

cambodia
timor-leste
indonesia
malaysia
philippines
singapore
thailand

F R E E D O M
of
E X P R E S S I O N
and
the
M E D I A



b a s e l i n e
s t u d i e s

'Everyone has the right to freedom of 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.'

ARTICLE 19 OF THE UNIVERSAL
DECLARATION OF HUMAN RIGHTS



FREEDOM OF EXPRESSION AND THE MEDIA IN MALAYSIA

*part of a series of baseline studies on
seven Southeast Asian countries*

©ARTICLE 19, London and SUARAM, Kuala Lumpur

ISBN 1 902598 78 4

December 2005

ARTICLE 19, 6-8 Amwell Street, London EC1R 1UQ • Tel: +44 20 7278 9292 •
Fax: +44 20 7278 7660 • info@article19.org • www.article19.org

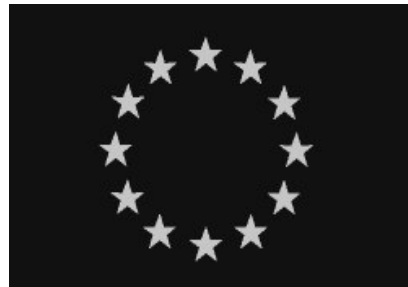
Suara Rakyat Malaysia (SUARAM), 383, 1st Floor, Jalan 5/59, Petaling Gardens, 46000 Petaling
Jaya, Selangor, Malaysia • Tel: +603 7784 3525 • Fax: +603 7784 3526 •
Email: suaram@suaram.net

Acknowledgements

This report is a product of cooperation between ARTICLE 19 and Suara Rakyat Malaysia (Suaram). Sonia Randhawa, Pauline Puah and Susan Loone researched and wrote this report. Comments and legal analysis were provided by Toby Mendel (Law Programme Director of ARTICLE 19) and Dini Widiastuti (Asia Programme Officer of ARTICLE 19). Final editing was made by Luitgard Hammerer (Acting Director for the Asia Programme of ARTICLE 19). Copy-editing was by Dini Widiastuti. Proof-reading was done by Joanna Hoare. The cover was designed by Mardiana Tukiran.

ARTICLE 19 would like to thank the European Commission for providing funding for this study and six other baseline studies on freedom of expression and the media. These studies are parts of the project “Promoting and Protecting Freedom of Expression and Freedom of Information in the ASEAN Region”. We would also like to thank other donors who have contributed to this project: the Open Society Foundation, the Royal Norwegian Embassy in Bangkok and UNESCO.

“This project is co-financed by the European Initiative for Democracy and Human Rights, European Commission. Opinions in this publication is fully the responsibility of ARTICLE 19 and Internews, and therefore do not reflect the official views of the European Commission.”



“This study was published with support from UNESCO. The ideas and opinions expressed in this study are those of the authors and do not necessarily represent the views of UNESCO. The designations employed and the presentation of material throughout the publication do not imply the expression of any opinion whatsoever on part of UNESCO concerning the legal status of any country, territory, city or area, or of its authorities, or concerning its frontiers or boundaries.”

Freedom of Expression and the Media in Malaysia

Contents

1. INTRODUCTION.....	5
2. RECOMMENDATIONS.....	8
3. BACKGROUND.....	12
3.1. Government and Administrative System.....	12
3.2. Ethnicity and Language.....	13
3.3. The New Economic Policy.....	14
3.4. Malaysian Democracy.....	15
3.5. Political Parties and the General Elections	19
4. INTERNATIONAL AND CONSTITUTIONAL OBLIGATIONS	22
4.1. The Importance of Freedom of Expression.....	22
4.2. Freedom of Expression and the Media	24
4.3. Restrictions on Freedom of Expression	25
4.4. Pluralism	26
4.5. Independence of Media Bodies	27
4.6. Freedom of Expression under the Malaysian Constitution.....	29
5. MEDIA SITUATION.....	31
5.1. Print Media	33
English language newspapers	33
Malay language newspapers	34

Chinese language newspapers.....	34
Print media in Sabah and Sarawak.....	35
Magazines	36
Alternative media	36
Foreign media.....	37
5.2. Television and Radio.....	38
Ownership and diversity	40
5.3. Web-based media.....	43
6. PRINT MEDIA REGULATIONS.....	45
6.1. The Printing Presses and Publications Act 1984 (PPPA).....	45
6.2. The Sedition Act 1948	49
6.3. The Official Secrets Act 1972 (OSA).....	54
6.4. The Media Council Bill.....	56
Professional codes of ethics.....	58
Recommendations	59
7. BROADCASTING REGULATIONS	61
7.1. Current Legislation and Its Implications.....	61
7.2. Public Broadcaster	64
Programming requirements.....	64
Parliamentary monitoring	64
7.3. Self-regulation	65
7.4. Other Legislation Restricting Freedom of Expression	65
Theatre and music.....	65
Ceramahs and public gatherings	66
Recommendations	67

8. DEFAMATION LAW.....	68
8.1. Key Features of Defamation Act 1957	68
The definition of defamation	68
The premium placed on reputation	69
Defences.....	70
8.2. “Mega-suits” Undermining Freedom of Expression	70
Recommendations	73
9. CONTENT RESTRICTIONS	73
9.1. Use of the Sedition Act	74
Race	75
Religion.....	76
The Judiciary	77
The Monarchy	78
The special position of Sabah and Sarawak	78
The special privileges of the Malays.....	78
The conclusion for the political landscape in Malaysia.....	79
9.2. Other Legislation Restricting Content	79
Recommendations	81
10. FREEDOM OF INFORMATION AND SECRECY.....	82
10.1. The Official Secrets Act.....	82
10.2. Culture of Secrecy.....	91
Types of information or documents readily accessible.....	92
Court cases and gag orders	92
Prosecution and persecution of whistleblowers.....	93
Positive measures to share information by the government.....	94

10.3. The need for a Freedom of Information Act	94
Recommendations	96
11. INFORMAL RESTRICTIONS AND HARASSMENT OF THE MEDIA	97
Recommendations	99

1. INTRODUCTION

During the run-up to the Malaysian general elections in March 2004, a private radio station broadcast a news item in which the Deputy Prime Minister called for Malaysians to re-elect the government. Not only was this the top story of the day, it was the only local news story. The radio station did not invite any opposition politicians to voice their views. But despite this being a clear example of unbalanced reporting, barely a comment was raised by opposition politicians and other media outlets.

Why is this case? Media freedom in Malaysia is heavily curtailed by legislation, but what is of much greater concern is the passivity that this legislation engenders. The vast majority of journalists, editors, commentators and politicians accept the existing conditions, even as they fall victim to their restrictions and absurdities.

Well-paid journalists, having put up with a restrictive environment for decades, rarely rock the boat. Thus, the Malaysian media seldom make international headlines. Journalists are not murdered, and until recently, very few were attacked as a result of their professional activities. The everyday indignities they do suffer fail to make the headlines. All this, has contributed to a culture where freedom of expression and information are devalued.

The media landscape in Malaysia is continually changing, rarely for the better. Since the beginning of 2004, some worrying developments in terms of journalists' safety in Malaysia have been observed, with several particularly shocking attacks against journalists and activists exercising their right to freedom of expression.

On 1 June 2004, Burmese journalist Ko Minn Kyaw was abducted and held for 12 hours, whilst on his way to cover a press conference with the Burmese Prime Minister. He was reported to have been beaten and denied food or water, before being released. The abductors identified themselves to him as Malaysian police, although the authorities have subsequently denied any involvement.

Another Burmese journalist, Sein Mar, was held by the police without being charged for over a month, from 25 May 2004. She was initially arrested on 17 May after a demonstration outside the Myanmar embassy, and was eventually released into the custody of the United Nations High Commission for Refugees on 25 June 2004.

An ethnic Chinese journalist, Pang Tian Koo, based in the south of Malaysia, was severely injured when attacked with a machete.

licence to publish in the early 1990s, it was the first new English-language daily in over 20 years. However, it had simply taken over an older licence for a weekly entertainment publication, rather than applying for a completely new licence. The Printing Presses and Publications Act is only one of an array of laws that curtails the press. These laws are examined in Chapter 6.

In Chapter 7, broadcast regulation is examined. The development of private and quasi-private television and radio stations has not meant greater diversity of opinion on local events, as private broadcasters practice self-censorship, despite less stringent licensing provisions than those faced by the press. In addition, although the recently gazetted Communications and Multimedia Act seems to allow for greater industry self-regulation, this change is more theoretical than real. The need for ministerial approval of codes of conduct and the ability of the bureaucrats appointed by the Minister of Energy, Water and Communication to impose a code of conduct on the industry negate this apparent relaxation. Nevertheless, this might open the way for less sensationalism and allow higher standards of conduct in some areas, even if it does not change the obvious political bias of both television and radio stations.

Defamation law is another tool used by powerful, well-connected individuals to silence critics. Defamation suits are excessively punitive and can run into hundreds of millions of Ringgit (RM), dwarfing settlements for loss of life or limb. This law is examined in Chapter 8.

Chapter 9 examines stringent restrictions on content, which limit discussion along most of the nation's fault lines, such as race and religion. Informal and self-censorship are the norm, rather than legislative restrictions. Journalists who raise issues that are not on the official agenda find themselves silenced.

The right to freedom of information is also non-existent in Malaysia. Information on air quality, military spending and corruption investigations are all classified. Legislation allows almost any civil servant to classify any piece of information, without justification. The decision to classify information cannot be challenged in court. Chapter 10 examines the extent to which access to information is controlled, both through formal legislation and informal obstacles. This chapter also looks at how information which is already in the public domain, such as Environmental Impact Assessments, can be made more easily accessible. It recommends a Freedom of Information Act as an important first step, but points out that more is needed to fight a pervasive culture of secrecy, to protect whistle-blowers and to improve the flow of information.

The last chapter examines informal harassment of the media through phone calls from officials to the news floor. Based on interviews, this



chapter relates anecdotal evidence from all levels of the print and broadcast industry. While threats of physical violence and attacks on journalists are very rare in Malaysia, coercion is more subtly exercised, as this chapter shows, through the persistent threat of licences being revoked.

Overall, the study paints a dismal picture of the state of media freedom in Malaysia, and recommends a comprehensive review of legislation. The focus of legislation needs to change from one of curtailing to one of protecting the rights of journalists.

2. RECOMMENDATIONS

In regards to the PPPA:

- The registration system should be abolished.
- If the system is retained, it should meet the following conditions:
 - the system should be administered by an independent body;
 - registration should be an automatic, purely administrative step;
 - the authorized body should not be allowed to refuse registration based on the subject matter of the media.
- The provision on “false news” should be repealed.

In regards to the OSA:

- Repeal the provisions that allow prolonged detention without charge.
- Cabinet and State Executive Council decisions should not, as a rule, remain classified as “official secrets” after final adoption.
- The definition of “official secret” should be rendered far more precise so that only documents whose disclosure would pose a serious and demonstrable risk to a legitimate protected interest, such as national security, may be classified, and for only as long as it poses a threat to that legitimate protected interest.
- The law should include a provision providing that information, even if otherwise classified as an “official secret”, should nevertheless be released if there exists an overriding public interest in disclosure (public interest override).

- The group of persons qualified to classify information should be narrowed to the Minister and designated senior public officials.
- An offence of wilful misclassification should be created to punish abuse of the classification procedure.
- The Act should be amended to impose a time limit on the classification of documents together with a compulsory review period to ensure that the necessity of a classification is reviewed with reasonable regularity.
- Judicial review of any determination to classify information should be specifically provided for.
- The Official Secrets Act must be consistent with any freedom of information legislation introduced.

In regards to the Media Council Bill:

- The draft Media Council Bill should be dropped, as statutory regulation of print and online media is not good practice.
- The print media should be allowed and encouraged to establish a truly self-regulatory system.
- Online media and the Internet should not be regulated. Instead they should be encouraged to adopt content rating systems and filtering mechanisms to enable users to control the content they wish to receive.
- Any press or media council that will be established should be fully independent of political and commercial pressures. In particular, this has implications for financing, nomination and appointment of its members, as well as operating procedures.
- Financing for any press or media council should come, at least in part, from the media industry.
- It is preferable that a media or press council includes representatives from a cross-section of stakeholders such as journalists, editors, owners and the public.
- The self-regulation body should be financed in a way that ensures full independence from political or commercial interests, ideally by the media industry itself.
- Any code of conduct drafted by the Media Council should be clear and unambiguous in its wording, should be developed in close consultation with the media and other stakeholders, and should be disseminated widely to the public.
- Any self-regulatory mechanism should provide for an independent appeals procedure.



In regards to Broadcasting

- The legal framework for broadcasting should be revised to establish progressive licensing and content regulation systems as well as clear regulation to limit ownership concentration.
- Licences should be made available for niche channels (such as minorities) and for community radio, based on social merit rather than only on available funds and political connections.
- This framework should foresee limited or no licence fees for community broadcasters and existing community broadcasters should, in principle, have their licences guaranteed. A definition of a community broadcaster should also be developed.
- A comprehensive law on public broadcasting should be passed.
- Self-regulation should not be imposed by law but should be a result of voluntary commitment by the media.
- The broadcast regulator (Communications and Multimedia Commission) should be reformed to obtain full independence.
- The Film Censorship Act should be substantially amended so as to comply with international standards. In particular, it should not make any distinction between foreign and domestic films; it should include exact definitions which make the law and its application predictable and foreseeable for filmmakers; and it should exclude vague concepts such as “un-Malaysian”.
- Awareness raising and educational programmes on the human right to free expression and the right to information should be provided for staff of the public sector and law enforcement bodies.

In regards to Defamation:

- Any defamation regime in Malaysia should respect the following rules:
 - Public officials should not benefit from special protection under defamation laws.
 - Public bodies should not be able to bring defamation suits.
 - No one should be held liable in defamation for statements which are true.
- The most immediate measure necessary is for legislation putting a cap to the amount that can be awarded.
- It would also be useful if provisions were made for reportage that is in the public interest or to publish stories in the public interest based on facts available at the time.

- If the journalist has followed professional standards with regards to “reasonable publication” he/she should not be liable.

In regards to Content Restriction:

- Repeal/amend legislation that stifles areas of discourse, particularly the Sedition Act.
- More positive measures are required to undo years of censorship and fear, such as investment in public and community broadcasting or presses.
- Self-regulation of all media should be encouraged but not imposed by law.
- Create a climate for more tolerance and encourage informed debates between and within communities, particularly on matters of importance such as race and religion. The justified concern (as seen by the vitriol on some websites) that this will degenerate into hate speech and increase society’s divisions can be overcome through existing legislation, particularly in the Penal Code, on inciting racial hatred and violence. This legislation, however, needs to be used sparingly – and against all incitements to violence regardless of political affiliation.

In regards to Freedom of Information:

- A comprehensive access to information law, in line with international standards, should be adopted as a matter of priority.
- Existing laws which provide for secrecy should be reviewed and amended as necessary so that only legitimate secret material is covered in accordance with international standards. For instance in the OSA:
 - Sections 3 and 4 should be repealed and replaced with narrowly drafted offences that clearly link harm to national security to the prescribed conduct. They should allow for a proportionate sentence to be imposed.
 - Section 7 should be repealed.
 - Section 16 should be repealed.
 - Sections 8 and 9(2) should be redrafted in clear and precise language, prohibiting only those disclosures which pose an immediate risk of serious harm to national security or another legitimate interest. These provisions should also allow for disclosure in the public interest.
- The government should encourage more openness on the side of public officials.
- Promote the right to information to the public and build public support for an FOI Act.



In regards to informal pressure on the media:

- Officials/business companies should respect editorial independence and not apply any pressure, direct or indirect, on journalists and media.
- Officials and other public figures should demonstrate tolerance of criticism and allow the media to play their role of public watchdog.
- The State should grant editorial independence to the state-owned media.
- Editors should encourage their journalists to carry out the media's role as government watchdog.
- A clause of conscience should be included in journalists' employment contracts.

3. BACKGROUND

3.1. Government and Administrative System

The Federation of Malaysia was established on 9 August 1963. It consisted of Malaya, Sabah, Sarawak, and Singapore. However, Singapore pulled out of the federation in 1965 and became an independent State. Malaysia has practised parliamentary democracy since its independence in 1957.

Based on the practice of the separation of powers, the branches of government include a bicameral legislature (combining a non-elected Upper house and an elected Lower House), an executive branch and a judiciary. An elected Parliament, an executive responsible to Parliament, and an independent judiciary were established to provide the necessary checks and balances to safeguard citizens' fundamental rights and liberties. The head of State is a constitutional monarch elected from among the nine hereditary *sultans* of the traditional Malay States to serve for five years on a rotational basis.

Malaysia was colonised by three foreign powers. The Portuguese arrived in 1511, followed by the Dutch, who with the help of the Acehese and the Johor Sultanate entered the Malay Peninsula in 1641. The British occupied the country from 1786 until Malaya gained its

independence in 1957.² The Japanese also occupied Malaysia from 1942 to 1945.

The administrative system is divided into thirteen States and three federal territories, Kuala Lumpur, Labuan and Putrajaya. It comprises a peninsula with 11 States—Johor, Kedah, Kelantan, Melaka, Negeri Sembilan, Pahang, Perak, Perlis, Pulau Pinang, Selangor, and Terengganu—and two other States, Sabah and Sarawak, on the island of Borneo in the South China Sea. Sabah and Sarawak have had a very different socio-political and economic development from the other States due to their unique geographical position, legal status and history.

The Federal Constitution states additional separation of powers between the federal and State governments. The Federal government prevails in matters of national interest, such as education, defence, foreign affairs, internal security, citizenship, health, commerce and industry. The State governments have autonomy over the administration of public services and the power to enact laws regarding Islamic affairs, land, agriculture and forestry, local government and local services.

The Federal government and the State Governments are required to work together in areas that involve common interests such as social welfare, village planning, national parks and wildlife, drainage and irrigation, scholarships and public health. However, State legislation cannot contradict the Federal Constitution or Federal legislation.³ The Federal Prime Minister has the power to approve the choice of a State *Menteri Besar* (Chief Minister) and informal control over State policies through party channels.

3.2. Ethnicity and Language

As a multi-ethnic and multi-religious society with a total population of 23.27 million, Malaysia comprises 65 per cent Malays and other indigenous groups, 26 per cent ethnic Chinese and 7.7 per cent ethnic Indian. Islam is the official religion, and 60.4 of the population are Muslim. Buddhism, mostly practised by Chinese, is the second largest religion with 19.2 per cent, followed by Christianity (9.1 per cent), Hinduism (6.3 per cent), Confucianism, Taoism and other Chinese traditional religions (2.6 per cent).⁴

² Malaya is now referred to as Peninsular Malaysia following the entry of the British colonies of Sabah and Sarawak in 1963 into the larger Federation of Malaysia.

³ Jawan, A. Jayum, *Malaysian Politics & Government*, (Shah Alam: Karisma Publication, 2003), p. 102.

⁴ Year 2000: National Population and Housing Census of Malaysia.



The Federal Constitution states that Malay (*Bahasa Malaysia*) is the national language. Article 160(2) of the Constitution defines a Malay as “a person who professes the Muslim religion, habitually speaks the Malay language, and conforms to Malay customs”. The Constitution makes special reference to *Bumiputras* (Sons of the Earth), which is the official term embracing ethnic Malays, as well as other indigenous ethnic groups, such as the Orang Asli and Orang Asal, and the Siamese minority in the northern States of Peninsular Malaysia. The Constitution allows for affirmative action for Bumiputras in education, employment and business; and prescribes Islam as the official religion.⁵

Race riots that took place in 1969 race riots marked a watershed in modern Malaysian history. The ruling Alliance coalition, consisting of various parties including the Malay-based United Malays National Organisation (UMNO), the Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC), had been in power since independence, but following the General Election that year, was returned with a reduced majority. Opposition supporters celebrated their perceived victory on the streets, prompting UMNO supporters to hold a counter-rally in Kuala Lumpur. What finally triggered the riots still remains unknown, but Chinese and Malays attacked and slaughtered each other, giving vent to grievances and discontent. According to official figures, by the end of May, 177 people had been killed and 340 injured. It is widely believed that the actual figures were higher.⁶

3.3. The New Economic Policy

In the aftermath of the riots, Parliament was disbanded for almost two years, emergency rule was imposed, and the government made a concerted attempt to address the issue of communal inequality⁷ through the New Economic Policy (NEP), which was introduced in 1970.

The NEP stipulated two principal objectives: “[F]irstly, a reduction and eventual eradication of poverty, irrespective of race; and secondly, a restructuring of society so that identification of race with economic function would be reduced and ultimately eliminated.”⁸ The policy’s aim was that within 20 years, 30 per cent of commercial industry and the professions would be in the hands of the Bumiputras. This, it was believed, would rectify the economic imbalance between the communities.

⁵ Hussein, S. Ahmad, “Muslim Politics and the Discourse on Democracy”, in Loh, Francis Kok Wah. & Khoo, Boon Teik (ed), *Democracy in Malaysia-Discourses and Practices*. (Surrey: Lurzon Press, 2002), p. 83.

⁶ Ibid, p. 232.

⁷ Esposito, John L., and Voll, John O., *Islam and Democracy*. (New York: Oxford University Press, 1996), p. 127.

⁸ Andaya, Babara Watson, and Andaya, Leonard Y., *A History of Malaysia*, (London: Palgrave, 2001), p. 303.

Under the NEP, business with the State was largely reserved for Bumiputra or State-backed companies. Most important was the implementation of a quota system for admissions into public universities and in the allocation of scholarships. The most obvious policies of the NEP existed before 1970, but now there were State-determined ethnic quotas and targets in most social and economic sectors.⁹

One important trend connected to the NEP has been the shift of the media into the hands of Malaysians from the early 1970s. The combination of the existing licensing provisions and the new ownership requirements saw government tightening its control over media ownership. The *New Straits Times* came into Malaysian and government-proxy hands in 1972. This followed a resolution by the youth wing of the United Malays National Organisation (UMNO Youth) that all newspapers and their staff should be Malaysian. Two months later, this policy was put in place, and the paper came under the control of one of UMNO's three vice-presidents, Tengku Razaleigh Hamzah.¹⁰

Two years later, this trend was made policy through legislation, which stated that a majority of shares in all media companies had to be owned by Malaysians.¹¹ Partly as a result, since then media ownership has been concentrated in the hands of the political and economic elite, as the government bought up controlling shares in media organisations as they come onto the market.

3.4. Malaysian Democracy

Political scientists have categorised the Malaysian system as a “quasi” democracy,¹² “semi democracy”,¹³ or “modified democracy”.¹⁴ According to one summary, “[w]hatever their theoretical assumptions, these characterisations implied the political system was perched uneasily between democracy and authoritarianism”.¹⁵

⁹ Khoo, Boo Teik, “Politics after Mahathir”, in Colin Barlow (ed), *Modern Malaysia in the Global Economy-Political and Social Change into the 21st Century* (Cheltenham & Northampton: Edward Elgar, 2001), p. 136.

¹⁰ Gomez, Edmund Terence, “Decline of the Malaysian press”, *Malaysiakini.com*, 2 April 2003.

¹¹ Mohd. Safar Hasim (1996), “Akhbar dan Kuasa: Perkembangan Sistem Akhbar di Malaysia Sejak 1806”, Universiti Malaya, p. 293.

¹² Zakaria, Haji Ahmad, “Malaysia: Quasi Democracy in a Divided Society”, in Diamond, Larry, Juan J. Linz, Seymour Martin Lipset (eds.), *Democracy in Developing Countries*, Volume Three: Asia, (Boulder, 1989).

¹³ Case, William, “Semi Democracy in Malaysia”, *Pacific Affairs*, vol. 66, no. 2, 1993.

¹⁴ Crouch, Harold, “Malaysia: Neither Authoritarian nor Democratic”, in Hewison, K., Robinson, R., and Rodan, G (eds.), *Southeast Asia in the 1990s: Authoritarianism, Democracy and Capitalism*, (New South Wales: Allen and Unwin, 1993).

¹⁵ Khoo, see note 9 above, p. 4.



Of particular concern has been the actions of the Barisan Nasional (BN or National Front), the ruling coalition formerly known as the Alliance, to increase executive power. Barbara Watson Andaya and Leonard Y. Andaya noted in their publication *A History of Malaysia*, that former Prime Minister Dr Mahathir Mohamad strengthened his power by undermining two important institutional safeguards against the power of the executive branch: the right of the head of State, the Yang di-Pertuan Agong, to veto legislation; and undermining the independence of the judiciary by replacing high court judges to assure a judiciary responsive to his demands.¹⁶

These actions have included Mahathir's successful attempt to limit the authority of the royal Head of State in 1983 through amending the Constitution to ensure that the Yang di-Pertuan Agong could not override Parliament. The amendment stated that if the King's assent to bills was not forthcoming, the bills would automatically become law.¹⁷ In 1993, the powers of the royal head of State were further undermined when the Sultans' immunity to criminal prosecution was removed.

The mass arrests that took place during Operasi Lalang also represent a significant watermark in Malaysian history, and a further weakening of democracy in the State. On 27 October, 106 political activists, educationists, and civil rights activists were arrested under the Internal Security Act (ISA). Although most of the detainees were released either conditionally or unconditionally, 40 were issued detention order of two years, including a number of politicians from the opposition parties: the Democratic Action Party (DAP) and the Islamic Party of Malaysia (PAS). The government accused these people as having played up "sensitive issues" and thus created "racial tension" in the country. The operation was the Malaysian government's reaction to a storm of protest and mass gathering to protest against the Education Ministry's appointment of 100 senior assistants and principals, who were not Chinese-educated, to vernacular Chinese schools. The incident provided PM Mahathir, who was facing a strong challenge to his leadership following a rift in UMNO, with the excuse to further tighten the executive stranglehold on politics by further restricting fundamental liberties.

The police crackdown in 1987 had far reaching implications for freedom of expression in Malaysia, not only placing increased pressure on the media, but also limiting the independence of the judiciary and infringing on the right of Malaysian citizens to a fair trial.

¹⁶ Andaya, Barbara Watson & Andaya, Leonard Y, *A History of Malaysia*. (London: Palgrave, 2001), p. 328.

¹⁷ Hooker, Virginia Matheson, *A Short History of Malaysia, Linking East and West* (New South Wales: Allen & Unwin, 2000), p. 261.

Within the media, the crack-down saw the revocation of the licences of three publications, *The Star*, *Watan* and *Sin Chew Jit Poh*;¹⁸ *The Star* did not get its permit back until five months later, after changes in ownership. It broke the back of its newsroom operations, with many of its best journalists leaving the daily due to job insecurity.

The police also called in journalists from other publications for questioning, and some of the most prominent left the profession or the country soon afterwards. Anecdotal evidence relates that journalists in the newsrooms of other papers discussed action, but did little more than raise funds for the welfare of their colleagues, or to employ as many of the newspapers' employees as they could take on. Morale fell to an all-time low, and previously adventurous journalists began to toe the government line. The media has still not recovered from this

The crackdown also saw the invocation of legislation allowing prolonged detention without trial, which the Malaysian government has continued to use since 1987.

Under the Internal Security Act (ISA), the Minister of Home Affairs has the right to detain anybody deemed 'prejudicial to the security of Malaysia' without a warrant or trial. Detainees are subjected to an initial 60-day detention with limited access to lawyers and family members, usually held at an unknown location. At the end of the 60-day detention, detainees may be given a detention order for up to two years, still without trial. Detention is renewable at the end of the two years for an indefinite duration. The detainee, when released, may be placed under supervision, under restrictive orders, or released unconditionally. Detainees have included those who have been critical of the government, religious minorities and counterfeiters.

This law considerably increased the power of the executive branch, and has been used on many subsequent occasions to suppress political dissent, including against then Deputy Prime Minister Anwar Ibrahim, who was detained under the ISA in 1998.

The downfall of Anwar Ibrahim began in 1997, following the Asian Financial Crisis. As the Minister of Finance, he adopted economic policies that were not in line with Mahathir's policies, and which disadvantaged business figures, many of whom were Mahathir's cronies. Anwar and his allies pressed on with measures and campaigned against cronyism and nepotism. At UMNO General Assembly in 1998, a book containing graphic sexual allegations and accusations of corruption against Anwar was circulated. The book, entitled *50 Dalil Kenapa Anwar Tidak Boleh Jadi PM (50 Reasons Why Anwar Cannot Become*

¹⁸ See e.g., V. Gayathry & Yeoh Seng Guan, *Media Values, Media Ownership and Democratic Governance in Malaysia* (Paper presented at the National Conference on the Future of the Media in a Knowledge Society: Rights, Responsibilities and Risks, organised by the United Nations Development Programme in association with Strategic Analysis Malaysia, Kuala Lumpur, March 24-25, 2003), p. 10.



Prime Minister), was written by Khalid Jafri, an ex-editor of *Utusan Malaysia*, a government-controlled newspaper (more discussion on the case in Chapter 8 on Defamation).

Anwar was fired from the cabinet on 2 September 1998, expelled from UMNO on 14 September and arrested on the night of 20 September following a demonstration in front of PM Mahathir's residence that Anwar had led earlier in the day. The demonstrators had been calling for “*reformasi*” (reforms), and from then on, this period has been known as the “*reformasi*” period, and Anwar’s attempts at policy change as the “*Reformasi*” movement.

After months of trials, in April 1999 Anwar was sentenced to six years imprisonment for corruption, and in August 2000 to nine years imprisonment for sodomy. He was released on 27 September 2004 after appeals court reversed the conviction.



Photo: freeanwar.net

The ISA was used again in 2002, when many arrests were made for alleged involvement in “extremist Islamic” and “militant activities”.¹⁹ According to the *Malaysia: Human Rights Report 2002*, torture and cruel, inhuman or degrading treatment are commonly meted out during ISA detentions.²⁰

The Emergency (Public Order and Prevention of Crime) Ordinance 1969 (EPOPCO) also gives the Home Minister the power to issue a detention

¹⁹ Suaram, *Malaysia: Human Rights Report 2002-Civil and Political Rights*, (Kuala Lumpur: Suaram Komunikasi, 2002), p. 21.

²⁰ Further details, please refer to *Ibid*, pp. 21-58.

order of up to two years. The Ordinance was deemed necessary for ‘preventing any person from acting in a manner prejudicial to public order’, for the “suppression of violence” and for the ‘prevention of crimes involving violence’. It has been used to detain arbitrarily and restrict the actions of suspected gangsters and violent criminals. The EPOPCO is often used when there is insufficient proof to gain a conviction in court. According to the Malaysian Human Rights Commission, Suhakam, approximately 400 persons were in detention under the Ordinance during 2002.²¹

Likewise, under the Dangerous Drugs (Special Preventive Measures) Act 1985, anybody can be detained without a warrant for 60 days if suspected of being ‘associated with any activity relating to or involving the trafficking in dangerous drugs’. As with the EPOPCO, the Home Minister can extend the detention for up to two years and renew it indefinitely.²² Political commentator, Lim Hong Hai has noted that the executive has

not only ... subordinated Parliament to its will; it has also amended the Constitution to clarify and limit the powers of the judiciary and even the head of State (or Yang di-Pertuan Agong). It has also removed constitutional constraints and passed laws that expand its powers and discretion in relation to society.²³

3.5. Political Parties and the General Elections

The National Front (Barisan Nasional - BN, formerly the Alliance), a coalition of 15 parties, has been in power since 1957. In June 1955, elections were held to the advisory Federal Legislative Council, and the Alliance won 51 of the 52 seats contested. In the first post-independence elections in 1959, the Alliance won 74 of the 104 seats in the national parliament.²⁴

All of the major BN component parties are race-based. UMNO is the core of the BN coalition, followed by the MCA, MIC and Chinese-dominated Gerakan. All the important positions in the cabinet, including Prime Minister, deputy prime minister, finance, education and defence ministers have traditionally been filled from UMNO’s ranks. Tunku Abdul Rahman was the first Malaysian premier from 1957 to 1970, followed by Abdul Razak bin Hussein (1970-76), Hussein Onn (1976-

²¹ Suaram, 2002, see note 19 on page 18, p. 36-37.

²² Amnesty International, *Malaysia-Human Rights Undermined: Restrictive Laws in a Parliamentary Democracy*, (London:International Amnesty, 1999), page 32.

²³ Lim, Hong Hai, “Public Administration-The Effects of Executive Dominance”, Khoo, see note 9 on page 15, p. 181.

²⁴ Khoo, see note 9 on page 15, p. 82



1981) and Mahathir Mohamad (1981-2003) who recently resigned and was replaced by Abdullah Ahmad Badawi.

As Hussin Mutalib has noted, racial or ethnic considerations loom large in many aspects of the political process. It is a consideration in every step, from when constituencies are delineated to when cabinet appointments are made.²⁵

The major opposition parties in Malaysia are the Islamic party Parti Islam SeMalaysia (PAS), the Chinese-dominated Democratic Action Party (DAP), and the newly-merged People's Justice Party (Parti Parti Keadilan Nasional Rakyat). Traditionally, the opposition parties in Malaysia have been weak, although the arrest of Anwar Ibrahim in 1998 did spark massive demonstrations calling for *reformasi* (reforms), for the first time in 30 years.²⁶

This was followed a year later with the establishment of an opposition coalition, the Alternative Front (Barisan Alternatif – BA), on 24 October 1999. The opposition parties worked together, producing a joint manifesto calling for a just and democratic Malaysia. They aimed to topple the current government at the 11th general elections.

However, in the elections, held on 29 November 1999, BN still gained a two-thirds majority in Parliament. The vote for BN declined drastically, especially in Malay-majority constituencies, but it still won 148 out of 193 parliamentary seats and 56.5 per cent of the popular vote, compared to 162 out of 192 seats and 66 per cent of the popular vote in 1995. It is worth noting that in the 1995 general elections, BN won its highest popular vote in over a decade. In 1982 it polled 60.5 per cent of the votes; in 1986 it was reduced to 57.6 per cent, and in 1990 to 53.4 per cent.²⁷

In 1999, UMNO was the main loser in the coalition, resulting in many important figures, cabinet ministers included, losing their seats. By contrast, PAS won a historic 27 Parliamentary and 98 State Assembly seats, compared to seven and 33 respectively in 1995. In addition to the State of Kelantan, PAS also captured another State on the East Coast, Terengganu, an UMNO stronghold for many years. It won 28 of the 32 State assembly seats and all seven parliamentary seats.

²⁵Mutalib, Hussin, "Islamisation in Malaysia: Between Ideals and Realities" in Mutalib, Hussin. & Hashimi, Taj Ul-Islam. (ed) *Islam, Muslims and the Modern State*, (New York: St.Martin Press, 1994), p.167.

²⁶See Freedman, Amy L., *Political and Ethnic Minorities: Chinese Overseas in Malaysia, Indonesia and the United States* (New York, London: Routledge, 2000), pp. 51-53.

²⁷ Loh, Francis Kok Wah, "Developmentalism and the Limits of Democratic Discourse" in Khoo, see note 9 on page 15.

If the Chinese had not voted en masse for the BN in the 1999 general elections, the ruling coalition would have been “gravely injured” by the opposition.²⁸ Non-Malay votes were crucial in keenly contested Malay constituencies, particularly against PAS.²⁹

One result of this was that PAS replaced DAP as the largest opposition party. DAP’s prominent leader, Lim Kit Siang, had been the Leader of the Opposition for more than 30 years, but this role was taken over by PAS president, moderate Islamic leader Fadzil Noor until he died on 23 June 2002, when he was replaced by Hadi Awang.

DAP leaders attributed their losses to the Islamic State issue, which BN acutely manipulated to frighten the Chinese. Lim Kit Siang acknowledged the risk of his party’s involvement in the Barisan Alternatif, the coalition formed from opposition parties, concluding that it ‘could win big, or lose it all’.³⁰ During the 10-day election campaign, BN advertised in all the major newspapers and media, with full-page advertisements. These maintained that the Chinese would lose their identity and culture if they supported Barisan Alternatif, as PAS’s ultimate objective was to establish an Islamic State. According to Syed Ahmad Hussein, PAS was painted as an extremist party whose new moderate and democratic posture was a political charade to gain power and turn Malaysia into a theocratic State.³¹

The MCA won with flying colours, especially in Chinese-majority constituencies. Not surprisingly, under tremendous pressure, the DAP decided to leave BA on 22 September 2001, ending their two year relationship. The withdrawal was made in the heat of the Sarawak State election campaign. Lim Kit Siang, in a lecture in London, proposed that the political aftermath of the September 11 terrorist attacks in the United States made a ‘secular pact’ crucial. Lim said the government would manipulate the evils of terrorism and associate it with the opposition to frighten voters at the following general elections.³²

It is worth noting that the electoral procedures in Malaysia are often controversial. Gerrymandering, for example, exaggerates the weight of rural Malay districts, the areas in which UMNO has historically reaped most of its votes.³³ The resources and facilities of the State have been used unashamedly by the BN camp, leaving poorly-funded opposition parties at a disadvantage. As Harold Crouch has noted ‘the Malaysian electoral system (has been) so heavily loaded in favour of the

²⁸ *Analysis Malaysia*, 2000:issue 4

²⁹ Lee, Kam Hing, (2001) “The Chinese in Malaysia”, in Colin Barlow (ed), *Modern Malaysia in the Global Economy- Political and Social Change into the 21 st Century.*, (Cheltenham & Northampton: Edward Elgar), p. 171

³⁰ Case, William, *Politics in Southeast Asia Democracy or Less*, (Surrey: Curzon Press, 2002), p. 141.

³¹ Khoo, see note 9 on page 15, p. 105.

³² Malaysiakini.com, 19 December 2001

³³ Crouch, see note 14 on page 14.



government that it is hard to imagine that the ruling coalition, as long as it remained united, could be defeated in an election'.³⁴

On 31 October 2003, Dr Mahathir resigned. His fourth deputy, Abdullah Badawi, emerged as the fifth Prime Minister of Malaysia. General elections were held in March 2004, and the BN remained in power with a greater share of the vote and of the seats. The number of Parliamentary seats won by the BN rose from 148 to 198, with the opposition dropping from 48 to 21 (including one independent in Sabah).³⁵ The shift was more profound at the State level, with the number of seats won by BN increasing from 281 to 453. Opposition parties that were comparatively weak in terms of their structure and finances, as well as being divided by profound ideological differences and being associated with an ambiguous Islamic State concept that obviously frightened many, all contributed to BN's success. Abdullah is perceived to be keen to be seen as the legitimate successor to Mahathir, mixing both continuity and reform. Unfortunately, continuity seems to be the main thread in his stance on the media, despite his declared intent to stamp out corruption.

The 2004 elections were marred by confusion due to blunders by the Election Commission and numerous petitions have been lodged, questioning the legitimacy of the count in some constituencies, including that of the Prime Minister.

Nevertheless, Badawi was re-elected with a huge mandate to push for change, and his style of governing has shown more openness in many ways than his predecessors, particularly in dealings with NGOs, though less so in terms of dealing with the media. Thus, the signals are contradictory and, for the media and freedom of expression and information issues, far from promising. His Cabinet, for example, includes familiar faces from the Mahathir era, including ministers against whom the opposition has raised allegations of corruption.

4. INTERNATIONAL AND CONSTITUTIONAL OBLIGATIONS

4.1. The Importance of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR) guarantees the right to freedom of expression in the following terms:

³⁴ Crouch, see note 14 on page 15.

³⁵ The discrepancy in figures is caused by the creation of new seats.

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.³⁶

The UDHR, as a UN General Assembly resolution, is not directly binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948 and therefore binding on all States.³⁷

The *International Covenant on Civil and Political Rights (ICCPR)*,³⁸ a treaty ratified by over 145 States, imposes formal legal obligations on State Parties to respect its provisions and elaborates on many of the rights included in the UDHR. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR:

1. Everyone shall have the right to freedom of opinion.
2. 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.

Although Malaysia has neither signed nor ratified the ICCPR, it is nonetheless an authoritative elaboration of the rights set out in the UDHR and hence of some relevance here.³⁹

Furthermore, as a Member of the Commonwealth, Malaysia has also affirmed its commitment to the protection of human rights generally and the right to freedom of expression specifically through statements issued by the Commonwealth Heads of Government Meetings.⁴⁰ In the 2001 Coolum Declaration, the Commonwealth Heads of Government declared that they,

³⁶ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

³⁷ See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit).

³⁸ UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

³⁹ In terms of international human rights treaties, Malaysia has only ratified two main treaties, namely the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). Both were ratified in 1995. Despite Suhakam's recommendation,³⁹ the Malaysian Government has not ratified the two main international covenants, International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economics, Social and Cultural Rights (ICESCR).

⁴⁰ See the Harare Commonwealth Declaration, Zimbabwe, 1991; Declaration of Commonwealth Principles, Singapore, 1971. On freedom of expression specifically, see the Abuja Communique, 8 December 2003 and the Coolum Declaration on the Commonwealth in the 21st Century: Continuity and Renewal, Australia, 2002.



... stand united in our commitment to democracy, the rule of law, good governance, freedom of expression and the protection of human rights.⁴¹

Freedom of expression is also protected in all three regional human rights instruments, at Article 10 of the *European Convention on Human Rights*,⁴² Article 13 of the *American Convention on Human Rights*⁴³ and Article 9 of the *African Charter on Human and Peoples' Rights*.⁴⁴ The right to freedom of expression enjoys a prominent status in each of these regional conventions and, although not directly binding on Malaysia, as noted above, judgments and decisions issued by courts under these regional mechanisms provide good evidence of the appropriate interpretation of the right to freedom of expression as guaranteed by the UDHR as well as by the Malaysian Constitution.

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. At its very first session, in 1946, the UN General Assembly adopted Resolution 59(I) which states: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."⁴⁵ A sentiment echoed by the UN Human Rights Committee, which has stated: "The right to freedom of expression is of paramount importance in any democratic society."⁴⁶

4.2. Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media and public service broadcasters. The European Court of Human Rights has consistently emphasized the "pre-eminent role of the press in a State governed by the rule of law".⁴⁷ It has further stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.⁴⁸

⁴¹ Harare Commonwealth Declaration, see note 40 on page 23, first paragraph.

⁴² Adopted 4 November 1950, in force 3 September 1953.

⁴³ Adopted 22 November 1969, in force 18 July 1978.

⁴⁴ Adopted 26 June 1981, in force 21 October 1986.

⁴⁵ 14 December 1946.

⁴⁶ *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

⁴⁷ *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

⁴⁸ *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

As the UN Human Rights Committee has stressed, a free media is essential in the political process:

[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.⁴⁹

The Inter-American Court of Human Rights has stated: ‘It is the mass media that make the exercise of freedom of expression a reality’.⁵⁰ Media as a whole merit special protection, in part because of their role in making public ‘information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”’.⁵¹

It may be noted that the obligation to respect freedom of expression lies with States, not with the media *per se*. However, this obligation does apply to publicly-funded broadcasters. Because of their link to the State, these broadcasters are directly bound by international guarantees of human rights. In addition, publicly-funded broadcasters are in a special position to satisfy the public’s right to know and to guarantee pluralism and access, and it is therefore particularly important that they promote these rights.

4.3. Restrictions on Freedom of Expression

The right to freedom of expression is not absolute: both international law and most national constitutions recognise that it may be restricted. However, any limitations must remain within strictly defined parameters. Article 19(3) of the ICCPR lays down the conditions which any restriction on freedom of expression must meet:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

⁴⁹ UN Human Rights Committee General Comment 25, issued 12 July 1996.

⁵⁰ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.

⁵¹ *Thorgeirson v. Iceland*, see note 47 on page 24.



A similar formulation can be found in the European, American and African regional human rights treaties. These have been interpreted as requiring restrictions to meet a strict three-part test.⁵² International jurisprudence makes it clear that this test presents a high standard which any interference must overcome. The European Court of Human Rights has stated:

Freedom of expression ... is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.⁵³

First, the interference must be provided for by law. This requirement will be fulfilled only where the law is accessible and 'formulated with sufficient precision to enable the citizen to regulate his conduct'.⁵⁴ Second, the interference must pursue a legitimate aim. The list of aims in Article 19(3) of the ICCPR is exclusive in the sense that no other aims are considered to be legitimate as grounds for restricting freedom of expression. Third, the restriction must be necessary to secure one of those aims. The word 'necessary' means that there must be a 'pressing social need' for the restriction. The reasons given by the State to justify the restriction must be 'relevant and sufficient' and the restriction must be proportionate to the aim pursued.⁵⁵

4.4. Pluralism

Article 2 of the ICCPR places an obligation on States to 'adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant'. This means that States are required not only to refrain from interfering with rights but also to take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public's right to know.

An important aspect of States' positive obligations to promote freedom of expression (and of the media) is the need to promote pluralism within, and ensure equal access for all to, the media. As the European Court of Human Rights has stated: "[Imparting] information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism."⁵⁶ The Inter-American Court has held that

⁵² See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).

⁵³ See, for example, *Thorgeirson v. Iceland*, note 47 on page 25, para. 63.

⁵⁴ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

⁵⁵ *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

⁵⁶ *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos.

freedom of expression requires that ‘the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media’.⁵⁷

The UN Human Rights Committee has stressed the importance of a pluralistic media in nation-building processes, holding that attempts to muzzle the media to advance “national unity” violate freedom of expression:

The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democratic tenets and human rights.⁵⁸

The obligation to promote pluralism also implies that there should be no legal restrictions on who may practise journalism and that licensing or registration systems for individual journalists are incompatible with the right to freedom of expression.⁵⁹ In a Joint Declaration issued in December 2003, 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 state: “Individual journalists should not be required to be licensed or to register.” Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non-discriminatory criteria published in advance.⁶⁰

4.5. Independence of Media Bodies

In order to protect the right to freedom of expression, it is imperative that the media be permitted to operate independently from government control. This ensures the media’s role as public watchdog and that the public has access to a wide range of opinions, especially on matters of public interest.

13914/88 and 15041/89, para. 38.

⁵⁷ *Compulsory Membership*, see note 50 on page 25.

⁵⁸ *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7.

⁵⁹ See *Compulsory Membership*, note 50 on page 25.

⁶⁰ Joint Declaration by 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, 18 December 2003, online at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/93442AABD81C5C84C1256E000056B89C?opendocument>.



Under international law, it is well established that bodies with regulatory or administrative powers over both public and private broadcasters should be independent and be protected against political interference. In the Joint Declaration noted above, the UN, OSCE and OAS special mandates protecting freedom of expression state:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.⁶¹

Regional bodies, including the Council of Europe and the African Commission on Human and Peoples' Rights, have also made it clear that the independence of regulatory authorities is fundamentally important. The latter recently adopted a Declaration of Principles on Freedom of Expression in Africa, which states:

Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.⁶²

The Committee of Ministers of the Council of Europe has adopted a Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, which states in a pre-ambular paragraph:

[T]o guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector...specially appointed independent regulatory authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play within the framework of the law.⁶³

The Recommendation goes on to note that Member States should set up independent regulatory authorities. Its guidelines provide that Member States should devise a legislative framework to ensure the unimpeded functioning of regulatory authorities and which clearly affirms and protects their independence.⁶⁴ The Recommendation further provides that this framework should guarantee that members of regulatory bodies are appointed in a democratic and transparent manner.⁶⁵

Constitutional courts in several countries have affirmed this point. For example, the Supreme Court of Sri Lanka, faced with a bill providing for

⁶¹ Joint Declaration, see note 60 on page 27.

⁶² Adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002.

⁶³ Recommendation No. R(2000) 23, adopted 20 December 2000.

⁶⁴ Recommendation No. R(2000)23, see note 63 on page 28, Guideline 1.

⁶⁵ *Ibid.*, Guideline 5.

a Broadcasting Authority, some of whose members would be government appointees, stated:

Since the proposed authority, for the reasons explained, lacks independence and is susceptible to interference by the minister, both the right of speech and freedom of thought are placed in jeopardy...We are of the opinion [that the bill's provisions] are inconsistent with ... the Constitution.⁶⁶

It can be argued that even a mere suspicion of improper interference suffices to cast doubt on constitutionality. As Lord Denning MR explained:

[I]n considering whether there was a real likelihood of bias, the court does not look at the mind of justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people.⁶⁷

In the hallowed phrase so often cited, “justice must not only be done, it must also be seen to be done.”⁶⁸

4.6. Freedom of Expression under the Malaysian Constitution

Part II of the Malaysian Constitution, entitled “Fundamental Liberties” contains nine articles including the right to life and the right to liberty of the person (including habeas corpus), equality under the law and freedom from discrimination, freedom of movement, freedom of speech, assembly and association.

In terms of the Constitutional guarantee of freedom of expression, Article 10 of the Constitution of Malaysia states:

- (1) Subject to Clauses (2), (3) and (4) –
 - (a) every citizen has the right to freedom of speech and expression

However, the right to freedom of expression is not absolute. Clause (2) of Article 10 states:

⁶⁶ *Athukorale and others v. Attorney-General*, 5 May 1997, 2 BHRC 609.

⁶⁷ *Metropolitan Properties Co. (F.G.C.) Ltd v. Lannon*, [1969] 1 QB 577, pp. 599.

⁶⁸ For the application of this maxim see, for example, *Locabail (UK) Ltd v. Bayfield Properties Ltd and another*, [2000] 1 All ER 65; *A.M.&S. Europe Ltd v. the Commission*, [1983] 1 All ER 705; and *Maynard v. Osmond*, [1977] 1 All ER 64.



- (2) Parliament may by law impose –
- (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;
 - (b) such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public inquiry; on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality;
 - (4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2) (a), Parliament may pass laws prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

Obviously, Clause (2) gives Parliament power to legislate restrictions on freedom of expression. “Expedient” is a much lower standard than the international guarantee, which requires any restriction to be “necessary”.⁶⁹ These clauses have allowed the fundamental principles of the Constitution to be comprehensively undermined and, through legislation, for the balance between the separate branches of State to shift sharply towards the Executive.⁷⁰

The Internal Security Act, the Printing Presses and Publications Act 1984 (PPPA), the Sedition Act 1948, the Official Secrets Act 1972 (OSA) and other formal and informal restrictions, discussed later, confirm the prevalence of executive power that both contradicts the Constitution and undermines freedom of expression in Malaysia.

The development of the law has also been retrogressive. The original system of constitutional supremacy has been replaced by a system of parliamentary supremacy. The highest court of the land, the Federal

⁶⁹ ARTICLE 19, *Memorandum on the Malaysian Sedition Act 1948*, (London: ARTICLE 19, 2003), p. 3.

⁷⁰ Amnesty International, see note 22 on page 19, p. 12.

Court (formerly Supreme Court) has repeatedly declined to interfere with legislation passed, even when the provisions are blatantly unconstitutional, arbitrary or discriminatory. The courts' exercise and affirmation of these fundamental freedoms guaranteed under the Constitution has been the exception rather than the norm. Judicial power to interpret the Constitution has also been repealed, further eroding the separation of powers to the benefit of the Executive.

The Alliance/Barisan Nasional governments since independence have maintained a two-thirds majority in Parliament, thus possessing a majority that allows them to amend the Constitution at will.

5. MEDIA SITUATION

Diversity in the Malaysian media is strictly limited by both legislation that has curtailed freedom of expression and information, and the concentration of media ownership in the hands of ruling parties or those closely allied to them. The small differences in editorial style can be largely explained by the affiliations of owners, all of whom are tied to the various ruling parties.

At independence, the Federation of Malaysia inherited the Printing Presses Ordinance of 1948 and the Sedition Ordinance of the same year, which later passed into Malaysian legislation as the Printing Presses and Publications Act and the Sedition Act, discussed in greater detail in Chapter 6. According to Mustafa K Anuar, these ordinances 'imposed strict controls over the press, an action that was considered as one of the government's counter-insurgency measures';⁷¹ judging from available archives, the rise of new publications dropped off sharply following the two ordinances.⁷² In the mid-60s, following independence, a spate of new papers came into circulation, but since then the majority of new publications have been devoted to niche or entertainment markets, while mainstream papers have become less and less diverse in outlook.

The early 1990s saw an increase in the number of print licences for daily newspapers granted.⁷³ There were new licences for English-language

⁷¹ Anuar, Mustafa K., "An historical overview of media development in Malaysia", (Paper presented at the National Conference on the Future of the Media in a Knowledge Society: Rights, Responsibilities and Risks, organised by the United Nations Development Programme in association with Strategic Analysis Malaysia. Kuala Lumpur, March 24-25, 2003), p. 4.

⁷² SeriPenerbitan Arkib Negara, *Majalah dan Akhbar*, available at <http://216.239.33.100/search?q=cache:iS5syAyIhooC:arkib.gov.my/bm/perkhidmatan/makatalogenglish.htm+fms+advertiser+singapore+&hl=en&ie=UTF-8> as of 10 April 2003.

⁷³ Not all these were new licences. *The Sun*, for example, converted an existing licence for an entertainment magazine into one for a daily newspaper. The effect, however, was



dailies for the first time in over 20 years. *The Leader* and *The Sun* both started up in 1993, with the urban-based free sheet *Leader* closing after a few months due to financial problems.



Media covering demonstration in Kuala Lumpur

Both television and radio were set up in Malaysia as government departments. From the outset, both forms of media have been seen in terms of being tools for nation-building. Radio flourished as a propaganda tool under the British and then the Japanese, before being taken over by an independent Malayan administration.⁷⁴

During the 1960s' civil war against the Communists, radio transmissions by the Communist Party of Malaya were regarded as highly dangerous and severe penalties were imposed on those found listening to these broadcasts.⁷⁵ Legislation still exists to penalise those receiving foreign broadcasts without a licence.⁷⁶

Traditionally, the State broadcaster, RTM, has been responsible to the Information Ministry. Appointments to the post of director have always been political—since 1969 the director has been directly responsible to and appointed by the Minister.⁷⁷ There is no official accountability to Parliament, and the only requirement in place has been an impossibly high 80 per cent local content provision, although it has recently been announced that this will be reduced to 60 per cent. RTM competes with commercial stations for advertising. However, RTM may be privatised

the same.

⁷⁴ Inisiatif Wartawan, "History of the English Language Media in Malaysia", published in *Suppressed Stories*, SOS! (Save Ourselves), May 2003.

⁷⁵ Interviews with activists undertaken by the author.

⁷⁶ Communications & Multimedia Act 1998, Section 234, published by International Law Book Series, as of 15th January 2002.

⁷⁷ See Karthigesu, R., *Sejarah Perkembangan Televisyen di Malaysia (1963-1983)*, page 76. In this book he cites a question raised by then-opposition member of Parliament Devan Nair in 1967.

under the Ninth Malaysia Plan, that covers the period between 2006 and 2010.⁷⁸

5.1. Print Media

The Malaysian press is most commonly classified by language, with the Malay papers having the largest share of circulation, followed by the Chinese papers. The English language market is dominated by *The New Straits Times* and *The Star*, with free daily *The Sun* gaining popularity. *Berita Harian* and *Utusan Malaysia* share the Malay language market, while the Chinese language press is dominated by *Sin Chew Jit Poh*. Its main rival is *Nanyang Siang Pau*, though its dominance has also been undermined by the entry of *Oriental Daily News* in 2002.

English language newspapers

The English language market has long been dominated by two players, *The New Straits Times* (NST) and *The Star*.⁷⁹ Following former Deputy Prime Minister Anwar Ibrahim's fall from power, the circulation of the NST plummeted. Readers appeared to be put off by the propaganda against a man who had recently been feted by the paper. In the recent past, industry sources say that the circulation began to slowly increase, but official figures show it is still stagnating at around 130,000 copies daily, from a height of around 180,000 before the Reformasi process.

Since January 2005, NST has been undergoing reform under its new editor, Kalimullah Hassan. Today, the government-controlled newspaper has sharper editorials, more investigative reports and coverage for opposition political parties, as well as new layouts.

The New Straits Times is part of a media group, Media Prima, which also controls *Berita Harian* and two TV channels (TV3 and 8TV). Until recently, this group was controlled indirectly by UMNO. A corporate "restructuring", however, removed it from UMNO's ownership, although it retains strong links with the political party. There are reports that it will be taken over by the Employee's Provident Fund (EPF), a government-controlled investment fund.

⁷⁸ RTM's corporatisation, mentioned as far back as 1989, has been repeatedly delayed. The latest statement on the matter, at the time of writing, was reported by Bernama "RTM Produces Idol-Related Programmes To Compete With Private Stations", 29 September 2004. In the report, Deputy Information Minister Zainudin Maidin says that the broadcaster may be corporatised under the Ninth Malaysia Plan.

⁷⁹ Information on circulation in this chapter comes from the Audit Bureau of Circulations.



The Star was established in 1971 as an independent newspaper. Although it enjoyed less than 10 years of independent existence,⁸⁰ being bought out by the Malaysian Chinese Association (MCA)—the Chinese component party of the ruling coalition—in 1979, its editorial policy has remained fairly liberal.⁸¹ In contrast to the NST, it has been picking up circulation since Reformasi. From around 200,000 before Reformasi, it has reached over 307,000 in published figures for the year to June 2003. While *The Star* is also controlled by a government political party, the MCA was less affected by the Reformasi crisis, as shown by the results of the 1999 General Election, and *The Star*'s coverage during this period was more positively received during this period. This was in contrast to the coverage of intra-party fighting from 2000 until the leadership change in MCA in mid-2003.

A third daily, *The Sun* distributes its print run of 150,000 free of charge. It only covers major urban centres. Owned by tycoon Vincent Tan Chee Yioun,⁸² a close associate of the then Prime Minister, *The Sun* attempted to carve out a more independent stance, particularly through the “special issues” section. This section was subsequently dropped, with several members of the team finding employment elsewhere.

Malay language newspapers

The two major Malay dailies, *Berita Harian* and *Utusan Malaysia*, both experienced falls in circulation during the height of the Reformasi movement. At the time, both were owned by the UMNO, the leading party of the governing Barisan Nasional coalition.

The fall was particularly pronounced for the New Straits Times Press' *Berita Harian*, although it had been steadily losing ground to *Utusan* since its mid-90s high of over 330,000 readers. In 2000 its circulation was less than 200,000 readers, but went on to stabilise at over 270,000 for the last six months of 2003.⁸³

Chinese language newspapers

Chinese-language papers are considered more independent than those published in other languages. Until the *Nanyang Siang Pau* takeover by MCA in 2001, none were owned by political parties.

⁸⁰ Anuar, see note 71 on page 31, p. 7.

⁸¹ Ibid, p. 9.

⁸² Gomez, see note 10 on page 15.

⁸³ This figure comes from Audit Bureau of Circulations figures quoted in *Media Guide 2003*, (Kuala Lumpur: Whiteknight Communications Sdn Bhd, 2003).

Sin Chew Jit Poh is the most popular Chinese daily and has been for over a decade, overtaking both *Nanyang Siang Pau* and the now-defunct *New Life Post* in 1992⁸⁴. *Sin Chew*'s circulation steadily rose throughout the 1990s and since 1997 has climbed from around 264,000 to 344,000⁸⁵ in the first six months of 2003. Tiong Hiew King, who owns *Sin Chew Jit Poh*, is a Sarawakian timber tycoon. He has a stake in dailies covering 53 per cent of the market, while ruling coalition component party MCA covers a further 37 per cent in the Peninsula.

Nanyang Siang Pau's circulation has been falling since before the MCA takeover in 2001, from around 191,000 in 1994 to 147,000 in the first six months of 2003. However, it dipped from 173,000 to 146,000 in the year before to the year after the takeover. This fall is not, however, evident in its sister paper, *China Press*; circulation figures for the latter have risen from around 80-90,000 throughout the 1990s to 209,000 in the first six months of 2003.

In 2003, a new daily, the *Oriental Daily News* was launched. Whilst it promised an interesting line-up of feature writers and columnists, many of these were dropped shortly after publication began.⁸⁶ The paper is owned by a rival Sarawakian timber tycoon,⁸⁷ and does not appear to be challenging the status quo, except through its independence from Tiong or the MCA. The paper's editor alleged that vendors selling the newspaper faced intimidation and threats.

Print media in Sabah and Sarawak

All the major Peninsular dailies are available in Sabah and Sarawak, which also have a host of local papers.

In Sarawak, the highest circulation overall lies with the *See Hua Daily News* (Chinese), which has a circulation of 53,000, followed by the *Borneo Post* (English), with total circulation of 47,478, higher by only 400 than the *Sarawak Tribune* (with 47,078).

In Sabah, the *Borneo Post* has a circulation of 21,000, around the same as *See Hua*. In English, the *Sabahan Daily Express* reaches sales of almost 28,000.

⁸⁴ This figure comes from Audit Bureau of Circulations figures quoted in *Media Guide 2001*, published by Whiteknight Communications Sdn Bhd.

⁸⁵ Figures for Chinese papers include "night sales", sales of a late edition of the newspaper.

⁸⁶ Discussion with Chinese media activists from Wami, in mid-2003.

⁸⁷ Siow, Chen Ming, "A big media bet", *The Edge Weekly*, 17 June 2003



Magazines

While it is easier for magazines to obtain licensing, the vast majority of those published deal with lifestyle issues. There are a few devoted to business, but almost none published locally that deal with news or politics.⁸⁸ The two exceptions to this: *Aliran Monthly*, owned by a local NGO (Aliran), and *Penita*, a women's magazine that began publication in August 2003. *Penita* expressly aims at empowering women.

Aliran Monthly has been facing financial difficulties, due partly to difficulties in maintaining consistent publication in the face of harassment of printers and vendors.

Alternative media

Local Alternatives

a. Independent print publications

Due to the licensing restrictions, there are very few independent publications. In addition, poor circulation has dogged their existence throughout the 1990s. The longest-running monthly is *Aliran Monthly*.

A more recent addition, going for a younger, more urban audience is *Siasah*. Launched by an opposition think-tank, Institut Kajian Dasar (the Policy Research Institute), it sells about 5,000 copies monthly.⁸⁹ It began circulation in 2002, but the magazine is also facing financial difficulties, and is currently closed temporarily.

In Tamil, there is a weekly magazine, *Semparuthi*, which has recently gone online. Although it also faces financial difficulties, it has had a successful history, being distributed in Tamil schools. It has, however, also faced harassment over licensing.⁹⁰

There is also a thriving underground "zine" industry. These informal publications often include translations by alternative thinkers, such as Noam Chomsky or Emma Goldman, interspersed with articles on music, graphic designs and poetry.

The NGO circuit also produces a number of publications. Aside from the usual books, there are irregular magazines for members. These will often reproduce articles from online news sites, helping them reach people who do not have Internet access.

⁸⁸ *Media Guide 2003*, see note 83 on page 34.

⁸⁹ Discussion with the Director of Institut Kajian Dasar, Khalid Jaafar in October 2003.

⁹⁰ Presentation on *Semparuthi* at ARTICLE 19 meeting in Kuala Lumpur, August, 2002.

Other news publications, printed under a different name but a similar masthead for each issue, have also been published. The most notable of these was the *Memo* series by Ahmad Lutfi Othman, which closed down due to financial difficulties. One issue was completely confiscated by the police, possibly because of its main story on corruption and the Chief Minister of Selangor.⁹¹

b. Party newspapers

Newspapers published by parties may only be sold to members. Following the huge rise in the circulation of the Islamic party PAS' newspaper, *Harakah*, the licensing conditions were tightened to limit the number of copies printed. The paper was also told that they could only publish once a fortnight, as opposed to twice weekly.⁹²

The Rocket, the DAP's newspaper, has had a chequered history.⁹³ Its Chinese language version is doing quite well, but its English language version has been launched numerous times in the past five years, with no appreciable impact on sustainability. Prior to circulation restrictions in the late 1980s, the paper had a circulation of over 70,000. This has fallen to less than 10,000 for each edition. Sales of the paper have been further restricted due to the harassment of vendors.

In addition to these, the Parti Keadilan Nasional Rakyat publishes two papers, *Berita Parti Keadilan Nasional* and *Suara PRM*, published alternate weeks.

Foreign media

Although expensive foreign magazines are easily available in Malaysia, there is a history of threatening censorship, delaying issues and occasionally the complete banning of an issue of a magazine. Most recently, in April 2003,⁹⁴ *The Economist* published a series of articles on the anticipated handover of power from Mahathir to his deputy Abdullah Ahmad Badawi. It then got caught in a tug-of-war of loyalty between Mahathir's supporters. The debate only arose weeks after the issue was published, and no action was taken.

There are intermittent attacks on foreign journalists, and foreign publications. In one of many examples, in January 2001, copies of the

⁹¹ See reports in *Harakah Daily*, archived at http://www.parti-pas.org/home_content2331okt2001.html, 22 October 2001.

⁹² Anuar, see note 71 on page 31, p. 12.

⁹³ Answer to written questions from Rocket activist Medaline Chang, September 2003.

⁹⁴ "The changing of the guard – A survey of Malaysia", *The Economist*, 3 April 2003



Asiaweek were held back, as the issue contained a picture of Mahathir looking tired.⁹⁵

Foreign journalists have also complained about harassment in Malaysia. The most notable case was the imprisonment of Murray Hiebert, for contempt of court.⁹⁶



Photo: Centre for Independent Journalism 1

5.2. Television and Radio

Officially, Malaysia has a mix of public and private broadcasters. However, there is little diversity of opinion either in news or broader programming.

There are currently around 168 televisions in Malaysia per thousand population, and 800,000 satellite subscribers.⁹⁷ According to analysis by Network Insight, the satellite market is likely to be saturated when it reaches 1.5 million subscribers.⁹⁸

Since the rise of private television and radio stations in the mid-80s, the State broadcaster has seen its share of both audiences and advertising

⁹⁵ *Asiaweek*, 26 January 2001.

⁹⁶ See Amnesty International report 11 October 1999, available at <http://web.amnesty.org/library/Index/ENGASA280121999?open&of=ENG-MYS> as of 21 October 2003.

⁹⁷ <http://www.worldbank.org/data/wdi2002/pdfs/table%205-10.pdf> p3, as of 21 October 2003, statistics for 2000.

⁹⁸ Armstrong, Mark et al, "Public service programme genres in the multichannel environment: a study of five East Asian countries", Network Insight, September 2002, p. 25.

revenue fall sharply.⁹⁹ In 1987, three years after the formation of the first “private” channel TV3, the government’s RTM network’s two channels (now known as TV1 and TV2) garnered only 55 per cent of advertising revenue.¹⁰⁰ In 2002, private broadcasters NTV7 and TV3 were believed to share 70 per cent of the free-to-air market.¹⁰¹ All these channels are available across Malaysia.

In September 2003, former production company Medanmas launched Channel 9.¹⁰² The company owning the station used to produce programmes for TV1,¹⁰³ terminating this contract in 1999, before receiving a licence to broadcast in 2000. It was an ‘anchor company’ in the entertainment industry for the former Ministry for Entrepreneur Development.¹⁰⁴ It thus worked closely with the Ministry, helping to identify starter companies for assistance, a privilege generally granted to established or multinational companies. Channel 9 has since been taken over by radio station THR’s parent company, and there are reports that both the radio station and the television station will be taken over by Media Prima, which also owns TV3, Channel 8 and the New Straits Times Press¹⁰⁵. At the time of writing, Channel 9 is only available in the Klang Valley, and temporarily stopped transmitting on 31 January 2005.

Another new channel, Channel 8, owned by the same company (Media Prima) that owns TV3 began broadcasting towards the end of 2003.

Pay television is dominated by Astro, which is currently the only provider of pay channels, from BBC World Service and CNN to Chinese-language channels Phoenix, Malay channels such as Ria and Tamil-language channels such as Astro-Vaanavil. Its most popular channel is Wah Lai Toh, a Chinese language channel.¹⁰⁶ In total it re-broadcasts 33 pay channels.¹⁰⁷ Other private television stations are NTV7, owned by a former UMNO Cabinet minister, Channel 9 and the jointly-owned TV3 and 8TV.

Radio audiences have been dropping in the last few years, although radio still reaches 86 per cent of the population.¹⁰⁸ RTM and the Astro group, AMP, control 31 per cent and 45 per cent of the market each, while the nine remaining private channels reach around 24 per cent of the audience. The most popular station remains the Malay-language Era,

⁹⁹ Hashim, Rahmah, “Television Programming”, *Privatizing Malaysia: Rents, Rhetoric, Realities*, Jomo K.S. (ed), (Kuala Lumpur: Westview Press), p. 240.

¹⁰⁰ TV3 was controlled by a holding company for UMNO when it first went to air.

¹⁰¹ Mark Armstrong et al., see note 98 above, p. 33.

¹⁰² “Channel 9 test run in September”, *The Star*, 26 July 2003.

¹⁰³ “Tune in for ongoing excitement!”, *New Sunday Times*, 4 June 2000.

¹⁰⁴ Kementerian Pembangunan Usahawan website.

¹⁰⁵ “Media Prima the frontrunner for Channel 9”, *The Edge Daily*, 10 January 2005.

¹⁰⁶ *Media Guide 2003*, see note 83 on page 34.

¹⁰⁷ *Ibid*

¹⁰⁸ *Ibid*.



owned by AMP. It has almost as many listeners as all the 18 RTM stations combined.

The State also owns two television stations, TV1 and TV2, and a mix of 17 local and five nationwide radio stations.

Ownership and diversity

During the 1970s and 1980s ownership of the *New Straits Times*, and its sister companies (including television stations, Chinese and Malay dailies), passed from the government-owned Pernas to the UMNO-owned Fleet Holdings.¹⁰⁹

All of the media is owned, directly or indirectly, by the ruling coalition or those closely allied to them.¹¹⁰ This issue has been highlighted in the recent past with the MCA's takeover of Chinese daily *Nanyang Siang Pau*¹¹¹ and the touch-and-go sale of English daily *The Sun* to a media group which also publishes a business weekly, *The Edge*. The latter is seen as more liberal, and the takeover was fraught, until a deal was reached which allowed owner Vincent Tan Chee Yioun, a close associate of Mahathir's, to retain a controlling stake in the paper.¹¹²

Besides party ownership of the media, particular factions within the ruling coalition have used media ownership to consolidate their control, and to put forward favoured political candidates.

Anwar Ibrahim's rise to power was mirrored by the rise of Realmild media group, run by his business allies, who took control of Malay and English language media. His downfall was reflected in management reshuffle within these media, including the newspapers *Utusan Malaysia*, and *The New Straits Times*. People who were seen as Ibrahim's allies—such as Johan Jaafar, the editor of the *Utusan Malaysia*, and Ahmad Nazri Abdullah, one of the leading shareholder and executive of the Realmild group—were replaced.¹¹³

The concentration of media outlet ownership in the hands of such a small group of individuals is closely linked to licensing issues. As the

¹⁰⁹ *Media Guide 2003*, see note 83 on page 34, p. 7.

¹¹⁰ Gomez, see note 10 on page 15.

¹¹¹ Ng, Tian Eng, "Daily vs Daily", *Aliran Monthly* 23:7, 2003.

¹¹² See e.g., V. Gayathry & Yeoh Seng Guan, *Media Values, Media Ownership and Democratic Governance in Malaysia* (Paper presented at the National Conference on the Future of the Media in a Knowledge Society: Rights, Responsibilities and Risks, organised by the United Nations Development Programme in association with Strategic Analysis Malaysia. Kuala Lumpur, March 24-25, 2003), p. 23.

¹¹³ For further discussion on the reshuffle at Realmild please see http://www.asiaweek.com/asiaweek/98/0731/nat_5.html and <http://www.malaysia.net/lists/sangkancil/1999-05/msg05213.html>

government retains the right to issue and revoke licences, it can ensure that independent media outlets are prevented from operating by only issuing licences to those considered to be loyal. As a result of this, a number of “alternative” publications have been closed down by the government, who have refused them a licence or revoked existing licences.¹¹⁴ The legislation on licensing has severely restricted the number of stations, both television and radio in Malaysia. Ownership is concentrated in the hands of very few well-connected individuals, who are able to influence the licensing process, with community broadcasting practically unknown.

Since the mid-80s the so-called “privatisation” of Malaysia’s airwaves has taken place, first with the introduction of TV3 and slowly with the introduction of other channels, both terrestrial and satellite.

However, this has been an illusory liberalisation. TV3, the first “private” television station, was and remains owned either by government parties (UMNO) or those closely allied to them.¹¹⁵ NTV7, another terrestrial channel, is partly owned by the former Agriculture Minister.¹¹⁶

Nevertheless, the broadcasting field has seen a lot of activity in the past five years. Satellite has opened up the airwaves to a much larger variety of stations, including CNN and BBC. However, all broadcasting outlets remain in the hands of five companies, three owned by ruling parties or ministers, and one by media tycoon Ananda Krishnan, closely allied with Mahathir.¹¹⁷ Channel 9, as explained earlier, has strong links with the Ministry of Entrepreneurial Development, while the only satellite station, Astro, is owned by Ananda Krishnan. The other stations are listed in the Table 5.1 below.

In radio, two opposing trends have been evident. The first has been the consolidation of commercial stations under the AMP banner, the conglomerate that also controls the Astro satellite channels.¹¹⁸

The second has been a growth in the number of non-commercial stations, largely due to the government’s commitment to the Multimedia Super Corridor, a government sponsored initiative to create a hi-tech business corridor in Malaysia, which encompasses an area of 15km by 40km at the suburb of Kuala Lumpur, and initiated by radio stations that began life online. Most of these cater to a niche market, and are based in institutes of higher education. The forerunner was Ikim FM, from the Malaysian Institute for Islamic Understanding, which broadcasts to a limited area in the Klang Valley. This has been joined by various other university networks.

¹¹⁴ Examples include *Detik*, *Al-Wasilah* etc.

¹¹⁵ *Privatizing Malaysia: Rents, Rhetoric, Realities*, see note 104 on page 38.

¹¹⁶ “Business touch to agriculture”, *The Star*, 20 December 1999.

¹¹⁷ “Media Prima the frontrunner for Channel 9”, *The Edge Daily*, 10 January 2005.

¹¹⁸ *Media Guide 2003*, see note 83 on page 34.



Table 5.1 Ownership of Media Outlets in Malaysia

Name of group	Controlling interest/ Political ties	Media outlets owned
1. Media Prima	Formerly owned by UMNO, it maintains strong links with the party and Government.	<i>New Straits Times</i> <i>Berita Harian</i> <i>Malay Mail</i> <i>Harian Metro</i> <i>Shin Min Daily News</i> TV3 8TV Numerous magazines
2. Huaren Holdings Sdn Bhd	The investment arm of the MCA	<i>The Star</i> <i>Nanyang Siang Pau</i> <i>China Press</i>
3. Nexnews Bhd	Majority owned by tycoon and Mahathir ally Vincent Tan.	<i>The Sun</i> <i>The Edge</i> (Business weekly)
4. Utusan Melayu (M) Sdn Bhd	Owned by UMNO	<i>Utusan Malaysia</i> Numerous magazines
5. Pemandang Sinar	Owned by Sarawakian timber tycoon Tiong Hiew King	<i>Sin Chew Jit Poh</i> <i>Guang Ming Daily</i>
6. KTS Group of Companies	Owned by Sarawakian timber tycoon Lau Hui Kang	<i>Oriental Daily News</i>

The optimism with which this is viewed should be tempered with concern over the freedoms available to students generally—students can be expelled for joining a political party, speaking to the media or engaging in any form of political activism. In the last few years, students have been fined for selling badges, publishing leaflets and taking part in demonstrations. Perhaps as a consequence of this, the content of these stations tends to be tame, replicating the commercial music programmes of the larger stations.

Another development is that the Communications and Multimedia Act now specifically promotes competition in the field of broadcasting and Internet provision. However, very recently there have been moves to amend the Act in Parliament.¹¹⁹ Although nothing is certain, it is likely that the provisions promoting competition will be watered down, as the Government has indicated that it plans a merger between the two main Internet Service Providers.¹²⁰ This is specifically banned under the Act

¹¹⁹ “Information and broadcasting policy under study”, *Bernama*, 25 September 2003.

¹²⁰ Sharif, Raslan, “TM Net-Jaring merger catches surfers by surprise”, *The Star*, 13 September 2003.

in its current form. It is uncertain whether amendments will extend to broadcasting.

5.3. Web-based media

During the 1990s the Internet began to make an impact in Malaysia. With government promises to keep the Internet censorship-free, it became a focal point for information following the sacking of the Deputy Prime Minister, Anwar Ibrahim. Initially there was a flurry of virulently anti-government sites, but even during the height of the street protests, a new style of unpaid, more balanced Internet journalism began to emerge, best embodied by former *New Straits Times* reporter Sabri Zain.¹²¹ He mixed eyewitness accounts and comment, offering the kind of reportage on political developments that was neglected by the print media. These reports, and others, were reputedly downloaded from the Internet, photocopied and circulated through mosques and public talks. Some were republished by magazines such as *Aliran Monthly*. In contrast, the credibility and integrity of the print media dropped to a historic low, with demonstrators launching boycott campaigns against the leading dailies and television stations.

The most important of the surviving websites is undoubtedly Malaysiakini.com. At one time its readership reached around 300,000, but following financial problems, it offered yearly subscriptions, and saw readership fall dramatically, despite exceedingly low rates.

Malaysiakini has been predominantly English-dominated, though it recently launched a Malay version of its content. The outlet has suffered numerous attacks on its credibility and access for its journalists to official functions has been denied. Political commentators, V Gayathry and Yeoh Seng Guan note:

In March 2001, when Malaysiakini was alleged to be receiving funds from George Soros and was described by the Prime Minister as ‘behaving like traitors, asking foreigners to harm their own country’ the International Press Institute (IPI) issued an action alert update. It described Malaysiakini as becoming ‘an invaluable alternative to Malaysia’s government-dominated mainstream media’. Attacks by government officials were ‘flagrant violations of everyone’s right to “seek, receive and impart information and ideas through any media regardless of frontiers”, as guaranteed by Article 19 of the Universal Declaration of Human Rights’.¹²²

¹²¹ Zain, Sabri, *Face Off: A Malaysian Reformasi Diary (1998-99)*, (Kuala Lumpur: BigO Books, 2000)

¹²² V. Gayathry & Yeoh Seng Guan, *Media Values, Media Ownership and Democratic Governance in Malaysia*, p. 11.



In January 2003, its office in Kuala Lumpur was raided by police following a police report by UMNO Youth that the site had published a “seditious” letter in its readers’ forum.¹²³ Meanwhile, other restrictions, particularly financial, also pose challenges to Malaysiakini’s future.

Another news site currently operating is AgendaDaily.com, in Malay. It reports over 120,000 hits per day throughout the week,¹²⁴ with readership dropping over the weekends. It has a small staff, but still faces problems with financial sustainability.

Most other independent news or political sites set up during the euphoria of the Reformasi period have closed down, or retained a distinctly party-political flavour. FreeAnwar.com, until Anwar’s release, was an example of the latter. An unpaid effort by one man, it remained popular, particularly during crisis periods. Although webmaster Raja Petra Kamaruddin has no post with opposition party Parti Parti Keadilan Nasional (now changing its name to Parti Keadilan Nasional Rakyat), his agenda and politics are closely linked with those of the party. He has recently launched a new news website, www.Malaysia-Today.com.

Recent developments have seen the emergence of critical and outspoken weblogs. In just two months in 2003, blogs discussed a massive fraud carried out against the Multimedia Development Corporation, corruption in local councils, and plagiarism. Three influential blogs are run by Jeff Ooi, Dinesh Nair and Johan Ismail.¹²⁵ Jeff Ooi’s blog alone attracts over 1,000 visits per day.¹²⁶

Another interesting experiment has been the partnership between a local group of media activists and an Indonesian radio station, who are attempting to circumvent broadcasting regulations by setting up a content provider. This quasi-station, RadiqRadio.com, has been broadcasting over the Internet, but plans to provide content to an Indonesian station, which will then re-broadcast the material. The shows will then be available to a Malaysian audience.¹²⁷

In addition, with the growth of cheap online radio servers, there is the possibility of exploiting the protection guaranteed for the Internet in more exciting ways, for example by working with local computer centres to act as information hubs in rural areas. Unfortunately, these loopholes are currently not being approached in an imaginative manner.

¹²³ “Malaysian police raid website office”, BBC, 20 January 2003, <http://news.bbc.co.uk/1/hi/world/asia-pacific/2676297.stm>

¹²⁴ Answer to written questions from editor Rosli Ismail, September 2003.

¹²⁵ Johan Ismail passed away as this chapter was being edited, on 18 October 2003.

Although he and the others mentioned here had received death threats shortly before, he died of natural causes.

¹²⁶ According to statistics provided by Jeff Ooi.

¹²⁷ The author of this chapter is intimately involved with the setting up of this station.

While online liberalisation is a positive trend, the financial sustainability of all online sites remains a cause for concern.

6. PRINT MEDIA REGULATIONS

What follows is not an exhaustive list of laws regulating the press in Malaysia. There is no current estimate for the number of laws affecting freedom of the press in Malaysia, but informal estimates range from 20 to 50 pieces of legislation. What follows is a selection of the most important existing and proposed laws restricting press freedom.

6.1. The Printing Presses and Publications Act 1984 (PPPA)

The Printing Presses and Publications Act is one of the most draconian of the media laws in Malaysia. The Act was first introduced by the British colonial government as the Printing Ordinance of 1948 at the beginning of the state of emergency imposed by the Colonial authorities, in order to counteract Communist activities seen as a threat to the establishment. The Act required all newspapers and printing presses to obtain an annual publishing licence.

The Ordinance was revised in 1971, after the race riots of 1969, and became the Printing Presses and Publications Act (PPPA). The revision aimed at ensuring that racial sensitivities would not be provoked. Additional power was given to revoke newspaper licences that were seen to be aggravating national sensitivities or were considered detrimental to national development goals.

Amid objections, the PPPA was amended in 1984. Again, more power was given to the government to seize or revoke a printing press or publication licence.

Section 3 of the Act gives the Internal Security Minister absolute discretion to grant a licence and absolute discretion to refuse any application for a licence. The licence can be revoked or suspended at any time, and can be given for a limited period.¹²⁸ The usual practice however, is for permits to be issued annually. In addition, the minister has absolute discretion to determine the fate of presses and publications, with decisions not subject to judicial review. Under Section 13A, courts

¹²⁸ Printing Presses and Publications Act 1984 (Act 301) as published by International Law Book Services on 20 October 2001 (referred to as Printing Presses and Publications Act 1984), p. 3.



are instructed that they cannot question ministers' decisions on any grounds whatsoever.

The amended Act, currently in force, not only regulates the press and publications, but also, in Section 9(1), regulates books, pamphlets and the import of publications from abroad. The possible reasons for a ban are extensive, but ill-defined:

...any publication which he is satisfied contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is likely to be prejudiced to public order, morality, security, the relationship with any foreign country or government, or which is likely to alarm public opinion, or which is likely to be contrary to any law or is otherwise prejudicial or is likely prejudicial to public interest or national interest.¹²⁹

In granting a licence, the Minister may impose conditions such as insisting upon a deposit. The deposit may be forfeit if an offence under the Act is committed.¹³⁰

Under international law, licence requirements for the print media cannot be justified as a legitimate restriction on freedom of expression since they significantly fetter the free flow of information. They do not pursue any legitimate aim recognised under international law and there is no practical rationale for them, unlike for broadcasting where limited frequency availability justifies licensing.

On the other hand, technical registration requirements for the print media do not, *per se*, breach the guarantee of freedom of expression as long as they meet the following conditions:

- there is no discretion to refuse registration, once the requisite information has been provided;
- the system does not impose substantive conditions upon the print media;
- the system is not excessively onerous; and
- the system is administered by a body which is independent of government.

However, registration of the print media is unnecessary and may be abused, and, as a result, is not required in many countries. ARTICLE 19 therefore recommends that the media not be required to register. As the UN Human Rights Committee has noted: 'Effective measures are

¹²⁹ Ibid, Section 9(1), p. 8.

¹³⁰ Ibid, Section 10, p. 9.

necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression.¹³¹

Amendments stipulate that the minister has the discretion to define offences under the category of publishing malicious “false news”. Action can be taken against any press outlet or publication if their writing is defined as not taking “reasonable measures” to verify the truth of the news. Violation of the licensing requirement is a criminal offence which can result in imprisonment for up to three years or a fine of up to 20,000 Ringgit (USD 5300) or both.¹³² The absolute discretion given to the minister under the PPPA allows for the abuse of power. The minister can revoke a press or publication licence if the news it publishes is defined as “malicious”. The government also has wide powers of seizure over printing presses and publications.

Through the years, the PPPA had been invoked several times, especially during power struggles within the ruling coalition. In Operasi Lallang in 1987, for example, the printing licences of three newspapers in Peninsular Malaysia were revoked: *The Star*, *Watan* and *Sin Chew Jit Poh*. They have since regained their licences, with management and ownership changes.

The authorities have also more recently taken action against media organisations seen to be critical of the government. In 2000, a series of crackdowns on the media took place following Malay support for the opposition in the 1999 General Elections. The Malay magazines *Detik*, *Eksklusif* and *Al-Wasilah* were in effect banned, through the non-renewal of publication permits. Simultaneously, the publication of *Harakah* (PAS’s party organ) was reduced from eight issues per month to two issues. Another monthly Malay-language magazine *Tamadun* was given a warning letter by the Home Ministry for allegedly publishing material that could cause hatred towards the government.¹³³

On 6 April 2000, a Tamil newspaper *Thina Murasu* was closed by Ministry of Home Affairs. *Thina Murasu* had defied an order by the Ministry and continued the publishing although its application for licence renewal was rejected.¹³⁴

According to the Suaram Human Rights Report 2000, by October 2000, seven people had had actions taken against them for contravening the PPPA. Eight book titles have been banned, and 32,869 publications had been seized by the Home Minister’s Publications Control Unit. The

¹³¹ General Comment 10(1) in Report of the Human Rights Committee (1983) 38 GAOR, Supp. No. 40, UN Doc. A/38/40.

¹³² Ibid, Section 8, pp. 7-8.

¹³³ Further details, please refer to Suaram, *Malaysian Human Rights Report-Civil and Political Rights in 2000*, (Kuala Lumpur: Suaram Komunikasi, 2000). pp.11-15.

¹³⁴ “Publications Continue Although Permit Not Renewed, A Tamil Daily Sealed”, *Sin Chew Jit Poh*, 7 April 2000.

amendment was necessary to curb the spread of ‘false information’ in the modern, high-tech information world.¹³⁹

Nevertheless, World Press Freedom Day 2004 saw editors call for the repeal or relaxation of the PPPA, saying that it was increasingly obsolete.¹⁴⁰ Such calls have been rare since the 1987 crackdown.

6.2. The Sedition Act 1948

In 1948, the Sedition Act was enacted by the British colonial government to combat the Communists. Amendments were made through an Emergency Ordinance in 1971, not long after the riots of 1969.

The Act has a very wide definition of “sedition”, and places many limitations on freedom of expression, particularly regarding supposedly sensitive political issues. According to some media commentators this legal uncertainty very much favours the prosecutor. It also means that what is seditious is not just a legal but also a political issue.¹⁴¹ Under the Act, those who commit an offence can be fined up to 5,000 Ringgit (USD 1326) and / or imprisoned up to three years. A second offence carries a sentence of up to five years imprisonment.

ARTICLE 19 in its memorandum on the Sedition Act concluded the Act is excessively vague, serves no legitimate aim sanctioned by international law and cannot be justified as necessary in a democratic society, in particular because of its breadth and the chilling effect it has on open, democratic debate.¹⁴²

The central notion of sedition is defined broadly in the Act as anything which, ‘when applied or used in respect of any act, speech, words, publication or other thing qualifies the act, speech, words, publication or other thing as having a seditious tendency.’

A seditious tendency is then defined in section 3 as follows:

1. to bring into hatred or contempt or to excite disaffection against any Ruler or government.
2. to seek alteration other than by lawful means of any matter by law established.

¹³⁹ “Media Laws May Be Tightened”, *The Star*, 17 April 2001.

¹⁴⁰ “Editors: Remove or relax press regulations”, *The Star*, 6 May 2004.

¹⁴¹ Faruqui, Shad Saleem, and Ramanathan, Sankaran, *Mass Media Laws and Regulations in Malaysia*, (Singapore: Asian Media Information and Communication Centre, 1998), p.52.

¹⁴² ARTICLE 19, *Memorandum on the Malaysian Sedition Act 1948*, (London: ARTICLE 19, 2003), p. 17.



3. to bring hatred or contempt to the administration of justice in the country
4. to raise discontent or disaffection amongst the subjects
5. to promote ill-will and hostility between races or classes
6. to question the provisions of the Constitution dealing with language, citizenship, the special privileges of the Malays and of the natives of Sabah and Sarawak and the sovereignty of the Rulers.¹⁴³

Section 4(1) of the Act covers the preparation of an action which would have “a seditious tendency”. It also covers speech and the printing, publishing, selling (or offering for sale), distribution, reproduction or importation of seditious materials. In a briefing session with journalists, human rights lawyer Sivarasa Rasiah pointed out that the burden of proof lay with the person who has in their possession articles deemed seditious.¹⁴⁴

As detailed in Chapter 4, the test for restrictions on freedom of expression under international law requires all such restrictions to be provided by law. This means that the law should be accessible and also that it should not be excessively vague. The crime of sedition, as set out in the Sedition Act, is far too vague to meet this standard. This is of particular importance given the criminal nature of these offences and the potential penalty of imprisonment. Both “sedition” and “seditious tendency” are loosely defined and subjective words such as “hatred”, “contempt”, “discontent”, “feelings of ill-will” and “disaffection” are used without any definition.

The second test is legitimacy. The guarantee of freedom of expression only permits restrictions on this fundamental right for the purpose of protecting certain aims, namely the rights or reputations of others, national security or public order (*ordre public*), or public health or morals. It is not sufficient, to satisfy this part of the test, for restrictions on freedom of expression to merely incidentally effect one of the legitimate aims listed.

The Inter-American Commission on Human Rights, along with some national courts, have recognised that sedition laws are not required to maintain public order and State security, and in fact they actually undermine these goals. Accordingly, the Commission recommended that members of the Organisation of American States (OAS) repeal or amend laws which criminalise speech critical of the government or governmental officials:

Finally and most importantly, the Commission notes that the rationale behind desacato laws, [which criminalise speech critical of government and public officials] reverses the

¹⁴³ *Sedition Act 1948* (Act 15), (International Law Book Series: 2001), p. 4.

¹⁴⁴ Following the Malaysiakini raid in January 2003.

principle that *a properly functioning democracy is indeed the greatest guarantee of public order*. These laws *pretend* to preserve public order precisely by restricting a fundamental human right which is recognized internationally as a cornerstone upon which democratic society rests.... In this respect, invoking the concept of 'public order' to justify desacato laws directly inverts the logic underlying the guarantee of freedom of expression and thought guaranteed in the Convention.¹⁴⁵ [emphasis added]

The third test is of necessity. The necessity part of the test only permits restrictions on freedom of expression which are rationally connected to achieving the legitimate aim; not overbroad, including in the sense of there being a less intrusive way of achieving the same aim; and which are proportionate, in the sense that the harm to freedom of expression is outweighed or justified by the benefits accrued.

As noted above, there is no rational connection between the aim of protecting public order and the crime of sedition. Shielding governments from criticism is, in fact, more likely to undermine public order, as properly understood, than to protect it.

Even more serious is the vast overbreadth of the sedition provisions in Malaysia, as illustrated by the cases in which they have been applied. It is clear from these cases that the impact of the law, even if it does at its core address a legitimate aim, restricts speech well beyond that legitimate aim.

Furthermore, there exists a wide range of other laws, which are more carefully tailored to protecting public order and which are less open to political manipulation. Indeed, once the scope of sedition is interpreted more narrowly, there is no need for the offence since it is entirely included within other, more appropriate, public order offences. As the UK Law Commission pointed out, in recommending the abolition without replacement of the common law offence of sedition:

[B]efore a person can be convicted of publishing seditious words, or a seditious libel or of seditious conspiracy [in the UK] he must be shown to have intended to incite to violence, or to public disorder or disturbance, with the intention thereby of disturbing constituted authority. In order to satisfy such a test it would, therefore, have to be shown that the defendant had incited or conspired to commit either offences against the person, or offences against property or urged others to riot or to assemble unlawfully. He would, therefore, be guilty, depending on the circumstances, of

¹⁴⁵ *Compatibility of "Desacato" Laws with the American Convention on Human Rights*, Advisory Opinion of the Inter-American Commission on Human Rights, p. 209.

incitement or conspiracy to commit the appropriate offence or offences...¹⁴⁶

Perhaps the most serious defect of the sedition laws is that they represent a disproportionately serious interference with democratic debate. Any benefits they may be deemed to bring in terms of protecting public order, which, as the analysis above makes clear, are slight and far outweighed by the harm done to freedom of expression in its most important guise, namely as an underpinning of democracy.

The point here is that the harm to democracy from prohibiting statements that fall within the ambit of the term sedition is far greater than any benefits in terms of protecting public order that might result from banning seditious speech.

Historically, the Sedition Act has been invoked against those critical of the government, including members of parliament. Under the Act, members of parliament can have their parliamentary immunity suspended, if found guilty of sedition. Over the years, many have been charged and found guilty under the Act.

In 1977, DAP Member of Parliament Fan Yew Teng was found guilty under the Act, and resigned as a Member of Parliament and State assemblyman. He was disqualified from standing for elections for five years and from receiving any parliamentary gratuity or pension. In 1980, DAP member of Parliament for Petaling Oh Keng Seng was fined RM 2,000 (USD 530) in default of six month's imprisonment for statements on the composition of the army and the 1969 riots.

In another case, Opposition Member of Parliament, Lim Guan Eng, was found guilty under the Sedition Act and the PPPA in April 1998 and jailed for 18 months on each charge, to run concurrently. Lim was convicted for "maliciously publishing false news" in a pamphlet entitled *Kisah Benar* (True Story), containing, among others, the words *mangsa dipenjarakan* (victim jailed) in reference to a teenage girl said to have been raped by the former Malacca Chief Minister, Rahim Thamby Chik.¹⁴⁷ Guan Eng was subsequently disqualified from Parliament. In August 1998, Amnesty International declared Guan Eng a prisoner of conscience and called for his immediate and unconditional release. He served his jail sentence following the Federal Court's decision to uphold his conviction and sentence. He was released after serving one year in jail. He was unable to stand in the 2004 elections due to the conviction.

¹⁴⁶ The UK Law Commission, *Codification of the Criminal Law: Treason, Sedition and Allied Offences*, Working Paper No. 72 (1977), para. 77.

¹⁴⁷ Faruqui, Shad Saleem, and Ramanathan, Sankaran, *Mass Media Laws and Regulations in Malaysia*, (Singapore: Asian Media Information and Communication Centre, 1998), p. 37.



Other opposition leaders were prosecuted under the Act during the Reformasi movement. Police announced that former Deputy Prime Minister Anwar Ibrahim was being investigated under the Act for public comments about an alleged high-level political conspiracy against him. His wife, Wan Azizah Wan Ismail, was also questioned by the police in September 1998 about an interview where she expressed fears about her husband's safety in police custody.

Human rights defenders and the press have also been the target of the Sedition Act. In 1986, the Bar Council vice president Param Kumaraswamy was charged for his open appeal to the Pardons Board to reconsider a petition by death row convict Sim Kie Chon for commutation of the sentence; he was later acquitted and discharged. One of Anwar's lead counsel Karpal Singh, was arrested in January 2000 and charged under the Act for statements made during the trial. He told the court that Anwar might have been poisoned, and that he suspected people in authority were responsible.

Marina Yusoff, former Vice President of opposition party Parti Keadilan Nasional, was arrested on 12 January 2000, for "provoking racial discord" in a speech on 29 September 1999, when she told a mostly Chinese audience not to vote for the ruling coalition because its members had instigated the killing of Chinese people during the May 1969 race riots. *Harakah's* editor-in-chief Zulkifli Sulong and its printer Chia Lim Thye were charged in January 2000 under the Act for an article relating to Anwar's sodomy case. The article, written by then Deputy President of Parti Keadilan Nasional Dr Chandra Muzaffar, alleged there had been a conspiracy between the judiciary, the Attorney General's chamber, the police, the media and the government. Zulkifli was found guilty and fined RM5,000 (USD1326), in lieu of six months' jail.¹⁴⁸ Chia, pleaded guilty in May 2000 and was subsequently fined RM4,000 (USD1000).¹⁴⁹

In March 2001, the head of police in Selangor lodged a report against leading independent online news web site Malaysiakini.com for questioning the actual number of casualties in a racial incident in Kampung Medan, Selangor. In a separate incident in January 2003, Malaysiakini.com was raided, and police confiscated 19 computers. The news website was accused of publishing a seditious letter from an anonymous reader criticising Malay privileges.

¹⁴⁸ "Harakah editor fined RM5,000", *The Star*, 3 May 2003.

¹⁴⁹ Malaysiakini.com, 2 May 2003.



6.3. The Official Secrets Act 1972 (OSA)¹⁵⁰

The Official Secrets Act, which was brought in to force in 1972, and was last amended in 1995, is a broadly worded law that entrenches a culture of secrecy in all matters relating to public administration. It contains a wide range of broadly framed prohibitions, which effectively obstruct the free flow of information from official sources. These prohibitions are backed by severe criminal sanctions and the State is armed with extensive powers which enhance its ability to detect infringements and secure convictions under the Act. The State holds the prerogative to withhold an extensive range of information from the public. This prerogative is placed firmly beyond judicial scrutiny. In addition, the Act grants the State extensive powers to intrude in and interfere with private speech.

These various broad powers and restrictions raise serious concerns with regard to the right to freedom of expression, as guaranteed under international law as well as under the Malaysian Constitution. While safeguarding national security is a legitimate aim in pursuit of which the right to freedom of expression may be restricted, international law requires such restrictions to be drafted in clear and precise legal language and to be “necessary in a democratic society”, meaning that they are a proportionate response to an overriding concern of serious public interest. The restrictions that the Act imposes on freedom of expression, and the powers it grants to the government to “police” these restrictions, are a disproportionate response to national security risks facing Malaysia.

The Act has played a decisive role in muzzling the media and inhibiting free speech, preventing dissenting views and subduing people into a culture of silence and fear. The most recent example of the Act’s use was the two-year jail sentence imposed on opposition party Parti Keadilan Nasional’s Youth chief Mohd Ezam Mohd Nor in 2002. The Petaling Jaya Sessions Court found him guilty of committing an offence under the Official Secrets Act (OSA) in August 2002. Like Guan Eng, he was also prevented from standing in the 2004 elections due to his conviction. Ezam was found guilty of exposing secret documents of the corruption investigations of International Trade and Industry Minister Rafidah Aziz and former Melaka chief minister Abdul Rahim Thamby Chik at a press conference in November 1999. However in April 2004, on appeal, the High Court unexpectedly acquitted Ezam.

He was convicted despite a document from the Prosecution Division, Attorney-General’s Office dated 14th March 1995 signed by Chief Prosecutor Abdul Gani Patail stating that there were *prima facie* grounds to prosecute Rafidah Aziz on five counts of corruption and secondly, that the Attorney-General’s Chambers and the ACA had concluded by

¹⁵⁰ See Chapter 10 for further details on the OSA.

June 1994 that there were sufficient grounds to prosecute Rahim Tamby on four charges of corruption based on the information supplied to the Anti-Corruption Agency by the former DAP Member of Parliament for Kota Melaka, Lim Guan Eng.

The Act allows for arrest and detention without a warrant, and substantially reverses the burden of proof, from the prosecution to the defendant. It states that ‘until the contrary is proven’, any of the activities proscribed under the act will be presumed to have been undertaken ‘for a purpose prejudicial to the safety or interests of Malaysia’.¹⁵¹

Reform of the OSA is seriously needed to curtail the excessive executive power that undermines freedom of expression in Malaysia. The definition of the laws should be clearer to avoid any power abuse and as a step towards restoring public confidence in the judiciary. Amnesty International has suggested reforms should also include the right to challenge administrative decisions made under a number of these laws, including before a court of law.¹⁵²



Photo: SUARAM

¹⁵¹ Sections 3, 4 and 16 of the OSA. For more information see: *Memorandum on the Malaysian Official Secrets Act 1972*, ARTICLE 19, 2004, and *Malaysia - Official Secrets Act*, Human Rights Watch, September 21, 1998.

¹⁵² Amnesty International, *Malaysia-Human Rights Undermined: Restrictive Laws in a Parliamentary Democracy* (London: Amnesty International, 1999), p. 72.



6.4. The Media Council Bill

A bill drafted by the Malaysian Press Institute at the instigation of the Home Ministry is currently under discussion. Section 12 of the Bill lists functions of the Media Council, including:

1. To maintain the highest journalistic standards and to preserve freedom of the Malaysian press, broadcast and online media in accordance with Article 19 of the UDHR;
2. To consider, investigate, and deal with complaints about the conduct of the print, broadcast media and the conduct of persons and organizations towards the media;
3. To build up a code of conduct for newspapers, news agencies, broadcasting and online media and journalists in accordance with high professional standards.
4. To ensure on the part of newspapers, news agencies, broadcasting, and online media and journalists, the maintenance of high standards of public taste and foster a due sense of both the rights and responsibilities of citizenship;
5. To keep under review developments likely to restrict the supply by and to the media of information of public interest and importance
6. To make representations concerning the freedom of the media on appropriate occasions to Government, public inquiries, and other organisations in Malaysia.¹⁵³

Section 3 of the Bill states that the establishment of the Media Council, a corporate entity, will be effective from a date set by the Federal Government. Section 4 addresses the selection and composition of the 25-member Council. The person appointed as Chairman must have served in a capacity ‘not less than a Justice of the Appeals Court’. The other members of the Council are to be nominated as follows:

1. Twelve members¹⁵⁴ will be nominated in accordance with a procedure prescribed by the Council among the chief editors or editors of print media, working journalists,¹⁵⁵ and producers or editors from broadcasting stations and online media.
2. Two members shall be media owners or managers, one each from broadcasting and from the print sector.
3. One member shall be the manager of a news agency¹⁵⁶

¹⁵³ Draft Media Council Bill, (*Akta Majlis Media Malaysia*).

¹⁵⁴ Of these 12, two shall be from ‘mainstream’ newspapers; two from tabloid or non-mainstream newspapers; two are to be working journalists other than chief editors; two producers or editors from broadcasting stations; two from the online media; and one editor from each of the provinces of Sabah and Sarawak.

¹⁵⁵ “Working journalist” is defined in section 2 as a person who works with a newspaper organization on a permanent basis and receives his remuneration on a regular basis. Freelance journalists are excluded from this definition, and thus are deprived of its benefits and spared its obligation.

¹⁵⁶ It is defined in Section 2 as a domestically incorporated and owned news organization for the purpose of collating and dissemination of news, information, photographs and videos.

4. One member shall represent journalists' associations and unions.
5. Eight members shall come from among eminent non-media persons, including four that have knowledge of or experience in the fields of science, education, and law.¹⁵⁷

The Chairman and the Council members, once nominated, will be appointed by the King (Yang di-Pertuan Agong).¹⁵⁸ The Chairman will hold office for three years and the other members for two years.¹⁵⁹

For print and online media, self-regulation is preferable to a statutory system, and statutory regulation of individual journalists is highly contentious. The bill fails to recognise the important differences between the print, broadcast and online media, which in almost all countries have led to a fundamentally different regulatory approach for each of these three sectors. In addition, the independence of the Council could be enhanced and the powers of this body should be more clearly circumscribed.

The Media Council Bill also does little to guarantee media independence given that it states that the Chairman and Council members will be appointed by the King, who usually acts on the advice of the Prime Minister.¹⁶⁰ Another problem is that editors are largely politically appointed, and, consequently, their important role in the council does not bode well for the council's independence. Furthermore, the council is to be funded by the Government, a fact that further undermines its independence. The manner in which it has been proposed has also been criticised.¹⁶¹ Some see it as an underhand way of imposing censorship on the Internet, under the guise of ethical self-regulation.

Inisiatif Wartawan (a coalition of concerned journalists) has submitted a memorandum to the Human Rights Commission,¹⁶² raising amongst other issues their dissatisfaction with the MPI for not consulting journalists before the bill was submitted to the Home Ministry. They also stated that statutory control is unacceptable, especially 'in an environment where other institutions of democracy are hampered from playing a robust role in checking abuse of power'. The National Human Rights Society (Hakam) President, Ramdas Tikamdas, said the council

¹⁵⁷ Of these four, two will be nominated by the Malaysian Universities Council of Vice-Chancellors, one by the Bar Council of Malaysia, and one by the Malaysian Medical Council. The remaining four members will be nominated non-governmental organizations and interest groups.

¹⁵⁸ Section 5.

¹⁵⁹ Section 6(i).

¹⁶⁰ Draft Media Council Bill, (*Akta Majlis Media Malaysia*).

¹⁶¹ "Proposed Press Council Receives Lukewarm Response From Media Reps", *Bernama*, 9 May 2004

¹⁶² The memorandum was endorsed by Writers' Action for Media Independence (WAMI), Committee Against Takeover of Nanyang Press by MCA (CAT), Centre for Independent Journalism and Charter 2000.



should only be implemented when a comprehensive statutory regime for freedom of expression was put in place.¹⁶³

On 20 January 2004, a meeting was held under the auspices of the National Human Rights Commission (Suhakam) which brought together editors, journalists and civil society actors to discuss the Media Council. This was to be the beginning of a process of negotiation among the three parties. Despite the rejection by the industry of the draft bill and the establishment of a media council as regulated by the current draft, Suhakam has unilaterally decided to set up an interim regulatory body, the Media Complaints Working Group.

It is not surprising that the Media Council Bill has raised suspicions, adding, as it does, another layer of regulation to an already over-regulated environment.

Professional codes of ethics

The Malaysian Press Institute was responsible for drafting a Code of Ethics for journalists, as part of the Media Council bill. This was a positive step, creating a more comprehensive ethics code than had previously been in force, that includes a provision that '[t]he journalist must avoid stereotyping by race, religion, ethnicity, gender, age, geography, sexual orientation, disability, physical appearance or social status'. However, there are still problems with the MPI Code. In the above section, for example, there is the provision that 'Acts of communal violence or vandalism shall be reported in a manner that does not undermine the authority of the State, and the confidence of society'. The Code is also problematic in the treatment of sources and confidentiality, allowing the journalist to voluntarily reveal confidential sources without censure.

The major concern with the Code, however, is that it applies only to journalists, not to media organisations. The journalist is expected to bear the full weight of breaches of the Code, while editors and owners are relieved of any responsibility.

¹⁶³ "Making New and Improved Media", *The Star*, 18 August 2002.

Recommendations:

In regards to the PPPA:

- The registration system should be abolished.
- If the system is retained, it should meet the following conditions:
 - the system should be administered by an independent body;
 - registration should be an automatic, purely administrative step;
 - the authorized body should not be allowed to refuse registration based on the subject matter of the media.
- The provision on “false news” should be repealed.

In regards to the OSA:

- Repeal the provisions that allow prolonged detention without charge.
- Cabinet and State Executive Council decisions should not, as a rule, remain classified as “official secrets” after final adoption.
- The definition of “official secret” should be rendered far more precise so that only documents whose disclosure would pose a serious and demonstrable risk to a legitimate protected interest, such as national security, may be classified, and for only as long as it poses a threat to that legitimate protected interest.
- The law should include a provision providing that information, even if otherwise classified as an “official secret”, should nevertheless be released if there exists an overriding public interest in disclosure (public interest override).
- The group of persons qualified to classify information should be narrowed to the Minister and designated senior public officials.
- An offence of wilful misclassification should be created to punish abuse of the classification procedure.
- The Act should be amended to impose a time limit on the classification of documents together with a compulsory review period to ensure that the necessity of a classification is reviewed with reasonable regularity.
- Judicial review of any determination to classify information should be specifically provided for.



- The Official Secrets Act must be consistent with any freedom of information legislation introduced.

In regards to the Media Council Bill:

- The draft Media Council Bill should be dropped, as statutory regulation of print and online media is not good practice.
- The print media should be allowed and encouraged to establish a truly self-regulatory system.
- Online media and the Internet should not be regulated. Instead they should be encouraged to adopt content rating systems and filtering mechanisms to enable users to control the content they wish to receive.
- Any press or media council that will be established should be fully independent of political and commercial pressures. In particular, this has implications for financing, nomination and appointment of its members, as well as operating procedures.
- Financing for any press or media council should come, at least in part, from the media industry.
- It is preferable that a media or press council includes representatives from a cross-section of stakeholders such as journalists, editors, owners and the public.
- The self-regulation body should be financed in a way that ensures full independence from political or commercial interests, ideally by the media industry itself.
- Any code of conduct drafted by the Media Council should be clear and unambiguous in its wording, should be developed in close consultation with the media and other stakeholders, and should be disseminated widely to the public.
- Any self-regulatory mechanism should provide for an independent appeals procedure.

7. BROADCASTING REGULATIONS

The broadcast media is owned by a select few, but is still severely restricted by the government. Legislation currently exists to ensure, in theory, that the media remain free of monopoly or cartelisation, but in practice little is done to allow marginalised groups, opposition political parties or NGOs access to broadcast media.

7.1. Current Legislation and Its Implications

Officially, there is no act legislating censorship of the airwaves. But the government retains a tight rein on content shown over terrestrial channels through licensing requirements which have the dual function of ensuring only government-linked companies can broadcast, and enabling the Government to impose conditions on broadcasters at short notice. These conditions include increasing the deposits paid by the broadcaster, or changing specifics about the type of broadcast that they may produce (language, hours of broadcasting, type of programme etc). As a result of this, broadcasters tend to censor the content of programmes themselves, in order to avoid jeopardising their licence.

The current legislation governing all aspects of broadcasting is the Communications and Multimedia Act 2000 (CMA). It pertains to broadcasting, networking, Internet services and the like. It specifies that there is nothing in the Act that can be interpreted as censorship of the Internet,¹⁶⁴ although it has become clear that this does not prevent the use of other acts to censor the Internet instead. The ministry in charge of implementing the Act is the Energy, Water and Communications Ministry.

Broadcast licences are granted for a specified time period, but unlike for print media outlets, this has often been for ten years or more. They are granted by the minister, who can put conditions on the licences or revoke them, at will.¹⁶⁵

In comparison to the old Broadcasting Act, there appear to be greater efforts towards transparency in the CMA. The Communications and Multimedia Commission has been established through a related Act of Parliament.

The Commission is appointed by the Minister and consists of a chairman, a representative from the Government and either two or three other members. Its job is to make recommendations to the Minister on

¹⁶⁴ Communications and Multimedia Act, Section 3 (3).

¹⁶⁵ Ibid, Section 4.



licences, conditions of licensing, whether there is a need for new restrictions on licences, or for restrictions to be lifted. Penalties for licensing non-compliance are severe—a fine of RM 300,000 (USD 75,600) or three years imprisonment, or both.¹⁶⁶

The Commission may fine any person using a “content applications service”, which includes the Internet, for content that is ‘indecent, obscene, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person’. A person can be fined up to RM 50,000 (USD 132,600) or imprisoned for up to a year for contravening this prohibition. Under this Act, the Commission has also appointed a content forum, which will produce a content code, i.e., a set of guidelines and procedures regulating content disseminated for public consumption by service providers in the communications and multimedia industry. Ironically, a member of the content forum, Jeff Ooi, was threatened in October 2004 with arrest and prosecution for content that appeared on his weblog.

This Act, as with the Printing Presses and Publications Act, gives sole power to the minister (in this case of Communications), who can revoke or grant a licence without recourse to the Commission and is not bound by their decision. The minister also appoints the Commission and the Appeals Board. Provisions exist for judicial review of licensing, but as the legislation does not provide for decisions to take into account broad public interest, there is the strong possibility that this will be confined to points of procedure. Since the implementation of the CMA, there has not been a court case challenging any ministerial decision in regard to broadcasting licences.

The legislation requires the media to self-regulate. The broadcast industry may decide on voluntary codes on any matter, but these have to be approved by the Commission. If the industry does not set a voluntary code, one can be imposed by the Commission. It can also impose mandatory standards on broadcasters.

In 2000, the first licences were granted under the Communication and Multimedia Commission,¹⁶⁷ and Channels 8 and 9 began broadcasting in late 2003. As yet, they have shown no tendency to try and push limits, either in terms of news or documentaries. The company owning Channel 9 was previously a production house, producing programmes for government channel TV1.¹⁶⁸ Channel 8 is owned by the same company which owns TV3. This channel has taken over the licence previously used by Metrovision.¹⁶⁹

¹⁶⁶ Ibid, Section 53.

¹⁶⁷ Chandran, Sheela, “Smooth start for Channel 9”, *The Star*, 10 September 2003.

¹⁶⁸ “Tune in for ongoing excitement!”, *New Sunday Times*, 4 June 2000.

¹⁶⁹ “TV3, Channel 8 under one roof?”, *Business Times*, 6 July 2003.

On the Internet, the main concern has been with independent or anti-Government sites. While the quality of these varies dramatically, a few good sites and blogs seem to be at the core of Government grievances.¹⁷⁰

Most recently, the Energy, Communications and Multimedia Ministry's parliamentary secretary announced that news sites such as Malaysiakini and Harakahdaily (a party organ) were being watched. Speaking in Parliament, he was reported as having said that although there was no censorship of the Internet, other laws, such as the Police Act, could be used against such websites.¹⁷¹

Webmasters were also among those picked up under the Internal Security Act in April 2001.¹⁷² This Act allows for detention without trial for more than two years. In January 2003, news site Malaysiakini.com had the majority of its computers and servers confiscated under the sweeping Sedition Act.¹⁷³ Although the investigation has been completed and most of the computers returned, as of October 2003, Malaysiakini still does not know whether any charges will be brought against it.¹⁷⁴



Demonstration against ISA (Photo: freeanwar.net)

¹⁷⁰ At which point, I'd like to offer condolences to the family of pioneering blogger Johan Ismail who passed away as this chapter was being edited, on 18 October 2003.

¹⁷¹ "Be careful, we are watching, Malaysiakini warned", Malaysiakini.com, 16 Oct 2003.

¹⁷² Various activists were arrested, including Raja Petra Kamaruddin, webmaster of freeAnwar.com, an event widely reported in the Malaysian media in April 2001.

¹⁷³ See note 123 on page 44.

¹⁷⁴ Lih Yi, "Ministry: Investigation on Malaysiakini completed", Malaysiakini.com, 6 October 2003.



7.2. Public Broadcaster

No public service broadcasting exists in Malaysia. Radio Television Malaysia, RTM, is under the direct control of the Ministry of Information, describing itself as the Ministry's broadcasting department. It runs two television channels, TV1 and TV2, along with numerous radio channels.

As noted earlier, there have been moves to privatise RTM. This was supposed to have taken place by June 2003.¹⁷⁵ Most recently, it was announced that privatisation would be postponed until the Ninth Malaysia Plan, that is sometime between 2006 and 2010, and would only occur if it appeared to be beneficial.¹⁷⁶ Privatisation has been done with minimal consultation with the general public or with staff.¹⁷⁷

RTM has long been castigated for not providing coverage for opposition parties, and for acting as a mouthpiece for the government rather than as a public service broadcaster.¹⁷⁸

Programming requirements

Under the Broadcasting Act, 80 per cent of the content aired over RTM should come from local producers; however this target has never been met. This is an extremely high proportion. The European Convention on Transfrontier Television, for example, sets a requirement of 50 per cent European production for States Parties.¹⁷⁹ Nevertheless, politicians often raise the matter of local content, and the need to increase local content requirements.¹⁸⁰ However, it remains uncertain whether conditions on local content will continue after privatisation.

Parliamentary monitoring

While there is no official role for parliamentary monitoring, questions are occasionally raised by the opposition.¹⁸¹ The Communications and

¹⁷⁵ "Govt in the final stage of corporatising RTM in June", *The Star*, 14 February 2003. Informal interviews with staff have also shown that they were told it would be privatised in January 2003.

¹⁷⁶ "RTM Produces Idol-Related Programmes To Compete With Private Stations", *Bernama*, 29 September 2004.

¹⁷⁷ Based on discussions with a few RTM journalists, as well as other journalists interested in media freedom in early 2003.

¹⁷⁸ Karthigesu, see note 77 on page 32, p. 76.

¹⁷⁹ E.T.S. 132, in force 1 May 1993, Article 10(1).

¹⁸⁰ "TV licences: Kadir to discuss with Lim", *Bernama*, 25 June 2004.

¹⁸¹ Karthigesu, see note 77 on page 32, p. 76.

Multimedia Commission carries out consumer satisfaction surveys, but there are no recommendations made on the basis of these surveys.¹⁸²

7.3. Self-regulation

Alongside the Communications and Multimedia Act sits the Communications and Multimedia Commission Act, which provides a platform for complaints on both broadcasting and Internet services and sites. Simultaneously, less promising initiatives have been proposed on self-regulation of the media, including Internet news sites.

Current trends to establish statutory “self-regulation” coexist with tough regulatory laws. While there is no move towards liberalisation of the laws, any move towards statutory ‘self-regulation’ will merely add another layer of control on top of an already tightly monitored media.

7.4. Other Legislation Restricting Freedom of Expression

Theatre and music

The last couple of years have seen increasing restrictions on live performances. Regulations on live performances are decided at the local level, leaving discretion in the hands of local authorities. This has led to massive discrepancies in the standards enforced. In Kelantan, traditional art forms, such as Wayang Kulit leather puppets, are considered “un-Islamic” and banned, in a move spearheaded by the largest opposition party, PAS.¹⁸³

Until recently, the environment in Kuala Lumpur was comparatively liberal. However, in February 2002, a production of the Vagina Monologues was banned on its second run, following complaints by a society of “Islamic scholars” from the north of Malaysia. The complaint was based on coverage in newspaper reports. Immediately following this, several other productions came under greater scrutiny, and were banned with no reasons being given.

In 2003, the Instant Café Theatre, renowned for its cutting political satire, had a production banned. Following outcry, the ban was lifted. The repercussions were felt as local laws governing performances were tightened. Previously, a synopsis of a play had to be sent to the

¹⁸² Available at <http://www.mcmc.gov.my/mcmc/consumer/ess.asp>

¹⁸³ Ibid.



authorities, who would then grant a license (in line with nation-wide legislation). Now, directors have to send a copy of the entire script. Arts practitioners have sent a memorandum to the National Human Rights Commission to complain about the new restrictions.¹⁸⁴

Other groups that face difficulties are independent musicians.¹⁸⁵ Falling under the same legislation, they face more restrictions because of the comparative powerlessness of the group: musicians and their audience are primarily young and often uncertain of their rights. Even if a licence is granted, the police may still raid a performance, arresting members of the audience. There are instances of the police releasing youths after midnight, having detained them in the late afternoon.

Ceramahs and public gatherings

Since the Reformasi movement, the police have tightened control over political gatherings. In the run-up to the next elections, fierce debate has been generated on whether political parties should be allowed to hold *ceramah* (political speeches) and public rallies. The latter have been banned since the 1970s,¹⁸⁶ but the former were banned more recently, in July 2001.¹⁸⁷ Police have arrested numerous members of the opposition parties since the ban was announced. The opposition has complained that the ruling coalition has silenced one of the few channels of communication between the opposition and the public, and that double standards favouring pro-government politicians are applied when issuing licences for political functions.

This has been thoroughly documented in a report by the National Human Rights Commission, in their investigation into a large gathering at the Kesas Highway near Shah Alam, Selangor.¹⁸⁸ The report found that the police showed bias in allowing public gatherings and that police brutality occurred. It made several recommendations on public assemblies, none of which have, as yet, been taken up by the government.

¹⁸⁴ Petition by ArtisProActiv, "Opposing censorship in Malaysia: Stringent guidelines equals censorship", 29 September 2003, available at <http://www.ipetitions.com/campaigns/DBKL/>

¹⁸⁵ Information from the "Forum on Freedom of Expression in the Arts" held by the Human Rights Organisation of Malaysia, *Hakam*, 3 May 2003.

¹⁸⁶ See media statement by Lim Kit Siang, DAP National Chair, 23 September 2003, "DAP to lodge a formal protest against Suhakam Deputy Chairman for not protecting human rights and justifying opposition to lifting of the 25-year-old ban on public rallies by falsely linking rallies with May 13 riots", <http://malaysia.net/dap/lks2634.htm>

¹⁸⁷ Suaram, *Malaysia: Human Rights Report 2002-Civil and Political Rights*, (Kuala Lumpur: Suaram Komunikasi, 2002), pp.7-8.

¹⁸⁸ Report by Suhakam, available at www.suhakam.org.my

Recommendations:

- The legal framework for broadcasting should be revised to establish progressive licensing and content regulation systems as well as clear regulation to limit ownership concentration.
- Licences should be made available for niche channels (such as minorities) and for community radio, based on social merit rather than only on available funds and political connections.
- This framework should foresee limited or no licence fees for community broadcasters and existing community broadcasters should, in principle, have their licences guaranteed. A definition of a community broadcaster should also be developed.
- A comprehensive law on public broadcasting should be passed.
- Self-regulation should not be imposed by law but should be a result of voluntary commitment by the media.
- The broadcast regulator (Communications and Multimedia Commission) should be reformed to obtain full independence.
- The Film Censorship Act should be substantially amended so as to comply with international standards. In particular, it should not make any distinction between foreign and domestic films; it should include exact definitions which make the law and its application predictable and foreseeable for filmmakers; and it should exclude vague concepts such as “un-Malaysian”.
- Awareness raising and educational programmes on the human right to free expression and the right to information should be provided for staff of the public sector and law enforcement bodies.

8. DEFAMATION LAW

Although the Constitution provides for freedom of speech and of the press, some important legal limitations exist. The Government restricts freedom of expression and intimidates the print and electronic media into practicing self-censorship. Criminal defamation laws are part of the arsenal used to restrict or intimidate dissenting voices.

The Defamation Act 1957 is an act relating to the laws of libel, slander and other malicious falsehoods. Defamation is a statement (of fact) about an individual, which is published, and which affects that person's reputation. A defamatory allegation is one that would either tend to make people think the worse of an individual, avoid him or her or expose him or her to ridicule.

8.1. Key Features of Defamation Act 1957

The definition of defamation

Defamation occurs when one person publishes words, shown to be false, about another, affecting his or her reputation in the eyes of a third person. It combines both falsehood and malice.

In most instances, damage to the reputation has to be proven. Under the terms of the 1957 Act here are, however, circumstances under which "special damage" does not need to be shown, in other words there is no need to prove that a person has been materially affected by the defamation. Examples include disparaging a person's "official, professional or business reputation"¹⁸⁹ and if the defamation is designed to cost the plaintiff money ("pecuniary damage").¹⁹⁰

Provisions in the Act are made for unintentional defamation, justifications, fair comment and for apologies in mitigation of damages. There are also provisions for reporting events such as meetings and judicial proceedings. Qualified privilege available to newspapers, where plaintiffs have to not only prove damage but also malice.

Privileges, however, are suspended during elections with regard to electoral candidates. That is, if a defamatory statement is published either by or on behalf of a candidate, whether in Parliament or any other

¹⁸⁹ Defamation Act 1957, published by International Law Book Series, as of 20 March 2003, Section 5.

¹⁹⁰ Ibid, Section 6.



place that normally affords protection, the candidate can still be prosecuted.

If the offending material is published in a permanent form then it is libel. If it is published in a non-permanent form, it is slander. Slander can only be prosecuted if pecuniary damages can be shown.

The majority of journalists are protected from defamation charges in the course of their work. According to the Malayan Law Journal Defamation Handbook:

Where an employee in the course of his employment or it is within his scope of authority has published a libellous statement, then the employer is liable for the act of publication. This is so even when the employee has written or published a libel where he has no authority to do so.¹⁹¹

The premium placed on reputation

It should be noted that in contrast to personal injury cases there are no clear-cut guidelines on how much a person should be compensated for damage to reputation. Again, according to the Defamation Handbook:

There is no mathematical formula (for damages)... nor... any requirement that damages be assessed with mathematical certainty.¹⁹²

The value of a reputation is difficult to quantify, and the damaged reputation of someone rich tends to be valued more highly. Thus, a defamatory statement about a tycoon can cost more in damages than the loss of a worker's limb or life.

The courts are granted almost absolute discretion over the amounts awarded in defamation cases, which has led to the phenomena of "mega-suits", where rich or influential persons sue for multi-million damages.

Practice has been that injury to reputation need not be pleaded or proved, and courts have awarded aggravated damages for "overbearing conduct". An example of this was when Ling Wah Press and others were sued by business tycoon Vincent Tan, over articles published in a local magazine. In July 2000, in a landmark decision, the Federal Court ruled that Ling Wah Press had 'aggravated the injury done to the plaintiff by giving evidence on justification and fair comment'.¹⁹³

¹⁹¹ Defamation Handbook, MLJ Handbook Series, Malayan Law Journal, S/B, Lexis Nexus 2003, pp.I-15.

¹⁹² Ibid, pp. I-40.

¹⁹³ Ibid, pages I-40. For more information on this case see section 8.2 below.



Defences

Defendants who can prove that a defamatory statement is true or justified cannot be prosecuted. This applies even where the defendant's statement was actuated by malice. The burden to prove that the statement is true lies with the defendant. The usual defence, however, is that the defendant denies that the statement was defamatory i.e. that it has harmed the reputation of the plaintiff.¹⁹⁴

However, the defendant's honest and reasonable belief that the statement was true is not sufficient, if he cannot prove that it was actually true. Mistake, in this sense, is not a defence. In addition, the meaning of the statement is judged by what would be understood by "reasonable persons of ordinary intelligence",¹⁹⁵ rather than what the defendant may have meant.

A common defence accepted elsewhere is that of "fair comment". This protects honest expression on matters of public interest, even though it may reflect unfavourably upon another person. It is a defence which protects defamatory criticism or expressions of opinion (comment), but does not apply to defamatory statements of fact (assertions of fact)—these must be proved by the defendant to be either false or not defamatory.¹⁹⁶

For the defence to apply in Malaysia, it must be a comment on a matter of public interest, a statement of opinion, and it must be "fair", which in this context means it must not be motivated by malice.

8.2. "Mega-suits" Undermining Freedom of Expression

Defamation suits against journalists are becoming more common. Damages sought in cases currently pending run into tens of millions of Ringgit. According to a former Malaysian Human Rights Society (Hakam) Chairperson Raja Aziz Addruse, the danger in such a climate is that the media cannot fulfil their duty to report critically on events.¹⁹⁷

As the title of an article by the *Asia Times* (15 July 2000) indicates, the extent of damages has a 'chilling' effect on Malaysia's journalists. Lawyers, human rights groups and opposition parties claim that

¹⁹⁴ *Defamation Handbook*, MLJ Handbook Series, Malayan Law Journal, S/B, Lexis Nexus 2003, pp. I-42.

¹⁹⁵ *Ibid*, pp. I-43.

¹⁹⁶ Carter-Ruck, P. and Harvey Starte, eds. *Carter-Ruck on Libel and Slander*, (London, Butterworths, 5th Edition, 1997), pp. 108-109.

¹⁹⁷ Addruse, Raja, *TimeAsia*, September 27, 1999.

politically well-connected businessmen have used this legislation to stifle freedom of expression.¹⁹⁸

Former Chief Justice Mohamed Dzaiddin Abdullah called the multi-million Ringgit awards a “blot on the legal landscape”.¹⁹⁹ Dzaiddin called on judges to check the size of awards handed out in defamation suits. He also acknowledged that huge awards made against the print and electronic media would ‘tend to stultify and curb press freedom’.²⁰⁰ According to an article by Asiafeatures, ‘(w)hat is fascinating about these mega awards is the premium put on one’s reputation, especially if one is a public figure’.²⁰¹ Outgoing Bar Council president, Sulaiman Abdullah, has commented that the sums awarded in recent cases were the highest in the Commonwealth and ‘possibly the highest in the world’, with the media bearing the brunt.²⁰²

A well-known case involved Param Cumaraswamy, a Malaysian attorney who serves as the United Nations Special Rapporteur on the Independence of Judges and Lawyers. He faced a RM25 million defamation suit brought by two Malaysian companies in 1997, for an interview with the London-based magazine *International Commercial Litigation*, in which he commented on his investigations into allegations of corporate interference with the Malaysian judiciary.

The companies requested a restraining order barring him from ‘speaking or publishing or causing to be published . . . words defamatory of the plaintiffs’.²⁰³ The Malaysian High Court refused to recognize the immunity granted to him in his capacity as Special Rapporteur to the United Nations. Following international pressure, including a landmark opinion from the International Court of Justice, the case was dismissed by the High Court in July 2000.²⁰⁴

In July 2000, the Federal Court upheld a judgment of a total RM7 million against freelance journalist MGG Pillai, his publisher Media Printext and editor Hassan Hamzah, who were found guilty of libel against Vincent Tan, a wealthy businessman. The Federal Court heard the case in 1998, but postponed delivering a verdict for 30 months. According to a report by *Asia Times*,²⁰⁵ the Chief Justice was quoted as saying “[I]ow and cheap awards will only send a wrong signal and will become a license to libel the respondent and other people with

¹⁹⁸ Asiafeatures.com, 24 March 2001.

¹⁹⁹ Asiafeatures.com, 24 March 2001.

²⁰⁰ Asiafeatures.com, 24 March 2001.

²⁰¹ Asiafeatures.com, 24 March 2001.

²⁰² Malaysiakini.com, 1 March 2001.

²⁰³ Human Rights Watch, *Malaysia: Other important court cases in Malaysia*, 21 September 1998, available at <http://www.hrw.org/press98/bck-brif/my-cases.htm> as of April 2004.

²⁰⁴ “Param entitled to UN immunity, says judge”, Malaysiakini.com, 7 July 2000.

²⁰⁵ “Libel award chills Malaysia’s journalists”, *Asia Times*, 15 July 2000.



impunity.” The earlier High Court decision in 1994, which awarded Vincent Tan RM10 million, triggered a slew of multimillion libel suits.

On July 10 1994, Transport Minister Ling Liong Sik filed a RM200 million defamation suit against a lawyer acting on behalf of his client. According to an *Asia Times* article:

Ling alleged that the lawyer had damaged his reputation by circulating a notice of demand on behalf of his client seeking the return of 152 million ringgit that was allegedly owed by Ling.²⁰⁶

Mega-defamation suits are not just the domain of the government. Opposition figures, such as Lim Kit Siang, have also filed suits for awards of millions of Ringgit. Kit Siang, Secretary-General of the Democratic Action Party (DAP), filed for three awards of RM250 million (over USD66,000) each against three newspapers, *Utusan Malaysia*, *the New Straits Times* and *Mingguan Malaysia*, for allegedly defamatory reports or cartoons.²⁰⁷ Lim Kit Siang dropped the case in November 2004. It should be noted, however, that Kit Siang was aware of the implications of these actions for freedom of expression, as mentioned in a media conference held in September 1999.²⁰⁸

In April 2000, Dr Rais Yatim, the Minister in the Prime Minister’s department responsible for legal affairs, told reporters that the Government would review the defamation law in response to public concern over libel awards which, he noted, frequently exceeded damages handed down in personal injury cases.²⁰⁹ However, he later maintained that the government would leave the matter of awards to the discretion of judges, although indicating that they should curtail high damages.²¹⁰

The most recent mega-defamation suit involved former Deputy Prime Minister Anwar Ibrahim, who was awarded RM 4.5 million (over USD 1 million) against writer Khaled Jafri in August 2005. The book, *50 reasons why Anwar cannot be Prime Minister*, was considered instrumental in Anwar’s fall from power. The massive award underlines the need for a cap to the amount that can be awarded. A maximum award would then indicate the severity of the effects of the defamation, without jeopardising freedom of expression.

²⁰⁶ Ibid. It could also be noted here how fear of defamation is leading to deterioration of writing quality through the over-use of words such as “alleged”.

²⁰⁷ See Media conference statement by Lim Kit Siang, ‘I have instructed my lawyers to file the RM250 million defamation suit against Deputy Home Minister, Abdul Kadir, as he has not retracted his defamatory statement against me’, 9 March 1999.

²⁰⁸ Ibid.

²⁰⁹ “High awards in defamation cases will affect press freedom: Bar”, *Daily Express* (Sabah), 3 April 2000

²¹⁰ Quoted in MGG Pillai, “Murder and Law”, 1 March 2001.

Recommendations:

- Any defamation regime in Malaysia should respect the following rules:
 - Public officials should not benefit from special protection under defamation laws.
 - Public bodies should not be able to bring defamation suits.
 - No one should be held liable in defamation for statements which are true
- The most immediate measure necessary is for legislation putting a cap to the amount that can be awarded.
- It would also be useful if provisions were made for reportage that is in the public interest or to publish stories in the public interest based on facts available at the time.
- If the journalist has followed professional standards with regards to “reasonable publication” he/she should not be liable.

9. CONTENT RESTRICTIONS

All content in the Malaysian media is subject to censorship in one form or another, be it externally imposed or “self-censorship”, whereby journalists and media outlets deliberately avoid reporting on certain issues for fear of official condemnation and / or sanction, or because such topics are deemed to be too sensitive. As a result, the Malaysian media have not attempted to push the boundaries of permissible discourse. Instead, content tends to lean towards being apolitical.

When bans on content are imposed from outside, grounds for censoring a publication or film are not always given; instead, strictures pertaining to pornographic or licentious content; violence; and ‘national sensitivities’ are referenced.

The latter seems to apply mainly to films with religious content, or local films that do not fit in—it is less acceptable to show local stars kissing than foreign stars, for instance. This has also led to a ban on movies such as the animated film “Prince of Egypt”, on religious and “moral”

Race

Race is a major factor in Malaysian politics. All the major parties of Government are race-based, and race permeates the rhetoric of the ruling coalition. However, racism and race-relationships are not openly discussed.

This is evident even in the coverage of events such as ruling coalition general assemblies. While the speeches are often racially explosive, coverage tends to downplay the evident racial aspects, concentrating on approved themes such as development. Even when members of the ruling coalition make overtly racial statements, these violent outbursts are given little coverage. For example, in 2001, former Deputy Prime Minister, Ghafar Baba led a gathering entitled “10,000 - Takkan Melayu Hilang di Dunia” (“10,000 – Malays Will Not Disappear from the Earth”), an emotive slogan with historical roots. The poster featured a Malay sword (*keris*) bathed in blood.²¹⁵ Coverage of the gathering rarely focused on its overtly racial nature.

Simultaneously, any attempt to discuss the government’s unequal treatment of the different races is labelled seditious. The most obvious example of this was the raid on Malaysiakini.com, motivated by a letter questioning the special privileges of the Malays.²¹⁶ Blanket bans on coverage of issues, such as the closing down of Chinese language schools²¹⁷ and the increasingly small space for non-Malay, non-Muslim cultural activities at universities²¹⁸ are perpetrated in the name of racial harmony.

Most recently, the Information Minister told reporters not to cover racial issues, with a veiled threat that the government would revoke the licenses of those who did not comply.²¹⁹

²¹⁵ Media statement by DAP leader Lim Kit Siang, “‘Takkan Melayu Hilang Di Dunia’ Gathering at PWTC the most open challenge to Mahathir-Abdullah leadership from inside UMNO since the Razaleigh revolt in 1987’, issued 5 February 2001.

²¹⁶ “Malaysian police raid website office”, BBC, 20 January 2003, <http://news.bbc.co.uk/1/hi/world/asia-pacific/2676297.stm>.

²¹⁷ From conversations with Chinese education activists, following the takeover of Chinese daily Nanyang Siang Pau by ruling coalition member Malaysian Chinese Association (MCA).

²¹⁸ See, e.g., the ban on Chinese cultural exhibition in Universiti Teknologi Malaysia (UTM), February 2000. This has been followed by increasing surveillance of the activities of Chinese language societies, from discussions with students from Universiti Sains Malaysia (USM), Penang in 2002.

²¹⁹ “Don’t publish stories on racial issues, media told”, *Bernama*, 26 April 2004.



Demonstrators gathered outside the office of the independent news website Malaysiakini.com after the police raided the site of the site's office (Photo: Malaysiakini.com)

Religion

Discourse on religion, particularly Islam, is confined by both law and the imposition of a uniform Sunni tradition on Malay Muslims. Only one school of jurisprudence is considered acceptable (the Syafii school), and there is little discussion of the history of the school or alternatives, even within the religion.

Islamic religious broadcasts, in particular, have been increasing since the early 1980s. However, discussion and debate are not encouraged. Belonging to a “deviant” Islamic denomination can lead to harassment and imprisonment under the Internal Security Act (ISA). Since the early 1990s Shia Muslims, who form a third of Muslims internationally, have been repeatedly imprisoned under the ISA.²²⁰ Though reasons are not given for the majority of ISA detentions, except in high-profile cases, human rights groups assert that these arrests were made purely on the grounds of faith.

This has led to frustration on the part of both individual academics²²¹ and NGOs who are trying to open up the space for liberal Islam.

Masjaliza Hamzah, programme manager for Sisters in Islam, a feminist organisation promoting women's rights in Islam, commented that they have difficulty putting forward their point of view in the media. She said they are curtailed by both the binary nature of the debate on Islam (seen

²²⁰ See Suaram Urgent Appeal, 8 February 2001, “Four Shia followers arrested under ISA purely on grounds of their faith”.

²²¹ Noor, Farish A., “My final column” by Farish A Noor, www.malaysiakini.com, 10 May 2003.

as a struggle between the United Malay National Organisation, UMNO, and the Pan Malaysian Islamic Party, PAS) and by the associations of Muslim scholars. In a written interview, she stated that:

The ulama are state-appointed officials and their opinions are accepted by the Malay-Muslim public as the “gospel truth”. Voices that question their interpretations are often seen as lacking legitimacy and authority, especially when (they) come from women whose heads are not covered and who are not schooled in Islamic studies. The national media, by not providing enough space for diverse opinions, is complicit in entrenching this belief. This despite the fact that the ulama’s opinions and interpretations often form the basis of laws that affect not only the lives of Muslims but also peoples of other faiths in multi-religious Malaysia.

She also pointed to an event that received little coverage in any media, the silencing of writer Astora Jabat who had previously written for both the mainstream daily *Utusan Malaysia* and a magazine, *Al-Islam*. He was called in by the Religious Affairs Department to ‘explain’ some of his articles. Since then, his column has not appeared in *Utusan* and he has ceased contributing to the magazine, while continuing to hold the post of editor.²²²

Members of other religions are not allowed to preach to Muslims, and there is very little public inter-religious dialogue.

The Judiciary

The delivery of justice in Malaysia is known to be flawed. The most recent cases to come under international criticism were the sodomy and conspiracy trials of former Deputy Prime Minister Anwar Ibrahim.

While the court case was covered in-depth, there was little discussion or debate in the newspapers or broadcast media over the role of the judiciary. This was in sharp contrast to the lively, often vitriolic, discussions taking place on-line.

However, the problem is more pervasive than the trials that generate massive publicity. For example, when a judge allowed a man to divorce his wife by SMS, there was a national outcry. However, there was little discussion on the role of judges in making decisions, how those decisions should be informed or whether the judge can legitimately issue a “contempt of court” warning for those discussing the decision outside the court-room.²²³

²²² Written interview with Masjaliza Hamzah, 18 May 2004.

²²³ “Gombak Syariah court wants SMS issue dropped”, *Malaysiakini.com*, 2 August



A similar problem arose when a judge, having heard the prosecution, dismissed the case against a police officer accused of the rape of two women in his custody, despite ruling that the officer had indeed had sex with the women. Following public pressure, the High Court ruled that the defence had to present its case. The judge reversed his decision and passed a harsh sentence, although in his judgement he made it clear that his sympathies lay with the policeman. Again there was no discussion about the implications of this for the legal system, about whether the judge had reversed his verdict due to public pressure or the implications of the judge's public statements indicating his sympathy with the convicted rapist.²²⁴

More disconcertingly, there are structural problems within the judiciary, evident since the sacking of Chief Justice Salleh Abbas by the executive in 1988.²²⁵ There is little discussion in the media of issues raised at this time or on the manner in which judges are appointed and replaced.

The Monarchy

While the role of the monarchy was reduced to an almost purely ceremonial one during the 1980s, they are still protected by the Sedition Act. Though there is no serious republican movement in Malaysia, there is little coverage of the monarchy, in its official role, except during award ceremonies, deaths or succession.

The special position of Sabah and Sarawak

Malaysia celebrates Merdeka or Independence Day on 31 August, apparently forgetting that two of its largest States, Sabah and Sarawak (East Malaysia) were only made independent on 16 September. The vast natural resources of these States help to finance the Peninsula; yet there is little discussion as to why poverty levels, and living costs, are considerably higher in East Malaysia.

The special privileges of the Malays

Although this is still categorised as a “sensitive” topic under the Sedition Act, and therefore prohibited, former Prime Minister Dr Mahathir began discussions about the failure of the Malay special privileges policy to forge a genuinely independent and innovative Malay business class and to tackle the roots of Malay poverty. Nevertheless, discussion on the

2003.

²²⁴ “15 years, 17 strokes of rotan”, *Malay Mail*, 8 August 2003.

²²⁵ Abas, Salleh, and K. Das, “May Day for Justice”, (Kuala Lumpur: Percetakan A-z Sdn Bhd, 1989).

topic is severely restricted by the Government. Criticism outside the limits set by the Government is rare.

The conclusion for the political landscape in Malaysia

With fundamental political issues cordoned off from public discussion and debate, there is little hope for genuine understanding between races, religions or regions. While the Government and major media outlets create the superficial image of an integrated multicultural society, there are increasing discrepancies between this fantasy and the reality lived by Malaysians.

This has been manifest most recently in the motivation behind the National Service training programme—to address the increasing polarisation between the races.²²⁶ Ironically, the programme has been plagued by violent incidents. However, the Deputy Police Chief has threatened that those spreading rumours that these incidents were racially motivated would be detained under the Internal Security Act.²²⁷

9.2. Other Legislation Restricting Content

Laws on pornography and sexual content fall under the Printing Presses and Publications Act, the Communications and Multimedia Act (CMA) and the National Film Development Corporation (FINAS) Act 1981. The latter places all censorship of films in the hands of a statutory body under the Ministry of Information. This corporation is also responsible for encouraging the growth of the local film industry.

The CMA can prevent even kissing being shown on television, although on video, which falls under the same Act, much more affection is allowed. However, there is a thriving market in pornography, with pornographic pirate DVDs available readily. In the last year, a clamp-down has ensured that pirated VCDs (which were previously more popular) are no longer openly displayed.

In contrast, although violent content is officially frowned upon and regularly condemned, films are rarely banned from either small or big screens on the grounds of violence alone. While censorship of this nature is in itself problematic, it is exacerbated by having no fixed limits. There appears to be little rationale as to why some foreign films are passed by the censors and others are not. The matter is worse for local films. Directors have an ongoing battle with the Film Censorship

²²⁶ “Races drifting apart, Malaysian PM warns”, *AFP*, 27 April 2004.

²²⁷ “Police attribute fights among NS trainees to low tolerance levels”, *New Straits Times*, 13 April 2004.



Board to understand why films have been cut, or banned, with unsatisfactory responses such as the film was “un-Malaysian”.²²⁸

The Penal Code deals comprehensively with restrictions on content. Section 153 deals with ‘Wantonly giving provocation, with intent to cause riot’. Intent to cause violence must be proven, in which case the defendant can be imprisoned for six months or fined. Sections 292 to 294 deal with obscene books, objects and songs, and are punishable with jail sentences ranging from three months (for songs) to five years (for offences involving young people) and a fine. An exception is made for religious symbols.

Section 298 deals with “uttering words” or making gestures with ‘deliberate intention of wounding the religious feelings of any person’, punishable with a jail sentence of up to one year and / or a fine. The following Section (298A) extends this to the written word, ‘by signs, or by visible representations, or by any act, activity or conduct, or by organising, promoting or arranging, or assisting in organising, promoting or arranging, any activity, or otherwise’ and is punishable by a jail sentence of between two to five years.

The Penal Code also contains a section on publishing and selling defamatory materials, punishable by a jail sentence of up to two years and / or a fine (Sections 499 – 502). Insult with intention to breach the peace is punishable by a jail sentence of up to two years and / or a fine (Section 504).

The Internal Security Act 1960 also deals with publications, prohibiting materials that contain incitement to violence, disobedience to the law, material that could breach the peace ‘or promote feelings of hostility between different races or classes’ or ‘is prejudicial to the national interest, public order, or security of Malaysia’. This can be extended to publishing houses and to successive numbers of a periodical. Once banned, publishers may appeal to the Ruler, but there is no appeal allowed in court. Punishment is a fine of up to RM 2,000 (USD 530) and/ or up to three years imprisonment. Subsequent sections also allow for punishment of those possessing or importing banned materials. However, Section 29 allows for stiffer penalties for possessing “subversive documents”, broadly defined as documents having a tendency to ‘excite organised violence’ in Malaysia and associated activities (such as fund-raising for those engaged in organised violence). The punishment is up to RM 10,000 (USD 2600) fine and / or imprisonment for up to five years.

Part IV of the Printing Presses and Publications Act governs “Control of Undesirable Publications”, which includes most of the above restrictions, as well as prejudicing relations with foreign governments or

²²⁸ See Chapter 9 on Broadcast Regulations.

materials 'likely to alarm public opinion'. Under this Act, possession of banned materials can lead to a fine of up to RM 5,000 (USD 1300), but the selling and distribution of the materials can lead to up to three years' imprisonment and / or a fine of up to RM 20,000 (USD 5300).

There are also local content laws on broadcast content by the public broadcaster, which are examined in greater detail in Chapter 7.

Recommendations:

- Repeal/amend legislation that stifles areas of discourse, particularly the Sedition Act.
- More positive measures are required to undo years of censorship and fear, such as investment in public and community broadcasting or presses.
- Self-regulation of all media should be encouraged but not imposed by law.
- Create a climate for more tolerance and encourage informed debates between and within communities, particularly on matters of importance such as race and religion. The justified concern (as seen by the vitriol on some websites) that this will degenerate into hate speech and increase society's divisions can be overcome through existing legislation, particularly in the Penal Code, on inciting racial hatred and violence. This legislation, however, needs to be used sparingly—and against all incitements to violence regardless of political affiliation.

10. FREEDOM OF INFORMATION AND SECURITY

Freedom of information is severely restricted in Malaysia both by legislation including the Official Secrets Act and a pervasive culture of secrecy. Information on matters ranging from public health to government spending is classified. There is no space for appeal to public interest when requesting documents, nor is there a culture of protecting whistle-blowers.

Nevertheless, Prime Minister Abdullah Ahmad Badawi seems ready to explore positive initiatives through his pledge to fight burdensome bureaucracy. He has set up a special task force to look into ways of reducing red tape and bureaucracy involving government departments.²²⁹ The Prime Minister has also proposed the setting up of an Institute for Public Ethics to support his earlier proposal for a National Integrity Plan.²³⁰

While the setting up of this institute might be beneficial to strengthen national systems and to promote greater transparency and accountability, more structural reform is needed. To achieve the stated aims in setting up the institute, there must be greater public access to information, guaranteed by a Freedom of Information Act.

10.1. The Official Secrets Act

The main instrument for suppressing information is the Official Secrets Act (OSA). Under the Act, the term “official” means ‘relating to any public service’. It does not clearly define an “official secret”; however Section 2 includes the following documents within the category of “official secret”:

- a) Federal documents, state Executive documents, documents concerning national security, defence and international relations.

- b) All official documents, which are classified as *Rahsia* (Secret), *Rahsia Besar* (Highly Secret), *Sulit* (Confidential)

²²⁹ Unfortunately, this does not seem to be reflected in greater transparency. Graffiti around Kuala Lumpur, for example, reads “18?”. The government earlier mentioned that 20 senior government politicians or civil servants were being investigated for graft, but only two have been charged.

²³⁰ Malaysiakini.com, 5 November 2003.

and Terhad (Limited Circulation) by the Minister or public officer charged with the responsibility concerned.²³¹

Under Section 30A, the Minister may make regulations to prescribe the manner of classifying information, documents and other materials. However, the Act fails to provide any guiding principles to regulate or limit the kind of material that may be classified. The Act also fails to require a minimum level of seniority for the public official who may be designated to classify information or documents.

Section 16A provides that any certificate of secrecy issued by practically any public official is conclusive evidence that a document is an official secret. Furthermore, it purports to place the executive determination on the secrecy of information beyond the reach of judicial scrutiny, stating that certification of information ‘shall not be questioned in any court on any grounds whatsoever’.

It can be fairly said that the amount of information subject to classification as a State secret is potentially unlimited. The list of documents and information provided in the Schedule is extremely broad, placing even formally adopted Cabinet documents in the realm of secrecy. This is contrary to fundamental democratic principles of open government. In addition, any designated public official may, at any time and apparently for any reason, classify anything at all as “official secret”. The last paragraph of the Schedule at least refers to a legitimate aim, namely national security, as grounds for classifying documents, but even in that case, all documents concerning “national security” are covered. There is no requirement that disclosure would pose a real and serious risk to national security, as required under international law. Once classified, a document will forever be considered a “State secret”; contrary to the practice in other States, there are no time limits or requirement for periodic review of classification.

In addition, the absence of any check or balance on the powers of the Minister or public officials to classify information is a serious flaw. There is no penalty for misclassifying information and section 16A attempts to place the decisions of even the most junior public official to classify a particular document beyond judicial scrutiny. This results in one-sided legislation that accords unlimited power to the State and its officials to deny the public information and enables the use of the Act to conceal corruption, abuse of public power and mismanagement of public resources, contrary to generally established principles of administrative justice.²³²

²³¹ Official Secret Act 1972.

²³² See, for example, *Norman Baker MP v. Secretary of State for the Home Department*, Information Tribunal (National Security Appeals), 1 October 2001 (United Kingdom).



The Act was amended in 1984 to increase the penalties for spying and to make it an offence to put oneself 'in the confidence of a foreign agent'. In 1986, the Act was again amended. Those found guilty under the amended Act face imprisonment for no less than a year and up to seven years.

Under amended Act Section 8:

...if any person having in his possession or control any official secret....which-

- a. has been entrusted in confidence to him by any public officer, or
- b. he has made or obtained, or to which he had access, own his position as a person who holds or has held office in the public service....

Does any of the following-

1. communicates directly or indirectly any such information or thing to any foreign country...or to any person other than a person to whom he is duly authorized to communicate it; or
2. uses any official secret or thing...for the benefit of a foreign country...or in any manner prejudicial to the safety or interests of Malaysia; or
3. retains in his possession or control any such thing as aforesaid when he has no right to retain it...

he shall be guilty of an offence punishable with imprisonment for a term not less than one year but not exceeding seven years.²³³

Section 4 creates an offence similar to that provided in section 3(a), prohibiting the making or taking of any document, measurement, sounding or survey of a prohibited place. The onus in the Section 4 offence is on the defendant to prove that 'the thing so taken or made is not prejudicial to the safety or interests of Malaysia and is not intended to be directly or indirectly useful to a foreign country'. Section 4(2) states that it is no offence to make a drawing or photograph²³⁴ that features a prohibited place as part of it, unless it is proven that the photograph or drawing was taken or made for a purpose prejudicial to the safety of Malaysia.

Section 7 creates an additional offence of carrying a camera or other photographic equipment within the premises of a prohibited place.²³⁵ This offence carries a maximum penalty of one year imprisonment and a

²³⁴ Except for photographs or drawings made or taken from aircraft.

²³⁵ Section 2 defines a prohibited place as including any establishment occupied or used by or on behalf of military forces, any communications centre used by or on behalf of the government, or any place where munitions of war or petroleum products are stored by or on behalf of the government.

fine, and the burden is on the defendant to show that he or she carried the equipment for a lawful purpose.

Section 16, which applies to all prosecutions under the Act, establishes a virtual presumption of guilt for anyone arrested and prosecuted:

In any prosecution for an offence under this act, unless the context otherwise requires—


a. it shall not be necessary to show that the accused person was guilty of a particular act tending to show a purpose prejudicial to the safety or interests of Malaysia;

b. ... the convicted person may be convicted if, from the circumstances of the case, his conduct or known character as proved it appears that his purpose was a purpose prejudicial to the safety or interests of Malaysia; and

c. if any documents, articles or information relating to ... anything in [any prohibited place] is made, obtained, collected, recorded, published or communicated by any person other than a person acting on lawful authority, it shall be presumed until the contrary is proved, to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of Malaysia.

The offences created under Sections 3 and 4 have an extremely broad reach, applying not only to information in the possession of the State but also to privately held information and original literary creations. The restriction could, in theory, apply to legitimate activities such as journalism, academia and even private letter writing, which would result in a provision of extraordinary breadth.

Neither Section 3 nor Section 4 requires that the proscribed conduct result in any actual harm to the national interest. The only requirement in Section 3 is the vague and imprecise one that the purpose of the offender be “prejudicial” to the safety or interest of Malaysia, and that the material be ‘useful to a foreign country’. These are vague and imprecise formulations that do not reach the required standard of “foreseeability” in order to pass the requirement that a restriction on freedom of expression be “provided by law”. Furthermore, this is simply not a sufficient standard. Being useful to another country cannot be equated with being harmful to Malaysia; indeed, the latter is a very small subset of the former. The reverse burden of proof is also highly problematic. Under both Section 4 and Section 3, a defendant has to prove that his or her conduct was not malicious. This breaches the fundamental principle of the presumption of innocence. The UN Human Rights Committee has stated, in relation to the burden of proof:



[The presumption of innocence is] fundamental to the protection of human rights ... By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond a reasonable doubt.²³⁶

The combined effect of the vague formulation of the offences and the reverse burden of proof is that most journalists would think twice before investigating alleged corruption in the military, for example, as this may well be interpreted as ‘obtaining information ... indirectly useful to a foreign country’. Not only would a journalist who is charged for conducting an interview have to prove that their activities were *bona fide* journalism; under Section 16(2) it may be that, if the journalist is known as a critic of government, that alone could be deemed sufficient to prove “malice” within the meaning of the Act and that a conviction could be secured on that basis. Thus these provisions exercise a severe chilling effect on freedom of expression.

Sections 3 and 4 are also problematic in that both impose harsh penalties. A breach of Section 3 is punishable by life imprisonment, while a violation of Section 4 will result in a sentence of at least one year’s imprisonment. Such harsh sentences in and of themselves constitute a violation of the right to freedom of expression.²³⁷

Section 7, finally, is problematic because of the broad definition of “prohibited place”. A person carrying a camera onto the premises of an oil refinery that does business with the government could be found to be in breach of this provision, and liable to one year’s imprisonment, unless they could prove that their purpose was a lawful one.

The unauthorised disclosure of an official secret is prohibited by Section 8 of the Act; Section 8(2) penalises the unauthorised receipt of the information unless the recipient can prove that they received the information contrary to their desire. Section 9(2) establishes a similar offence of possessing official information without lawful authority. All three offences are subject to a penalty of one to seven years’ imprisonment. Section 7A makes it an offence to fail to report an unauthorised request for an official secret, while Section 7B makes it an offence to place oneself ‘in the confidence of’ a “foreign agent”, or to do anything that is “likely to” place oneself in the confidence of a foreign agent’. Under section 17, the mere fact that a person has been in touch with a foreign agent, or has tried to do so, is evidence of having obtained or communicated information calculated to be useful to a foreign country, or having attempted to do so.

²³⁶ ICCPR General Comment 13, Twenty-first session, 1984.

²³⁷ See, for example, *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application No. 18139/91 (European Court of Human Rights).

Section 28 establishes that where one member of a firm or corporation has been found guilty of an offence under the Act, ‘every director and officer of the company or corporation ... shall be guilty of the like offence unless he proves that the act or omission took place without his knowledge, consent or connivance and that he exercised such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions and to all other circumstances’.

All these provisions are highly problematic from the point of view of the right to freedom of expression. The extremely broad definition of an “official secret”, which we analyse above, and the absence of any harm requirement combine to render the Section 8 offences extraordinarily broad in scope. The Section 9(2) offence is even broader in that it applies not only to official secrets, but also to all other official documents. While there is a requirement that the person possess the information for a purpose prejudicial to the safety of the country, the effect of Section 16, noted above, is to place the burden on the defendant to disprove a presumption that they were acting for prejudicial purposes. Add to this the strict liability nature of the Section 8 and 9 offences, together with the lack of any public interest override, and the result is a draconian set of offences that effectively limits the media, in relation to information on official matters, to official communications, largely inhibiting the ability of the media to publish any other information.

The Johannesburg Principles emphasise that no one should be punished for disclosing information where this is in the overall public interest, even if it is formally classified as a “State secret” or “official secret” and even if its release might adversely impact on, say, military interests or foreign policy.²³⁸ For example, a journalist may come into the possession of cabinet documents that disclose an important impending policy change relating to the country’s financial and economic policies or that provides evidence of corruption within the civil service. In such cases, the media, exercising their function as “watchdogs” of democracy, are under a duty to publish the information.

Protection for disclosure in the public interest should not only extend to the media. Those who, in the course of their employment, come across classified material that discloses wrongdoing should also benefit from protection if they decide, in good faith, to release it. Protection for so-called whistleblowers is a vital element in freedom of information and encourages good administrative practices at all levels of the civil service.

Section 7A further tightens up information from official sources by requiring civil servants to report all approaches made to them by unauthorised persons. This requirement is so broad that, technically, it

²³⁸*The Johannesburg Principles*, Principles 15 and 16. See Chapter 4 for more information on the Johannesburg Principles.



would require a civil servant working in a government department to report virtually every phone call they get. It would certainly require a civil servant to report a phone-call from a journalist who is investigating, for example, an agreement reached within the ASEAN group regarding financial or economic policies and who is looking for some further background information.²³⁹ Indeed, it may be noted that this provision runs directly counter to what international law mandates in terms of access to information, namely that everyone should be free to request any information whatsoever, subject only to a limited regime of exceptions.

Section 7B is extraordinarily broadly phrased, prohibiting conduct that is “likely to” result in a person placing themselves in the confidence of a foreign agent. Not only will most people be unaware that a particular individual is a “foreign agent” (spies tend not to identify themselves); a prohibition on conduct that is “likely to” result in finding oneself in the confidence of such a person is totally unpredictable. It should be noted in this regard that the provision applies not only to public servants but to “any person”. It is absurd to expect that all persons in Malaysia should strictly avoid being in the confidence of foreign agents—not knowing who is or is not a foreign agent—even where those people might not be privy to any classified State information at all.

Section 17 establishes that anyone who has been in touch with a foreign agent shall be presumed to have done so in order to communicate information which might be useful to a foreign country. Under Section 17(2), even being given a foreign agent’s business card or any “information regarding” a foreign agent, suffices to be presumed to have been “in communication” with a foreign agent. This is in violation of the presumption of innocence, and undermines the ability of the media to gather information by making contact with potential sources of information.

Finally, Section 28 extends criminal liability to the directors and editor-in-chief of a newspaper, TV or radio station or other media organisation if one of their journalists has been convicted of an offence under the Act, unless those persons can prove they did all that could have been expected of them to prevent the offence. This is an unacceptable extension of criminal responsibility. Under general principles of criminal law, other persons should be liable only if they actively instigated the offence, conspired to commit it or were grossly negligent in the oversight of those under their direction. There is no reason why the same principle should not also apply here. Section 13 is related in that it creates the offence of “harbouring” a person who may be suspected of having committed an offence under the Act, or allowing such persons to meet. Insofar as the Act may be used to stifle critical journalism, it is not

²³⁹ The information would probably fall in the “international relations” category of Schedule 1, and thus constitute an “official secret”.

unlikely that a newspaper office might fall foul of this provision if one of its staff is suspected of having received an “official secret”.

The Act has created a culture of secrecy, which makes it difficult to access documents even when there is a legal obligation for the government to make these public, such as environmental impact assessments, budgets and local development plans. It has also made it illegal for journalists to have access to almost all official documents.

The Act is often invoked to silence dissidents. DAP Member of Parliament Lim Kit Siang was found guilty of receiving and revealing information about the purchase of Swedish warships for the Malaysian Navy. It was a controversy of possible excessive expenditure and misuse of public funds. Lim was fined RM 15,000 (over USD 3900). However, on appeal the Federal Court reduced the fine to less than RM 2,000 (USD 530), and he was not automatically disqualified from Parliament.²⁴⁰

The Act has inevitably had a negative impact on newsroom operations. In just one year, 1985, three major media freedom violations occurred. First, *New Straits Times* journalist, Sabry Sharif, was fined RM7,000 (USD1800) under the Act. He pleaded guilty to violating the Act for writing a story on alleged irregularities in military aircraft purchases. Then, two journalists from the *Asian Wall Street Journal* were charged and fined RM 10,000 (USD 2600). They were also expelled from the country for their investigation into the alleged personal gains of then Finance Minister Daim Zainuddin through the sale of bank shares to a State agency, Pernas. Finally, the *Far Eastern Economic Review* correspondent James Clad was charged after he cited an allegedly confidential Cabinet document. He pleaded guilty and was fined RM 10,000 (USD 2600).²⁴¹

In 1995, two journalists from a Malay tabloid *Harian Metro*, Yusaini Ali and Saniboey Mohd Ismail, were held under the OSA. Both of them were picked up in connection with reporting the kidnap of 14-year-old schoolboy Ang Choon Fong. The kidnap case had been classified by the police as confidential. Nevertheless, they were released and no action was taken against them.²⁴²

Government officials have also been threatened with action if they disclose official documents. In 1995, the Negeri Sembilan Menteri Besar (Chief Minister) warned local council members not to disclose local government secrets.²⁴³ In 1998, the Selangor State Government warned its heads of departments, staff and politicians not to leak Government

²⁴⁰ Ibid, pp. 42-43.

²⁴¹ Ibid, p. 43.

²⁴² “Two Reporters held under OSA released”, *The Star*, 3 June 1995.

²⁴³ “Disclose Internal Secrecy, Actions Against Council Members”, *Nanyang Siang Pau*, 2 July 1995.



secrets. Then Menteri Besar Abu Hassan Omar was quoted: “Printed materials classified as secret must be kept away from the public and government staff should handle them with extra caution.”²⁴⁴

In 2000, Minister in the Prime Minister’s Department Bernard Dompok said a committee would be set up to investigate information leakage from government agencies, and that the OSA and other relevant laws would be invoked to tackle the problem. It was said to be necessary to stop unauthorised people from prying into secret government files.²⁴⁵ Moreover, in September 2003, another Minister in the Prime Minister Department Rais Yatim, when commenting on the alleged leak of the 2004 Budget, said: “it was especially serious if a former or serving civil servant divulged classified information”, and “even Members of Parliament and Senators were not allowed to divulge State secrets.”²⁴⁶ This kind of statement has made government officials scared of revealing information or making any statement concerning government-held information, as they might be reprimanded or punished to the point of losing their jobs.

In August 2002, Mohd Ezam Mohd Noor, Youth chief of the Parti Keadilan Nasional (the National Justice Party) was sentenced to two years imprisonment under the Act for distributing Anti-Corruption Agency documents concerning an investigation into the International Trade and Industry Minister, Rafidah Aziz and the former Chief Minister of Malacca, Abdul Rahim Thamby Chik. In June 2003, he was released by the High Court on a RM 20,000 (USD 5300) bail pending his appeal against the conviction and sentence in the Sessions Court.²⁴⁷

Information recently protected under the OSA includes the Air Pollution Index (API). This was classified in 1997, following a prolonged period of haze. The rationale given was that if it was released, it could affect tourism. Academics and others openly protested this order but nevertheless had to heed the warnings for fear of job security.²⁴⁸ During the recurrence of the haze in August 2005, the API were taken out of OSA protection and prominently published in newspapers and on the Department of Environment website.

The Environmental Impact Assessment (EIA) for the Bakun dam is also believed to be classified. This document was, as specified by law, made open to public scrutiny when it was first published. However, following international controversy, it became unavailable during the 1990s.

²⁴⁴ “MB: Some Civil Servants Leaking Official Secrets”, *The Star*, 10 June 1998.

²⁴⁵ “Committee Will be Set Up Immediately, Says Official”, *The Star*, 19 April 2000.

²⁴⁶ “Rais: Prevent leakage of State Secrets”, *New Straits Times*, 15 September 2003.

²⁴⁷ “Keadilan Youth Chief Ezam Released on RM20,000 bail”, *New Straits Times*, 11 June 2003.

²⁴⁸ U.S. Department of State Malaysia Country Report on Human Rights Practices for 1998 Released by the Bureau of Democracy, Human Rights, and Labor, February 26, 1999.

Environmental activists have questioned the applicability of the original EIA to the current scaled-down version of the dam, but have complained that they are unable to make a detailed analysis, as they lack access to the original document.²⁴⁹

10.2. Culture of Secrecy

Due to the prevailing culture of secrecy in Malaysia there is a long list of information that is of public interest but which the public is unable to access or, if it can be accessed, red tape and bureaucracy prevents the public from obtaining this information.

In 2003, the Health Ministry prevented State departments from commenting on the status of the SARS virus. As a result, the information relayed was slow and ineffective, creating more uncertainties and fear, despite daily press briefings in Kuala Lumpur by the ministry. This was evident from the questions and comments raised by the public during briefings, seminars and conferences organised by State Health Departments.

Business tenders are not publicised, resulting in a perception that the government is not serious about promoting openness and transparency in commercial dealings.

Politicians rarely feel the need to explain or justify expenditure, even on large projects. The RM 1 billion Penang Outer Ring Road (PORR) has been touted as the most expensive highway in the country. However, the proposed project has been vehemently opposed by Penang residents who are concerned about environmental impact and question whether the new road is necessary. There are also concerns on how the contract was awarded. Penang Chief Minister Dr Koh Tsu Koon has yet to answer questions on why a particular concessionaire, Peninsular Metro-Works, with no track record in this type of work, has been given the PORR contract.²⁵⁰

Another problem is that ministers or government officials are not obliged to reveal the facts, even when the issue concerns the public interest.

This is obvious during the debate and question and answer sessions in Parliament, where the minister, to whom the question is directed can

²⁴⁹ Personal conversations with anti-dam activists.

²⁵⁰ Speech by DAP politician Lim Kit Siang, 2 June 2002: "PORR violates international best practices of good urban governance and public integrity that government support for any privatization project should be defined upfront as a maximum so that the private sector can prepare realistic bids".



decide not to answer. This provision is available under Parliamentary Standing Orders, defeating the purpose of a parliamentary question time.

Even on minor non-sensitive issues, civil servants are often reluctant to speak out. Anecdotaly, a Radiq Radio journalist was investigating a story on a popular exhibition on ghosts, being held at the National Museum. Museum staff were reluctant to speak to her without clearance, saying that they were afraid that they could be arrested for doing so.²⁵¹

The absence of the right to know in the Malaysian context has led journalists and the public at large to seek information unofficially. Sometimes, there is no option but to rely on informed sources, on whistle-blowers or on unsubstantiated documents.

While these sources may reveal the truth, which otherwise may be hidden, they bear no responsibility, and thus their credibility is questionable.

Types of information or documents readily accessible

There are a few types of official documents that are in the public domain. These include legal judgements, judicial reviews, parliamentary reports, laws, statutes, Acts, speeches by government officials, environmental impact assessments (EIAs), financial statements of companies and constitution of political parties and non-governmental organisations.

But problems persist even among this list of accessible documents. For example, although EIAs must be made available for comment, there is little attention paid to whether meaningful consultation can take place. First, they are accessible only in certain places such as government departments, for a limited time. The reports are expensive and generally only available in English, apart from an Executive Summary. Often affected people are in poverty and/or belong to marginalised groups, such as indigenous people or agricultural small-holders. They can neither afford nor understand the reports, which can result in their forced relocation unless challenged.

Court cases and gag orders

Judges use contempt of court and gag orders to prevent the discussion of controversial judgements. In 2003, for example, Sharia Judge Mohamad Fauzi Ismail warned that those discussing a controversial ruling that allowed Muslim men to divorce their wives via SMS could find

²⁵¹ Conversations with Radiq journalist Nara Duang Dean.

themselves guilty of contempt.²⁵² In 1999, Justice Abdul Wahab Patail had issued a gag order in relation to one of the Anwar Ibrahim trials, which disallowed any comments or publication on the trial or ‘any matter related to it’. This included anything being said by Anwar, his family, lawyers or comments from human rights groups or the public. Journalists were threatened with non-admittance to the court if they reported comments that went beyond ‘evidence or submissions in relation to the proceedings’.²⁵³

The *Far Eastern Economic Review* correspondent Murray Hiebert’s case in 1997 stemmed from an article he wrote. In September 2000, Hiebert lost his appeal against conviction for contempt of court. He was not free to leave Malaysia for over two years pending his appeal and chose to forgo another appeal to the country’s highest court, instead serving a six-week sentence. Hiebert’s case was the first in which a journalist has been sentenced to jail for contempt in the ordinary course of his duties. It raised serious questions about both the freedom of the press and about judicial impartiality.²⁵⁴

Prosecution and persecution of whistleblowers

There is no legislation to protect whistle-blowers. In a high profile case in 2003, the Kuala Lumpur deputy chief of the Fire and Rescue Services Department was forced into early retirement. He had earlier alleged abuse by the Director-General of the department, who he said had used department facilities and personnel to organise a wedding reception for his son.²⁵⁵

More recently, however, the Prime Minister has announced a “National Integrity Plan”, which mentions the cultivation of a culture of whistle-blowing among Malaysians.²⁵⁶ Unfortunately, however, this has not meant a re-instatement for the victimised whistle-blower from the Fire and Rescue Services Department. How serious this effort is, therefore, remains uncertain.

²⁵² M.G. Pillai, see note 210 on page 72.

²⁵³ www.suaram.org, June 8th, 1999.

²⁵⁴ “CPJ condemns jailing of Canadian journalist in Malaysia”, Committee to Protect Journalists (CPJ) news alert, 11 September 1999.

²⁵⁵ See media statement by DAP Secretary-General Lim Kit Siang: “DAP welcomes Cabinet decision to ratify the UN Convention Against Corruption in Mexico next week and calls on Malaysia to be the first country in the world to establish a National Commission on UN Convention Against Corruption with political party and civil society representation to implement the Convention principles of zero tolerance for corruption.”

²⁵⁶ “Whistle-blower culture will encourage flow of honest feedback”, *New Straits Times*, 2 May 2004.



Positive measures to share information by the government

Due to pressure from groups inside and outside the country, the government seems more prepared to reveal and share information with the public. Some laws pertaining to public participation in projects affecting their lives and livelihood have been amended.

One major change since 2001 has been to the Town and Country Planning Act. It is now compulsory for the government to consult communities before preparing a draft local plan.²⁵⁷ Prior to this, consultation only occurred after the draft plan had been published. Currently, a number of provisions are supportive of public representation and participation.²⁵⁸ This followed, but has not officially been connected to, public discontent over a draft plan for the suburb of Petaling Jaya.

Other positive signs include government departments' posting of information on their websites, although there are on-going complaints that the sites need to be updated more frequently. An Environmental Impact Assessment for a controversial project was reportedly made available, for a while, on the Department of the Environment website. E-mails, addresses and telephone numbers of government officials are also now readily available on designated websites. Citizens can e-mail the Prime Minister.

10.3. The need for a Freedom of Information Act

In 2003 a United Nations Development Programme conference on the future of the Malaysian media started with a government representative arguing that a Freedom of Information Act (FOIA) was not suitable. Deputy Home Minister Chor Chee Heung said the government was 'by no means a closed-door government' but has retained media laws since independence to safeguard multi-ethnic, multi-religious and multi-cultural harmony.

However, a FOIA would guarantee a culture of transparency and openness within public bodies. People would be able to make informed choices on matters ranging from health to education. Greater openness and transparency might have helped prevent deaths in the Nipah virus outbreak, for example. Rather than a blanket ban on information released, with a few exceptions, the government would have to

²⁵⁷ Town and Country Planning Act, Section 12A.

²⁵⁸ From a conversation with a representative from the Town and Country Planning Department, June 2003.

specifically outline areas where information could not be disclosed and conditions under which access would be privileged (for example on grounds of respect for privacy). This would, inevitably, also entail the repeal of the Official Secrets Act.

Another recommendation is to examine laws enacted elsewhere to protect whistle-blowers, and to re-instate those whose careers have suffered due to coming forward. This would do more to encourage a culture of whistle-blowing than vague assertions in planning documents.

There should also be reforms made to the judiciary. The current poor state of the Malaysian judiciary has been acknowledged by the Chief Justice, and far-reaching reforms are necessary. However, these reforms should be a matter for public debate. For informed debate to be possible, the judiciary has to curtail the practice of threatening contempt orders when dubious judgements are issued and become a matter for public concern and debate.

For these reforms to be meaningful, however, information must not only be unclassified as secret, it needs to be accessible. This means ensuring people have access to vital information. The case of the Environmental Impact Assessments, illustrates the inadequacies in current conditions, even when documents are made public. Presumably, the reason for public consultation is because of the far-reaching nature of projects requiring EIAs. Thus, the consultation should be meaningful, rather a mere rubber-stamping exercise. In particular, feedback, views and consent from directly affected communities should be sought so it allows them to participate in a free, prior and informed manner.



Recommendations:

- A comprehensive access to information law, in line with international standards, should be adopted as a matter of priority.
- Existing laws which provide for secrecy should be reviewed and amended as necessary so that only legitimate secret material is covered in accordance with international standards. For instance in the OSA:
 - Sections 3 and 4 should be repealed and replaced with narrowly drafted offences that clearly link harm to national security to the prescribed conduct. They should allow for a proportionate sentence to be imposed.
 - Section 7 should be repealed.
 - Section 16 should be repealed.
 - Sections 8 and 9(2) should be redrafted in clear and precise language, prohibiting only those disclosures which pose an immediate risk of serious harm to national security or another legitimate interest. These provisions should also allow for disclosure in the public interest.
- The government should encourage more openness on the side of public officials
- Promote the right to information to the public and build public support for an FOI Act.

11. INFORMAL RESTRICTIONS AND HARASSMENT OF THE MEDIA

Hostile media or media-related laws have an adverse impact upon freedom of expression in Malaysia. However, apart from restrictions imposed by laws, informal restrictions also have a profound impact on journalists. Intimidation or harassment is often invisible, and rarely reported. The following report is based on interviews conducted in September and October 2003, all done on condition of anonymity.

In all newsrooms, irrespective of language, reporters believe that editors often receive telephone calls from the authorities. Editors are also invited to have “coffee sessions” with ministers or high-ranking officers concerned during times of tension. Editors interviewed confirmed that they received a mixture of soft advice to lightly veiled threats during these calls and meetings.²⁵⁹

A senior editor said that the phone calls have become routine in the newsrooms, with editors accepting them as common practice. Reasons behind the calls can be as trivial as discontent over the photographs published.

The editor was worried the threats came not only from people in power, but also from unknown officers and politicians. He claimed that ‘it is because the media is not respected as it should be’. He blamed media institutions which have been too obedient.

Over the years, overt intimidation has decreased, according to a senior journalist. However, this should not be seen as a positive development, but an indication that the media have internalised the government agenda. According to the journalist, [w]hen the older generation (retires) from journalism, the new blood (...sees) threats from the government as legitimate, or even worse, they don’t think these are threats’.

A senior journalist said that twenty years ago, they had no difficulties accessing information from government officials. The government officials were obliged to give information, especially information regarding the public interest. According to him, nowadays government officials refuse to give out any information as only ministers are allowed to do so. The subtle message is that journalists are not respected as a watchdog anymore. The power possessed by the fourth estate has been undermined.

²⁵⁹ This section was based on a number of interviews with journalists at differing levels in the profession. For obvious reasons, the sources did not want to be named.



In the State-owned media, a journalist said that editors are government officials, rather than news editors. Control tends to be indirect, through the appointment of bureaucrats to editorial positions and internal censorship. They are not only lacking journalistic experience but could be readily transferred to other government departments that have nothing to do with the media.

Journalists in the field are also under pressure. A junior journalist related that once he posed a question to a minister regarding a power struggle in his party. The minister's press secretary immediately signalled that he should be silent. His editor then received a call from the minister, advising him to teach his journalists better. A senior journalist said it was common for the ministers or officials to try to embarrass those who posed critical questions. She conceded that some journalists are afraid to be taken to task. They rely on questions asked by other journalists, particularly foreign reporters, especially on controversial issues.

On several occasions journalists conceded they learnt to identify the news angle which would guarantee publication. One of the journalists interviewed said: "I don't want my hard work to be thrown into the dustbin. I know how to write news which I know would be published." Another junior journalist said editors tried hard to brainwash him to accept that it is hard to criticise the establishment. He added that: "Now it is noticeable that young journalists are no longer interested in their profession. They see that being a journalist is like working in any other field."

Conversely, the editors interviewed observe that young journalists lack professional knowledge. An editor said: "They do not know that the government officials are obliged to give information especially on matters of concern to the public interest". Another editor said, "[t]hey have no sense of social responsibility and see their job as just a common job."

It is worth noting that corporate interference in newsrooms has been becoming more prevalent. A senior editor said that companies, especially advertisers, do not hesitate to call editors, urging them not to publish news unfavourable to them. "Have you noticed if there is a murder case at a resort, for example, no company or organisation names are given in the report? It is not because it cannot be published, but we have been forced not to publish."

A junior journalist said it was particularly frustrating when she was asked to attend and write stories on corporate functions which do not have any news value. Furthermore she said: "For approximately half a year, I only attended corporate functions, conducting interviews and writing stories that did not have any news value." She felt she was acting as a public relations officer rather than a professional journalist. "This is

a dangerous tendency if readers are unable to identify whether the stories are news or merely promotion(s).”

She claimed that 40 per cent of the space in newspapers is occupied by advertisements. As a consequence, news stories have to “fight” with advertisements to get published. An editor in a television station also conceded he has to “sacrifice” certain news to give way to advertisements. “I was frustrated, as my news time has been ‘eaten’. News represents hard work by my reporters, but what can I do?.”

Recommendations:

- Officials/business companies should respect editorial independence and not apply any pressure, direct or indirect, on journalists and media. .
- Officials and other public figures should demonstrate tolerance of criticism and allow the media to play their role of public watchdog
- The State should grant editorial independence to the state-owned media
- Editors should encourage their journalists to carry out the media’s role as government watchdog.
- A clause of conscience should be included in journalists’ employment contracts.



ARTICLE 19 champions freedom of expression and the free flow of information as fundamental human rights that underpin all others. We take our name from Article 19 of the Universal Declaration of Human Rights. It states:

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

ARTICLE 19 believes that freedom of expression and of information is not a luxury but a basic human right: it is central to achieving individual freedoms and developing democracy.

When people are denied freedom of speech or access to information, they are denied the right to make choices about their lives. Freedom of expression and access to information are essential to achieving equality for women and minorities, and to protecting children's rights. They are crucial to respond to the global HIV/AIDS pandemic, to fight against corruption and to ensure equitable and sustainable development.

ARTICLE 19 works to make freedom of expression a reality all over the world:

- ARTICLE 19 works worldwide – in partnership with 52 local organisations in more than thirty countries across Europe, Africa, Asia, Latin America and the Middle East - to lead institutional, cultural and legal change.
- ARTICLE 19 monitors threats to freedom of expression in different regions of the world and develops long-term strategies to combat them.
- ARTICLE 19 undertakes authoritative and cutting edge research and monitoring, advocacy and campaigning work.
- ARTICLE 19 produces legal analysis, set standards, and advocate for legal and judicial changes.
- ARTICLE 19 carries out advocacy and training programmes in partnership with national NGOs to enable individuals to exercise their human rights.
- ARTICLE 19 engages international, regional and State institutions, as well as the private sector, in critical dialogue.

Founded in 1986, ARTICLE 19 was the brainchild of Roderick MacArthur, a US philanthropist and journalist. Its International Board consists of eminent journalists, academics, lawyers and campaigners from all regions of the world. ARTICLE 19 is a registered UK charity (UK Charity No. 327421) based in London with international staff present in Africa, Latin America and Canada. We receive our funding from donors and supporters worldwide who share a commitment to freedom of expression.

ARTICLE 19, 6-8 Amwell Street, London EC1R 1UQ, United Kingdom.

Telp +44 20 7278 9292

info@article19.org

Fax +44 20 7278 7660

<http://www.article19.org>

Suara Rakyat Malaysia (SUARAM)

Vision Statement:

To work for a society that is peaceful, free, equal, just and sustainable by a process of empowering people and building a mass movement to uphold human rights.

How did SUARAM Begin?

SUARAM was established in 1989 by ex-ISA detainees and other activists to campaign for the abolition of the ISA. What started as a single-issue campaign evolved into an activist movement for human rights and democracy in the following years. Presently, SUARAM works towards the realisation of fundamental liberties, democracy and justice in Malaysia.

What does SUARAM do?

1. Monitoring and Documentation

Much of SUARAM's work is in monitoring and documentation of human rights violations. The work consists of gathering information from victims of human rights abuses, monitoring politicians and news. We publish the Malaysian Human Rights Report and other human rights related publications. We organise and participate in fact-finding missions. We organise training on monitoring and documentation for other NGOs.

2. Human Rights Campaigns

SUARAM campaigns on a number of issues including, the abolition of draconian laws such as the ISA, misuse of police powers, an independent and effective National Human Rights Commission and for genuine democracy. SUARAM also supports environmental issues through the SUARAM Green Desk, such as the peoples' movement against the Bakun Dam, the Sungai Selangor Dam project and the preservation of Bukit Sungai Putih Forest Reserve.

3. Human Rights Support

SUARAM intervenes and supports victims and their families whose basic rights have been violated such as in the cases of arbitrary arrests and detention, eviction and abuses of police powers. We assist marginalised communities such as the urban poor, students and indigenous peoples. SUARAM releases urgent appeals on Malaysian situation which needs immediate actions; coordinates an Urgent Arrest Team which monitors and assists people who have been arrested during peaceful assemblies; assists refugees in Malaysia as well as facilitates safe passage for other asylum-seekers.

4. Coalition Building

SUARAM networks with other social interest groups involved in human rights, labour issues, gender, environment, indigenous people and other issues of common interest.

5. International Solidarity

SUARAM campaigns for human rights in the region, especially in South East Asia. Our priority areas are Indonesia, East Timor, Aceh, Burma and Singapore.

SUARAM:

433A, Jalan 5/46, 46000 Petaling Jaya,, Selangor, Malaysia.

Telephone: +603 7784 3525; Fax: +603 7784 3526

Email: suaram@suaram.net



cambodia
TIMOR-LESTE
thailand
MALAYSIA PHILIPPINES
singapore
indonesia

suara
rakyat
malaysia
SUARAM

XIX
ARTICLE 19
SUKSES, CAMPURAN DAN BEBAS BERPENDAHULU