

Seditious Tendency?

**Political Patronisation of Free Speech
and Expression in Malaysia**



by Jeyaseelen Anthony



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by Jeyaseelan Anthony

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SEDITIONOUS TENDENCY?

Political Patronisation of Free Speech and Expression in Malaysia

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Laws of Malaysia: Act 15 - Sedition Act 1948

Preface

This book is an analysis of the draconian provisions in the Sedition Act 1948 of Malaysia, its history and how it affects the citizen's constitutional right to freedom of speech and expression as enshrined in the Constitution. This book will provide some understanding of, and reasons why, the Sedition Act as enacted and adopted in 1948 by the British colonial government must be abolished, or alternatively, reformed to reflect the changes in national and global political dimensions, particularly the threat of terrorism.

The Sedition Act 1948 is a relic of its time. The provisions of the Act are couched with archaic and vague wordings, in particular Section 3(1) (a) to (f), which lays down situations where words can come within the meaning of "seditious tendencies". This is implicit in words like *bringing into hatred or contempt or to excite disaffection against any ruler or against any government* in Section 3(1) (a). The language used here is broad and vague, enough to catch any statement or speech which has a tendency to question or criticise the government about its policies or actions.

There seems no line drawn between legitimate criticism and criticism that leads to *incitement to violence and disorder*. It seems that any criticism aimed at the government or its institutions is capable of having seditious tendencies under the Act. Of grave concern is the fact that the Act can be used quite easily to stifle legitimate criticism against the government and its institutions. Cases have shown that this has happened and continues to happen.

Even more worrying is the fact that the truth or falsity of the words, uttered or written, is immaterial and will not provide a defence. Even words uttered by the speaker with the noblest intention will not provide a defence. It is therefore an absolute liability offence where intention is irrelevant. In *Public Prosecutor v Mark Koding, Azmi, J* in the course of his judgment said:

"... it is immaterial whether the accused's intention or motive was honourable or evil when making the speech"

All the judge has to do is to see whether the words are likely to create disaffection against the government, the ruler or amongst the people. If, in his honest judgment he finds it is likely to do that, then the statement is seditious. The Malaysian courts have adopted the meaning of disaffection in the Australian case of *Burns v Ransley*, which means disloyalty, enmity and hostility.

In other common law jurisdictions such as Canada and India, it has been established that sedition cannot be established without proof of acts that have implicit in them the idea of subverting the government by violent means and inciting others to violence and disorder. Unfortunately, the trend in Malaysia gleaned from the cases reviewed does not involve any allegation of incitement to violence or violent behaviour.

It is my fervent hope that this book will be an impetus for further discussion and debate in Malaysia, especially in Parliament and among civil society groups, and would ultimately lead to the abolishment of the Sedition Act, even more so at this period of time, with the Act rearing its ugly head again especially after the March 2008 general elections.

Finally, I would like to thank the publishers for making this book possible, and my family for their constant encouragement and support.

JeyaseelenAnthony

*Advocate & Solicitor
High Court of Malaya*

Foreword

Laws against sedition were enacted by the British colonial government to suppress freedom and nationalist movements in their colonies. The Malaysian Sedition Act was enacted and adopted in 1948 and used by the colonial government to deal with the spread of the communist ideology and the communist insurgency, which took root in Malaya in the late 1940s. Although communism is no longer a threat and despite almost five decades of independence, Malaysia's Sedition Act has been continuously used by the Executive to silence critics.

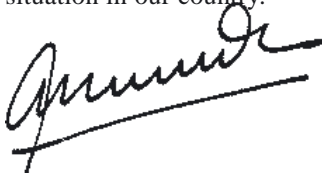
It is even more disappointing that the Act can be used against Members of Parliament (MPs) as well. MPs are expected to speak without fear or favour for the people who put them in office, but the Sedition Act is a weapon that can be used to instil fear of prosecution in their minds as well. The fear of prosecution on grounds of sedition may prevent MPs from raising important issues that affect the lives of the people. This is definitely against the established principles of democracy.

This book gives an insight into the history of the law of sedition in Malaysia. It discusses all the important aspects of the Sedition Act 1948, including its application since independence and its far-reaching implications on the freedom of speech and expression in our country.

More importantly, this book encapsulates the position and changes in sedition laws of other Commonwealth jurisdictions as well. Hence it should be a useful reference for the government of the day, and for the Human Rights Commission of Malaysia or SUHAKAM to initiate changes in our own law. It is also an easy reference for lawyers, students and MPs or, for that matter, for the general reader who is concerned about his or her constitutional right to free speech and expression.

Finally, I would encourage the author to update the book from time to time so as to keep readers abreast of developments in the sedition law, as this would invariably affect the right of every Malaysian to freely express his or her thoughts.

I am certain that this book will receive wide attention in view of the current political situation in our country.



Datuk Marimuthu Nadason

President

ERA Consumer Malaysia

March 2009

Foreword

Even before the 12th general election, Malaysia was already notorious as one of the few countries where the the Sedition Act is wielded wantonly to silence criticism and dissent.

However, in the six months after the March 8, 2008 “political tsunami”, the powers-that-be had never been so trigger-happy in the nation’s history to invoke the Sedition Act either to threaten its use or to arrest and prosecute Malaysians for exceeding the bounds of free and responsible expression, especially in the new frontier of the cyberspace.

In the past six weeks, for instance, the Home Minister, Datuk Seri Syed Hamid Albar had repeatedly warned of the use of Sedition Act, particularly against the Malaysian Bar Council for holding forums on the Social Contract and Conversion to Islam.

He also warned of action under the Sedition Act during the Permatang Pauh by-election – the first by-election after the March 8 “political tsunami” to pave the way for the return of Datuk Seri Anwar Ibrahim to Parliament after an absence of a decade.

Malaysia is at the cross roads. Should draconian and repressive laws like the Sedition Act which criminalises speech and expression be relegated to the dustbin of history in the country’s march forward to greater openness, democracy and a just rule of law?

This study on the Sedition Act 1948 by Jayaseelen Anthony cannot be more timely to contribute to the national debate on a new Malaysia built on genuine democracy, freedom, justice and solidarity of a plural society of diverse races, religions, cultures and languages.

Popular political blogger and editor of *Malaysia Today* Raja Petra Kamarudin is currently the most prominent Malaysian awaiting trial under the Sedition Act for his article **‘Let’s send the Altantuya murderers to hell’** dated April 25, 2008 which implicated the Deputy Prime Minister, Datuk Seri Najib Razak and his wife Datin Seri Rosmah Mansor in the murder case of Mongolian Altantuya Shaariibu.

The Sedition Act had claimed many victims, most notably the Penang Chief Minister and DAP Secretary-General Lim Guan Eng who was sentenced to 18 months’ jail on his conviction on a sedition charge when he challenged the role of the Attorney-General while defending the honour and dignity of an underaged Malay girl. Guan Eng, who was then a third-term Member of Parliament for Kota Melaka, was disqualified of his parliamentary position and disenfranchised of his civil rights to vote and stand for elective

office for five years after his imprisonment in Kajang Prison – barring him from two general elections, 1999 and 2004.

Guan Eng is not the only DAP leader to fall victim to the Sedition Act. In fact, the DAP leaders were the one who faced the brunt of the Sedition Act after the 1969 general election when the Sedition Act became one of the chief instruments of repression after remaining quite dormant in the first 31 years of its existence after its enactment as Sedition Ordinance 1948.

Among first victims of the Sedition Act was Dr. Ooi Kee Saik. As Penang DAP Chairman, Dr. Ooi spoke at a dinner in Penang to commemorate my release from my first spell of 17-month detention under the Internal Security Act on Oct. 1, 1970.

Dr. Ooi's speech on the injustices and inequalities under the then Alliance government was published in the December 1970 issue of the Rocket, the DAP party organ, resulting in Dr. Ooi, Fan Yew Teng (editor of Rocket and then MP for Kampar) and two printers being charged and convicted under the Sedition Act.

Dr. Ooi, like Fan, was convicted and fined \$2,000 in default six months' imprisonment – ending Dr. Ooi's short sojourn in politics.

Dr. Ooi would undoubtedly have left an indelible mark in Penang and Malaysian politics if his political commitment had not been cut short by the Sedition Act.

Malaysian politics' loss is the gain for Malaysian letters. Dr. Ooi returned to writing and shared the third prize in the Asiaweek Short Story Competition 1988 with his short story, The Shirt. This short story is now being used in an English language textbook by Singapore secondary students. Dr Ooi passed away on May 5, 2004 at the age of 82.

We should remember the victims of the Sedition Act and the sacrifices they made in the campaign to mobilise public opinion to repeal the Sedition Act to usher in a new democracy in Malaysia.

Lim Kit Siang
Member of Parliament
Ipoh Timur
PerakDarul Ridhuan

Foreword

A good book is one that ‘un-packs’ the subject, provokes thought and invites its readers to act to bring about positive change. Jeya’s book on the archaic Sedition Act does just that.

Many Malaysians have been and are victims of the legislation. Recently, Raja Petra Kamarudin was charged and Karpal Singh is being investigated under the Act. A further and unintended consequence of the Act has been the emergence of a large number of ‘sedition-defenders’ willing to pounce on any statement or deed, and to lodge police reports in the purported defence of certain institutions or persons. Many of these actions are heavily politicised and have hidden agendas, causing by themselves more fear and fissures in society compared to the act being complained of.

From the human rights perspective, freedom of expression is not absolute. Article 19 of the International Covenant of Civil and Political Rights 1966 (ICCPR) provides that States must protect and fulfill minimum guarantees of the right to freedom of expression which includes the freedom to seek and receive information. In-built safeguards to allow States to restrict free expression in the name of national security or public order may only be imposed after effective consultation with all stakeholders, and if the proposed measures are proportional and necessary to meet certain narrowly-defined objectives. Article 20(2) of the ICCPR further prohibits hate speech, incitement to or advocacy of national, racial or religious hatred, discrimination, violence or hostility. These prohibitions must be carefully crafted.

It is therefore misconceived to say that international rights law allows or encourages an unrestricted right to free expression, and that human rights is a purely ‘Western concept’. Governments that spout these ideas seek merely to besmirch human rights. Rather, any genuine discourse today between the relevant stakeholders should appropriately focus on the proportionality and necessity of the various limitations to free expression; not whether the right to free expression is to be granted or practiced relative to where one is situated in the world. As it stands, the Sedition Act does not pass the ‘rights-limitation’ test and its existence cannot be justified.

Of course, the core principle which must be accepted is the ‘natural’ and ‘original’ human position of *freedom*, as opposed to one of *restriction* or *limitation*. In other words, any discussion on free expression should be premised on the natural position that everyone must be free to express his/her views even if it includes serious or harsh critique of the

State and its policies. Compelling arguments have already been made against the Act, and Jeya has adequately surveyed the range in this book.

The State now bears the primary burden of removing legislative curbs which have artificially impinged our natural position of freedom. A first step would be to review and repeal the Sedition Act, and other draconian laws such as the Official Secrets Act and the Printing Presses and Publications Act. Existing criminal and penal legislations are already sufficient to regulate speech and expression. A second phase, post-deconstruction of anti-human rights laws, would be to re-construct the nation's system of democracy by including the 'human rights way' as a key component in law-making. A Royal Commission on freedom of expression is quite definitely required in this project, leading to a model 'Freedom of Expression and Information Act' to be implemented.

The changing landscape of communication in the 21st century with the advent of technology and increased actors in the blogosphere requires an 'expression transformation'. Jeya's book provides the impetus for this, which the country badly needs now.

The book is without doubt a necessary addition to our libraries, and an invaluable resource tool for all. I would commend it to you.

Edmund Bon Tai Soon

Chairperson

Human Rights Committee

Bar Council, Malaysia (2008/9)

Summary of Chapters

Chapter 1

A brief introduction on the right to freedom of speech and expression as provided under the Federal Constitution. The discussion focuses on various provisions in the Constitution that curtail this right and whether it is an absolute right. The role of the judiciary in interpreting restrictive laws like the Sedition Act is also looked at.

Chapter 2

The historical aspects of the law against sedition are discussed here, in particular its colonial legacy. For this purpose, the historical position of the law against sedition in England, India and Malaysia is looked into. The crux of this chapter is to show how the British colonial courts interpreted the sedition laws in India differently from that in England. Unlike in England, even statements that did not incite people to violence or disorder were held to be seditious by the British colonial courts in India. The law was mainly used against Indian nationalists and freedom fighters opposing British rule.

Chapter 3

This chapter looks at the post-independence use of the Sedition Act in Malaysia, with a review of post-independence sedition cases. This review reveals a pattern of prosecution against members of the Opposition, Opposition Members of Parliament, journalists and others pursuing campaigns where there's been some criticism of government institutions and policies. Suppressing dissent under the Act through prosecution in a court of law even stretches to what MPs say in Parliament.

Chapter 4

This chapter is about sedition laws in other Commonwealth jurisdictions. The study reveals that sedition laws are longer used in many of these countries or is undergoing massive reform.

Chapter 5

Here, how the Sedition Act 1948 is used by the Executive to silence its critics is analysed. The draconian provisions of the Act, particularly Section 3(1) (a) to (f), which describe the meaning of “seditious tendencies”, are analysed.

Chapter 6

This discussion is centred on reasons and the justification for the repeal of the Sedition Act 1948.

Glossary

Barisan Nasional	The ruling government of Malaysia, consisting of three major political parties, i.e. UMNO, MCA and MIC
Bumiputra	“Sons of the soil” or the indigenous people of Malaysia, i.e. the Malays and the people of Sabah and Sarawak. They are people accorded with special privileges and benefits
Common Law	Unwritten legal doctrines which include English customs and traditions developed by the English courts over the centuries
Communist Party of Malaya	A political party founded by Chin Peng, based on communist ideology
Court of Appeal	The second highest court in Malaysia
Dewan Rakyat	Chamber of the People (House of Representatives); Lower House of Parliament
Ex-parte	From one side only
Executive	Government of the day
Federal Court	The apex court of Malaysia
House of Commons	Parliament (Lower House) of United Kingdom
Ibid	In the same passage or case
Infra	Below
Malaysian Chinese Association (MCA) ..	The political party representing the interests of the Chinese in Malaysia

Malaysian Indian Congress (MIC)	The political party representing the interest of the Indians in Malaysia
Malay	The dominant race in Malaysia
Merdeka Constitution	The Federal Constitution of Malaysia, drafted by the Reid Commission before Malaysia achieved its independence in 1957
Mens rea	Intention
Pardons Board	A committee chaired by the Yang di-Pertuan Agong to hear appeals and grant pardon to persons sentenced to death
Pari materia	Same as
Penal Code	Criminal law of Malaysia
Pakatan Rakyat	Coalition of opposition parties formed after the 2008 general elections.
September 11(9/11)	The date when terrorists attacked the World Trade Centre in New York and the Pentagon.
Sultan	The title of the Malay ruler of a State
SUHAKAM	Suruhanjaya Hak Asasi Manusia (Human Rights Commission of Malaysia)
Supra	Above
Yang DiPertuanAgong	The King of Malaysia

Abbreviations & Acronyms

ALLER	All England Law Reports
ALRC	Australian Law Reform Commission
CLR	Commonwealth Law Reports
CLJ	Current Law Journal
DAP	Democratic Action Party
DLR	Dominion Law Reports
ILR	Indian Law Reports
AIR	All India Law Reports
MLJ	Malayan Law Journal
MP	Member of Parliament
SC	Supreme Court
R	Regina
UMNO	United Malays National Organisation

CHAPTER 1

FREEDOM OF SPEECH UNDER THE MALAYSIAN CONSTITUTION

The Constitution of Malaysia guarantees freedom of speech and expression¹. Though freedom of speech is guaranteed as a fundamental right enshrined under Part II of the Constitution, under Article 10(2) however, Parliament may impose “such restrictions as it deems necessary or expedient” on eight specified grounds². Thus, the freedom of speech and expression in Malaysia is not an absolute right.

Article 149 provides that any law designed to stop or prevent the six specified incidents or circumstances contained in the Article is valid, notwithstanding that it is inconsistent with any of the provisions in Article 10(1)³. The Sedition Act 1948 mainly represents the restrictions envisaged by Article 10(2). The restriction on the freedom of speech and expression is justified insofar as it is declared “*necessary and expedient in the interest of the security of the federation, public order and morality*”⁴.

1.1. Is the freedom of speech and expression an absolute right?

By reason of the permissible restrictions under the Constitution, the freedom of speech and expression is not an absolute right. One cannot deny that there must be some restriction to this right.

1 Article 10 (1) (a) reads: Every citizen has the right to freedom of speech and expression.

2 The eight grounds specified under clause 2 of Article 10: “Parliament may by law impose (a)... such restriction as it deems necessary or expedient in the interest of 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”.

3 Article 149 – The six specified grounds are (1) to cause a substantial number of citizens to fear organised violence against persons or property; (2) to excite disaffection against the Yang DiPertuan Agong or and Government in the Federation; (3) to promote feelings of ill-will and hostility between races or other classes of the population likely to cause violence; (4) to procure the alteration, otherwise than by lawful means, of anything by law established; (5) which is prejudicial to the maintenance or the functioning of any supply or service to the public in the federation or any part thereof; and (6) which is prejudicial to public in, or the security of, the federation or any part thereof.

4 Article 10(2) (a) Federal Constitution.

In reference to such restriction, Professor Harry Street noted:

“... The citizen may do as he likes unless he clashes with some restriction on his freedom. The law does not say: ‘You can do that’; it says ‘You cannot do this’, which means that you can do everything else except that which it says you cannot do. Whenever such a prohibition is made, the reason will be that some other interest is rated more important than that freedom on which it impinges.”⁵

Lord Denning in *Freedom Under The Law* put it thus:

“The freedom of the individual, which is so dear to us, has to be balanced with his duty; for, to be sure every one owes a duty to the society of which he forms part. By personal freedom I mean the freedom of every law-abiding citizen to think where he will on his lawful occasions without let or hindrance from any other persons. ... It must be matched, of course, with social security, by which I mean the peace and good order of the community in which we live. The freedom of the just man is worth little to him if he can be preyed upon by the murderer or thief. Every society must have the means to protect itself from marauders. It must have powers to arrest, to search and to imprison those who break the laws.”⁶

In the same book, Lord Denning commented on the freedom of mind and conscience and observed:

“... In the last lecture I was concerned with personal freedom... Now I come to the freedom of his mind and of his conscience. This is just as important, if not more important, than his personal freedom. To our way of thinking, it is elementary that each man should be able to inquire and seek after the truth until he has found it. We hold that no man has any right to dictate to another what religion he shall believe, what philosophy he shall hold, what shall be his politics or what view of history he shall accept. Every one in the land should be free to think his own thoughts – to have his own opinions, and to give voice to them, in public or in private... and free also to criticise the government or any party or group of people...”

5 Harry Street (Freedom, The Individual and the Law (5th edition) at p.12.

6 Freedom under the Law (Hamlyn Lectures, first series), p.4, 5, 35 and 36.

“... Although this principle seems obvious to us, it is on occasions prone to bring the individual into conflict with the State, or rather with the people who are in power in the State. This country, just as every country, preserves to itself the right to prevent the expression of views which are subversive of the existing constitution or a danger to the fabric of society...”⁷

Finally, Professor Harry Street sums up the need for restrictions as follows:

“..... freedom of speech can never be a positive power to do something. Every legal system prescribes that you cannot do this and this: you must not defame another, you must not be seditious, you must not be obscene, and so on. The legal concept of liberty is that there are residual areas of great importance where man is free to act as he likes without being regulated by law.”⁸

Thus, it is a well recognised principle that there cannot be absolute freedom when we speak of a fundamental right or human rights. Freedom is not an absolute right in all common law countries. As Lord Denning put it, it is freedom under the law. However, although the right to free speech and expression is not an absolute right, laws restricting free speech and expression should be interpreted in a way that the greatest latitude is given to that right. A law restricting free speech and expression should not be interpreted in a restrictive manner. The law should be used as a tool for social change and not as tool to stifle free speech and expression. Any effort to stifle free speech and expression, drastically, can be expected to lead to the decline in innovation and creativity that are essential for the progress of a nation. Freedom of speech and expression is the catalyst for bringing change in any society.

In this regard, the judiciary should play an important role in ensuring that laws restricting the freedom of speech and expression are interpreted to give greater liberty for fundamental rights. The judiciary should be more creative and adventurous, instead of interpreting the law strictly in accordance to the “*black letter*” of the law. Supporting this call for greater liberation of human rights in Malaysia, former Court of Appeal judge Datuk Mahadev Shankar remarked:

“Human rights will become an empty catchphrase unless Malaysian judges are sensitive to the role they should assume in bringing about normative changes to keep in line with the current imperative needs of the civil

7 Ibid, p312.

8 The Family Story at page. 177 - 178.

society. The human rights of life and liberty, and the pursuit of justice, happiness, truth, knowledge, beauty, peace and harmony, are all needs which should not be confused with wants.”⁹

Unfortunately, the Malaysian judiciary has not been creative when issues relating to freedom of speech and expression are raised before it. This is evident from a string of prosecutions of individuals, ranging from politicians from the opposition parties, Members of Parliament, newspaper editors/publishers and human rights activists under the Sedition Act 1948. The Malaysian courts have strenuously rejected the common law notion that statements written or spoken must incite others to violence or disorder in order to be seditious, thereby adopting a strict interpretation of the Sedition Act 1948.

Besides the Sedition Act, another severe restriction to the freedom of speech and expression in Malaysia is contained in the Constitution (Amendment) Act 1971¹⁰. This amendment has made it illegal for anyone, including Members of Parliament during parliamentary debates, to question citizenship matters under Part III of the Constitution or any matter pertaining to the Rulers¹¹, the national language¹² or the special rights of the Malays¹³. The questioning of these Articles or the rights and privileges provided under these Articles may incur sanction under the Sedition Act 1948.

With the existence of the Sedition Act 1948 and the strict interpretation of the Act adopted by Malaysian courts and the limitations in the Constitution that curtail the right to free speech, freedom of speech and expression in Malaysia rests on a very precarious perch. Its survival depends entirely on the attitude taken by the courts and the self-restraint of the Executive in Parliament¹⁴.

9 His keynote address at the Third National Medico-Legal Conference on 2nd June 2001.

10 Act A30/71.

11 Article 181 of the Federal Constitution.

12 Article 152 Federal Constitution

13 Article 153 Federal Constitution

14 Supra n .3 - Under Article 149, Parliament may enact laws that may override the fundamental liberties of the individual as enshrined in the Constitution. Any law passed may be inconsistent with any of the provisions of Articles 5, 9, 10 or 13.

CHAPTER 2

SEDITION - MEANING AND ITS ORIGIN

2.1. Meaning

The crime of sedition makes it an offence whenever words or publications are used to stir up discontent or opposition to the establishment/government.

2.2. Origin

The crime of sedition is purely an English creation¹⁵. Prior to the 17th Century, the offence of seditious libel emerged as an offence in the Court of Star Chamber¹⁶. In *De Libellis Famosis*, the defendant was prosecuted for defaming the deceased Archbishop of Canterbury. The court held that the basis of criminal libel was that it incited breach of peace. The truth or falsity of the statements did not provide a defence. At the time of the decision, the monarchy was under threat from rising parliamentarians. The advent of the printing press at that time created the need to control the expression of ideas that were critical of the Church and the State. Thus, the offence of sedition came into being during a period when the divine right of rulers was not only accepted but believed to be necessary; when rulers who dispensed laws were largely above question and criticism; and when criticism of rulers was considered sinful as well as unlawful¹⁷. The Star Chambers was abolished in 1641 and sedition then began to develop in the common law courts.

In 1791, Charles Fox proposed a Bill in the House of Commons, which became the Fox Libel Act 1792. The Act says that it is the jury, and not the judge, who can decide on whether a libel is seditious. This made it easier for persons accused to canvass political issues before a jury and moreover, the fine line between legitimate criticism and sedition

15 Some date the genesis of sedition from the Statute of Westminster, 1275, 3 Edw.1, c.34.

16 The Court of Star Chamber was created by Henry VII in 1487 to combat the evils of feudal anarchy and was the main tool by which the Tudors restored authority of the national courts and repressed baronial disorder.

17 Lawyers and the Rule of Law on Trial – Sedition in Malaysia, p.9, an article published by the Lawyers Rights Watch Canada by Davidson, Gail, Friesen, Tami and Jackson, Michael QC, May 2000.

is drawn by the jury, a body independent of the State. As a result, in England, prosecution for sedition became more difficult and less attractive to the government to pursue an action.

At the end of the 18th Century, sedition, or more commonly known in common law as the crime of seditious libel, was backed up by several statutes, for example the Sedition Meetings Act 1817. In common law, the main weapon in the government's armoury is the crime of seditious libel. This covers any attack on any institution of the State. Historically, the crime of sedition was used to stifle criticism of government policy, including all democratic debate, encompassing any political opposition to the government of the day¹⁸.

Subsequently, the trend in common law cases of seditious libel seemed to show that mere criticism, or use of words that merely create disaffection or a feeling of enmity against the government, is not sufficient to constitute sedition. Instead attention turned to public order concerns, where words, written or spoken, must intend to provoke violence aimed at disturbing or overthrowing the government by force in order to be liable to conviction. The test on what constitutes sedition was laid down as early as 1839 in *R v Collins*. The judge in his direction to the jury laid it down that "*you are to consider whether ... they meant to excite the people to take power into their own hands, and meant to excite them to tumult and disorder ... the people have a right to discuss any grievances that they have to complain of, but they must not do it in a way to excite to tumult*"¹⁹.

In *R v Caunt*²⁰, where a newspaper editor was prosecuted in respect of an article which was alleged to create a risk of disorder because of its anti-Semitic bias, the judge instructed the jury that the prosecution had to prove the defendant intended to provoke such disorder, and the jury acquitted the defendant. Similarly, in *R v Burns*²¹, the judge instructed the jury that in order to establish the necessary *mens rea* (intention), there must be distinct intention to produce disturbances or disorder. In *R v Chief Metropolitan Magistrate ex parte Choudhury*²², a Divisional Court held that seditious libel is founded on an intention to incite violence or to create public disturbance or disorder against the government or the institutions of the government. In this case, the court decided that there was no evidence that Salman Rushdie or the book publishers had such an intention, and it dismissed the application for judicial review.

18 Sir James Stephen, *A History of the Criminal Laws of England* (London Macmillan, 883 3vols), p.299 – 376.

19 [1839] 3 St. Tr. (N. S) 1149.

20 [1947] 64 L. Q. R. 203.

21 [1886] 16 Cox cc 355.

22 [1991] 1 All ER 306.

The liberal approach taken under common law in England in interpreting the offence of sedition seems to be a balanced one, in that it does not criminalise the mere use of words, written or spoken, which criticise government policy or any of its institutions or which merely creates feelings of disaffection or enmity against the government. In other words, the approach adopted is not a “catch-all” approach. It only criminalises words, written or spoken, which tend to incite to violence or public disorder. Therefore, the balance between the need to protect society at large from mayhem and disorder and the need for the people to express their thoughts fully is properly struck here.

However, it is interesting to note that the crime of sedition is rarely invoked in England. In fact, the Seditious Meetings Act 1817 was replaced with the Public Order Act 1986²³.

2.3. India

Legislation on sedition in India is modelled on the English common law of sedition. The introduction of the English common law into India began from the early 1600.

It was not until 1772 with the initiation of the Warren Hastings Plan, that English Law was extended to India and enforced by all courts in the country. On matters regarding inheritance, marriage, caste and religion, Hindu and Islamic law prevailed. The plan of 1772 therefore indirectly introduced English law in India. Islamic criminal law was administered for a long time in the criminal courts of India. However the British saw it fit to change that. The British regarded the Islamic laws as archaic. Islamic criminal law was finally abolished as a law of general application to all individuals²⁴, which saw the creation of the Penal Code of 1860 and the Criminal Procedure Code 1860.

Much of Hindu law and custom was also criminalised as a result of the 1860 Penal Code. For example, the practice of starving female infants to death was declared to be a crime equivalent to murder.

Through the appointment of the Indian Law Commission headed by Lord Macaulay, English law, to the extent that it suited Indian conditions, usages and customs, was systematically imported to India. In 1860, the Indian Penal Code²⁵ was placed in the Indian statute book, thereby eliminating all forms of Islamic and Hindu law except in cases of inheritance, marriage, caste and religion.

23 Law Commission Report No 123 Criminal Law (HMSO 1983).

24 Regulation VI of 1832 - brought the end to Mohammedan Criminal Law, the result being that this law was no more applicable as a general law in the civil and criminal courts of India.

25 In *pari materia* with the Malaysian Penal Code.

The introduction of English criminal law into India came with it the common law on sedition. The common law offence of sedition was incorporated into the Indian Penal Code of 1860 under Section 124A of the Act²⁶.

2.4. Double Standards

However, although the English common law on sedition adopts the liberal approach, British colonies were visited with laws against sedition even more draconian than the English common law model²⁷. The British saw it necessary to introduce a rigid law on sedition as it was necessary to stifle any opposition or criticism against its colonial policies or to its colonial rule. It was actually a matter of political convenience. The colonial British court in India systematically refused to apply the liberal approach enunciated by the English common law. This was clear in the prosecution of Indian nationalists and freedom fighters like Bal Gangadhar Tilak and Mahatma Gandhi on charges of sedition²⁸.

The court in the Tilak's case adopted the view that intention to create public disorder or inciting people to violence is irrelevant²⁹. In a nutshell, so long as the words, written or spoken, tend to arouse, stimulate or cause in the minds of people a feeling of enmity, hostility or dissatisfaction towards the government, that is in itself enough for a person to be guilty of sedition. This view is clearly different from the liberal view adopted under the English common law.

It is clear from the narrow approach adopted in Tilak's case that the British were practising double standards by, on the one hand refusing to apply the liberal interpretation of sedition as established by the English common law, in India, and on the other hand by

26 Section 124A - Sedition ... whoever by words either spoken or written, or by signs or by visible representation or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the government established by law in India, shall be punished with imprisonment for life, to which fine may be added or with imprisonment which may extend to three years to which fine may be added, or with fine.

27 Freedom of Expression: Its extent and the problem it encounters by Dato' Mahadev Shankar, paper presented at the 12th Commonwealth Law conference, Sept 13-16, 1999.

28 Balgangadhar Tilak was an Indian nationalist and freedom fighter who was the first popular leader of the Indian independence movement. A member of the Indian National Congress, he was arrested by the British for sedition in 1906. He was found guilty by a British court and was imprisoned from 1908 to 1914 in Mandalay, Burma. After calling for a campaign of mass civil disobedience, Mahatma Gandhi was arrested on March 10, 1922, tried for sedition and sentenced to jail for six years. He was convicted for sedition although his struggle for the independence of India was based on principles of "ahimsa" or non-violence

29 Reported in [1891] 19 ILR Bani 112.

faithfully adhering to the liberal common law interpretation of sedition, in England. The intention of the British was clearly to suppress and punish per se any individual who attempted to create feelings of disaffection, hatred or contempt of its rule, irrespective of the whether or not disorder followed or was likely to follow. Clearly, this was the most convenient way to successfully prosecute freedom fighters and nationalists. The crime of sedition was the most effective weapon used by the British to suppress dissent and to fulfil their colonial agenda in India. A further qualification of incitement to violence and public disorder to prove the offence of sedition would have definitely been an hindrance.

The Legislature, Executive and Judiciary in British India were oriented to protect and promote the interests of the British. The British courts administered justice according to law that pretended to be impartial and neutral³⁰. In short, there was one law for the rulers and another for the ruled³¹. A classic example of this situation was the unfair and inconsistent interpretation of the offence of sedition in India.

2.5. Malaysia

The Malaysian Sedition Act 1948 was enacted by the British colonial authority and it came into force into the then Malaya before independence³². The Act is basically a copy of Sir James Stephen's definition of what is and what is not seditious³³. The Act was used primarily to fight the communist insurgency that began in 1948.

It should be noted that although Malaysia was a British colony, there were no prosecutions under the Sedition Act during the period of its colonisation. Paradoxically, prosecutions under the Act began only after independence from the British in 1957 and increased thereafter. This is clear from a string of sedition cases after independence. Ironically, the Act was never used against communist sympathisers or leaders; it was mainly used against members of the opposition political parties, Members of Parliament, journalists, publishers and social activists. The Sedition Act continues to be used with full force today, despite the communist insurgency³⁴ having ended.

30 Human Rights under the Indian Constitution- The Philosophy and Judicial Gerrymandering by P.L Mehta and N. Verma -Deep & Deep Publication Ltd 1999.

31 Ibid, p.20.

32 The Sedition Act came into force on July 17, 1948. Revised in 1969, it was gazetted as PUCA 282/70.

33 Digest of the Criminal Law, Sir James Stephen (3rd edition, Art. 91).

34 The Communist Party of Malaysia laid down weapons and surrendered to the Malaysian and Thai governments by signing a peace accord on Dec 2, 1989.

CHAPTER 3

POST INDEPENDENCE USE OF THE SEDITION ACT

3.1. Background

The improper and indiscriminate use of the Sedition Act resulted in many individuals being charged and convicted for merely raising issues of public interest that highlighted unfairness in government policies and actions with the sole intention of seeking justice and social change.

Under Section 3(1) of the Sedition Act 1948 it is “seditious tendency” for an individual to utter words or write anything which (a) brings into hatred or contempt or to excite disaffection against any Ruler or against any Government; (b) excites the subjects of any Ruler or the inhabitants of any territory of the Ruler or governed by the Government, the alteration otherwise than by lawful means, of any matter as by law established; (c) brings into hatred or contempt or excites disaffection³⁵ 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 the Ruler of any State or amongst the inhabitants of Malaysia or of any State; or (e) promotes feeling of ill-will and hostility between the different races or classes of the population of Malaysia; or (f) questions any matter, right, status, position, privilege, sovereignty or prerogative protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution.

The Act declares that intention is irrelevant if in fact the speech or publication had a seditious tendency, thus making it an offence of strict liability³⁶. In *Mark Koding*³⁷, Justice Azmi observed “... *it is immaterial whether the accused’s intention or motive was honourable or evil when making the speech*”. The decision of the High Court in *Ooi Kee Saik*³⁸ established that the truth or falsity of the words uttered is immaterial and it is

35 Disaffection ... in the context of the Sedition Act means more than political criticism; it means the absence of affection, disloyalty, enmity and hostility. To “excite disaffection” in relation to a government refers to the implanting or arousing or stimulating in the minds of people a feeling of antagonism, enmity and disloyalty, tending to make the government insecure. Per Justice Raja Azlan Shah in *PP v Ooi Kee Saik*.

36 Strict liability offences are where intention to commit the crime is irrelevant; mere commission is sufficient

37 *Infra* n.36.

38 *Infra* n.40.

not a defence to a charge for sedition. It is also immaterial whether or not the words complained of could have the effect of producing or did in fact produce any of the consequences enumerated in Section 3(1) (a) to (f). That means the prosecution need only prove that words were spoken. This is one of the reasons why prosecutions for sedition almost always end in conviction.

In 1970, the Sedition Act was amended by adding paragraph (f) to sub-section (1) of Section 3 as follows³⁹ :

(f) A seditious tendency is a tendency ... 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.

The 1970 amendment widened the definition of “seditious tendency” by making virtually taboo any public discussion calling into question the provision of Part III or Article 152, 153, 181 of the Federal Constitution. The amendment has indeed led to the indiscriminate use of the Sedition Act, sometimes even suppressing legitimate criticism against government policies and measures.

3.2. Effects of its use

The effect of the 1970 amendment was so far-reaching that it would even be seditious to question or debate these issues in Parliament, where issues of public interest and those concerning the will and aspirations of the people are brought up for scrutiny and debate. In 1978 for example, Mark Koding⁴⁰, a Member of Parliament from the State of Sarawak and an MP from the ruling coalition, was charged with uttering seditious words, an offence punishable under Section 4 (1) b of the Sedition Act 1948. He was alleged to have uttered the seditious words in the course of his speech in Malay in the Dewan Rakyat. The alleged seditious words were verbal demands for the closure of Chinese and Tamil medium schools in Malaysia, the abolition of the use of the two languages on road signboards, contravening Article 152(1) proviso (a) of the Federal Constitution⁴¹ and his suggestion

39 Amendments made in response to the May 13, 1969, racial riots in Kuala Lumpur. The cause of the clashes were because of inflammatory speeches made by electoral contestants during the 1969 general election campaign, where issues concerning the national language, special position of the Malays were debated and called into question. Consequently, the King declared a state of Emergency on May 15, 1969. The Emergency (Essential Powers) Ordinance No. 45 of 1970 makes it an offence to question these issues.

40 PP v Mark Koding [1983] 1 MLJ 111.

41 Article 152 (1) proviso (a) The national language shall be Malay language and shall be in script as Parliament may by law provide: Provided that – (a) no person shall be prohibited or prevented from using (otherwise than for official purposes), or from teaching or learning, any other language;

that if such closure of these schools contravened Article 152, then the Federal Constitution itself should be amended or if necessary, repealed.

The court held that the accused was not guilty of sedition when he advocated the closure of Tamil and Chinese medium schools as the court was of the view that proviso (a) of Article 152 only protects the usage (except for official purposes), teaching or learning of any other language, other than the national language (Malay language). The proviso does not justify the extension of the protection to the operation of schools where the medium of instruction is in Chinese or Tamil. This is so since the proviso only contains the words “teaching or learning any other language” as opposed to teaching or learning in any other language. As for Koding’s suggestion that the use of the Chinese and Tamil languages in signboards be abolished, the court held that the accused was not guilty since he merely demanded the implementation of the national language as provided for in the Article.

Although, Koding was found not guilty for the first two charges, he was convicted on the third, for suggesting that Article 152 be amended or repealed if necessary, to implement his proposals. He was placed under a bond of good behaviour, without a conviction recorded.

The decision in Mark Koding is as good as saying that an MP should refer to the Sedition Act first before he or she wishes to articulate or raise a particular issue in Parliament. Therefore, the 1948 Act severely restricts the parliamentarian’s duty to speak without fear or favour when raising issues of public interest. Applying the Sedition Act in Parliament is indeed shocking, as even the presiding judge observed that “*the law of sedition in this country is difficult to understand due to its artificial nature and until recently, even a Member of Parliament could not be expected to know why his freedom of speech has been limited, although sections 3 and 8 of the Houses of Parliament (Privileges and Powers) Ordinance have not been expressly repealed*”⁴². Parliamentary privilege is thus no defence for words that are considered to be seditious. A leading constitutional expert has even commented that if elected Members of Parliament are prevented from questioning sensitive issues (as envisaged in the 1970 amendments) in Parliament and if elected MP’s are not trusted to deal with these fundamental issues, then the need for elections would seem to be questionable⁴⁴.

The judicial approach to the offence of sedition in Malaysia has favoured the restrictive

42 Ibid at p.117.

43 PP v Ooi Kee Saik (1971) 2 MLJ 108.

44 See Andrew Harding, Law, Government and the Constitution in Malaysia Kluwer Law International 1996 at p.195.

interpretation as opposed to the liberal approach of the English common law, and this unfortunate scenario has contributed significantly to the abuse of the Sedition Act.

This unfortunate state of affairs was again seen when Dr Ooi Kee Saik⁴³, a leader of the Democratic Action Party (DAP), one of the main opposition parties in Malaysia, was sentenced to pay a fine under Sedition Act for having uttered seditious words in his speech during a party dinner. In his speech, Dr Ooi lamented the domination of one particular race (the Malays) in the army, police, educational institutions and business and said these policies do not augur well with the government's policy on racial integration. He went on to accuse the government of gross partiality in favour of one race. The court found that the issues raised by Dr Ooi amounted to bringing the government into hatred or contempt, or exciting feelings of disaffection against the government.

Lawyers for Dr Ooi argued that in interpreting the Sedition Act, the court ought to follow the common law principles of England. However, the court rejected the plea and instead chose to follow the narrow interpretation of the offence of sedition as established in Tilak's case⁴⁴. The court seemed to have overlooked the fact that the Tilak case was decided at a time before India gained its independence, where sedition laws were interpreted narrowly to suit the political agenda of the British Empire.

It must be appreciated that Dr Ooi was only calling for greater racial integration among the various races in Malaysia in order to prevent racial imbalance in the institutions of government and that he was only pointing out to the government that they should do away with policies that do not promote racial integration, which is a recognised objective of the government. He did not incite any members of his party or the general public to violence. In fact, many government ministers have time and again called on the government to maintain better racial balance in the various institutions of government. The issues raised by Dr.Ooi also falls squarely under Section 3(2) (b) of the Act as he had only pointed out errors and defects in government policies and weaknesses in its implementation⁴⁵. It is therefore difficult to understand how Dr Ooi's statements could be considered seditious.

44 Ibid, p.111: "Although it is well to say that our sedition law had its course, if not its equivalent, from English soil, its waters had, since its inception in 1948, flowed in different streams. I do not think it necessary to consider the matter in great detail because I have been compelled to come to the conclusion that it is impossible to spell out any requirement of intention to incite violence, tumult or public disorder in order to constitute sedition under the Sedition Act. The words of subsection (3) of Section 3 of our Sedition Act and the subject matter with which it deals repel any suggestion that such intention is an essential ingredient of the offence".

45 Section 3(2) (b) – to point out errors or defects in any government or constitution as by law established (except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (f) of sub-section (1) otherwise than in relation to the implementation of any provisions relating thereto)

In 1971, a journalist from a Malay newspaper, Melan Abdullah⁴⁶, was charged with sedition for a news report with the subheading that read, *Abolish Tamil- or Chinese-medium schools in this country*. This statement was considered to be seditious as it challenged the provisions of Article 152 (1) (a) of the Constitution. The subheading was part of a report on a talk given by a prominent Malay leader and MP from the ruling coalition, the Barisan Nasional⁴⁷. Here again, the common law approach was not used by the court to interpret the offence of sedition. The irony was the court, while acknowledging that the MP might have uttered the seditious statement while giving the talk, decided against the journalist and as a result, it was the journalist who had to bear the brunt of the Sedition Act. He became the scapegoat⁴⁸. The journalist's appeal was dismissed and the punishment, a fine imposed on him by the lower court, was also affirmed.

The wanton use of the Sedition Act can also be seen in the prosecution of *Param Cumaraswamy*⁴⁹, a prominent lawyer and human rights activist, who was charged with having uttered seditious words at a press conference, where he made statements calling upon the Pardons Board to recommend to the King that the death sentence on a man charged with possession of a firearm be commuted to life imprisonment, as it had done in another more serious case where the accused, a influential politician and a serving minister, was guilty of discharging a firearm and committing murder. The accused also urged the Pardons Board to exercise its powers fairly and uniformly so that people would not be made to feel that the Board was discriminating between the rich and the poor in terms of severity of sentence. The prosecution alleged that the utterance of these words by the accused had a tendency to raise discontent or disaffection among the subjects of the Yang DiPertuan Agong (the King) or any Ruler of any State and to bring into hatred or contempt or to excite disaffection against any Ruler or against any government, as contained in Section 3 (1) (a) and (b) of the Sedition Act.

Lawyers for Param Cumaraswamy argued, that by reason of Article 10(2)(a) of the Federal Constitution, inciting others to public disorder or violence was an essential ingredient of the crime of sedition, which is the view adopted under the English common law. However

46 PP v Melan bin Abdullah (1971) 2 MLJ 280.

47 The Barisan Nasional (National Alliance) is a coalition of political parties representing the interests of the Malays (United Malay National Organisation, UMNO), Chinese (Malaysian Chinese Association, MCA) and the Malaysian Indian Congress (MIC). The coalition has been the ruling government since independence and has since expanded to include several more political parties from the peninsula, Sabah and Sarawak.

48 Ibid, p.283.

49 PP v Param Cumaraswamy [1986] 1 MLJ 512. Param Cumaraswamy was the former United Nations Special Rapporteur on the Independence of Judges and Lawyers.

this argument was again shot down by the court⁵⁰.

Again, the need for greater recognition of freedom of speech and expression, which is afforded in common law, was completely rejected. Under Article 10(2), the restriction that is imposed on the freedom of speech by the Sedition Act is for the purpose of the prevention of public disorder and the maintenance of public order⁵¹. That means words, written or spoken against the government, with the sole intention of subverting the government through violence or by inciting others to violence in order to bring a change of government, or where the words in themselves incite others to violence or public disorder in order to effect changes in government policy or measures, then and only then, should the words be considered as seditious.

Words, however strong or vigorous, which are directed to a very strong criticism of government policy with a view to call for its improvement or its alteration by lawful means, or criticism of any acts or omission of a public official, should not be considered seditious until and unless those words incite others to violence or public disorder in order to bring about these changes.

The court in deciding *Param Cumaraswamy's* case also refused to be moved by the allowance for greater freedom of speech and expression as established by the Indian Supreme Court in *Kedar Nath*⁵², where it was established that only when the words have *“the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in ...”*⁵³.

50 Ibid, p.517-518. Per Justice N.H Chan: “Public disorders may well be, and no doubt often are, the result of wild ill-considered words, but there is no requirement in the constitutional provision that the law made under it must be aimed at an intention to produce that result. As here, Section 3(1) of the Sedition Act does not require proof from the words themselves of any intention to produce such a result. Those words which would be necessary to support the argument of the defence need not be imported into Section 3(1) of the Sedition Act.”

51 Raja Aziz Adrusse in a paper presented at the 12th Commonwealth Law Conference 13-16 Sept 1999.

52 *Kedar Nath v State of Bihar*, AIR 1962 SC 955.

53 Ibid, p.520. Per Justice Sinha: “Comments, however strongly worded, expressing disapprobation of actions of the government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal. In other words, disloyalty to government established by law is not the same thing as commenting in strong terms upon the measures or acts of government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitement to public disorder or the use of violence. A citizen has a right to say or write whatever he likes about the government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the government established by law or with the intention of creating public disorders”.

The approach adopted by the Indian Supreme Court in *Kedar Nath* is the reasonable one and ought to have been considered and adopted by the court in Param's case. Instead, the learned judge relied heavily on Sir James's definition of sedition. He observed that "*Nowhere in Section 124A of the Indian Penal Code did Sir James Stephen include the further qualification of incitement to violence or inciting others to public disorders as an ingredient of the offence ...*"⁵⁴

Although the common law qualification of incitement to violence or to public disorder does not appear in either Section 124A of the Indian Penal Code or the Sedition Act 1948, as observed by the learned judge, it must be pointed out that Sir James Stephen had two inconsistent views as to whether seditious words must incite people to violence or to public disorder. There is no doubt that Sir James did not mention anything about the further qualification of incitement to violence or inciting others to public disorder in his *Digest of the Criminal Law*⁵⁵. However, Sir James adopted a different view in the *History of the Criminal Law*⁵⁶, where he took the view that a requirement of specific intent, i.e. an intention to produce public disorders, is essential⁵⁷.

It is this latter view that appears to have been adopted in many of the English decisions⁵⁸. Why there are two inconsistent views will remain unanswered. However, this clearly reveals a diabolic scheme by the British to intentionally exclude the intention to incite violence and public disorders to enable prosecutions for the crime of sedition in British colonies to be fairly easy. This also fortifies the view submitted earlier that there was one law for the ruled and another for the rulers in the British colonies. One may note that sedition laws in British colonies like India and Malaya were based on the definition of sedition by Sir James in the *Digest of the Criminal Law*. Why didn't Sir James Stephen follow his view in the *History of the Criminal Law* (which he authored in 1883) when drafting sedition laws in the British colonies remains a mystery. Although this issue was never canvassed before the court in the Param Kumaraswamy case, the court ought to have imported into the statutory offence of sedition i.e. the common law qualification that there must be a "*tendency to disorder or intention to create disturbance of law and order*".

54 Ibid, p.521. Justice N.H. Chan relied on the definition of sedition in Sir James Stephen in Article 93 of the Digest of the Criminal Law.

55 Supra n.33.

56 Sir James Stephen, A History of the Criminal Law of England (London: Macmillan, 1883, Vol 2) p.375.

57 Ibid, p.375 - Sir James sums up, "In other words, nothing short of direct incitement to disorder and violence is seditious libel."

58 Supra n.19, 20, 21, 22.

Be that as it may, Param Kumaraswamy was acquitted and discharged after being called to enter his defence on the grounds that the alleged seditious statements did not have the tendency to incite or to raise disaffection among the people and it did not refer to the King but only to the Pardons Board. On hindsight, Param should not have been prosecuted in the first place since it is obvious that he was only seeking reprieve for his client by calling on the Pardons Board to act according to good conscience so that it would not be seen to be discriminatory. His plea was for a good cause and as such, there was nothing seditious in his plea.

3.3. An Executive ‘Gag Order’

Yet another example of the pernicious nature of the Sedition Act was seen in the prosecution of Lim Guan Eng, a prominent MP from the DAP. In a speech delivered at a political rally, he accused the Attorney-General of practising double standards when exercising his discretion not to prosecute a former Chief Minister of Malacca for statutory rape, which resulted in all the charges against the chief minister being dropped.

Lim was charged under Section 4(1) (b) of Sedition Act 1948 for uttering seditious words. The words uttered were alleged to have a seditious tendency under Section 3 (1) (a) *by bringing into hatred or contempt or to excite disaffection against the administration of justice in Malaysia*. Here, the Court of Appeal followed the decision in Ooi Kee Saik and again refused to adopt the common law principles in interpreting the offence of sedition. Had the Court of Appeal done so, the accused would have been acquitted since he did not incite anyone to violence or to create public disorder. The Court of Appeal remarked in its judgment that *“To allege double standards against the Public Prosecutor in deciding which cases ought to be brought before the court amounts to denigrating and undermining the administration of justice”*.⁵⁹ Lim’s sentence was then increased to 18 months’ imprisonment, against a fine imposed by the High Court.

There is no doubt that the Attorney-General in Malaysia is given the discretion under the Constitution whether to prosecute or not to prosecute a wrongdoer and that the exercise of his discretion is unquestionable and cannot be reviewed in any court. However, the decision of the Court of Appeal has set a dangerous precedent, since if any challenge or public criticism of a decision by the Attorney-General is taken to be seditious, then even the questioning or criticism of a decision made by persons in authority, particularly those involved in the administration of justice such as government ministers exercising powers

59 Lim Guan Eng v PP [1998] 3 MLJ 34 - Judgment of the Court of Appeal, which was later upheld by the Federal Court.

under any legislation, can similarly be considered to be seditious⁶⁰. The decision of the Court of Appeal is even more alarming when one realises that the office of the Attorney-General in Malaysia is actually part and parcel of the Executive⁶¹. This means that the office of the Attorney-General is subservient to the Executive and his discretion to prosecute or not to prosecute may be influenced by the Executive. This can give rise to abuse of power by the Executive in that it may be a breeding ground for selective prosecution. As such, the decision in *Lim Guan Eng*, which confirms that the decision of the Attorney-General is beyond reproach, is actually a weapon given to the Executive to silence its critics and to suppress free speech.

This state of affairs is against the spirit of the Federal Constitution and it shows how easy it is to use the Sedition Act to suppress criticism and dissent. Even MPs during parliamentary debates would not be able to question the decision of the Attorney-General or the decision of a minister exercising powers conferred on him by law, since firstly, the decision in *Mark Koding* technically imposes a “gag order” on parliamentarians and secondly, the decision of the Court of Appeal in *Lim Guan Eng* would also gag the mouths of MPs.

The Supreme Court of Malaysia has decided that the court has no powers to review the manner in which the Attorney-General exercises his discretion, but it also emphasised that any complaint against the Attorney-General can be addressed to Parliament or to the appropriate minister under whom the A-G serves or to the A-G personally⁶². However in light of the decisions of the court in *Mark Koding* and *Lim Guan Eng*, this view might no longer be accurate.

The qualification of inciting people to violence and disorder, which is to be read into alleged seditious words written or spoken, is the more balanced and reasonable approach since it would prevent just any statement and comment that merely criticise the government, however strongly worded, from being seditious. In effect, it creates a line between harsh criticism, comments about government policies and measures and comments and criticism

60 Section 20 of the Industrial Relations Act 1967 confers on the Minister of Human Resources discretion whether to refer or not any employment dispute to the Industrial Court for adjudication. Section 4 of the Immigration Act 1959/1963 gives power to the Minister to issue direction to the Director-General of Immigration on issues regarding the immigration policy of Malaysia. Section 16 of the Housing Developers Act provides that the decision of the Minister concerning an appeal made by a housing developer is final and cannot be questioned in any court.

61 Malaysian Constitution – A Critical Introduction by Dr Abdul Aziz Bari, at p.118, “...the decision whether or not to prosecute and if so under what law is the government’s decision”- citing the decision in *Mohd Nordin Johan v Attorney-General of Malaysia* [1983] 1 MLJ 68.

62 *Tan Sri Salleh Abbas in Savarimuthu v Public Prosecutor* [1987] 2 MLJ 173, 177.

that incite people to violence and public disorder. Thus the common law qualification precludes the Sedition Act from being a “*catch all*” legislation.

The rejection of the common law interpretation of the offence of sedition in Malaysia explains why prosecution in cases of sedition is litigated with ease, with a high number of convictions, unlike in India. In fact it is easy to be seditious under Malaysian law and that is because of the refusal of Malaysian courts to accept the English common law principles on sedition. As such, the prosecution of individuals under the Sedition Act in Malaysia is relatively easy.

CHAPTER 4

SEDITION IN OTHER COMMONWEALTH JURISDICTIONS

4.1. Canada

The Criminal Code Canada, which was enacted in 1891, does not incorporate Sir James Stephen's narrow definition of sedition⁶³. The Canadian Act omits any reference to the definition, except that the crime includes the advocacy of the "use of force" as means of bringing about change of government⁶⁴. By virtue of Section 133A, certain actions are not included as seditious⁶⁵. It is interesting to note that the code makes reference to an intention to "use of force". This demonstrates that the ingredient of the crime of sedition in Canada is also along the lines of the interpretation of sedition as established by English common law. The Canadian Supreme Court has also applied the English common law on sedition⁶⁶. There has not been a prosecution for sedition in Canada since the 1950s. This may be due to the fact that the Law Reform Commission of Canada in 1986 described the offence of sedition as "an outdated and unprincipled law" and that there no longer seemed to be a need for a separate offence of sedition since the conduct that would be proscribed by it could be dealt with as incitement, conspiracy, contempt of court or hate propaganda⁶⁷.

4.2. India

The offence of sedition in India would only be complete if the words spoken or written tend to incite people to violence or public disorder with the intention to take violent

63 Section 133 of Criminal Code of Canada.

64 Ibid.

65 Section 133A - In pari materia with Section 2 of Sedition Act 1948.

66 [1951] SC.R i [1950] 1 DLR 657. The use of the British common law in interpreting the offence of sedition in Canada was upheld by the Canadian Supreme Court *Boucher v The King*, where Justice Rand observed: "Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality.". Justice Kellock, also observed: "The law breakers are those who 'resort to violence' rather than those who exercise the right of free speech in advocating religious views, however such views may be unacceptable ..."

67 Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49 (1986), 36.

methods to overthrow the government of the day⁶⁸.

In India, therefore, the courts have chosen to adopt the liberal interpretation of the crime of sedition as established by English common law. Thus the liberal attitude of the Indian courts can be said to be the reasonable one as it balances the exigent demands of the State with the civil rights of the individual. Because of the liberal attitude of the Indian Courts, most charges for sedition are dismissed⁶⁹. However, there recently have been complaints that the sedition laws in India have been used as a tool to suppress free speech. State agencies like the police have arrested persons who champion the rights of the lower caste. The police have abused the laws by using them to prohibit peaceful meetings and protest organized by the Dalit Panthers of India⁷⁰. However with the adoption of the English common law on sedition by the Indian judiciary, these charges for sedition might not see the light of day in court.

4.3. Australia

Laws against sedition in Australia was introduced by the British. The last prosecution for sedition in Australia occurred in 1949 when the General Secretary of the Communist Party of Australia was charged and convicted for sedition⁷¹. Sedition laws in Australia have been significantly tightened after the September 11 terrorist attacks against the United States. The post 9/11 era led to the passing of the Anti- Terrorism Act (No 2) 2005 which made substantial amendments to existing sedition laws by repealing several sections of

68 Kedar Nath v State of Bihar 1962 AIR SC955. Justice Sinha observed that: "The provisions of the sections read as a whole, along with the explanations, make it reasonably clear that the sections aim at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence. As already pointed out, the explanations appended to the main body of the section make it clear that 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. So construed, the section, in our opinion, strikes the correct balance between individual fundamental rights and the interest of public order. Ibid, p.805 & 809.

69 An example of this trend is the decision of the Gujarat High Court in Manubai v Gujarat [1971] 12 Gujerat. ILR 968.

70 Dalit Panthers of India (DPI) is non-violent awareness-raising group concentrating primarily on women's issues and land claims of the lower caste peoples in India. The Criminalisation of Social Activism – Broken People: Caste Violence Against India's Peoples of Lower Caste. Hyperlink: <http://www.hrw.org/reports/> <http://www.hrw.org/reports/1999/India994-10.htm>.

71 R v Sharkey [1949] 79 CLR 121.

the Crimes Act 1914 concerning sedition⁷². It re-introduced the new provisions against sedition in the Australian Criminal Code. The Anti Terrorism Act 2005 re-introduced the specific condition in the Criminal Code that the intention to use force or violence (the common law qualification) is necessary before conviction for sedition can be made out⁷³. However, Malaysia's Sedition Act makes no mention about this condition since, as pointed out earlier, intention is irrelevant under the Malaysian law.

It is also important to note that the Australian law on sedition does not contain any provision which makes it an offence to "... excite disaffection against the administration of justice..." unlike the Malaysian Sedition Act⁷⁴. The new Act reflects international initiatives to criminalise any activity that promotes terrorist violence. The new provision introduced by the Anti Terrorism Act 2005 attempts to shift the focus away from "mere speech" towards urging others to use "force or violence" to promote terrorist activities. It is actually a tool to be used in the counter-terrorism context. However, the Anti Terrorism Act 2005 has come under severe criticism by the opposition Australian Labour Party and civil society groups. Their main concerns are that the new Act undermines free speech, it is poorly drafted and the continued use of the term "sedition", which is associated in the public mind as punishing those who criticise the government.

The Australian Law Reform Commission (ALRC) recommended that the term "sedition" be removed from the Australian Criminal Code. The ALRC emphasised that there must be a "bright line between freedom of expression, even when it is exercised in a challenging or unpopular manner, and the reach of the criminal law, which should focus on the exhortations to the unlawful use of force or violence"⁷⁵. As a result of the fact that the offence of sedition is considered to be a political crime in that this offence has been used to criminalise speech or expression that is critical of the government, the ALRC recommended that term

72 Schedule 7 of the Anti Terrorism Act 2005 repealed Section 24A to 24E of the Crimes Act 1914.

73 Part 5, Land Division 80.2 of the Criminal Code. See also the 1984 Hope Commission Report, which recommended that the sedition provisions be amended to include the common law requirement of intention to create violence, public disturbance or disorder. Hope Commission recommendations were accepted in 1986. This resulted in the creation of Section 24D(1) of the Crimes Act 1914, which specifically says that any person with the intention of causing violence or creating public disorder or public disturbance writes, prints or utters any seditious words is guilty of an offence. The Gibb Committee in 1991 criticised sedition laws in Australia as being archaic and excessively wide and recommended that they be rewritten to accord with a modern democratic society. The Committee considered that a separate offence of sedition be retained, but it should be limited to inciting violence for purposes of disturbing or overthrowing constitutional authority.

74 Section 3 (1) (c) of the Sedition Act 1948.

75 See Australian Law Commission Report, Part 2 p13 at <http://www.austlii.edu.au/other/alrc/publications/reports/104/2.html>. Fighting Words: A review of the Sedition Laws in Australia (ALRC 104,2006).

sedition be removed⁷⁶. The ALRC also pointed out that since the new provisions in the Criminal Code are essentially related to counter the promotion of terrorism activities within Australia, therefore the continued use of term sedition to describe such activities is inaccurate and misleading. Consequently, the ALRC recommended that Division 80.2 of the Criminal Code be renamed to “Urging political or inter-group force or violence”⁷⁷.

To appease the public and politicians who asserted that a person could be in breach of the new provisions by saying things like “the government was wrong to send troops to Iraq or that “Australia needs to cut ties with the British Crown”, the ALRC strongly emphasised that “such an analysis of the current sedition provisions is wrong in law: the substantive provisions demonstrate that mere criticism of government action – unless it urges force or violence, is outside the parameters of the defence in section 80.3 ... and it will not be caught by the main offence provisions”.

It is important to note that ALRC has re-emphasised, in strong terms, the common law qualification of incitement to violence and disorder before any charges of sedition can be brought against an individual. The recommendations have indirectly thrown out the traditional version of the offence of sedition from the Australian federal laws. It has, in fact, established that the traditional provisions against sedition, which are couched in archaic and ill-defined language, are redundant and no longer suited to be used in a democratic society that places a high premium on free speech. The recommendations of the ALRC have not yet been implemented by the Australian government and are under active consideration⁷⁸.

4.4. New Zealand

Under the New Zealand Crimes Act, sedition is only made out when there is advocacy or incitement to violence or disorder and civil disobedience. However, there recently have been calls by the Green Party to review the laws on sedition in New Zealand. This call was made after activist Tim Selwyn was convicted and jailed by the Auckland District Court in July 2006 for publishing a statement with seditious intent, where he had called for civil disobedience. Prior to this case, there had not been any prosecution for sedition over the past 50 years. Keith Locke, an MP from the Green Party who had made calls for the review, said:

76 Ibid, p.13 item 2.74.

77 Ibid.

78 According to the ALRC report 109, Annual report 2007-2008 as of June 30, 2008, the recommendations have not been implemented to date but are under consideration and have been received positively by the Australian government.

The Sedition laws should be urgently reviewed. Some of the sedition offences are clearly contrary to other New Zealand legislation. For example, under the Crimes Act, Section 81, we are not allowed to “excite disaffection against Her Majesty or the Government of New Zealand”, yet the more recent Bill of Rights provision protects our right to protest and impart information and opinions in any kind of form⁷⁹.

4.5. England

In England the common law on sedition still exists. However, the last conviction for sedition occurred way back in 1909⁸⁰, where the printer of the Indian Socialist was convicted for sedition for calling for the independence of India. The last prosecution for seditious libel initiated by the English Crown was in 1947⁸¹ and it ended with an acquittal and thereafter, prosecutions have become very rare.

4.6. Kenya

Kenya has repealed its Sedition Act after it was found that it was more of a political offence rather than a criminal one⁸². It was seen as being used as a political tool to silence the opposition.

79 <http://www.greens.org.nz>.

80 R v Aldred [1909] 22 Cox C.C.1.

81 Supra n.20.

82 Infra n.94.

CHAPTER 5

THE SEDITION ACT – A TRUMP-CARD FOR THE EXECUTIVE

5.1. An Executive Trump Card

The Sedition Act is a wide net that can be used to criminalise any statement, written or spoken, by an individual merely criticising the policies or decisions of any government. This is so because the words “hatred”, “contempt” and “disaffection” or “discontent” appearing in the Act are words that are not properly defined, too broad, vague and extremely subjective⁸³. They are, as described by the Australian Law Reform Commission, “archaic and redundant”. These words can be used conveniently by the Executive to make any words, written or spoken, to come within the purview of these vague words defined as “seditious tendency” under the Act⁸⁴.

For example, during an election campaign, fiery political speeches are regularly made by members of the opposition, criticising government policies and decisions. These speeches can cause intense dislike, hatred, disaffection and discontentment towards government policies and decisions. The objective of any opposition political party is to try to garner support for its cause by criticising government policies or pointing out its defects in the strongest possible words. Creating an atmosphere of hatred, disaffection and discontentment towards the ruling government and its policies would, in turn, translate into votes for that political party. This has been part and parcel of the democratic process since time immemorial. That being so, such criticism of government policy by the opposition may fit in or can be tailored to fit neatly into the oppressive and vague wordings such as *“bringing into hatred or contempt or to raise discontent or disaffection against any ruler or against any government or the administration of justice”*. The question is, how are the members of the opposition expected to play their roles effectively as the people’s “watchdog” when vague and archaic words such as these are loosely tied around their necks, waiting to be tightened by the Executive on its whims and fancies?

This unfortunate state of affairs explains why it is relatively easy to be seditious under the Sedition Act. Criticism levelled against the government that is alleged to be seditious may actually be legitimate criticism against the government and its institutions. Although

83 Sections 3 (1) (a) & (c) of the Sedition Act 1948.

84 Ibid.

the Sedition Act specifies the circumstances or situations where speech is not considered seditious⁸⁵, in reality the wordings of the provisions are vague and ill-defined, as such the defences mentioned in Section 3(2) will be of no avail to an individual facing a charge of sedition and more importantly as cases have shown, it depends absolutely on the attitude of the court⁸⁶.

Again, for example, speeches made criticising government policies or pointing out its errors and defects during a political rally held during an election campaign may naturally contain words that may cause intense dislike, hatred or disaffection of government policies and measures. These words may fit snugly into, or can be made to fit into, the definition of the words having a seditious tendency that bring *“hatred or contempt or raise discontent or disaffection against any ruler or against any government”*.

As such the Sedition Act does not really provide adequate defence for a person facing charges of sedition and the person can be convicted quite easily for uttering words with seditious tendency. The examples above show how easy it is for the executive to pursue charges of sedition against its political opponents with a view to silencing them and how the Act can be abused by the Executive. The prosecution of Dr Ooi Kee Saik, Param Kumaraswamy and Lim Guan Eng are clear examples of such abuse, as well as clear examples of how a law like the Sedition Act can be used to silence legitimate criticism.

It is in fact a testimony of how the Act can also be used to create a culture of fear among right thinking members of the civil society, opposition politicians and the people of Malaysia that they would be investigated, arrested and even prosecuted by the authorities if they spoke their mind on any issue. The incidences which support this contention are the raiding of the online news website Malaysiakini.com in January 2003 for publishing a letter alleged to be seditious⁸⁷; the arrest of a prominent opposition leader for allegedly distributing seditious material concerning the “Merdeka Constitution” and the “Islamic State”⁸⁸; and more recently, the threat by a minister that the Sedition Act would be used

85 Section 3(2): Notwithstanding anything in subsection (1) an act, speech, words, publications or other thing shall not be deemed to be seditious by reason only that it has a tendency: (a) to show that any ruler has been misled or mistaken in any of his measures. (b) to point out errors or defects in any government or constitution as by law established.

86 Refer situations in PP v Ooi Kee Saik, PP v Melan bin Abdullah and PP v Param Kumaraswamy.

87 The raid by the police resulted in the seizure of several computers and interrogation of its editor and journalists. The alleged seditious material was the publication of a letter on the website entitled “Similarities between new Americans and Bumiputra”.

88 Opposition Leader Lim Kit Siang and some of his colleagues were arrested by the police for distributing leaflets that criticised former Prime Minister’s Tun Dr Mahathir Mohamad’s declaration that Malaysia was an Islamic State.

against non-Muslims who make comments that might be construed as “interfering” in matters concerning Islam⁸⁹.

One can also see this phenomenon happening again especially after the March 2008 general elections as politicians from the executive branch of the government keep reminding the people and the opposition about the offence of sedition whenever there is a by election or a political controversy. Examples of such incidences are the calls for the Sedition Act to be used against Karpal Singh a prominent lawyer and a opposition politician for questioning the Sultan of Perak’s decision to reinstate the former head of the Perak Religious Department who was removed by the new Pakatan Rakyat state government⁹⁰, a warning by the Home Minister that the Sedition Act may be used against the Bar Council for organizing a forum concerning the social contract and religious conversions⁹¹, again another warning by the Home Minister that Sedition Act will be used against anyone who raise sensitive issues during the Permatang Pauh by election⁹². More recently, the strong calls for Karpal Singh to be charged for sedition when he said that he would sue the Sultan of Perak for refusing to dissolve the Perak state assembly which led to the fall of the Pakatan Rakyat led state government in Perak which was erroneously interpreted by certain members of the Executive and some individuals and groups connected to the ruling government, to mean that he had challenged the position of the Malay rulers and the authority of the Sultan of Perak⁹³. These trend of using

89 Press statement made by the Minister in the Prime Minister’s Department Datuk Seri Mohd Nazri Abdul Aziz. See also The Sun, March 24, 2006, “*Sedition Act call unjustified*” an article by Dato’ Param Cumaraswamy

90 New Straits Times, 9 May 2008 & 11 May 2008.

91 New Straits Times, 3 July 2008

92 New Straits Times, 17 August 2008

93 New Straits Times, 16 February 2009. Karpal Singh was ultimately charged under Section 4(1) (b) of the Sedition Act 1948 on the 17 March 2009 for uttering seditious words during a press conference held in his office (The Star 17 March 2009). It is difficult to see how an expression of intention to sue the Sultan comes within the meaning of seditious tendency under Section 3(1) (a) or (d) of the Sedition Act 1948 since with the passing of Constitutional Amendment Act 1993 which effectively removed the legal immunity enjoyed by the Sultans against any legal proceedings taken against them in their personal capacity, any citizen of Malaysia may express an intention to sue the Sultans in their personal capacity. Clearly under no stretch of imagination can one say that one has uttered seditious words since Article 182(2) of Federal Constitution provides for it. Be that as it may, Karpal Singh may also avail himself of the defence under Section 3(2) (a) of the Act. Also one should compare Karpal Singh’s case with the incidences that happened in Parliament in 1993 during the Douglas Gomez fiasco (infra n.94). Also see, The Star, 3 April 2009 where ironically, in a suit filed by the former Pakatan Rakyat Chief Minister of Perak, to challenge the appointment of the current Chief Minister of Perak, the Senior Federal Counsel who appeared for the state, Datuk Kamaludin Mohd Said himself submitted before the High Court that the Sultan of Perak should have been named as a party to the suit and sued as a respondent since His Majesty was a public authority who had appointed the new Chief Minister

threats and warnings of prosecution for sedition does not augur well with the right to the freedom of speech and expression as guaranteed under the Federal Constitution as none of these statements or incidences mentioned above had incited anyone to violence or public disorder or the overthrowing of an elected government or the monarch through unlawful means.

5.2. Selective Prosecutions

There have also been claims that the Sedition Act has been used selectively to prosecute politicians and individuals who are considered to be too “vocal” in championing the rights of the people. Conversely, the Act was not used against politicians from the ruling government or persons connected to the ruling elite when they themselves may have breached the provisions of the Sedition Act⁹⁴. Examples of these incidents are the alleged seditious remarks made by Marina Mahathir about the mishandling of a rape case by the former Attorney-General⁹⁵, criticisms made by MPs from the ruling government against the Sultans in order to bring about changes to their constitutional position⁹⁶, the use of

94 Lim Guan Eng MP in Jail, 2nd Edition, p.14, 15, 19 & 20.

95 Ibid at p.19. In her column in The Star on Nov 9, 1994, Marina Mahathir, the daughter of former Prime Minister (Tun) Dr Mahathir Mohamad had strongly expressed her dissatisfaction over the Attorney-General’s handling of a rape case involving an underaged girl, where a chief minister of Malacca was implicated. She had expressed similar sentiments about the case as Lim Guan Eng, who was later charged with sedition and jailed. Marina wrote about the “gross mockery of justice” in her article, in which she said: “There are injustices in the law, which are mind-boggling. A Muslim woman particularly has it hard. If she is raped by a non-Muslim man and gets pregnant, she is charged for illicit sex and he gets away. Wonderful! Even if she is raped by a Muslim, the administration of justice obviously depends on who he is, how old she is, whose family she comes from. The lesson is clear: choose your rapist carefully..... As a woman especially a Muslim woman, I am angry disgusted and ashamed ... As a mother I now have real fears for my daughter. What protection can we hope for our daughters if, in the interest of politics, a minor can so easily be sacrificed? Are we only to hope to God that the real criminals will be brought to justice at a later date because man is too weak to?”

96 In 1993, the relationship between the Executive and the Sultans became tense as result of the plans by the Executive to curtail and control the rights and powers of the Malay Sultanate. The situation became more serious when a hockey coach alleged that the Sultan of Johor had assaulted him at his palace. This event set the stage for the passing of the Constitutional Amendment Act 1993 which took away the legal immunity enjoyed by the Sultans against any legal proceedings taken against them in their personal capacity. To lend credence to the need to pass the Constitution Amendment Act, certain members of the Executive made several criticisms during speeches at parliamentary debates against the Sultans, which were alleged to be seditious as these criticisms were strong enough to bring into hatred or into contempt or excite disaffection against the Rulers/Sultans. Although these speeches amounted to seditious tendency under Section 3(1) (a) of the Sedition Act 1948, no prosecution was instituted against any of the MPs from the ruling government: For further information on the events that unfolded between the Executive and the Sultans 1993, see Rais Yatim, *Freedom under Executive Power in Malaysia – A Study of Executive Supremacy*, Endowment Publications, 1995, p.105-107.

a derogatory word in Parliament by an MP from the ruling government in reference to the Indian community in Malaysia⁹⁷. More recently, at the UMNO general assembly in October 2006, many scathing remarks which were racially insensitive, even to the extent of inciting violence, were made against the non-Malays by several UMNO delegates⁹⁸ and during the Permatang Pauh by elections which was held after the March 8, 2008 general elections, racially inflammatory speeches were made against the Chinese community in Malaysia by an UMNO politician⁹⁹.

Under normal circumstances, these utterances would have amounted to sedition because these statements contained what were clearly seditious tendencies as envisaged under Section 3(1) (a) to (e) of the Sedition Act 1948. However no criminal prosecution was ever instituted under the Sedition Act against any one of them. One can only be left pondering, whether the position would have been the same if similar statements were made by members of the opposition.

5.3. Abuse

In the Param Cumaraswamy case, the judge indirectly warned of the possible abuse of sedition laws by the Executive. He pointed out that *“the line between criticism and sedition is drawn by a judge who is independent of the party in power in the State”*¹⁰⁰. He further observed: *“... in the present case, the line between what is seditious and*

97 The Barisan Nasional MP for Jerai, Badruddin Amin, used the word “keling” during parliamentary proceedings in reference to the Indian community in Malaysia. This word is considered to be derogatory and it is accepted generally among Malaysians to be a socially impolite word to refer to a Malaysian of Indian origin. A police report was lodged by opposition MP M. Kulasegaran against the Jerai MP for uttering words of seditious tendency under Section 3(1) (e) of the Sedition Act 1948, which refers to the uttering of words that promote feelings of ill will and hostility between different races or classes of the population in Malaysia. However, no action whatsoever was taken against Badruddin by the Attorney-General.

98 *Newsweek* in its Dec 4, 2006, issue on p.38 reported that “some UMNO delegates at the rally, which ended Nov 17, gave speeches that, either explicitly or in veiled terms, were racist or called for violence as a means of settling religious or political differences. One of them, Hasnoor Sidang Hussein, declared: “UMNO is willing to bathe in blood in defence of race and religion”.

99 Bukit Bendera UMNO division chief Datuk Ahmad Ismail was investigated under the Sedition Act 1948 for remarking that “Malaysians of Chinese origin are merely squatting in this country and hence, not entitled to equality”. The racially sensitive statements were uttered in the midst of campaigning for the Permatang Pauh by election where opposition stalwart Anwar Ibrahim stood as a candidate which he ultimately won. Penang state police chief said the police had received five reports in connection with the statement. However, although Datuk Ahmad Ismail was investigated by the police no charges were instituted against him for sedition.

100 Supra n.49, p.522 paragraph E.

*what is not seditious is drawn by a judge. In the UK, it is drawn by a jury. If the judges are independent as they are in Australia and in this country, then there is nothing to fear – the rule of law is preserved*¹⁰¹.

The judge had in fact made a very pertinent cautionary statement here. In effect, his view serves as a warning in that laws like the Sedition Act are liable to be abused by the party in power in the state in order to cling to power. A common strategy employed by a government to stay in power is to use laws like the Sedition Act to silence critics. Given this situation, the learned judge stressed on the need for an independent judiciary to counter the threat of abuse. However, judicial attitude and pronouncements on the offence of sedition in Malaysia have shown that the courts are more inclined to favour the Executive branch of the government, rather than the opposition.

The words “*to bring into hatred or contempt or to excite disaffection or discontent against the administration of justice, the ruler or against any government*”, which make up the meaning of the words “seditious tendency” under the Act, are reminiscent of a colonial or imperialist government suppressing dissent and therefore, it is to say the least, anachronistic. As pointed out earlier, these words are vague, oppressive and liable to be abused. In Dr Ooi’s case, for example, it was decided that seditious words are words that tend to make the “*government insecure*”¹⁰². In hindsight, isn’t that the prime objective of any opposition political party when it engages in any political debate or discussion, be it in Parliament or in any political forum or rally? To say otherwise would mean that the opposition parties would have no role to play in the democratic process and that would be against the time-honoured principle that the opposition provides the check-and-balance in government, and the notion that the opposition in Parliament is the bastion to ensure transparency and accountability in the administration of the government.

There must be a clear demarcation between “criticism”, however strong or harsh against the government, and words with “seditious tendency”. Mere criticism can be differentiated from words having a seditious tendency. When these words innate to violence, armed insurrection, tumult or rioting, then, and only then, should the crime of sedition be made out. Anything else that falls short of these ingredients must not be construed as words having a seditious tendency. This approach, as pointed earlier, is the position under English common law and it is constitutionally sound, in line with needs of protecting society from tumult and anarchy and the citizen’s freedom to exercise his right to free speech.

101 Ibid, paragraph E.

102 Supra n.35, p.112 paragraph I.

CONCLUSION

6.1. Repeal

With a law like the Sedition Act 1948 actively put to use despite five decades of independence and the rejection of English common law principles in cases of sedition by Malaysian courts, it is doubtful whether freedom of speech will be able to flourish in our country. The British left Malaya in 1957, but their laws never left with them instead they were adopted into the Malaysian legal system by a constitutional amendment. It is unfortunate that we are still being dictated by Sedition Act, a law considered obsolete in many Commonwealth countries due to its history of being an instrument of oppression.

The Sedition Act 1948 is clearly not in line with a modern democracy that values free speech. In fact, this law is an affront to democratic principles. The legal elements of sedition are vague, imprecise and ill-defined¹⁰³, therefore liable to be abused. The United States Supreme Court has struck down legislation on the basis that it is void for vagueness and want of certainty¹⁰⁴. A law is void for vagueness if it fails to give a person fair notice that certain conduct is prohibited. Unfortunately, this is a striking feature of the Sedition Act 1948. Further, it is a fundamental requirement that penal laws like the Sedition Act contain a *mens rea* element. With the dispensation of a fundamental element like *mens rea* to establish criminal liability, the Sedition Act violates the principles of fundamental justice. These two grounds alone are sufficient justification for the repeal of the Sedition Act 1948.

The Sedition Act actually spells the death knell for the Opposition in any parliamentary democracy and therefore this is another justification for its repeal. Even if it is argued that the Sedition Act is necessary to maintain public tranquillity and racial harmony, there are enough provisions in the Penal Code to deal with racial strife and anarchy¹⁰⁵. People who cross the line by inciting others to violence or to commit crimes against another community can be severely dealt with under the Penal Code. Any threat by any party that advocates the overthrow of the Constitution and the government of the day by violent means can be dealt with by putting into place amendments to the Penal Code to deal with such offences. In fact, the Penal Code Amendment Bill 2005 already has several provisions dealing with the threat of terrorism and organised crime and currently, the Penal Code has

103 Section 3(1) (a)-(c) Sedition Act where words such as hatred, contempt, disaffection and discontent are used.

104 *Papachristou v City of Jacksonville* 405 U.S. 156 (1972). Refer “Lawyers and the Rule of Law on Trial-Sedition in Malaysia at <http://www.Irwc.org>.

105 See Section 505 of the Malaysian Penal Code.

provisions dealing with offences committed against the State¹⁰⁶. There are also ample laws against defamation in Malaysia for a person who feels he has been defamed to initiate a civil suit for damages.

The law on sedition came about during a period when kings and queens were believed to have divine powers and they were believed to be god sent. As such, the laws dispensed by them were unquestionable and criticism of the Rulers was seen as sinful and unlawful¹⁰⁷. Today, this belief is no longer true and is seen as foolish as we do not live in a feudal society. Therefore a law created with such a purpose in mind will not be suitable or relevant in present times.

The relevance of the Sedition Act today must be looked at along the lines of maintaining public order by deterring and punishing those who incite violence and public disorder, and in curbing the threat of terrorism. However, our Sedition Act does not address these concerns. It only seeks to criminalise speech or expression that is critical of the government, its policies and its institutions. Opposition MPs or even MP's from the ruling party, as the elected representatives of the people, should be allowed to criticise the administration of government and its policies, since it is the legitimate expectation of the people that the government and institutions of government are administered in accordance with the principles of transparency and accountability.

Therefore, the repeal of the Act is necessary and timely since the Malaysian Penal Code is equipped with provisions against racial incitement and subversion. The Penal Code can be further strengthened by introducing provisions to curb threats of internal terrorism and terrorist activities, including inciting people to engage in terrorism against the State and other terrorist activities. For this purpose, the Australian model and the ALRC recommendations can be looked into. Alternatively at the very least, the Sedition Act should be amended to include the common law qualification of incitement to violence and disorder as the gist of the offence of sedition. Recently, there was a suggestion by a former MP that a Parliamentary Select Committee be set up to reform laws that restrict the media and free speech¹⁰⁸. This suggestion is timely and most welcome. The Sedition Act is clearly a stumbling block for a free and vibrant press as shown in the case of Melan bin Abdullah¹⁰⁹.

106 See Penal Code Amendment Act 2003 Section 130B(2) and Chapter VI of the Penal Code particularly Section 121 & 121B.

107 Lawyers and the Rule of Law on Trial – Sedition in Malaysia, p.9, an article published by the Lawyers Rights Watch Canada by Davidson, Gail, Friesen, Tami and Jackson, Michael QC, May 2000.

108 A call made by the former Kota Melaka MP Wong Nai Chee at the Asian Institute for Development Communication forum to commemorate World Press Freedom Day. Also refer the Sun, May 4, 2007.

109 Supra p.25. See also Section 4(1)(c) and Section 9 of the Sedition Act 1948.

The repeal of the Act is necessary to provide the space that a democratic society demands for the people to freely express their political thoughts and beliefs on matters of public interest. It is the right of citizens to criticise government officials or even the rulers if they believe that they have erred in their duties.

6.2. The Reality

The clamouring for equal rights and fair treatment by the people has never been stronger than what we witnessed during the period leading up to the 2008 general elections. Thus, banning fair comment on issues of public interest which directly affect the rights of the people *vis-a-vis* the Sedition Act 1948 will only bring dire consequences and further weaken ethnic relations in this country.

In any event, discussions on these “*sensitive issues*” (as contained in Section 3(1)(f) of the Act) are no longer sensitive since it is being openly brought up to scrutiny and question by all and sundry in the internet and in other alternative medias. Our leaders need to accept this reality. Surely, they can’t prefer charges of sedition against all of them. To continue to shut people up by using a repressive law like the Sedition Act is definitely a step in the wrong direction as it would further alienate the people from any government which claims to be a government for the people and by the people.

In view of this reality, it is only prudent for our leaders to engage the people and the groups lobbying for social reform by considering their views and proposals through discussion and seriously push for positive social reforms and transformation instead of threatening them with charges of sedition. Our leaders risk allowing the people to be misled and influenced by undesirable elements in cyberspace which hold extremist and distorted views, if they fail to take initiatives that lead to social reformation particularly in the areas of business, employment and education where there is a strong call for equal opportunities and fair treatment.

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APPENDIX

LAWS OF MALAYSIA

REPRINT

Act 15

SEDITION ACT 1948

Incorporating all amendments up to 1 January 2006

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SEDITIONACT 1948

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LAWS OF MALAYSIA
Act 15
ARRANGEMENT OF SECTIONS
SEDITIONACT 1948

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LAWS OF MALAYSIA
Act 15
SEDITION ACT 1948

An Act to provide for the punishment of sedition.
[*Peninsular Malaysia—19 July 1948, Ord. No. 14 of 1948;*
Sabah—28 May 1964, L.N. 149/1964;
Sarawak—20 November 1969, P.U.(A)476/1969]

Short title

1. This Act may be cited as the Sedition Act 1948.

Interpretation

2. In this Act—

“Government” means the Government of Malaysia and of any State in Malaysia;
“publication” includes all written or printed matter and everything whether of a nature similar to written or printed matter or not containing any visible representation or by its form, shape or in any other manner capable of suggesting words or ideas, and every copy and reproduction or substantial reproduction of any publication;

“Ruler” means the Yang di-Pertuan Agong or the Ruler or Yang di-Pertua Negeri of any State in Malaysia;

“seditious” when applied to or used in respect of any act, speech, words, publication or other thing qualifies the act, speech, words, publication or other thing as one having a seditious tendency;

“words” includes any phrase, sentence or other consecutive number or combination of words, oral or written.

Seditious tendency

3. (1) A “seditious tendency” is a tendency—
 - (a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;
 - (b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;
 - (c) to bring into hatred or contempt or to excite disaffection against the

- administration of justice in Malaysia or in any State;
- (d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State;
 - (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 other thing shall not be deemed to be seditious by reason only that it has a tendency—
- (a) to show that any Ruler has been misled or mistaken in any of his measures;
 - (b) to point out errors or defects in any Government or constitution as by law established (except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (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 paragraph (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.

Offences

4. (1) Any person who—
- (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act which has or which would, if done, have a seditious tendency;
 - (b) utters any seditious words;
 - (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or
 - (d) imports any seditious publication,
- shall be guilty of an offence and shall, on conviction, be liable for a first offence to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both, and, for a subsequent offence, to imprisonment for a term not exceeding five years; and any seditious publication found in the possession of the person or used in evidence at his trial shall be forfeited and may be destroyed or otherwise disposed of as the court directs.
- (2) Any person who without lawful excuse has in his possession any seditious publication shall be guilty of an offence and shall, on conviction, be liable for a first offence to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding eighteen months or to both, and, for a subsequent offence, to imprisonment for a term not exceeding three years, and the publication shall be forfeited and may be destroyed or otherwise disposed of as the court directs.

Legal proceedings

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

Evidence

6. (1) Notwithstanding anything to the contrary contained in the Evidence Act [Act 56], no person shall be convicted of an offence under section 4 on the uncorroborated testimony of one witness.
- (2) No person shall be convicted of any offence referred to in paragraph 4(1)(c) or (d) if the person proves that the publication in respect of which he is charged was printed, published, sold, offered for sale, distributed, reproduced or imported

without his authority, consent and knowledge and without any want of due care or caution on his part, or that he did not know and had no reason to believe that the publication had a seditious tendency.

Innocent receiver of seditious publication

7. Any person to whom any seditious publication is sent without his knowledge or privity shall forthwith as soon as the nature of its contents has become known to him deliver the publication to the officer in charge of a police district or, in Sabah and Sarawak, to an administrative officer or to the officer in charge of the nearest police station, and any person who complies with the provisions of this section shall not be liable to be convicted for having in his possession the publication: Provided that in any proceedings against that person the court shall presume until the contrary be shown that the person knew the contents of the publication at the time it first came into his possession.

Issue of search warrant

8. (1) A Magistrate may issue a warrant empowering any police officer, not below the rank of Inspector, to enter upon any premises where any seditious publication is known or is reasonably suspected to be and to search therein for any seditious publication.
(2) Whenever it appears to any police officer not below the rank of Assistant Superintendent that there is reasonable cause to believe that in any premises there is concealed or deposited any seditious publication, and he has reasonable grounds for believing that, by reason of the delay which would be entailed by obtaining a search warrant, the object of the search is likely to be frustrated, he may enter and search the premises as if he were empowered to do so by a warrant issued under subsection (1).

Suspension of newspaper containing seditious matter

9. (1) Whenever any person is convicted of publishing in any newspaper any matter having a seditious tendency, the court may, if it thinks fit, either in lieu of or in addition to any other punishment, make orders as to all or any of the following matters:
 - (a) prohibiting, either absolutely or except on conditions to be specified in the order, for any period not exceeding one year from the date of the order, the future publication of that newspaper;
 - (b) prohibiting, either absolutely or except on conditions to be specified in the order, for the period aforesaid, the publisher, proprietor, or editor of that newspaper or from publishing, editing or writing for any newspaper,

- or from assisting, whether with money or money's worth, material, personal service, or otherwise in the publication, editing, or production of any newspaper; and
- (c) that for the period aforesaid any printing press used in the production of the newspaper be used only on conditions to be specified in the order, or that it be seized by the police and detained by them for the period aforesaid.
- (2) Any person who contravenes an order made under this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.
- (3) Nothing in this Act shall affect the power of the court to punish any person contravening an order made under this section for contempt of court: Provided that no person shall be punished twice for the same offence.

Power of court to prohibit circulation of seditious publications

10. (1) Whenever on the application of the Public Prosecutor it is shown to the satisfaction of the court that the issue or circulation of a seditious publication is or if commenced or continued would be likely to lead to unlawful violence, or appears to have the object of promoting feeling of hostility between different classes or races of the community, the court shall make an order (in this section called a "prohibition order") prohibiting the issuing and circulation of that publication (in this section called a "prohibited publication") and requiring every person having any copy of the prohibited publication in his possession, power, or control forthwith to deliver every such copy into the custody of the police.
- (2) An order under this section may be made *ex parte* on the application of the Public Prosecutor in chambers.
- (3) It shall be sufficient if the order so describes the prohibited publication that it can be identified by a reasonable person who compares the prohibited publication with the description in the prohibition order.
- (4) Every person on whom a copy of a prohibition order is served by any police officer shall forthwith deliver to that police officer every prohibited publication in his possession, power, or control, and, if he fails to do so, he shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both.
- (5) Every person to whose knowledge it shall come that a prohibited publication is in his possession, power, or control shall forthwith deliver every such

publication into the custody of the police, and, if he fails to do so, he shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both.

- (6) The court may, if it thinks fit, either before or after or without service of the prohibition order on any person, issue a warrant authorizing any police officer not below the rank of Inspector to enter and search any premises specified in the order, and to seize and carry away every prohibited publication there found, and to use such force as may be necessary for the purpose. A copy of the prohibition order and of the search warrant shall be left in a conspicuous position at every building or place so entered.
- (7) The owner of any prohibited publication delivered or seized under this section may, at any time within fourteen days after the delivery or seizure, petition the court for the discharge of the prohibition order, and the court, if on the hearing of the petition it decides that the prohibition order ought not to have been made, shall discharge the order and shall order the prohibited publication delivered by or seized from the petitioner to be returned to him.
- (8) Every prohibited publication delivered or seized under this section with respect to which a petition is not filed within the time aforesaid or which is not ordered to be returned to the owner shall be deemed to be forfeited to the Federal Government.
- (9) For the purposes of this section “court” means the High Court.

Arrest without warrant

- 11. Any police officer not below the rank of Inspector may arrest without warrant any person found committing or reasonably suspected of committing or of having committed or of attempting to commit or of procuring or abetting any person to commit any offence against this Act, or reasonably suspected of the unlawful possession of any thing liable to forfeiture thereunder.

LAWS OF MALAYSIA
Act 15
SEDITION ACT 1948

LIST OF AMENDMENTS

<i>Amending law</i>	<i>Short title</i>	<i>In force from</i>
L.N. 332/1958	Federal Constitution (Modification of Laws) (Ordinances and Proclamations) Order 1958	13-11-1958
L.N. 149/1964	Modification of Laws (Sedition) (Extension and Modification) Order 1964	28-05-1964
P.U.(A)476/1969	Modification of Laws (Sedition) (Extension and Modification) Order 1969	20-11-1969
P.U.(A)282/1970	Emergency (Essential Powers) Ordinance No. 45, 1970	10-08-1970
Act 160	Malaysian Currency (Ringgit) Act 1975	29-08-1975

LAWS OF MALAYSIA

Act 15

SEDITION ACT 1948

LIST OF SECTIONS AMENDED

<i>Section</i>	<i>Amending authority</i>	<i>In force from</i>
2	L.N. 332/1958	13-11-1958
3	L.N. 332/1958 P.U.(A)282/1970	13-11-1958 18-08-1970
4	Act 160	29-08-1975
5	P.U.(A)282/1970	18-08-1970
6	L.N. 332/1958	13-11-1958
9	Act 160	29-08-1975
10	Act 160	29-08-1975

About ERA Consumer Malaysia

The Education and Research Association for Consumers, Malaysia (ERA Consumer Malaysia) was founded as a voluntary, non-profit and non-political organisation in Ipoh, Perak, in 1985. It is a membership organisation registered under the Malaysian Societies Act of 1966 to develop critical consciousness on people-related issues arising from the larger socio-economic environment

ERA Consumer aims to create awareness among the people on issues affecting their lives through research and educational programmes. It consistently responds to the needs of the people and develops its services based on independent and balanced research. ERA Consumer focuses on consumer and human rights education, food, trade and economic issues. It carries out public education projects, makes policy recommendations to the government and international institutions and builds solidarity among NGOs and society. It also endeavours to increase South-South relations and North-South understanding.

About the Author

Jeyaseelen Anthony is an advocate and solicitor. He is currently a committee member of ERA Consumer and a member of the Bar Council (Human Rights Committee). His practice mainly focuses on industrial relations, human rights, criminal and civil litigation.

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**EDUCATION AND RESEARCH
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(ERA CONSUMER MALAYSIA)**

No 24, Jalan SS1/22A

47300 Petaling Jaya

Selangor Darul Ehsan

Tel (603) 7877 4741, 7876 4648

Fax (603) 7873 0636

Email general@eraconsumer.org

Website www.eraconsumer.org

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