



MEMORANDUM

on

the Malaysian Sedition Act 1948

by

**ARTICLE 19
Global Campaign for Free Expression**

**London
July 2003**

I. Introduction

Sedition as an offence came into existence in Malaysia during the British colonial era. The crime of sedition has its roots in an era when statesmen and political leaders were considered to be largely above reproach by the common man, and when the institutions of government were far more parlous than at present. Coups and revolutions were a constant threat, and the resort to political violence a common phenomenon. Sedition as a concept is largely antithetical to the underlying premises of modern democracy. As a result, sedition laws in many countries have either been repealed or have fallen into disuse for some time.

Against this backdrop, it is surprising to find that prosecutions for sedition are becoming increasingly common in Malaysia. The Sedition Act was first introduced in Malaysia in 1948 by the British, who used it as part of a set of legal restrictions designed to silence dissent against colonialism and British rule. This Memorandum analyses the Sedition Act 1948 in light of international and comparative standards regarding the guarantee of

freedom of expression. It also provides an outline of those standards, as well as our reasons for recommending that the Sedition Act 1948 be repealed.

II. International and Comparative Standards

II.1 International Guarantees of Freedom of Expression

Article 19 of the *Universal Declaration on Human Rights* (UDHR),¹ 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 adoption in 1948.²

Freedom of expression is also guaranteed at Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),³ a treaty with 149 States Parties, as well as in all three regional treaties on human rights, specifically at Article 10 of the *European Convention on Human Rights* (ECHR),⁴ at Article 9 of the *African Charter on Human and Peoples' Rights*,⁵ and at Article 13 of the *American Convention on Human Rights*.⁶

II.2 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:

¹ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

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

³ UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.

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

⁵ Adopted at Nairobi, Kenya, 26 June 1981, entered into force 21 October 1986.

⁶ Adopted at San José, Costa Rica, 22 November 1969, entered into force 18 July 1978.

- (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 of 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 necessary 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.

II.3 The Importance of Freedom of Expression

International bodies and courts have made it very clear that freedom of expression and information is one of the most important human rights. In its very first session in 1946 the United Nations 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.⁷

As this resolution notes, freedom of expression is both fundamentally important in its own right and also key to the fulfilment of all other rights. It is only in societies where the free flow of information and ideas is permitted that democracy can flourish. In addition, freedom of expression is essential if violations of human rights are to be exposed and challenged.

The importance of freedom of expression in a democracy has been stressed by a number of international courts. For example, the African Commission on Human and People's Rights has held:

Freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country.⁸

⁷ 14 December 1946.

⁸ *Constitutional Rights Project and Media Rights Agenda v. Nigeria*, 31 October 1998,

Similarly, the Inter-American Court of Human Rights has stated:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. ... [I]t can be said that a society that is not well informed is not a society that is truly free.⁹

This has repeatedly been affirmed by both the UN Human Rights Committee and the European Court of Human Rights.

The fact that the right to freedom of expression exists to protect controversial expression as well as conventional statements is well established. For example, in a recent case the European Court of Human Rights stated:

According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, 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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".¹⁰

These statements emphasise that freedom of expression is both a fundamental human right and also key to democracy, which can flourish only in societies where information and ideas flow freely.

II.4 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."¹¹

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'.¹²

Communications 105/93, 130/94, 128/94 and 152/96, para. 52.

⁹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No. 5, para. 70.

¹⁰ *Nilsen and Johnsen v. Norway*, 25 November 1999, Application No. 23118/93, para. 43.

¹¹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, *op cit.*, para. 34.

¹² *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

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.¹³

This has been recognised by the constitutional courts of individual States around the world. For example, the Supreme Court of South Africa has recently 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.¹⁴

II.5 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, any limitations must remain within strictly defined parameters.

Article 29 of the *Universal Declaration of Human Rights* provides:

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

Article 19(3) of the *International Covenant on Civil and Political Rights* lays down the benchmark, stating:

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

¹³ *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 (European Court of Human Rights).

¹⁴ *Government of the Republic of South Africa v. the Sunday Times*, [1995] 1 LRC 168, pp. 175-6.

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. Accordingly, any restriction on the right to freedom of expression must meet a strict three-part test, approved by both the UN Human Rights Committee¹⁵ and the European Court of Human Rights.¹⁶ This test requires that any restriction must a) be provided by law; b) be for the purpose of safeguarding a legitimate public interest; and c) be necessary to secure that interest.

The third part of this test means that even measures which seek to protect a legitimate interest must meet the requisite standard established by the term “necessity”. Although absolute necessity is not required, a “pressing social need” must be demonstrated, the restriction must be proportionate to the legitimate aim pursued and the reasons given to justify the restriction must be relevant and sufficient.¹⁷ In other words, the government, in protecting legitimate interests, must restrict freedom of expression as little as possible. Vague or broadly defined restrictions, even if they satisfy the “provided by law” criterion, will generally be unacceptable because they go beyond what is strictly required to protect the legitimate interest.

III. Sedition: History and International Practice

Sedition as an offence originated in UK. Prior to 1606, treason (an offence similar to sedition) was punishable under the Statute of Treasons of 1352. The offence of seditious libel was first created in 1606 by the infamous Star Chamber decision in *de Libellis Famosis*¹⁸ and continued to exist at common law as a species of libel. The history of sedition is a sorrowful litany of cruel repression of political dissent by intolerant and intransigent regimes.¹⁹

In most of the mature democracies, the law of sedition has now either formally been rescinded or is largely defunct. Pronouncements by courts and law reform commissions in a number of common law jurisdictions support the contention that the law of sedition serves no useful purpose, is anachronistic, is palpably undemocratic, and is an unconstitutional encroachment on the right to freedom of expression.

¹⁵ See, for example, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7.

¹⁶ See, for example, *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, paras. 28-37.

¹⁷ *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 62 (European Court of Human Rights). These standards have been reiterated in a large number of cases.

¹⁸ (1606) 5 Co. Rep. 125a, v. 208.

¹⁹ For the most comprehensive history of sedition and freedom of expression see F.S. Siebert, *Freedom of the Press, 1476-1776: The Rise and Fall of Government Control* (Urbana: University of Illinois Press, 1965).

Australia

The crime of seditious libel remains in the Commonwealth *Crimes Act* of 1914.²⁰ These provisions have, however, fallen into disuse and have been targeted for legal reform. Most importantly, recent developments in Australian law substantially circumscribe the government's ability to restrict political speech and expression.

In 1986, the Federal Parliament amended the *Crimes Act*²¹ to limit the crime of sedition to statements or actions carried out "with the intention of causing violence or creating public disorder or a public disturbance."²² These modified provisions have never been used. Most recently, the *Fifth Interim Report* of the Committee of Review of Commonwealth Criminal Law proposed that the law should be completely rewritten, focussing solely on the prohibition of incitement to violently overthrow the democratic government or constitution, or violent interference with the democratic process.²³

Canada

Although the offence of seditious libel remains in the *Criminal Code*, it has not been used since 1951, when the Supreme Court of Canada decided the landmark case of *Boucher v. The King*.²⁴ The accused, a Jehovah's Witness, had distributed leaflets which were titled "Quebec's Burning Hate for God and Christ and Freedom Is the Shame of all Canada."²⁵ The body of the impugned document recounted a detailed narrative of the persecution endured by members of the faith and called upon the people of Quebec to protest against the regime of oppression. Although the contents of the leaflet were entirely capable of provoking anger and hostility towards the administration of justice, and indeed were calculated to engender a feeling of indignance towards the injustices it alleged, the court emphasised that this alone was insufficient to found a conviction for sedition. Justice Kerwin held: "An intention to bring the administration of justice into hatred and contempt or exert disaffection against it is not sedition unless there is also the intention to incite people to violence against it."²⁶

India

The crime of sedition is contained in section 124A of the Indian Penal Code. In *Kedar Nath v. State of Bihar*²⁷ the court addressed the all-important question of whether angry and intemperate speech, undoubtedly calculated to bring the government and its

²⁰ Section 24 make it a crime (a) "to bring the Sovereign into hatred or contempt; (b) excite disaffection against the Sovereign or the Government or Constitution of the United Kingdom or against either House of the Parliament of the United Kingdom; or (c) to excite disaffection against the Government or Constitution of any of the King's dominions." The archaic language of the Act, referring as it does to the United Kingdom, reveals it to be a anachronistic holdover from colonial times.

²¹ Sections 24C and 24D.

²² *Intelligence and Security Act* No. 102, 1986, sections 12 –13.

²³ Australia, Review of Commonwealth Criminal Law, *Fifth Interim Report* (1991), para. 32.15.

²⁴ [1951] S.C.R. 265.

²⁵ *Ibid.*, p. 286.

²⁶ *Ibid.*, p. 283.

²⁷ AIR (1962) SC 955.

administration of the affairs of State into contempt and disrepute, but falling short of inciting lawlessness or disorder, constituted sedition. Balancing the values of public order with freedom of expression, the Supreme Court unanimously held:

Criticism of public measures or comment on Government action, however strongly worded, would be within reasonable limits and would be consistent with the fundamental right of freedom of speech and expression. It is only when the words, written or spoken, etc, which have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public order.²⁸

The *Kedar Nath* decision is of particular importance, since the statute being applied contained no such qualifications and did not make guilt contingent upon the intention or likelihood of violence or disorder. The Indian Supreme Court chose to give the offence of sedition this narrower and more specific interpretation because it concluded that permitting a broader application of the law was both unnecessary for the security of the State, and contrary to the basic principles of democratic free speech. Adopting the words of American founding-father and Constitutional scholar James Madison, Chief Justice Sinha stated that, when tending the tree of liberty, “it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits.”²⁹

Ireland

In 1991, in recommending the abolition without replacement of the common law offence of seditious libel, the Irish Law Reform Commission stated: “As an offence it has an unsavoury history of suppression of government criticism and has been used as a political muzzle. Furthermore, the matter which is the subject of the offence is punishable in accordance with provisions of Irish legislation.”³⁰

New Zealand

Sections 80-85 of the New Zealand Crimes Act 1961 contained provisions on seditious offences. However, in 1989 a new Crimes Act was adopted and these provisions were dropped.³¹

South Africa

The crime of sedition continues to exist at common law in South Africa, but even before the fall of the apartheid regime, the South African courts severely curtailed to scope of criminal punishment for political debate. In *Argus Printing and Publishing Co. Ltd. v. Inkatha Freedom Party*, a case concerning the law of defamation, the court observed that, “the general approach properly adopted by our courts [is] that a wide latitude should be

²⁸ *Ibid.*, p. 969.

²⁹ *Ibid.*, p. 965.

³⁰ Irish Law Reform Commission, Consultation Paper on the Crime of Libel (1991), para 217.

³¹ Irish Law Reform Commission, Consultation Paper on the Crime of Libel (1991), para 211.

allowed in public debate on political matters.”³²

Almost sixty years earlier, in the 1936 case of *R. v. Roux*, the courts considered a charge under the law of *crimen laesae venerationis*, meaning words scandalous or dishonouring of the King and government. Assuming for purposes of argument that the offence existed, Justice Curlewis stated:

The words of the article complained of in the summon would certainly not fall within the definition of the crime as...they cannot be construed as seditious or as an incitement to the taking up arms against the King or as inducing a mutiny or insurrection whereby the welfare of the King and the State (*res publica*) is placed in jeopardy.... We must interpret the language complained of by the light of modern thought and freedom of speech and not by the light of the restricted ideas of the middle ages.³³

Under the modern post-apartheid Constitution, section 16 of which explicitly guarantees freedom of expression and the press, the courts have articulated a robust defence of freedom of expression, especially in the political realm. The freedom of expression guaranteed by the Constitution is subject to a few narrow exceptions, one of which is the “incitement of imminent violence.”³⁴ This, taken together with the judicial pronouncement in *Holomisa v. Argus Newspapers Ltd.* that, “the success of our constitutional venture depends upon robust criticism of the exercise of power,”³⁵ suggests that nothing short of a direct and successful call for violence or disorder could be considered sedition under contemporary South African law.

United Kingdom

Sedition remains an offence at common law in the United Kingdom, although in practice it is obsolete and has not been used by the State for more than fifty years. Recent attempts to bring private prosecutions for sedition in the United Kingdom have also foundered. Indeed, both the judiciary and the government’s own experts agree that sedition should be completely removed from the law of England, and the United Kingdom’s Law Commission has expressed the view that there was no need to retain the offence.³⁶

In 1990, a number of individuals angered by the publication Salman Rushie’s critically acclaimed but highly controversial novel *The Satanic Verses*, sought to bring a private prosecution against the author and his publisher for blasphemy and seditious libel. The Magistrate refused to issue a summons and the Court of Appeal affirmed his decision. Their Lordships unanimously agreed with the Canadian Supreme Court’s judgement in the *Boucher* case, discussed above, that “a prosecution for seditious libel must be founded [upon] an intention to incite violence or to create public disturbance or disorder against

³² 1992 (3) SA 579.

³³ 1936 AD 271, pp. 280-81.

³⁴ Section 16(2)(b).

³⁵ 1996 (2) SA 588 (W), p. 609.

³⁶ United Kingdom, The Law Commission, *Working Paper No 72, The Codification of the Criminal Law, Treason, Sedition and Allied Offences*, para 78.

His Majesty or the institutions of government.”³⁷

United States

As early as 1798, Thomas Jefferson and James Madison condemned the continued existence of the crime of sedition as an aberration of the principle of free and democratic government.³⁸ When he became President, Jefferson pardoned all those who had been convicted of sedition and, in 1840, the United States Congress repaid all the fines which had ever been levied against individuals convicted under the *Sedition Act* 1798 on the basis that it was unconstitutional and invalid.³⁹

The Supreme Court in the landmark decision of *New York Times v. Sullivan*, stated that “no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.”⁴⁰

The limited conditions under which anti-social speech may be punished in the United States Court’s were enumerated in the subsequent case of *Brandenburg v. Ohio*.⁴¹ This case concerned statements made by leaders of a white-supremacist organisation which intimated that their group might resort to violence if the government did not alter certain policies concerning matters of race. The Court reversed the conviction⁴² and stated definitively that the American constitution only permits the punishment of speech criticising government or State institutions when it is “directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action.”⁴³ Absent either the intention to incite unlawful conduct *or* the objective likelihood that such conduct will directly result, speech could not be criminally sanctioned.

IV. Analysis of the Malaysian Sedition Provisions

There are a number of serious problems with the Malaysian Sedition Act, which fails all three parts of the international test for restrictions on freedom of expression. It is vague and broadly defined, and has been applied even more broadly than the terms of the Act would seem to warrant, thereby failing the “provided by law” part of the test. Furthermore, it does not pursue a legitimate aim; protecting government against criticism is far too tangentially linked to the aim of protecting public order to justify restricting freedom of expression on that basis. Finally, due to its overbreadth and the serious chilling effect it has on open democratic debate, it cannot be justified as necessary in a democratic society.

³⁷ *R. v. Chief Metropolitan Stipendiary Magistrate, Ex Parte Choudhury*, [1990] 1 Q.B. 429, p. 453.

³⁸ See *New York Times v. Sullivan* 376 U.S. 254 (1964), p. 275.

³⁹ *Ibid.*, p. 276.

⁴⁰ *Ibid.*, p. 291.

⁴¹ 395 U.S. 444 (1969), p. 447.

⁴² The accused was charged under Ohio’s Criminal Syndicalism statute which forbade “advocat[ing]...the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform”.

⁴³ *Brandenburg v. Ohio*, 395 U.S. 444 (1969), p. 447 [emphasis added].

It is also problematical from the perspective of basic rules of criminal law, also protected human rights.

IV.1 The Definition of Sedition

The crime of sedition is specified in Section 4 of the Sedition Act of 1948. The offence, which may attract a sentence of up to three years' imprisonment and/or a fine of up to 5000 Ringgit (approximately US\$1300), is defined in section 4 of the Sedition Act. Anyone who, "does or attempts to do, or makes any preparation to do, or conspires with any person to do" any act which has or would have a seditious tendency, who utters any seditious words, or who prints, publishes or imports any seditious publication is guilty of sedition. Furthermore, it is a crime to have in one's possession, without lawful excuse, any seditious publication.

The central notion of sedition is defined circularly 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) A 'seditious tendency' is a tendency -
 - (a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;
 - (b) to excite the subjects of the Ruler or the inhabitants of any territory governed by any government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;
 - (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;
 - (d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State;
 - (e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia; or
 - (f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of part III of the Federal constitution or Article 152, 153 or 181 of the Federal Constitution.
- (2) Notwithstanding anything in subsection (1) an act, speech, words, publication or any other thing shall not be deemed to be seditious by reason only that it has a tendency -
 - (a) to show that any Ruler has been misled or mistaken in any of his measures;
 - (b) to point out errors or defects in the Government or Constitution as by law established (except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in subsection (1)(f) otherwise than in relation to the implementation of any provision relating thereto) or in legislation or in the administration of justice with a view to the remedying of the errors or defects;
 - (c) except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in subsection (1)(f)
 - (i) to persuade the subjects of any Ruler or the inhabitants of any territory

governed by any Government to attempt to procure by lawful means the alteration of any matter in the territory of such Government as by law established; or

- (ii) to point out, with a view to their removal, any matters producing or having a tendency to produce feelings of ill-will and enmity between different races or classes of the population of the Federation.

If the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency.

- (3) For the purpose of proving the commission of any offence against this Act the intention of the person charged at the time he did or attempted to do or made any preparation to do or conspired with any person to do any act or uttered any seditious words or printed, published, sold, offered for sale, distributed, reproduced or imported any publication or did any other thing shall be deemed to be irrelevant if in fact the act had, or would, if done, have had, or the words, publication or thing had a seditious tendency.

The following examples of actions under the Sedition Act give a sense of the very broad interpretation attributed to these definitions by the authorities in Malaysia:

- The police detained National Justice Party (Parti Keadilan Nasional) Supreme Council member N. Gopala Krishnan under the Sedition Act on the basis of his comments on the brutal treatment of Indian detainees.
- Marina Yusoff, former vice president of the National Justice Party (Parti Keadilan Nasional), was arrested on 12 January 2000, for “provoking racial discord” in violation of section 14(1)(b) of the Sedition Act when in a speech on 29 September 1999, Yusoff alleged told a mostly Chinese audience not to vote for UMNO (United Malay National Organization) because it started the massacres of Chinese during the 13 May 1969 race riots.
- Zulkifli Sulong, editor of the opposition newspaper Harakah, and Chia Lim Thye, who held the permit for Harakah’s printing company, were charged under the Sedition Act in January 2000 for an article relating to the Anwar Ibrahim sodomy trial allegedly written by Chandra Muzaffar, deputy president of the National Justice Party (Parti Keadilan Nasional). The article alleged that there was a government conspiracy against Anwar.
- Karpal Singh, lead counsel for Anwar Ibrahim and deputy chairman of the Democratic Action Party (DAP), was arrested on 12 January 1999 and charged for sedition for statements he made in court during Anwar’s sodomy trial when he told the court that Anwar might have been poisoned, adding “I suspect that people in high places are responsible for the situation.”
- On 25 August 1998, opposition parliamentarian Lim Guan Eng was jailed for sedition and maliciously publishing false news for statements he made and published in 1995 accusing the Attorney General of mishandling allegations that the Chief Minister of Malacca was guilty of statutory rape of a schoolgirl. Because of his conviction, Lim Guan Eng was disqualified from being a Member of Parliament or holding elective office, was prohibited from holding any position in a political party for five years and was barred from pursuing his profession as an accountant.
- Abdullah Ahm Badawi, the Deputy Prime Minister, allegedly threatened to use the provisions of the Sedition Act against any individual or group who continued to oppose the government’s move to compel schools to teach science and mathematics

in English.

- In January 2003, the authorities raided the office of Malaysiakini, an Internet site which was a major source of independent news and information on Malaysia, and ordered it shut down under the Sedition Act after it published a letter from an anonymous reader criticising Malay rights and likening the youth wing of one of the ruling coalition parties to the Ku Klux Klan.

IV.2 Provided by Law

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.

It might be argued that the exceptions to the general rule on sedition clarify and narrow the scope of the offence. In fact, however, they indicate just how broad and undefined the offence really is. Any rule which needs an exception in favour of pointing out that the rulers are misled is quite obviously unacceptably vague. The same is true of the exception in favour of pointing out errors with a view to remedying them. Indeed, this narrow exception seems to imply that pointing out errors for any purpose other than remedying them, for example for political gain during elections, is not allowed.

In *Boucher v. The King*, the Canadian Supreme Court, striking down a similar provision on sedition, stated “as is frequently mentioned in the authorities, probably no crime has been left in such vagueness of definition as that with which we are here concerned.”⁴⁴

Vague provisions are susceptible of wide interpretation, by both authorities and those subject to the law. As a result, they are an invitation to abuse and authorities may seek to apply them in situations which bear no relation to the original purpose of the law or to the legitimate aim sought to be achieved. Unfortunately, in Malaysia, the State organs have taken advantage of the vagueness of the law as a means of silencing their critics. As the cases noted above amply demonstrate, the Malaysian authorities, including the judiciary, have given an extremely wide interpretation to the crime of sedition. Indeed, the authorities have practically given a new meaning to sedition, wielding this law to quash opposing and/or critical opinions.

Vague provisions also fail to provide sufficient notice of exactly what conduct is prohibited. As a result, they exert an unacceptable chilling effect on freedom of expression as citizens steer well clear of the potential zone of application to avoid censure. As observed by the Supreme Court of Sri Lanka, “laws that trench on the area of speech and

⁴⁴ Note 24, p. 294.

expression must be narrowly and precisely drawn to deal with precise ends. Over-breadth in the area has a peculiar evil – the evil of creating chilling effects which deter the exercise of that freedom. The threat of sanctions may deter its exercise as patently as application of the sanctions. The State may regulate in that area only with narrow specificity.”⁴⁵

In the light of the above, it is clear that the Sedition Act fails to define the scope of the various offences sufficiently clearly and narrowly to prevent abuse by the authorities or the serious chilling effect they currently exert.

IV.3 Legitimate Aim

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 measure in question must be primarily directed at that aim. As the Indian Supreme Court has noted:

So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.⁴⁶

In assessing whether a restriction on freedom of expression addresses a legitimate aim, regard must be had to both the purpose and the effect of the restriction. Where the original purpose was to achieve an aim other than one of those listed in the ICCPR and/or constitution, the restriction cannot be upheld. As the Canadian Supreme Court has noted:

[B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.⁴⁷

Of these, only public order and security are relevant to the crime of sedition. It is fairly obvious that there is simply no proximate connection between “bringing a government into hatred and contempt” and these important aims. This conclusion is supported by the jurisprudence of a number of courts around the world. For example, the Supreme Court of South West Africa (Namibia) has noted: “Because people may hold their government in contempt, does not mean that a situation exists which constitutes a danger to the security of the State or to the maintenance of public order. To stifle just criticism could as likely lead to these undesirable situations.”⁴⁸

The Nigerian High Court, in striking down the law of sedition in a decision that was later approved by the Federal Court of Appeal, emphasised:

⁴⁵ *Perera v. Attorney General & Ors*, [1992] 1 Sri L.R. 199, pp. 215 and 228 (Sharvananda, CJ).

⁴⁶ *Thappar v. State of Madras*, [1950] SCR 594, p. 603.

⁴⁷ *R. v. Big M Drug Mart Ltd*, [1985] 1 SCR 295, p. 331.

⁴⁸ *Free Press of Namibia (Pty) Ltd v. Cabinet for the Interim Government of South West Africa*, 1987(1) 614, p. 624.

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsible to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of Constitutional Government.⁴⁹

The Nigerian courts have thus recognised that not only are sedition laws not required to maintain public order and State security, in fact they actually undermine these goals. This was also the conclusion of the Inter-American Commission on Human Rights in recommending 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 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.⁵⁰ [emphasis added]

IV.4 Necessity

The necessity part of the test permits only restrictions on freedom of expression which are rationally connected to achieving the legitimate aim, which are 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 government from criticism is, in fact, more likely to undermine public order, 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, noted above. 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 exist 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

⁴⁹ *State v. Ivory Trumpet Publishing Company Limited*, [1984] 5NCLR 736, p. 748.

⁵⁰ *Compatibility of “Desacato” Laws with the American Convention on Human Rights*, Advisory Opinion of the Inter-American Commission on Human Rights, p. 209.

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 incitement or conspiracy to commit the appropriate offence or offences...⁵¹

Perhaps the most serious defect of 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, are far outweighed by the harm done to freedom of expression in its most important guise, namely as an underpinning of democracy.

Democracy involves continuous debate and participation by the public in society and politics, and necessarily entails that all views must be considered, including disagreeable sentiments. Freedom of expression is, in this regard, a bedrock of democracy. To achieve meaningful self-government, a people must have access to a free and open community of information, opinion and argument from which to derive the political intelligence necessary for informed democratic choice. Indeed, the notions of democracy and the freedom of expression have practically become synonymous.

This has particular implications for the law of sedition. As the Court of Appeal of Australia held in *Ballina SC v. Ringland*:

The idea of a democracy is that the people are encouraged to express their criticisms, even their wrong-headed criticisms, of elected governmental institutions, in the expectation that this process will improve the process of government. The fact that the institutions are democratically elected is supposed to mean that, through a process of political debate and decision, the citizens of the community govern themselves. To treat governmental institutions as having a “governing reputation” which the common law will protect against criticism on the part of the citizen is, to my mind, incongruous.⁵²

Furthermore, as Justice Rand noted in the *Boucher* case:

There is no modern authority which holds that the mere effect of tending to create discontent or disaffection, but not tending to issue in illegal conduct, constitutes the crime [of sedition], and the reason for this is obvious. Freedom of thought and belief and disagreement in ideas and beliefs, on every conceivable subject, are of the

⁵¹ The UK Law Commission, *Codification of the Criminal Law: Treason, Sedition and Allied Offences*, Working Paper No. 72 (1977), para. 77.

⁵² (1994) 33 NSWLR 680, p. 688 (NSW).

essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of our daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality.⁵³

The flood of prosecutions under the law of sedition in Malaysia noted above shows that the authorities actually use this law in a targeted way to “chill” criticism of the government. This highlights a fundamental shortcoming of the law and leads to it have a disproportionate chilling effect on democratic debate.

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.

1V.5 Strict Liability

A further problem with the Malaysian law of sedition is that it breaches the fundamental principle that any criminal offence should contain a *mens rea* or mental element, known in Latin as, *actus non facit reum nisi mens sit rea*. The Malaysian Sedition Act 1948 disregards this vital prerequisite by substituting ‘intention’ with the idea of a ‘seditious tendency’. The Act clearly specifies, in section 3(3), that the intention of an accused person is irrelevant if they committed an act which has a seditious tendency. Thus an individual who had no intention of committing sedition can be imprisoned for up to three years simply as a result of uttering something which, for example, causes certain individuals to become discontented.

V. Conclusion

ARTICLE 19 is of the view that immediate steps should be taken to repeal the Malaysian Sedition Act 1948. The law simply cannot be justified as a restriction on freedom of expression. It is excessively vague, serves no legitimate aim sanctioned by international law and it cannot be justified as necessary in a democratic society, in particular because of its overbreadth and the serious chilling effect it has on open, democratic debate.

Furthermore, steps should be taken to bring about an end to political victimisation and to allow parliamentarians, opposition party members, media, human rights organisations and any other person or body highlighting issues critical of the government the freedom to express themselves openly and without fear of retribution, legal or otherwise.

⁵³ Note 24, p. 288.