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# ADHERENCE TO THE RULE OF LAW IN RELATION TO ARTICLE 10(1)(a) OF THE MALAYSIAN FEDERAL CONSTITUTION: POLITICAL SITUATIONS PRIOR TO 2018 GENERAL ELECTION

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***ABSTRACT***

The rule of law is enshrined in the Malaysian National Pillars, *Rukun Negara*. It connotes that the rule of law is inherent and fundamental liberties are protected by the rule of law and each citizen enjoys equal treatment before the law. However, many times, the rule of law seems questionable especially in relation to Article 10(1)(a) of Freedom of Speech and Expression as there have been claims that the government has contravened the protection of the rule of law. Freedom of speech and expression is seen stifled by the existence of repressive laws such as Sedition Act 1948 (amended 2015) and Communication and Multimedia Act (CMA) 1998. The main aim of this research paper is to examine and discuss the extent to which adherence to the rule of law has been observed by the government of the day particularly in relation to Article 10(1)(a) of Freedom of Speech and Expression. Based on the legal analysis of cases charged and investigated under the Sedition and CMA Acts over the years in particular, during some political situations prior to the 2018 General Election, the rule of law in Malaysia is arguably more of a notion than it should have been a reality by virtue of several landmark cases like Param Cumaraswamy's, Lim Guan Eng's and Mat Shuhaimi Shafiei's.

*Keywords:* rule of law; freedom; expression; legislation; federal constitution

## Introduction

This research paper is aimed at analysing the degree of adherence to the rule of law in relation to Article 10(1)(a) on Freedom of Speech and Expression. In Malaysia, there have been clamouring for equal rights and fair treatment by the people. But this had never been stronger than was witnessed during the period leading up to the 2008 general elections.

The main reason has been due to the banning and restraining of people making fair comment on issues of public interest which directly curtails the right to freedom of speech and expression *vis-a-vis* the Sedition Act 1948. This has brought many dire consequences and in fact it further weakens ethnic relations in this country.

In any event, discussions on these *"sensitive issues"* (as contained in Section 3(1)(f) of the Sedition Act) are no longer sensitive since it is being openly brought up to scrutiny and question by all and sundry in the internet and in other alternative media. Malaysian leaders need to accept this reality. To continue to deprive people of their right to freedom of speech and expression using a repressive law like the Sedition Act is definitely a step in the wrong direction as it would further alienate the people from any government which claims to be a democratic government for the people and by the people.

With a law like the Sedition Act 1948 (amended 2015) actively being put to use despite five decades of independence and the rejection of English common law principles in cases of sedition by Malaysian courts, it is doubtful whether freedom of speech and expression will be able to flourish in our country. The British left Malaya in 1957, but their laws never left with them instead they were adopted into the Malaysian legal system by a constitutional amendment. It is unfortunate that circumstances involving political expressions in particular, are purposely criminalised to protect the governing party as such so-called 'political' (connotation is normally seen as anti-government) expressions are still being dictated by Sedition Act, a law considered obsolete in many Commonwealth countries due to its history of being an instrument of oppression. Based on this legal backdrop, it is the aim of this research to analyse and examine the extent to which the rule of law which represents the constitution as the supreme law has been adhered to or ignored by the ruling party for their power consolidation and stability against the opposition at the expense of fundamental liberty like the one in Article 10(1)(a) of the Federal Constitution (FC thereafter).

**Literature Review**

This article is a discussion paper which looks into legal literature on the meanings and definition of rule of law and related legal cases in Malaysia. It seeks to analyse and examine several relevant court cases involving freedom of speech and expression in the context of political situations prior to 2018 General Election.

**Rule of Law**

The essence of the rule of law is that of the sovereignty or supremacy of law over man. The rule of law insists that every person irrespective of rank or status in society must be subject to the law. It means that for the citizen, the rule of law is both prescriptive, that is, dictating the conduct required by law and also it is protective of citizens, that is, demanding that the government acts according to the law. The most basic sense of the rule of law is the notion that government must act in accordance with, and not beyond, its legal powers. The minimum element in the rule of law is that the government is subject to the law and may exercise its power only in accordance with the law. A government that claimed to be above the law and to be subject to no legal restraint in issuing commands to give effect to its view of the public interest would undoubtedly be a government that did not acknowledge the rule of law.

### *Dicey's Principles of Rule of Law*

Dicey's work on the rule of law is the first major modern work on the subject. In his *An Introduction to the Study of the Law of the Constitution*, Dicey identified the rule or supremacy of the law as one of the features of the political institutions of England since the Norman conquest (Dicey, 1961). Dicey (1961) identified three distinct conceptions as forming the rule of law:

I. No man is punishable or can be lawfully made to suffer in body or goods except for a breach of law established in the ordinary legal manner before the ordinary courts of the land, as contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint.

II. Not only is no man above the law, but every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to jurisdiction of ordinary tribunals.

III. The constitution is pervaded by the rule of law on the ground that the general principles of the constitution are a result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

Within the realm of legal theory, the rule of law has been one of the twentieth century's bedrock legal doctrines. The rule of law refers to various established legal principles imposing limitations on governmental authority. An English legal scholar, Dicey (1961), defined the rule of law as follows:

*[It] means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government .... It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts ... [and], lastly,.. . that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land (p.42)..*

The rule of law is a noble set of principles, according to which, regardless of racial, gender, educational, or economic differences, the government treats each individual equally and fairly. If respected by government, the rule of law inspires loyalty among citizens. By observing the rule of law, a nation demonstrates that it values individuals and their importance. Conversely, by ignoring the rule of law, a nation acts arbitrarily, capriciously, and discriminatorily and illustrates that race, gender, wealth, and power are the values most important to the regime. In the end, ignoring the rule of law produces an elitist society.That **"rule of law,"** then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view. It means, in the first place, it advocates absolute supremacy or predominance of regular law, as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.

### *Malaysian Perspective on Rule of Law*

The doctrine of the rule of law in Malaysia according to Sultan Azlan Shah, is understood from Dicey's definition,

"*…equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts ... [and], lastly,... that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land."*

Sultan Azlan Shah (2004) elaborated that Dicey in his *Introduction to the Study of the Law of the Constitution* in 1885 (republished 1961) explained the concept of the rule of law to mean:

(1) the absolute supremacy or predominance of the law as opposed to arbitrary exercise of power;
(2) the fact that every man is subject to the ordinary law of the country; and
(3) a system where the principles of the constitution pertaining to personal liberties are a result of judicial decisions determining the rights of private persons in particular cases brought before the courts.(2004, pp.16-17) The doctrine of the rule of law is emphasised in Article 4(1) of the Federal Constitution provides:

*This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*(p.17)

The essence of the rule of law is that of the sovereignty or supremacy of law over man. The rule of law insists that every person irrespective of rank or status in society must be subject to the law. It means that for the citizen, the rule of law is both prescriptive, that is, dictating the conduct required by law and also it is protective of citizen, that is, demanding that the government acts according to law. The most basic sense of the rule of law is the notion that government must act in accordance with, and not beyond, its legal powers. The minimum element in the rule of law is that the government is subject to the law and may exercise its power only in accordance with law. A government that claims to be above the law and to be subject to no legal restraint in issuing commands to give effect to its view of the public interest would undoubtedly be a government that did not acknowledge the rule of law.

### *Malaysian Rule of Law Principles*

Based on Dicey's (1961) perspective of the rule of law, it advocates for ***'equality before the law of all classes to the ordinary law of the land administered by the ordinary law courts'*****(p.42)**. This means that the government of the day must also give respect to the law. To put it differently, no one is above the law, and the society must be governed by law and that all must be equally subject to the law, and to law only. Again, making references to some court decisions would lead to such conclusion that the rule of law is recognised and much respected under the Federal Constitution. For instance, in the case of ***Lee Gee Lam v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor*** - the order of detention stated few grounds on which the supposed detainee was apprehended with the word 'or' and not 'and' in between. The court held that the statement in regards of the grounds in the alternative form denied the detainee the right to know the reason for his

arrest, a constitutional right, for the record. The decision of the court was in line with the Article 5(3) of the Constitution.

Article 4(1) of the Federal Constitution (as at 1 November 2022, p.12), as it is viewed as the foundation of the rule of law for the Constitution, probably it would be imperative to make reference to the case of ***Ah Thian v Government of Malaysia*** , with focus on the observation of Suffian LP. His Lordship observed: *"The doctrine of Parliamentary supremacy does not apply in Malaysia. Here we have a written constitution. The power of Parliament and State Legislatures in Malaysia is limited by the Constitution, and they cannot pass any law as they please. Under our Constitution, written law may be invalid on one of these grounds: (1) Article 74; (2) in the case of both Federal and State* (Federal Constitution, 2022, p.58)

For instance, under Article 159 (Federal Constitution, 2022, p.127), Parliament is vested with the authority to make amendments to the constitution, even if it is inconsistent to other Articles of the Constitution. The main points, according to Beetham, 1998), of this contribution can be summarised as follows:

1. The foundation of democracy is the right of all adults to have a voice in public affairs, both through the associations of civil society and through participation in government; this right should be exercised in conditions of equal citizenship and with respect for the voice of others.
2. The right to have a voice presupposes that the rights and freedoms of expression, association and assembly are guaranteed. The right to unimpeded expression of opinion requires the existence of independent media and of legislation preventing concentrations of media ownership. The right of free association includes the right to found new associations for economic, social, cultural and political purposes, including political parties. The right of peaceful assembly entails the right of free movement within and between countries. None of these rights can be exercised effectively without the liberty and security of the person, and the guarantee of due legal process. Democracy is thus inseparable from fundamental human rights and freedoms, and from respect for the rights and freedoms of others.
3. The right to participate in government includes the rights to take part in public service, to stand for elective office and to elect public officials by universal secret ballot under arrangements that are "free and fair" according to international standards. It includes the right to hold public officials accountable, both directly, through the electoral process, and indirectly, through the supervision of an elected legislature that is independent of the executive. Democratic accountability requires the accountability of all non-elected officials of the executive, including the police, the military and the secret services, to elected officials. It entails a public right of information about the activities of government. It includes the right to petition government and to seek redress, through elected representatives, the courts, the Ombudsman, etc., in the event of maladministration. Democratic accountability is underpinned by the basic principle of the rule of law: that the competence of all public officials is defined and circumscribed by the law and the constitution, as interpreted and enforced by an independent judiciary.
4. Equality of citizenship entails that all persons are protected against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It further requires the progressive elimination of the obstacles which hinder any groups or categories of citizens from exercising a voice or participating in government on terms of equality with

others. Special measures taken to correct existing inequalities do not constitute discrimination. Equal citizenship is unattainable in the absence of guaranteed economic and social rights, such as access to education and a basic income.

5. Respect for the voice of others presupposes that democratic societies are characterised by differences of opinion and a diversity of cultures and identities. A democratic state will guarantee the conditions for all cultures and identities to pursue their distinctive way of life, subject to the law and the principle of equal citizenship, and will foster public institutions which enable any disagreements between them to be resolved through dialogue. Tolerance of diversity and a readiness to engage in dialogue are a basic responsibility of citizens as well as governments.

It is safe to conclude that in Malaysia, as in many other democratic countries, we have a written constitution with an express set of rules that stipulates the distribution of powers of various governing bodies as well as their modes of operation. Hence, clearly, as explained earlier in this essay, the rule of law in Malaysia somehow embodies the doctrine of supremacy of the constitution which then confers power and authority to make provisions for people acting on the behest of the State. Having a written constitution operating on the belief that it is supreme does not guarantee that there is respect and recognition for the doctrine of the rule of law. For example, the provisions in Article 149 and Article 150 to deal with subversive acts and times of emergency greatly affected the stern observation on constitutionalism and the doctrine of rule of law, which both are vital in any civilised democratic State. (Federal Constitution, 2022, pp.118-119)

**The Scope of Freedom of Speech and Expression Under the Malaysian Federal Constitution (FC)**

Malaysia as a democratic country, firmly upholds the right to freedom of speech and expression. This is enshrined in the Federal Constitution in Article 10 (1)(Federal Constitution, 2022, p.16). This constitutional right enables the citizens to express their minds and thoughts on various aspects. But yet the importance of freedom of speech and expression does not necessarily make freedom an absolute right. Even in a country that proclaims the right as a positive right such as the USA and other democratic countries, there are certain forms of restrictions imposed. In respect to freedom of speech and expression, Malaysia has always had several restrictive laws capable of suppressing free speech expression.

While there is an explicit guarantee of freedom of speech and expression in the FC, the Constitution somewhat does not elaborate on the meaning of the right. The provision seems to be wide enough to include all modes of expressions and communications. Raja Azlan Shah J. in ***Public Prosecutor v Ooi Kee Saik & Ors [1971]*** explains the right by saying that `*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 commit a breach of the law. '* According to Raz (1997), speech and expression can be in the form of verbal and non-verbal activity. It involves communication by word of mouth, signs, symbols and gestures; and through works of art, music, sculpture, photographs, films, videos, books, magazines and newspapers. It is the freedom to communicate one's idea through any medium. Symbolic speech such as flag burning DPP v Percy [2001] EWHC 112 does not involve verbal communication (Shad Faruqi, 1992). What it uses is a form of non-linguistic symbol to inform and communicate to others. Thus,the expression has both content and form. On the other hand, conduct is expressive if it attempts to convey meaning and the meaning is

the content. It may also be noted that the concept of freedom of speech and expression also covers freedom of the press (Abdul Hamid, 1987). It means that the role of the press as a feeder of information to the society on various issues relates to speech and expression in the general and wider sense. There is however no special privilege granted to the press.

Freedom of expression under the Constitution is a positive right that cannot be denied by the government. However, other interests curtail the enjoyment as stated in Article 10 (2) (a) of the Constitution. The Article provides:

*Such restriction as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privilege of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence* (Federal Constitution, 2022, p.16).

Thus, the real issue is not the question of the existence but, rather, the exercise of the right. The exceptions as stated in Article 10 (2) (a) determine the extent and context of the exercise of freedom of expression. Since Parliament has the power to determine the scope of exceptions based on the extent of executive influence there is a great possibility that the freedom might have its limitations. Arguably, the executive branch in Malaysia acquires wide power to determine the extent of freedom of speech under Article 10 of the Constitution. Although there is a doctrine of separation of power supposedly inherent among the three main bodies, the executive, legislature and judiciary under the FC, there is no clear separation between the executive and the legislature which may actually be considered as Parliament itself. It must be interesting to analyse the nature of political expression in Malaysia involving restrictive laws and legal cases in relation to Article 10(1)(a) of the FC (Federal Constitution, 2022, p.16).

**Cases related to Article 10(1)(a) of Freedom of Speech and Expression**

This section highlights some very important cases, either landmark or quite recent, involving charges under the Sedition Act (SA) 1948 and Communication and Multimedia Act (CMA) 1998, which curtail the right to freedom of speech and expression under Article 10(1)(a) of the Federal Constitution. First, the selected cases charged under each Act are analysed and discussed. Next, the investigation and prosecution cases are tabulated to show the extent to which each Act (SA & CMA) has been used by the government to limit freedom of speech and expression.

***Sedition Act Landmark Cases Prior to 2018 General Election***

The Federal Constitution of Malaysia guarantees freedom of speech and expression. Though freedom of speech is guaranteed as a fundamental right enshrined under Part II of the Constitution, under Article 10(2) however, Parliament may impose “such restrictions as it deems necessary or expedient” on eight specified grounds. Thus, the Federal Constitution of Malaysia guarantees freedom of speech and expression. Though freedom of speech is guaranteed as a fundamental right enshrined under Part II of the Constitution, under Article 10(2) however, Parliament may impose “such restrictions as it deems necessary or expedient” on eight specified grounds. Thus, the freedom of speech and expression in Malaysia is not an absolute right. Article 149 provides that any law designed

to stop or prevent the six specified incidents or circumstances contained in the Article is valid, notwithstanding that it is inconsistent with any of the provisions in Article 10(1)3. The Sedition Act 1948 mainly represents the restrictions envisaged by Article 10(2). The restriction on the freedom of speech and expression is justified insofar as it is declared *"necessary and expedient in the interest of the security of the federation, public order and morality*". As explained earlier, by reason of the permissible restrictions under the Constitution, the freedom of speech and expression is not an absolute right.

What makes it a lot worse is that the Malaysian judiciary has not been creative when issues relating to freedom of speech and expression are raised before it. This is evident from a string
of prosecutions of individuals, ranging from politicians from the opposition parties, Members of Parliament, newspaper editors/publishers and human rights activists under the Sedition Act 1948. The Malaysian courts have strenuously rejected the common law notion that statements written or spoken must incite others to violence or disorder in order to be seditious, thereby adopting a strict interpretation of the Sedition Act 1948. The improper and indiscriminate use of the Sedition Act resulted in many individuals being charged and convicted for merely raising issues of public interest that highlighted unfairness in government policies and actions with the sole intention of seeking justice and social change.

Under Section 3(1) of the Sedition Act 1948 it is "seditious tendency" for an individual to utter words or write anything which (a) brings into hatred or contempt or to excite disaffection against any Ruler or against any Government; (b) excites the subjects of any Ruler or the inhabitants of any territory of the Ruler or governed by the Government, the alteration otherwise than by lawful means, of any matter as by law established; (c) brings into hatred or contempt or excites disaffection as in PP v Ooi Kee Saik, against the administration of justice in Malaysia or in any State; (d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or the Ruler of any State or amongst the inhabitants of Malaysia or of any State; or (e) promotes feeling of ill-will and hostility between the different races or classes of the population of Malaysia; or (f) questions any matter, right, status, position, privilege, sovereignty or prerogative protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution (Federal Constitution, 2022).

In ***Mark Koding v PP [1982],*** a Member of Parliament from the State of Sabah an MP from the ruling coalition, was charged with uttering seditious words, an offence punishable under Section 4 (1) b of the Sedition Act 1948. He was alleged to have uttered the seditious words in the course of his speech in Malay in the Dewan Rakyat. The alleged seditious words were verbal demands for the closure of Chinese and Tamil medium schools in Malaysia, the abolition of the use of the two languages on road signboards, contravening Article 152(1) proviso (a) of the Federal Constitution and his suggestion that if such closure of these schools contravened Article 152, then the Federal Constitution itself should be amended or if necessary, repealed.

The court held that the accused was not guilty of sedition when he advocated the closure of Tamil and Chinese medium schools as the court was of the view that proviso (a) of Article 152 only protects the usage (except for official purposes), teaching or learning of any other language, other than the national language (Malay language). The proviso does not justify the extension of the protection to the operation of schools where the medium of

instruction is in Chinese or Tamil. This is so since the proviso only contains the words "teaching or learning any other language" as opposed to teaching or learning in any other language. As for Koding's suggestion that the use of the Chinese and Tamil languages in signboards be abolished, the court held that the accused was not guilty since he merely demanded the implementation of the national language as provided for in the Article.

Another similar case involving a politician in ***PP v Ooi Kee Saik [1971].*** In his speech, Dr Ooi lamented the domination of one particular race (the Malays) in the army, police, educational institutions and business and said these policies do not augur well with the government's policy on racial integration. He went on to accuse the government of gross partiality in favour of one race. The court found that the issues raised by Dr Ooi amounted to bringing the government into hatred or contempt, or exciting feelings of disaffection against the government. He did not incite any members of his party or the general public to violence. In fact, many government ministers have time and again called on the government to maintain a better racial balance in the various institutions of government. The issues raised by Dr.Ooi also falls squarely under Section 3(2) (b) of the Act as he had only pointed out errors and defects in government policies and weaknesses in its implementation . It is therefore difficult to understand how Dr Ooi's statements could be considered seditious.

In ***PP v Param Cumaraswamy [1986] 1 MLJ 512***, the wanton use of the Sedition Act can also be seen in his prosecution, a prominent lawyer and human rights activist, who was charged with having uttered seditious words at a press conference, where he made statements calling upon the Pardons Board to recommend to the King that the death sentence on a man charged with possession of a firearm be commuted to life imprisonment, as it had done in another more serious case where the accused, a influential politician and a serving minister, was guilty of discharging a firearm and committing murder. The accused also urged the Pardons Board to exercise its powers fairly and uniformly so that people would not be made to feel that the Board was discriminating between the rich and the poor in terms of the severity of sentence. The prosecution alleged that the utterance of these words by the accused had a tendency to raise discontent or disaffection among the subjects of the Yang Di Pertuan Agong (the King) or any Ruler of any State and to bring into hatred or contempt or to excite disaffection against any Ruler or against any government, as contained in Section 3 (1) (a) and (b) of the Sedition Act 1948 (Sedition Act, 2006, p.7)

Lawyers for Param Cumaraswamy argued, that by reason of Article 10(2)(a) of the Federal Constitution, inciting others to public disorder or violence was an essential ingredient of the crime of sedition, which is the view adopted under the English common law. However, this argument was again shot down by the court. Under Article 10(2), the restriction that is imposed on the freedom of speech by the Sedition Act is for the purpose of the prevention of public disorder and the maintenance of public order. (Addruse, 1999). Param Cumaraswamy was acquitted and discharged after being called to enter his defence on the grounds that the alleged seditious statements did not have the tendency to incite or to raise disaffection among the people and it did not refer to the King but only to the Pardons Board. Arguably, in hindsight, Param should not have been prosecuted in the first place since it is obvious that he was only seeking reprieve for his client by calling on the Pardons Board to act according to good conscience so that it would not be seen to be discriminatory. His plea was for a good cause and as such, there was nothing seditious in his plea.

In a speech delivered at a political rally, Lim Guan Eng, a prominent MP from DAP, accused the Attorney-General of practising double standards when exercising his discretion not to prosecute a former Chief Minister of Malacca for statutory rape, which resulted in all the charges against the chief minister being dropped. In ***Lim Guan Eng v PP [1998]***, Lim was charged under Section 4(1) (b) of the Sedition Act 1948 for uttering seditious words. The words uttered were alleged to have a seditious tendency under Section 3 (1) *(a) by bringing into hatred or contempt or to excite disaffection against the administration of justice in Malaysia*. Here, the Court of Appeal followed the decision in Ooi Kee Saik and again refused to adopt the common law principles in interpreting the offence of sedition. This state of affairs is against the spirit of the Federal Constitution and hence a lack of adherence to the rule of law as regards the fundamental right of freedom of speech and expression and it shows how easy it is to use the Sedition Act to suppress criticism and dissent. Even MPs during parliamentary debates would not be able to question the decision of the Attorney-General or the decision of a minister exercising powers conferred on him by law, since firstly, the decision in *Mark Koding* technically imposes a *"gag order"* on parliamentarians and secondly, the decision of the Court of Appeal in *Lim Guan Eng* would also gag the mouths of MPs.

In ***Mat Shuhaimi Bin Shafiei v Kerajaan Malaysia*** in 2015, the Court of Appeal made a landmark ruling on the Sedition Act. The panel, consisting of Justices Datuk Varghese George Varughese, Datuk Lim Yee Lan and Datuk Harmindar Singh Dhaliwal, held Section 3(3) of the Sedition Act to be unconstitutional. The section provides that the intention of the accused is irrelevant when proving a sedition charge. The appeal was brought by Sri Muda assemblyman Mat Shuhaimi Shafiei, who challenged the constitutionality of the section at the High Court. He was charged under Section 4(1) of the Sedition Act in 2011 over an article published in his blog. At the High Court, his application for a declaration that Section 3(3) is unconstitutional was dismissed. He then appealed to the Court of Appeal. The Sedition Act criminalises "sedition" by making it an offence to do anything which has a "seditious tendency" or to utter any seditious words. "Seditious" is defined in the Act as any act, speech, word, publication or other thing which qualifies one as having a "seditious tendency". One of the biggest criticisms of the Sedition Act is that by virtue of Section 3(3), intention is irrelevant. In other words, even if the accused person had absolutely no intention to be seditious and made the alleged seditious remarks innocently, it would have no bearing on the case.

### *Sedition Act Cases from 2015 to 2018*

In 2015, there were a number of sedition cases which include Mohammad Fakrulrazi, vice president of Parti Amanah Negara, who was charged with sedition on September 8, 2015, for calling for the release of Ibrahim at a rally in February 2015 (The Malay Mail Online, 2016). On August 25, 2016, he was found guilty and sentenced to eight months in jail; Opposition MP Sivarasa Rasiah was charged with sedition on October 21, 2015, based on statements he made about the imprisonment of opposition leader Anwar Ibrahim at a *Kita Lawan* rally on March 7, 2015 (The Star Online, 2015)..The case is pending, and he has filed a constitutional challenge to the Sedition Act; S. Arulchelvan, one of the key leaders of the opposition Parti Socialis Malaysia (PSM), was charged with sedition on November 23, 2015, based on a statement the party issued in February 2015 criticizing the Federal Court verdict in the case of Anwar Ibrahim. Police arrested and held him overnight for investigation on February 19, 2015, but did not charge him until nine months

later (Human Rights Watch, 2015); Activist Lawrence Jayaraj, another person investigated for sedition in February 2015 for criticizing the Anwar verdict, was charged with sedition nine months later, in November 2015 (The Malay Mail Online, 2015). The case is pending. Police called in three lawyers for questioning under the Sedition Act after they submitted a motion at the Malaysian Bar's annual general meeting calling for Attorney General Apandi to resign (Malaysiakini, 2016). At the meeting on March 29, 2015, the Bar voted in favour of the resolution, which called on the attorney general to resign to restore public confidence in the administration of justice in light of his decision to "clear" the prime minister of corruption charges. At the time of writing, the lawyers had still not been charged.

In 2016 the arrests continued, Azrul Mohammed Khalib, who posted a petition on the website Change.org asking people to sign the Citizens' Declaration, was called in for questioning under the Sedition Act on April 21, 2016. The Citizens' Declaration was launched in March 2016 by an alliance of former and current members of the longtime ruling Barisan Nasional (BN) alliance, members of the political opposition, and civil society groups, and called for Najib to be removed from office by legal means. On April 1, 2016, police arrested former Solidariti Mahasiswa Malaysia (SMM) student activist Ahmad Shukri Kamarudin and detained him for five days for investigation of allegedly seditious statements he made about the Sultan of Johor on Twitter in 2012—four years earlier. Shukri had been detained and questioned regarding the same statements in 2012, but never charged; Shazni Munir, a political activist with the opposition Parti Amanah, was called in for questioning on April 4, 2016, regarding an article he wrote for *Free Malaysia Today* about the impact of the Goods and Services Tax on Malaysians. At the end of the article, he called on people to join an anti-tax rally scheduled for April 2. His comments were then reported in *Bicara* News as calling for people to topple the *Barisan Nasional* through "riots," and the inspector general of police instructed the police to arrest him (Malaysiakini, 2016). After giving his statement to the police, the police proceeded to arrest and hold him overnight, then held him for an additional two days. He was released on bail on April 6. Police told him that he was being investigated for sedition and activity detrimental to parliamentary democracy.

The application of the Sedition Act 1948 remained prevalent in 2018. The hope that the Sedition Act 1948 would be suspended with a moratorium pending its eventual repeal failed to materialize. Notable investigations under the Sedition Act 1948 include those made against Fadiah Nadwa Fikri (Ibrahim, 2018) and Kadir Jasin (Kumar, 2018). The new administration has failed to answer the continued questioning of the Sedition Act 1948 with several PH Members of Parliament themselves calling for others to be investigated under the Sedition Act 1948. This includes the initial call by Ramkarpal Singh for Hanif Omar to be investigated under the Sedition Act 1948 for his allegation made against the Democratic Action Party (DAP). Ramkarpal later apologized and retracted his statement (Karpal, 2018). Then we saw Johari Abdul's call for Kadir Jasin to be investigated under the Sedition Act 1948 for alleged comments insulting the Sultan of Kedah (Rahim, 2018).

While most of the cases under the Sedition Act have been withdrawn or dropped, there are some such as Wan Ji Wan Hussin's, who is still facing a prison sentence for his initial conviction by the session court and awaiting his appeal (Ruzki, 2018). In 2017 the list of cases under the Sedition Act has reduced rather abruptly. Application of the Sedition Act 1948 has reduced significantly from its peak in 2015 with just 9 cases documented in 2017. While the overall reduction in arrest, detention and prosecution under the Act is a welcome

improvement, the documented cases in 2017 suggest that the Act still stands as one of the more noteworthy laws in restricting freedom of expression despite the existence of other more well-used legal provisions.

Table 1: List of individuals charged or investigated under the Act 2017

| No | Name | Allegation or Cause for Investigation | Date Investigated, Arrested or Charged |
|---|---|---|---|
| 1 | Lim Guan Eng | Remarks that MCA, MIC, Gerakan and SUPP should leave BN | 14 January 2017 |
| 2 | Rozaid Abdul Rahman | Publication of the Star's frontpage45 | 31 May 2017 |
| 3 | Brian Martin | | |
| 4 | Dorairaj Nadason | | |
| 5 | M. Shanmugam | | |
| 6 | Errol Oh | | |
| 7 | Mohd Sahar Misni | | |
| 8 | Zamihan Mat Zin | Remark against a decree by Sultan of Johor | 11 October 2017 |
| 9 | Wan Ji Wan Hussin | Picture with words I (Wan Ji wants the sultanate system to be abolished) | 13 October 2017 |

As of 31 October 2018, the administration has reiterated its commitment to abolish the Sedition Act 1948 with the cabinet imposing a moratorium on the Sedition Act 1948.

Table 2: List of individuals charged or investigated under the Act 2018

| No | Name | Allegation or Cause for Investigation | Date Investigated, Arrested or Charged |
|---|---|---|---|
| 1 | Badrul Hisham (Chegubard) | Alleged sedition against the Selangor Royal Institution | 13 April 2018 |
| 2 | Jeffrey Chew Gim Earn | Jeffrey Chew, who alerted his party about a slanderous video clip allegedly spreading the video he was trying to warn his party about. | 26-Apr-201859 |
| 3 | Abdul Kadir Jasin | Alleged sedition against the Royal Institution based on his commentaries on the expenditure of Sultan Muhamad V. | 7-Jun-201860 |
| 4 | Fadiah Nadwa Fikri | Allegedly disrespecting the royal institution through an article 'Don't Kiss the Hand that Beats you' in Jentayu, the blog by Malaysia Muda. | 11 July 2018 |
| 5 | Asheeq Asli | Called for questioning after expressing support for Fadiah Nadwa at the solidarity event by SUARAM | 13- Aug- 2018 |
| 6 | Azman Noor Adam | UMNO supreme council member Lokman Adam's younger brother was arrested by police under the Sedition Act for allegedly sharing a photo insulting Tun Dr Mahathir on social media. | 2-Oct-2018 |
| 7 | Ngeh Koo Ham | Called in for allegedly leaking documents on the Perak government | 7-Oct-2018 |

### *Communication and Multimedia Act Cases Prior to 2018 General Election*

The restriction on freedom of expression in Malaysia took a turn in 2017. With the application of the Sedition Act 1948 relegated to the back seat by the authorities, arrests, detentions and prosecutions made in relation to freedom of expression have largely fallen under the Communications and Multimedia Act 1998 (CMA) and other laws.

Table 3: List of 20 individuals (extract only, more names) investigated under CMA 2017

| No | Name | Allegation or Cause for Investigation | Date Investigated, Arrested or Charged |
|---|---|---|---|
| 1 | Rosli Johol | Condemning country leadership on social media | 7 January 201750 |
| 2 | Unknown | Defamatory comment against late Adenan Satem on Facebook | 14 January 201751 |
| 3 | Unknown | Offensive statement against member of royalty | 16 January 201752 |
| 4 | Tuan Syed Sigaraga (Twitter) | Uploading document of 'Bangsar Johor' IC on Twitter | 3 February 201753 |
| 5 | Mat Tere (Facebook) | Making anti-royalty remark | 8 February 201754 |
| 6 | Unknown | Offensive remark against Crown Prince of Johor | 9 February 201755 |
| 7 | Arif Senai (Facebook) | Insulting Yang- di-Pertuan Agong and Timbalan Yang di-Pertuan Agong | 10 February 201756 |
| 8 | Unnamed 19-year old | Offensive remark against Crown Prince of Johor on Whatsapp | 12 February 201757 |
| 9 | 2 unnamed men | Posting false news of police warning on Facebook | 22 February 201758 |

Table 3 (Continued): List of 20 individuals (extract only, more names) investigated under CMA 2017

| No | Name | Allegation or Cause for Investigation | Date Investigated, Arrested or Charged |
|---|---|---|---|
| 10 | Unnamed 17-year old | Facebook post calling for public to gather to seek audience with the Sultan and police | 24 February 201759 |
| 11 | Unnamed 57-year old | Offensive remark against Johor sultan | 25 February 201760 |
| 12 | 3 unnamed individuals | Offensive remark and urging people to hold bicycle rally | 26 February 201761 |
| 13 | Unnamed 64-year old blogger | Making slanderous and seditious statement against country's leader | 28 February 201762 |
| 14 | Hew Kuan Yau - Superman (Facebook) | Facebook posting on banning of beauty and the beast | 20 March 201763 |
| 15 | Unnamed | Insulting Johor Sultan on Facebook | 24 March 201764 |
| 16 | Unnamed | Uploading photo of himself holding a placard while holding Bersih 4 and 5 T-shirt | 10 April 201765 |
| 17 | (Facebook) | Insult Sultan of Johor on Facebook | 12 April 201766 |
| 18 | Kum Eng Choon | Posting offensive comments against Najib Razak and Rosmah Mansor | 13 April 201767 |
| 19 | Unnamed 19-year old | Insulting Sultan of Terengganu | 13 April 201768 |
| 20 | Unnamed | Vulgar and insulting remark against Sultan of Johor and Royal Institution on Facebook | 14 April 2017 |

The list is longer than the one illustrated in Table 4.2. On 6 November 2017, the Parliamentary reply by Deputy Communications and Multimedia Minister, Jailani Johari revealed that there were 269 cases investigated under CMA between January and 30 September 2017. Out of the 269 cases, 146 cases were investigated under Section 233 of CMA with 56 investigation papers submitted to the Attorney-General Chamber (Parliament Hansard, 2018).The investigations and prosecutions under the CMA seemingly stopped after the 14th General Election with the majority of the criminal prosecutions against human rights defenders and political opponents withdrawn. However, this does not necessarily mean that Section 233 of CMA is no longer abused by the Malaysian Communication and Multimedia Commission (MCMC) or the Royal Malaysian Police.

Table 4: Records of Individuals Investigated, Arrested or Charged under CMA in 2018

| No | Name | Allegation or Cause for Investigation | Date Investigated, Arrested or Charged |
|---|---|---|---|
| 1 | Sarajun Hoda Abdul Hassan | Allegedly insulting Islam | 29 January 2018 |
| 2 | Nga Kor Ming | Allegedly making offensive social media post | 18 January 2018 |
| 3 | Datuk Mahfuz Omar | Allegations of insulting the Sultan of Pahang | 18 January 2018 |
| 4 | Unknown | Allegedly making an offensive remark against the Islamic religion and also alleged provocations against Muslims on his Facebook | 22 January 2018 |
| 5 | Mazlan Aliman | Uploading a video on Youtube on March 7, which allegedly linked Rosmah to a sturgeon -farming project. | 23 March 2018 |
| 6 | Lim Guan Eng | Allegations that he had indoctrinated children with 'politics of hate' during the recent launch of a tuition centre in the state | 1 April 2018 |
| 7 | Ainin Syazwani | Alleged Fake News | 13 April 2018 |
| 8 | Mohd Azsrul | Alleged Fake News | 13 April 201863 |
| 9 | Jeffrey Chew Gim Earn | Allegedly spreading a video, in which he was trying to warn his party (DAP) about | 26-Apr-201864 |

Table 4 (Continued): Records of Individuals Investigated, Arrested or Charged under CMA in 2018

| No | Name | Allegation or Cause for Investigation | Date Investigated, Arrested or Charged |
|---|---|---|---|
| 10 | Fadiah Nadwa | Allegedly disrespecting the royal institution through an article 'Don't Kiss the Hand that Beats you' in Jentayu, the blog by Malaysia Muda. | 11 July 2018 |
| 11 | Mohd Hannan Ibrahim | Insulting police force on Facebook | 23 October 2018 |

Based on the cases being investigated and charged under the two Acts, it is clear that political speeches in particular and criticisms hurled at government's poor administration and policies in Malaysia do not enjoy a privileged freedom.

What seems clear is that theoretically, expressions like commercial and artistic types under article 10(1) of the Malaysian Constitution are permitted but political (as interpreted

by the government) expressions are dealt with by repressive laws like Sedition Act and CMA. In fact, a close scrutiny of sedition and CMA cases reveal that political speeches/criticisms have been severely limited in practice by the government to strengthen its position and political control. Since it was observed that open public dialogue and criticism is hardly permissible, it is submitted that so long as the Sedition Act 1948 as well as CMA 1998 continue to be in force and employed by the government, it is very much unlikely that political speeches or criticisms against the government and its institutions will be freely exercised by the people in the country.

## Discussion

### Malaysian Freedom of Speech and Expression

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

The Sedition Act and CMA seem to be a wide net that can be used to criminalise any statement, written or spoken, by an individual merely criticising the policies or decisions of any government, thus violating the provision of Article 10(1)(a) of Freedom of Speech and Expression. This begs the question of to what degree is the rule of law being adhered to if such Acts deprive the citizens from enjoying the freedom of speech and expression.

In the Sedition Act for instance, words like “hatred”, “contempt” and “disaffection” or “discontent” are words that are not properly defined, too broad, vague and extremely subjective **(Sedition Act, 2006)**. They are, as described by the Australian Law Reform Commission, “archaic and redundant”. These words can be used conveniently by the Executive to make any words, written or spoken, to come within the purview of these vague words defined as “seditious tendency” under the Act **(Sedition Act, 2006).**

For example, during an election campaign, fiery political speeches are regularly made by members of the opposition, criticising government policies and decisions. These speeches can cause intense dislike, hatred, disaffection and discontentment towards government policies and decisions. The objective of any opposition political party is to try to garner support for its cause by criticising government policies or pointing out its defects in the strongest possible words. Creating an atmosphere of hatred, disaffection and discontentment towards the ruling government and its policies would, in turn, translate into votes for that political party. This has been part and parcel of the democratic process since time immemorial. That being so, such criticism of government policy by the opposition may fit in or can be tailored to fit neatly into the oppressive and vague wordings such as *“bringing into hatred or contempt or to raise discontent or disaffection against any ruler or against any government or the administration of justice”* (Sedition Act, 2006, p.6). The question is, how are the members of the opposition expected to play their roles effectively as the people’s “watchdog” when vague and archaic words such as these are loosely tied around their necks, waiting to be tightened by the Executive on its whims and fancies?

This unfortunate state of affairs explains why it is relatively easy to be seditious under the Sedition Act. Criticism levelled against the government that is alleged to be seditious may actually be legitimate criticism against the government and its institutions. Although the Sedition Act specifies the circumstances or situations where speech is not considered seditious (Sedition Act, 2006, pp.5-7), in reality the wordings of the provisions are vague and ill-defined, as such the defences mentioned in Section 3(2) will be of no avail to an individual facing a charge of sedition and more importantly as cases have shown, it depends absolutely on the attitude of the court (*PP v Ooi Kee Saik, PP v Melan bin Abdullah and PP v Param Cumaraswamy*).Again, for example, speeches made criticising government policies or pointing out its errors and defects during a political rally held during an election campaign may naturally contain words that may cause intense dislike, hatred or disaffection of government policies and measures. These words may fit snugly into, or can be made to fit into, the definition of the words having a seditious tendency that brings *"hatred or contempt or raise discontent or disaffection against any ruler or against any government"*(Sedition Act, 2006, p.6).

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

It is in fact a testimony of how the Act can also be used to create a culture of fear among right-thinking members of the civil society, opposition politicians and the people of Malaysia that they would be investigated, arrested and even prosecuted by the authorities if they spoke their mind on any issue. The incidences which support this contention are the raiding of the online news website Malaysiakini.com in January 2003 for publishing a letter alleged to be seditious ; the arrest of a prominent opposition leader for allegedly distributing seditious material concerning the "Merdeka Constitution" and the "Islamic State" ; and more recently, the threat by a minister that the Sedition Act would be used against non-Muslims who make comments that might be construed as "interfering" in matters concerning Islam (Param Cumaraswamy,, 2006).

With the number of cases of politicians especially those from the opposition parties and other individuals alike being investigated and charged under the Sedition Act and CMA as shown in the tables above, these are evidence to show that the rule of law seems to be more of a theory than in actual practice. Dicey's perspective of the rule of law advocates for **'equality before the law of all classes to the ordinary law of the land administered by the ordinary law courts'**. This means that the government of the day must also give respect to the rule of law. In other words, no one is above the law, and the society must be governed by the law and that all individuals must be equally subject to the law, and to the law only. Again, making references to some court decisions in *Dr Ooi Kee Saik, Param Cumaraswamy and Lim Guan Eng* would lead to such conclusion that the rule of law is more of a notion as the Executive asserts its power for its own political advantage.

**Political Patronisation of Free Speech and Expression**

One can also see this phenomenon happening again especially after the March 2008 general election as politicians from the executive branch of the government keep reminding the people and the opposition about the offence of sedition whenever there is a by election or a political controversy. Examples of such incidences are the calls for the Sedition Act to be used against Karpal Singh a prominent lawyer and an opposition politician for questioning the Sultan of Perak's decision to reinstate the former head of the Perak Religious Department who was removed by the new Pakatan Rakyat state government, a warning by the Home Minister that the Sedition Act may be used against the Bar Council for organizing a forum concerning the social contract and religious conversions, again another warning by the Home Minister that Sedition Act will be used against anyone who raise sensitive issues during the Permatang Pauh by-election.

There have also been claims that the Sedition Act has been used selectively to prosecute politicians and individuals who are considered to be too "vocal" in championing the rights of the people. Conversely, the Act was not used against politicians from the ruling government or persons connected to the ruling elite when they themselves may have breached the provisions of the Sedition Act (Democratic Action Party, 1998). Examples of these incidents are criticisms made by MPs from the ruling government against the Sultans in order to bring about changes to their constitutional position (Yatim, 1995), the use of a derogatory word in Parliament by an MP from the ruling government in reference to the Indian community in Malaysia. More recently, at the UMNO general assembly in October 2006, many scathing remarks which were racially insensitive, even to the extent of inciting violence, were made against the non-Malays by several UMNO delegates and during the Permatang Pauh by elections which was held after the March 8, 2008 general elections, racially inflammatory speeches were made against the Chinese community in Malaysia by an UMNO politician.

In the ***Param Cumaraswamy*** case, the judge indirectly warned of the possible abuse of sedition laws by the Executive. He pointed out that *"the line between criticism and sedition is drawn by a judge who is independent of the party in power in the State"*. He further observed: *"… in the present case, the line between what is seditious and what is not seditious is drawn by a judge. In the UK, it is drawn by a jury. If the judges are independent as they are in Australia and in this country, then there is nothing to fear – the rule of law is preserved"*. The judge had in fact made a very pertinent cautionary statement here. In effect, his view serves as a warning in that laws like the Sedition Act are liable to be abused by the party in power in the state in order to cling to power. A common strategy employed by a government to stay in power is to use laws like the Sedition Act to silence critics. Given this situation, the learned judge stressed the need for an independent judiciary to counter the threat of abuse. However, judicial attitudes and pronouncements on the offence of sedition in Malaysia have shown that the courts are more inclined to favour the Executive branch of the government, rather than the opposition.

The words *"to bring into hatred or contempt or to excite disaffection or discontent against the administration of justice, the ruler or against any government"*(Sedition Act, 2006, p.6), which make up the meaning of the words "seditious tendency" under the Act, is reminiscent of a colonial or imperialist government suppressing dissent and therefore, it is to say the least, anachronistic. As pointed out earlier, these words are vague, oppressive and liable to be abused. In ***Dr Ooi's*** case, for example, it was decided that seditious words are words that tend to make the *"government insecure"*. In hindsight, isn't that the prime objective of any opposition political party when it engages in any political debate or discussion, be it in

Parliament or in any political forum or rally? To say otherwise would mean that the opposition parties would have no role to play in the democratic process and that would be against the time-honoured principle that the opposition provides the check-and-balance in government, and the notion that the opposition in Parliament is the bastion to ensure transparency and accountability in the administration of the government.

## Conclusion

In conclusion, it is apparent that there must be a clear demarcation between "criticism", however strong or harsh against the government, and words with "seditious tendency". Mere criticism can be differentiated from words having a seditious tendency. When these words are innate to violence, armed insurrection, tumult or rioting, then, and only then, should the crime of sedition be made out. Anything else that falls short of these ingredients must not be construed as words having a seditious tendency. This approach, as pointed out earlier, is the position under English common law and it is constitutionally sound, in line with the needs to protect society from tumult and anarchy and the citizen's freedom to exercise his right to free speech. With a law like the Sedition Act 1948 and CMA being actively put to use despite five decades of independence and the rejection of English common law principles in cases of sedition by Malaysian courts, it is doubtful whether freedom of speech and expression will be able to flourish in our country.The Sedition Act 1948 in particular, is clearly not in line with a modern democracy that values free speech. In fact, this law is an affront to democratic principles. The legal elements of sedition are vague, imprecise and ill-defined, therefore liable to be abused.

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