh's right and duty as a lawyer to fully represent the best interests of his client, but also infringes his right to freedom of expression. In so doing, the charge violates common law principles and international human rights standards.

LAWYERS' RIGHTS WATCH CANADA is concerned that the charge against Karpal Singh not be clothed with legitimacy by the fact that a trial is being held. As lawyers we oppose the usurpation of the law to achieve political ends. As cautioned by author Vahakn N. Dadrian:

"We are all familiar with the cloak of legality to what are essentially political prosecutions."<sup>4</sup>

The Federal Constitution of Malaysia clearly provides for a legal and parliamentary system governed by the rule of law. As lawyers we are concerned that the offences created by the *Sedition Act* and the charge against Karpal Singh are not compatible with the rule of law. We have written this

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<sup>2</sup> Karpal Singh was a DAP Member of Parliament from the State of Penang from 1978 to November 1999, and was a State Assemblyman for the State of Kedah from 1974 to 1978.

<sup>3</sup> Karpal Singh is one of the defense counsel for Anwar Ibrahim on a sodomy charge, the trial of which commenced in June, 1999. Anwar Ibrahim is charged under the Penal Code of Malaysia, s.377B: "Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment which may extend to twenty years, and shall also be liable to whipping."

<sup>4</sup> V.N.Dadrian, "The historical and legal interconnections between the Armenian genocide and the Jewish Holocaust: From immunity to retributive justice" (1998), 23 *Y.J.I.L* 503 at 504.

article to provide lawyers and human rights commentators with an overview of the standards and legal principles—drawn from national, international and common law sources—against which to assess the validity of the charge and the *Sedition Act*.

LAWYERS' RIGHTS WATCH CANADA hopes this article will provide some understanding of why sedition in the form created by Malaysian law has been rejected in other common law jurisdictions as incompatible with democracy.

## I THE POLITICAL BACKGROUND

Karpal Singh, in addition to having been a prominent government critic for over 25 years and previously arrested and imprisoned without charge for over a year,<sup>5</sup> is the lead defense counsel for Anwar Ibrahim, who is charged with sodomy. The trial of the sodomy charge against Anwar is one of a series of arrests and prosecutions that began when the political struggle between Malaysia's Prime Minister Mahathir and his popular ex-deputy Anwar came to a head in September 1998 with Anwar being fired and arrested. Anwar's firing, his arrest and the related prosecutions have caused rifts within the ruling party (UMNO), galvanized the attention of Malaysians and attracted criticism worldwide. Shortly after Anwar's arrest, Amnesty International declared him a prisoner of conscience and expressed the opinion that he had been arrested to silence him as a political opponent.

On September 2<sup>nd</sup>, 1998 Prime Minister Mahathir fired Anwar Ibrahim from his positions as Deputy Prime Minister and Minister of Finance. Two days later, Malaysian newspapers carried banner headlines announcing that Anwar Ibrahim had been implicated in sodomy. The former Deputy Prime Minister was then arrested on September 20<sup>th</sup>, 1998. Prime Minister Mahathir has relied on the allegations of sodomy as his justification for the arrest and firing of the man who had once been his protégé. He has declared on many occasions that Anwar was guilty of sodomy and morally unfit to govern. Prime Minister Mahathir has stated publicly on several occasions that he became convinced of Anwar's guilt as a result of his own extensive investigations that had revealed:

“...incontrovertible proof, that it, [sodomy allegation] is true...Other people cannot very well get the information I got.”<sup>6</sup>

Around the time that Anwar Ibrahim was fired sixteen of his close associates were arrested without charge under the Internal Security Act. Subsequently, three of these men, after being held incommunicado for periods of up to 126 days, pled guilty to having been sodomized by Anwar. All three of these men claim that the police and others in authority forced them, through deprivation, torture and brutality to give false confessions and to enter guilty pleas. While the authorities deny the accusations of torture and brutality, they do not deny that the men pled guilty without independent legal representation. There has not been any public inquiry into these extraordinary allegations, notwithstanding the fact that the allegations have been accepted as true by international human rights organizations. Nor has there been any public inquiry into the allegation that Anwar Ibrahim is the victim of a political conspiracy to silence him.

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<sup>5</sup> Karpal Singh was arrested during 'Operation Lalang' in October 1987 under the *Internal Security Act* and imprisoned until January 1989. He was released on a habeas corpus application in March 1988, but was arrested hours later. As a result of the 1987 arrest, Karpal Singh was designated as a prisoner of conscience by Amnesty International.

<sup>6</sup> *The Straits Times* [Singapore] (23 September 1998).

Subsequent to his arrest, Anwar was charged with a number of offences all of which relied on the sodomy and adultery allegations. The first charges against Anwar to be brought to trial<sup>7</sup> were based on allegations that he had directed the police to obtain written statements from two people denying the written accusations of sodomy and sexual misconduct they had previously made against him. The essence of the four Ordinance 22 charges was that Anwar, in so directing the police, had corruptly misused his office to obtain the personal benefit of avoiding either embarrassment or criminal prosecution. Sodomy and adultery allegations were a material ingredient of these charges. During the trial, these allegations of sexual improprieties attracted so much criticism, ridicule and incredulity that the prosecution, at the close of their case, amended the charges to remove the sodomy and adultery issues from the trial. The trial judge, Augustine Paul J., then forbade defense counsel from referring to any of the extensive evidence on these allegations in their defense. In the early stages of this trial one of the defense lawyers left the defense team after having been summarily sentenced to 3 months in jail for contempt. By the end of the trial all the remaining defense lawyers had been threatened with contempt citations.

Anwar Ibrahim's conviction on what remained of the Ordinance 22 charges in April 1999 did little to either undermine Ibrahim's popularity or to support the widely published sodomy allegations. That trial was widely criticized by human rights organizations and other commentators as has been the Malaysian Court of Appeal's dismissal of the appeal.

Karpal Singh's defense of Ibrahim has been vigorous. In the fall of 1999 he gave notice of his intention to call Prime Minister Mahathir as a witness. There is no doubt that Mr. Singh's capable and 'full' representation of Anwar Ibrahim may well undermine public confidence in his client's guilt irrespective of the verdict. The political background to the trial of the sodomy charge against Anwar Ibrahim coupled with the unresolved allegations of an underlying political conspiracy give rise to a concern that Karpal Singh may have been charged with sedition to hamper the defense of Anwar Ibrahim.

## **I.1 The Circumstances of the Charge**

The sedition charge is based on the allegation that Karpal Singh, on September 10<sup>th</sup> 1999, while in court representing Ibrahim, expressed the concern that somebody might be trying to murder his client. At the time, trial judge Justice Arifin Jaka, Karpal Singh and lead prosecutor Attorney General Tan Sri Mohtar Abdullah were discussing a report that seemed to indicate that Ibrahim, who had been in custody for over a year, was suffering from arsenic poisoning. Karpal Singh was calling for an inquiry into his client's in-custody treatment; the Attorney General, as lead prosecutor, was disavowing the need for an inquiry and suggesting Anwar Ibrahim had perhaps been poisoned, not by people in high places, but by supporters.

One year earlier Mr. Singh's client had been severely beaten while in custody by a 'person in a very high place', the Malaysian Chief of Police, Abdul Rahim Noor. News of Anwar's injuries was met with outcries for a public inquiry from lawyers and others. Prime Minister Mahathir initially responded to the demands for a public inquiry by suggesting that the injuries might have been self-inflicted. An inconclusive internal police inquiry failed to silence national

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<sup>7</sup> Pursuant to Emergency (Essential Powers) Ordinance No. 22/1970, s.2(1), repealed in October 1998, [the Ordinance 22 charges].

and international demands for a public inquiry. The conclusions of the resulting Royal Commission of Inquiry, namely that Anwar Ibrahim's injuries had been caused by the Malaysian Chief of Police Abdul Rahim Noor who had delivered potentially lethal blows to Anwar while he was in custody, bound and blindfolded, are a source of continuing embarrassment to the government of Malaysia. However, it was never suggested in 1998 that it was seditious to use strong language to call for an inquiry into Anwar's in-custody treatment.

## **I.2 The Charge**

The charge against Mr. Singh was laid on January 12<sup>th</sup>, 2000, four months after the date upon which the alleged statements were made.

The English translation of the charge reads:

re "Public Prosecutor - vs. - Karpal Singh s/o Ram Singh

That you on 10 September, 1999 at about 9:10 a.m. in the High Court Kuala Lumpur in the Federal Territory of Kuala Lumpur in trial Public Prosecutor - vs. - Dato' Seri Anwar bin Ibrahim (WPPJ45-51-98) and Public Prosecutor - vs. - Sukma Darmawan Sasmitaat Madja (WPPJ45-26-99) during the course of your submissions over the issue in relation to allegation of arsenic poisoning of Dato' Seri Anwar bin Ibrahim did utter the following seditious words, to wit,

'It could well be that someone out there wants to get rid of him...even to the extent of murder.

I suspect that people in high places are responsible for the situation.',

and you have thereby committed an offence under section 4(1)(b) of the Sedition Act, 1948 (Act 15) punishable under section 4(1) of the same Act."

## **II THE HISTORY OF SEDITION ACT PROSECUTIONS IN MALAYSIA**

This prosecution of Karpal Singh and sedition prosecutions against other Malaysians active in opposition parties have been severely criticized by international human rights organizations as examples of 'selective prosecutions' and of the use of penal statutes not to punish and prevent criminal activity but to silence critics. Amnesty International, commenting on the sedition charges against Karpal Singh and others, criticized such prosecutions by stating:

"Charging political leaders and journalists with sedition threatens to strike at the heart of free speech in a democratic society... When such prosecutions fall solely on opposition figures, public confidence in the rule of law and administration of justice risks being seriously undermined."<sup>8</sup>

An editorial in *The Economist*, made this comment when the Court of Appeal confirmed the conviction for sedition of Lim Guan Eng, then a Member of Parliament, and imposed a jail term,

"The jailing of an opposition politician for daring to criticize the Attorney General and the police is outrageous in principle, dangerous in practice."<sup>9</sup>

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<sup>8</sup> Amnesty International Press Statement (28 January 2000) AI Index: ASA 28/01/00.

<sup>9</sup> "Muzzled in Malaysia", *The Economist* (29.08.98 - 04.09.98).

These criticisms are inspired by a number of factors that include: the pattern of *Sedition Act* prosecutions in Malaysia, the Prime Minister's stated interest in silencing Karpal Singh, the Prime Minister's apparent interest in the outcome of trial of the sodomy charge against Anwar Ibrahim's and the lack of any legal safeguards preventing the Prime Minister from interfering with the Attorney General's exercise of discretion.

A review of post independence sedition cases in Malaysia indicates a pattern of prosecutions against members of the opposition, opposition members of Parliament, and others pursuing campaigns that implied some criticism of government. None of the cases reviewed involve any allegation of incitement to violence or unlawful behaviour. All fit into a pattern of what Amnesty International has labeled as: "politically motivated, selective prosecutions to silence prominent dissenters."<sup>10</sup>

Some examples of *Sedition Act* prosecutions and threatened prosecutions against government critics are as follows:

- ❑ In 1971 Dr Ooi Kee Saik, an active member of the opposition Democratic Action Party, was convicted of sedition for a speech he made at a dinner celebrating the release from prison of an opposition Member of Parliament, Lim Kit Siang, who had been held in jail for 18 months without charge or trial.
- ❑ Fan Yew Teng, a Member of Parliament for the Democratic Action Party, was convicted for publishing the text of Dr. Ooi's speech in the party newsletter. Dr. Ooi's speech had suggested that some of the government's policies were racially discriminatory.
- ❑ In 1985 Param Cumaraswamy<sup>11</sup> was charged with sedition for a statement he made during a press conference calling on the Pardons Board to reconsider the commutation of death sentence for Sim Kie Chon. A mandatory death sentence had been imposed on Mr. Sim for his illegal, but otherwise innocent, possession of a gun. Mr. Cumaraswamy was acquitted on the grounds that his criticism was directed toward the Pardon Board and not against the King.
- ❑ In 1997 Lim Guan Eng, opposition Member of Parliament for the Democratic Action Party, was convicted of sedition and sentenced on appeal to 18 months in prison for stating that the Attorney General had used a double standard in a statutory rape case involving a 15 year old female constituent. Mr. Lim had questioned the fact that the victim was placed in a detention home for a period of three years while one of the alleged perpetrators, the Chief Minister of Melaka was not charged. In 1994 corruption charges had been brought against the Chief Minister following a number of reports by Lim Guan Eng. As a result of his conviction Mr. Lim is barred from sitting as a Member of Parliament for 5 years from the date of his release.
- ❑ In September 1998, Dr. Wan Azizah, wife of Anwar Ibrahim, was arrested under the *Sedition Act* for expressing concern for her husband's well being in police custody. She was arrested for expressing this concern after Anwar Ibrahim had been severely beaten by the Chief of Police, but before Wan Azizah knew of the beating.
- ❑ In November 1999 the High Court of Malaysia issued an injunction prohibiting the Malaysian Bar from meeting to discuss a perceived loss of confidence in the judiciary on the grounds that the participants in such a discussion would be committing sedition. Justice Dato' Dr. Kamalanthan Ratnam when issuing the injunction said:

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<sup>10</sup> Amnesty International Press Statement (March 2000) AI Index: ASA 28/03/00.

<sup>11</sup> Dato' Param Cumaraswamy is currently the UN Special Rapporteur on Judicial Independence.

“ The conduct of the defendants and the members of the 3<sup>rd</sup> defendant (Malaysian Bar) if allowed to attend the EGM and to discuss the resolution would appear to constitute an offence under Section 4(1)(a) read together with Section 3(1)(c) of the Sedition Act 1948. However, it is not my duty to make any finding as to whether an offence has or has not been committed under the said sections. This is for the Public Prosecutor to decide, if at all. In any event it is my judgement that the plaintiff in actual fact is protecting the defendants from plunging into an abyss from which they cannot emerge unscathed.”<sup>12</sup>

In January 2000, *Sedition Act* charges were laid against three prominent government critics:

- a) Marina Yusoff, lawyer and Vice President of the opposition National Justice Party, was charged for allegedly inciting racial hatred by suggesting that there was a connection between the ruling party and the 1969 race riots,
- b) Zulkifli Sulong, editor of *Harakah*, was charged for publishing an article by Chandra Muzaffar, Deputy President of the National Justice Party, that criticized the media and the judiciary in relation to the trial of Anwar Ibrahim, and
- c) Chia Lim Thye, owner of the printing company for *Harakah*, was also charged in relation to the same article. *Harakah* is a newspaper published by the opposition Party Islam (PAS).

In the case of Karpal Singh, an additional factor suggesting ‘directed’ prosecution arises from the statement that Prime Minister Mahathir was reported to have made on February 4<sup>th</sup>, 2000 during an interview in London with Lee Tse Yin, expressing in very strong language the desire to get rid of Karpal Singh:

“As for my attitude towards lawyers, sometimes I crack jokes about lawyers. What I said was actually a quote from Shakespeare. Shakespeare, in one of his writings said, ‘the first thing we do, we hang the lawyers’ so during a Cabinet meeting, I jokingly said, the first thing we do, we should line up all the lawyers and shoot them. It was a joke. Unfortunately somebody told the lawyers about it and the lawyers in the Bar Council decided I am against the lawyers. I cannot be against all the lawyers. Only against some of the lawyers maybe. I don’t see why I should like Karpal Singh, for example, but not all the lawyers. But there are some lawyers who of course go all out and say things which are nasty. Then I would like very much to hang the lawyers, these particular lawyers. But of course this is just a wish. It is not going to materialize.”<sup>13</sup>[emphasis added]

As observed in *Lawyers and Ethics*:

“We can appreciate the fundamental importance of an independent bar only by contrasting the treatment of lawyers in Western democracies in repressive regimes. In the regimes of Stalin, Hitler, the Greek Colonels, and the Chinese Cultural revolutionaries, among others, vigorous and independent lawyers who have acted for clients whose views or conduct the government has deplored or feared have been harassed, ill-treated, prevented from practising their profession and in some instances even murdered, either by or with the complicity of the government. The cunning revolutionary in Shakespeare’s King Henry VI who said, “First, let

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<sup>12</sup> Civil Case No. S2-23-93-1999 (19 November 1999) (Kuala Lumpur High Court) [unreported]. This decision has been appealed.

<sup>13</sup> As reported on the website <<http://www.malaysiakini.com>>

us kill all the lawyers” knew that totalitarianism could not survive a strong and independent bar.”<sup>14</sup>[emphasis added]

Karpal Singh is one of the defense counsel for Anwar Ibrahim on charges that have divided the ruling party and captured the attention of Malaysians. The firing, incarceration and prosecutions of Anwar Ibrahim have proved to be unpopular with both members of the ruling party and with other Malaysians. Another factor perhaps contributing to criticisms that the prosecution of Karpal Singh is politically motivated arises from the perception that anything that hampers the defense of Anwar Ibrahim is likely to improve the chance of a guilty verdict that is accepted as being legitimate.

### III SEDITION IN COMMON LAW JURISDICTIONS

Many jurists and scholars consider sedition properly to be an obsolete offence, one no longer valid in purpose or substance. Contemporary case law in common law jurisdictions has clearly established that only an intention to incite violent overthrow of lawfully constituted authority coupled with action(s) likely to achieve the prohibited result could constitute sedition, but even this narrowly defined offence has fallen into disuse. Laurence W. Maher concludes from his study of sedition in Australia that, “there is almost complete agreement in the common law jurisdictions that sedition should be made obsolete.”<sup>15</sup>

Lord Denning is less qualified in his remarks about the offence of seditious libel:

“The offence of seditious libel is now obsolescent. It used to be defined as words intended to stir up violence, that is, disorder, by promoting feelings, of ill-will or hostility between different classes of His Majesty’s subjects. But this definition was found to be too wide. It would restrict too much the full and free discussion of public affairs...So it has fallen into disuse for nearly 150 years. The only case in this century was *R. v. Caunt*...when a local paper published an article stirring up hatred against Jews. The jury found the editor Not Guilty.”<sup>16</sup> [emphasis added]

In a decision of the Supreme Court of Canada, Mr. Justice Rand commented that the crime of seditious libel was founded in legal and social beliefs no longer held:

“The crime of seditious libel is well known to the Common Law. Its history has been thoroughly examined and traced by Stephen, Holdsworth and other eminent legal scholars and they are in agreement both in what it originally consisted and in the social assumptions underlying it. Up to the end of the 18<sup>th</sup> century it was, in essence, a contempt in words of political authority or the actions of authority. If we conceive of the governors of society as superior beings, exercising a divine mandate, by whom laws institutions and administrations are given to men to be obeyed, who are, in short, beyond criticism, reflection or censure upon them or what they do implies either an equality with them or an accountability by them, both equally offensive.”<sup>17</sup>

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<sup>14</sup> G. MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Carswells, 1993) at 26-27.

<sup>15</sup> L.W. Maher, “The Use and Abuse of Sedition” (1992), 14 *Sydney L. R.* 287 at 312.

<sup>16</sup> Lord Denning, *Landmarks in the Law* (London: Butterworths, 1984) at 295.

<sup>17</sup> *Boucher v. The King*, [1951] S.C.R. 265 at 285-86.

Although there are some differences amongst scholars as to the exact origins of the offence, all agree that this offence came into being during a period when the divine right of rulers was not only accepted but believed to be necessary, when the rulers who dispensed laws were largely above question and criticism, and when criticism of rulers was considered sinful as well as unlawful. Some date the genesis of sedition from the Statute of Westminster, 1275, 3 Edw. I, c. 34. (repealed in 1887). *De Scandalis Magnatum* created penalties for publishing ‘false’ news or other statements that could create discord between the Ruler and his subjects. The language was broad and unrestrained, “...that from henceforth none be so hardy to tell or publish any false news or Tales, whereby discord, or accession of discord or slander may grow between the King and his people, or the Great Men of the Realm.”<sup>18</sup>

Others date the original offence of seditious libel from 1606, when the Chief Justice of the Star Chamber laid down in *De Libellis Famosis*, some defining characteristics of this offence. The Court of Star Chamber was created by Henry VII in 1487 to combat the evils of feudal anarchy and was the chief institutional tool by which the Tudors restored the authority of the national courts and repressed baronial disorder. One of the tools of the Star Chamber was censorship, a particular concern with the advent of printing. When the Court of Star Chamber was abolished in 1641, seditious libel continued as an offence in the common law courts. The language used in *De Libellis Famosis* is strikingly similar to Malaysia’s *Sedition Act*: intention was irrelevant as was absence of actual harm. Truth, according to Lord Coke, was not a defense because truth could be more injurious to the King or Ruler than fiction.<sup>19</sup> In 1606 seditious libel could be punished by imprisonment, fine, pillorying or loss of ears.<sup>20</sup>

These antecedents to the *Sedition Act* bestowed powers that were sweeping enough to be used arbitrarily by Rulers not accountable to ordinary citizens with none of the balancing of state powers and individual rights, nor the legal protections necessary to maintain that balance which have become cornerstones of modern democracy.

The fact that sedition has often been used as a political tool and not for a legitimate public purpose is another factor contributing to its repudiation by common law courts. Authors, Gitobu Imanyara and Kibe Mungai, when reviewing Kenya’s now repealed<sup>21</sup> *Sedition Act*, observed:

"Sedition was always a political, rather than a criminal, offence. Thus, there was no vigorous effort on the part of the government to prove the culpability of an accused in court."<sup>22</sup>

In England, sedition survived only as a common law offence of seditious libel and prosecutions since the Reform Act of 1832 have been rare. The last conviction in England for seditious libel occurred in 1909.<sup>23</sup> This was a prosecution of the printer of the *Indian Socialist*, a publication that

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<sup>18</sup> The decision of Mme. Justice MacLachlin (S.C.C.) in *Zundel v. The Queen et al.* (1992), 75 C.C.C. (3d) 449 at 501.

<sup>19</sup> 77 Eng. Rep. 250.

<sup>20</sup> *Ibid.*, at 251.

<sup>21</sup> Kenya’s *Sedition Act* was repealed in November 1997 by the *Statute Laws Repeals and Miscellaneous Amendments Act 1997*.

<sup>22</sup> G. Imanyara & K. Mungai, “Kenya” in R. Martin, ed., *Speaking Freely: Expression and the Law in the Commonwealth* (Toronto: Irwin Law, 1999) 287 at 330.

<sup>23</sup> *R. v. Aldred* (1909), 22 Cox C.C. 1.

advocated independence for India. The last prosecution for seditious libel initiated by the English crown was in 1947 and this prosecution ended in an acquittal.<sup>24</sup> In 1991, a private individual sought to compel a magistrate to issue a summons for seditious libel and blasphemy based on the book *Satanic Verses*, against both the author, Salman Rushdie, and the printer. The Queen's Bench Division, on judicial review of the magistrate's refusal to issue the summons, found as a fact that *Satanic Verses* contained passages that promoted hostility and ill-will amongst the Queen's subjects and had caused the breakdown of diplomatic relations between Britain and Iran, but did not disclose an intention to incite violence against constituted authority. The Court of Queen's Bench unanimously upheld the magistrate's ruling that the prosecution for sedition could not proceed. Lord Justice Watkins, giving judgment for the Court, relied on the statement of law contained in the decision of the Supreme Court of Canada in *Boucher v. The King*<sup>25</sup> and stated that:

“...the seditious intention upon which a prosecution for seditious libel must be founded is an intention to incite to violence or to create public disturbance or disorder against the sovereign or the institutions of Government. Proof of an intention to promote feelings of ill will and hostility between different classes of subjects do not alone establish a seditious intention. Not only must there be proof of an incitement to violence in this connection, but it must be violence or resistance or defiance for the purpose of disturbing constituted authority, meaning some person or body holding public office or discharging some public function of the state.”<sup>26</sup>[emphasis added]

In Canada, no prosecutions for sedition have been initiated for over 50 years. The original Criminal Code sedition offence was based partly on the 1879 English Draft Code, itself a codification of the law of seditious libel prior to 1879. The last prosecution for sedition in Canada (*Boucher v. The King*) targeted a member of the Jehovah Witness religion, prosecuted for urging people to protest against the Quebec government's 'mob rule and Gestapo tactics' by obedience to god. The Supreme Court of Canada set aside Mr. Boucher's conviction and observed that the courts in all countries had rejected criminality based on the mere creation of 'disaffection', 'discontent', 'ill-will', or 'hostility'. The Court stated:

“There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence, of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality.”<sup>27</sup>

In *Boucher v. The King*, the Supreme Court also rejected all of the definitions of 'seditious intention' found in *Stephen's Digest of Criminal Law, 8th ed.* except where there was an intentional incitement to violent lawlessness against a constituted authority. Seditious libel as found in *Stephen's Digest of Criminal Law* included actions:

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<sup>24</sup> *R. v. Caunt* (1947), 64 L.Q.R. 203.

<sup>25</sup> *Supra* note 17.

<sup>26</sup> *R. v. Chief Metropolitan Magistrates Court ex parte Choudhory*, [1991] 1 All E.R. 306 at 323.

<sup>27</sup> *Supra* note 17 at 288.

1. to bring into hatred or contempt, or to excite disaffection against, the King or the Government and Constitution of the United Kingdom, or either House of Parliament, or the administration of justice; or
2. to excite the King's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established; or
3. to raise discontent or disaffection amongst His Majesty's subjects; or
4. to promote feelings of ill-will and hostility between different classes of such subjects, that is to vilify or bring into hatred or contempt or to excite disaffection or hostility against the Ruler or the administration of justice.

Mr. Justice Rand, when rejecting the validity of sedition based on the creation of negative responses such as hostility, ill-will and hatred observed as follows:

“But constitutional concepts of a different order have necessitated a modification of the legal view of public criticism; and the administrators of what we call democratic government have come to be looked upon as servants, bound to carry out their duties accountable to the public.”<sup>28</sup>

The leading decision on sedition in India reached a conclusion similar to that in *Boucher v. The King*. In *Kedar Nath Singh v State of Behar*,<sup>29</sup> the Supreme Court found that without proof of “...acts that have implicit in them the idea of subverting the government by violent means”, the offence of sedition cannot be established. Chief Justice Sinha also eloquently concluded that the court, as the guardian of citizens' rights, was duty bound to strike down unnecessarily restrictive legislation.

“This Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression with which we are concerned in this case.”<sup>30</sup>

In Australia, sedition, codified in 1920 as section 24C & D of the Crimes Act, has also fallen into disuse. 1986 amendments to these sections<sup>31</sup> make intention a necessary element and require proof that the seditious act was carried out with the intention of causing violence or creating public disorder or a public disturbance. Notwithstanding these amendments, author L. W. Maher concluded:

“...the law of sedition is anachronistic and an unjustified interference with freedom of expression and that abolition of sedition offences at both Commonwealth and State level is therefore to be preferred to any attempt to “modernise” the crime of sedition.”<sup>32</sup>

The last commonwealth prosecution in Australia occurred in 1953 during what Laurence W. Maher described as the “anti-communist” crusades.<sup>33</sup>

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<sup>28</sup> *Ibid.*, at 286.

<sup>29</sup> *Kedar Nath. Singh v. State of Behar*, A.I.R. 1962 S.C. 955.

<sup>30</sup> *Ibid.*, at 968.

<sup>31</sup> The Australian Intelligence and Security (Consequential Amendments) Act 1986, section 12 & 13.

<sup>32</sup> *Supra*, note 15 at 288.

<sup>33</sup> L. W. Maher, “Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case” (1994) 16 *Adel. L.R.*, No. 1p. 1 at 17.

United States law has narrowed the offence of sedition to one in which there is an advocacy to use unlawful force coupled with the likelihood that such advocacy will produce the unlawful force.<sup>34</sup> A recent U.S. decision<sup>35</sup> interpreting the statutory offence of seditious conspiracy<sup>36</sup> held that an intention to ‘overthrow’ the government coupled with an act of violence intended to achieve or contribute to the overthrow was not enough if the act of violence could not achieve the overthrow. The accused, in that case, were charged with seditious conspiracy alleged to have been committed by a number of means, including the murder of Meir Kahane and the planned assassination of Egyptian president Hosni Mubarak during his visit to the U.S. The accused apparently believed that the murder of Meir Kahane--rabbi and leader of a group opposed to Arabs living within the biblically defined borders of Israel--would be a blow against the West, and therefore would contribute to the overthrow of the U.S. government. The court dismissed the seditious conspiracy count based on the murder of Meir Kahane on the grounds that the murder of Kahane could not in itself further the goals of a seditious conspiracy and the fact that the accused believed it would was not determinative of the issue. The court concluded:

“Were the rule otherwise, the seditious conspiracy statute would expand infinitely to embrace the entire agenda of anyone who violated it, whether or not that agenda also included an objectively non-seditious plan...”<sup>37</sup>

The original rationale for seditious prosecutions, namely to protect rulers from criticism and ridicule, no longer exists today. The offence of sedition (other than that involving incitement to violent lawlessness against constituted authority) has been resoundingly rejected in the jurisprudence reviewed as being incompatible with democracy and indeed antithetical to the rule of law. The same tests and considerations applied to the Malaysian *Sedition Act* would have the same result. The ambit of the offence of sedition involving incitement to violent lawlessness against constituted authority has not been extensively explored due, probably, to other criminal charges being laid when such elements are present.

## IV MALAYSIAN NATIONAL LAW

### IV.1 History of the Sedition Act, 1948 of Malaysia

The original Malaysian *Sedition Act* was adopted in 1948<sup>38</sup> by the British colonial government to deal with threats precipitated by the ‘communist insurgency’. When Malaysia gained its independence on August 31<sup>st</sup>, 1957 the *Sedition Act* continued as a Malaysian statute by the operation of Article 162(1) of the Federal Constitution (the Constitution).<sup>39</sup>

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<sup>34</sup> *Brandenburg v. Ohio*, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (U.S.S.C. 1970).

<sup>35</sup> *United States v. Rahman*, 854 F. Supp. 254 (S.D.N.Y. 1994).

<sup>36</sup> 18 U.S.C. s.2384: “If two or more persons...conspire to overthrow, put down or to destroy by force the Government of the U.S., or to levy war against them...”.

<sup>37</sup> J.J. Paust & M.C. Bassiouni et al., *International Criminal Law: Cases and Materials* (Durham: Carolina Academic Press, 1986) at 1215.

<sup>38</sup> The Sedition Ordinance came into force on July 19, 1948 [hereinafter *Sedition Act*].

<sup>39</sup> 162. Existing laws

Post independence *Sedition Act* amendments, adopted during the State of Emergency declared May 15, 1969,<sup>40</sup> criminalized a broader range of expression than the original Malaysian *Sedition Act*. During the 22 months that Parliament was suspended, many statutes, including the Constitution were amended to give the governing council even greater powers to prevent rebellion and suppress criticism against the government.

In 1970 pursuant to the Emergency (Essential Powers) Ordinance No. 45/1970, the *Sedition Act*<sup>41</sup> was amended to prohibit as a ‘seditious tendency’ any tendency to question new provisions of the Constitution dealing with citizenship, national language, special rights to Malays and the sovereignty of the Rulers and any tendency to promote ill-will amongst Malaysians.<sup>42</sup> Section 5(1) of the *Sedition Act* which had prohibited the preferment of a charge more than six months after the alleged publication was repealed.

Constitutional amendments made during 1970 narrowed Parliamentary privilege so that Parliamentarians were no longer protected from *Sedition Act* charges based on anything said or any vote taken in Parliament relating to citizenship, national language, special right to Malays and the sovereignty of the Rulers. These amendments, by imposing penal sanctions, prohibit elected representatives from questioning an entire category of legislation affecting all aspects of Malaysian society.

While sedition has become obsolete in most other countries to accommodate the growth of democracy, Malaysia’s *Sedition Act* has broadened.

## **IV.2 The Sedition Act**

To assess the broad reach of Malaysia’s *Sedition Act* reference must first be made to the provisions of the statute.

### **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

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(1) 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.

<sup>40</sup> Parliament was suspended from May 1969 to February 1971.

<sup>41</sup> Subsections 3(2)(e)&(f) were added and s. 3(2) was amended.

<sup>42</sup> *Sedition Act*, ss. 3(1)(e)&(f).

- 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.
- (2) Notwithstanding anything in sub-section (1) an act, speech, words, publication or other thing shall not be deemed to be seditious by reason only that it has a tendency—
- (a) to show that any Ruler has been misled or mistaken in any of his measures:
- (b) to point out errors or defects in any Government or constitution as by law established (except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (f) of sub-section (1) otherwise than in relation to the implementation of any provision relating thereto) or in legislation or in the administration of justice with a view to the remedying of the errors or defects;
- (c) except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (f) of sub-section (1);
- (i) to persuade the subjects of any Rulers or the inhabitants of any territory governed by any Government to attempt to procure by lawful means the alteration of any matter in the territory of such Government as by law established; or
- (ii) to point out, with a view to their removal, any matters producing or having a tendency to produce feelings of ill-will and enmity between different races or classes of the population of the Federation, if the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency.
- (3) For the purpose of proving the commission of any offence against this Act the intention of the person charged at the time he did or attempted to do or made any preparation to do or conspired with any person to do any act or uttered any seditious words or printed, published, sold offered for sale, distributed, reproduced or imported any publication or did any other thing shall be deemed to be irrelevant if in fact the act had, or would, if done, have had, or the words, publication or thing had a seditious tendency.

#### **4. Offences**

- (1) 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 and shall, on conviction, be liable for a first offence to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding three years or to both,....

## **5. Legal Proceedings**

(1) No person shall be prosecuted for an offence under section 4 without the written consent of the Public Prosecutor. In such written consent the Public Prosecutor may designate any court within Malaysia to be the court of trial.

These sections of the *Sedition Act* give rise to a number of concerns. Section 2 creates the tautology that the word ‘seditious’ when paired with a verb or a noun qualifies the noun or verb as having a seditious tendency. Section 3(1) describes ‘seditious tendency’ as including a number of extremely broad categories of consequences that could render otherwise legal acts, illegal. The language used in section 3 is broad and imprecise enough to catch everything from a ‘tendency to question’ certain topics, to a ‘tendency to raise discontent amongst inhabitants’, to a tendency to excite Malaysians to alter the law by lawless means. Section 3(1)(b) is the only section that could be said to ‘define’ a ‘seditious tendency’ with sufficient particularity to enable a person to either know in advance of being charged the behaviour prohibited or to prepare and present a full answer and defense. Section 3(1)(b) is the only section that prohibits acts that would fall within the definition of sedition as interpreted in most other common law jurisdictions.

Section 4(1)(b) specifies only the means by which the offence of sedition can be committed: publishing, printing, selling, possessing, distributing or reproducing any seditious publication or uttering any seditious words. As the acts listed in section 4 become criminal only when done in relation to a seditious publication, it is imperative to know what ‘seditious’ means in order to know what constitutes the offence. Case law has failed to provide the definition missing from the statute.

### **IV.3 Malaysian Jurisprudence**

Malaysian courts have interpreted sedition so broadly that a conviction appears to be the almost inevitable result of a prosecution. It is clear from the jurisprudence that no defense lies in either: truth, lack of intention to offend, presence of an innocent or honourable intention, absence of consequent harm, or even in lack of possibility or potential for consequent harm. To prove a charge based on uttering seditious words, the prosecution apparently need only prove that the words or ‘equivalent’ words were spoken and need not prove that the words had or could have had any of the consequences referred to in section 3 of the *Sedition Act*.

The decision of the High Court in *P.P. v. Ooi Kee Saik & Ors*<sup>43</sup> established that both the absence or impossibility of section 3 consequences and the truth or falsity of the words uttered are immaterial and will not provide a defense. These interpretations, later cited with approval in 1998 by Malaysia’s Court of Appeal,<sup>44</sup> were summarized by Raja Azlan Shah, J.:

“In my view what the prosecution have to prove and all that the prosecution have to prove is that the words complained of, or words equivalent in substance to those words, were spoken by

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<sup>43</sup> *P.P. v. Ooi Kee Saik & Ors.*, [1971] 2 M.L.J. 108.

<sup>44</sup> *Lim Guan Eng v. P.P.*, [1998] 3 M.L.J. 14 at 43.

accused No. 1 at the dinner party. Once that is proved the accused will be conclusively presumed to have intended the natural consequences of his verbal acts and it is therefore sufficient if his words have a tendency to produce any of the consequences stated in section 3(1) of the Act. It is immaterial whether or not the words complained of could have the effect of producing or did in fact produce any of the consequences enumerated in the section. It is also immaterial whether the impugned words were true or false.”<sup>45</sup>

Counsel in the *Ooi Kee Saik* case urged the court to follow the common law principles of sedition established by English courts and articulated by the *Kedar Nath Singh*<sup>46</sup>. The Indian Supreme Court held that sedition could not be established without proof of “...acts that have implicit in them the idea of subverting the government by violent means”.<sup>47</sup> Raja Azlan Shah, J. rejected interpretations of sedition requiring an intention to incite violence, tumult or public disorder with the non sequitur:

“Our sedition law would not necessarily be apt for other people but we ought always to remember that it is a law that suits our temperament.”<sup>48</sup>

Malaysian case law has interpreted sedition to be essentially an absolute liability offence. The decision in *P.P. v. Mark Koding*<sup>49</sup> held that even an innocent or noble intention will not provide a defense. Mohamed Azim, J. giving judgment in the case held:

“Thus, it is immaterial whether the accused’s intention or motive was honourable or evil when making the speech.”<sup>50</sup>

The test of what is seditious is not based on evidence, information or other considerations that could be known by the accused in advance of conviction. It is not necessary for the prosecution to submit any evidence on the issue of whether the words did or could have a ‘tendency’ to provoke any of the consequences found in section 3 of the *Sedition Act*. At the end of the trial the judge apparently decides whether the words are seditious free from the clutter of evidence and restricted only by the confines of his “honest judgment”. In the words of Mr. Justice Chan in *P.P. v. Param Cumaraswamy*:

“...a judge has to ask himself if it is in his honest judgment that the statement was likely to create dissatisfaction among the people. If it is likely to do that then the statement is seditious. If in his honest judgment he does not think that the words were likely to create dissatisfaction among the people, then he has to find that the words are not seditious.”<sup>51</sup>

Relying on a 1868 decision,<sup>52</sup> Chan J. in the *Cumaraswamy case* ‘defined’ the word ‘discontent’ (s. 3(1) (d)) as meaning, dissatisfaction. Citing the case of *Burns v. Ransley*,<sup>53</sup> Chan J. defined the

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<sup>45</sup> *Supra* note 43 at 111.

<sup>46</sup> *Supra* note 29.

<sup>47</sup> Venkt Iyer in R. Martin ed., *Speaking Freely: Expression and the Law in the Commonwealth*, *supra* note 22 at 232.

<sup>48</sup> *Supra* note 43 at 112.

<sup>49</sup> *P.P. v. Mark Koding*, [1983] 1 M.L.J. 111.

<sup>50</sup> *Ibid.*, at 114.

<sup>51</sup> *P.P. v. Param Cumaraswamy* (No.2), [1986] 1 M.L.J. 518 at 525.

<sup>52</sup> *R. v. Sullivan* (1868), 11 Cox C.C. 44.

<sup>53</sup> (1949), 79 C.L.R. 101.

word ‘disaffection’ (section 3(1) (a), (c)&(d)) as meaning ‘disloyalty, enmity and hostility’. The decision in *Burns v. Ransley*, a seditious libel action against an Australian communist, is no longer good law in Australia. That decision was made, according to author Laurence Maher, when “the High Court allowed itself to be manipulated by anti-communist hysteria”.<sup>54</sup> Malaysian case law repeats the tautologies of the *Sedition Act* in purporting to define ‘disaffection’ as disloyalty, enmity, or hostility and ‘discontent’ as dissatisfaction.

A leading Malaysian lawyer, Raja Aziz Addruse, summarized the extent to which Malaysian jurisprudence has deviated from both the Malaysian Constitutional guarantees of freedom of expression and the common law offence of sedition. He stated:

“Unlike the common law offence of sedition (which requires the prosecution to prove the offence by cogent evidence such as a rousing to rebellion, tumult, or rioting), the offence created by the Act is committed by a person whose spoken words are regarded as having a seditious tendency. Not prepared to test the constitutionality of the provisions of the Act by reference to their reasonableness as restrictions imposed in the interest of national security, public order, or incitement to violence, the courts have perpetuated the vagueness of the offence. They have described it using the phrase “freedom of speech ends where sedition begins.” In the end, a finding of guilt on a charge of sedition depends on subjective judgment.”<sup>55</sup>

The sweeping ambiguities created by the *Sedition Act* are compounded by the jurisprudence and have resulted in the creation of an offence to which there is no defense. A sedition conviction, it appears, can occur in the absence of both mens rea and an actus rea. The charge is essentially that the accused committed sedition by a means (in the case of Karpal Singh, by speaking) on a date and at a place that are specified. The consequence that did or could have rendered the words seditious and therefore criminal is neither specified nor does the occurrence or likelihood of occurrence of that consequence have to be proven. What constitutes a seditious tendency will be determined after the conclusion of the trial based on the ‘honest judgment’ of the judge. The accused can know what is seditious and what constitutes the crime only after that final determination has been made by the trial judge and so is estopped from defending the charge.

Malaysian jurisprudence, by ignoring contemporary standards and principles and by ignoring both the rights guaranteed by and the legislative restrictions imposed by the Malaysian Federal Constitution, has taken sedition back to its 1606 origins in the Court of Star Chamber. Malaysia’s *Sedition Act* allows for absurdities of the kind satirized in the children’s story *The Emperors’ New Clothes*. In Malaysia, remarking on the nakedness of an unclothed emperor could well result in a sedition prosecution.

## **V COMMON LAW PRINCIPLES AND THE RULE OF LAW**

### **V.1 Common Law Doctrine of Absolute Privilege**

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<sup>54</sup> *Supra* note 33.

<sup>55</sup> R.A. Addruse, “Malyasia” in R. Martin, ed., *Speaking Freely: Expression and Law in the Commonwealth* (Toronto: Irwin Law, 1999) 369 at 380.

According to the common law, absolute privilege attaches to any statements made by judges, witnesses and advocates during the course of judicial or quasi-judicial proceedings.<sup>56</sup> The principle and the immunity it provides from both civil and criminal proceedings has been a principle of primary importance to the integrity of common law legal systems for over three hundred years. The parameters of the doctrine of absolute privilege, which have remained constant, were enunciated in 1772 by Lord Mansfield in *R. v. Skinner*:

“Neither party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office.”<sup>57</sup>

The only exceptions to absolute privilege are with respect to perjury, contempt of court and perverting the course of justice. In 1892, the English Court of Appeal affirmed the ambit of absolute privilege and its purpose as an essential requirement for the proper administration of justice:

“The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action for libel or slander lies whether against judges, counsel, witnesses, or parties for words spoken in the course of any proceeding before any court recognized by law and this although the words were written or spoken maliciously, without any justification or excuse, and from personal ill-will or anger against the party defamed. This 'absolute privilege' has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech exist.”<sup>58</sup>

This above quoted statement of the law was adopted in January 2000 by the High Court of Malaysia in *Thiruchelvaseharam a/l Manickavasegar v. Mahadevi a/p Nadchatiram*. Quoting the first sentence of the above passage, Justice Foong further stated that:

“The defendant has claimed that she made it [the statement] as counsel for Jega and for herself personally as a party in Suit 61. For this, she is entitled to be protected by absolute privilege....It is immaterial whether such proceedings take place in open court or in private and whether they are final or of a preliminary nature – see paragraph 13.3 of *Gatley on Libel And Slander* (9<sup>th</sup> edition).”<sup>59</sup>

In his decision, Justice Foong defined absolute privilege as protecting counsel guilty of misconduct and malice and rejected relevancy as a requirement stating that public policy required that the principle of privilege be subject only to those restrictions cited in *R. v. Skinner*. Justice Foong stated:

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<sup>56</sup> P. Milmo & W.V.H. Rogers, eds., *Gatley on Libel and Slander*, 9th ed. (London: Sweet & Maxwell, 1998) at 281 [hereinafter *Gatley*]; P.R. Carter-Ruck, R. Walker & H.N.A. Starte, *Carter-Ruck on Libel and Slander*, 4th ed. (London: Butterworths, 1992) at 119; R.E. Brown, *The Law of Defamation in Canada*, 2nd ed., vol. 1 (Toronto: Carswell, 1994) at 554.

<sup>57</sup> *R v. Skinner*, (1772) Lofft 55 at 56, 98 E.R. 529 at 530 [cited to E.R.].

<sup>58</sup> *Royal Aquarium v. Parkinson*, [1892] 1 Q.B. 431 (C.A.) at 451 per Lopes, L.J.

<sup>59</sup> Civil Case No. S2 (S5)-23-14-1997 tried together with Civil Case No. S5-23-08-1997 (22 January 2000) (Kuala Lumpur High Court) at 31 per Dato' Foong, J. [unreported]

“...it[a relevancy restriction to absolute privilege] contradicts their Lordships’ basic rationale of preventing any pressure on counsel or parties when they present their case before the Court. Any exceptions or proviso attached to this rule on the freedom to advance a prosecution or defence without fear of an action for libel and slander will certainly defeat this concept on administration of justice as a public policy. In my view there must be no restriction placed in the way of this principle”.<sup>60</sup>[emphasis added]

The application of absolute privilege to criminal prosecutions as articulated in *R. v. Skinner* was adopted in 1993 by the High Court of Australia in *Jamieson v. The Queen and Brugmans v. The Queen*. Deane and Dawson JJ. in the majority judgment commented on the dearth of cases on the subject with this observation:

“It is true that, until recently, there has been a dearth of cases in which common law courts have been called upon to quash a criminal proceeding or conviction by application of the principle. That is not, however, surprising. It could scarcely be expected that prosecuting authorities would institute proceedings in disregard of a general proposition of common law principle which had been enunciated by Lord Mansfield and subsequently endorsed by strong authority including a unanimous Court of Exchequer Chamber constituted by ten judges.”<sup>61</sup> [emphasis added]

Privilege attaches to the occasion, and therefore no action can lie for libel and slander for defamatory statements made during a privileged occasion.<sup>62</sup>

The scope of absolute privilege regarding statements made in judicial proceedings is very broad. Absolute privilege applies to all statements made and all matters done in open court,<sup>63</sup> and includes the contents of documents tendered as evidence.<sup>64</sup> Absolute privilege attaches to statements that are irrelevant to the matters before the court,<sup>65</sup> and it is a defense to a criminal indictment for defamatory libel.<sup>66</sup>

Most importantly as confirmed by Justice Foong, it is immaterial if the alleged libelous statements are false, malicious and spoken without justification:

“With regard to counsel, the questions of malice, bona fides, and relevancy, cannot be raised; the only question is whether what is complained of has been said in the course of the administration of the law.”<sup>67</sup>

The Australian High Court has also affirmed that the scope is broad enough to protect even false statements:

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<sup>60</sup> *Ibid.*, at 33.

<sup>61</sup> *Jamieson v. The Queen, Brugmans v. The Queen* (1993), 177 C.L.R. 574 at 582.

<sup>62</sup> *Supra* note 56: Carter-Ruck at 119; Brown at 574-75; Gatley at 282-83.

<sup>63</sup> *Geyer v. Merritt* (1979), 16 B.C.L.R. 27 (B.C.S.C.), aff’d (1980), 26 B.C.L.R. 373 (B.C.C.A.); *Munster v. Lamb* (1883), 11 Q.B.D. 588 (C.A.).

<sup>64</sup> Gatley, *supra* note 56 at 284.

<sup>65</sup> *Munster v. Lamb*, *supra* note 63; Brown, *supra* note 56 at 616.

<sup>66</sup> Carter-Ruck, *supra* note 56 at 185.

<sup>67</sup> *Munster v. Lamb*, *supra* note 63 at 605; See also *supra* note 56: Carter-Ruck at 119; Brown at 574. *supra* note 56 at 31.

“In the case of a party or her lawyer, the phrase “words spoken in office” (from *R. v. Skinner*) at least encompasses “anything said ... in the ordinary course of any proceeding in a court of justice”, “although falsely and maliciously and without any reasonable or probable cause.”<sup>68</sup>

The jurisprudence clearly defines absolute privilege as a full defense as the privilege provides complete immunity from liability to counsel for statements made before the court.

The doctrine of absolute privilege is based on public policy considerations. There are certain occasions when it is in the public interest that people must be able to speak and write with complete freedom and without fear of prosecution.<sup>69</sup>

“It is in the public interest that a person who is taking part or filling a role in litigation should be independent and encouraged to speak freely, so that the true facts may be ascertained, so that the credibility of witnesses may be accurately assessed, and so that the evidence and law may be frankly and candidly discussed to ensure that a correct and just result is obtained in the litigation.”<sup>70</sup>

“Freedom of speech without fear of consequences is ... indispensable for the proper and effective administration of justice.”<sup>71</sup>

These public policy considerations are especially critical for lawyers. In a democratic society, which Malaysia's governmental structure would suggest it is, there is an essential need for freedom of speech for lawyers while defending and advocating for their clients' interests. As stated by Brett, M.R. in *Munster v. Lamb*:

“...a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law is privileged; and the reason of that rule covers a counsel even more than a judge or a witness. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct.”<sup>72</sup>[emphasis added]

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<sup>68</sup> *Supra* note 61 at 583. The latter two quotes are from *Dawkins v. Lord Rokeby* (1873), L.R. 8 Q.B. 255 at 264.

<sup>69</sup> *Supra* note 56: Carter-Ruck at 119; Gatley at 292; Brown at 575-76.

<sup>70</sup> *Bretherton v. Kaye*, [1971] V.R. 111 (S.C.) at 116 per Gillard, J; See also *Lincoln v. Daniels*, [1962] 1 Q.B. 237 (C.A.) at 255-56 per Lord Devlin.

<sup>71</sup> J.G. Fleming, *The Law of Torts*, 8<sup>th</sup> ed., (Sydney: Law Book, 1992) at 559; See V.V. Veeder, "Absolute Immunity in Defamation: Judicial Proceedings" (1909), 9 *Col. L. Rev.* 463 at 469.

<sup>72</sup> *Munster v. Lamb*, *supra* note 63 at 603-04.

A lawyer has a duty to his or her client to "fearlessly raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case".<sup>73</sup> The doctrine of absolute privilege is essential to allow a lawyer to effectively and zealously perform the duties he or she owes to clients. Subjecting lawyers to actions for defamation or sedition fetters and restrains them in discharging their duty.<sup>74</sup> To be an effective advocate and aid to the court, "great latitude must necessarily be allowed to counsel, not only in the examination of witnesses, but in commenting upon their testimony".<sup>75</sup> Malaysian lawyers cannot perform their duty towards clients, nor fully protect clients' rights, if they are not free to make certain statements for fear of prosecution under the *Sedition Act*.

In *Bretherton v. Kaye*,<sup>76</sup> a lawyer was accused of defamation for remarks made during his opening address to a Board of Inquiry convened to determine allegations of police malpractice. The Court held that as the occasion was privileged and the lawyer had made his statements during the ordinary course of carrying out his duties as counsel, he was not liable for making the statements. It is a well established practice for counsel to make opening and closing remarks, and

“since the source of the evidence itself is protected from action for defamation, it is very necessary that counsel be free to submit the testimony to a critical examination involving, as it must, slanderous imputations having regard to the allegations made here. Public policy would demand that counsel should be encouraged to carry out this work fearlessly and independently and without fear of being sued for defamation.”<sup>77</sup>

The Malaysian Bar Council (the Council) has shown overwhelming support for the application of absolute privilege in Malaysian Courts, particularly to protect advocates from criminal and/or civil prosecutions for statements uttered in the course of judicial proceedings.<sup>78</sup> In its resolution, the Council recognized that "[i]t ... is an entrenched Principle and Rule of Law in the Commonwealth and in Common Law that Advocates enjoy Absolute Privilege for all, any and every statement(s) uttered in the course of Judicial Proceedings", and that "it is not merely a right but a duty of Advocates to speak out fearlessly in a Court of Law".<sup>79</sup> The Council recognized that there is no reported precedent in the Commonwealth where a lawyer has been criminally charged for statements made during judicial proceedings. The Council urged the Attorney General to accord due recognition and respect to advocates discharging their duties in upholding justice, to respect the rights of an independent Bar and legal profession, and to withdraw the sedition prosecution against Karpal Singh as it sets a dangerous and unfair precedent regarding advocates' in-court statements.<sup>80</sup>

In discharging his or her public duty, it is essential that lawyers enjoy freedom of speech without fear of legal or criminal consequences. Otherwise the proper administration of justice is seriously jeopardized. The doctrine of absolute privilege applied to the charges against Karpal Singh

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<sup>73</sup> *Rondel v. Worsley* (1969), 1 A.C. 191 at 227 per Lord Reid.

<sup>74</sup> Veeder, *supra* note 71 at 482.

<sup>75</sup> *Ibid.*, at 482-83.

<sup>76</sup> *Bretherton v. Kaye*, *supra* note 70.

<sup>77</sup> *Ibid.*, at 125.

<sup>78</sup> Resolution No.4 of Bar Council Malaysia (25 March 2000) at paras. 4, (a) at <[http://www.jaring.my/bar-mal/fr\\_mess.htm](http://www.jaring.my/bar-mal/fr_mess.htm)> There were 107 joint proposers and seconders to this resolution.

<sup>79</sup> *Ibid.*, at paras. 1, 7.

<sup>80</sup> *Ibid.*, at paras. 10, (b), (c), (e), (f).

provides a complete defense. The charge itself alleges that the words were spoken during a privileged occasion -- in the course of representing his client in judicial proceedings before open court. The alleged statements are immune from civil or criminal liability and cannot form the basis of a criminal prosecution under the *Sedition Act*.

The sedition charge against Karpal Singh represents an alarming precedent that undermines a cornerstone of the democratic tradition: the right and duty of a lawyer to represent the best interests of his/her client fully. Absolute privilege must apply first and foremost to providing immunity from sedition prosecutions. It is a fundamental obligation of lawyers to be critical of the actions of the state where they constitute an abuse of power and to advocate against every injustice, including that occasioned by the improper use of the law. A vital role of lawyers in a legal system governed by the rule of law is to stand between the citizen and the state.

### **V.1.a Application of International Law Principles to Lawyers' Rights and Duties**

Principles of international law found in the Universal Declaration of Human Rights (UDHR),<sup>81</sup> the United Nations Basic Principles of the Role of Lawyers (Basic Principles) adopted by the 8<sup>th</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana 27 August to 7 September 1990,<sup>82</sup> and the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms<sup>83</sup> (Declaration of the Right and Responsibility of Individuals), support the proposition that lawyers must not be hampered in their conduct of judicial proceedings by limitations on their speech and must enjoy immunity for statements made during such proceedings.

Article 10 of the UDHR states that "everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". Article 11, paragraph 1 of the UDHR further states that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense". A fair trial with all the guarantees necessary for a defense includes fearless representation by independent counsel.

The Basic Principles, which set minimum standards to assist States in ensuring the proper role of lawyers, consider the right to freedom of expression in the context of lawyers' representation of clients. The preamble of the Basic Principles states:

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled requires that all persons have effective access to legal services provided by an independent legal profession.

The preamble also states that the Basic Principles "should be respected and taken into account by Governments within the framework of their national legislation and practice".

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<sup>81</sup> G.A. Res. 217A (III), U.N. GAOR, 3<sup>rd</sup> Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [hereinafter UDHR].

<sup>82</sup> U.N. Doc. A/CONF. 144/28/Rev. 1 at 118 (1990) [hereinafter Basic Principles].

<sup>83</sup> Adopted by the United Nations General Assembly in 1999.

To ensure an independent bar, the Basic Principles include, in paragraphs 14 and 16, guarantees for functioning lawyers relating to government:

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.<sup>84</sup>

16. Government shall ensure that lawyers  
(a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference...and  
(c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.<sup>85</sup>

Directly relevant to the Karpal Singh prosecution, paragraph 20 of the Basic Principles states that lawyers have immunity for in-court statements:

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

The Declaration of the Right and Responsibility of Individuals provides:

1. Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.

9(3) To the same end, everyone has the right, individually and in association with other, inter alia,...[t]o offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms.

The right to a fair trial and legal representation under the UDHR arguably includes the right to a lawyer who can represent his or her client fully and fearlessly. Karpal Singh made relevant statements while discharging his duty to his client, and therefore he should enjoy penal immunity pursuant to Paragraph 20 of the Basic Principles. Further, according to the Basic Principles, the Malaysian government must ensure that lawyers are independent and not hindered by or threatened with prosecution for the exercise of their professional duties. In using the *Sedition Act* to prosecute Karpal Singh, the Malaysian government is violating the Basic Principles and the UDHR.

Another source of state commitment to protecting the legal profession from government interference and intimidation is the Latimer House Guidelines. The Latimer House Guidelines for the Commonwealth<sup>86</sup> were developed to renew and enlarge on the commitments made by Commonwealth countries set out in the Harare Declaration<sup>87</sup> to the rule of law and the attendant safeguards and

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<sup>84</sup> Basic Principles, *supra* note 82 at para. 14.

<sup>85</sup> *Ibid.*, at para. 16.

<sup>86</sup> Published June 1, 1998.

<sup>87</sup> The Harare Declaration is the Commonwealth's second general statement of beliefs and was issued by Commonwealth Heads of Government at their meeting in Zimbabwe in 1991.

restrictions. By the Latimer House Guidelines Malaysia and other members of the Commonwealth are committed to ensuring that their national law and procedure reflect the principle:

“An independent, organised legal profession is an essential component in the protection of the rule of law.”<sup>88</sup>

Lawyers liable to criminal prosecutions for sedition for words spoken while representing a client cannot uphold the rule of law. To uphold the rule of law, lawyers must be prepared to advocate both against government arbitrariness and for the protection of the rights of citizens. In order to protect the rights of citizens the legal profession must be entirely separate from government and free from its interference and control,<sup>89</sup> and lawyers must be free to stand between the state and the citizen and to criticize and call into question the actions of the state.

## V.2 The Rule of Law and Principles of Legality

Prime Minister Mahathir has often responded to criticisms of Malaysia’s legal system by saying that Malaysia is governed by the rule of law. The prosecution of Karpal Singh seems to belie that statement.

Simply put the rule of law refers to a state of affairs in which there are legal barriers to government arbitrariness and legal safeguards for the protection of individuals. The rule of law requires the law to be the guardian of justice: a guarantee against tyranny. The rule of law was the term used by Dicey over a century ago to refer to the principles of legality that protect citizens from laws that are arbitrary or otherwise unjust. Of the many descriptions of the rule of law by legal theorists, the following two are of interest. The International Commission of Jurists at a conference in Delhi in 1959 defined the rule of law as:

“The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.”<sup>90</sup>

Another articulation of the rule of law is that of P. Sieghart:<sup>91</sup>

“the rule of law, the principle which requires that there should be laws which lay down what the state may and may not do and by which one can test whether such power which it claims, or any particular exercise of such power is legitimate and a system of courts independent of

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<sup>88</sup> Latimer House Guidelines for the Commonwealth, Part VII, article 3.

<sup>89</sup> *Supra* note 14 at 27-3

<sup>90</sup> D. Stuart, *Canadian Criminal Law: a Treatise* (Toronto: Carswell, 1995) at 17.

<sup>91</sup> N. Ambe, “A Legal Analysis of the Domestic Enforceability of International Human Rights Law: The Rule of Law Imperative” (1998), 47 *U.N.B.L.J.* 109 at 123.

every other institution of the state, including the legislators and the executive, which interprets and applies those laws.”<sup>92</sup>

The principles governing the legality of penal statutes are an integral part of the rule of law. *Nullum crimen sine lege, Nullum Poena sine lege* - that there can be no crime or punishment except in accordance with fixed predetermined laws is a basic principle of justice and is a component of the rule of law. Professor Glanville Williams in *Criminal Law (General Part)*, 2nd ed. (1961)<sup>93</sup> identifies four facets of this principle developed by the common law: certainty, accessibility, non-retroactivity and strict compliance. These principles are determinative of the legality of penal laws. Mr. Justice (later Chief Justice) Lamer of the Supreme Court of Canada, expressed the importance of these principles to a free and democratic society:

“The principles expressed in these two citations are not new to our law. In fact they are based on the ancient Latin Maxim *nullum crimen sine lege, nulla poena sine lege* --that there can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive. The rationale underlying this principle is clear. Is essential in a free and democratic society that citizens are able, as far as possible, to foresee the consequences of their conduct, in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited to clear and explicit legislative standards.”<sup>94</sup>

### V.2.a Certainty: Vagueness and Overbreadth

Courts in the United States recognize the power to declare legislation unconstitutional on the basis of the doctrine of void for vagueness. The key American case regarding vagueness is *Papachristou v. City of Jacksonville*<sup>95</sup> where the United States Supreme Court recognized two separate heads to the vagueness doctrine: fair notice and protection from arbitrary discretion. A law is void for vagueness if it fails to give a person fair notice that certain conduct is prohibited. A law is also void for vagueness if it encourages arbitrary and erratic arrests and convictions.<sup>96</sup> According to the chilling effect, a law is vague if it is so unclear that it prevents people from engaging in protected activities.<sup>97</sup>

The Supreme Court of Canada has also recognized a void for vagueness doctrine<sup>98</sup> that encompasses protection against the ‘standardless sweep’. Mr. Justice Lamer concluded that the test is: “whether the impugned sections of the Criminal Code can be or have been given sensible meanings by the Court. In other words, is the statute so pervasively vague that it permits a “standardless sweep” allowing law enforcement officials to pursue their personal predilections.” In *Irwin Toy v. Quebec Attorney General*, the court stated that the vagueness doctrine includes a fair notice requirement and

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<sup>92</sup> P. Sieghart, *International Human Rights Law*, cited in Lord Elwyn-Jones, “Judicial Independence and Human Rights” in R. Blackburn & J. Taylor, eds., *Human Rights for the 1990s: Legal and Political and Ethical Issues* (London: Mansell, 1991) at 44.

<sup>93</sup> *Supra* note 90 at 16.

<sup>94</sup> Reference Re ss. 193 & 195.1(1)(c) of the Criminal Code (Man), [1990] 1 S.C.R. 1123 at 1152 per Lamer, J.

<sup>95</sup> 405 U.S. 156 (1972).

<sup>96</sup> *Papachristou v. City of Jacksonville, ibid.*, at 170.

<sup>97</sup> J. Daniels, “Valid Despite Vagueness: The Relationship Between Vagueness and Shifting Objective” (1994), 58 *Sask. L. Rev.* 101 at 109, referring to *Grayned v. City of Rockford*, 408 U.S. 104 (U.S.S.C. 1972).

<sup>98</sup> *Supra* note 94.

an intelligible standard for the judiciary.<sup>99</sup> In *Nova Scotia Pharmaceutical Society*, the Supreme Court stated that the test for vagueness encompasses a requirement of fair notice and a prohibition of the standard less sweep and uncontrolled discretion. Mr. Justice Gonthier citing with approval the decision of the European Court of Human Rights in the *Sunday Times and Malone* case, said,

“A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute.”<sup>100</sup>

The language of the *Sedition Act* as interpreted by Malaysian courts has created a standardless sweep providing government with unbridled discretion and affording citizens no fair notice. The offences created by the *Sedition Act* do not meet the common law tests for legality based on certainty. The vagueness of Malaysia’s sedition law potentially criminalizes all but the most sycophantic of comments on issues of public concerns.

## V.2.b Non-Retroactivity

Another fundamental tenet of the rule of law as applied to penal law is that of non-retroactivity. This rule prohibits penal laws that are *ex post facto*, laws passed after the occurrence of a fact or commission of an act, laws punishing that which was innocent when it was done. While this rule is habitually applied to strike down *ex post facto* statutory provisions, it ought also to prevent judicial interpretations that have the effect of transforming an innocent act retroactivity into a criminal act. This rule should also operate to prohibit convictions for offences that can only be defined at the time of conviction.

Prior to September 10, 1999 it was apparently not seditious under Malaysian law to express concern about Anwar Ibrahim’s in-cusody treatment. In September of 1998, news that Anwar Ibrahim had been severely injured while in custody was greeted with outrage and demands for a public inquiry from lawyers and private citizens like. These demands resulted first in an inconclusive internal police inquiry and finally, in January of 1999, a Royal Commission of Inquiry. The Royal Commission of Inquiry established that Anwar Ibrahim’s beating had been potentially life threatening, administered by Abdul Rahim Noor, then the Chief of Police for Malaysia, and carried out while Anwar was in his cell, blindfolded and handcuffed. There was never a suggestion that these expressions of concern that Anwar had been beaten by ‘people in high places’ could be considered seditious.

In September 1999 Mr Singh, alarmed by a report that Anwar Ibrahim’s arsenic levels were dangerously high, called for an inquiry into his client’s health. Mr. Singh was duty bound to bring to the court’s attention the concern that his client’s life, while in custody, might again be in jeopardy. Based on what had occurred the previous year there was no way for Karpal Singh to know that his actions would be deemed seditious. Reference to the repeated calls for an inquiry into Anwar Ibrahim’s maltreatment at the hands of people in authority that were made a year earlier indicate that there was no Malaysian law that prohibited Mr. Singh from doing so. A conviction on this sedition charge would therefore require the trial judge to retroactively create a penal offence, for conduct which only a year before was acceptable and indeed had been necessary to bring to public attention a gross abuse of human rights.

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<sup>99</sup> [1989] 1 S.C.R. 927 at 983.

<sup>100</sup> *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 636.

## V.2.c Absolute Liability

The mens rea requirement for criminal culpability has long been a requirement of penal justice. As the Supreme Court of Canada has stated:

“It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice that is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin: *actus non facit reum nisi mens sit rea*.”<sup>101</sup>

The Supreme Court of Canada has established that the combination of absolute liability and the possibility of imprisonment violates the principles of fundamental justice and the right to liberty of the person in s.7 of the Canadian Charter of Rights and Freedoms.<sup>102</sup>

As discussed above, the *Sedition Act* creates an absolute liability offence upon proof that an accused uttered a statement with a seditious tendency. The intention of the accused in making his or her statement is irrelevant.<sup>103</sup> A conviction can result in a maximum three-year term of imprisonment.<sup>104</sup>

Based on the principle, *actus non facit reum nisi mens sit rea*, the *Sedition Act* violates the principles of fundamental justice and the right to liberty of the person in creating an absolute liability offence of sedition with potential for imprisonment.

## VI INTERNATIONAL LAW AND STANDARDS

### VI.1 International Instruments

The UDHR is the principle source of international legal norms with respect to human rights and articulates the rights and freedoms contained in the United Nations Charter (the UN Charter).<sup>105</sup> All members of the United Nations pledge themselves to take joint and separate action to achieve the purposes of the organization, including the promotion and encouragement of universal respect for, and observance of, human rights and fundamental freedoms for all.<sup>106</sup> Member States are also required to reaffirm faith in fundamental human rights and in the dignity of the person, and "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."<sup>107</sup> Malaysia became a member of the United Nations on

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<sup>101</sup> *Reference Re s.94(2) of the Motor Vehicle Act (British Columbia)* (1985), 23 C.C.C. 289. (S.C.C.). In this case, the offence of driving during a license suspension created liability upon proof of driving.

<sup>102</sup> *Ibid.*, at 310 per Lamer, J.

<sup>103</sup> *Sedition Act*, s.3(3).

<sup>104</sup> *Sedition Act*, s.4(1)(b).

<sup>105</sup> Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, (entered into force 24 October 1945) [hereinafter UN Charter].

<sup>106</sup> *Ibid*, Articles 1(3), 55, 56.

<sup>107</sup> *Ibid*, Preamble.

September 17, 1957, and as such, it has an obligation to promote justice, respect for and observance of fundamental human rights.

The preamble of the UDHR sets out guiding principles. Of particular importance are the following statements:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Now, therefore, The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.<sup>108</sup>[emphasis added]

The former Chief Justice of the Supreme Court of Canada has stated that the UDHR "vividly underlined a commitment to usher in a new period of human history, one characterized by a profound respect for human rights".<sup>109</sup>

The International Covenant on Civil and Political Rights (ICCPR)<sup>110</sup> was adopted by the General Assembly of the United Nations on December 16, 1966. It contains important civil and political rights including the right to a fair trial and the right to freedom of opinion and expression. As discussed below, although Malaysia is not a party to the ICCPR, the convention still serves as an interpretive aid for the meaning of and permissible limits on freedom of expression in the country.

## **VI.2 Application of International Law and Principles to Malaysia**

There is some debate regarding the legal effect of the UDHR, and the rights and freedoms contained therein, on member States. Some argue that the UDHR is a non-binding statement of general principles of international law, while according to others, the UDHR is binding on member States as an articulation of the UN Charter and/or customary international human rights norms.

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<sup>108</sup> UDHR, *supra* note 81, Preamble.

<sup>109</sup> B. Dickson, "The Canadian Charter of Rights and Freedoms: Context and Evolution" in G.A. Beaudoin & E. Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3<sup>rd</sup> ed. (Toronto: Carswell, 1996) 1-1 at 1-5.

<sup>110</sup> G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16 at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 March 1976). To date there are 144 state parties to the Convention.

## VI.2.a International Law as an Aid to Interpretation

According to the view that the UDHR is a statement of general principles of the highest moral authority, the UDHR does not create binding legal obligations upon member States.<sup>111</sup> Non-binding international law can serve as an interpretive aid in construing domestic legislation. Provisions of international treaties and conventions, as well as international jurisprudence, can help give content to imprecise concepts, such as the right to freedom of expression.<sup>112</sup> For example, there is a well established rule that where domestic legislation is ambiguous, the legislation should be interpreted in such a way as to respect and conform with international law.<sup>113</sup>

Canadian courts have found international human rights law and instruments, including the UDHR and the ICCPR, to be valuable interpretive aids in defining the meaning of freedom of expression and reasonable limits upon that freedom pursuant to the Canadian Charter of Rights and Freedoms.<sup>114</sup> As Dickson, C.J. stated in *Reference Re Public Service Employee Relations Act*:

“The norms of international law provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions.”<sup>115</sup>

International instruments, such as the UDHR, can also be relevant to the interpretation of a country's constitution and in defining the content of a right or freedom where the instrument and constitution share similar wording and subject matter.<sup>116</sup>

## VI.2.b Direct Application of International Human Rights Principles in Domestic Courts

A customary international norm can emerge through widespread ratification of international conventions as well as the common practice of States. Many support the view that the UDHR is binding on member States. Some argue that the binding nature of the UDHR comes indirectly by way of an authoritative interpretation of the UN Charter.<sup>117</sup>

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<sup>111</sup> *The Universal Declaration of Human Rights: A Standard of Achievement*, (United Nations Officer of Public Information), UN Publ. No. 62.I.9 at 13.

<sup>112</sup> J. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982), 4 *Supreme Court L.R.* 287 at 293; W.A. Schabas, *International Human Rights Law and The Canadian Charter*, 2nd ed., (Toronto: Carswell, 1996) at 39.

<sup>113</sup> Schabas, *ibid.*, at 41-42, 55; A.M. Hayward, "International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications" (1985), 23 *U.W.O. L. Rev.* 9 at 10.

<sup>114</sup> For example, see *R. v. Videoflicks* (1984), 14 D.L.R. (4<sup>th</sup>) 10 (Ont. C.A.); *International Fund for Animal Welfare Inc. v. Canada*, [1987] 1 F.C. 244 (T.D); *R. v. Keegstra*, [1990] 3 S.C.R. 697.

<sup>115</sup> [1987] 1 S.C.R. 313 at 350.

<sup>116</sup> Hayward, *supra* note 113.

<sup>117</sup> L.B. Sohn, "The New International Law: Protection of the Rights of the Individuals Rather Than States" (1982), 32 *Am. U. L. Rev.* 1 at 16-17; See E. Schwelb, "The International Court of Justice and the Human Rights Clauses of the Charter" (1973), 66 *Am. J. Int. L.* 337 at 348 and *Namibia Advisory Opinion of the International Court of Justice* (1971), I.C.J. Rep. 78 at paras. 128-29.

Others argue that the UDHR creates binding obligations because it is an interpretation of the UN Charter and its provisions codify customary international law.<sup>118</sup> One of the drafters of the UDHR argues that the Declaration has "become an international standard by which the conduct of government is judged both within and outside the United Nations" and that since the UDHR has inspired numerous treaties and conventions, and is reflected in many national constitutions and in decisions of national and international courts, it has now acquired the force of law as part of the customary law of nations.<sup>119</sup> Following either rationale, Malaysia, as a member of the United Nations, is bound to uphold the human rights standards found in the UDHR. Customary international law is automatically incorporated into domestic common law and may be applied by domestic courts unless there is a clear conflict between international customary law and the statute or common law.<sup>120</sup> Under the Malaysian Constitution, Federal law includes "any custom having the force of law".<sup>121</sup>[emphasis added] As Malaysian courts have authority to apply customary law pursuant to Article 160 of the Constitution, such courts have the authority to apply the provisions of the UDHR as part of the customary law of nations.

### VI.3 Malaysia's Adherence to International Law

Unfortunately, Malaysia has recently demonstrated an intransigent refusal to adhere either to its international obligations arising from the Convention on the Privileges and Immunities of the United Nations<sup>122</sup> or to a binding decision of the International Court of Justice.

The latter decision involved Dato' Param Cumaraswamy, appointed in 1994 as the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers. Four private defamation suits were filed in Malaysia, against Mr. Cumaraswamy based on a 1995 magazine article containing references to an interview with him. In January of 1997 the Secretary General of the United Nations determined that the words spoken by Mr. Cumaraswamy that formed the basis of the four defamation suits were protected by privilege pursuant to the provisions of the aforesaid Convention and called on the Malaysian government to advise the Malaysian courts accordingly. The Malaysian High Court refused a subsequent application in June of 1997 to set aside the defamation proceedings and dismissed the Secretary General's opinion as having, "scant probative value and no binding force upon the court."

After extensive negotiations failed to resolve the differences between the government of Malaysia and the United Nations on the issue of Mr. Cumaraswamy's immunity, the matter was

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<sup>118</sup> J.P. Humphrey, "The Canadian Charter of Rights and Freedoms and International Law" (1985-86), 50 *Sask. L. Rev.* 13; Schabas, *supra* note 112 at 36; J.P. Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character" in B.G. Ramcharam, ed., *Human Rights: Thirty Years After the Universal Declaration* (The Hague: Martinus Nijhoff: 1979) at 21, 28 [hereinafter *The Universal Declaration*]; M. Haleem, Chief Justice of Pakistan, "The Domestic Application of International Human Rights Norms" in *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms, Judicial Colloquium in Bangalore* (London: Commonwealth Secretariat, 1988) 92 at 97.

<sup>119</sup> Humphrey, *The Universal Declaration*, *ibid.*, at 28.

<sup>120</sup> *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 1 All E.R. 881 (H.L.) per Lord Denning; A.F. Bayesfsky & M. Cohen, "The Canadian Charter of Rights and Freedoms and International Law" (1983), 61 *Can. Bar. Rev.* 265 at 275.

<sup>121</sup> Article 160.

<sup>122</sup> The Convention on the Privileges and Immunities of the United Nations was ratified by Malaysia in 1957 without reservation.

referred for opinion to the International Court of Justice. An April 1999 decision of the International Court of Justice both confirmed the 1997 decision of the Secretary General that Mr. Cumaraswamy's statements were protected by immunity and determined that Malaysia is bound by the decision of the International Court of Justice. Two statements of interest contained in the summary of the majority judgment are:

“...Mr. Cumaraswamy, in speaking the words quoted in the article in International Commercial Litigation, was acting in the course of the performance of his mission as Special Rapporteur of the Commission. Consequently, Article VI, Section 22(b)<sup>123</sup>, of the General Convention is applicable to him in the present case and affords Mr. Cumaraswamy immunity from legal process of every kind.”<sup>124</sup>

“...according to Article VIII, Section 30,<sup>125</sup> of the General Convention, the opinion given by the Court [the International Court of Justice] shall be accepted as decisive by the parties to the dispute.”<sup>126</sup>

In reliance on this decision of the International Court of Justice another application was brought to set aside one of the defamation suits on the grounds of Mr. Cumaraswamy's immunity. This application was refused on October 28/99 by the Senior Assistant Registrar of the High Court Wan Shaharuddin bin Wan Ladin with these words:

“...that the issue whether the Courts in Malaysia should follow the Advisory Opinion of the ICJ, [the International Court of Justice] I find that the said Convention is not a final and binding authority.”<sup>127</sup>[emphasis added]

#### **VI.4 Conclusion on the Use of International Law in Malaysia**

At best, the rights and freedoms in the UDHR are now part of international customary law and therefore binding on Malaysia and its courts. At the very least, the UDHR, and other international instruments to which Malaysia is not a party, provide general principles of international law to guide the interpretation and application of Malaysia's national law and permissible limitations on rights and freedoms within Malaysia. As a member of the Commonwealth, Malaysia has committed through the Harare Declaration to principles that require adherence to the broad principles of the rule of law. The Latimer House Guidelines for the Commonwealth to which Malaysia has also committed, further confirm that: “freedom of expression is a universal human right...(and) is the primary freedom, an essential precondition to the exercise of other freedoms.”

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<sup>123</sup> The Convention on the Privileges and Immunities of the United Nations, Article VI, s.22: “Experts...shall be accorded: (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations.”

<sup>124</sup> *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Summary of the Advisory Opinion of 29 April 1999 of the International Court of Justice at 7, at <[http://www.ecj-cij.org/icjwww/ipresscom/iPress1999/ipresscom9916bis\\_inuma\\_19990429.htm](http://www.ecj-cij.org/icjwww/ipresscom/iPress1999/ipresscom9916bis_inuma_19990429.htm)>

<sup>125</sup> Section 30: “All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice...The opinion given by the Court shall be accepted as decisive by the parties.”

<sup>126</sup> *Supra* note 124 at 8.

<sup>127</sup> *Insas Berhad & Magapolitan Nominees Sdn Bhd. v. Param Cumaraswamy* (29 October 1999) Grounds for Judgment, Unofficial English Translation [unreported].

## **VI.5 Fundamental Rights and Freedoms under International Law**

Fundamental rights and freedoms that are relevant to the interpretation and application of the *Sedition Act* include the right to freedom of speech and expression, and the right to life, liberty and security of the person.

A right to freedom of expression is found in numerous international documents: Article 19 of the UDHR; Article 19, paragraph 2 of the ICCPR;<sup>128</sup> and Article 10, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (The European Convention on Human Rights).<sup>129</sup> The right to freedom of expression under Article 19 of the UDHR reads as follows:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Other relevant provisions of the UDHR include the right to life, liberty and security of the person.<sup>130</sup>

The Federal Constitution of Malaysia also includes similar fundamental guarantees. Article 5 provides that "no person shall be deprived of his life or personal liberty save in accordance with law". Article 10(1)(a) guarantees that every citizen has the right to freedom of speech and expression.

Therefore, pursuant to the UDHR and the Federal Constitution, Malaysia has an obligation to promote freedom of speech and expression and the right to liberty of the person.

### **VI.5.a Limitations and Restrictions on Fundamental Rights and Freedoms under International Law**

The *Sedition Act* offence and sentencing provisions impose restrictions on citizens' rights to liberty of the person and freedom of speech and expression. Both international law and the Malaysian Constitution restrict the State's power to impose limitations and/or restrictions<sup>131</sup> on the exercise of guaranteed rights and freedoms. To be legitimate, restrictions of guaranteed rights must meet tests with respect to their scope and purpose.

The purposes for which rights and freedoms might be limited and the requirements of legal limitations are similar under various international instruments, such as the UDHR, the ICCPR, the

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<sup>128</sup> "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

<sup>129</sup> "Everyone shall have the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

<sup>130</sup> Article 3.

<sup>131</sup> The words 'restrictions' and 'limitations' will be used interchangeably to refer to any derogation on fundamental human rights and freedoms.

European Convention on Human Rights, the Johannesburg Principles,<sup>132</sup> the Siracusa Principles<sup>133</sup> and the Malaysians Federal Constitution. Due to the similarity in wording, interpretation and jurisprudence relating to these instruments, they can provide guidance as to the limits on freedom of expression and security that can be legitimately imposed by Malaysian law.

The limitation provisions of the UDHR apply to all of the rights and freedoms contained the Declaration. Article 29 of the UDHR provides as follows:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[emphasis added]

Article 30 of the UDHR states:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

The combined purpose of Articles 29(2) and 30 of the UDHR is to prevent far-reaching restrictions on fundamental human rights.

The ICCPR, Article 19, paragraph 3 states that the right to freedom of expression may be subject to certain restrictions, but that such restrictions:

Shall only be such as are provided by law and are necessary:  
For respect of the rights and reputations of others:  
For the protection of national security or of public order (ordre public), or of public health or morals.

Similarly, the European Convention on Human Rights, Article 10 paragraph 2, characterizes permissible restrictions on freedom of expression:

The exercise of these freedoms, since it carries duties and responsibilities, may be subject to such formalities, conditions, restriction or penalties as are prescribed by law in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the

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<sup>132</sup> The Johannesburg Principles: National Security, Freedom of Expression and Access to Information (November 1996), 3 *Media Law and Practice in Southern Africa*. The Johannesburg Principles were developed during an international consultation convened by ARTICLE 19, the International Centre Against Censorship in collaboration with the Centre for Applied Legal Studies of the University of Witwatersrand in Johannesburg [hereinafter Johannesburg Principles].

<sup>133</sup> “The Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant on Civil and Political Rights (1984)” (1985), 7 *H.R.Q.* 3. The Siracusa Principles were adopted in May 1984 by a group of international human rights experts convened by the International Commission of Jurists, the International Association of Penal Law, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy to consider the limitation and restriction provisions of the ICCPR.

reputation or rights or others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. [emphasis added]

Article 4 of The Federal Constitution of Malaysia gives paramountcy to the rights guaranteed in Articles 5 through 13 of the Federal Constitution. Article 4(1) reads:

(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Articles 10(2) and 149 give the State limited power to restrict fundamental Constitutional rights. Article 10(2) of the Federal Constitution allows the State to impose only such restrictions on freedom of speech and expression as are necessary or expedient to the protection of certain enumerated public interests by the wording:

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.[emphasis added]

Article 149 of Part XI—Special Powers Against Subversion, Organised Violence, And Acts And Crimes Prejudicial To The Public And Emergency Powers—of the Federal Constitution empowers Malaysia’s Parliament to enact temporary restrictions to, inter alia, the guaranteed freedoms of expression and liberty rights, for the specific purpose of stopping or preventing actions against the state “taken or threatened by any substantial body of persons”.

#### **VI.5.a.i General Principles**

As a general rule of interpretation, restrictions on fundamental human rights must be given a narrow interpretation having regard to the particular right at issue and the purpose of the restriction.<sup>134</sup> A state cannot impose a limitation for an improper purpose; limitations must be justifiable having regard to one of the specific purposes allowing for limitations.<sup>135</sup> Limitations must be made in accordance with law, be of general application, and should not be applied in an arbitrary manner.<sup>136</sup> In addition, limitations should not operate in a manner contrary to the purposes and principles of the UN Charter or the UDHR.<sup>137</sup>

#### **VI.5.a.ii Necessary**

Under Malaysia's Constitution, the ICCPR and the European Convention on Human Rights, limitations on freedom of expression must be "necessary" to achieve one of several purposes.

The Siracusa Principles define the term "necessary" as implying that the limitation:

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<sup>134</sup> E.A. Daes: *The Individual's Duties to the Community and the Limitations on Human Rights Under Article 29 of the Universal Declaration of Human Rights* (New York: United Nations, 1983) at 129, 172; *Ibid.*, Siracusa Principle No.3.

<sup>135</sup> Daes, *ibid.*, at 129, 174.

<sup>136</sup> Daes, *ibid.*, at 73; Siracusa Principle No.7.

<sup>137</sup> Daes, *ibid.*, at 174.

1. is based on one of the grounds justifying limitation recognized by the relevant article of the Covenant;
2. responds to a pressing public or social need;
3. pursues a legitimate aim; and
4. is proportionate to that aim.<sup>138</sup>

Further, the assessment as to whether a limitation is necessary should be based on objective considerations.<sup>139</sup>

*The Sunday Times v. United Kingdom*<sup>140</sup> decision of the European Court on Human Rights is a leading case on permissible State restrictions on and interference with freedom of expression. The *Sunday Times Case* concerned a newspaper's ability to publish material about a pending court proceeding involving alleged negligence of distributors of a drug that caused birth defects. The House of Lords issued an injunction against the newspaper preventing it from publishing any material which might prejudice the case. The owners of the newspaper brought a complaint to the European Court on Human Rights, arguing that the decision of the House of Lords unjustifiably interfered with the right to freedom of expression in Article 10 of the European Convention on Human Rights. The European Court of Human Rights found that Article 10(2) of the European Convention on Human Rights did not give States an unlimited power to restrict the right to freedom of expression and held that the injunction imposed on the newspaper by the House of Lords did not meet the test of being 'necessary in a democratic society to achieve any legitimate purpose'.

In both the *Sunday Times Case* and in the *Handyside Case*,<sup>141</sup> the European Court of Human Rights held that a "necessary" limit on freedom of expression required a "pressing social need". The Court found that the phrase 'prescribed by law in a democratic society' imported broad freedom of expression rights and narrow permissible restrictions. In the *Handyside Case* decision, the Court stated:

“The Court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a "democratic society". Freedom of expression constituted one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2) it is applicable not only to 'information' or 'ideas; that are favourably received or regarded as inoffensive or as a matter of indifference , but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no "democratic society". This means amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.”<sup>142</sup>

In other words, a necessary restriction is one that is proportionate to a legitimate government

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<sup>138</sup> *Supra* note 133, Siracusa Principle No. 10.

<sup>139</sup> *Ibid.*

<sup>140</sup> (1979-80), 2 E.H.R.R. 245 (Eur. Ct. of H.R.) at 275, 280; April 26, 1979, Series A, No.30 [hereinafter *Sunday Times Case*, cited to E.H.R.R.].

<sup>141</sup> *Handyside v. United Kingdom* (1979-80), 1 E.H.R.R. 737 (Eur. Ct. H.R.), December 7, 1976, Series A, No.24 [hereinafter *Handyside Case*, cited to E.H.R.R.].

<sup>142</sup> *Ibid.*, at para. 49.

objective and a pressing social need. Further, according to the common law principle of proportionality, a limit on a constitutionally protected right should be no more restrictive than necessary to accomplish its legitimate purpose.

With respect to criticism of government, the European Court of Human Rights made the following comments:

“...the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system, the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities, but also of the press and public opinion.”<sup>143</sup>

[emphasis added]

Similarly, the Siracusa Principles state that “[a] limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism.”<sup>144</sup>

As freedom of expression is a fundamental international human right and an essential component of a democratic society,<sup>145</sup> a proper examination of the necessity of a limitation on freedom of expression must take into consideration the importance of this freedom.

#### **VI.5.a.iii Prescribed by Law**

It is a common principle of international law that any limitation on a fundamental right or freedom must be prescribed by law.<sup>146</sup> The term “prescribed by law” means that a limitation: (1) must be provided for by national law of general application,<sup>147</sup> (2) shall not be arbitrary or unreasonable,<sup>148</sup> (3) must be clear and accessible to everyone,<sup>149</sup> and (4) that adequate safeguards shall be provided against illegal or abusive imposition or application of limitations on human rights.<sup>150</sup>

#### **VI.5.a.iv Precision and Accessibility**

The two most important requirements for “prescribed by law” are precision and accessibility. The European Court of Human Rights has described the primacy of these two requirements as follows:

“In the Court's opinion, the following are two of the requirements that flow from the expression ‘prescribed by law’. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal

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<sup>143</sup> *Castells v. Spain*, April 23, 1992, Series A, No.236 (Eur. Ct. H.R.).

<sup>144</sup> *Supra* note 133, Siracusa Principle No.37.

<sup>145</sup> Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (London, under the auspices of Article 19, 26 November 1999).

<sup>146</sup> The terms “in accordance with law”, “prescribed by law”, and “determined by law” have the same meaning.

<sup>147</sup> Siracusa Principle No.15.

<sup>148</sup> Siracusa Principle No.16.

<sup>149</sup> Siracusa Principle No.17; *Sunday Times Case*, *supra* note 140.

<sup>150</sup> Siracusa Principle No.18.

rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able --- if need be with appropriate advice --- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”<sup>151</sup>

A limitation that is clear and accessible to everyone refers to a law that provides citizens with notice of any restrictions on guaranteed rights that is sufficiently precise to enable them to regulate their conduct accordingly.

#### **VI.5.a.v Reasonable and Non-arbitrary**

Subsequent to the *Sunday Times Case*, the European Court of Human Rights added the requirement of limitation of enforcement discretion to the "prescribed by law" test. "[T]here must be a measure of legal protection in domestic law against arbitrary interferences by public authorities" with respect to rights under the European Convention on Human Rights.<sup>152</sup>

The United Nations Human Rights Committee has found that the phrase "in accordance with law", which appears in article 13 of the ICCPR, requires a state to apply the relevant provisions of its domestic law "in good faith and in a reasonable manner".<sup>153</sup>

In the context of Article 9 of the ICCPR which prohibits arbitrary arrest and detention, arbitrary standards have been described as follows:

“While the context of a minimum international standard cannot be defined or enumerated, one form of arbitrariness is surely within the prohibition of Article 9 -- when law permitting detention is a *lex specialis* applicable solely to John Doe and not to others. Article 9 implies that the law governing detention must be of general applicability. The arrest of a given person on legal grounds fitting only the specific occasion is arbitrary and notwithstanding the form of law supporting it -- because it is capricious.”<sup>154</sup>

The prosecution of Karpal Singh appears to be a *lex specialis* application of the *Sedition Act*. To be prescribed by law, a state must not apply a limitation on a fundamental right in a selective manner. Any limitation in domestic law must have general application and be applied in good faith and in a reasonable manner.

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<sup>151</sup> *The Sunday Times Case*, *supra* note 140 at para. 49; See also P. W. Hogg, "Section One of the Canadian Charter of Rights and Freedoms" in A. de Mestral, S. Birks and M. Bothe, eds., *The Limitations of Human Rights in Comparative Constitutional Law* (Cowansville, Que: Yvon Blais, 1992) 3 at 12-13.

<sup>152</sup> *Malone v. United Kingdom* (1984), 7 E.H.R.R. 14 (Eur. Ct. H.R.) at 32; August 2, 1984, Series A, No.82.

<sup>153</sup> *Maroufidou v. Sweden* (No. 58/1979), U.N. Doc. CCPR/3/Add.1, Vol.II at 318, U.N. Doc. CCPR/C/OP/1 at 80 OR (58/1979), S.D. Vol.1; A/36/40 (1981) at 160.

<sup>154</sup> Y. Dinstein, "The Right to Life, Physical Integrity and Liberty" in L. Henkin, ed., *The International Bill of Rights*, (New York: Columbia University Press, 1981) 130 at 131, quoted in *Common Interpretation of the International Covenant on Civil and Political Rights: Report of the Continuing Federal-Provincial-Territorial Committee of Officials Responsible for Human Rights* (June 1993) at 15.

## VI.5.a.vi National Security

The original purpose for the restrictions on speech provided for by the *Sedition Act*, when adopted by the British colonial authority, was to protect national security.

National security concerns measures taken "to protect the existence of the nation or its territorial integrity or political independence against force or threat of force",<sup>155</sup> and this purpose "cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order".<sup>156</sup> Nor can this ground be invoked "as a pretext for imposing vague or arbitrary limitations".<sup>157</sup>

The Johannesburg Principles recognize that restrictions on freedom of expression that may be imposed for the purpose of national security are exceptional.<sup>158</sup> The Johannesburg Principles state that laws limiting freedom of expression must be necessary in a democratic society for the genuine purpose of protecting a legitimate national security interest.<sup>159</sup> To establish that a law is necessary, a government must demonstrate that (1) the expression or information at issue poses a serious threat to a legitimate national security interest, (2) the restriction imposed is the least restrictive means possible of protecting that interest and (3) the restriction is compatible with democratic principles.<sup>160</sup> A restriction is not justified unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use of threat of force.<sup>161</sup> A restriction is not legitimate if its genuine purpose or effect is to protect interests unrelated to national security, including to protect a government from embarrassment or exposure of wrongdoing.<sup>162</sup>

Further, the Johannesburg Principles provide that for expression to be punishable as a threat to national security, it must satisfy three requirements:

- (1) the expression is intended to incite imminent violence;
- (2) it is likely to incite such violence; and
- (3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.<sup>163</sup>

This test applies to criticisms of or insults to the nation, the state, the government, its agencies or public officials.<sup>164</sup>

## VII CONCLUSIONS ON THE VALIDITY OF THE SEDITION ACT

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<sup>155</sup> Siracusa Principle No.29.

<sup>156</sup> Siracusa Principle No.30.

<sup>157</sup> Siracusa Principle No.31; Daes, *supra* note 134 at 177.

<sup>158</sup> Johannesburg Principles, *supra* note 132, Preamble.

<sup>159</sup> *Ibid.*, Principle 1(d).

<sup>160</sup> *Ibid.*, Principle 1.3.

<sup>161</sup> *Ibid.*, Principle 2(a).

<sup>162</sup> *Ibid.*, Principle 2(b).

<sup>163</sup> *Ibid.*, Principle 6.

<sup>164</sup> *Ibid.*, Principles 7, 8.

The *Sedition Act* seeks to limit and control freedom of expression far beyond what is permissible under international law. The *Sedition Act* must be given a narrow interpretation having regard to the particular rights at issue, namely freedom of speech and expression and liberty of the person, and the purpose of the restriction. The purpose for restricting speech under the *Sedition Act* is protection of national security. However, according to international human rights law, as freedom of expression is fundamental to a functioning democracy, it can be restricted only with regard to serious threats to national security.<sup>165</sup> The exercise of the right to freedom of expression cannot be punished on the basis that a statement might possibly jeopardize national security.<sup>166</sup> The statements allegedly made by Karpal Singh cannot reasonably be construed as posing any threat to national security.

Although on its face, the *Sedition Act* is a law of general application, the Malaysian government has been applying the law in an arbitrary manner, in bad faith and for an improper purpose -- to prevent political opposition. It cannot be said that the *Sedition Act* is prescribed by law or that persons charged with sedition are being deprived of their liberty of the person in accordance with law. The effect of the restriction -- the stifling of all political speech -- is disproportionate to the aim of protection of national security. In a modern democracy, the offence of sedition does not serve a pressing social need. Moreover, when Article 10(2) of Malaysia's Constitution is interpreted in light of the international instruments and jurisprudence, the *Sedition Act* does not constitute a "necessary or expedient" limit on freedom of speech and expression or liberty of the person.

The application of the *Sedition Act* is contrary to the purposes of the UN Charter and the UDHR and to the principles of democracy, which place a high premium on freedom of expression, political discourse and criticism of government. The wording and implementation of the *Sedition Act* fails to adequately protect the right to freedom of expression as provided for by international law, including Article 19 of the UDHR<sup>167</sup>

The Malaysian Constitution provides for an independent judiciary, and therefore, the courts must ensure that restrictions do not render fundamental freedoms illusory.<sup>168</sup> As discussed above, it is the courts' duty to apply the principles enshrined in the UDHR to interpret the *Sedition Act* and to ensure its proper application.

In a Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, the parties stated that "in many countries laws are in place, such as criminal defamation laws, which unduly restrict the right to freedom of expression".<sup>169</sup> The parties urged States to review any such criminal defamation laws to bring them into conformity with their international obligations. Malaysia should heed to this urging as the *Sedition Act*, in both its present form and application, is a violation of international human rights principles.

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<sup>165</sup> Ibid.; Report of the Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission on Human Rights Resolution 1998/42: Report on the mission to Malaysia, U.N. Doc. E/CN.4/1999/64/Add.1 (23 December 1998) [hereinafter Report on Malaysia].

<sup>166</sup> Report on Malaysia, *ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Supra* note 165.

One of the functions that lawyers in a democracy serve is to stand between the state and the individual, to protect the individual from the state and to uphold the rule of law. The broad scope of Malaysian sedition law imperils lawyers who put this honourable responsibility to practice. The prosecution of Karpal Singh violates the absolute privilege protecting judges, lawyers and witnesses from civil and criminal liability for statements made in the course of judicial proceedings, thereby compromising the integrity of the Malaysian legal system.

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