

## Sedition Law and the Bloggers' Freedom of Expression in Malaysia

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### ABSTRACT

*The advancement of Information Technology has transformed the landscape of communication to the new medium of communication. Therefore, blog becomes one of the main communication mediums for a blogger in Malaysia. Bloggers write blog posts, share their likes and dislikes. They voice their opinions; provide suggestions, report news, and form groups in the Blogosphere. However, many bloggers were arrested and prosecuted in court under Sedition Law. This hinders the bloggers' freedom of expression which is protected by Article 10(1) of the Federal Constitution of Malaysia. The objective of this article is to explore the impact of sedition law in the era of Information Technology for bloggers in practicing their freedom of expression in Malaysia. The qualitative research design has been adopted in analyzing three selected blogs and bloggers who were investigated and prosecuted in court. The authors submit that the Sedition Law does not override bloggers' freedom of expression since the freedom itself is not originally absolute. This study will create awareness among bloggers on the importance of their blog information and the limitations of their freedom of expressions.*

*Keywords: Bloggers; blogging; inadequacy; legislation*

### INTRODUCTION

The growing numbers of active bloggers bring serious implications on multicultural society in Malaysia since the myth that bloggers may publish desired content online without legal repercussion had caused unbecoming and inappropriate contents to be posted online thus endangering the relationship among Malaysians. This is to the detriment of genuine bloggers whose main purpose is to publish and share their thoughts, and make comments on aspects that attract their interests and less likely harms others. Despite great economic achievement, enhancement of education and advancement of technology, Malaysia is always regarded as a nation in stable tension.<sup>1</sup> Therefore, issues that may disrupt harmonious relationship among multicultural Malaysians are closely monitored and guarded. Realising that Weblog can and has been used to disseminate contents that caused uneasiness among members of the society; the Sedition Act 1948 (afterwards referred to as Sedition Act) is put into place to restrain such contents for the purpose to curbing racial vengeance. However, the usage of Sedition Act to restrict bloggers postings is subject to contention, since based on earlier studies, Sedition Act had been regularly used for political purposes and to silence dissenters, while suspects are subjects to selective prosecution due to the ambiguity of the Act.<sup>2</sup>

Since freedom of expression in Malaysia is a very contentious topic and the scope of the freedom is ambiguous, the advent of weblog makes the boundaries even more obscure. Resentment to the application of the Sedition Act mounted since bloggers vehemently believed that the Malaysian Multimedia Super Corridor (MyMSC) policy permits unlimited liberty to share ideas and contents disregards of the impact on society.<sup>3</sup> However, contrary to this belief, liberty to say and communicate ideas and expression is not absolute. Even though this freedom is acknowledged as an essential feature of any open, liberal and democratic society, yet limitation is imposed almost globally.<sup>4</sup> The key international standard<sup>5</sup> on the restrictions of freedom of speech can be found in Art 19(3) of the Universal Declaration of Human Rights (UNHDR) which reads:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Based on this provision, most countries including Malaysia restrict the exercise of freedom of speech. Thus, despite the fact that the Sedition Act does not specifically make reference to online statement, the Act is also used to charge and prosecute blogger.

Bloggers resist the application of the Sedition Act on their activities, due to their understanding on the boundary of freedom of speech and expression that had moved away from the understanding on freedom of speech and expression in the era of traditional media, which is narrower in comparison to the era of information age. The era of information age refers to the period where there is free flow and widespread availability of information via ICT that make easy access and distribution of information by on line storage for the purpose of news and knowledge sharing. The emergence of bloggers are to fill in the unavailability of information and to provide alternative news resources since the prime media is allegedly bias towards the government and practice selective reporting. Therefore, the vagueness of the provisions, in particular, penalizing anyone who does or attempt to do, or make expression that has seditious tendency causing the intention of the bloggers irrelevant, does not fit into the era. These changes call upon the study on the relevancy of sedition law to control bloggers activities so as the restrictions if needed does not hamper bloggers freedom of speech.

#### THE LAW OF SEDITION

The Sedition Act 1948 is derived from the criminal provisions drafted by Sir James Stephen in 1870 in the then colonial India. The law's intention was to curb opposition to colonial rule. The law migrated to colonial Malaya in 1948, to Sabah in 1964 and to Sarawak in 1969.<sup>6</sup> The Federal Constitution of the Federation of Malaya 1957 and later Malaysia 1963 permitted Parliament to impose restrictions on the freedom of speech granted by the Constitution. After the May 13 Incident, when racial riots in the capital of Kuala Lumpur led to at least 200 deaths, the government amended the Constitution to expand the scope of limitations on freedom of speech.<sup>7</sup>

The Constitution (Amendment) Act 1971 named Articles 152, 153, and 181, and also Part III of the Constitution as specially protected, permitting Parliament to pass legislation that would limit dissent with regard to these provisions pertaining to the social contract. (The social contract is essentially a *quid pro quo* agreement between the Malay and non-Malay citizens of Malaysia; in return for granting the non-Malays citizenship at independence, symbols

of Malay authority such as the Malay monarchy became national symbols, and the Malays were granted special economic privileges.) With this new power, Parliament then amended the Sedition Act accordingly. Sedition law criminalizes the expression or publication of words that tend to incite hatred or contempt against any government or the ruler.

A person found guilty of sedition may be sentenced to three years in jail, a RM5, 000 fines, or both. In Malaysia, various offences are provided for in the Sedition Act 1948 such as it is an offence for any person to print, publish or distribute any seditious publication.<sup>8</sup> Section 2 of the Act links sedition with a "seditious tendency".<sup>9</sup> The central notion of sedition is defined circularly in the Act as anything which, "when applied or used in respect of any act, speech, words, publication or other thing qualifies the act, speech, words, publication or other thing as having seditious tendency."<sup>10</sup> The section states that any act, speech, words or publication is seditious if it falls under any of the following:

1. To excite disaffection: This encompasses bringing into hatred or contempt or exciting disaffection against any Ruler or against any government, section 3(1) (a).<sup>11</sup>
2. To attempt alteration otherwise than by lawful means: This encompasses exciting subjects to attempt to procure the alteration other than by lawful means of any matter by law established.<sup>12</sup>
3. To excite disaffection against administration of justice: This encompasses bringing into hatred or contempt the administration of justice in the country, section 3(1) (c).<sup>13</sup>
4. To raise discontent amongst subjects: This covers the raising of discontent or disaffection among the subjects or amongst the inhabitants of Malaysia or of any State, section 3(1) (d).<sup>14</sup>
5. To promote ill-will and hostility: This consists of promoting ill-will and hostility between races or classes of the population.<sup>15</sup>
6. To question the "sensitive matters": This encompasses the questioning of any provisions dealing with the right, status, position, privilege, sovereignty or prerogative established or protected by the Constitution in relation to citizenship, language, the special position of the Malays and the natives of Sabah and Sarawak and the sovereignty of the Malay Rulers, section 3(1)(f).<sup>16</sup>

Section 3(2) provides certain exceptions, providing examples of speech which cannot be deemed seditious. It is not seditious to "show that any Ruler has been misled or mistaken in any of his measures", nor is it seditious "to point out errors or defects in the Government or Constitution as by law established". It is also not seditious "to attempt to procure by lawful means the alteration of any matter in the territory of such Government as by law established" or "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". However, the act explicitly states that any matter covered by subsection (1) (f), namely those matters pertaining to the Malaysian social contract, cannot have these exceptions applied to it.

Section 3(3) goes on to state that "the intention of the person charged at the time he did or attempted (a seditious act) ... 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". This latter provision has been criticized for overruling *mens rea*, a legal principle stating that a person cannot be guilty of a crime if he did not have the intent to commit a crime. A person found guilty of sedition may be sentenced to three years in jail, a RM5, 000 fines, or both.<sup>17</sup>

## BLOGS AND THE ANALYSIS

### BLOG 1: PAPAGOMO.BLOGSPOT.COM

Wan Mohd Azri Wan Deris, better known as Papagomo had posted an entry in Malay titled, "Mesej Sebaran Cina DAP Yang Dahagakan Kuasa (The Message Spread of the Chinese DAP that Thirsts for Power)" that drew 54 comments. He had posted another entry a day earlier titled "Bangsa Cina DAP Wajib Ditentang Walaupun Bermendi Darah (The Chinese race DAP must be opposed even if soaked in blood.)" that purportedly carried a Malay translation of a pamphlet detailing a Chinese plot to take over the country by taking advantage of weakened Malay leaders.<sup>18</sup> In relation to this post Wan Mohd Azri was arrested and as well as another blogger, King Jason.<sup>19</sup>

The case was investigated under Section 4(1) (c) of the Sedition Act 1948. The bloggers publications occurred in retaliation to the Utusan Melayu report which sparked a nationwide uproar

with its incendiary front page report titled "Apa lagi Cina mahu?" seen to blame the Chinese for the Barisan Nasional's (BN) weaker score in Election 2013. The police also investigated Utusan Melayu for sedition.<sup>20</sup>

Analysing the blog's statements, "Bangsa Cina DAP Wajib Ditentang Walaupun Bermendi Darah (The Chinese race DAP must be opposed even if bathed in blood.)" and "Mesej Sebaran Cina DAP Yang Dahagakan Kuasa (The Message Spread of the Chinese DAP that Thirsts for Power)", clearly suggests that there should be a fight against Chinese DAP to the extent of bloodshed. Even though the second statement refers to the same party as suggesting that the party wants to rule Malaysia. Both statements have elements of hatred, ill-will and violence against the Chinese in reference to the Sedition Act 1948.

In applying Param Cumarasamy case who was charged with sedition for a statement he made during a press conference calling on the Pardons Board to reconsider the commutation of death sentence for Sim Kie Chon. A mandatory death sentence had been imposed on Mr. Sim for his illegal, but otherwise innocent, possession of a gun. Mr. Cumaraswamy was acquitted on the grounds that his criticism was directed toward the Pardon Board and not against the King. It was held that intention to incite violence, tumult or public disorder is not a necessary ingredient of the crime. As long as the words were intentionally published and they had a tendency to cause ill-will, the offence is complete. The prosecution need not prove that the act, speech, words or publication in question actually caused hostility, ill will or disaffection. A tendency is sufficient.<sup>21</sup> Whether the publication has a seditious tendency or not is for the judge to decide. It is no defense for the accused to argue that his words were, in fact, true and honest.<sup>22</sup>

Therefore, "Bangsa Cina DAP Wajib Ditentang Walaupun Bermendi Darah (The Chinese race DAP must be opposed even if bathed in blood.)" and "Mesej Sebaran Cina DAP Yang Dahagakan Kuasa (The Message Spread of the Chinese DAP that Thirsts for Power)", have the elements of *sedition tendency* and the blogger's publication actually caused *hostility, ill will or disaffection* among the Chinese in Malaysia as the offence is completed.

Another case that referred is Public Prosecutor v Ooi Kee Saik & Ors (HC).<sup>23</sup> Raja Azlan Shah J had rejected the liberal interpretation of the

provisions of section 124A of the Indian Penal Code as adopted by the courts of India which brought the Indian law of sedition at par with the English law<sup>24</sup> and rely on the strict and literal interpretation of the law.<sup>25</sup> According to the learned justice, the prosecution only needs to prove that words complained of, or words equivalent in substance to those words were spoken by the accused. Once these requirements are proved the accused will be conclusively presumed to have intended the natural consequences of his verbal acts. Therefore that is sufficient if his words have a tendency to produce any of the consequences stated in section 3(1) of the Sedition Act. Moreover there is no need to prove the words complained of could have the effect of producing or did in fact produce any of the consequences enumerated in the said section and it also immaterial whether the impugned words were true or false.<sup>26</sup>

The statements of Papagomo could be viewed as to safeguard one race interest, and that could be his intention. However he should realize that his words would stir racial tension among races especially to whom the words were targeted. There should not be another May 13, 1969 incident. Papagomo should make distinct in between his rights into absolute rights. No constitutional state has seriously attempted to translate the 'right' into an 'absolute right'. Restrictions are a necessary part of the 'right' and in many countries of the world freedom of the speech and expression is, in spite of formal safeguards, seriously restricted in practice. In addition the right to freedom of speech is simply the right which everyone has to say, write or publish what he pleases so long as he does not violate the law. Therefore if he says or publishes anything expressive of a seditious tendency he is guilty of sedition. The government has a right to preserve public peace and order, and therefore, has a duty to prohibit the propagation of opinions which have a sedition tendency. In addition, a meaningful understanding of the right to freedom of speech under the constitution must be based on the realities of our contemporary society in Malaysia. Striking a balance of the individual interest against the general security or the general morals, or the existing political and cultural institutions.<sup>27</sup>

Therefore, Papagomo's statements are seditious and has the seditious tendency. This case reads in section 3(1)(e) to promote feelings of ill-will and hostility between races or classes of the population of Malaysia and the offence under section 4(1)(c)

prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication under the offences. In another development Papagomo was also arrested for publishing false information that led to a brawl at the Low Yat Plaza.<sup>28</sup>

#### BLOG 2: WWW.MALAYSIA-TODAY.NET

In April 25, 2008 Raja Petra Kamaruddin (RPK) has posted an article "Let's Send The Altantuya Murderers To Hell", implicated Deputy Prime Minister Najib Razak (now is the Ex-Prime Minister) and his wife Rosmah Mansor in the killing of Mongolian model, Altantuya Shaariibuu. This is one of the first legal action taken against a blogger. RPK was investigated over his posting allegedly contained seditious tendency. The blogger was charged with sedition and put behind bar when he refused to post RM5, 000 (\$2,100) bail.<sup>29</sup> He left the country while his case is still on trial and warrants were issued for his arrest.<sup>30</sup> Charges against him were dropped pending his return to Malaysia. Prior to the sedition charge, RPK was detained under the Internal Security Act on 12 September 2008 and he was released after a habeas corpus was filed by his lawyer citing unlawful detention by the Home Ministry.<sup>31</sup> Raja Petra Kamaruddin also investigated and prosecuted with Defamation for defaming Prime Minister's wife, Datin Seri Rosmah Mansor, in his sworn statement in his statutory declaration made at the Civil High Court.<sup>32</sup>

In analyzing, "Let's Send The Altantuya Murderers To Hell", a statement that may has a seditious tendency. A blogger who writes an article in his or her blogs commonly writes words or phrases based on two important approaches or do have two type of meanings. The first is which has the 'Natural and Ordinary meaning';<sup>33</sup> in deciding the meaning of words complained, the court's approach is to apply the standard of the ordinary, reasonable person.<sup>34</sup> That is, 'what would the ordinary, reasonable person understand by the offending words?' It is noted here that the question is not what the defendant meant, but what the hypothetical reasonable person would understand the words to mean and how do we decide who an ordinary, reasonable person is? Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning *they* would put on the

words in question.<sup>35</sup> When imprecise, ambiguous, fanciful or unusual words are used they could give rise to a wide range of reasonable opinion on what the words mean. This case notes that in such an event: 'The publisher can hardly complain...if he is reasonably understood as having said something that he did not mean.'<sup>36</sup> As per Lord Devlin advise:

"A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire: but it can be done."<sup>37</sup>

The second style of writing is 'Innuendo meaning', also known as *special meaning* and is different from the natural and ordinary meaning in that it refers to the meaning that arises outside the words themselves. The meaning here is that which can be placed on the words only by reference to certain facts or circumstances that is known to certain persons.<sup>38</sup> In other words, what otherwise might appear as a harmless statement can be converted into seditious one because hearer or reader has a special knowledge of the relevant facts. For example a statement that Reverend X regularly visits a particular address may not mean much to someone who does not know that the address belongs to a brothel, and on the contrary could give rise to a negative innuendo to someone who knows that the address belongs to a brothel.

Eventually RPK's blog title is general as it does not specify any individual. However the content of this article which relates the Ex-Prime Minister, Dato Sri Najib Tun Razak and his wife Datin Rosmah Mansor directly under the category of Inneundo meaning reads as sedition. As the Ex-Prime Minister who was the Deputy Prime Minister at the time of the article published is representing the government as a deputy head, the case falls under the offense falls under the section 4(1) (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication<sup>39</sup> and under the section 3(1) (a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government.

In the case of Public Prosecutor v Oh Keng Seng,<sup>40</sup> the defendant was acquitted at the High Court without being called for defense on the ground that his speech was not seditious as his statement does not come within the definition of seditious tendency. However on appeal to Federal Court, Wan Suleiman FJ, stated that the respondent's exceed the limit of freedom of

speech, that his content of speech is not legitimate criticism permissible under section 3(2)<sup>41</sup> of the Sedition Act. The respondent's speech clearly contains sedition tendency envisaged in both section 3(1) (a) and 3(1) (c). Therefore the judge allows the appeal and set aside the order of acquittal and called the respondent to make his defense. The defendant in his defense argued that his speech was a fair criticism of government policies, that he had no intention of causing any racial trouble and that he never advocated to the people that they should take the law into their own hand. Bona fide and fair criticism of government policies and of opposition political parties is not within the ambit of the Sedition Act as long as the speaker does not exceed the permissible scope under the law. The defendant has failed in his defense in the High Court as the judge found that the evidence and of the defendant witness has in no way raised any reasonable doubt nor establishing even on a balance of probabilities (for the onus lies on the defense) that the speech delivered by the accused came within any of the permissible limits as set out in section 3(2) of the Sedition Act. Therefore the defense objection was disallowed and the accused was fined RM 2,000 in default six months' imprisonment.<sup>42</sup> The defendant appeal against the Federal Court judgment on the ground that the charge was improper and defective as well as the accused should acquitted and discharge for the amendment of charge. However the Federal Court dismissed the appeal and affirmed the conviction and sentence imposed by the learned trial judge.<sup>43</sup>

"Let's Send The Altantuya Murderers To Hell", is a statement clearly refers to a person who commits murder; a killer of Altantuya to the place or state of punishment of the wicked after death; the abode of evil and condemned spirits.<sup>44</sup> In addition the content of the article which clearly refers to the Ex-Prime Minister and his wife involvement has justified that the title and the content is seditious and has the sedition tendency. This falls under section 3(1) (a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government and section 4(1) (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication<sup>45</sup> Raja Petra could argue that the article is written on public interest and it is a fair criticism against the government leader who could has committed the act. However there should be a complete evidence to produce apart from the written

article or story narration with mere opinion. There should be a complete effect of his information that he merely criticized the Ex-Prime Minister and no intention of causing the country instability. Involving the government leader in a murder conspiracy needs utmost care to ensure that the words uttered or published do not otherwise have a seditious tendency as defined in the Sedition Act as the the Prime Minister is representing the government. He could not rely on section 3(2) of the Sedition Act as a defense as his allegation of murder against the Prime Minister is serious which could diminish the credibility of the Prime Minister. Neither, could he argue on Article 10 of the Federal Constitution which provides for the right to freedom of speech and expression. The Sedition Act is thus designed to impose restrictions on the right to freedom of speech which Parliament has deemed necessary and expedient pursuant to and in accordance with Article 10 of the Federal Constitution. Raja Petra Kamaruddin fled away to the United Kingdom after his release on bail. His case is pending from its inception as he is currently residing in Manchester.<sup>46</sup>

#### BLOG 3: ALVIN TAN

Alvin Tan and Vivian Lee were jointly charged and prosecuted of making a seditious posting on their Facebook page by uploading a photo of them eating bak kut teh (a Chinese herbal pork soup)

with a caption “Selamat Berbuka Puasa”<sup>47</sup> that means Happy Breaking Fast, Malay greeting for breaking fast. The couple pleaded not guilty; therefore the couple were denied bail and imprisoned without bail.<sup>48</sup> They were charged under subsection 4(1)(c) of the Sedition Act 1948 for posting seditious material through the offensive greeting which carries fine maximum fine of RM5,000 which is punishable under subsection 4(1) of the same Act.<sup>49</sup> The couple also was charged under Section 298A (1) (a) of the Penal Code for creating ‘enmity between different groups of religion or races. In April 2016, as Alvin Tan (currently seeking asylum in the United States) Vivian Lee was acquitted of the Penal Code charge as it was ruled it did not apply to non-Muslims.<sup>50</sup>

“Selamat Berbuka Puasa” - Malay greeting for breaking fast with a Chinese herbal pork soup as shown in Figure 1. The statement fall under section 4(1) (c) that makes it offence to prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication and 3(1) (e) to promote feelings of ill-will and hostility between races or classes of the population of Malaysia. The statement Selamat Berbuka Puasa, for example to wish the Muslims the best for breaking fast is not sedition. However the following sentence “dengan Bak Kut Teh...Wangi, enak, menyelerakan!”(with Bak Kut The...Fragrant, delicious and appetizing) had sedition tendency as pork meat is haram<sup>51</sup> which means forbidden or not allowed to eat by Muslims.



FIGURE 10.1 Depicting Alvin Tan and Vivian Lee eating bak kut teh and describing it as ‘wangi, enak, menyelerakan’ (fragrant, delicious, appetizing)

In applying the case of *Fan Yew Teng*,<sup>52</sup> it was held that the defendant phrased his words so clearly that no reader will be left with any doubt which group he was referring to. Therefore the words used were calculated to produce ill-will and enmity between the races that it has gone beyond what is sanctioned by law and has in fact a seditious tendency.<sup>53</sup> Alvin Tan's statement clearly reflects the sedition tendency as whether he has the intention to provoke Muslims in the country is irrelevant.<sup>54</sup> Alvin Tan has to be very sensitive to the words chosen when publishing them in his blog. Alvin Tan conclusively presumed to have intended the natural consequences of his publication therefore sufficient if his words have a tendency to produce any of the consequences stated in section 3(1) of the Act. It is irrelevant whether or not the words complained of could have the effect of producing or did in fact produce any of the consequences enumerated in the section.<sup>55</sup> The message are particularly dangerous which are meant to hurt a specific group of race which could establish a broad consensus for large-scale harmful actions among the races. Therefore the spread of such statement invites racial hatred that continues to elicit violence. Thus Vivian Lee was found guilty of sedition and jailed six months over 'bak kut teh' Ramadan photo. However Alvin Tan failed to attend the hearing and is believed to have fled to the United States to avoid facing trial. Therefore Vivian Lee appealed against her conviction and sentence. The High Court dismissed the appeals. The learned Judge found that Vivian and Alvin Tan had a common intention to publish the picture, and that Vivian was a willing participant. Although no one saw Alvin or Vivian posting the picture, the learned Judge also made an inference from the evidence showing that the picture was kept in Alvin's notebook and the Facebook page was registered in the name of Alvin and Vivian. The High Court however substituted the sentence of five (5) months and twenty (22) days imprisonment with a fine in the sum of RM5,000 in default, imprisonment of six (6) months. The High Court in the same vein dismissed the prosecution's appeal on the inadequacy of the sentence.<sup>56</sup>

#### FREEDOM OF EXPRESSION IN MALAYSIA

Freedom of speech and expression is vital for citizens of democratic countries. The freedom

enables the people to take part within a democratic framework, to cherish the ideals of a government by the people for the people. Democracy is worthless if it does not allow free expressions on all matters pertaining to political and social aspects of the people. To have freedom of expression is to allow the people to exercise their democratic rights on the basis of well-informed decisions. As such democracy without freedom of speech and expression is untenable. Malaysians take pride in the fact that they practice parliamentary democracy. They have, since their independence in 1957, held free general elections as enjoined in the Constitution. The same system has enabled the country to prosper from the status of an under-developed to a developing country. Democracy flourishes when people are given the space to participate in the system. Democracy has also contributed to the fact that Malaysia is now recognized as one of the fast growing economic countries in the Asian region. Since Malaysia became a member of the United Nations on September 17, 1957,<sup>57</sup> it has an obligation to promote justice, respect for and observance of fundamental human rights. Malaysia has recognized the preamble of Universal Declaration of Human Rights (UDHR), in cooperation with the United Nations, on the promotion of universal respect for and observance of human rights and fundamental freedoms. As a Member of the Commonwealth, Malaysia has also affirmed its commitment to the protection of human rights generally and the right to freedom of expression specifically through statements issued by the Commonwealth Heads of Government Meetings.<sup>58</sup> In fact the principle of freedom of expression in Malaysia is enshrined in the Federal Constitution in Part II on Fundamental Liberties. A constitutional guarantee of freedom of speech ensures an individual's ability to assist in the operation and development of institutional arrangements that serve the common good. Hence enable all members of the community to pursue their various ends in reasonable harmony and co-operation. According to the Constitution:

Article 10 states that:

- (1a) 'Every citizen has the right to freedom of speech and expression. However in the same article in clause 2 (a) of the same provision, permission is given to restrict freedom of speech and expression if necessary "in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public

order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence’.

Malaysians do have the rights to enjoy the freedom of speech and expression as stated in the Article 10(1)(a). However, the freedom is only qualified in term of national security, public order, ethics or morality as stated in Article 10 (2)(a). But the importance of freedom of speech and expression does not make the freedom an absolute right. The freedom is restricted and certain issues like the status of national language, Malay’s special rights, the status of Islam as national religion should not be questioned as stated in the Federal Constitution.<sup>59</sup> This means that Malaysian have the rights to say whatever they like without breaking the rules or regulations that threaten the society and even causes any public disorder or riot. The constitution and other laws however have provisions that seek to punish those who are found to be exceeding their right of expression by expressing controversial views on issues such as the special rights of the Malays and other indigenous people (bumiputera), Islam as national religion, the rights of immigrant races (especially Chinese and Indians) to citizenship, the position of the King, and the status of the Malay language as the national language and a host of other issues that could potentially be sensitive in the context of the fragile race relations in the country. Malaysia as a multiracial society, liable to racial conflict, requires such laws to prohibit the propagation of racial prejudice and religious bigotry. The constitution also prohibits speech that advocates the forcible overthrow of the government.<sup>60</sup>

Therefore blogs which are recognized as one of the avenue to store and convey information invites many Malaysians to express their freedom via blogs especially when there are issues related to the government and politics. Evolution of bloggers may due to suppression of the liberty to voice out ideas, opportunity to show support, disagreement and disappointment in emerging issues such as misappropriation, scourging, corruption, scandal and misdeeds of leaders and authority to the public. Activists have difficulties in expressing their feelings and opinion through the conventional media such as newspaper, magazine and other printed media due to the government control over media ownership. How ever in general, the freedom of speech and expressions in Malaysia is not absolute.

## SEDITION (AMENDMENT) ACT 2015 (A NEW DEVELOPMENT)

The amendment is in line with the hope of the government to be more open and allow the public to give feedback or criticism against the government towards setting up an administration which is transparent and responsible in Malaysia. The act of inciting hatred, contempt or causing dissatisfaction against the government will no longer be offences under new the Sedition Act 2015. However, the Malay rulers are still off limits and inciting hatred, contempt or dissatisfaction against that institution will land offenders in jail for a lengthier time. This Act is also deleted paragraph 3(1)(c) of the same act to make the act of sowing hatred or contempt or raising dissatisfaction towards the administration of justice in Malaysia no longer regarded as inciting, and as such, would no longer be dealt with as an offence under the act. Nevertheless, to protect the sanctity of religions professed by the multi-religious communities in the country, the Act stated that any individual spreading bad feelings, hostility or hatred between any person or group by using religion, be regarded as having committed an offence under the act. The updated Sedition Act, however, removes a fine as punishment, replacing it with a compulsory jail term. Furthermore, the old law provided for a maximum jail term of up to three years allowing the courts to maybe let off an offender with only a few months jail. But the new Sedition Act guarantees a convicted person a minimum of three years behind bars which can go up to seven years.

The new Sedition Act also stipulates a new kind of offence whereby any act of sedition that leads to bodily injury or damage of property will be punishable by at least five years in jail and up to 20 years behind bars. For sedition offences resulting in bodily injury or damage to property, an accused can be denied bail if this is backed by a public prosecutor in writing that it would not be in public interest to grant bail. This particular offence also excludes all forms of leniency meaning a young offender or a first-time offender will not be let off lightly. Offenders charged with sedition will have their passport seized. In what appeared to be a response to those who fled the country after being charged with sedition, anyone charged with committing sedition (Section 4) must now surrender their passports. If the accused has yet to have any international travel documents, the courts can order the Immigration director-general



not to issue any such documents until the case is resolved. Judicial discretion will be taken away, making sentencing a bit dicey in the Sedition Act. First of all, the bill will take away judicial discretion in sentencing. The Court no longer has the option to impose fines upon conviction of a Section 4 sedition offence. Instead, there is now an imprisonment sentence of 3 years. The maximum sentence will also be increased to up to 7 years. There is absolutely no justification for this. For an Act as wide as the Sedition Act, with no element of intention that must be proven, as well as the disproportionately high conviction rate, judicial discretion in sentencing may at least cushion some of the more draconian aspects of the law. It may be difficult for the Court to acquit a person as the Act casts a wide net on what is deemed to be seditious, but at the very least the Court has options when it comes to sentencing. Changes to the Sedition Act will further be clamping down on electronic media and publication. Even though the old Sedition Act has been used to charge individuals for offences committed online, the updated law makes it clearer by defining publications to include "by electronic means". It also now allows the courts to issue a prohibition order requiring the person who publishes allegedly seditious material to remove it from the electronic platform and further bar the person from accessing any electronic devices. Failing to remove the said material is an offence punishable with a fine of up to RM5,000 or a one-year jail term or both. Subsequent failure to comply after conviction will be subjected to a RM3,000 fine and a year's jail in default of payment. A person can be charged under sedition for sharing or re-tweeting content, or simply hosting material deemed as seditious.

The amended Act makes it an offence to disseminate seditious speech, with a civil liberties lawyer saying that this means social media users will be held liable for sharing seditious remarks on Facebook or retweeting them, even if they are not the maker of such remarks. Previously, it was an offence to print, publish, sell, offer for sale, distribute or reproduce any seditious material. However, an additional phrase has been added to the Act namely "cause to be published". This means someone can be guilty of sedition even if he or she was not directly involved with the material such as hosting the material for an alleged offender. However, protection clauses such as not having knowledge of the seditious material still stand. In the related development, Human rights lawyer Eric Paulsen and Parti Sosialis Malaysia (PSM) central

committee member S. Arutchelvan were acquitted and discharged by a Sessions Court of committing an offence for sedition.<sup>61</sup> The prosecution dropped the case against the two men. Mr. Paulsen was charged with sedition in February 2015 for criticizing the Malaysian Islamic Development Department on his Twitter account.<sup>62</sup> Mr. Arutchelvan was charged with sedition in October 2015 for allegedly criticizing the judiciary over the Sodomy 2 judgement.<sup>63</sup> In Wan Ji Wan Hussin's case, his nine-month sentenced by a Sessions Court in April 2014 for "insulting the Sultan of Selangor" extended to a year after the High Court rejected his appeal. Wan Ji bin Wan Hussin an independent Muslim preacher, was charged on 10th September 2014 in the Sessions Court, Shah Alam under Section 4(1) (c) of the Sedition Act, 1948, for publishing words deemed insulting against the Sultan of Selangor. The offence carries a maximum imprisonment of 3 years upon conviction. The seditious statements were published by him on his Facebook account, wanji.attaaduddi, on 5th November 2012. Hence, the present position is that the Accused is on bail pending the hearing by the Court of Appeal of his appeal.<sup>64</sup> In a nutshell, again the amended Act has wide and arbitrary definition of what constitutes "seditious". The lack of mens-rea (intention) as an element to be proven and the manner of prosecution are just some of the weaknesses that may be levelled at the Act. Therefore it is immediately clear that the amendments were made with social media users in mind and also interfere with the independence of the judiciary.

## CONCLUSION

With a law like the Sedition Act 1948 actively put to use despite five decades of independence it is doubtful whether the law could effectively regulates the bloggers. Sedition law has severe undemocratic tendencies that need to be improved. By facilitating the open sharing of ideas, information and perspectives, blogging in Malaysia has the potential to serve as a democratizing force in a country with little freedom of expression. Evolution of bloggers happened in Malaysia due to the evolution of information technology and encouragement of the government to meet the global requirements. Therefore, the notion of freedom of expression has made bloggers to be freely expressed their ideas and opinions on political blogs as new medium to the public. This made the government to implement the Sedition

Act in restricting and combating the abuse of such freedom especially that fall under the categories of sedition or sedition tendency.

Therefore a question arise on the needs of the sedition law and whether the law hinders the bloggers freedom of expression became vital as the country moves to be a developed nation 2020. Democratic expectations of the local blogosphere must be tempered, however, with a realistic understanding of its limitations and of the government's hegemonic, and sometimes coercive, mechanisms of control. This paper has only begun to introduce sedition law on bloggers freedom of expression and leaving plenty of room for future research and analysis.

#### NOTES

- <sup>1</sup> S A Baharuddin Many ethnicities, Many Cultures, One Nations: The Malaysian Experience, Institute Kajian Etnik, Bangi.
- <sup>2</sup> Report on the Mission to Malaysia, Report of the Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission on Human Rights resolution 1998/42, Commission On Human Rights, E/CN.4/1999/64/Add.1, 23 December 1998, para 55; Human Rights Watch (2015) Creating a Culture of Fear, The Criminalization of Peaceful Expression in Malaysia, USA
- <sup>3</sup> Sani, M., & Azizuddin, M. The emergence of new politics in Malaysia from consociational to deliberative democracy. (2009) 5(2) *Taiwan Journal of Democracy*, 97-125.
- <sup>4</sup> Article 14(2) of the Constitution of the Republic of Singapore, Article 19(2) of the Constitution of India, Article 20 of the Constitution of Spain, Article 301 Constrains on Freedom of Expression in Turkey and Article 19 of the Constitution of Pakistan.
- <sup>5</sup> Other international standards include International Covenant on Civil and Political Rights (ICCPR), Article 49, 1966 and International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 27, 1966.
- <sup>6</sup> See judgment of N H Chan, J in *PP v Param Cumaraswamy* [1986] CLJ (Rep) 606.
- <sup>7</sup> Rahman, Tunku Abdul May 13- "Before and After", 1969.
- <sup>8</sup> Section 4 of the Sedition Act 1948.
- <sup>9</sup> Section 2 of the Sedition Act 1948.
- <sup>10</sup> Section 3 of the Sedition Act 1948.
- <sup>11</sup> *PP v Param Cumarasamy* [1986] 1 MLJ 518 at 524.
- <sup>12</sup> Section 3(1) (b) of the Sedition Act 1948.
- <sup>13</sup> *Lim Guan Eng v PP* [1998] 3 MLJ 14.
- <sup>14</sup> *PP v Ooi Kee Saik* [1971] 2 MLJ 108.
- <sup>15</sup> Section 3(1) (e) of the Sedition Act 1948.
- <sup>16</sup> *Melan bin Abdullah v PP* [1971] 2 MLJ 280.
- <sup>17</sup> Sedition Act 1948, Law of Malaysia.
- <sup>18</sup> "Cops investigating Utusan and two bloggers for sedition", 7 May 2013 - See more at: <http://www.themalaysianinsider.com/malaysia/article/cops-investigating-utusan-two-bloggers-forsedition#sthash.YOTYCbDz.dpufhttp>. Retrieved on 8 May 2014.
- <sup>19</sup> Who has made remarks against the Barisan Nasional party and its leader.
- <sup>20</sup> See more at: <http://www.themalaysianinsider.com/malaysia/article/cops-investigating-utusan-two-bloggers-for-sedition#sthash.GpxUs0vJ.dpuf>. Retrieved on 8 May 2014
- <sup>21</sup> See also *Fan Yew Teng v PP* [1975] 2 MLJ 235; *PP v Ooi Kee Saik* [1971] 2 MLJ 108; *PP v Oh Keng Seng* [1971] 2 MLJ 206; *Mark Koding v PP* [1982] 2 MLJ 120.
- <sup>22</sup> *PP v Ooi Kee Saik* [1971] 2 MLJ 108 and *Fan Yew Teng v PP* [1975] 2 MLJ 235.
- <sup>23</sup> Dr.Ooi Kee Saik(the accused No.1), was charged with an offence under section 4(1)(b) of the Sedition Act, 1948, on November 22nd , 1970, at Sun Hoe Peng Restaurant, 25 Light Street, Penang, as he uttered seditious words namely: "ALLIANCE POLICY OF SEGREGATION: ' EVIDENCE GALORE'".
- <sup>24</sup> See *Niharendu Majumdar v King Emperor* (1942) FCR 38; *Kedar Nath v State of Bihar* AIR 1962 SC 955.
- <sup>25</sup> Adopted by the Privy Council cases: see Tilak's case, supra; Wallace-Johnson, supra; *King Emperor v Sadashiv Narayan* LR 74 IA 89.
- <sup>26</sup> *Queen Empress v Ambra Prasad* [1898] ILR 20 ALL 55, 69.
- <sup>27</sup> *Public Prosecutor v Ooi Kee Saik & Ors* (HC), Raja Azlan Shah J, [1971] 2 MLJ 108.
- <sup>28</sup> "Blogger surrenders after cops warn of action over Low Yat posts", by Muzliza Mustafa, 15 July 2015, The Malaysian Insider. See more at: <http://www.themalaysianinsider.com/malaysia/article/cops-nab-blogger-papagomo-over-racist-posts-on-low-yat-brawl#sthash.IBHXs49P.dpuf>. Retrieved on 18 June 2015.
- <sup>29</sup> "Blogger Raja Petra charged with sedition", by AdminK, May 7, 2008. See also <http://www.malaysia-today.net/blogger-raja-petra-charged-with-sedition/>. Retrieved on 15 April 2015.
- <sup>30</sup> "Raja Petra Can't Be Tried in Britain," by Teh Eng Hock, *Star Online*, May 26, 2010, <http://thestar.com.my/news/story.asp?file=/2010/5/26/nation/6340987&sec=nation>.
- <sup>31</sup> Aishath Muneeza. 2010. "The Milestone of Blogs And Bloggers In Malaysia". Volume 3, *Malayan Law Journal*.
- <sup>32</sup> "RAJA PETRA'S DEFAMATION CASE: HIGH COURT TO DECIDE," BY SHASHI KALA, THENUTGRAPH, 28 NOVEMBER 2008. SEE [HTTP://WWW.THENUTGRAPH.COM/RAJA-PETRA-DEFAMATION-CASE-HIGH-COURT-DECIDE/](http://WWW.THENUTGRAPH.COM/RAJA-PETRA-DEFAMATION-CASE-HIGH-COURT-DECIDE/).
- <sup>33</sup> Butler and Rodrick, *Australian Media Law*, Lawbook Co, Pymont, Australia, 2004, 31-41.
- <sup>34</sup> *Costello v Random House Australia Pty Ltd* [1999 ACTSC13; (1999) 137 ACTR 1, p.8-9
- <sup>35</sup> *Lewis v Daily Telegraph Ltd* [1964 AC 234, Lord Reid, p. 259.
- <sup>36</sup> *Lewis v Daily Telegraph Ltd* [1963] 1 QBB 340, Holroyd Pearce LJ, p.374.
- <sup>37</sup> *Lewis v Daily Telegraph Ltd* [1964] AC 234, p. 285.
- <sup>38</sup> M Armstrong, D Lindsay and R Watterson, *Media Law in Australia*, 3rd Edn, Oxford University Press, Melbourne, 1995 p 24.
- <sup>39</sup> Sedition Act 1948.
- <sup>40</sup> *Public Prosecutor v Oh Keng Seng* (FC), [1977] 2 MLJ 206. The defendant on 23rd of June, 1972 between 8.40 p.m. and 9.35p.m. at the Padang Besar, Tampin, Negeri Sembilan, uttered seditious words in Mandarin. The speech was translated and recorded in English. He was prosecuted for the offense under section 4(1)(b) of the Sedition Act 1948 (Revised 1969).
- <sup>41</sup> 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)—
- <sup>42</sup> *Public Prosecutor v Oh Keng Seng* (HC) (no 2), Criminal Trial No 2 Of 1976 OJ Seremban, Ajaib Sing J, [1979] 2 MLJ 174.
- <sup>43</sup> *Oh Keng Seng v Public Prosecutor* (FC) (no 2) [1980] 2 MLJ 244.
- <sup>44</sup> Dictionary.com,. See at <http://dictionary.reference.com/browse/murderer> and <http://dictionary.reference.com/browse/hell?s=t>.
- <sup>45</sup> Sedition Act 1948.
- <sup>46</sup> RAJA PETRA KAMARUDIN & FAMILY: Hari Raya at Manchester 2019, Malaysia Today, Jun 5, 2019. See at <https://www.malaysia-today.net/2019/06/05/raja-petra-kamarudin-family-hari-roya-at-manchester-2019/>
- <sup>47</sup> <https://www.facebook.com/tanjyeyee>
- <sup>48</sup> See <http://www.channelnewsasia.com/news/asiapacific/sex-bloggers-plead-not/748658.html>
- <sup>49</sup> *Tan Jye Lee & Anor v PP* [2015] 2 CLJ 745 at 753
- <sup>50</sup> *Blogger At Risk Of Prison For Facebook Post*, Amnesty International, 2 June 2016. See <https://www.amnesty.org/download/Documents/ASA2841742016ENGLISH.pdf>
- <sup>51</sup> 'Definition of Halal', Halal Food Authority, see at <http://halalfoodauthority.com/definition-of-halal/>. Retrieved on 13 May 2015.
- <sup>52</sup> The accused is charged with an offence under section 4(1) (c) of the Sedition Act 1948, for publishing a seditious publication namely, an article under the caption "Alliance Policy of Segregation 'Evidence Galore' listed by DR.Ooi" at page 8 of the December 1970 issue of the "Rocket"(English edition) an official organ of the Democratic Action Party.
- <sup>53</sup> *Public Prosecutor v Fan Yew Teng*, Abdul Hamid J, [1975] 1 MLJ 176
- <sup>54</sup> See *Tilak's case*, supra; *Wallace-Johnson*, supra; *King Emperor v Sadashiv Narayan* LR 74 IA 89.
- <sup>55</sup> *Queen Empress v Ambra Prasad* [189] ILR 20 All 55, 69
- <sup>56</sup> *Lee May Ling V. Pp & Another Appeal* [2018] 10 CLJ 742
- <sup>57</sup> United Nations Member States. Meetings Coverage And Press Releases, United Nations. 2006. See at <http://www.un.org/press/e n/2006/org1469.doc.htm>. Retrieved on 10 September 2016.
- <sup>58</sup> See the Harare Commonwealth Declaration, Zimbabwe, 1991; Declaration of Commonwealth Principles, Singapore, 1971. On freedom of expression specifically, see the Abuja Communique, 8 December 2003 and the Coolom Declaration on the Commonwealth in the 21st Century: Continuity and Renewal, Australia, 2002.
- <sup>59</sup> Tommy Thomas, Advocate & Solicitor, *The Social Contract :Malaysia's Constitutional Covenant*, 14th Malaysian Law Conference 2007, Kuala Lumpur Convention Centre 29-31 October 2007.
- <sup>60</sup> Azizuddin Mohd Sani, M. Freedom of speech and democracy in Malaysia. (2008) 16(1), *Asian Journal of Political Science*, 85-104.
- <sup>61</sup> "Prosecution drops sedition cases against PSM's Arul, lawyer Eric Paulsen"., Malay Mail, 15 Aug 2018. See <https://www.malaymail.com/news/malaysia/2018/08/15/prosecution-drops-sedition-cases-against-psms-arul-lawyer-eric-paulsen/1662642>
- <sup>62</sup> *PP v Eric Paulsen* [2018]
- <sup>63</sup> *PP v S. Arutchelvan* [2018]
- <sup>64</sup> *Wan Ji Wan Hussin v PP* [2019]

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