ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

MEMORANDUM

on

the Malaysian Official Secrets Act 1972

by

ARTICLE 19
Global Campaign for Free Expression

London
September 2004

I. Introduction

This Memorandum analyses the Malaysia Official Secrets Act (the Act) against international standards on the right to freedom of expression.

The Act, which was brought in force in 1972,[1] is a broadly-worded law that entrenches a culture of secrecy in all matters relating to public administration. It contains a very ample package 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 expansive range of information from public view. 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

[1] It was last amended in 1995.

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. We do not consider that the restrictions that the Act imposes on freedom of expression, and the powers it grants to the government to 'police' these restrictions, are a proportionate response to national security risks facing Malaysia. We are also concerned about the broad and vague legal language employed by the Act.

Section II of this Memorandum contains a brief restatement of the applicable international law, drawing on the *Universal Declaration of Human Rights* (UDHR) and the *International Covenant on Civil and Political Rights* (ICCPR). Section III contains the principal analysis of our concerns, and recommendations and suggestions for improvement are provided throughout. In addition to drawing on the text of the UDHR and ICCPR, the analysis draws on ARTICLE 19's *The Johannesburg Principles: National Security, Freedom of Expression and Access to Information* (the Johannesburg Principles).[2] This is a standard-setting document based on international legal standards as well as best comparative practice. The Johannesburg Principles have been referred to by the UN Commission on Human Rights in each of their annual resolutions on freedom of expression since 1996[3] and have been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression.[4] They have also been used by supreme courts of appeal in various countries to help interpret national security-related restrictions on freedom of expression.[5]

II. International and Constitutional Obligations

II.1 International Guarantees of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),[6] a United Nations General Assembly resolution, guarantees the right to freedom of expression in the following terms:

> 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.

The UDHR is not directly binding on States but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its

[2] (London: 1996). Available at http://www.article19.org/docimages/511.htm.
[3] See UN Doc. Nos. E/CN.4/RES/2003/42, E/CN.4/RES/2002/48, /CN.4/RES/2001/47, E/CN.4/RES/2000/38, E/CN.4/RES/1999/36, E/CN.4/RES/1998/42, E/CN.4/RES/1997/27 and E/CN.4/RES/1996/53.
[4] For example, in his 2003 and 2004 reports to the UN Commission on Human Rights: UN Doc. Nos. E/CN.4/2004/62 and E/CN.4/2003/67.
[5] See, for example, *Gamini Athukoral "Sirikotha" and Ors v. Attorney-General*, 5 May 1997, S.D. Nos. 1-15/97 (Supreme Court of Sri Lanka) and *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 (House of Lords).
[6] UN General Assembly Resolution 217A(III), adopted 10 December 1948.

adoption in 1948.[7] It has also been cited in ASEAN documents agreed by Malaysia[8] and Malaysia took part in the 1993 Vienna World Conference on Human Rights that reaffirmed its full commitment to the *Universal Declaration of Human Rights*.[9]

The *International Covenant on Civil and Political Rights* (ICCPR),[10] a formally binding legal treaty, guarantees the right to freedom of opinion and expression at Article 19, in terms very similar to the UDHR. 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 relevance here.

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.[11] In the 2001 Coolum Declaration, the Commonwealth Heads of Government declared that they,

> … stand united in our commitment to democracy, the rule of law, good governance, freedom of expression and the protection of human rights.[12]

The right to freedom of expression is also protected in the three regional human rights systems, at Article 10 of the *European Convention on Human Rights* (ECHR),[13] Article 13 of the *American Convention on Human Rights*[14] and Article 9 of the *African Charter on Human and Peoples' Rights*.[15] While neither these treaties nor the judgments of courts and tribunals established under them are formally binding on Malaysia, they 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.

---

[7] See, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). Generally, see M.S.McDougal, H.D.Lasswell, L.C.Chen, *Human Rights and World Public Order*, Yale University Press (1980), pp. 273-74, 325-27.

[8] See, for example, the Ha Noi Plan of Action, adopted at the 6th ASEAN Summit 15-16 December 1998, Hanoi, Vietnam. Malaysia is a founding Member Country of ASEAN (Association of Southeast Asian Nations).

[9] Report of the World Conference on Human Rights, UN Doc. No. A/CONF.157/24 (Part I), 13 October 1993.

[10] UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976. The ICCPR had been ratified by some 151 States by November 2003. [UPDATE]

[11] 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.

[12] Note 11, first paragraph.

[13] Adopted 4 November 1950, in force 3 September 1953.

[14] Adopted 22 November 1969, in force 18 July 1978.

[15] Adopted 26 June 1981, in force 21 October 1986.

II.2 The Importance of Freedom of Expression

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. In its very first session in 1946, the UN General Assembly adopted Resolution 59(I) which stated: "Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."[16] The UN Human Rights Committee has stressed the importance of freedom of expression in a democracy:

> [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. … this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.[17]

The guarantee of freedom of expression applies to all forms of expression, not only those which fit with majority viewpoints and perspectives:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man … it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[18]

Freedom of expression has a double dimension; it protects not only the individual's right to impart information and ideas but also the general public's right to receive them. This is explicit in international guarantees of freedom of expression such as those quoted above, and has also been stressed by international courts. The Inter-American Court of Human Rights, for example, has stated:

> [T]hose to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds. Hence, when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to 'receive' information and ideas.[19]

---

[16] 14 December 1946. The term 'freedom of information' is used as a catch-all phrase for freedom of expression and the free circulation of ideas and information.

[17] *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995, para. 13.4.

[18] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49 (European Court of Human Rights). Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

[19] *Compulsory Membership in an Association Prescribed by Act for the Practice of Journalism*, Advisory Opinion OC-5/85 of November 13, (Series A) No. 5 (1985), para. 30.

II.3 Media Freedom

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media. As the Inter-American Court of Human Rights has stated: "It is the mass media that make the exercise of freedom of expression a reality."[20]

Because of their pivotal role in informing the public, the media as a whole merit special protection. As the European Court of Human Rights has held:

> [I]t is … incumbent on [the press] to impart information and ideas on matters of public interest. Not only does it 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'.[21]

This applies particularly to information which, although critical, relates to matters of public interest:

> The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest [footnote omitted]. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.[22]

This has been recognised by the constitutional courts of individual States around the world. For example, the Supreme Court of South Africa has held:

> The role of the press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed.[23]

II.4 Restrictions on Freedom of Expression

The right to freedom of expression is not absolute. Both international law and most national constitutions recognise that freedom of expression may be restricted. However, limitations must remain within strictly defined parameters laid down by Article 19(3) of the ICCPR:

---

[20] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 19, para. 34.
[21] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.
[22] *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights).
[23] *Government of the Republic of South Africa v. the Sunday Times*, [1995] 1 LRC 168, pp. 175-6.

> 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.

It is a maxim of human rights jurisprudence that restrictions on rights must always be construed narrowly; this is especially true of the right to freedom of expression in light of its importance in democratic society. Any restriction on freedom of expression must meet a strict three-part test, as recognised by the UN Human Rights Committee. This test requires that any restriction must a) be provided by law, b) be for the purpose of safeguarding one of the legitimate interests listed, and c) be necessary to achieve this goal.

The first condition, that any restrictions should be 'provided by law', is not satisfied merely by setting out the restriction in domestic law. Legislation must itself be in accordance with human rights principles set out in the ICCPR.[24] The European Court of Human Rights, in its jurisprudence on the similarly worded ECHR provisions on freedom of expression, has developed two fundamental requirements:

> First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[25]

The second condition requires that legislative measures restricting free expression must truly pursue one of the aims listed in Article 19(3) of the ICCPR, namely the protection of the rights or reputations of others or of national security, public order (*ordre public*) or public health or morals.

The third condition means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term "necessary". This is a very strict test:

> [The adjective 'necessary'] is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable". [It] implies the existence of a "pressing social need".[26]

Furthermore, any restriction must restrict freedom of expression as little as possible. [27] The measures adopted must be carefully designed to achieve the objective in question,

---

[24] *Faurisson v. France*, Decision of 8 November 1996, Communication No. 550/1993 (UN Human Rights Committee).

[25] *Sunday Times v. the United Kingdom*, Judgment of 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

[26] *Ibid*., para. 59.

[27] *Handyside v. the United Kingdom*, Judgment of 7 December 1976, Application No. 5493/72, para. 49

and they should not be arbitrary, unfair or based on irrational considerations.[28] Vague or broadly defined restrictions, even if they satisfy the "provided by law" criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

A specific set of minimum principles related to restrictions on national security grounds is set out in the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, adopted in October 1995 by a group of experts in international law and human rights convened by ARTICLE 19 and the Centre for Applied Legal Studies of the University of the Witwatersrand. The *Johannesburg Principles* have since been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression and are used as a reference tool by the UN Commission on Human Rights.[29] They recognise that the right to seek, receive and impart information may, at times, be restricted on specific grounds, including the protection of national security. However, national security cannot be a catchall for limiting access to information. The following principles are of particular relevance:

> **Principle 2: Legitimate National Security Interest**
>
> (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
> (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.
>
> **Principle 6: Expression That May Threaten National Security**
>
> Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that:
>
> (a) the expression is intended to incite imminent violence;
> (b) it is likely to incite such violence; and
> (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.
>
> **Principle 15: General Rule on Disclosure of Secret Information**
>
> No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.
>
> **Principle 16: Information Obtained Through Public Service**

(European Court of Human Rights).
[28] See *R. v. Oakes* (1986), 26 DLR (4th) 200, at 227-8, (Canadian Supreme Court).
[29] See notes 3 and 4.

> No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

Both the UN Human Rights Committee and the European Court of Human Rights have on several occasions had to deal with cases in which States have sought to justify restrictions on freedom of expression or other human rights by reference to national security considerations.

The UN Human Rights Committee, for example, has made it clear that the onus is on the State seeking to justify a restriction based on grounds of national security by reference to a specific threat. In the case of *Jong-Kyu v. Republic of Korea*,[30] for example, the government had claimed that a national strike in any country would pose a national security and public order. The Committee held that this failed to pass the necessity part of the test.

In a similar vein, the European Court has warned that laws that restrict freedom of expression on national security grounds must lay down clear and precise definitions, so as to safeguard against abuse.[31] The Court has issued repeated warnings against excessive use of national security laws, in many cases finding violations of fundamental human rights. In a recent case involving Romania, involving data that had been gathered on the applicant by the security services, the Court noted that it had "doubts as to the relevance to national security of the information".[32] It went on to find a violation of the applicant's rights.

The Court has also warned against the use of national security laws even in situations of armed internal conflict. While stressing that it would not condone the use of the media as a mouthpiece for advocates of violence, it has said that States "cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media."[33]

II.5 Constitutional Guarantees

Article 10(1) of the Malaysian Federal Constitution guarantees freedom of speech and expression to every citizen.

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

Articles 10(2) and (4) of the Malaysian Constitution provide for restrictions on freedom of expression as follows:

---

[30] Communication No. 518/1992, views adopted July 1995.
[31] See, for example, *Klass v. FRG*, Application No. 5029/71, 6 September 1978.
[32] *Rotaru v. Romania*, 4 May 2000, Application No. 28341/95, para. 53.
[33] *Erdogdu and Ince v. Turkey*, 8 July 1999, Application Nos. 25067/94 and 25068/94, para. 54.

(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; …

(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 law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

It may be noted that these protections are weaker than those found in international law. The Malaysian Constitution has additional grounds for imposing restrictions, namely friendly relations with other countries and the privileges of Parliament or of any Legislative Assembly. More seriously, under the Malaysian Constitution, the test is not whether or not the restriction is necessarily but the much lower standard of whether or not Parliament deems the restrictions necessary or even expedient. There is no objective requirement that the restriction actually be necessary or expedient and the latter standard is much lower than that of necessity.

III. Analysis of the Act

As set out in the introduction, ARTICLE 19 is of the view that a number of the Act's provisions are incompatible with the right to freedom of expression. Below, we detail our concerns. Recommendations for reform are provided throughout.

II.1 Scope of the Act

Section 2 of the Act defines an 'official secret' as "any document specified in the Schedule to the Act and any information and material relating thereto", as well as any other information, document or material that may be classified as 'Top Secret', 'Secret', 'Confidential' or 'Restricted', by designated Ministerial officials or designated public officials. The Schedule to the Act lists three categories of documents that are always considered 'official secret':

- Cabinet records, records of decisions and deliberations including those of Cabinet committees;
- State Executive Council documents, records of decisions and deliberations including those of State Executive Council committees;
- Documents concerning national security, defence and international relations.

Under section 2A, this list may be added to at any time by Ministerial Order.

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 in fact 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".

Analysis

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'. There is no requirement of even a risk of harm from disclosure. 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.[34]

One example of the unacceptably broad reach of these provisions is the prosecution and detention of Mohammad Ezam bin Mohd Nor, an opposition politician who was charged under the Act with disclosing secret Anti Corruption Agency (ACA) reports to the media. These reports showed, he claimed, that the ACA was failing to pursue corruption cases against senior government officials. He was convicted in August 2002 and sentenced to two years' imprisonment. The High Court later reversed, noting that section 16A is "obnoxious, draconian and oppressive" and holding that it was, "void to the extent that it is in conflict with section 2 [which allows only those so authorised to classify documents]".[35]

[34] See, for example, *Norman Baker MP v. Secretary of State for the Home Department*, Information Tribunal (National Security Appeals), 1 October 2001 (United Kingdom).
[35] *Mohammad Ezam bin Mohd Nor v. Pendakwa Raya*, Case No. 42-22-2002, 15 April 2004.

Recommendations:

- Cabinet and State Executive Council decisions should, as a rule, not remain classified as 'official secrets' after final adoption.
- The definition of 'official secret' should be rendered far more precise so that only documents whose release would pose a serious and demonstrable risk to a legitimate protected interest, such as national security, may be classified.
- The class 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 executive decisions on classification should be specifically provided for.

II.2 Offences: Spying

Section 3 creates three separate offences grouped under the general category of 'spying'. Section 3(a) prohibits approaching, inspecting or passing over any prohibited place, while section 3(b) prohibits the making of any document which is "calculated to be", "might be" or is "intended to be" "directly or indirectly" useful to a foreign country. Finally, section 3(c) prohibits the obtaining, collection or dissemination of any secret password or sign or "any article, document or information which … might be … directly or indirectly useful to a foreign country". All three offences are qualified in that the prosecution must prove that the alleged conduct occurred for a "purpose prejudicial to the safety or interest of Malaysia." All three offences are punishable by life imprisonment.

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 photograph[36] 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.[37] This offence carries a maximum penalty of one year imprisonment and a fine, and the burden is on the defendant to show that he or she carried the equipment for a lawful purpose.

[36] Except for photographs or drawings made or taken from aircraft.

[37] 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.

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–
>
> (1) 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;
>
> (2) … 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
>
> (3) 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.

Analysis

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. It is possible, for example, that an academic paper or newspaper article describing a certain new scientific technology developed in Malaysia "might be useful to a foreign country" and therefore be an infringement of section 3(b) or (c).

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, in sections 3(b) and (c), 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 (the latter by virtue of section 16), 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 reverse onus:

> [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.[38]

[38] ICCPR General Comment 13, Twenty-first session, 1984.

The combined effect of the vague formulation of the offences and the reverse onus 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 well 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. These provisions thus 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 will result in mandatory life imprisonment, while a violation of section 4 will result in a section of at least one year's imprisonment. Such harsh sentences in and of themselves constitute a violation of the right to freedom of expression.[39]

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.

Recommendations:

- 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.

II.3 Other Offences

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.

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

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

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."

Analysis

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 criticise 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[40] 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. For example, a journalist may come into the possession of cabinet documents that disclose an important impending policy change relating 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, on its face, it 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.[41] Indeed, it may be noted that this provision runs directly counter to what international law mandates in terms of

[40] Note 2, Principles 15 and 16.

[41] The information would probably fall in the 'international relations' category of Schedule 1, and thus constitute an 'official secret'.

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 another flagrant violation of the presumption of innocence which 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 journalist 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 unlikely that a newspaper office might fall foul of this provision if one of its staff is suspected of having received an 'official secret'.

Recommendations:

- 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.
- Sections 7A, 7B, 13, 17 and 28 should be repealed.

II.4 Miscellaneous

Investigative powers

The Act provides the authorities with an array of special investigative powers. Section 12 empowers the Minister to order the interception of telecommunications sent or received by any person "where it appears … that such a course is expedient". Under section 19, a