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Advocating Media Freedom and Access to Information



UNDI18



May 25, 2023

Datuk Seri Saifuddin Nasution Ismail
Minister of Home Affairs

Dato' Sri Azalina Binti Othman Said
Minister in Prime Minister's Department (Law and Institutional Reform)

Dear Honourable Ministers,

We, the undersigned press freedom, civil liberties, and international human rights advocacy organizations the Clooney Foundation for Justice, the International Bar Association's Human Rights Institute, SUARAM, Lawyers for Liberty, Article 19, Center for Independent Journalism, ALIRAN, Undi18, and the Teoh Beng Hock Trust for Democracy, urge the introduction of legislation to repeal Malaysia's Sedition Act 1948 and in the meantime urge your government to concede the unconstitutionality of the Sedition Act, which is currently subject to challenge in the Court of Appeals in connection with the criminal conviction of Wan Ji in the case *Wan Ji Bin Wan Hussin vs. Public Prosecutor*.

As described in the attached Annex, the Sedition Act violates international standards on the rule of law and freedom of expression. Further, courts and legislatures around the world have recently struck down or repealed this archaic, colonial holdover. But in Malaysia it remains on the books – and indeed is still being used – despite pledges by the Pakatan Harapan coalition as well as previous governments to repeal or reform the law.

Tomorrow, the Court of Appeals will hear further arguments on the Act's constitutionality in Wan Ji's case. The government should fulfil its promise to the Malaysian people, concede the Act's unconstitutionality, and begin work to repeal the law.

Broken Promises

Wan Ji's case is a reminder that successive Malaysian governments have broken their promises to repeal the archaic Sedition Act, which has primarily been used to [“suppress political dissent and restrict press freedom on the Internet.”](#) Prime Minister Najib Razak, for example, [repeatedly pledged](#) to abolish the Sedition Act. Indeed, the government of Malaysia in 2013 agreed during its Universal Periodic Review to repeal the law.¹ In 2015, Prime Minister Razak [strengthened it instead](#).

Next, Pakatan Harapan promised to remove all draconian laws if it came to power. Its [2018 election manifesto](#) stated: "This book contains Pakatan Harapan's promises to the people of Malaysia on the steps we will take when we become the government. These are the policies and actions that we will implement to give this country the treatment that it needs, to REBUILD THE NATION and to FULFIL THE HOPE of the people. . . . The Pakatan Harapan Government will revoke the following laws: Sedition Act 1948 . . ."

In 2018, Pakatan Harapan assumed power. Months later, in advance of the country's next UPR review, the government stated that it was "in the midst of conducting consultations with the relevant ministries and agencies to review the Sedition Act."² In October 2018, the Pakatan Harapan government imposed a moratorium on sedition cases but [lifted it](#) soon thereafter. Subsequently, the administration took no further actions on repeal.

In 2020, the new Perikatan Nasional administration [stated](#) that it was "committed to improving security laws including Sosma and the Sedition Act." No reform followed.

And in 2022, Pakatan Harapan issued another [election manifesto](#), stating that one of its priorities if re-elected would be "reviewing and repealing draconian provisions of acts that can be abused to restrict free speech such as the Sedition Act 1948, Communications and Multimedia Act 1998, and Printing Press and Publications Act 1984." And yet the Sedition Act remains intact. Not only that, the public prosecutor is opposing Wan Ji's petition requesting that the Federal Court evaluate whether the Sedition Act complies with freedom of speech, guaranteed under both the Malaysian constitution and international standards.

Rule of Law and Freedom of Expression Standards

Successive Malaysian governments have promised to repeal or reform the Sedition Act precisely because it does not comply with rule of law and freedom of expression guarantees.

As described further in the Annex below, for instance, international, regional, and national precedents require that criminal laws be sufficiently clear, so that individuals can understand what is criminal, and what is not.³

¹ Compare Report of the Working Group on the Universal Periodic Review, Malaysia, Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review, Mar. 4, 2014, A/HRC/25/10/Add.1, ¶ 7 with Report of the Working Group on the Universal Periodic Review, Malaysia, Dec. 4, 2013, A/HRC/25/10, ¶¶ 146.48-146.49 (accepting in principle recommendation to repeal the Sedition Act).

² National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, Malaysia, Aug. 23, 2018, A/HRC/WG.6/31/MYS/1, ¶ 23.

³ UN Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, Aug. 31, 2001, CCPR/C/21/Rev.1/Add.11, ¶ 7.

The Sedition Act, however, is so broad and imprecise that it is unclear what speech can be criminalized, leaving it susceptible to abuse.

The Act criminalizes speech with a ‘seditious tendency,’ which includes (among other things) a tendency “to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government” and “to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State.” None of the key terms, such as ‘hatred,’ ‘contempt,’ ‘discontent,’ or ‘disaffection’ are defined. Meanwhile, Malaysian courts have allowed prosecutors to outsource their burden of proof by introducing evidence on the subjective reactions of particular individuals to certain speech – as opposed to hewing to a consistent standard.

These ambiguities have led to rampant abuse, as documented by leading watchdogs — some of the signatories of this letter. According to numbers released by the government in 2023, there have been 367 investigations launched under the Sedition Act over the previous five years, with one of us finding that cases have spiked during times of heightened criticism of the government.

The Sedition Act further fails to comply with the widely-accepted requirement that any restriction on freedom of expression must be necessary and proportional. It has been interpreted, as in Wan Ji’s case,⁴ not to require a risk of violence but merely risk of an adverse reaction, which encompasses much more minute disruptions to public order and sets a low threshold for criminal prosecution and punishment. Indeed, various international, regional, and national bodies have held that there must be an imminent risk of violence for the prosecution of speech offenses. The Sedition Act falls far short of that.

Global Trends

The Sedition Act is a holdover from the British colonial era, and its wording is thus replicated in the sedition laws of various other former British colonies around the world, which have taken action to overturn or repeal their sedition laws precisely because of their vagueness and lack of proportionality.

In Pakistan, for example, the Lahore High Court recently struck down the country’s sedition law, emphasizing that sedition was “enacted to perpetrate and entrench British rule in the sub-continent,”⁵ and explaining that the provision was “archaic and antithetical to the instincts and traditions of a people under a constitutional democracy.”⁶ The court denounced the “broadly worded” nature of the provision, which gave “unstructured discretion” to the authorities.⁷ In 2022 the Indian Supreme Court stayed all pending sedition cases, noting that “it is clear that the Union of India agrees with the prima facie opinion expressed by this Court that the rigors of Section 124A of IPC [the sedition law] is not in tune with the current social milieu, and was intended for a time when this country was under the colonial regime.”⁸

In other Commonwealth states, legislatures have repealed or limited sedition laws, with Australia amending criminal provisions referring to sedition to instead use the term ‘urging violence,’ New Zealand doing away

⁴ PP v. Wan Ji Bin Wan Hussin, Shah Alam Sessions Court, Judgment, ¶ 22.

⁵ Haroon Farooq v. Federation of Pakistan & others, Lahore High Court, W.P No.59599 of 2022, Mar 30, 2023, ¶ 15.

⁶ *Id.*, ¶ 38.

⁷ *Id.*, ¶ 55.

⁸ S. G. Vombatkere v. Union of India, (2022) 7 SCC 433, ¶ 5.

with its sedition law altogether, and Canada [restricting sedition cases](#) to those involving the advocacy of violence. One of us has published a [detailed report](#) describing these trends.

In 2022, Malaysia's neighbor Singapore [repealed its sedition law](#), with the Ministry of Home Affairs noting that "[s]ome types of conduct covered by the Sedition Act 1948 should also not be criminalised in today's context, *such as exciting disaffection against the Government*" – the exact same term used in Malaysia's law.

Malaysia should likewise act to address a law "intended for a time when [it] was under the colonial regime."

Conclusion

The Pakatan Harapan coalition has an opportunity to fulfill more than a decade of promises. The Sedition Act has no place in Malaysia.

Respectfully,

[Article 19](#)

[ALIRAN](#)

[Center for Independent Journalism](#)

[The Clooney Foundation for Justice](#)

[The International Bar Association's Human Rights Institute](#)

[Lawyers for Liberty](#)

[SUARAM](#)

[Teoh Beng Hock Trust for Democracy](#)

[Undi18](#)

Annex: Legal Analysis of the Sedition Act's Compliance with Rule of Law and Freedom of Expression Guarantees⁹

I. The Sedition Act 1948 Violates the Principle of Legality

International, Regional, and National Precedent on the Principle of Legality

The principle of legality, *nullum crimen, nulla poena sine lege*, is at the core of criminal law. This principle is reflected in Article 11(2) of the Universal Declaration of Human Rights, which states: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.” It is also enshrined in Article 15 of the International Covenant on Civil and Political Rights (ICCPR), Article 7 of the European Convention on Human Rights, Article 9 of the American Convention on Human Rights, and Articles 6 and 7(2) of the African Charter on Human and Peoples’ Rights.

Malaysia has acknowledged the importance of the standards in the UDHR.¹⁰ The Human Rights Commission of Malaysia Act of 1999, for instance, prescribes that “regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.”¹¹

At the UN level, the Human Rights Committee, which is charged with interpreting the International Covenant on Civil and Political Rights, has noted that “the principle of legality in the field of criminal law” includes “the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty.”¹² This aspect of the principle of legality—relating to clarity and precision—has been applied by international, regional, and national courts and bodies around the world to require that criminal laws be formulated in a way that would allow individuals to know whether their conduct is prohibited or not. Indeed, as early as 1935, the Permanent Court of International Justice held that “[i]t must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment.”¹³

The UN Human Rights Committee has further explained in its General Comment No. 35 that “[a]ny substantive grounds for arrest or detention must be prescribed by law and *should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.*”¹⁴ Likewise, the UN Working

⁹ This Annex was prepared by the Clooney Foundation for Justice’s TrialWatch initiative and the International Bar Association’s Human Rights Institute.

¹⁰ When announcing Malaysia’s membership in the Human Rights Council for the 2022 term, Prime Minister Datuk Seri Ismail Sabri Yaakob acknowledged the importance of the UDHR. Ismail Sabri (@IsmailSabri60), Twitter (Oct. 14, 2021, 12:16 PM), <https://twitter.com/IsmailSabri60/status/1448684116489084935>.

¹¹ Human Rights Commission of Malaysia Act 1999, Sec. 4(4).

¹² UN Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, Aug. 31, 2001, CCPR/C/21/Rev.1/Add.11, ¶ 7.

¹³ *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion, 1935 PCIJ (ser. A/B) No.65 (Dec.4) at p. 56-57.

¹⁴ UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, Dec. 16, 2014, CCPR/C/GC/35, ¶ 22 (emphasis added).

Group on Arbitrary Detention has stressed that “[o]ne of the fundamental guarantees of due process . . . [includes] (c) the principle of certainty.”¹⁵

Regional courts have also emphasized the importance of laws not being unduly vague as a key aspect of the principle of legality. The European Court of Human Rights, for instance, has explained that the principle of legality “embodies, more generally, the principle that only the law can define a crime and prescribe a penalty,” which it must do clearly and precisely.¹⁶ The Inter-American Court of Human Rights has likewise elaborated that the principle of legality requires “a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that either are not punishable offences or are punishable but not with imprisonment.”¹⁷ And the East African Court of Justice has held that laws “must be clear, and accessible to citizens so that they are clear on what is prohibited.”¹⁸

At the national level, to give just one example, the Indian Supreme Court has applied a ‘void for vagueness’ doctrine, stating that “a penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness. Ordinary people should be able to understand what conduct is prohibited and what is permitted. Also, those who administer the law must know what offence has been committed so that arbitrary and discriminatory enforcement of the law does not take place.”¹⁹

Malaysia’s Sedition Act Does Not Comply with the Principle of Legality

Malaysia’s Sedition Act 1948 criminalizes speech with a ‘seditious tendency,’ which in turn is defined to include (among other things) a tendency “to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government” and “to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State.” None of the key terms, such as ‘hatred,’ ‘contempt,’ ‘discontent,’ or ‘disaffection’ are defined.

The Sedition Act 1948 fails the test of clarity required by the principle of legality. In fact, several courts have struck down colonial sedition laws nearly identical to the Sedition Act 1948 on vagueness grounds, principally because (1) the terms of the law are themselves so unclear; (2) the law appears to hinge on the hypothesized potential reactions of those hearing allegedly seditious speech; and (3) the law has vast potential for abuse.

¹⁵ UNWGAD, Waleed Abulkhair v. Saudi Arabia, Opinion No. 10/2018, July 4, 2018, UN Doc. A/HRC/WGAD/2018/10, ¶ 50 (citing Claus Kieß, “Nulla poena nullum crimen sine lege” in Max Planck Encyclopedia of Public International Law, vol. VII, Rudiger Wolfrum, ed., 2010, pp. 889-890).

¹⁶ European Court of Human Rights, Kokkinakis v. Greece, App. No. 14307/88, May 25, 1993, ¶ 52.

¹⁷ Inter-American Court of Human Rights, Castillo Petruzzi et al. v. Peru, Series C, No. 52, May 30, 1999, ¶ 121.

¹⁸ Media Council of Tanzania v. The Attorney General of the United Republic of Tanzania, EACJ Reference No. 2 of 2017, Mar. 28, 2019, ¶ 60.

¹⁹ Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶ 59; *see also* K.A. Abbas v. Union of India, (1970) 2 SCC 780, ¶ 46 (where “the persons applying [a law] are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution”).

With respect to the first reason—that the terms of the Sedition Act 1948 are themselves unclear—many of these same terms are or were found in the sedition laws in The Gambia,²⁰ Uganda,²¹ Tanzania,²² Hong Kong,²³ and India,²⁴ which in turn have been struck down or criticized on vagueness grounds.²⁵ For instance, the ECOWAS Court found that The Gambia’s colonial sedition law “espouses expressions of inexactitude.”²⁶ Some of these same terms are also those that the UN has urged be better defined in the context of the Rabat Plan of Action, adopted through expert workshops convened by the Office of the United Nations High Commissioner for Human Rights on the prohibition of incitement to national, racial or religious hatred. In particular, the Plan of Action suggested “including robust definitions of key terms such as *hatred*, discrimination, violence, hostility, among others.”²⁷ And with specific respect to Malaysia’s Sedition Act 1948, the UN has already said that it “outlaws a number of vague offenses.”²⁸

The same findings have been made at the national level. Just recently, the Lahore High Court struck down Pakistan’s sedition law, which criminalized “excit[ing] or attempt[ing] to excite disaffection towards, the Federal or Provincial Government,” on constitutional grounds.²⁹ The court found that the law was vague and overbroad: it is “a broadly worded provision which gives wide leeway to a Government . . . This impacts the people in a number of ways. On the one hand they are placed under threat of unstructured discretion of a police officer and on the other, they are enjoined to receive restrictive information at the whims of the Government.”³⁰ The court also stressed the imprecision of the language used in the law, highlighting that there was a “wide margin of appreciation of these terms [e.g., hatred/contempt] and it is entirely subjective for a construction to be put on them.”³¹

²⁰ Federation of African Journalists and Ors. v. The Gambia, ECW/CCJ/JUD/04/18, Mar. 13, 2018, p. 38 (noting the definition of a seditious intent to include any action likely “[t]o bring into hatred or contempt or to excite disaffection against the person of the President, or the Government of the Gambia”).

²¹ Mwenda & Ors v. Attorney General, [2010] UGCC 5, Aug. 25, 2010 (noting that Uganda’s law defines a seditious intention to include an intention “to bring into hatred or contempt or to excite disaffection against the person of the President, the Government” or “to bring into hatred or contempt or to excite disaffection against the administration of Justice”).

²² Media Council of Tanzania v. The Attorney General of the United Republic of Tanzania, EACJ Reference No. 2 of 2017, Mar. 28, 2019, ¶ 97 (noting that Tanzania’s law defines a seditious intention to include an intention to “[b]ring into hatred or contempt or to excite disaffection against the lawful authority of the Government of the United Republic”).

²³ See Section 9(1) of the Hong Kong Crimes Ordinance (defining a seditious intention to include an intent “to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or Her Heirs or Successors, or against the Government of Hong Kong”).

²⁴ See Section 124A of the Indian Penal Code (defining sedition to include bringing or attempting to bring “into hatred or contempt, or excit[ing] or attempt[ing] to excite disaffection towards” the government of India).

²⁵ See generally *infra*.

²⁶ Federation of African Journalists and Ors. v. The Gambia, ECW/CCJ/JUD/04/18, Mar. 13, 2018, p. 40.

²⁷ Report of the UN High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred (Appendix: “Rabat Plan of Action”), Jan. 11, 2013, U.N. Doc. A/HRC/22/17/Add.4, ¶ 21 & n.5 (emphasis added).

²⁸ OHCHR, Malaysia’s Anti-Terror and Sedition Laws ‘Curtail’ Human Rights, Warns UN Rights Chief, Apr. 9, 2015, available at <https://news.un.org/en/story/2015/04/495512-malaysias-anti-terror-and-sedition-laws-curtail-human-rights-warns-un-rights>.

²⁹ Haroon Farooq v. Federation of Pakistan & others, Lahore High Court, W.P No.59599 of 2022, Mar. 30, 2023.

³⁰ *Id.*, ¶ 55.

³¹ *Id.*, ¶ 60.

Likewise, in Uganda the constitutional court found that Uganda’s colonial-era sedition law contained “an endless catchment area,”³² explaining that “the wording creating the offence of sedition is so vague that one may not know the boundary to stop at, while exercising one’s right.”³³ And parliaments and legislatures have expressed their concern at the vagueness of colonial-era sedition laws when justifying their repeal. For instance, in New Zealand, repeal was justified on the ground that the sedition law was “broad and uncertain.”³⁴

The second reason for finding these laws too vague to pass muster is their subjectivity. The East African Court of Justice, for instance, has held that “[t]he definitions of sedition . . . are hinged on the possible and potential subjective reactions of audiences to whom the publication is made. This makes it all but impossible . . . to predict and thus, plan [potential defendants’] actions.”³⁵ Likewise, the Ugandan constitutional court has noted that “[o]ur people express their thoughts differently depending on the environment of their birth, upbringing and education.”³⁶ As a result, different speakers may not appreciate the potential reaction of their audience in the same way. The recent decision from the Lahore High Court also reflected on the subjectivity of criminalizing speech based on audience reaction, stating that “[w]hether the feelings are strong enough to constitute an offence is for the person in authority to determine. At a given time and in a particular case those strong feelings of disapproval may go unnoticed yet in another case and under different circumstances, lesser feelings of disapproval would be enough to attract the offence. In the ultimate analysis the decision to prosecute depends on who wield the authority.”³⁷

A third related reason for striking down sedition laws on vagueness grounds has been that their breadth leaves them vulnerable to abuse. Thus, for instance, the UN Human Rights Committee recently urged Hong Kong to “[r]epeal the sedition provisions under the Crimes Ordinance and refrain from using them to suppress the expression of critical and dissenting opinions.”³⁸ Likewise, in formulating the list of issues prior to reporting for India, the UN Human Rights Committee requested India to respond to “[a]buse and misuse of broadly formulated sedition laws.”³⁹

These concerns regarding vagueness, the subjectivity of putative audience reaction, and the potential for abuse have been borne out in cases monitored by the Clooney Foundation for Justice’s TrialWatch initiative. For instance, in a case in Hong Kong, the court convicted the defendant, according to a TrialWatch Report on the

³² Mwenda & Ors v. Attorney General, [2010] UGCC 5, Aug. 25, 2010, p. 23.

³³ *Id.*

³⁴ Government Moves to Repeal Sedition Laws, June 9, 2007, available at <https://www.beehive.govt.nz/release/government-moves-repeal-sedition-laws>. For a full list of recent repeals, see TrialWatch Report, *The Crime of Sedition: At the Crossroads of Reform and Resurgence*, April 2022, available at <https://cfj.org/wp-content/uploads/2022/04/Sedition-Report-April-2022.pdf>.

³⁵ Media Council of Tanzania v. The Attorney General of the United Republic of Tanzania, EACJ Reference No. 2 of 2017, Mar. 28, 2019, ¶ 99.

³⁶ Mwenda & Ors v. Attorney General [2010] UGCC 5, Aug. 25, 2010, p. 23.

³⁷ Haroon Farooq v. Federation of Pakistan & others, Lahore High Court, W.P No.59599 of 2022, Mar. 30, 2023, ¶ 60.

³⁸ UN Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Hong Kong, China*, Nov. 11, 2022, CCPR/C/CHN-HKG/CO/4, ¶ 16(a), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FCHN-HKG%2FCO%2F4&Lang=en.

³⁹ UN Human Rights Committee, List of Issues Prior to Submission of the Fourth Periodic Report of India, Aug. 22, 2019, CCPR/C/IND/QPR/4, ¶ 27(b), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FIND%2FQPR%2F4&Lang=en.

case, for “comments—about the police, the Communist Party, and the NSL [National Security Law], and his use of slogans,” which were “regarded as seditious words because they *could* urge or inspire ‘hatred’ and/or encourage people to oppose the NSL.”⁴⁰ The report went on to find that the decision “offers no guidance on what speech and criticism is in fact permissible.”⁴¹

The convicting judgment of the Sessions Court in Wan Ji’s case, and other reporting on the use of the Sedition Act in Malaysia, aptly illustrate all three of these concerns. First, with respect to the lack of clarity of the Sedition Act 1948, the Sessions Court did not specify the particular limb (or limbs) of the Act under which the defendant was convicted: i.e., it does not explain whether the defendant was convicted for speech that may have caused “hatred or contempt towards His Majesty the King of Selangor”⁴² or for speech that allegedly had a “tendency to raise discontent or disaffection amongst the inhabitants of Malaysia; or a tendency to promote feelings of ill-will and hostility between the different races in Malaysia; or a tendency to question any matter, right, status or position established or protected by the provision of art 152 of the Federal Constitution.”⁴³ Nor does it apply any of those specific terms to the speech at issue. This leaves individuals with scant guidance regarding what type of speech might be criminalized.

Further, although the Sessions Court cites jurisprudence from the Court of Appeal that the “views of the witnesses who heard the allegedly seditious words are also not decisive and are irrelevant,”⁴⁴ it specifically noted that “[t]he testimonies given by SP1, SP2, and SP7 above clearly shows *how they felt* after they all read the Accused’s publication about the King of Selangor on Facebook. SP1, SP2 and SP7 as members of the public are of the opinion that the words used by the Accused in the publication are inappropriate and insulting the King of Selangor.”⁴⁵ The Court then concludes that “there is no necessity to prove that the accused’s speech has caused an act of violence or actual adverse reaction. The prosecution need only prove under the second ingredient that the words uttered by the accused have one or more of the six tendencies.”⁴⁶ Taken together, this suggests the Sessions Court saw the testimony of three witnesses as indicative of how the broader public might have reacted—and thus the ‘tendency’ of the speech. This illustrates the subjectivity of the analysis.

Finally, with respect to the potential for abuse, it bears noting that numerous human rights groups have criticized abusive enforcement of the Sedition Act 1948 in Malaysia.⁴⁷ Article 19, for example, has stated that “successive governments have used the Sedition Act to stifle dialogue and silence critical voices,”⁴⁸ while

⁴⁰ Elizabeth Wilmshurst KC, TrialWatch Fairness Report: HKSAR v. Tam Tak-chi, May 2022, p. 41, *available at* <https://cfj.org/wp-content/uploads/2022/05/Tam-Tak-Chi-Fairness-Report-May-2022.pdf>.

⁴¹ *Id.* p. 41.

⁴² PP v. Wan Ji Bin Wan Hussin, Shah Alam Sessions Court, Judgment, ¶ 21.

⁴³ *See also id.*, ¶ 22.

⁴⁴ *Id.*

⁴⁵ *Id.*, ¶ 19 (emphasis added).

⁴⁶ *Id.*, ¶ 22.

⁴⁷ *See, e.g.*, Human Rights Watch, Submission to the Universal Periodic Review of Malaysia, Mar. 28, 2018 (“The Sedition Act has been repeatedly used to investigate and prosecute those who criticize the government or the judiciary or make remarks the government considers to be derogatory toward the sultans (traditional Malay state rulers) or disrespectful of religion.”), *available at* <https://www.hrw.org/news/2018/03/29/submission-universal-periodic-review-malaysia>.

⁴⁸ Article 19, Malaysia: Drop Sedition Charges Against Opposition Party Member and Repeal the Draconian Sedition Act, June 2, 2021, *available at* <https://www.article19.org/resources/malaysia-drop-sedition-charges/>.

Lawyers for Liberty has described how “easily the legislation can be misused against dissidents.”⁴⁹ The vulnerability of the law to abuse is reflected in monitoring of sedition cases conducted by SUARAM, which in 2021 reported that the “the Sedition Act [was] being used to suppress political dissent and restrict press freedom on the Internet, including online articles or posts written by HRDs or critics of the government”⁵⁰ and in 2022 reported that the law had been “applied to articles or posts written online by Human Rights Defenders or critics of the government.”⁵¹ According to numbers released by the government in 2023, there have been 367 investigations launched under Sedition Act over the previous five years, with SUARAM finding that cases have spiked during times of greater criticism of the government.⁵²

II. Because the Sedition Act 1948 Violates the Principle of Legality, It Also Does Not Qualify As ‘Law’ for Purposes of Article 162 of the Malaysian Constitution

Under Article 10(2) of the Malaysian Constitution, “Parliament may by law impose” restrictions on the exercise of the right to freedom of expression in defined circumstances. In its 2015 decision on the Sedition Act, the Federal Court found that Article 10(2) applied to the Act, even though it was not enacted by Parliament (rather, it was enacted by the Federal Legislative Council).⁵³ The Federal Court held instead that the Sedition Act 1948 came within the ambit of Article 10(2) by virtue of the interplay between Article 10(2) and Article 162 of the Constitution, the latter of which provides that “the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by federal or State law.” On this basis, the Federal Court concluded that “[t]he [Sedition] Act, being a written law which was in operation in the Federation immediately prior to Merdeka Day clearly comes within the meaning of the term ‘existing law’ as defined in art. 160(2).”⁵⁴

The Court did not, however, explicitly consider whether the Sedition Act enjoys the qualities of ‘law’ sufficient to come within the ambit of Article 162. And it does not, because the Sedition Act violates the principle of legality, as discussed above.

III. The Sedition Act 1948 Violates the Right to Freedom of Expression

Even if the Sedition Act 1948 were covered by Article 162, it would violate the right to freedom of expression and should be repealed or struck down on this basis, not only because laws restricting freedom of expression cannot be vague, but also because the restriction imposed by the Sedition Act is neither necessary nor proportionate.⁵⁵

⁴⁹ Lawyers for Liberty, Wan Ji’s Imprisonment Under the Sedition Act a Huge Stain in Malaysia Baharu, July 9, 2019, *available at* <https://www.lawyersforliberty.org/2019/07/09/lfl-wan-jis-imprisonment-under-the-sedition-act-a-huge-stain-in-malaysia-baharu/>.

⁵⁰ SUARAM, Malaysia Human Rights Report 2021, 2022, p. 61, *available at* https://www.suaram.net/_files/ugd/359d16_a65ec707b2c745bd8f4aeb7630a3f2fb.pdf.

⁵¹ SUARAM, Malaysia Human Rights Report 2022, 2023, p. 41, *available at* https://www.suaram.net/_files/ugd/359d16_652d7c44f55841689970f68f0d83debd.pdf.

⁵² *Id.*, p. 44.

⁵³ PP v. Azmi Sharom, [2015] 8 CLJ, ¶ 7.

⁵⁴ *Id.* ¶ 18.

⁵⁵ In its 2015 decision, the Federal Court applied a proportionality test to provisions of the Sedition Act and found that “it cannot be said that the restrictions imposed by s. 4(1) [of the Sedition Act] are too remote or not sufficiently connected to the

International Standards on Freedom of Expression

Article 19 of Universal Declaration of Human Rights protects the right to freedom of expression. The right to freedom of expression is also specifically enshrined in several international human rights treaties to which Malaysia is a party, such as in Article 13 of the Convention on the Rights of the Child and Article 21 of the Convention on the Rights of Persons with Disabilities.

The UN Human Rights Committee has noted that “any restriction on freedom of expression constitutes a serious curtailment of human rights.”⁵⁶ Thus, while “certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole,” such restrictions “may not put in jeopardy the right itself.”⁵⁷ In particular, any restrictions imposed by a State on the exercise of the right to freedom of expression must satisfy a three-part test: (a) be provided by law, (b) serve a legitimate purpose, and (c) be necessary and proportional to said legitimate purpose.⁵⁸

Further, the Committee has specifically made clear that mere criticism of rulers or government officials cannot be criminalized,⁵⁹ emphasizing that “[t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.”⁶⁰

As described above, the Sedition Act 1948 fails the first prong of this test, as it is too vague to be considered ‘provided by law.’ As described below, it also fails the test of necessity and proportionality.

Malaysia’s Sedition Act Does Not Comply with Necessity and Proportionality Requirements

Under international standards, a law restricting speech will “violat[e] the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”⁶¹ Further, the UN Human Rights Committee has held that a state must establish “a direct and immediate connection between the expression and the [specific] threat” that the state says is the reason for a restriction on speech.⁶² The necessity requirement overlaps with the proportionality requirement, as the latter means that a restriction must be the “least intrusive

subjects/objects enumerated in art. 10(2)(a). Furthermore, this is not a total prohibition as it is subject to a number of exceptions.” *Id.* ¶ 43. This conclusion does not, however, fully account for the ways in which the Sedition Act 1948 is inconsistent with international standards on necessity and proportionality, and left unaddressed certain arguments, such as the potential for the Sedition Act 1948 to be misused, and which might lead it to a different result.

⁵⁶ UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, Sept. 12, 2011, CCPR/C/GC/34, ¶ 24.

⁵⁷ UN Human Rights Committee, *General Comment No. 10: Freedom of Expression (Art. 19)*, June 29, 1983, CCPR/C/GC/10, ¶ 4.

⁵⁸ UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, Sept. 12, 2011, CCPR/C/GC/34, ¶ 22.

⁵⁹ *Id.* ¶ 38 (“[T]he mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties.”)

⁶⁰ *Id.* ¶ 13.

⁶¹ UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, Sept. 12, 2011, CCPR/C/GC/34, ¶ 33.

⁶² *Id.* ¶ 35.

instrument amongst those which might achieve their protective function.”⁶³ That is, “restrictions must not be overbroad . . . they must [also] be proportionate to the interest to be protected.”⁶⁴

States must therefore meet a high threshold before instituting criminal prosecutions based on speech. Notably, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has recommended that only the following speech offenses should ever be criminalized: child pornography, incitement to terrorism, direct and public incitement to commit genocide, and advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence.⁶⁵

The Sedition Act 1948 fails the necessity and proportionality tests for two main reasons: because the law does not require a likelihood of imminent violence, it is not narrowly tailored to the potential objectives of protecting public order and national security, nor is it the ‘least intrusive means’ of achieving those objectives; and because the law includes a statutory presumption that speakers intend to cause the likely response to their speech, it may sweep in speakers who do not actually intend harm, much less the incitement of violence, but where courts think this could be the result of their speech. The law is therefore overbroad and disproportionate for this reason as well.

First, the Sedition Act 1948 has been interpreted not to require any risk of violence at all, but only the “tendency to raise discontent or disaffection amongst the inhabitants of Malaysia: or a tendency to promote feelings of ill-will and hostility between the different races in Malaysia; or a tendency to question any matter, right, status or position [under the Constitution],” in the words of the Sessions Court in Wan Ji’s case.⁶⁶ This means that speech may be considered seditious if the court believes the spoken words have a ‘tendency’ to produce an ‘adverse reaction,’ even if there is no risk of provoking violence.

Under the Johannesburg and Siracusa Principles, by contrast, speech should only be punished on the grounds it is a threat to national security if the government can show that “(a) the expression is intended to incite imminent violence; (b) is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”⁶⁷ Likewise, under the Rabat Plan of Action—as mentioned above, adopted through expert workshops convened by the Office of the United Nations High Commissioner for Human Rights on the prohibition of incitement to national, racial or religious hatred—prosecutions for advocacy of hatred that constitutes incitement should be limited to circumstances

⁶³ *Id.* ¶ 34.

⁶⁴ *Id.* ¶ 34.

⁶⁵ U.N. General Assembly, Promotion and Protection of the Right to Freedom of Opinion and Expression, Sixty Sixth Session, Aug. 10, 2011, U.N. Doc. A/66/290, ¶¶ 81, 83; *see also* Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of Fundamental Freedoms and Human Rights While Countering Terrorism, Apr. 29, 2016, U.N. Doc. A/HRC/31/65, ¶ 38; Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Mar. 22, 1996, U.N. Doc. E/CN.4/1996/39, Annex, Principle 7.

⁶⁶ *PP v. Wan Ji Bin Wan Hussin*, Shah Alam Sessions Court, Judgment, ¶ 22.

⁶⁷ Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, [hereinafter ‘Johannesburg Principles’], Mar. 22, 1996, U.N. Doc. E/CN.4/1996/39, Annex, Principle 6; *see also* United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights [hereinafter ‘Siracusa Principles’], Sept. 28, 1984, U.N. Doc. E/CN.4/1985/4, Annex, ¶¶ 29-32.

where there is a “reasonable probability that the speech would succeed in inciting actual action against the target group.”⁶⁸

Such limits have been imposed by legislation, for instance in Australia and Canada, where, respectively, legislatures replaced the term sedition with ‘urging violence’ and restricted sedition to advocacy of forceful overthrow of the government.⁶⁹ Mostly recently, Singapore repealed its Sedition Act, with the Ministry of Home Affairs noting, “[s]ome types of conduct covered by the Sedition Act 1948 should also not be criminalised in today’s context, *such as exciting disaffection against the Government*.”⁷⁰

Here, by contrast, Malaysian courts appear to consider a tendency toward causing an ‘adverse reaction’ alone sufficient to justify conviction.

In fact, the elastic concept of a ‘tendency’ to incite a particular response also exacerbates the issue. Despite the Indian Supreme Court’s earlier decision limiting the sedition law in India, just last year the Indian Supreme Court went a step further and stayed all pending sedition cases, noting that “it is clear that the Union of India agrees with the *prima facie* opinion expressed by this Court that the rigors of Section 124A of IPC [the sedition law] is not in tune with the current social milieu, and was intended for a time when this country was under the colonial regime.”⁷¹ In the petitions that prompted this stay, the attention of the court was drawn to the fact that the term ‘tendency’ has “no ascertainable objective criterion for assessment; [it is a term] susceptible to wide and discretionary interpretation.”⁷²

For these reasons, the Sedition Act 1948 is not sufficiently narrowly tailored and fails the necessity and proportionality tests.

Second, the Sedition Act 1948 violates the necessity and proportionality tests because it functionally presumes the accused person’s intent, based on the court’s analysis of their speech. Section 3 of the Act states that “[f]or the purpose of proving the commission of any offence against this Act the intention of the person charged . . . 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.”

Presuming intent is a further basis for finding that the law violates the right to freedom of expression. In fact, a Malaysian court has already come to this conclusion: in the *Mat Shuhaimi Bin Shafiei* case, citing the appellant’s submission on proportionality, the court noted that the lack of an intent requirement is “‘akin to using ‘a hammer to confront the menace of a mosquito.’”⁷³

⁶⁸ Report of the UN High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious hatred (Appendix: “Rabat Plan of Action”), Jan. 11, 2013. U.N. Doc. A/HRC/22/17/Add.4, ¶ 29(f).

⁶⁹ TrialWatch Sedition Report, *supra*, at pp. 8-9.

⁷⁰ Ministry of Home Affairs, Press Release, Commencement of the Sedition (Repeal) Act 2021, *available at* <https://www.mha.gov.sg/mediaroom/press-releases/commencement-of-the-sedition-repeal-act-2021/>

⁷¹ *S. G. Vombatkere v. Union of India* (2022) 7 SCC 433, ¶ 5.

⁷² See petition available at https://www.livelaw.in/pdf_upload/final-sedition-petition--58-142-392721.pdf.

⁷³ *Mat Shuhaimi bin Shafiei v Kerajaan Malaysia*, [2017] 1 MLJ, ¶ 34. The Federal Court had a previous opportunity to consider Section 3 but found that the question was *res judicata* in connection with a prior challenge by the same party to a conviction under Section 4 of the Act. Thus, the Federal Court has not had a proper opportunity to evaluate the effect of Section 3 on the constitutionality of the Act as a whole.

At the international level, the Rabat Plan of Action notes that “Article 20 of the International Covenant on Civil and Political Rights anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the Covenant, as this article provides for ‘advocacy’ and ‘incitement’ rather than the mere distribution or circulation of material.”⁷⁴

At the regional level, the European Court has indicated that intent is a relevant factor to consider when imposing criminal sanctions relating to freedom of expression.⁷⁵ Likewise, the Inter-American Court of Human Rights has emphasized the relevance of “actual malice” in a criminal case implicating the right to freedom of expression.⁷⁶

Regional courts have also deemed presumptions regarding intent to violate the right to be presumed innocent. For instance, the Inter-American Court has expressed its concern at a practice that assumed ‘dolus’ because the defendant did not retract statements that were at issue in a criminal case, explaining, “the Court finds it evident that both the [domestic courts] presumed the dolus of [the defendant] and, based on this, they demanded that he should refute the existence of his punishable intention. Hence, these courts did not presume the innocence of the defendant.”⁷⁷ More generally, the European Court of Human Rights has explained that “States [must] confine [presumptions of fact or of law] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”⁷⁸

Because the Sedition Act 1948 provides that ‘intent shall be irrelevant,’ it fails the tests of necessity and proportionality on this basis as well.

IV. Conclusion

As measured against international, regional, and national precedents, it is evident that the Sedition Act 1948 is fundamentally flawed. The Act does not make clear what speech can be criminalized, flouting a core norm governing criminal laws. It is also an unnecessary and disproportionate restriction on freedom of expression. For these reasons, it is past time for the Sedition Act to be repealed or struck down.

⁷⁴ Report of the UN High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred (Appendix: “Rabat Plan of Action”), Jan. 11, 2013, U.N. Doc. A/HRC/22/17/Add.4, ¶ 29.

⁷⁵ Cf. European Court of Human Rights, *Handzhiyski v. Bulgaria*, App. No. 10783/14, Apr. 6, 2021, ¶ 55 (“[T]he question whether it can be ‘necessary in a democratic society’ to impose sanctions . . . becomes more nuanced. In such situations, the precise nature of the act, the intention behind it, and the message sought to be conveyed by it cannot be matters of indifference. For instance, acts intended to criticise the government or its policies, or to call attention to the suffering of a disadvantaged group cannot be equated to acts calculated to offend the memory of the victims of a mass atrocity.”).

⁷⁶ Cf. Inter-American Court of Human Rights, *Kimel v. Argentina*, Series C No. 177, May 2, 2008, ¶ 78.

⁷⁷ Inter-American Court of Human Rights, *Canese v. Paraguay*, Series C No. 111, Aug. 31, 2004, ¶ 161.

⁷⁸ European Court of Human Rights, *Salabiaku v. France*, App. No. 10519/83, Oct. 7, 1988, ¶ 28.