HUMAN RIGHTS WATCH

CREATING A CULTURE OF FEAR

The Criminalization of Peaceful Expression in Malaysia

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Map of Malaysia

Glossary of Common Terms and Acronyms

1MDB	1 Malaysia Development Berhad
Bersih	Coalition for Free and Fair Elections
BN	Barisan Nasional, or National Front
CMA	Communications and Multimedia Act
DAP	Democratic Action Party
EO	Emergency (Public Order and Prevention of Crime) Ordinance
GST	Goods and Services Tax
ICCPR	International Covenant on Civil and Political Rights
IGP	Inspector General of Police
ISA	International Security Act
JAKIM	Malaysian Islamic Development Department
MCMC	Malaysian Communications and Multimedia Commission
MP	Member of Parliament
OHCHR	Office of the High Commissioner on Human Rights
OSA	Official Secrets Act
PAS	Parti Islam Se Malaysia, or the Pan Malaysian Islamic Party
PAA	Peaceful Assembly Act
PKR	Parti Keadilan Rakyat, or the People's Justice Party
PPPA	Printing Presses and Publications Act
PTA	Prevention of Terrorism Act
PSM	Party Sosialis Malaysia, or the Socialist Party of Malaysia
PSRM	Party Sosialis Rakyat Malaysia
RM	Malaysian Ringgit
RPDM	Polis Diraja Malaysia, or the Royal Malaysia Police
Suaram	Suara Rakyat Malaysia
SUHAKAM	Suruhanjaya Hak Asasi Manusia, or the Human Rights Commission of Malaysia
TMI	*The Malaysian Insider*
UDHR	Universal Declaration of Human Rights
UMNO	United Malays National Organization

Summary

> They are creating a culture of fear. If you engage in any talk of public interest, the police may come to your house, you may be arrested, taken to the police station, remanded. Even members of Parliament are treated that way.
> —Yap Swee Seng, former executive director of Suara Rakyat Malaysia (Suaram), Kuala Lumpur, April 14, 2015

Freedom of expression and assembly in Malaysia are currently under attack, aided by the existence of broad and vaguely worded laws that the government can wield to arrest, investigate, and imprison its critics. The recent increase in use of laws that criminalize peaceful expression is a step backward for a country that had seemed to be making progress on the protection of rights. This report examines how the Malaysian government is using and abusing such laws, and the ways in which the laws themselves fall short of international standards.

In Prime Minister Najib Razak's first term between 2009 and 2013, the Malaysian government rescinded several laws, including the draconian Internal Security Act (ISA), which had been regularly used to restrict civil and political rights, including freedom of expression. During the campaign leading up to the 2013 elections, Najib promised to repeal the notorious Sedition Act as well. As long-time activist Hishamuddin Rais told Human Rights Watch:

> When the ISA was abolished, there was a sense of freedom. I thought Malaysia was going in the right direction. When Najib promised to abolish the Sedition Act, I thought: "We have arrived. We are on the right path."

That optimism has now evaporated. Faced with declining popularity and rising public discontent on a range of issues, the prime minister has responded by cracking down on critics and supporting new laws, such as the 2015 Prevention of Terrorism Act (PTA), that replicate many of the flaws in the laws that were repealed. In November 2014, Najib reneged on his promise to repeal the Sedition Act and announced that the law would instead "be strengthened and made more effective," with "a special clause to protect the

sanctity of Islam, while other religions also cannot be insulted." In April 2015, the government pushed through amendments providing for harsher penalties and further restrictions on speech, particularly on social media.

The level of repression intensified in late 2014 and early 2015 as the government faced increasing public criticism about the treatment of former opposition leader Anwar Ibrahim and the imposition of a new goods and services tax. A spiraling corruption scandal involving the government-owned 1 Malaysia Development Berhad (1MDB), whose board of advisors is chaired by Prime Minister Najib, led the government to block websites and suspend newspapers reporting on the scandal and to announce plans to strengthen its power to crack down on speech on the Internet.

While the original focus of the crackdown appeared to be mainly opposition politicians, as public criticism of the government has spread, students, journalists, civil society activists, and ordinary citizens have all been caught up in the wave of repression.

Student activist Adam Adli bin Abdul Halim, for example, has been arrested six times for participating in peaceful protests against the government and for calling for others to do the same. In September 2014, he was convicted of sedition for a speech protesting the 2013 general election and sentenced to one year in jail. He is currently on bail pending appeal, and is now facing a new charge of participating in an “unlawful street protest” in February and an investigation for “activity detrimental to parliamentary democracy” for his role in organizing a recent protest. Due to his activism he was suspended, and then effectively expelled, from his teacher training course at Sultan Idris Teacher Training College. He is currently studying law at a private institution.

Asked why he continues to speak out despite the risks, Adli responded:

> It is a duty for us to speak out when the government tampers with the rule of law to keep themselves in power…. It is not about the result or what is to be accomplished in the short term. Protest is necessary to open up more democratic spaces…. Freedom of expression in Malaysia is under duress by the state. The authorities are clearly not in favor of the rights of free speech and expression.

Chua Tian Chang, vice-president of Malaysia's opposition Parti Keadilan Rakyat (PKR) (People's Justice Party), is also paying the price for speaking out about political issues. He is facing sedition charges in one case and is being investigated for sedition in another, while the government is appealing his acquittal of sedition charges in a third case. On August 12, 2014, fresh charges were brought against him under section 509 of the penal code for allegedly verbally abusing police officials when months earlier they seized his mobile phone and iPad to investigate one of his statements on social media. He was earlier acquitted of participating in an illegal protest, but is now under investigation for participating in a number of "unlawful assemblies" and for wearing a banned yellow t-shirt bearing the logo of the Coalition for Clean and Fair Elections (Bersih), a group that has been campaigning for electoral reform since 2012. Chua says the government's actions are politically motivated:

> For the authorities, everything I say is a problem.... If you go for peaceful protest, they will catch you for assembling. If you criticize government, they come after you for sedition.

Overly Restrictive Laws as a Tool for Repression

Since the end of colonial rule in 1957, Malaysia has been ruled by coalitions dominated by the United Malays National Organization (UMNO). The current coalition, Barisan Nasional (BN) (National Front), has ruled since 1974. Throughout its more than 40 years in power, BN has used a wide range of overly broad and vaguely worded laws to harass and silence critics and political opponents. Some of these laws have been in place since Malaysia gained independence from the United Kingdom in 1957, while many others have been more recently adopted or amended.

Najib took office in April 2009 pledging to "uphold civil liberties" and exhibit "regard for the fundamental rights of the people," but the use of broadly worded criminal laws to silence critics and civil society activists has increased dramatically since the 2013 national elections in which BN held onto a parliamentary majority but lost the popular vote. Since the run-up to that election, more than 200 people have been arrested or questioned by the police for doing nothing more than offering peaceful criticism of the authorities or the judiciary or peacefully exercising their right to freedom of assembly.

The weapon most frequently used in this crackdown, as the Adli and Chua cases illustrate, has been Malaysia's notorious Sedition Act, which has been wielded against opposition politicians, civil society activists, journalists, academics, and ordinary citizens using social media.

In its efforts to silence critics, the government has also turned to broadly worded provisions of the penal code, including sections 504 and 505(b), which criminalize speech that leads to a breach of "public tranquility," and section 499, which criminalizes speech injuring the reputation of another person, alive or dead.

The Printing Presses and Publications Act (PPPA) has been used to limit the number of printed newspapers, suspend publication of newspapers that report on corruption, deter printing presses from printing books critical of the government, and even to ban the Bersih logo. The Communications and Multimedia Act (CMA) has been used to block websites reporting on corruption, penalize radio stations for airing discussions of matters of public interest, and arrest and prosecute users of social media.

Those engaging in peaceful protest have been prosecuted under the Peaceful Assembly Act (PAA) and section 143 of the penal code, which criminalizes "unlawful" assemblies, while some of those organizing or calling on people to attend peaceful rallies have been charged with or investigated for sedition. In 2015, confronted with increased public focus on allegations of corruption involving 1MDB, the government began threatening those speaking out about corruption with charges of "activity detrimental to parliamentary democracy" under sections 124B and 124C of the penal code. The government did not appear to understand the irony of using a law designed to protect democracy to censor critical speech.

Laws that impose criminal penalties for peaceful expression are of particular concern because of their chilling effect on free speech. As the UN special rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated, with such laws in place,

> Individuals face the constant threat of being arrested, held in pretrial detention, subjected to expensive criminal trials, fines and imprisonment, as well as the social stigma associated with having a criminal record.

Many of the individuals Human Rights Watch interviewed referred to a "culture" or "climate" of fear in Malaysia. Fear leads to self-censorship, and self-censorship leads to a stifling of the political debate that is at the very core of a democratic society.

Targeting the Political Opposition

Members of the political opposition have long been a particular target of Malaysia's more repressive laws, and that trend has continued during the government's most recent crackdown. At least five opposition members of parliament have been charged under the Sedition Act for criticizing the government, government officials, or the judiciary since the elections, and at least three have been charged under other criminal laws. If convicted and sentenced to more than a year in prison or fined more than 2,000 Malaysian ringgit (RM) (approximately US$482), they will be disqualified from serving in parliament for five years after their release from any term of imprisonment. Opposition politicians serving in state assemblies and those playing leading roles in opposition political parties have also been targeted during the crackdown.

Prominent opposition figures faced sedition charges under Najib's administration as early as 2009, when the prominent lawyer and MP Karpal Singh was charged with that offense. After a lull, during which there was hope that the law would be repealed, the government resumed aggressive use of the Sedition Act shortly after the 2013 elections, when PKR MP Tian Chua and Parti Islam Se-Malaysia (PAS) MP Tamrin Ghafar were charged with sedition for speeches they made at a public rally protesting the outcome of the elections. In May 2014, Democratic Action Party (DAP) Vice President Teresa Kok was charged with sedition for her satirical Chinese New Year video "Onederful Malaysia CNY 2014," which depicts Kok as the host of a talk show in which her guests satirize political issues ranging from corruption to Malaysia's crime rate. The crackdown intensified in August 2014, with five opposition politicians charged with criminal offenses during that month alone:

- PKR Vice President and lawyer N. Surendran was charged with sedition twice, in both cases for statements he made about the sodomy case against his client Anwar Ibrahim;
- Former Perak Chief Minister Mohammad Nizar Jamaluddin, from the opposition Parti Islam Se-Malaysia, was charged with criminal defamation on August 25 for remarks he had made about Prime Minister Najib during the election campaign in April 2012;

- Khalid Samad, a member of parliament from PAS, was charged with sedition on August 26 for remarks he made regarding the Selangor State Islamic Religious Council, a government body that advises the sultan of Selangor;
- DAP Penang State Assemblyman R.S.N. Rayer was charged with sedition on August 27 for saying "*celaka celaka* UMNO" ("damn, damn UMNO") to several state assemblymen of the United Malays National Organization during an assembly session in May 2014; and
- PKR Secretary General Rafizi Ramli was charged on August 28 with violating section 504 of the penal code, which criminalizes "intentional insult with intent to breach the peace," for a statement he made alleging that right wing groups who were staging protests in front of churches in Selangor were being orchestrated and supported by the UMNO.

The police have also investigated, and in many cases arrested and held in custody for several days, at least 20 opposition politicians since August 2014, some of them multiple times.

Targeting Civil Society

Activists and civil society groups who criticize the government have also come under increasing pressure. Student activists Adam Adli bin Abdul Halim and Safwan Anang and long-time civil society activist Hishamuddin Rais were all charged with sedition after speaking at the May 13, 2013, public meeting at which Tian Chua and Tamrin Ghafar also spoke. All three have since been convicted and are on bail pending appeal, and all have been subjected to further arrests and investigations for their involvement in protests against corruption and participation in the demonstrations that followed the February 2015 sodomy conviction of Anwar Ibrahim.

The decision by the Federal Court of Malaysia, on February 10, 2015, to uphold Anwar Ibrahim's sodomy conviction and sentence led to an explosion of public criticism, followed by a concerted crackdown on those who spoke out. Malaysian political cartoonist Zulkifli Anwar Ulhaque, better known as Zunar, was charged with a record nine counts of sedition on April 3, 2015 — one for each of nine tweets he sent on February 10 criticizing the verdict. If convicted on all counts, he faces up to 43 years in prison.

Comments on the government's handling of religious issues have also resulted in arrests and sedition charges. In one notable example, Eric Paulsen, the executive director of Lawyers for Liberty, was charged with sedition on February 5, 2015, for a tweet that criticized the Malaysian Islamic Development Department (JAKIM), a government agency, for issuing sermons that allegedly promoted extremism. Paulsen was subjected to a frenzied media campaign that included death threats, and was accused of insulting Islam. As Paulsen himself noted in a tweet responding to the hate campaign: "My statement was referring to JAKIM as a government agency. Criticism of JAKIM should not be construed as insulting Islam."

Paulsen was arrested for sedition a second time on March 22, 2015, in connection with a tweet that criticized efforts by the state government in Kelantan to introduce Sharia-based punishments.

Many other civil society activists have been investigated, arrested, and harassed for exercising their rights to freedom of expression or freedom of assembly.

Targeting the Media

The media have not been immune from the crackdown on peaceful political commentary. Officials have denied licenses required under the Printing Presses and Publications Act (PPPA) to news outlets viewed as critical of the government, and government agents have threatened to withdraw printing licenses from presses that publish books and other material that officials dislike. The PPPA was also used to suspend publication of two newspapers for three months for reporting on the allegations of corruption involving the prime minister and 1MDB.

According to Editor-in-Chief and Co-Founder Steven Gan, the online news portal *Malaysiakini* routinely has to deal with lawsuits, as well as other forms of harassment:

> One time we published a letter criticizing UMNO. The police came and asked who wrote the letter, which was under pseudonym. We protect identity to encourage free opinion. We refused to provide details. The police confiscated our computers…. We have the police come in at least once a

> month. It has become routine really. Someone files a complaint and they want a statement.

The government has even initiated sedition investigations in at least two cases in which journalists were merely reporting the news. In March 2015, three editors, the chief executive, and the publisher of *The Malaysian Insider (TMI),* an online news portal, were arrested for sedition and violation of the Communications and Multimedia Act. Their "offense" was to report that the Malaysian Council of Rulers had rejected a proposal to amend federal law to allow the implementation of Sharia-based punishments in the state of Kelantan – a report which the Council of Rulers denied.

Targeting Social Media Users

The government crackdown on speech in Malaysia has affected not only politicians and activists, but also ordinary citizens, particularly those who use social media. As the project coordinator for Suara Rakyat Malaysia (Suaram), a highly respected Malaysian human rights organization that has been documenting the increased use of the Sedition Act, observed:

> Last year they started with politicians, then branched out to lecturers and activists. People started realizing that it affects not just political people but also ordinary people.

According to Suaram documentation, a number of ordinary citizens were charged with sedition in 2014 for statements made on Facebook or other social media, while many more were subjected to investigations and arrests. J. Gopinath, a 28-year-old engineering assistant, was charged with sedition on June 19, 2014, based on a 2012 Facebook posting that was viewed as insulting to Islam. Although he had been arrested shortly after the posting, he was not charged until after the start of the post-election crackdown. Despite the fact that his post was in response to a post insulting his Hindu faith, the individual who posted the video to which he was responding was never prosecuted. He was convicted and fined RM 5,000 (US$1,209).

The 2015 amendments to the Sedition Act seem specifically designed to give the government more control over social media and the Internet. These amendments make it an offense to "propagate" or "cause to be published" seditious material, and enable the

government both to order the deletion of supposedly seditious material and to prohibit the person who posted that material from having access to "any electronic device."

Restrictions on Freedom of Assembly

Faced with rising public opposition, the Malaysian government is also cracking down on individuals involved in protests. The government initially did so by invoking section 9(5) of the Peaceful Assembly Act (PAA), which makes it a criminal offense to hold a public assembly without giving the government 10 days' advance notice. Despite the fact that this provision was held unconstitutional by the Malaysian Court of Appeal on April 25, 2014, the government continued to invoke section 9(5) when arresting protesters until as late as April 2015, while also adding charges of "unlawful assembly" under section 143 of the penal code.

A series of peaceful protests held in the wake of the Federal Court conviction of Anwar Ibrahim (the "KitaLawan" rallies) resulted in the arrest of numerous opposition politicians and activists, many of whom were arrested at night and held in custody for several days. As Rafizi Ramli, one of the opposition politicians who has been repeatedly arrested and held by the police points out: "The police are increasingly using that route to frighten, harass, and keep people away from important functions."

A demonstration on March 23, 2015, at the Kuala Lumpur Customs House intended to raise questions about the imposition of the new goods and services tax resulted in the arrest of 79 people, including S. Arutchelvan, then secretary general of the Parti Sosialis Malaysia (PSM) (Socialist Party of Malaysia). On April 23, 2015, 50 of those activists and politicians were charged under section 447 of the penal code and section 21(d)(1) of the Peaceful Assembly Act for criminal trespass and not abiding by an order to disperse. A largely peaceful rally against the goods and services tax, held on May 1, 2015, resulted in another wave of arrests, including that of prominent lawyer Ambiga Sreenevasen, who was detained for sedition and illegal assembly and held overnight.

Public indignation at reports implicating Prime Minister Najib in the 1MDB scandal and at the government's response to that reporting led to an August 1 protest organized by student activists calling for Najib to resign. A much larger 34-hour protest, organized by Bersih and held on August 29 and 30, also called for Najib's resignation or for a vote of no confidence against him, and for a host of institutional reforms to tackle corruption. Despite

the fact that both protests were peaceful, the organizers were accused of "activity detrimental to parliamentary democracy" and arrested or summoned for questioning, as were some of the participants. No charges related to those protests have yet been filed.

Abusive Police Tactics and Selective Prosecution

The use of overly broad laws to crack down on dissent has been accompanied by a disturbing use of aggressive tactics that seem designed to harass and frighten those critical of the government. Instead of asking government critics to come to the police station to make a statement, the police arrest them, often at night, and sometimes with threatening and unnecessary displays of force. After the KitaLawan assembly held on March 28, 2015, for example, six carloads of police came to the house of PAS MP Khalid Samad at 3:20 a.m. the following morning to arrest him for sedition and unlawful assembly. Many of the officers were carrying M16 assault rifles. He was released from custody at 9:30 p.m. He has not yet been charged with an offense.

In some cases, the police appear to be using arrest and remand as a form of preventive detention. In the days preceding the KitaLawan rally, the police arrested at least four activists and opposition politicians involved with the rallies. Rafizi Ramli and Hishamuddin Rais were both arrested on March 27 and held until after the conclusion of the March 28 rally. Rais was seized by a group of men wearing plainclothes as he got out of a taxi the evening of March 27: "As I leaned forward to pay the taxi they grabbed me. One put his arm around my neck and pulled me, squeezing my neck. They were not wearing uniforms and did not identify themselves."

After being driven around Kuala Lumpur for a while, he was finally taken to the Dang Wangi police station and detained overnight. The following day, the police asked that he be remanded for four days so that they could complete their investigation into violations of section 9(5) of the Peaceful Assembly Act and section 143 of the penal code. He was finally released at the end of his remand. While he had not been charged as of the time of his interview, he noted that "at any time they can trigger this bomb."

For opposition figures and activists, or those perceived as such, the police frequently request the maximum remand of four days even where there is no apparent justification for doing so. Hishamuddin Rais noted that when he was finally questioned on the last day of

his four day remand, after three days during which no investigation appeared to take place, “they asked very little: just the basics like name, age, and profession.”

Cases involving individuals perceived as sympathetic to the ruling coalition are handled quite differently, if they are pursued at all. When Mashitah Ibrahim, a former deputy minister in the ruling coalition, made a false claim that Malaysians of Chinese descent were “burning Qurans,” she was not arrested or remanded, but simply asked to come in and give a statement. The inconsistent treatment by the police of those perceived as pro-opposition and those perceived as pro-government creates a troubling appearance of bias in the handling of criminal cases.

Key Recommendations

Malaysia is an active member of the United Nations and, in October 2014, was reelected as a non-permanent member of the UN Security Council after a 15 year hiatus. The country has also served three terms on the UN Human Rights Council and has repeatedly reaffirmed its commitment to the Universal Declaration of Human Rights. Indeed, the official website of the Malaysian attorney-general states that Malaysia, "by virtue of being a member [of the UN], has subscribed to the philosophy, concepts and norms provided by the Universal Declaration of Human Rights, which sets out the minimum and common standard of human rights for all peoples and all nations."[1]

The current repression of critical speech makes a mockery of those affirmations. If Malaysia wants to be taken seriously as a rights-respecting member of the United Nations, it must bring its laws and policies into line with international norms and standards, including by implementing the following recommendations:

To the Prime Minister and the Government of Malaysia

- Develop a clear plan and timetable for the repeal or amendment of laws as recommended at the end of this report and, where legislation is to be amended, consult thoroughly with Suruhanjaya Hak Asasi Manusia (SUHAKAM) (Human Rights Commission of Malaysia) and civil society groups in a transparent and public way;
- Drop all prosecutions and close all investigations based on peaceful expression or peaceful assembly. At a minimum, immediately drop all investigations and charges of sedition based on criticism of judicial decisions, the government, government decisions or government bodies in light of the parliament's decision, in the 2015 amendments to the Sedition Act, to delete such criticism from the scope of that law;
- Establish a clear policy that participation in peaceful assemblies should never be the basis for charges under sections 143, 124B or 124C of the penal code;

[1] Official Portal of the Attorney General's Chambers of Malaysia, www.agc.my/index.php?option=com_content&view=article&id=408&itemid=334&lang=en (accessed 30 March 2014).

- Instruct all police departments that it is their duty to facilitate peaceful assemblies, not to hinder them. Persons and groups who are organizing assemblies or rallies should be permitted to hold their events within sight and sound of their intended audience, and the police should take appropriate steps to protect the safety of all participants; and
- Instruct all police departments to avoid late night or evening arrests of persons charged with crimes unless necessary to prevent flight or the destruction of evidence and to permit individuals to appear voluntarily to give a statement unless there is a clear and compelling reason to believe that an individual will not comply with a police summons relating to an investigation.

Methodology

This report was researched and written between March 2014 and October 2015. It is based primarily on in-depth analysis of Malaysian laws used to restrict freedom of expression and assembly and on the interviews described below. It also draws on court judgments and news reports concerning criminal proceedings in relevant cases, and public statements by the government.

Human Rights Watch went to Kuala Lumpur in August 2014 and April 2015, where we interviewed 38 lawyers, opposition politicians, journalists, activists, members of civil society organizations, and academics, some of them multiple times. Further in-person interviews were conducted in London. Telephone interviews and email correspondences continued until the time of publication. Interviews were conducted in English; no incentives were offered or provided to interviewees.

On August 10, 2015, Human Rights Watch sent a letter to four members of the Malaysian government requesting their input. The letter, a copy of which is contained in Appendix 1, was sent by fax, email, and registered mail to Minister for Home Affairs Zahid Hamidi, Attorney General Haji Mohamed Apandi bin Haji Ali, Inspector General of Police Khalid bin Abu Bakar, and Chairman of the Malaysian Communications and Multimedia Commission Dr. Halim Shafie. Unfortunately, none of those contacted responded.

The report is not meant to be a comprehensive list of all laws that criminalize free speech in Malaysia, but discusses the laws that have proven to be most prone to misuse and abuse.

I. Background

Since gaining independence in 1957, Malaysia has been ruled by party coalitions dominated by the United Malays National Organization (UMNO). Both the original Alliance Coalition and Barisan Nasional (BN), the coalition formally registered in July 1974 that has now ruled the country for more than 40 years, have a history of using criminal laws to suppress speech and marginalize the opposition. For much of that time, the most frequently used laws were the Internal Security Act (ISA), which authorized administrative detention for up to two years, and the Emergency (Public Order and Prevention of Crime) Ordinance (EO), which allowed the police to hold individuals in detention for 60 days.[2]

During the 1960s and 1970s, the Malaysian government used the ISA to suppress political activity, such as that of the Labor Party of Malaysia and the Party Sosialis Rakyat Malaysia (PSRM). Approximately 3,000 persons were administratively detained during the years between the passage of the ISA in 1960 and the assumption of power by then-Prime Minister Mahathir Mohamed in 1981. Mahathir, who served as prime minister from 1981 until 2003, used the ISA extensively to imprison political opponents and human rights activists, with the most prominent example being Operation Lalang in October and November 1987, during which the government detained 106 human rights advocates and political activists from the major political parties. Mahathir also led the effort at that time to amend the ISA to include provision 8(b), which eliminated the possibility of judicial review of ISA decisions. Mahathir used the ISA in high profile cases including the 1998 detention of his former deputy Anwar Ibrahim and the 2001 detention of senior Parti Keadilan Rakyat activists who were publicly demanding Anwar's release.[3]

Mahathir regularly used the Printing Presses and Publications Act (PPPA) to control the press and to penalize publications critical of the government. In 1996, opposition parliamentarian Lim Guan Eng was tried for "false reporting" under the PPPA and for sedition for criticizing the government's handling of rape charges involving a member of

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[2] Upon expiration of the 60-day period, the Minister of Home Affairs could authorize administrative detention, solely based on police recommendations, for two years for persons deemed to be a threat to national security, suspected of crime, or involved in trafficking. The two-year detention periods could be renewed indefinitely and the grounds for detention could not be challenged in court.

[3] Human Rights Watch, *"No Answers, No Apology": Police Abuses and Accountability in Malaysia*, (New York: Human Rights Watch, 2014), pp. 18-19, https://www.hrw.org/report/2014/04/01/no-answers-no-apology/police-abuses-and-accountability-malaysia.

UMNO.[4] He was subsequently convicted and sentenced to 18 months in prison.[5] Irene Fernandez, then director of women's and migrants' rights organization Tenaganita, was also charged with "false reporting" under the PPPA in connection with a report she published on the mistreatment of migrant workers in Malaysia's immigration centres.[6] After a trial lasting almost seven years, she was convicted and sentenced to a year in prison.

The PPPA was also used to attack the newspapers run by opposition political parties. After BN lost ground to Parti Islam Se-Malaysia (PAS) in the November 1999 elections, the Ministry of Home Affairs accused *Harakah Daily,* the PAS-run newspaper, of breaching the conditions of its publishing license by selling the paper to non-PAS members. The government also arrested the editor and printer of the paper on charges of sedition for publishing an article that alleged a government conspiracy against Anwar Ibrahim. In March 2000, the ministry restricted the number of issues the paper could publish and banned it from sale on newsstands.[7]

Protests and rallies were strictly controlled using the draconian Police Act, which required a police permit to hold an assembly and authorized the use of force to break up unauthorized gatherings. The government regularly used the act to ban political rallies linked to opposition political parties or concerning issues (like campaigns to repeal the ISA) opposed by the government. Those organizing rallies supporting Anwar Ibrahim and the '*reformasi*' movement he inspired, or raising concerns about his arrest and prosecution, were regularly denied permits. Repeated public demonstrations in support of Anwar in 1999, 2000, and 2001 were met with tear gas, chemical-laced water cannons and baton charges, and the arrest of dozens of people for illegal assembly under the Police Act or for rioting under the penal code. In July 2001, the government announced a ban on all political rallies, stating that they would undermine the country's security.[8]

Mahathir stepped down as prime minister in 2003 and was replaced by his deputy Abdullah Ahmed Badawi, but the suppression of dissent continued unabated. During

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[4] Human Rights Watch, *World Report 1997* (New York: Human Rights Watch 1997), pp. 174-175.

[5] Human Rights Watch, *World Report 1999* (New York: Human Rights Watch 1999), p. 199.

[6] Human Rights Watch, *World Report 1997* (New York: Human Rights Watch 1997), p. 174.

[7] "Malaysia Urged to Lift Ban on Rallies," Human Rights Watch news release, March 31, 2000, https://www.hrw.org/news/2000/03/31/malaysia-urged-lift-ban-rallies.

[8] Ibid.

Badawi's rule, the Malaysian Communications and Multimedia Commission (MCMC) ordered Internet services to block online news portal *Malaysia Today* for printing "slanderous statements that threaten public order." The government also detained critics, including the editor of *Malaysia Today* and opposition politician Teresa Kok, under the ISA;[9] suspended several opposition party newspapers from publication for three months using the PPPA;[10] and refused to grant a permit to the Coalition for Free and Fair Elections (Bersih) for a rally demanding electoral reform, and then arrested many of those who went forward with the planned protest.[11]

In April 2009, Najib Razak took over as prime minister pledging to "uphold civil liberties" and exhibit "regard for the fundamental rights of the people."[12] Najib initially fulfilled his promises of reform. He acted quickly to rescind the bans on the opposition party newspapers, later saying that Malaysia needs "a media …that is empowered to responsibly report what they see without fear of consequence."[13] He released 13 people held under the ISA, and pledged to review that law and other repressive security laws. However, restrictions on those newspapers and on public assemblies continued.

When Bersih announced a "Walk for Democracy" for July 9, 2011, the police announced that they would not issue a permit for the march and threatened to take "stern action" against anyone who participated. The Home Affairs Minister also declared Bersih an "illegal organization" under the Societies Act. In the lead up to the rally, the police used the Sedition Act, the Police Act, the Societies Act and the PPPA to arrest some 270 supporters for wearing or selling Bersih's yellow t-shirts, printing or possessing Bersih posters, or promoting the coalition's aims at public meetings. The police also raided the Bersih offices, arrested staff, and called in the rally's organizers for questioning.[14] On July

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[9] "Malaysia: Free Journalists and Parliamentarian," Human Rights Watch news release, September 12, 2008, https://www.hrw.org/news/2008/09/12/malaysia-free-journalists-and-parliamentarian.

[10] "End Ban on Opposition Papers," Human Rights Watch news release, March 28, 2009, https://www.hrw.org/news/2009/03/25/Malaysia-end-ban-opposition-papers.

[11] "Malaysia: Allow Rally for Electoral Reform," Human Rights Watch news release, November 6, 2007, https://www.hrw.org/news/2007/11/09/malaysia-allow-rally-electoral-reform.

[12] Human Rights Watch, *World Report 2010* (United States: Human Rights Watch 2010), p. 315.

[13] Ibid, p. 317.

[14] "Malaysia: End Crackdown on Peaceful Campaigners," Human Rights Watch news release, June 29, 2011, https://www.hrw.org/news/2011/06/29/malaysia-end-crackdown-peaceful-campaigners.

9, the police broke up the Bersih 2.0 rally, which had been a peaceful and well-disciplined event, with baton charges and tear gas, arresting nearly 1,700 people.[15]

Najib did take steps to reform some of the more repressive laws. His government repealed the Emergency Ordinance in the fall of 2011 and, in June 2012, repealed the ISA.[16] In December 2011, the government passed the Peaceful Assembly Act which, while flawed, eliminated the need for a police permit and some of the more draconian elements of the Police Act.[17] The government also eliminated the annual renewal requirement for printing licenses in the 1984 Printing Presses and Publications Act and lifted the ban on student participation in politics through amendments to the 1971 University and University Colleges Act. In July 2012, in the run-up to the 2013 general election, Najib promised to repeal the Sedition Act and replace it with a "National Harmony Act."

Nevertheless, when Bersih organized a major rally to take place in Kuala Lumpur on April 28, 2012, police still cracked down with excessive force, breaking up what had been an entirely peaceful rally. City officials had refused rally organizers' request to use Dataran Merdeka Square in central Kuala Lumpur, and police backed that up with a court order forbidding entrance to the square. Over 250,000 people attended the rally, but when a small group dismantled a police barricade, police launched an all-out assault with tear gas and baton charges to break up the entire rally.[18] Suruhanjaya Hak Asasi Manusia (SUHAKAM), the national human rights commission, determined in an inquiry that "there

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[15] "Malaysia: Investigate Crackdown on Pro-Democracy March," Human Rights Watch news release, July 13, 2011, https://www.hrw.org/news/2011/07/13/malaysia-investigate-crackdown-pro-democracy-march.

[16] Regrettably, the ISA was replaced with the 2012 Security Offenses (Special Measures) Act, which replicates many of its repressive features; in 2015, the government passed the Protection of Terrorism Act which, like the ISA, permits indefinite detention without trial or, in the case of POTA, the hope of judicial review. Mickey Spiegel (Human Rights Watch), "Smoke and Mirrors: Malaysia's 'New' Internal Security Act," *Asia Pacific Bulletin, No. 167,* June 14, 2012, http://www.hrw.org/sites/default/files/related_material/2012_Malaysia_EastWest.pdf; "Malaysia: Scrap Repressive Counterterrorism Bill," Human Rights Watch news release, April 5, 2015, http://www.hrw.org/news/2015/04/05/malaysia-scrap-repressive-counterterrorism-bill.

[17] Phil Robertson, "Political Bait and Switch Trumps Rights Reform in Malaysia," December 16, 2011, originally published in *Jurist,* https://www.hrw.org/news/2011/12/16/polical-bit-and-switch-trumps-rights-reform-malaysia.

[18] Human Rights Watch, *"No Answers, No Apology": Police Abuses and Accountability in Malaysia*, April 2014, pp. 67-75, https://www.hrw.org/report/2014/04/01/no-answers-no-apology/police-abuses-and-accountability-malaysia; Malaysian Bar Council, "Final Report of the Malaysian Bar on Bersih 3.0 rally held on 28 April 2012 in Kuala Lumpur," May 10, 2012, http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/final_report_of_the_malaysian_bar_on_bersih_3.0_rally_held_on_28_april_2012_in_kuala_lumpur.html (accessed October 5, 2015).

was use of disproportionate force and misconduct by the police toward the participants" of the rally.[19]

The 2013 general election brought the government's movement towards reform to an end. Although Barisan Nasional maintained its parliamentary majority, it received only 47 percent of the popular vote, while the opposition coalition Pakatan Rakyat received more than 50 percent of the popular vote. The wave of repression documented in this report soon followed.

[19] Suruhanjaya Hak Asasi Manusia (SUHAKAM) (Human Rights Commission of Malaysia), *Report of SUHAKAM Public Inquiry into the Incidents During and After the Public Assembly of 28 April 2012*, www.suhakam.org.my/public_inquiry, 2013, paras. 57-59.

II. International and Domestic Legal Standards

The Universal Declaration of Human Rights (UDHR) provides in article 19 that:
Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[20]

The UDHR further provides, in article 20, that "everyone shall have the right to freedom of peaceful assembly and association."

Although the declaration is not a treaty, it is a foundational document of the United Nations, and since its adoption in 1948 is widely regarded as having acquired binding legal authority as customary international law.[21] Malaysia has repeatedly reaffirmed its commitment to the UDHR.[22]

Elaborating on the Universal Declaration, the International Covenant on Civil and Political Rights (ICCPR) provides in article 19 that: [23]

> Everyone shall have the right to hold opinions without interference.

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[20] Universal Declaration of Human Rights, adopted December 10, 1948, G.A. Res. 217A (III), 3 UN GAOR, UN Doc. A/810, at 71 (1948), https://www.un.org/e/documents/udhr/.

[21] See, for example, International Court of Justice, *Barcelona Traction, Light and Power Company Limited* (Belgium v. Spain) (Second Phase), ICJ Rep. 1970 30; International Court of Justice, *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). See generally M.S.McDougal, H.D.Lasswell, and L.C.Chen, *Human Rights and World Public Order* (Yale University Press, 1980), pp. 273-74, 32-27; H. Steiner, P. Alston & R. Goodman, *International Human Rights in Context: Law, Politics Morals* (3rd edition, 2007) at 135-139; R. Bilder, "The Status of International Human Rights Law: An Overview" in *International Law and Practice* 1 (J. Tuttle, ed. 1978), p. 8.

[22] Official Portal of the Attorney General's Chambers of Malaysia, www.agc.my/index.php?option=com_content&view=article&id=408&itemid=334&lang=en (accessed 30 March 2014). Malaysia, "by virtue of being a member [of the United Nations], has subscribed to the philosophy, concepts and norms provided by the Universal Declaration of Human Rights, which sets out the minimum and common standard of human rights for all peoples and all nations."; Official Portal of the Human Rights Commission of Malaysia, http://www.suhakam.org.my/about-suhakam/sejarah/ [accessed August 12, 2015]; "Suhakam Welcomes the Government's Commitment to the Principles and Values of Human Rights," Press Release, May 17, 2014, http://www.suhakam.org.my/2014/05 (accessed May 17, 2014). See also ASEAN Human Rights Declaration, http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration ("reaffirming . . . commitment to the Universal Declaration of Human Rights").

[23] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 171, entered into force March 23, 1976 (except article 41, which entered into force March 28, 1979), http://www.ohchr.org/en/professionalInterest/pages/CCPR.aspx.

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

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.[24]

Although Malaysia has not acceded to the ICCPR,[25] the widely-accepted covenant is generally viewed as persuasive guidance on the scope of the rights set out in article 19 of the UDHR.[26]

The UN Human Rights Committee (HRC), an independent body of experts that provides authoritative interpretation of the International Covenant on Civil and Political Rights, has stressed the importance of freedom of expression in a democracy:

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.... [C]itizens, in particular through the media, should have wide

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[24] The rights to freedom of expression and freedom of assembly are also protected in regional human rights treaties, including the European Convention on Human Rights (article 10 and article 11), the African Charter on Human and Peoples' Rights (article 9 and article 11), and the American Convention on Human Rights (article 13 and article 15), all of which draw upon the UDHR. These treaties and the court judgments deriving from them demonstrate the global acceptance of the rights guaranteed by the UDHR, and provide useful perspectives on the appropriate interpretation of those rights.

[25] Malaysia has stated that it adheres to the principles of the ICCPR "subject to the Malaysian Constitution and applicable laws and policies." Official Portal of the Attorney General, www.agc.my/index.php?option=com_content&view=article&id=408&itemid=334&lang=en (accessed 30 March 2014).

[26] See UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, UN Doc. A/CONF.157/23, http://www.refworld.org/docid/3ae6b39ec.html (accessed 17 March 2014) (emphasizing that the UDHR, "which constitutes a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments, in particular the International Covenant on Civil and Political Rights."). Malaysia participated in the 1993 Vienna World Conference on Human Rights that led to the adoption, by consensus, of the *Vienna Declaration*.

access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.[27]

The guarantee of freedom of expression applies to all forms of expression, not only those that fit with majority viewpoints and perspectives, as noted by the European Court of Human Rights in the seminal *Handyside* case:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the Development of every man.... [I]t is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[28]

Under international law, the right to freedom of expression is not absolute. Given its paramount importance in any democratic society, however, the UN Human Rights Committee has held that any restriction on the exercise of this right must meet a strict three-part test. Such a restriction must (1) be "provided by law"; (2) be imposed for the purpose of safeguarding respect for the rights or reputations of others, or the protection of national security or of public order (*ordre public*), or of public health or morals; and (3) be necessary to achieve that goal.[29]

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[27] UN Human Rights Committee, Decision: *Gauthier v. Canada,* Communication No. 633/1995, U.N. Doc. CCPR/C/65/D/633/1995, May 5, 1999, http://www1.umn.edu/humanrts/undocs/session65/view633.htm (accessed March 18, 2014), para. 13.4.

[28] European Court of Human Rights, *Handyside v. United Kingdom,* (no. 5493/72), Judgment of 7 December 1976, ECHR 1976-V, available at www.echr.coe.int, para. 49. *See also R. v. Central Independent Television plc*, [1994] 3 All ER 641 ("Freedom of [speech] means the right to [say] things which the government and judges, however well-motivated, think should not be [said]. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible."); UN Human Rights Committee (HRC), General Comment 34, Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34 (2011), available at: www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf, para. 11 ("The scope of paragraph 2 [of the ICCPR] embraces even expression that may be regarded as deeply offensive.").

[29] UN HRC General Comment 34, para. 22. The same three-part test has been applied by, among others, the African Court of Human and Peoples' Rights to cases under article 9 of the African Charter on Human and Peoples' Rights, see, e.g., *Lohe Issa Konate v. Burkina Faso,* Application no. 004/2013, December 5, 2014, http://www.african-court.org/en/images/documents/Judgment/Konate%20Judgment%20Engl.pdf (accessed June 17, 2015]); the European Court of Human Rights to cases under article 10 of the ECHR, see, e.g. *Goodwin v. United Kingdom,* [GC] (No. 17488/90), 22 EHRR 123 (1996), para. 28-37, the Canadian Supreme Court to cases under the Canadian Charter of Rights and Freedoms, *see, e.g., R. v. Oakes,* [1986] 1 SCR 103, 138-139, and the Kenyan High Court, Constitutional and Human Rights division, to cases under the Kenyan Constitution, *see, e.g., Coalition for Reform and Democracy v. Republic of Kenya,* Petitions 628 and 630 of 2014 and 12 of 2015 (consolidated), February 23, 2015, http://kenyalaw.org/caselaw/cases/view/106083/ (accessed June 23, 2015).

The Malaysian Constitution

Article 10(1) of the Constitution of Malaysia provides that: a) every citizen has the right to freedom of speech and expression; and b) all citizens have the right to assemble peaceably and without arms. However, with respect to freedom of expression, the constitution grants parliament the power to impose, by law:

Such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence.[30]

With respect to freedom of assembly, the Malaysian constitution allows parliament to impose "such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof of, public order or morality."[31]

The constitutional protection for these rights falls short of that provided in international law, for it allows parliament to impose restrictions it deems "expedient," rather than only those that are actually necessary to protect national security, public order, public health or morals, or the rights and reputations of others. Notwithstanding its less stringent standard for restrictions, Malaysia's constitution unambiguously calls for respect for the rights of freedom of expression and assembly, as also required by international law.

[30] Constitution of Malaysia, article 10(2)(a).

[31] Ibid, art. 10(2)(b).

III. The Criminalization of Peaceful Expression

The Najib administration, particularly since 2013, has been using a range of overly broad and vaguely worded laws to harass, investigate and arrest individuals for their peaceful expression. Some of these laws are recently enacted while others are carried over from the British colonial era; still others are existing laws that were recently amended to broaden the restrictions on speech or assembly. This section describes those laws, identifying provisions that do not comport with international standards for the protection of freedom of expression and assembly, and examines how they have been used to criminalize peaceful exercise of those rights.

Sedition Act of 1948 and Amendments

The Sedition Act is currently the government's primary weapon against dissent. Originally enacted by British colonial authorities to contain a communist insurrection, it was only infrequently used between 2009, when Najib first became prime minister, and 2013.[32] After the 2013 elections, however, the government began to use the law aggressively to harass, arrest and prosecute opposition politicians, civil society activists, and anyone else who has spoken critically about the government, the judiciary, religion, or a number of other "sensitive" issues.

The current version of the Sedition Act imposes criminal penalties on any person who:[33]

(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act which would, if done, have a seditious tendency;

(b) utters any seditious words;

(c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or

(d) imports any seditious publication.[34]

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[32] Between 2010 and 2012, only four people were charged with sedition, according to Suaram Monitoring and Documentation.

[33] As discussed herein, further amendments to the Sedition Act were passed in April 2015. Those amendments, which were published in the *Federal Gazette* on June 4, 2015, had not come into force at the time of publication of this report.

[34] Sedition Act 1948, section 4(a).

The law further makes it criminal to possess any seditious publication "without lawful excuse."[35]

The law never actually defines sedition. Instead, "seditious," as used in the law, is said to "qualify the act, speech, words, publication or other things as one having a seditious tendency."[36] Initially, "seditious tendency" was broadly defined in Section 3(1) of the Sedition Act to include speech having a tendency to "bring into hatred or contempt or to excite disaffection against" the government, the king or the ruler of any state, or the administration of justice in Malaysia, or to "raise discontent or disaffection" amongst the inhabitants of Malaysia.[37] At the time the original Sedition Act was promulgated, British colonial authorities were attempting to suppress an armed insurrection by the Communist Party of Malaya and the law played a central role in those efforts.

The definition of seditious tendency was expanded during the State of Emergency that the government declared on May 15, 1969 and that continued until February 1971. The expanded definition in Section 3(1)(e) included speech with a tendency to "promote feelings of ill-will and hostility between different races or classes of the population of Malaysia."[38] Speech that questions certain portions of the constitution, including article 152 (making Malay the official language), article 153 (providing special rights for Malays and natives of Sarawak and Sabah), and article 181 (preserving certain rights for ruling chiefs in the states), was also made seditious.[39]

In 2015, the definition of seditious tendency was further amended to delete the reference to "the government" from section 3(1)(a) and to delete the provision dealing with the administration of justice.[40] While the government presented these changes as a liberalization of the law, nothing in the amended act prevents the authorities from treating

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[35] Sedition Act, sec. 4(2).

[36] Ibid, sec. 2.

[37] Ibid, sec. 3(1)(a), (c) and (d).

[38] Emergency (Essential Powers) Ordinance No. 45, P.U. (A)282/1970.

[39] Section 3(1)(f), added by the Emergency (Essential Powers) Ordinance No. 45/1970.

[40] Sedition (Amendment) Act 2015, http://www.federalgazette.agc.gov.my/outputaktap/20150604_A1485_BI_Act%20A1485.pdf, sec. 3(a) and (b) (amending sections 3(1)(a) and 3(1)(c)). Section 3(1)(a), as amended, still makes seditious statements with a tendency to "bring into hatred or contempt or excite disaffection against" the king or any ruler. As previously discussed, at the time of publication the 2015 amendments had not yet come into force.

criticisms of the government as seditious on the grounds that they have a tendency to "cause discontent among the inhabitants of Malaysia" in violation of section 3(1)(d).[41]

Moreover, the 2015 amendments added a new section 3(1)(ea), making expression with a tendency "to promote feelings of ill will, hostility or hatred between persons or groups of persons on the ground of religion" part of the definition of seditious tendency.[42] As Yin Shao Loong, executive director of the Institut Rakyat, a think tank set up by the PKR, explains:

> Many critiques of the government fall in the areas of race or religion. Even economics is tied up with race, religion and the rulers. So most criticism of the government can probably still be charged as sedition even under the amended law.[43]

Those charged prior to the effective date of the 2015 amendments face the possibility of up to three years in prison and a fine of RM 5,000 (US$1,210) for a first offense, and up to five years in prison for any subsequent offense. Those charged with sedition once the 2015 amendments enter into force will face significantly higher penalties. As amended, the court will no longer have the option to impose a fine. Instead, those convicted of sedition will face a minimum sentence of three years in jail and a maximum of seven years.[44]

In addition, the 2015 amendments created a new offense of "aggravated sedition." Under the new section 4(1A), any person who commits sedition (as broadly defined in the statute) and "by such act causes bodily injury or damage to property" faces the possibility of up to 20 years in prison, and must be sentenced to a minimum term of three years.[45] The law does not require that the property damage be substantial or that the speaker or his or her

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[41] In the explanatory statement to the proposed amendments, the amendment deleting reference to criticism of the government was described as "in line with the intention of the Government to be more open whereby the public is at liberty to give feedback or criticize the Government so as to create a transparent and accountable administration in Malaysia." Sedition (Amendment) Act 2015, Explanatory Statement, para. 4(a), https://www.digitalnewsasia.com/sites/default/files/files_upload/sedition_act_amendments.pdf.

[42] Sedition (Amendment) Act 2015, sec. 3(a)(iv)(inserting new section 3(1)(ea)).

[43] Human Rights Watch interview with Yin Shao Loong, Kuala Lumpur, April 14, 2015.

[44] Sedition (Amendment) Act 2015, sec. 4(a)(ii)(amending section 4(1) of the act).

[45] Sedition (Amendment) Act 2015, sec. 4(b) (inserting new section 4(1A) into the act). The 2015 amendments also introduced a new section 6A, which provides that certain provisions of the Code of Criminal Procedure, including those that allow the court to show leniency to first offenders or youthful offenders, are not applicable to convictions for aggravated sedition. According to Yin Shao Loong, this amendment aimed at the ones who "got away" because they were young or first offenders, and will be used to target student activists.

intended audience commit the injury or damage. As Eric Paulsen, executive director of Lawyers for Liberty, points out, "If I make a 'seditious' statement and someone gets mad and hits someone, I am responsible and face up to 20 years in jail."[46]

Long-time activist Maria Chin Abdullah, the current chair of the Coalition for Clean and Fair Elections (Bersih) and head of the women's rights NGO EMPOWER, is very troubled by this provision:

> It is crucial to look at the fact that violence is being justified. If I make a statement about the use of Allah and the Bible and it results in the burning of churches, the ones who burned the churches won't get penalized, but the one who used the word Allah gets arrested. This justifies the violence and leads to impunity.[47]

Yap Swee Seng, former executive director of Suaram, the Malaysian human rights NGO, commented on the chilling effect of the Sedition Act:

> People are definitely more careful now in terms of what they say, tweet, and post. That will be even truer after the amendments to the Sedition Act. It is a much more serious risk now.[48]

Comparison to International Standards

The Sedition Act goes well beyond the standard definition of sedition, which has generally been interpreted to require an intention to incite the public to violence against constituted authority or to create a public disturbance or disorder against such authority.[49] While the government claims that the restrictions on speech in the Sedition Act are intended to deal with "threats against peace, public order and the security of Malaysia," in both language and application they sweep far too broadly to justify that claim.[50] With the possible

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[46] Human Rights Watch interview with Eric Paulsen, Kuala Lumpur, April 9, 2015.

[47] Human Rights Watch interview with Maria Chin Abudullah, Kuala Lumpur, April 16, 2015.

[48] Human Rights Watch interview with Yap Swee Seng, Kuala Lumpur, April 14, 2015.

[49] The Oxford English Dictionary defines sedition as "(1) a concerted movement to overthrow an established government; a revolt, rebellion, rioting; (2) conduct or language inciting to rebellion against the constituted authority in a state." *Oxford English Dictionary* (Oxford University Press, 1971. See also Supreme Court of Canada, *Boucher v. The King,* [1951] S.C.R. 265, 288; Supreme Court of India, *Kedar Nath v. State of Bihar* (1962) SCR Supl. (2) 769, 809.

[50] Sedition (Amendment) Act 2015, Explanatory Statement.

exception of subsection 3(1)(b), the law does not even require that the expression at issue encourage unlawful activity or public disorder, much less that it pose a real risk of causing such impact.[51] Instead, it penalizes expression that simply "has a tendency" to cause ill-will, hatred, disaffection or discontent, regardless of whether it actually has such an impact, and regardless of whether or not any of those who feel "disaffection" or "discontent" as a result are inspired to do anything other than sit at home and nurse their discontent.

Moreover, under the Malaysian Sedition Act, the intention of the speaker is *irrelevant* if the speech, publication or act has a "seditious tendency."[52] This effectively permits the imprisonment of citizens who had no intention of "exciting disaffection," much less of undermining national security or public order, simply because someone else views their statement as having the "tendency" to do so. The fact that a statement is truthful is also not a defense to a charge of sedition if the court finds that the statement had a "seditious tendency."[53] Thus, a statement alleging corruption in a government contract could result in a conviction for sedition, *even if the statement is true*, if the court finds that the statement had a tendency, for example, to "cause discontent among the citizens of Malaysia." As a result, it is almost impossible to defend against a charge of sedition. As one defense lawyer told Human Rights Watch, "acquittals in sedition cases are rare. They occur only if you can prove that the defendant did not utter the allegedly seditious statement."[54]

A few examples of recent uses of the Sedition Act show just how broadly it can be and is being used:

- Azmi Sharom, a member of the law faculty at University of Malaya, has been charged with sedition for giving his legal opinion that actions taken during the political crisis in Perak in 2009 were illegal and should not be repeated;[55]

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[51] Subsection 3(1)(b) defines seditious tendency to include speech that has a tendency "to excite" individuals to try to change laws "other than by lawful means." But even this provision goes far beyond what international law allows; someone who might be tempted to attend a banned rally or violate public order laws by carrying a sign in traffic would thereunder be disproportionately penalized by a charge under "sedition" which does not consider either the necessity or proportionality of the restriction on expression.

[52] Sedition Act, sec. 3(3).

[53] *Public Prosecutor v. Ooi Kee Saik & Ors, [1971] 2 M.L.J. 108* ("It is… immaterial [in a prosecution under the Sedition Act] whether the impugned words were true or false.").

[54] Human Rights Watch interview with N. Surendran, Kuala Lumpur, April 10, 2015.

[55] Following elections in March 2008, Perak was governed by a three-party opposition alliance that included the DAP. Early in 2009, three Perak state legislators defected to the governing coalition, tipping the balance of power. After a visit from BN members of the state assembly, the Perak sultan fired the Perak Chief Minister, who was allied with the opposition alliance, and asked the BN to govern.

- Political cartoonist **Zulkiflee Anwar Ulhaque**, commonly known by his pen-name **Zunar**, has been charged with nine counts of sedition, one for each of the nine tweets he sent criticizing the Federal Court's decision to uphold the sodomy conviction of Anwar Ibrahim;
- **Five journalists and editors** from online news portal *The Malaysian Insider* have been investigated for sedition for reporting on actions allegedly taken by Malaysia's Council of Rulers; and
- Constitutional scholar **Dr. Aziz Bari** has been investigated for sedition for articles discussing the role of the sultans under the Malaysian constitution.

As lawyer and opposition MP N. Surendran told Human Rights Watch:

> They say the [sedition] law is needed for ethnic relations, but the people are fine. They are using it against people who are not doing anything to do with religion and race. They are creating fear of an ethnic explosion to justify laws to keep the people down.[56]

The Sedition Act is further flawed in that it fails to formulate the restrictions it imposes on speech "with sufficient precision to enable the citizen to regulate his conduct."[57] "Seditious tendency" is loosely defined with terms such as "ill-will," "discontent," and "disaffection," that are both vague and subjective.[58] When a law is so vague that individuals do not know what expression may violate it, it creates an unacceptable chill on free speech.

Vague provisions not only give insufficient notice to citizens, but also leave the law subject to abuse by authorities.[59] As activist Hishamuddin Rais says:

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[56] Human Rights Watch interview with N. Surendran, Kuala Lumpur, April 10, 2015.

[57] UN HRC, General Comment 34, para. 25; European Court of Human Rights, *Sunday Times v. United Kingdom,* Judgment of 26 April, 1979, Series A no. 30, www.echr.coe.int, para. 49.

[58] See *Mwenda & Eastern Media Institute v. Attorney General* [2010] UGCC 5 (invalidating Uganda's Sedition Law, which is strikingly similar to that of Malaysia: "[T]he way impugned sections were worded have an endless catchment area, to the extent that it infringes one's right [to free speech under Uganda's Constitution].").

[59] See Report of the special rapporteur on the promotion and protection of the right to freedom of opinion and expression Frank La Rue, September 2012, UN Doc. A/67/357, at para. 32; See also *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972), at p. 170 (law is void for vagueness if it is a "standardless sweep" that allows law enforcement officials to pursue their own predilections.)

> Sedition is a dragnet. Any time they can pick you up if they want to. What is sedition? It is up to [the government's] interpretation. It is a draconian and abusive law.[60]

The Sedition Act raises particular concern because, even as amended, it effectively restricts discussion of many government actions,[61] as well as discussion of sections of the Malaysian constitution, including those providing special privileges for Malays and retaining certain privileges for the rulers of the states.[62] The right of individuals to criticize or openly and publicly evaluate their governments without fear of interference or punishment is an essential aspect of the right to freedom of expression, and restrictions on such speech must be closely scrutinized.[63]

As a New Zealand law commission recommending abolition of the country's sedition law concluded:

> People may hold and express strong dissenting views. These may be both unpopular and unreasonable. But such expressions should not be branded as criminal simply because they involve dissent and political opposition to the government and authority.[64]

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[60] Human Rights Watch interview with Hishamuddin Rais, Kuala Lumpur, April 16, 2015

[61] As discussed above, because the law still criminalizes speech having a tendency to cause disaffection against the king or any ruler, to cause discontent among the inhabitants of Malaysia, or to promote ill will between persons on the grounds of religion, the law severely restricts the discussion of most matters of public interest even after the deletion of specific reference to the government from the statute.

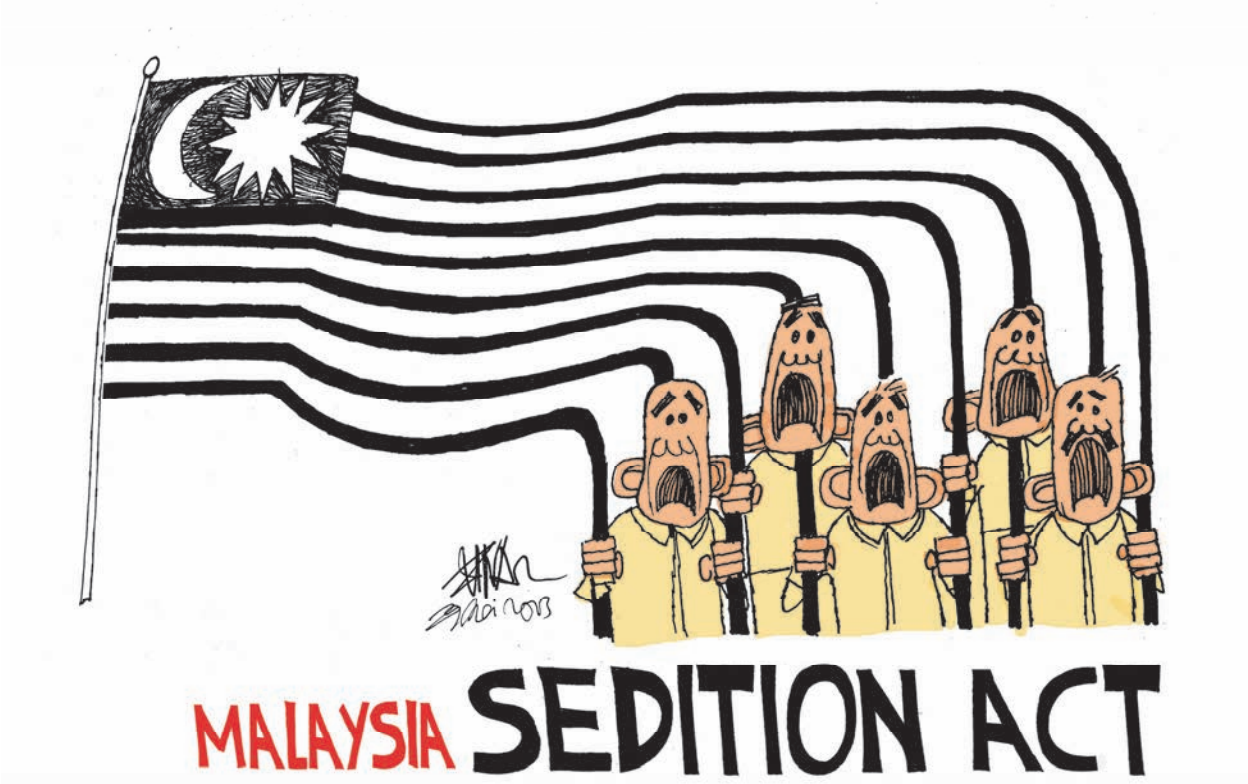
[62] Sedition Act, sec. 3(1)(f)(making seditious speech questioning, among others, articles 152, 153, and 181 of the Malaysian Constitution.

[63] See, e.g., UN Human Rights Committee, General Comment 34, para. 38; European Court of Human Rights, *Nilsen and Johnson v. Norway,* no. 23118/93, Judgment of 25 November 1999, ECHR 1999-VIII, www.echr.coe.int, para. 46*;* UN Human Rights Committee, Decision: *Marques de Morais v. Angola,* Communication No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/2002 (2005), http://www1.umn.edu/humanrts/undocs/1128-2002.html (accessed April 14, 2014) (finding a breach of article 19 where author was imprisoned for articles he wrote criticizing the President of Angola); Supreme Court of India, *S. Rangarajan v. P. J. Ram,* [1989] SCR (2) 204, 231; See also European Court of Human Rights, *Incal v. Turkey,* (no. 22678/93), Judgment of 9 June 1988, Reports 1998-IV, www.echr.coe.int (finding breach of ECHR article 10 when defendant imprisoned for strong criticism of governmental actions against the Kurdish population).

[64] New Zealand Law Commission, *Law Commission Reforming the Law of Sedition: Consultation Draft* (October 2006), http://www.lawcom.govt.nz/sites/default/files/press-releases/2006/10/Publication_128_343_SEDITION%20CONSULTATION%20DRAFT.pdf, at para. 18 (recommending abolition of New Zealand's sedition law). New Zealand has abolished its sedition law, as has the United Kingdom. *See The Crimes (Repeal of Seditions Offense) Amendment Act of 2007,* http://www.legislation.govt.nz/act/public/2007/0096/latest/whole.html and *The Coroners and Justice Act 2009, chapter,* sec. 73, www.legislation.gov.uk/ukpga/2009/25/section73.

The Sedition Act provides that speech will not be considered seditious solely on the basis that it "has a tendency to point out errors or defects in Government or in legislation… with a view to their removal."[65] However, that limitation applies only if "the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency," and it specifically excludes any matters dealing with the rights and privileges granted to the rulers and the Malay majority in Part III of the Malaysian Constitution. It has thus done little to limit the application of the law to critics of the government or those commenting on sensitive issues.

On October 6, 2015, the Federal Court of Malaysia rejected a constitutional challenge to the Sedition Act, holding that the restrictions it imposes on speech are consistent with article 10(2) of the Malaysian Constitution.[66]



One of Zunar's cartoons responding to the government's use of the Sedition Act to arrest and imprison critics. © 2013 Zunar

[65] Sedition Act, sec. 3(2)(b)(emphasis added). The act also provides that speech shall not be considered seditious "only because it has a tendency to show that any Ruler has been mistaken or misled in any of his measures." Sedition Act, sec. 3(2)(a). It excludes from even these limited exceptions anything having to do with the special rights and privileges granted to the Malays and the rulers as set forth in Part III of the constitution and articles 152, 153, and 181.

[66] Federal Court of Malaysia, *Public Prosecutor v. Azmi Bin Sharom,* Criminal Reference No. 06-5-12/2104(W).

The Sedition Act as a Tool of Repression

The possibilities for abuse of the Sedition Act are amply demonstrated by the wave of arrests of opposition politicians, activists, lawyers, the media and even academics that began after the 2013 election and intensified in August 2014. The Malaysian authorities have arrested lawyers for statements they made in representing their clients; an opposition member of parliament for a speech she made on the floor of parliament; a university professor for the expression of his academic opinion about the legality of an action taken by the government six years earlier; and a range of ordinary citizens for comments made on Facebook or Twitter.

Following the April 2014 decision by the Court of Appeal to convict former Deputy Prime Minister and later opposition leader Anwar Ibrahim of sodomy and to impose a five year prison sentence, a prosecution seen by Human Rights Watch and many other observers as politically motivated, the government launched a wave of sedition investigations and arrests of those commenting negatively on the verdict. [67] The decision by the Federal Court of Malaysia, in February 2015, to affirm Anwar's conviction was followed by another wave of investigations and arrests of those who expressed their outrage at the verdict. Despite the April 2015 amendment removing from the definition of seditious tendency statements tending to "bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any state," the government has thus far shown no sign of dropping the cases against those charged with sedition for criticizing the courts' verdict.[68] While many of the cases discussed below have been on hold while the constitutional challenge to the Sedition Act was pending, they are likely to resume now that the court has rejected that challenge.

Use Against Opposition Politicians

One of the primary targets for the Sedition Act has been opposition politicians, who face the possibility of a five year disqualification from serving in Parliament if convicted and sentenced to more than a year in prison or fined more than RM5,000 (US$1,210).[69] Since

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[67] "Anwar Imprisoned, Malaysia rights in free fall," Human Rights Watch news release, February 17, 2015, https://www.hrw.org/news/2015/02/17/anwar-imprisoned-malaysia-rights-free-fall.

[68] Human Rights Watch specifically asked, in its letter to the government dated August 10, 2015, whether the government intended to dismiss charges against all those arrested or charged for criticizing court judgments (see Appendix 1) but did not receive a response.

[69] Constitution of Malaysia, article 48. The disqualification period begins after the conclusion of any term of imprisonment.

the 2013 elections, the government has investigated at least 20 opposition politicians under the sedition law, and charged at least six federal and state opposition politicians with violating it.

The Prosecution of Karpal Singh

The first sedition prosecution after Najib's election was that of the late Karpal Singh. Singh was a lawyer, the chair of the opposition Democratic Action Party, and a member of parliament who was much admired for his devotion to human rights and to an independent judiciary. The authorities jailed him without trial from October 1987 to January 1989 under the now repealed Internal Security Act.

The government filed sedition charges against him in March 2009 for his comments at a news conference on February 6, 2009. Specifically, he expressed his legal opinion on a constitutional matter during the political crisis in Perak state saying, "In law, the decision of the Sultan of Perak can be questioned in a court of law."[70] Singh, noting that his arrest came only days after his son had criticized Najib in parliament, claimed that the charges were "obviously politically motivated."[71]

The charges against Singh originally referred to section 3(1)(a), which requires that the statement have a tendency to bring "into hatred or contempt or to excite disaffection against" any ruler and 3(1)(d), which focuses on statements that "raise discontent or disaffection amongst the subjects" of any ruler or amongst the inhabitants of Malaysia. In June 2010, the High Court acquitted Singh, finding that the prosecution had failed to make a prima facie case that his statement had a tendency to "incite hatred, insult and disloyalty to the Ruler."[72]

On appeal, the government argued that the statements had a seditious tendency as defined in section 3(1)(f) of the Sedition Act, which defines as seditious any statement

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[70] For an explanation of the Perak Crisis see footnote 58.

[71] "Malaysian MP on sedition charges," BBC News Online, March 17, 2009, http://news.bbc.co.uk/1/hi/world/asia-pacific/7947461.stm (accessed May 28, 2015); "Malaysia: Drop sedition charges against prominent parliamentarian," Human Rights Watch news release, August 10, 2009, https://www.hrw.org/news/2009/08/10/malaysia-drop-sedition-charges-against-parliamentarian.

[72] "Karpal Singh acquitted of sedition against Sultan of Perak," *The Star Online,* June 11, 2010, http://www.thestar.com.my/story/?file=%2f2010%2f6%2f11%2fnation%2f20100611153445&sec=nation (accessed May 28, 2015). The High Courts in Malaysia are the third-highest courts in the judiciary, after the Federal Court and the Court of Appeal.

questioning any matter under a variety of provisions of the Malaysian constitution, including article 181, which provides that no ruler may be charged in his official capacity in a court of law. The Court of Appeal overturned the acquittal in January 2012 and returned the case to the High Court for trial.

Singh was convicted, on February 21, 2014, of uttering seditious words and fined RM2,000 (US$484).[73] As a result of the conviction and fine, he also faced disqualification as a member of parliament and resigned his party posts on March 29, 2014.[74] Singh was tragically killed in an automobile accident in April 2014. At the time of his death the government was still arguing that he should be given a sentence of imprisonment rather than just a fine.[75]

The Prosecution of Tian Chua

Malaysian authorities have filed sedition charges against Tian Chua, vice-president of PKR and a member of parliament, in two different cases. In the first case, filed two months before the election, he faced charges under section 4(1)(b) of the Sedition Act for alleged remarks to a journalist suggesting that the security operation at Lahad Datu, in Sabah, between Malaysian security forces and armed men from the Philippines, was part of a "planned conspiracy" by the government "to divert attention and frighten citizens."[76] Because several soldiers involved in the security operation were killed in a firefight after he made his statement but before it was posted online, he was accused of disrespecting soldiers, who largely are recruited from the majority Malay Muslim community.[77] He was acquitted after a trial in November 2014 because the government could not prove that he uttered the words that were the basis of the charge.[78] The government has appealed.

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[73] Phil Robertson, Human Rights Watch, "Malaysia: Quash unjust conviction of prominent lawyer," CNN, March 9, 2014, https://www.hrw.org/news/2014/03/09/malaysia-quash-unjust-conviction-prominent-lawyer.

[74] "Karpal resigns as DAP chairman following sedition conviction," *The Malaysian Insider,* March 29, 2014, http://www.themalaysianinsider.com/malaysia/article/karpal-resigns-as-dap-party-chairman (accessed June 17, 2015).

[75] "A Tribute to Karpal Singh," Human Rights Watch news release, April 17, 2014, https://www.hrw.org/news/2014/04/17/tribute-karpal-singh.

[76] "Malaysia: Drop Sedition Charges for Opposition Leader," Human Rights Watch news release, April 10, 2013, https://www.hrw.org/news/2013/04/10/malaysia-drop-sedition-charges-opposition-leader.

[77] Human Rights Watch interview with Tian Chua, Kuala Lumpur, April 10, 2015; Maizatul Nazlina, "Tian Chua charged with sedition," *The Star Online,* March 15, 2015, http://www.thestar.com.my/News/Nation/2013/03/15/Tian-Chua-charged-with-sedition/ (accessed June 17, 2015).

[78] "Tian Chua Freed of Sedition Charge, Court Rules Report Attributed to him was Unclear," *The Malaysian Insider,* November 14, 2014, http://www.themalaysianinsider.com/malaysia/article/tian-chua-freed-of-sedition-charge-court-rules-report-attributed-to-him-was (accessed September 20, 2015).

The second case, filed on May 29, 2013, and still pending, is linked to his speech at a forum held on May 13, 2013, calling upon voters to challenge the 2013 election results. There were several speakers at the forum and five, including Tian Chua, were charged with sedition. He is currently free on bail in that case. Chua was also investigated for sedition for tweeting, in reaction to the Court of Appeal's decision in the Anwar Ibrahim case, "If Najib sends Anwar to prison for five years the people will bring him down in five months." After a two-month investigation, during which the police seized and held his phone and tablet, he was told that he would not be prosecuted for sedition. A week later, he was charged, instead, with violating section 509 of the penal code by uttering swear words at police personnel when they seized his phone.[79]

Tian Chua says that the government is determined to crush the opposition:

> For the authorities, everything I say is a problem… If you go for peaceful protest, they will catch you for assembling. If you criticize government, they come after you for sedition.[80]

He believes that "much of what they are doing is intended to deter ordinary members of the public from getting involved in political activities and rallies led by the opposition."[81]

Teresa Kok's "Seditious" Video

Teresa Kok, MP and national vice-chair of the opposition Democratic Action Party (DAP), was charged with sedition on May 6, 2014.[82] The prosecution is based on a satirical video, "Onederful Malaysia CNY 2014," that she posted for Chinese New Year. [83] In the video, Kok appears as a host of a fake interview show. The three "guests" on the show poke fun at a range of current issues in Malaysia, ranging from discrimination against Chinese and Tamil

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[79] "Tian Chua charged with insulting police," *The Malaysian Insider,* August 12, 2014, http://www.themalaysianinsider.com/malaysia/article/tian-chua-charged-with-insulting-police (accessed September 20, 2015). Section 509 of the penal code, which criminalizes speech that "insults the modesty" of any person, is discussed in section VII of this report.

[80] Human Rights Watch interview with Tian Chua, Kuala Lumpur, August 4, 2014.

[81] Human Rights Watch interview with Tian Chua, Kuala Lumpur, April 10, 2015.

[82] "Malaysia: Drop sedition case against opposition leader," Human Rights Watch news release, June 8, 2014, https://www.hrw.org/news/2014/06/08/malaysia-drop-sedition-case-against-opposition-leader.

[83] Teresa Kok "Onederful" Malaysia CNY 2014 Video Clip, http://www.youtube.com/watch?v=JtsRcId7obk (accessed August 18, 2014).

language education to the fact that Malaysia was listed in one survey as the sixth most dangerous country in the world. According to Kok, the sections that discussed those two topics were among the six parts of the video listed on the charge sheet as being "seditious."[84] She said:

> They wanted to target me. The claims are always that it is anti-government, thus anti-Malay and anti-Islam, and therefore, anti-the king. This video was another excuse. It is a very selective and arbitrary use of the Sedition Act. It is only used against the opposition. It is to undermine the opposition.[85]

Kok said that she was threatened after the airing of the video. A group of Muslim NGOs calling itself "Council of Islamic NGOs" claimed the video was an insult to Malays, Muslims and Malay rulers, and offered RM 1,200 (US$290) to anyone who dared to slap Kok and provide photographic evidence of the act. The group also slaughtered chickens at a protest held at Jalan Tun Perak on February 7 and smeared the blood on a banner that featured Kok's photograph.[86] When Kok filed a police report, Home Minister Datuk Zahid Hamidi responded that offering a reward for someone to slap her "was not a threat."[87]

Activists and lawyers point out that his remark was inappropriate and that threats of violence should be investigated and prosecuted.[88] Teresa Kok said that the home minister's remarks encourage attacks against her. "Are they going to take action only after I have been attacked?"[89] The next court date in Kok's sedition prosecution is scheduled for December 7, 2015.[90]

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[84] Human Rights Watch interview with Teresa Kok, Kuala Lumpur, April 11, 2015. The other allegedly seditious portions of the video dealt with (1) a mural by a well-known graffiti artist that was painted over by the government in Johor, (2) a warning that, to be safe, you should not wear yellow when walking around (yellow was the color of the Bersih movement), and (3) two comments criticizing the Malaysian Chinese Association, which is part of the ruling coalition, for "selling out" the rights of the Chinese community.

[85] Human Rights Watch interview with Teresa Kok, Kuala Lumpur, August 3, 2014.

[86] Diyana Ibrahim, "Muslim NGO slaughters chickens, offers RM1200 to anyone who slaps Teresa Kok," *The Malaysian Insider,* February 6, 2014, http://www.themalaysianinsider.com/malaysia/article/muslim-ngo-slaughters-chickens-offers-rm1200-to-anyone-who-slaps-teresa-kok (accessed May 28, 2015).

[87] Eileen Ng, "Threat to slap Kok not a criminal offense, says Zahid," *The Malaysian Insider,* June 11, 2015, http://www.themalaysianinsider.com/malaysia/article/no-action-against-ngos-which-offered-reward-to-slap-teresa-kok (accessed May 28, 2015).

[88] Human Rights Watch interview with Eric Paulsen, Kuala Lampur, August 4, 2014.

[89] Human Rights Watch interview with Teresa Kok, Kuala Lampur, August 3, 2014.

[90] "Teresa Kok's sedition case set for re-mention on Dec 7," *Malaysiakini,* October 2, 2015, https://www.malaysiakini.com/news/314277 (accessed October 2, 2015).

N. Surendran's "Seditious" Defense of Anwar Ibrahim

N. Surendran, a PKR MP and a lawyer who represents many of those charged under Malaysia's repressive speech laws, has been charged with sedition in two separate cases, both related to comments on the sodomy prosecution of Anwar Ibrahim, whom he represented in his appeal to the Federal Court of Malaysia.[91] The first case was in connection with a statement he made to the press attacking the Court of Appeal's decision to overturn Anwar's acquittal by a lower court. Although the statement was made in March 2014, he was not charged until August 18, 2014, when the government crackdown intensified.

A second sedition charge was brought against him on August 29, 2014, for repeating Anwar's defense that his prosecution on sodomy charges was "an attempt to jail the opposition leader of Malaysia," and that Prime Minister Najib was responsible. Surendran made the statement outside the courthouse after a hearing to fix the date for Anwar's appeal to the Federal Court. According to Surendran, after his press conference was uploaded on YouTube:

> Right wing groups started lodging police reports against me. The Chief Minister of Kedah said that every UMNO division in the state of Kedah should lodge a police report. Reports were lodged all over the country, even in Borneo. A Sabah UMNO MP lodged a police report in Sabah. The police used the upswell of complaints as a justification for acting.[92]

As Surendran notes, he has been "charged with sedition for repeating my client's defense to the press."[93]

The Prosecution of Khalid Samad, R.S.N. Rayer, and Fakhrulrazi Mohamed Mokhtar

The government has charged at least three other opposition politicians or office holders in opposition political parties with sedition in the past thirteen months:

- Khalid Samad, a member of parliament from Parti Islam Se-Malaysia (PAS), was charged with sedition on August 26 after he called for review of the powers of the

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[91] The Federal Court of Malaysia is the highest court and final appellate court in Malaysia.

[92] Human Rights Watch interview with N. Surendran, Kuala Lumpur, April 10, 2015; "Bung Mokhtar lodges complaint against PKR's Surendran for 'lies against Najib'," *The Malaysian Insider,* August 17, 2014, http://www.themalaysianinsider.com/malaysia/article/bung-mokhtar-lodges-report-against-pkrs-surendran-for-lies-against-najib (accessed July 27, 2015).

[93] Human Rights Watch interview with N. Surendran, Kuala Lumpur, April 10, 2015; Koh Jun Lin, "Surendran targeted for defending Anwar," *Malaysiakini,* August 28, 2014, http://www.malaysiakini.com/news/272998 (accessed July 27, 2015).

Selangor State Islamic Religious Council (MAIS) after it failed to abide by the attorney general's decision that Iban and Malay-language Bibles seized from the Bible Society of Malaysia should be returned;[94]

- DAP Penang State Assemblyman R.S.N. Rayer was charged with sedition on August 27 for saying "*celaka celaka* UMNO" ("damn, damn UMNO") to several state assemblymen of the United Malays National Organization (UMNO) during an assembly session in May 2014; and
- Former PAS Youth Treasurer Fakhrulrazi Mohamed Mokhtar, now youth chief for newly formed Parti Amanah Negara, was charged with sedition on September 8, 2015, for a speech he made at the February 28 KitaLawan rally in which he called for the release of Anwar Ibrahim.[95]

Sedition Investigations: Rafizi Ramli and S. Arulchelvan

The government has investigated and harassed many other opposition politicians using the Sedition Act. Rafizi Ramli, the secretary general of PKR, has been the target of five separate sedition investigations.[96] S. Arulchelvan, who was secretary general of Parti Sosialis Malaysia (PSM) at the time, was investigated for sedition in connection with a statement the party issued condemning the Federal Court decision against Anwar Ibrahim. According to Arulchelvan, 10 police officers came to his house on February 19, the first public holiday of the Chinese New Year:

> I asked if they needed to seize anything and they said yes. They took my laptop and one of my phone bills to show that I have internet connection in my house. They also took my hand phone and the modem and wire.[97]

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[94] In 2013, a Catholic newspaper challenged new rules restricting the use of the word "Allah" by non-Muslims. While the litigation was pending before the Federal Court, the Selangor Islamic Affairs Department (JAIS) raided Malaysia's Bible Society and seized 321 bibles. JAIS said they were acting under the decree of the Sultan of Selangor, the custodian of Islam. "More than 300 bibles are confiscated in Malaysia," *BBC News Online,* January 2, 1014, http://www.bbc.com/news/world-asia-25578348 (accessed September 17, 2014). The attorney general ordered JAIS to return the bibles, but it refused to do so. Sukhbir Cheema, "MAIS refuses to return bibles," *The Rakyat Post,* June 14, 2014, http://www.therakyatpost.com/news/2014/06/14/mais-refuses-return-seized-bibles/ (accessed June 23, 2015).

[95] Muzliza Mustafa, "Maria Chin among 9 charged with illegal assembly, sedition," *The Malaysia Insider,* September 8, 2015, http://www.themalaysianinsider.com/malaysia/article/maria-chin-3-others-claim-trial-over-illegal-assembly-charge (accessed September 8, 2015); "Former PAS youth treasurer charged with sedition," *The Borneo Post,* September 8, 2015, http://www.theborneopost.com/2015/09/08/former-pas-youth-treasurer-charged-with-sedition (accessed September 28, 2015).

[96] For details of the charges against and investigations of Rafizi Ramli, see Chapter V of the report.

[97] Human Rights Watch interview with S. Arulchelvan, Kuala Lumpur, April 10, 2015.

He was taken to the police station and put in the holding cell. The next day, the police requested that he be remanded for four days.

They said they needed to see who else conspired with me to make the statement. They also said that, since I use several offices, they needed time to go to the other offices and do their investigation. The police said the statement was made "too fast" after the verdict, implying that we somehow knew in advance. My lawyers argued that they didn't need to remand me to seize items and search my office.[98]

The magistrate denied the request for remand and Arulchelvan was finally released at about 5:30 p.m. He has not yet been charged in connection with that investigation.

The Sedition Investigation of Nurul Izzah Anwar

Nurul Izzah Anwar, an MP from the opposition party PKR and the daughter of jailed opposition leader Anwar Ibrahim, read a speech on good governance and judicial reform on the floor of Parliament on behalf of her father on March 10, 2015. According to Anwar, "On March 11, a Barisan Nasional MP attacked my speech as insulting the judiciary. On March 12, the vice president of PERKASA filed a police complaint against me."[99]

Anwar, who has two small children, was arrested at 6 p.m. on March 16, 2015, even though she had appeared at the police station earlier that same afternoon to give a statement in a Peaceful Assembly Act investigation.[100] She was held in the police lock-up overnight and told that the police were going to request a four day remand. The following morning, the investigating officer drove her to her home and demanded that she produce the original copy of the speech, which she did. She was then returned to the police station for the recording of her statement: "They asked things like 'what do you mean by Satan?' They showed me a video of my speech and asked 'is this you?'[101]

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[98] Ibid.

[99] Human Rights Watch interview with Nurul Izzah Anwar, Kuala Lumpur, April 10, 2015. PERKASA is the acronym for Persatuan Pribumi Perkasa, a conservative, ethnic Malay NGO that focuses on protecting the rights of Malays.

[100] Ibid.

[101] Ibid.

She was finally released at around noon after being fingerprinted and photographed.[102] At the time of writing, she had not yet been charged with a crime.

Nurul Izzah Anwar's arrest, for a speech made on the floor of parliament, shocked many and highlighted further the risk that the Sedition Act poses to the opposition. As one opposition MP told Human Rights Watch:

> Even MPs are afraid to speak up because of the threat of sedition. Since [Nurul] Izzah's arrest, they are nervous even in Parliament. So I can only imagine the effect it is having on civil society and the ordinary public.[103]

Other opposition MPs are defiant. Tian Chua asserted that the sedition dragnet "will not stop politicians from speaking out," but expressed concern for "members of the public who will be caught up in the dragnet."[104]

Use Against the Media and Academics

The government is also using the Sedition Act to investigate, arrest, and prosecute journalists and even academics who speak out on public issues.

The Investigation of *Malaysiakini*'s Susan Loone

On September 4, 2014, the authorities arrested Susan Loone, assistant editor at *Malaysiakini*, an online newspaper critical of the government and the ruling coalition, on suspicion of sedition for an article she wrote that included statements by Phee Boone Poh, a Penang State executive councilor, about the conditions under which he had been held in detention.[105] Loone was held and interrogated for nine hours before being released on bail.[106]

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[102] Ibid.

[103] Human Rights Watch interview with opposition member of parliament, Kuala Lumpur, April 10, 2015.

[104] Human Rights Watch interview with Tian Chua, Kuala Lumpur, April 10, 2015.

[105] Himanshu Bhatt, "Journalist Susan Loone arrested in Penang over 'seditious' article," *The Malasyian Insider,* September 4, 2014, http://www.themalaysianinsider.com/malaysia/article/journalist-susan-loone-arrested-in-penang-over-seditious-article (accessed July 27, 2015).

[106] "Mkini journo arrested for sedition, quizzed for nine hours," *Malaysiakini,* September 4, 2014, http://www.malaysiakini.com/news/273607 (accessed May 28, 2015).

Police had earlier detained Phee because of his role as chairman of the Penang People's Voluntary Patrol, an auxiliary force connected with the DAP-led Penang state government that the inspector general of police alleges is illegal. The story reported Phee saying that, during four hours of police questioning, he was "treated like a criminal."[107] While the government has not, as of yet, filed formal charges against Loone, neither have they told her that she has been officially cleared. As Editor-in-Chief and Co-Founder of *Malaysiakini* Steven Gan commented, noting that *Malaysiakini* was investigated for sedition in 2003 but never officially cleared: "It leaves you looking over your shoulder. That is what they want you to do."[108]

Sedition Investigation of The Malaysian Insider

During the crackdown on dissent in February and March 2015, the police arrested three journalists, the chief executive, and the publisher of *The Malaysian Insider ("TMI"),* another online news publication critical of the ruling coalition, on suspicion of sedition. The investigation was a reaction to a story published in *TMI* on March 25 reporting that the Malaysian Council of Rulers had rejected a proposal to amend federal law to allow Sharia-based punishments in the state of Kelantan.[109] Jahabar Sadiq, chief executive and editor of the publication, commented on the chilling effect the threat of sedition can have on the press: "*TMI* doesn't usually report on issues relating to the Council of Rulers until the council issues a formal statement because it is viewed as dangerous to do so."[110]

In this case, he added, the paper felt that they had sufficient information and that reporting on the issue was in the public interest. The Keeper of the Rulers' Seal, which serves as secretary to the Malaysian Council of Rulers, filed a police complaint denying that the issue had been discussed, and a sedition investigation was opened.[111]

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[107] Susan Loone, "Exco man grilled for four hours, treated like a 'criminal'," *Malaysiakini,* September 1, 2014, http://www.malaysiakini.com/news/273286 (accessed July 27, 2015).

[108] Human Rights Watch interview with Steven Gan, Kuala Lumpur, April 9, 2015.

[109] Tan Li Yiang, "Three The Malaysian Insider editors arrested over hudud report," *The Star Online,* March 30, 2015, http://www.thestar.com.my/News/Nation/2015/03/30/The-Malaysian-Insider-Three-arrested/ (accessed July 28, 2015); "Police arrest Edge, TMI executives for sedition," *The Malayisan Insider,* March 31, 2015, http://www.themalaysianinsider.com/malaysia/article/police-arrest-edge-tmi-executives-for-sedition (accessed July 28, 2015).

[110] Human Rights Watch interview with Jahabar Sadiq, Kuala Lumpur, April 9, 2015.

[111] "Rulers' office denies issuing hudud remarks, lodges police report," *The Malay Mail Online,* March 26, 2015, http://www.themalaymailonline.com/malaysia/article/rulers-office-denies-issuing-hudud-remarks-lodges-police-report [accessed April 22, 2015].

According to Sadiq, no one contacted *TMI* to request a retraction or correction of the article. Instead, on March 30, he received a phone call saying the police wanted to take a statement from him. When he went to the police station with his lawyer:

> The police said they were arresting me, saying "Didn't you write this article?" I said no, that I am the editor of the paper. They then asked who wrote and edited the articles. I told them, but said that if they need to arrest anyone they should arrest me.[112]

Instead, at around 5 p.m. that day, eleven law enforcement officials appeared at the offices of *TMI.* Sadiq continued: "They were trying to figure out who they should arrest – consulting with each other and with superiors. In the end they said they would arrest the three journalists."[113]

Managing editor Lionel Morais, features editor Zulkifi Sulong, and Bahasa news editor Amin Shah Iskander were arrested at 7 p.m. and taken to the police lock-up, where they were held overnight. Ho Kay Tat, the publisher of The Edge Media Group, which owns *TMI,* told the paper:

> "We did not think the arrests were necessary as they can meet the police any time to have their statements taken…We cooperated fully with them but could not convince them that there was no necessity to take the three editors to the lock-up for the night."[114]

When Sadiq went to visit the three journalists at the police lock-up, a police officer told him that he had been told to arrest Sadiq that night, but had told his supervisor he would wait until the following day.[115]

The next morning, Sadiq and Ho Kay Tat went to the police station and were formally arrested. The three journalists were released on bail late in the day on March 31, but Sadiq

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[112] Human Rights Watch interview with Jahabar Sadiq, Kuala Lumpur, April 9, 2015.

[113] Ibid.

[114] "Police arrest TMI editors over hudud report, *The Malaysian Insider,* March 30, 2015, http://www.themalaysianinsider.com/malaysia/article/police-arrest-tmi-editors-over-hudud-report (accessed April 4, 2015).

[115] Human Rights Watch interview with Jahabar Sadiq, Kuala Lumpur, April 9, 2015,

and Tat were held overnight because the police had not yet taken their statements, despite the fact that they had been arrested at 10 a.m.[116] They were finally released on bail at 12:30 p.m. on April 1. As of the time of writing, no formal charges have yet been filed against any of the five. Sadiq believes the purpose of the arrests was intimidation:

> I personally believe they are just trying to show they can put you in the slammer… I also believe it has to do with our wider reporting on 1MDB.[117]

He added that "it is not what you say, but who says it," noting that *The Malaysian Insider* and other publications that report on all sides are labeled "pro-opposition."

Professor Azmi Sharom's "Seditious" Legal Opinion

Even academics have not been immune from sedition investigations and charges. On September 1, 2014, Dr. Azmi Sharom, a law professor at the University of Malaya, was charged with sedition for comments related to a political event that occurred in 2009. His "offense" was to give his legal opinion, in answer to a question from the *Malay Mail Online*, that actions taken during the 2009 "Perak Crisis" were improper and should not be repeated. He said:

> The Malay Mail Online called me in August [2014]. At the time, there was an ongoing crisis in Selangor where the majority party had lost confidence in the chief minister [Menteri Besar]. The Malay Mail asked me whether the Selangor Crisis could be solved in the same manner as the Perak Crisis had been. In the Perak Crisis, a group of state assemblymen went to see the sultan – taking steps outside of the assembly to try to force out the Perak Menteri Besar. So when the Malay Mail asked me if the Selangor Crisis could be solved in the same way, I said no, because what happened in Perak was legally wrong. If they wanted to get rid of the Menteri Besar, they should have a vote of no confidence in the state assembly.[118]

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[116] Ibid.

[117] Ibid.

[118] Human Rights Watch telephone interview with Azmi Sharom, May 4, 2015.

A week later, while in Thailand, he kept getting calls from a number he did not recognize, so did not answer the calls. He then received a text from that number. It was the police, saying they wanted to question him about something that he had said.
I learned later that it was a police officer who filed the complaint against me. This shows that there was a concerted effort to go through the news and find things. They were purposefully looking for people to charge.[119]

Dr. Sharom was surprised that what he said could be considered seditious: "I was a law lecturer giving a legal opinion. What struck me was how obtuse it was."[120] Dr. Sharom challenged the constitutionality of the Sedition Act, but the Federal Court rejected his challenge on October 6, 2015. Sharom's case will now be sent down for trial.

Sedition Investigation of Dr. Abdul Aziz Bari

Constitutional scholar Dr. Abdul Aziz Bari has also been hauled in for questioning under the Sedition Act for certain legal opinions he expressed regarding the role of the sultans. Dr. Bari was questioned by the police on October 1, 2014. The investigations centered on statements Dr. Bari made in two articles published in *The Malaysian Insider.*[121] In the first article, Dr. Bari said that the sultan was bound by the 1992 Declaration of Constitutional Principles, which sets guidelines for rulers, including clarifying the role of royalty in politics. The second article was based on a speech Aziz had given during a forum on September 8 during which he said that, according to the constitution, the sultan's discretionary powers in appointing a *menteri besar* (chief minister) were limited to cases of a hung parliament.

On July 30, 2015, the day after Dr. Bari announced that he was joining the opposition party DAP, he was summoned to appear for questioning for allegedly insulting the sultan of Selangor in an article published in *Malaysiakini* on May 7, 2015. According to *The Malaysian Insider,* the article criticized the sultan of Selangor for his comments on a water agreement, noting that in the Westminster parliamentary system, which Malaysia

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[119] Ibid.

[120] Human Rights Watch telephone interview with Azmi Sharom, May 4, 2015.

[121] Eileen Ng, "Aziz Bari opts to remain silent in sedition probe," *The Malaysian Insider,* October 1, 2014, http://www.themalaysianinsider.com/malaysia/article/aziz-bari-opts-to-remain-silent-in-sedition-probe (accessed August 3, 2015). The two articles were "Sultan Selangor terikat Deklarasi 1992, perlu lantik Wan Azizah, kata Aziz Bari," published on September 1, 2014 and "Only God, not Sultan, has absolute powers, says legal expert," published on September 9, 2014.

practices, it was improper for monarchs to give their personal opinions during official functions.[122] As of the time of writing, no charges have been filed against him.

Use Against Students and Civil Society Activists

The use of the Sedition Act against political activists demonstrates even more clearly the failure of the Malaysian government to protect political speech.

Activist Uthayakumar: Two Years in Prison for Sedition

P. Uthayakumar, the leader of the Hindu Rights Action Force (HINDRAF) and a vocal opponent of the government who was imprisoned without trial for almost two years under the ISA, was convicted of sedition on June 5, 2013. His "crime" was writing a letter, in November 2007, to the then British Prime Minister Gordon Brown asking the UK to move a resolution in the United Nations seeking protection for ethnic Indians in Malaysia as citizens of the Commonwealth. The letter, which was posted on the website Police Watch Malaysia, complained of state sponsored atrocities and persecution.[123] He was convicted and sentenced to two years and six months in prison.[124] Uthayakumar appealed his conviction to the High Court and then to the Court of Appeal, which upheld his conviction on September 27, 2014, but reduced his sentence to two years. He was released from prison on October 3, 2014.[125]

Activists Adam Adli, Safwan Anang, and Hishamuddin Rais Convicted of Sedition

Student activists Adam Adli bin Abdul Halim and Safwan Anang, and long-time civil society activist Hishamuddin Rais, were all charged with sedition after speaking at the May 13 public meeting at which Tian Chua and Tamrin Ghafar also spoke. Adli, who is 25 years old, said of his speech at the rally:

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[122] Hasbullah Awang Chik, "Article on Sultans getting involved in politics lands Aziz Bari in hot water," *The Malaysian Insider,* July 31, 2015, http://www.themalaysianinsider.com/malaysia/article/article-on-sultans-getting-involved-in-politics-lands-aziz-bari-in-hot-wate (accessed July 31, 2015).

[123] A copy of the letter is contained in the article "Malaysia's Racial Policies Draw International Scrutiny," *Asia Sentinel,* November 28, 2007, http://www.asiasentinel.com/politics/malaysias-racial-policies-draw-international-scrutiny/ (accessed May 28, 2015).

[124] Hasbullah Awang Chik, "Let me be the last prisoner under Sedition Act, says Uthayakumar," *The Malaysian Insider*, http://www.themalaysianinsider.com/malaysia/article/let-me-be-the-last-prisoner-under-sedition-act-says-uthayakumar, (accessed May 2, 2015).

[125] "Hindraf found Uthayakumar freed," *The Star Online,* October 3, 2014, http://www.thestar.com.my/News/Nation/2014/10/03/Hindraf-founder-Uthayakumar-freed/ (accessed July 28, 2015).

> We called for the Election Commission to step down, we demanded fresh elections, and we condemned comments against racial harmony… It was an opposition event and the audience was opposition supporters who were angry about the elections… Since we don't have access to government-owned television or newspapers, the opposition uses such public speeches to reach out to people.[126]

Adli said that he suspected secret police were present at the event, and even defiantly announced his national identification number. He was arrested five days later, and was remanded to police custody for six days. Adli said police interrogated him every day, even though they had "run out of questions."

> It doesn't really matter what is your intent. If they don't like what you say, it is sedition. When the police brought me to court, the judge said, "The police have a case because you said it, and they say what you said is sedition." How does this make sense? No one knows what is sedition. I don't know what is sedition. Only the police seem to know. If I rob a bank, it is clear, both the police and I know it is a crime. But not sedition. I think this act should be abolished.[127]

In September 2014, Adli was convicted of sedition and sentenced to a year in prison.[128] Adli says that he was not surprised at his conviction:

> I am not surprised at all since the nature of the Sedition Act has always been arbitrary and literal. There is no other way of interpreting it. I am also glad that it is jail time instead of a penalty. I don't have that much money to pay the penalty.[129]

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[126] Human Rights Watch interview with Adam Adil, Kuala Lumpur, August 6, 2014.

[127] Human Rights Watch interview with Adam Adil, Kuala Lumpur, August 6, 2014.

[128] Hafiz Yatam, "Adam Adli gets 12 months' jail for sedition," *Malaysiakini,* September 19, 2014, http://www.malaysiakini.com/news/275075 (accessed July 28, 2015).

[129] Human Rights Watch email correspondence with Adam Adli, May 22, 2015.

Safwan Anang, former chair of Malaysian Students Solidarity, an activist group, was convicted on September 5, 2014, and sentenced to 10 months in prison.[130] Both Adli and Anang are out on bail pending appeal of their convictions. In both cases, the government has cross-appealed, seeking imposition of a heavier sentence. Hishamuddin Rais, a 64-year-old film maker and political activist who gave a speech at the rally urging the audience to go to the streets and protest the election results, was convicted on January 9, 2015.[131] He was spared a prison sentence but was fined RM 5,000 (US$1,210). The government has appealed the sentence, arguing that he should have been sent to prison.

The Prosecution of Eric Paulsen

The prosecution of Eric Paulsen, the executive director of Lawyers for Liberty, demonstrates how criticism of the government's handling of religious issues can be treated as anti-Islamic. It also shows the power of pro-government civil society groups in agitating for criminal prosecutions. In response to a statement by the Malaysian defense minister predicting that a terrorist attack similar that that which occurred in Paris could occur in Malaysia, Paulsen tweeted, on January 9, 2015, "Yes if Govt [sic] continues to support or close an eye to extremist groups like Isma & Perkasa."[132]

He then tweeted: "JAKIM is promoting extremism every Friday. Govt needs to address that if serious about extremism in Msia."

JAKIM is the acronym for the Malaysian Islamic Development Department, a government agency that oversees Islamic affairs.[133]

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[130] Ahmad Fadli KC, "Activist Safwan gets 10 months' jail for sedition," *Malaysiakini,* September 5, 2014, http://www.malaysiakini.com/news/273715 (accessed July 28, 2015).

[131] V. Anbalagan, "Hishamuddin spared jail, fined RM 5,000 for sedition," *The Malaysian Insider,* January 9, 2015, http://www.themalaysianinsider.com/malaysia/article/activist-hishamuddin-rais-found-guilty-of-sedition (accessed July 28, 2015).

[132] Perkasa is the acronym for Persatuan Pribumi Perkasa, a conservative, ethnic Malay NGO that focuses on protecting the rights of Malays. Isma is the acronym for Ikatan Muslimim Malaysia (Malaysian Muslim Solidarity), another conservative NGO focused on the rights of the Malays and the supremacy of Islam.

[133] Among other activities, JAKIM issues sermons to be given in mosques at Friday services, many of which have been perceived as divisive. See, for example, "When Places of Worship are Turned into Hatred Factories," *The Malay Mail Online,* February 7, 2015, http://www.themalaymailonline.com/opinion/zurairi-ar/article/when-places-of-worship-are-turned-into-hatred-factories; MD Izwan, "PAS: Friday Sermon an Attempt to Spread Religious Hatred," *The Malaysian Insider,* January 26, 2013, http://www.themalaysianinsider.com/malaysia/article/pas-friday-sermon-an-attempt-to-spread-religious-hatred; "In Friday Sermon, JAKIM calls for 'jihad' against liberals, IS," *The Malay Mail Online,* March 20, 2015, http://www.themalaymailonline.com/malaysia/article/in-friday-sermon-jakim-calls-for-jihad-against-liberals-is (all accessed May 13, 2015).

Paulsen was then subjected to a frenzied social media campaign, which he believes was initiated by pro-government "cyber-troopers," in which his tweet was screen-captured and superimposed on an enlarged picture of his face with the word "*biadap*" ("rude").[134] Eventually, the tweet came to the attention of Inspector General of Police (IGP) Khalid Abu Bakar, who tweeted, in Bahasa, "such a statement ought to be investigated under the Sedition Act. PDRM [Polis Diraja Malaysia, or the Royal Malaysia Police] will investigate under the Sedition Act," together with the screen-captured tweet and photo. This tweet went viral, and Paulsen received many threats, including death threats, and was widely accused of insulting Islam.

Facing pressure from many sides, Paulsen deleted his tweet, and then tweeted: My tweet was referring to JAKIM as a govt agency. Criticism of JAKIM should not be construed as insulting Islam."[135] Later that afternoon, the police called him and the parties agreed that he would come to the police station for questioning on Wednesday, January 14.
On January 12, Paulsen and his lawyer Latheefa Koya went to the police station to lodge a report about the death threats that had been made against him. At approximately 8 p.m. that evening, a group of 15-20 police officers arrested him as he walked to his car with his lawyer and N. Surendran, and confiscated his mobile phone. They took him back to his office where they confiscated his laptop, claiming that they needed to know where the tweet was generated from. According to Paulsen:

> The IGP announced on Twitter that they had "managed" to arrest me, as if I were trying to evade them. But I had lodged a police report earlier that day, so I was at the police station and they did not arrest me then.[136]

Paulsen was detained overnight and, the following morning, the police asked that he be remanded for four days. During the proceedings his lawyers argued that remand was unnecessary as his mobile phone and laptop had already been seized and any further investigation did not require his detention, but he was nonetheless remanded for two days. He was finally released from custody at approximately 4:30 p.m. on January 14. He

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[134] Human Rights Watch interview with Eric Paulsen, Kuala Lumpur, April 9, 2015; Human Rights Watch email correspondence with Eric Paulsen, April 9, 2015.

[135] Rahmah Ghazali, "Paulsen says tweet not meant to insult Islam," *The Star Online,* January 11, 2015, http://www.thestar.com.my/News/Nation/2015/01/11/Eric-Paulsen-defends-Jakim-tweet/ (accessed July 28, 2015).

[136] Human Rights Watch interview with Eric Paulsen, Kuala Lumpur, April 9, 2015.

was charged on February 5 with violating section 4(1)(c) of the Sedition Act. He is out on bail of RM2,000 (US$484) pending trial.

Paulsen was arrested for sedition a second time on March 22, 2014, in connection with a tweet that criticized efforts by the state government in Kelantan to introduce Sharia-based punishments. In the second case, the police did not bother to ask him to come in for questioning, but simply arrived at his location and arrested him at approximately 5 p.m. He was held overnight and the police again asked for four days remand. This time, remand was not granted and he was released on bail at approximately 6 p.m. on March 23.

Perhaps the most aggressive use of the Sedition Act has been against political cartoonist Zulkiflee AM Anwar Ulhaque, usually known as Zunar, who faces nine counts of sedition for nine tweets he sent criticizing the Federal Court decision in the Anwar case. Zunar, whose cartoons and cartoon books cover current political issues such as the Anwar sodomy trial, corruption, misuse of public funds and police abuses, has long been a target of government harassment.[137]

Use Against Social Media Users

The sedition dragnet has captured not only politicians and known activists, but ordinary citizens using social media. The wide range of speech being targeted on social media under the Sedition Act demonstrates the law's potential for abuse.

J. Gopinath Convicted for Facebook Posting

J. Gopinath, a 29-year-old engineering assistant, was charged under Section 4(1)(c) of the Sedition Act on June 19, 2014, for allegedly making a "lewd and vulgar" posting about Islam on his Facebook account almost two years previously, in September 2012. He was convicted and fined RM5,000 (US$1,210). According to Latheefa Koya of Lawyers for Liberty, his posting was a reaction to an online video that he perceived as insulting Hinduism, but the individual who posted that video was not prosecuted.[138]

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[137] For details of the legal actions taken against Zunar, see Section V of the report.

[138] Human Rights Watch interview with Latheefa Koya, Kuala Lumpur, April 16, 2015.

Teacher Hidayat Mohamed Charged with Sedition

On June 12, 2014, Hidayat Mohamed, a 35-year-old special school teacher, was charged under the same section for making remarks allegedly insulting the Hindu Thaipusam procession on a Facebook page in January 2014.

Wan Ji Wan Hussain Charged with Sedition

Wan Ji Wan Hussain is a freelance Muslim preacher. He was charged with sedition for remarks he made on Facebook that were viewed as insulting to the sultan of Selangor. Although the posting was made on November 5, 2012, he was not charged until September 10, 2014, after the start of the recent crackdown.[139]

According to Suaram, at least 13 others were investigated for sedition in 2014 for tweets, blog postings or Facebook postings.[140] In one of the more extreme cases, a Form 5 student in Penang was investigated for sedition for "liking" a Facebook page titled "I Love Israel." Criticism of the inspector general of police (IGP) is also being treated as seditious. Twitter user Nasrul Omar was investigated for sedition in September 2014 for tweeting that the IGP was "a Barisan Nasional dog," and at least three other anonymous Twitter users were investigated for "being disrespectful" of the IGP.[141] As Zunar commented,

> The problem with the sedition act is that the scope of what is seditious is not clear. Whenever the government or the inspector general of police is unhappy with something it is seditious.[142]

The Increased Threat Posed by the 2015 Amendments to the Sedition Act

The pursuit of social media users may accelerate as a result of the 2015 amendments to the Sedition Act, which were justified as necessary…

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[139] "Muslim preacher latest to be arrested for sedition, *The Malaysian Insider,* September 10, 2015, http://www.themalaysianinsider.com/malaysia/article/muslim-preacher-latest-to-be-arrested-for-sedition (accessed August 3, 2015). Human Rights Watch interview with Latheefa Koya, Kuala Lumpur, April 16, 2015.

[140] Suaram, "Malaysia Human Rights Report 2014."

[141] Ibid.

[142] Human Rights Watch interview with Sedition Act defendant, Kuala Lumpur, April 10, 2015. As noted in footnote 34, the amendments, although gazette in June 2015, had not come into effect as the time of writing.

…to deal with threats against peace, public order and the security of Malaysia, in particular through the irresponsible misuse of social media platforms and other communication devices to spread divisiveness and to insult the race, religion, culture etc. of particular groups of Malaysians without regard for the consequences.[143]

The amendments strengthened the government's ability to pursue social media users by adding the offense of "propagating" seditious material.[144] The term is not defined in the law, but it is generally interpreted as meaning disseminating, spreading or passing on.[145] It thus appears intended to limit the dissemination of online content by going after those who share, "like," or retweet material the government does not like. As Rafizi Ramli noted:

> A lot of people are affected and afraid, especially among normal Malaysians. I get comments on my Facebook page saying, "Will I get charged with sedition if I share this?" or "Will I get in trouble if I like this?"…The sedition amendments are trying to create a culture of fear so that people may read but don't share. It is an effort to limit the reach of news coming from activists and the opposition.[146]

Steven Gan, editor-in-chief of *Malaysiakini*, emphasized:

> The impact of these laws on Facebook users and people on the street is severe. They worry about what they can post, what they can tweet. I think that is at least partly the intention…It will definitely have a chilling effect.[147]

The amendments have also strengthened the government's ability to go after online content by altering the offenses section to cover any person who "causes" seditious

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[143] Sedition (Amendment) Act 2015, Explanatory Statement, https://www.digitalnewsasia.com/sites/default/files/files_upload/sedition_act_amendments.pdf .

[144] Sedition (Amendment) Act 2015, sec. 4(a)(ii) (substituting the word "propagates" for the word "imports" in section 4(1)(d)), and section 4(b)(ii) (including propagating seditious material in the new provision on aggravated sedition).

[145] For example, the Oxford Dictionary defines propagate as "spread and promote (an idea, theory, etc.) widely," http://www.oxforddictionaries.com/definition/english/propagate. Similarly, Merriam-Webster Dictionary defines it as "to make (something, such as an idea or belief) known to many peoples," http://www.merriam-webster.com/dictionary/propagate.

[146] Human Rights Watch interview with Rafizi Ramli, Kuala Lumpur, April 16. 2015.

[147] Human Rights Watch interview with Steven Gan, Kuala Lumpur, April 9, 2015.

material to be published.[148] Prior to the amendments, the law only covered persons who "published" seditious material.

The amendments give the government the power not only to have material removed from the Internet but also to prohibit the person who circulated the material from accessing "any electronic device."[149] Upon application by the public prosecutor showing that an allegedly seditious publication is "likely" to cause bodily injury or damage to property, "appears" to promote feelings of ill will, hostility or hatred between races or classes of people in Malaysia, or "appears" to promote feelings of ill will, hostility or hatred between people on grounds of religion, a sessions court judge can issue an order prohibiting the making or circulation of the publication.[150] The law does not provide for any avenue of appeal.

For publications circulated via the Internet, the prohibition order (1) requires the person "making or circulating" it to remove the prohibited publication and (2) prohibits the person making or circulating the publication from accessing "any" electronic device.[151] The term "electronic device" is not defined but clearly would, at a minimum, prohibit the individual from accessing a computer, laptop or mobile telephone for an undefined period of time.

According to lawyer Syahredzan Johan, co-chair of the Malaysian Bar Council's Young Lawyer's Committee:

> You could foresee a case where *The Malaysian Insider* writes an article critical of the religious authorities for something. Technically it is criticism of the government, but they can say it is criticism of religion and "appears" to promote feelings of ill will on the basis of religion, apply for a prohibition order, and *TMI* must take it down. The individual reporter, and maybe others at *TMI,* could then be prohibited from accessing any electronic devices.[152]

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[148] Sedition (Amendment) Act, 2015, sec. 4(a)(i) and 4(b)(inserting the words "causes to be published" in section 4(1)(c) and including those words in new section 4(1A).

[149] Sedition (Amendment) Act 2015, sec. 8(b) (inserting new section 10(1A).

[150] Sedition (Amendment) Act 2015, sec. 8(a) (substituting new language for section 10(1)).

[151] Sedition (Amendment) Act 2015, sec. 8(b) (inserting new section 10(1A)).

[152] Human Rights Watch interview with Syahredzan Johan, Kuala Lumpur, April 16, 2015.

Any person contravening the prohibition order is liable to a fine of RM5,000 (US$1,210) or a term of up to three years' imprisonment and, in the case of a continuing offense, a fine of RM3,000 (US$726) for each day during which the offense continues.[153]

Where the person making or circulating the publication cannot be identified, the session's court judge "shall make an order" directing appropriate officers to "prevent access to such publication."[154] Under the order, the authorities could simply block access to any website that contained the anonymous "seditious" publication. Steven Gan, editor-in-chief of *Malaysiakini,* is very worried about this provision. The online publication currently permits readers, not all of whom are fully identified, to comment on the articles it posts. Gan said:

> Moderating reader comments is difficult as we get around 1000 comments a day… We do not want to censor the comments but we are very much looking at how we can protect ourselves.[155]

The new section 3(ae), which makes expression with a tendency "to promote feelings of ill will, hostility or hatred between persons or groups of persons on the ground of religion" part of the definition of seditious tendency, also raises the risk that "offensive" speech, particularly on social media, will become even more the subject of sedition prosecutions.[156] The government justified the new provision on the ground that "[a]n act of insulting and ridiculing any religion may cause disharmony and threaten public order."[157] The issue of insulting religion or causing others to think less of a religious system has been discussed extensively in the UN system, but it remains the view of the General Assembly, the special mechanisms, and other experts on international law that the criminalization of hate speech is acceptable only where speech is intended to motivate not just bad feeling in the abstract, but to actually threaten the rights of others. The new section 3(ae), which criminalizes speech that simply has a tendency to promote feelings of ill will, is far too broad to meet that standard. The result is likely to be an increase in

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[153] Sedition (Amendment) Act 2015, sec. 8(c) (substituting new section 10(4)).

[154] Sedition (Amendment) Act 2015, sec. 9 (inserting new section 10A).

[155] Human Rights Watch interview with Steven Gan, Kuala Lumpur, April 9, 2015.

[156] Sedition (Amendment) Act 2015, sec. 3(a)(iv)(inserting new section 3(1)(ea)).

[157] Sedition (Amendment) Act 2015, Explanatory Statement, para. 4(d), https://www.digitalnewsasia.com/sites/default/files/files_upload/sedition_act_amendments.pdf.

prosecutions of those making ill-judged, and possibly offensive, comments on social media, but whose speech is protected under international law.

Sections 504 and 505(b) of the Penal Code: Offenses Against Public Tranquility

A second tool used to criminalize freedom of expression are provisions of the penal codeon "public tranquility." Section 504 provides that:

> Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

Section 505(b) provides a sentence of up to two years' imprisonment for anyone who "makes, publishes or circulates any statement, rumor or report with intent to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public, whereby any person may be induced to commit an offence against the State or against the public tranquility."
While it is legitimate under international law to impose restrictions on speech to protect public order, the limitations imposed must be "appropriate to achieve their protective function" and be "the least intrusive instrument amongst those which might achieve their protective function."[158] Sections 504 and 505(b) are remarkably broad provisions that, while purporting to protect public order, may actually encourage those who disagree with a speaker to threaten public disorder to instigate criminal investigations of the speaker. As one defense lawyer described it:

> Right wing groups … like Perkasa and Isma stage demonstrations, lodge police reports and say inflammatory things. Then the police take action

[158] UN HRC, General Comment 34, para. 34. See also Supreme Court of India, *Chintaman Rao v. State of Madhya Pradesh,* 1950 SCR 759 ("The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness.")

> against those that are the target of those complaints and cite the public outcry as justification.[159]

As discussed later in this report, while civil penalties are appropriate for false statements that genuinely defame someone, insulting someone should never be a criminal offense, regardless of whether or not the person insulted threatens to, or does, break the public peace. Similarly, while the government might be able to justify restricting speech that is both intended and very likely to induce the commission of offenses against the state, section 505(b) is not so limited.[160] A statement about suspected electoral fraud could "alarm" a segment of the population and cause it to publically protest—thereby "offending" public tranquility.

Criminalizing speech not because it urges unlawful action but simply because it is likely to alarm or offend others, causing them to protest or otherwise disturb public order, is an extreme measure that generally cannot be justified as "necessary" in a democratic society.[161] Such restrictions hand those offended a "hecklers veto" that stifles healthy debate. Indeed, some types of provocative and disturbing speech—such as criticism of government or public figures—are vital to a democratic society and if made in good faith should be protected even if inaccurate.

Both sections 504 and 505(b) also fail to meet the requirement that any restriction on speech be formulated with sufficient precision to enable an individual to know what speech would violate the law.[162] An individual cannot know what statements are "likely" to cause someone to break the public peace, as that would require knowing in advance another person's subjective response to the alleged insult. Similarly, an individual cannot know what statements are "likely to cause fear and alarm in the public," or what will be considered an offense "against public tranquility." The provisions thus do not provide an individual with

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[159] Human Rights Watch interview with opposition Member of Parliament, Kuala Lumpur, April 10, 2015.

[160] Section 505(b), unlike section 504, does contain an exception for statements made where the speaker has "reasonable grounds" for believing that it is true and makes the statement without any "intent" to cause someone to offend public tranquility or commit an offense. However, the provision is too broad to be sufficiently limited by the exception.

[161] ECHR, *Sunday Times v. United Kingdom,* para. 59.

[162] UN Human Rights Committee, General Comment 34, para. 25.

sufficient guidance to enable him or her to regulate his conduct accordingly,[163] or provide clear limitations on those who are charged with enforcing it.[164]

This lack of clarity leaves the provisions subject to abuse by officials looking for a way to silence government critics or others who are saying things the government finds distasteful.

While these laws have, in the past, rarely been used, the government has recently begun using them against opposition politicians and activists.

Rafizi Ramli's Prosecution for Insulting UMNO

PKR MP Rafizi Ramli is being prosecuted under section 504 for a statement quoted in online news portal *fz.com* and subsequently in *The Edge Financial Daily* on February 4, 2015, that suggested that UMNO was attempting to undermine the opposition in Selangor State by using policies emphasizing race and religion. Ramli was quoted as saying:

> You can only see the issues and also campaigns conducted by UMNO Selangor in the last few months and they harped on one issue, which is race and religion. For many years we haven't seen this kind of demonstration in front or around places of worship, in front of churches and threats and people marching and protesting against Christians and so on. And of course in the last one or two weeks we have seen some violence, with Molotov cocktails being thrown. These are things that don't happen on their own. It's planned and endorsed and being carried out by UMNO Selangor.[165]

After a member of the United Malays National Organization filed a complaint, the police opened an investigation and asked Ramli to come in and give a statement. According to Ramli, when he was first asked to give a statement, he was told that he was being investigated for sedition. However, since his statement was not about the government but about a political party, "they apparently decided that they could not

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[163] Ibid; ECHR, *Sunday Times v. United Kingdom,* para. 49.

[164] UN Human Rights Committee, General Comment 34, para. 25 ("Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.")

[165] Azril Annuar, "Analyst: Will Rafizi Quit if Selangor is not toppled?" *fz.com,* February 4, 2014, http://www.fz.com/content/exclusive-will-rafizi-quit-if-selangor-not-toppled-analyst (accessed May 20, 2015).

proceed with sedition charges."[166] On August 28, 2014, he was charged with violating section 504 by insulting members of the Selangor UMNO. His experience, and that of Viktor Wong, discussed below, reinforce the comment made by Syahredzan Johan, defense lawyer and chair of the Young Lawyers Committee of the Malaysian Bar Council: "First they arrest you under the Sedition Act, then they find another law to charge you with."[167]

Trial of the case commenced in March 2015. On July 29, the court ruled that the prosecution had made a prima facie case, and Ramli was ordered to present a defense.[168] As of the time of writing, the defense case was ongoing.

In its efforts to prove that Ramli not only insulted Selangor UMNO but that the insult was "likely" to provoke a breach of the peace, Hulu Langat UMNO Youth Division Chief Mohamad Halim Wahab testified that the statement could "raise tension and cause chaos" and that it made him "feel angry."[169] Making criminal liability dependent upon the subjective response of a listener not only gives no guidance to the appropriate limits of speech, but clearly gives leverage to those seeking to silence a speaker, for how can one disprove an allegation that the insult provoked the listener to potentially breach the peace?

The Prosecution of Viktor Wong for Insulting the IGP

The absurd reach of section 504 is evidenced by the prosecution of political analyst Viktor Wong for his criticism of Inspector General of Police Khalid Abu Bakar. Wong, director of a think tank in Penang, was reacting to news that the police had arrested 154 members of the Penang Voluntary Patrol (PSS).

After posting several tweets commenting on the detentions, he tweeted: "Bastardization of @PDRMsia. Thanks to the ruthless@KBAB51 [the personal twitter handle of Khalid]. Heinrich Himmler of Malaysia."

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[166] Human Rights Watch interview with Rafizi Ramli, Kuala Lumpur, April 15, 2015.

[167] Human Rights Watch interview with Syahredzan Johan, Kuala Lumpur, April 16, 2015.

[168] P. Aruna, "Rafizi to defend charge of causing hatred at Umno members," *The Star,* July 29, 2015, http://www.thestar.com.my/News/Nation/2015/07/29/rafizi-ramli-to-enter-defence-on-charge-of-directing-hatred-at-umno/ (accessed July 29, 2015).

[169] "Rafizi's remarks could spark religious controversy," *Free Malaysia Today.com,* March 26, 2015, http://www.freemalaysiatoday.com.category/nation/2015/03/26/rafizis-remarks-could-spark-religious-controversy// (accessed March 27, 2015).

Khalid, on his own twitter account, then urged the police to investigate Wong, tweeting "PCIRC @PDRMsia. Another rude person detected for further action."[170] PCIRC is the acronym for the Police Cyber Investigations Response Centre. Wong was, like Ramli, initially investigated under the Sedition Act, but was ultimately charged on September 11, 2014, with violating section 504 of the penal code. Wong is being criminally prosecuted, in essence, for insulting the IGP.

The Investigation of Eric Paulsen for Insulting Prime Minister Najib

Similarly, Eric Paulsen, executive director of Lawyers for Liberty, was called in for police questioning under sections 504 and 505 of the penal codeon June 16, 2015, in connection with tweets critical of Prime Minister Najib.[171]

The use of criminal laws to respond to perceived personal insults is a disproportionate response to any harm caused and inconsistent with international standards for protection of freedom of expression.

Section 505(c) of the Penal Code: Hate Speech

Section 505(c) of the penal code is another overly broad provision that has been used to suppress speech. Section 505(c) provides a sentence of up to two years' imprisonment for anyone who makes, publishes, or circulates any statement, rumor, or report "with intent to incite or which is likely to incite any class or community of persons to commit any offence against any other class or community of person." As with section 504, it appears that section 505(c) is being invoked when the authorities feel they cannot proceed under the Sedition Act.

Criminal Complaints Against BFM Radio

On December 18, 2014, a group of Islamic and Malay NGOs filed police complaints against five presenters from BFM radio, alleging that they had "challenged the sovereignty of Islam" by discussing, among other things, the controversy over the use of "Allah" by non-Muslims and the wearing of the headscarf, in two separate talk shows.[172] The police announced later that day that the five presenters would be investigated for "inciting or

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[170] Sukhbir Cheema, "IGP Wants Action on Being Called 'Heinrich Himmler,'" *The Rakyat Post,* August 31, 2014, http://www.therakyatpost.com/news/2014/08/31/igp-wants-action-called-henrich-himmler/ (accessed May 20, 2015).

[171] "Lawyer probed third time, now for criticising PM," *Malaysiakini,* June 15, 2015, https://www.malaysiakini.com/news/301892 (accessed June 16, 2015).

[172] "Muslim groups demand sedition probe against BFM radio," *The Malaysian Insider,* December 18, 2014, http://www.themalaysianinsider.com/malaysia/article/muslim-groups-demand-sedition-probe-against-bfm (accessed June 15, 2015).

stirring up prejudicial feelings" under section 505(c) of the penal code.[173] BFM radio denied that any of the issues in the complaint were discussed on the talk shows.[174]

While the goal of preventing inter-communal strife is an important one in a country as diverse as Malaysia, it must be done in ways that restrict speech as little as possible. UN human rights experts have stated that:

It is absolutely necessary in a free society that restrictions on public debate or discourse and the protection of racial harmony are not implemented at the detriment of human rights, such as freedom of expression and freedom of assembly.[175]

Malaysia's overly broad definition of "hate speech" opens the door for arbitrary and abusive application of the law, and creates an unacceptable chill on the discussion of issues relating to race and religion.[176]

Limiting discussion of contentious issues such as race and religion will not address the underlying social roots of the prejudice that undermines equality. . . Instead of restrictions, open debate is essential to combating negative stereotypes of individuals and groups and exposing the harm created by prejudice.[177]

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[173] "BFM 5 hauled up for radio shows on Islam," *The Malaysian Insider,* December 18, 2015, http://www.themalaysianinsider.com/malaysia/article/bfm-4-hauled-up-for-radio-shows-on-islam (accessed June 15, 2015).

[174] "BFM89.9 denies making seditious broadcasts," *FTM News,* December 19, 2014, http://www.freemalaysiatoday.com/category/nation/2014/12/19/bfm89-9-denies-making-seditious-broadcasts/ (accessed June 15, 2015).

[175] Joint submission by Mr. Heiner Bielefeldt, special rapporteur on freedom of religion or belief; Mr. Frank La Rue, special rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Mr. Githu Muigai, special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, to the OHCHR Expert Workshop on the prohibition of incitement to national, racial or religious hatred (July 6-7, 2011, Bangkok), http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/SRSubmissionBangkokWorkshop.pdf (discussing similar provision in Singapore's penal code).

[176] UN Office of the High Commissioner for Human Rights (OHCHR), Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitements to discrimination, hostility or violence ("Rabat Plan of Action"), October 2012, para. 15, http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf (accessed August 16, 2015).

[177] Article 19, "Camden Principles on Freedom of Expression and Equality ("Camden Principles"), http://www.article19.org/advocacy/campaigns/camden-principles, p. 4. The Camden Principles were prepared by Article 19 on the basis of discussions involving a group of high-level UN and other officials, and civil society and academic experts in international human rights law on freedom of expression and equality issues at meetings held in London on 11 December 2008 and 23-24 February 2009. The Principles represent a progressive interpretation of international law and standards, accepted State practice (as reflected, inter alia, in national laws and the judgments of national courts), and the general principles of law recognised by the community of nations.

While certain types of hate speech can be restricted under international law, the threshold for such restrictions is very high and requires the intentional advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence.[178]

As previously discussed, it remains the view of the General Assembly, the special mechanisms, and other experts on international law that the criminalization of hate speech is acceptable only where speech is intended to motivate not just bad feeling in the abstract, but to actually threaten the rights of others. Applying section 505(c) to "stirring up prejudice" where no intention to provoke acts of hostility or discrimination or other unlawful acts that threaten the rights of members of such groups can be demonstrated, and indeed, where no such acts have taken place, is incompatible with freedom of expression.

Penal Code Sections 499-502: Criminal Defamation

Defamation law is another tool that may be misused by government officials and individuals to silence critics. Defamation occurs when a person makes statements that may lower another person's reputation in the eyes of the public. In criminal cases, when the state prosecutes a private person for defamation, sections 499 to 502 of the Malaysian Penal Code are applicable. Section 499 defines defamation as follows:

Whoever, by words either spoken or intended to be read or by signs, or by any visible representation, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said…to defame that person.

The penalty for criminal defamation is imprisonment for up to two years, a fine, or both.[179] Under Malaysian law, even true statements can be the basis for a libel conviction. The law expressly states that "it is not defamation to impute anything which is true concerning any person, *if it is for the public good that the imputation should be made or published*. Whether or not it is for the public good is a question of fact."[180] This provision, which could result in the libel conviction of someone who had made a truthful statement, is

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[178] ICCPR art. 20; Camden Principles, princ. 12.1.

[179] Penal Code, sec. 500. Section 501 of the penal code criminalizes the act of "printing or engraving" defamatory material, while section 402 criminalizes the sale of "any printed or engraved substance containing defamatory matter."

[180] Penal Code, sec. 499, First Exception (emphasis added).

unacceptable under international standards and highly susceptible to abuse. The aim, however legitimate, of protecting someone's reputation is not sufficient to justify the suppression of truthful speech.[181]

While criminal defamation used less frequently in Malaysia than is civil defamation, even the threat of criminal action has a chilling effect on free speech.

Criminal defamation violates international norms on freedom of speech that hold that defamation should be considered a civil matter, not a crime punishable with imprisonment. The former UN Special Rapporteur on the Right to Freedom of Expression, Frank La Rue, has recommended that criminal defamation laws be abolished, as have the special mandates of the United Nations, the Organization for Security and Cooperation in Europe, and the Organization of American States, which have stated that: [182]

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.[183]

Defamation cases involving government officials or public persons are particularly problematic. While government officials and those involved in public affairs are entitled to protection of their reputation, including protection against defamation, as individuals who have sought to play a role in public affairs they must tolerate a greater degree of scrutiny and criticism than ordinary citizens. This distinction deters those in positions of power from using the law to penalize their critics or those who seek to expose official wrongdoing, and it facilitates public debate about issues of governance and common concern.[184]

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[181] See UN Human Rights Committee, General Comment 34, para. 47 ("[P]enal defamation laws should include such defenses as the defence of truth and they should not be applied to those forms of expression that are not, of their nature, subject to verification.").

[182] La Rue Report, June 2012, UN Doc. A/HRC/20/17, para. 87.

[183] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 2002, http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&lID=1 (accessed June 11, 2014). Similarly, the African Court on Human and Peoples' Rights has held that imposing a custodial sentence for defamation violates both article 9 of the African Charter on Human and Peoples' Rights and the ICCPR. African Court on Human and Peoples' Rights, *Lohe Issa Konate v. Burkina Faso,* Application no. 004/2013, December 5, 2014, https://www.african-court.org/en/images/documents/Judgment/Konate%20Judgment%20Engl.pdf (accessed June 17, 2015).

[184] UN Commission on Human Rights, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, April 2010, UN Doc A/HRC/14/23 para. 82 (The protection of reputation of others "must not be used to protect the State and its officials from public opinion or criticism. . . . (N)o criminal or civil action

The Prosecution of Mat Sabu Over the Interpretation of History

Recent uses of the criminal defamation laws in Malaysia amply demonstrate their potential for abuse. Mohamad (Mat) Sabu, an opposition member of parliament and former deputy president of PAS, was recently tried for criminally defaming police officers who were killed on Bukit Kepong more than 50 years ago. In a speech on August 20, 2011, Sabu took the position that all those who fought the British, regardless of who they were, should be recognized as freedom fighters. He then gave, as a specific example, the leader of an attack by the Communist Party of Malaya on a police station in Bukit Kepong in 1950 in which a number of police officers were killed, asserting that the police officers were fighting to defend the British occupiers, while the attackers were fighting for freedom.[185]

A week later, *Utusan Malaysia,* a newspaper that is 50% owned by the ruling UMNO party and therefore sympathetic to the government,[186] reported on its front page that Mat Sabu supported the Communist Party. According to Sabu's lawyer Hanipa Maidin, "over a thousand police reports were filed against him, he was threatened, someone attempted to burn down his house, people threatened to rape his daughter." [187]

n September 21, 2011, Sabu was charged with criminally defaming the police officers who fought in Bukit Kepong by saying that they were fighting to defend the British.[188] He was released on bail of RM50,000 (US$12,097).

Maidin said that the government's case turned on its claim that the area where the police station was located was not colonized by the British but only had British advisors.[189] For

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for defamation should be admissible in respect of a civil servant or the performance of his or her duties."); UN Human Rights Committee, General Comment 34, para. 38 (the Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high.); Siracusa Principles, para. 37 ("A limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism."); Criminal Code of Canada, sec. 310, http://yourlaws.ca/criminal-code-canada/321 (it is not defamatory libel to publish "fair comments on the public conduct of a person who takes part in public affairs.").

[185]Human Rights Watch interview with Hanipa Maidin, lawyer for Mat Sabu, Kuala Lumpur, April 14, 2015.

[186] Joe Fernandez, "Utusan Malaysia admits UMNO influence," *Free Malaysia Today,* August 14, 2015, http://www.freemalaysiatoday.com/category/nation/2015/05/12/utusan-malaysia-admits-umno-influence/ (accessed August 14, 2015).

[187] Ibid.

[188] Under Malaysian law, "it may amount to libel to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives." penal code, sec. 499, Explanation 1.

[189] Human Rights Watch interview with attorney Hanipa Maidin, Kuala Lumpur, April 14, 2015.

what was, in essence, a debate about history, an opposition politician faced years of uncertainty and a criminal trial, with the possibility of being sentenced up to two years in jail and being disqualified from politics for another five years after the end of his sentence. Sabu was finally acquitted of the charge on July 8, 2015, almost four years after charges were filed, when the trial court found that the prosecution had failed to prove its case.[190]

Prosecution of Mohammed Nizar Jamaluddin for Defaming the Prime Minister

On August 25, 2014, another PAS member, former Perak Chief Minister Mohammad Nizar Jamaluddin, was charged with criminal defamation for remarks he made about Prime Minister Najib in the run-up to the 2013 general election. Jamaluddin allegedly told the audience that Najib had called military leaders and directed them to do something if Barisan Nasional lost in the general election.[191] Although the comments were made in April 2012, charges were not filed until August 2014, after the start of the current crackdown. Trial in the case began on June 10, 2015, but was postponed two days later.[192] As the Malaysian Bar Council stated in connection with the civil defamation suit filed by Najib against *Malaysiakini*: "If the comments and issues complained of are sufficiently important for correction, the Prime Minister should reply in the public arena and let the measure of public opinion be the judge of the truth. Public funds and resources should not be used or expended on defamation suits with respect to matters and comments made in relation to his public office."[193]

Investigation of Khoo Ying Hooi for Defaming the Police

In a case that exemplifies the current tendency to initiate criminal investigations of even the most innocuous comments, an academic at University of Malaya, Khoo Ying Hooi, was investigated for criminal defamation in March 2015. Hooi, who writes a regular column for *The Malaysian Insider,* was investigated for criminal defamation of the police for stating in a

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[190] Susan Loone, "Mat Sabu not guilty of defaming police," *Malaysiakini,* July 8, 2015, http://www.malaysiakini.com/news/304453 (accessed July 8, 2015).

[191] Chan Li Leen, "Nizar gets discharge not amounting to acquittal," *The Star Online,* January 14, 2015, http://www.thestar.com.my/News/Nation/2015/01/14/Nizar-gets-discharge-not-amounting-to-acquittal/ (accessed June 17, 2015).

[192] Ista Kyra Sharmugam, "Nizar defamation case postponed to August 19," *The Malaysian Insider,* June 12, 2015, http://www.themalaysianinsider.com/malaysia/article/nizar-defamation-case-postponed-to-august-19 (accessed July 29, 2015).

[193] The Malaysian Bar Council, "Press Release: Defamation suit by PM is no answer to public misgivings and criticisms," June 7, 2014, http://www.malaysianbar.org.my/press_statements/press_release_%7C_defamation_suit_by_the_prime_minister_is_no_answer_to_public_misgivings_and_criticisms.html (accessed May 21, 2015).

March 16 column that "the police allowed the KitaLawan rally on March 7 to carry on smoothly."[194] Apparently interpreting the article as implying that the police gave permission for the rally, Inspector General of Police Khalid Abu Bakar tweeted that the article was misleading and that the police had not "allowed" the rally. Hooi has not yet been charged, but the experience of being accused of a criminal offense and having to undergo police questioning is stressful and frightening. Moreover, as Hooi told *The Malaysian Insider,* pursuing academics on criminal charges for commentary that is perceived as critical or inconsistent with the government's message restricts academic freedom:

> The police pinpointed my language in the article. They have to understand that we can't be writing everything that is positive. We have to question. If we academics are not allowed to question at all, how do we carry on our research?[195]

Human Rights Watch believes that criminal defamation laws should be abolished, as criminal penalties are always disproportionate punishments for reputational harm and infringe on free expression. Criminal defamation laws are open to easy abuse, resulting in very harsh consequences, including imprisonment. As demonstrated by the repeal of criminal defamation laws in an increasing number of countries, including the United Kingdom, New Zealand, Kenya, Uganda, and Ghana, such laws are not necessary for the purpose of protecting reputations.[196]

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[194] Khoo Ying Hooi, "Who Owns the Police?" *The Malaysian Insider,* March 16, 2015, http://www.themalaysianinsider.com/opinion/khoo-ying-hooi/article/who-owns-the-police (accessed April 12, 2015).

[195] Elizabeth Zachariah, "UM lecturer now under probe over article on police," *The Malaysian Insider,* March 27, 2015, http://www.themalaysianinsider.com/malaysia/article/um-lecturer-now-under-probe-over-article-on-police (accessed April 4, 2015).

[196] While defamation should be handled as a civil matter, "civil penalties for defamation should not be so heavy as to block freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant," and, in particular, "pecuniary awards should be strictly proportionate to the actual harm caused, and the law should give preference to the use of non-pecuniary remedies including, for example, apology, rectification and clarification." Report of UN special rapporteur Frank La Rue, April 2010, UN Doc A/HRC/14/23. As the Privy Council said in *Hector v. Attorney-General of Antigua and Barbuda,* (1990) 2 AC 312: "In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind." Unfortunately, rather than responding to criticism with counter-arguments in the public arena, Prime Minister Najib has repeatedly resorted to civil defamation suits to counter criticism of his conduct. On June 3, 2014, Najib sued online news portal *Malaysiakini,* Editor-in-Chief Steven Gan and Chief Editor Fathi Aris Omar for defamation for republishing reader comments that criticized Najib's conduct. As the Malaysian Bar Council noted, "The Prime Minister is in effect suing the members of the news media for the views and comments of the public to whom the Prime Minister is accountable and answerable. This sets a bad precedent and sends the wrong message." According to Gan, Najib was offered the opportunity to reply to the comments, and refused. The suit is still pending. On March 20, 2015, Najib again sued the

Printing Presses and Publications Act of 1984 (Amended 1988 and 2012)

The Printing Presses and Publications Act (PPPA) is another tool used by the government to limit access to critical information.[197] The law, which imposes permit requirements for newspapers and printing presses and gives the Ministry of Home Affairs the authority to ban and seize publications, has been used repeatedly to restrict the space for debate. The government has denied publishing licenses to news organizations critical of the government, suspended newspapers reporting on corruption, and seized hundreds of copies of books. A free, uncensored, and unhindered press is essential in any society to ensure freedom of opinion and expression and the enjoyment of other rights, and constitutes one of the cornerstones of a democratic society.[198] The restrictions imposed by the PPPA are inconsistent with the principles of freedom of the press and expression.

Permit Requirements

Sections 2 and 3 of the PPPA require domestic and foreign publishers to apply to the government for a permit to print, import, or circulate newspapers, and requires a permit for the possession of a printing press. Possession or use of an unlicensed printing press or the printing or distribution of an unlicensed newspaper can be punished by imprisonment for up to three years and/or fines. The Malaysian government has used its ability to withhold or to cancel licenses to try to stifle dissenting voices in the press and in other print publications. Those in the press view the licensing regime as "oppressive." As Jahabar Sadiq, executive editor of *The Malaysian Insider,* said, "You have to jump through 25 hoops and a beauty pageant."[199]

Although the act was amended in April 2012 to end the yearly renewal requirement for publication licenses and to provide for court review of the Home Minister's previously unlimited power to arbitrarily approve or revoke publishing permits, the law still provides

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media in response to critical comments. The PAS newspaper *Harakat* published an article on February 19, 2015, raising questions about the source of the money used by Najib's stepson Riza Aziz to purchase property and finance a film production company in the United States. Rather than responding to the questions raised in the article, which was based on an article previously published it *The New York Times,* Najib sued the newspaper, along with its managing director and editor-in-chief, for civil defamation. Najib also sued an opposition MP, Tony Pua, for defamation in March 2015 after Pua made a speech about the 1MDB scandal and concluded by saying that Najib's coalition partners were "letting him rob the people." The case is still pending.

[197] Printing Presses and Publications Act, http://www.agc.gov.my/Akta/Vol.%207/Act%20301%20-%20Printing%20Presses%20And%20Publications%20Act%201984.pdf.

[198] See UNHRC, General Comment 34, para. 13.

[199] Human Rights Watch interview, Kuala Lumpur, April 9, 2015.

no standards by which his decision should be made and/or reviewed. As noted in UN Human Rights Committee General Comment 34, the criteria for any licensing of the media should be "reasonable and objective, clear, transparent, non-discriminatory and otherwise in compliance with [the ICCPR]."[200] The PPPA's complete lack of licensing criteria is incompatible with international norms, and susceptible to misuse and abuse by the government.

The Denial of Permits to Mini Dotcom

The potential for abuse is demonstrated by the government's treatment of efforts by Mini Dotcom to obtain a license to print a physical newspaper. Mainstream print and television news media is tightly controlled in Malaysia, and tends to publish pro-government views. Mini Dotcom, the owner of independent online news portal *Malaysiakini,* first applied for a license to publish a print edition in 2002.[201] While the home ministry acknowledged the application, it neither granted nor denied it, leaving Mini Dotcom in limbo.[202] Mini Dotcom filed another application for a permit in 2010. This time, it received a letter dated August 19, 2010, which it interpreted as a denial of its application but which provided no reasons for the decision.[203]

The company appealed the denial to the courts. The High Court ruled that a publishing permit is a right, not a privilege, and therefore could be denied only to protect national security, public order or morality.[204] At the court proceedings, the Ministry of Home Affairs attempted to justify its decision to deny the permit as being in line with an unpublished government policy to restrict the number of newspapers to avoid undue competition between them and to avoid confusion of the public "owing to the variety of reports." The Ministry of Home Affairs claimed that a further ground for the decision was the fact that Mini Dotcom's online publication, *Malaysiakini,* was "not neutral" and was "inclined

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[200] UN Human Rights Committee, General Comment 34, para. 39.

[201] "Malaysiakini fights for newspaper license," *Singapore Straits Times,* November 11, 2011, reprinted in Ideas for Democracy and Economic Affairs, November 11, 2011, http://ideas.org.my/news/malaysiakini-fights-for-newspaper-licence/ (accessed August 3, 2015).

[202] Human Rights Watch interview with Steven Gan, editor-in-chief of *Malaysiakini,* Kuala Lumpur, April 9, 2015.

[203] Ibid.

[204] *Mkini Dotcom v. Ketua Setiausaha Kemaenterian Dalam Negeri,* S.K. No. R1-25-455-2010, Decision of 10 January 2013, http://www.loyarburok.com/wp-content/uploads/2013/02/Malaysiakini-Press-Permit-High-Court-Abang-Iskandar-Grounds.pdf (accessed July 7, 2014).

towards inciting controversy."[205] The High Court held that the cited grounds were all invalid, as they were irrelevant to protecting the security of Malaysia, public order or morality. As the court noted:

> Merely inciting controversy would by no means amount to a threat to public order, national security or morality, as any effective investigative journalism would result in controversy if it exposes the wrongdoings of any public authority. There is no reasonable nexus to be found there.[206]

The court therefore quashed the Home Minister's decision and sent the application back to the Ministry of Home Affairs to be reconsidered. The government appealed, but the appeal was dismissed by the Court of Appeal in October 2013. In late September 2014, Mini Dotcom received a written rejection of its application, citing grounds remarkably similar to those already held invalid by the High Court. The notice stated that the application had been rejected on the basis that *Malaysiakini's* news reports are "controversial in nature and do not have elements of neutrality." The letter went on to add that *Malaysiakini's* news "is an annoyance and may shock readers as it deals with sensitive issues."[207] *Malaysiakini* editor-in-chief Steven Gan said that they will continue to fight for a print license through the courts if necessary.[208]

The Denial of a Permit to Edge Communications

In a similar case, the government granted Edge Communications a permit to publish a print version of online news portal *FZ Daily* in August 2013, but a week later "deferred" that permission. When the Ministry of Home Affairs did not respond to a letter seeking reasons why the application had been deferred, Edge Communications filed for judicial review of the deferral. On February 5, 2014, after the High Court granted leave to challenge the decision, the government issued a letter dated January 21 saying that the application had been rejected. In March 2014, in response to a question posed in parliament by PKR MP Johari Abdul, Home Minister Datuk Seri Ahmad Zahid Hamidi stated that the permit for

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[205] *Mkini DotCom v. Ketua Setiausaha Kemaenterian Dalam Negeri*, para. 38.

[206] *Mkini DotCom v. Ketua Setiausaha Kemaenterian Dalam Negeri,* para.46.

[207] Human Rights Watch email correspondence with Shamini Arumugan, HR & Legal Affairs Manager, *Malaysiakini,* Kuala Lumpur, April 20, 2015; "After two court victories, M'kini still denied permit," *Malaysiakini,* October 2, 2014, http://www.malaysiakini.com/news/276359 (accessed October 3, 2015).

[208] Human Rights Watch interview with Steven Gan, Kuala Lumpur, April 9, 2015.

both Edge Communications and Mini Dotcom had been denied on the basis that the news portals would publish "sensational and controversial" news.[209] He further claimed that granting the permits would harm profits to existing newspapers, and could lead to confusion. By relying on grounds previously held irrelevant by the High Court, the home ministry amply demonstrated the law's potential for abuse and the government's disregard for the rule of law.

The Use of Licensing Requirements to Suppress Publications

The requirement that each printing press must receive a license from the Ministry of Home Affairs is similarly problematic. Under Section 3 of the PPPA, the home minister may:

Grant to any person a licence to keep for use or use a printing press and he may refuse any application for such license or may at any time revoke or suspend such licence for any period he considers desirable.[210]

The government has used threats that it would revoke printing press licenses to suppress the publication of critical books. According to political cartoonist Zunar, the authorities have gone to three publishers who were printing his books and threatened to revoke their printing press licenses if they continued to do so.[211] He now struggles to get his books published, and has since resorted to blacking out the name of the publisher on every copy of his books. Although the PPPA was amended, in 2012, to provide for the possibility of judicial review of decisions to revoke a printing or publishing license, the law provides no standards for the home minister's decisions, and the threat of losing their license is often enough to discourage publishers from printing controversial content.

Printing Press for Unlawful Purposes

Section 4 of the PPPA provides further ammunition for the Malaysian government in its efforts to control access to information. The section provides criminal penalties for anyone who "prints or produces, or causes or permits to be printed or produced by his printing press or machine" any publication or document that:

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[209] Eileen Ng, "Malaysiakini, FZ Daily denied print permits because they run sensational news, says Zahid," The Malaysian Insider, http://www.themalaysianinsider.com/malaysia/article/malaysiakini-fz-daily-denied-newspaper-permits-because-they-run-sensational (accessed September 17, 2014).

[210] PPPA, sec. 3, as amended by the Printing Presses and Publications (Amendment) Act 2012.

[211] Human Rights Watch interview with Zunar, Kuala Lumpur, April 10, 2015.

- is "obscene or otherwise against public decency;"
- contains an incitement to violence against persons or property, or counsels disobedience to the law; or
- leads or is likely to lead to a breach of the peace "or to promote feelings of ill-will, hostility, enmity, hatred, disharmony or disunity."

While international norms permit the suppression of certain obscene materials and incitement to violence, the broad language of section 4 is inconsistent with those norms. It criminalizes publication of material "otherwise against public decency," a vague phrase that does not provide clear guidance to those seeking to determine what they can lawfully publish.[212] The terms "ill-will," "disharmony," and "disunity" are similarly vague and susceptible to varying interpretations, leaving ample scope for arbitrary and abusive enforcement of the law to punish those who publish books that the government does not like.[213]

Banning of Publications

Section 7(1) of the PPPA empowers the Minister of Home Affairs to ban or restrict any publication "which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest."[214] By its terms, this provision radically oversteps international human rights standards, which limit restrictions on free expression to those that are both necessary and proportionate to protect specified interests such as public order, morality, and security.

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[212] See Optional Protocol to Convention on Rights of the Child, adopted May 25, 2000, G.A. Res. 54/263, UN Doc. A/RES/54/263 (2000), entered into force Jan. 18, 2002, www.ochr.org/EN/professionalinterest/Page/OPSCCRC.aspx (requiring states parties to prohibit child pornography); ICCPR art.19 and 20.

[213] UN HRC, General Comment 34, para. 25.

[214] The Ministry of Home Affairs has used the broadly worded statute to ban numerous publications. The list of "prohibited publications" on the Ministry of Home Affairs website lists 1,551 publications, ranging from scholarly books on Islam to books on acupuncture to specific issues of *National Lampoon, GQ*, and *James Bond Magazine*. "Prohibited Publications," Official Portal of the Ministry of Home Affairs, http://www.moha.gov.my/index.php/en/2012-08-08-00-54-58/penerbitan-larangan (accessed May 19, 2015). Zunar, the Malaysian political cartoonist, has seen seven of his books of political cartoons banned by the Ministry of Home Affairs on the ground that they are "prejudicial to public order." Banning a publication is a severe restriction on the freedom of expression of both the person who wrote it and those who wish to read it. As such, under international legal standards, it can only be justified if the government can show that it is necessary to protect national security, the rights and reputations or others, public order, or public health or morals in a democratic society. Section 7(a), which permits the banning of a publication simply on the basis that it is "likely to alarm public opinion" or is "likely prejudicial to public interest or national interest," is far too broad to meet international standards.

Moreover, the broad and ill-defined language of the statute gives insufficient guidance to those charged with its enforcement, and leaves it open to abuse by government officials who simply do not like the content of a publication.

The act not only regulates the press and local publications, but also books, pamphlets and the import of publications from abroad. Anyone who prints, sells or otherwise distributes a prohibited publication, or is in possession of one with intent to sell or distribute, can be fined and imprisoned for up to three years.[215]

Suspension of The Edge Weekly and The Edge Financial Daily

The government has used section 7(1), together with the threat of withdrawal of a publishing license, to suppress reporting on allegations of public corruption. In July 2015, after *The Edge Weekly* and *The Edge Financial Daily,* both owned by the Edge Media Group, published reports on allegations of corruption involving the government-owned investment fund 1 Malaysia Development Berhad (1MDB), the Ministry of Home Affairs suspended publication of both newspapers for three months on the grounds that their reporting was "prejudicial or likely to be prejudicial to public order, security or likely to alarm public opinion or is likely to be prejudicial to public and national interest."[216] According to Ho Kay Tat, the publisher and chief executive officer of The Edge Media Group, the government warned that if the newspapers did not suspend publication their publishing licenses would be withdrawn.[217]

The government subsequently announced three "justifications" for the suspension:

(1) The headings and reporting by the two publications had "raised questions and created negative public perceptions towards 1Malaysia Development Berhad (1MDB) and also implicated the government and national leaders;"

(2) The published news reports were based on "doubtful and unverified information, which might alarm public opinion and could/might be prejudicial to public order and national interest;" and

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[215] PPPA, sec. 8(1).

[216] "Edge Weekly, Financial Daily suspended for three months," *Malaysiakini,* July 24, 2015, https://m.malaysiakini.com/news/306053 (accessed July 24, 2015).

[217] Ibid.

(3) The 1MDB issue was being investigated by an investigation team that already had been set up. Therefore, it was "inappropriate for the reporting (on the issue) to create negative perceptions."[218]

Ho Kay Tat, Edge Media Group's publisher and chief executive, was quoted as saying, "We don't see how exposing the scam to cheat the people of Malaysia of billions of ringgit can be construed as being detrimental to public order. This is nothing more than a move to shut us down in order to shut us up."[219]

The government's efforts to shut down reporting on a corruption scandal that is a matter of intense public interest shows a disregard for both press freedom and freedom of expression. On July 25, 2015, The Edge Media Group filed an application in the High Court to challenge the suspension as unjustified.[220] An application to stay the suspension of the publications while the challenge is pending was rejected by the High Court on August 14, 2015.[221] On September 21, 2015, however, the High Court revoked the suspension of both papers citing a lack of procedural fairness based, in part, on the fact that the government did not specify the articles on which it was basing the suspension.[222] The government announced two days later that it would appeal the ruling, and filed an application to try to prevent the newspapers from resuming publication.[223]

The Banning of Bersih 4.0 Shirts and Publications

Section 7(1) of the PPPA has even been used to ban t-shirts, which fall under the statute's broad definition of "publication" to include "anything which by its form, shape or in any

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[218] Bernama, "Home Ministry gives three reasons for Edge ban," *Malaysiakini,* July 25, 2015, http://www.malaysiakini.com/news/306109 (accessed July 25, 2015).

[219] Austin Ramzy, "Malaysia suspends 2 newspapers covering scandal at state-owned fund," *The New York Times,* July 24, 2015, http://www.nytimes.com/2015/07/25/world/asia/malaysia-suspends-2-newspapers-covering-scandal-at-state-owned-fund.html (accessed July 24, 2015).

[220] "The Edge fights suspension order," *The Star Online,* July 25, 2015, http://www.thestar.com.my/News/Nation/2015/07/28/The-Edge-fights-suspension-order/ (accessed July 26, 2015).

[221] "Edge fails to get stay order on suspensions," *Malaysiakini,* August 14, 2015, http://www.malaysiakini.com/news/308526 (accessed August 14, 2015).

[222] V. Anbalagan, "Suspension of the Edge daily, weekly, lifted," *The Malaysian Insider,* September 21, 2015, http://www.themalaysianinsider.com/malaysia/article/suspension-of-the-edge-daily-weekly-lifted (accessed September 23, 2015).

[223] V. Anbalagan, "Putrajaya appeals court order against The Edge suspension," *The Malaysian Insider,* September 23, 2015, http://www.themalaysianinsider.com/malaysia/article/government-appeals-court-order-against-the-edge-suspension (accessed September 23, 2015).

manner is capable of suggesting words or ideas."[224] On August 27, 2015, two days before a large rally organized by Bersih to call for Prime Minister Najib's resignation over his handling of 1MDB and for institutional reforms to prevent corruption, Home Minister Zahid Hamidi issued an order under section 7(1) of the PPPA "absolutely prohibiting throughout Malaysia" any material bearing the Bersih 4.0 logo, including the official yellow t-shirt being sold by Bersih to supporters, on the grounds that they were "likely to be prejudicial to public order, likely to be prejudicial to security, likely to be contrary to any law and likely to be prejudicial to national interest."[225]

Despite this order, which came into effect on August 28, the majority of the tens of thousands of people who participated in the Bersih 4.0 rally wore the yellow Bersih t-shirts. In the three weeks after the rally, the police began calling in opposition politicians and activists for questioning under section 8(1) of the PPPA for wearing the Bersih shirts. The first to be called in was PKR MP Tian Chua, who was called in for questioning on September 7.[226] Former Bersih co-chairperson Ambiga Sreenevasan, Selangor executive committee member Elizabeth Wong, Kapar MP G. Manivannan, and Selangor Chief Minister and PKR Deputy Mohamed Azmin Ali have also been questioned under section 8(1) for wearing Bersih t-shirts.[227]

Bersih 2.0 has filed an application for leave to challenge the Home Minister's ban on yellow coloured clothing and printed materials that contain the words "Bersih 4," arguing that the ban was unreasonable, illegal and made in bad faith.[228] The application was still pending at the time of publication.

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[224] PPPA, sec. 2.

[225] "Printing Presses and Publications (Control of Undesirable Publications)(No. 22) Order 2015, Federal Gazette, http://www.federalgazette.agc.gov.my/outputp/pua_20150828_P.U.%20(A)%20200%20-%20Perintah%20Larangan%20-%20Bersih%204%20(FINAL)%20AGC%20LULUS.pdf (accessed September 15, 2015). The order prohibits the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of "any yellow coloured clothing and which contains the words 'Bersih 4'" and "any other printed material and pamphlet which leads to Bersih 4 rally."

[226] Radzi Razak, "MP vows to put up legal battle if charged over Bersih T-shirt," *Malaysiakini,* September 7, 2015, https://www.malaysiakini.com/news/311428 (accessed September 8, 2015).

[227] Koh Jun Lin, "Opposition, NGO leaders quizzed for wearing Bersih 4 T-shirts," *Malaysiakini,* September 17, 2015, https://www.malaysiakini.com/news/312647 (accessed September 17, 2015); Syed Jaymal Zahiid, "Under probe for 3 offences during Bersih 4, Azmin vows to take on Home Ministry in court," *Malay Mail Online,* September 18, 2015, http://www.themalaymailonline.com/malaysia/article/under-probe-for-3-offences-during-bersih-4-azmin-vows-to-take-on-home-minis (accessed September 18, 2015).

[228] V. Anbalagan, "Electoral reform group challenges ban on yellow colour, 'Bersih 4' words," *The Malaysian Insider,* September 18, 2015, http://www.themalaysianinsider.com/malaysia/article/electoral-reform-group-challenges-ban-on-yellow-colour-bersih-4-words (accessed September 18, 2015).

Demonstrators in Kuala Lumpur listen to a speech on the street while wearing yellow Bersih 4 t-shirts printed with the movement's key demands - clean elections, clean government, save our economy, and right to dissent - on August 29, 2015, the day after the Ministry of Home Affairs used the Printing Presses and Publications Act to declare the shirts and other Bersih branded items illegal. © 2015 Storm Tiv, Human Rights Watch

"Malicious" Publication of False News

Section 8A of the PPPA criminalizes "malicious publication" of false news, and provides that malice shall be presumed without evidence showing that prior to publication the accused took reasonable measures to verify the truth of the news. Treating what may be merely negligent, opinionated, or difficult to verify reporting as a criminal offense is an undue burden on freedom of the press and is incompatible with free expression and

access to information. Human Rights Watch believes that "false news" should never be treated as a criminal offense unless the publisher acted with knowledge the news was false and that the publication of the false information would cause actual damage to an individual, and the publication did cause such damage.

Communications and Multimedia Act of 1998 (Amended 2006)

Another law being used by the Malaysian government to crack down on social media content is the Communications and Multimedia Act (CMA).

Regulating Internet Content

While asserting "that nothing in this act shall be construed as permitting the censorship of the Internet," the CMA contains content regulations and permits criminal punishment for those who fall afoul of them.[229] The government has been using the Communications and Multimedia Act, along with the Sedition Act, to harass and prosecute critical voices, and is threatening to strengthen that law to enable it to impose more control. Communication and Multimedia Minister Ahmed Shabery Cheek, in response to a question posed in parliament in March 2015, said that amendments to the CMA and the Malaysian Communications and Multimedia Commission Act will be tabled later this year or early next year to strengthen those laws. Shabery is reported to have said that amendments "are necessary to update the existing laws and give more bite in enforcement, including penalties and better preventive efforts."[230] On August 2, 2015, at the annual general meeting of the Hutu Selangor UMNO division, Prime Minister Najib reiterated the call for tightening of laws governing the Internet, complaining that he was facing "trial by social media" and had to "prove his innocence."[231] Neither comment augurs well for Internet freedom in Malaysia.

In its current form, section 233(1) of the CMA provides that a person shall be guilty of an offence for communication that "is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person." Similarly, section 211(1) of the CMA provides that: "No content applications service provider, or other person using a content applications service, shall provide content which is indecent,

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[229] CMA, sec. 3(3).

[230] A. Asohan, "Malaysians need their MPs to be on the ball come October," *Digital News Asia,* Mar. 23, 2015, https:www.digitalnewsasia.com/insights/malaysians-need-their-mps-to-be-on-the-ball-come-oct (accessed May 26, 2015).

[231] "PM: Tighter laws to deal with "unfair" netizens, *Malaysiakini,* August 2, 2015, http://www.malaysiakini.com/news/307083 (accessed August 3, 2015).

obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten, or harass any person."

As former UN Special Rapporteur Frank La Rue has pointed out, "imprisoning individuals for seeking, receiving or imparting information and ideas can rarely be justified as a proportionate measure" to protect legitimate bases for restrictions on speech.[232] Restriction of electronic communications intended to cause annoyance is not necessary to protect national security, public order, public health or morals, or to protect the rights and reputations of others. Nor is it consistent with international norms to impose criminal penalties on speech simply because someone else views it as "offensive." As the UN Human Rights Committee has made clear, protection of freedom of expression "embraces even expression that may be regarded as deeply offensive."[233]

The use of vague and ambiguous terms compounds the problem. The statute does not define "offensive" and the term is, in fact, highly subjective, making the criminal liability of an Internet user dependent upon the sensitivity of those reading what he or she has posted. As a result, Internet users in Malaysia are left uncertain about what speech might fall afoul of the law, violating the requirement under international law that restrictions on speech be formulated "with sufficient precision to enable an individual to regulate his or her conduct accordingly."[234] Uncertainty will lead to self-censorship as those using the Internet restrict their comments out of fear of prosecution, with the overall impact being a severe restriction of freedom of expression on the Internet. Even more troubling is the fact that the vagueness of the terms leaves wide scope for arbitrary application and use of the law to suppress communications that the government does not like.

The "voluntary" code drafted pursuant to sections 95 and 212 of the CMA, which provides specific examples of the types of speech that should be avoided, is itself so broad that it does nothing to clarify the statute, and defense lawyers to whom Human Rights Watch spoke were unaware that it even existed.[235]

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[232] UN Commission on Human Rights, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, May 2011, UN Doc. A/HRC/17/27, para. 36.

[233] UN HRC, General Comment 34, para. 11. See also ECHR, *Handyside v. United Kingdom*, para. 49 (emphasis added)(freedom of expression applies to information and ideas that "offend, shock or disturb the State *or any sector of the population").*

[234] UN HRC, General Comment 34, para. 25.

[235] The Communications and Multimedia Content Forum of Malaysia, "The Malaysian Multimedia Communications and Content Code, Version 6," http://www.skmm.gov.my/skmmgovmy/files/attachments/ContentCode.pdf (accessed March 13,

Syahredzan Johan, a lawyer who is handling a number of cases under investigation by the Malaysian Communications and Multimedia Commission (MCMC), said of the CMA:

It is a wide piece of legislation where they can catch a lot of postings. Police are actually acting on private complaints, launching investigations under sedition or refer to the MCMC. Sometimes the investigation can continue for a year or more, causing a lot of harassment and fear. Usually it is for what is termed "offensive" comments… Media is controlled by the government. So the Internet is the place for anti-government sentiment. People are more aware of their rights and they want to express their views.[236]

Communications Minister Ahmed Shabery announced on October 14, 2014, that 11 cases of social media "abuse" had been taken to court in 2014.[237] In a number of these cases, the charge under section 233(1)(a) was presented as an alternative to a charge under the Sedition Act or a criminal defamation charge.

Use of the CMA Against The Malaysian Insider

Jahabar Sadiq, executive editor of *The Malaysian Insider* (TMI), said that he was questioned under both the Sedition Act and the Communications and Multimedia Act during the investigation into the news portal's story on the Council of Rulers, described above, and that Communications and Multimedia Commission investigators were framing most of the questions posed to him.[238] He also noted that, when the authorities came to arrest Zulfiki Sulong, Lionel Morais, and Amin Iskandar, there were five police officers and six people from the MCMC. While they have not, as yet, been charged under either the Sedition Act or the CMA, the use of the CMA to investigate and harass the media is a troubling development for freedom of expression in Malaysia.

2014). The Malaysian Communications and Multimedia Commission (MCMC) designated the Communications and Content Multimedia Forum of Malaysia as an industry body to draw up a content code pursuant to sections 95 and 212 of the CMA.

[236] Human Rights Watch interview with Syahredzan Johan, Kuala Lampur, August 6, 2014.

[237] Elizabeth Zacharaih, "Malaysia has blocked 1400 inappropriate websites says Ahmad Shabery," October 14, 2014, http://www.themalaysianinsider.com/malaysia/article/malaysia-has-blocked-1400-inappropriate-websites-says-ahmad-shabery (accessed May 26, 2015).

[238] Human Rights Watch interview with Jahabar Sadiq, Kuala Lumpur, April 9, 2015.

Prosecutions for Tweets and Facebook Postings

The CMA has been used repeatedly to investigate and prosecute social media users for content that others allegedly view as offensive. Chow Mun Fai was charged with violating the Sedition Act for posting disparaging remarks about Islam on his Facebook page. He pled guilty to an alternative charge of violating section 233(1)(a) of the CMA, and was sentenced to the maximum of one year in prison.[239] Blogger Effi Nazrel Saharudin pled guilty to two charges under section 233(1)(a) for posting "offensive" tweets that referred to the king as a "puppet" and a "waste of the people's money." He was fined RM10,000 (US$2,420).[240]

In neither of these cases is there any evidence that the individual intentionally advocated "national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." As the Committee for Independent Journalists noted, Chow "did not advocate violence and his remarks were aimed at expressing his own ill-formed opinions rather than inciting others to do the same."[241] While the remarks made may well have been offensive to some, being offensive or even hurting someone's feelings is not a basis for the suppression of speech under international legal standards.

Blocking of the Sarawak Report

Use of the CMA to restrict public debate increased dramatically in July 2015 in response to online reporting of allegations of corruption involving 1MDB. On July 9, 2015, the MCMC posted a warning on its Facebook page that sharing "unverified news or any speculation on the investigation into 1MDB through social media" would constitute a violation of sections 211 or 233 of the act.[242] On July 14, 2015, MCMC Monitoring and Enforcement Division Chief Zulkarnain Yasin was quoted as saying that the commission

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[239] Suaram, "Malaysia Human Rights Report 2014."

[240] "Twitter user fined RM10,000 for 'offensive tweets' of Agong," *Malay Mail Online*, August 15, 2014, https://my.news.yahoo.com/twitter-user-fined-rm10-000-offensive-tweets-agong-054600491.html?pt=Array.html (accessed October 4, 2014); Suaram. "Malaysia Human Rights Report 2014."

[241] "Hurting someone's feelings is not a crime," *Malaysiakini,* September 21, 2014, http://www.malaysiakini,com/news/274428 (accessed May 26, 2015).

[242] "Don't spread false news on 1MDB probe, Putrajaya warns," *The Malaysian Insider,* July 9, 2015, http://www.themalaysianinsider.com/malaysia/article/no-false-news-social-media-parodies-on-1mdb-probe-putrajaya-warns (accessed July 9, 2015).

was monitoring social media users and would take action against those who "spread lies and baseless allegations which could undermine security and public order."[243]

Less than a week later, the commission issued an administrative order blocking access to the London-based web site *Sarawak Report,* which had reported extensively on the corruption allegations. The MCMC justified the blocking on the grounds that the *Sarawak Report* had uploaded "unverified" information that could "undermine peace and cause national instability, disrupt order and affect economic stability."[244] The commission stated that the blockage would last "until the special task force completes its investigation," apparently referring to the special task force investigating allegations regarding 1MDB.[245]

Clare Rewcastle Brown, the manager of the site, responded by saying that "this is a blatant attempt to censor our exposures of major corruption through the Development fund 1MDB. Sarawak Report will not be impeded in any way by this action in bringing out future information as and when its investigations deliver further evidence."[246] At the time of writing, access to the website remained blocked in Malaysia.

Blocking of Websites Carrying Information on Berish 4.0

On August 27, 2015, the MCMC announced on its Facebook page that it intended to block websites that "promote, spread information and encourage people to join the Bersih 4 demonstration," a 34-hour rally planned for August 29 and 30. The reason given for the block was that providing information about the rally would "threaten national stability."[247]

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[243] "MCMC to monitor social media users spreading provocative news," *The Malaysian Insider,* July 14, 2015, http://www.themalaysianinsider.com/malaysia/article/mcmc-to-monitor-social-media-users-spreading-provocative-news (accessed July 14, 2015).

[244] "MCMC blocks access to Sarawak Report," *The Star Online,* July 20, 2015, http://www.thesundaily.my/news/1494196 (accessed July 20, 2015). The statutory basis for blocking a website is unclear, but the MCMC appears to have relied on section 263(2) of the CMA, which provides that a licensee shall "upon written request by the Commission or any other authority, assist the Commission or other authority as far as reasonably necessary in preventing the commission or attempted commission of an offence under any written law of Malaysia or otherwise in enforcing the laws of Malaysia, including, but not limited to, the protection of the public revenue and preservation of national security."

[245] Ibid.

[246] Cahal Milmo, Sarawak Report whistleblowing website blocked by Malaysia after PM corruption allegations," *The Independent,* July 20, 2015, http://www.independent.co.uk/news/uk/home-news/sarawak-report-whistleblowing-website-blocked-by-malaysia-after-p.m.-corruption-allegations-10402770.html (accessed July 21, 2015).

[247] "MCMC to block websites with information on Bersih 4," *The Malaysian Insider,* August 27, 2015, http://www.themalaysianinsider.com/malaysia/article/mcmc-to-block-websites-with-information-on-bersih-4 (accessed September 2, 2015); "Malaysia blocks anti-government rally organiser website," *BBC News,* August 28, 2015, http://www.bbc.co.uk/news/world-asia-34070655 (accessed September 28, 2015).

Licensing Requirements

The CMA requires "content applications providers" to obtain a license and authorizes the MCMC to impose conditions on that license.[248] Failure to comply with those conditions can lead not only to revocation of the license but also to criminal penalties of up to two years in jail and fines of up to RM100,000 (US$24,196).[249]

The definition of "content applications service" in the CMA is so broad that it could sweep in blogs/blogging platforms and social media sites that host user content.[250] As former UN Special Rapporteur on Freedom of Expression Frank La Rue has stated, however:

> Unlike the broadcasting sector, for which registration or licensing has been necessary to allow States to distribute limited frequencies, such requirements cannot be justified in the case of the Internet, as it can accommodate an unlimited number of points of entry and an essentially unlimited number of users.[251]

Moreover, the fact that license conditions and requirements are not defined in the statute and are instead declared by the minister leaves far too much discretion to government authorities, making the provision ripe for abuse.[252]

Imposition of Criminal Fines on BFM Radio

While licensing of the radio spectrum does not, by itself, raise issues under international legal standards, the imposition of arbitrary conditions and the imposition of criminal penalties for violation of those conditions is a matter of serious concern. The MCMC has used this power to attempt to limit coverage of certain issues by radio stations. Radio station BFM was fined RM10,000 (US$2,420) in December 2014 for broadcasting an interview with religious scholar and author Reza Azlan. In the interview, Azlan criticized Malaysia's ban on the use of the word "Allah" by non-Muslims, saying, among other things, that it was a generic term to refer to "god." The MCMC accused BFM of breaching

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[248] Communications and Multimedia Act of 1998, http://www.agc.gov.my/Akta/Vol%2012/Act%20588.pdf, sec. 205 and 206.

[249] CMA, sec. 206(3) and 242.

[250] CMA, sec.6 ("applications service means a service provided by means of, but not solely by means of, one or more network services;" "applications service provider means a person who provides an applications service").

[251] La Rue Report, May 2011, UN Doc. A/HRC/17/27, para. 27.

[252] CMA sec. 206(2) ("Any special or additional conditions of a licence may be declared by the Minister and included in the licence").

the terms of its license, which requires the station obtain the prior approval of the commission and advice from religious authorities before airing any religious or Islamic programs, and imposed a fine.[253]

Penal Code Section 124B-124N: Activity Detrimental to Parliamentary Democracy

In July 2015, faced with criticism of its use of the Sedition Act and rising public discontent over the 1MDB scandal, the Malaysian government started using additional laws in its efforts to suppress dissent.

Penal code sections 124B and 124C are two of thirteen criminal "offenses against the state" added to the penal code in 2012.[254] The amendments were intended to "amend the penal code in line with the Security Offenses (Special Measures) Act 2012," a law that went into effect on the same day.[255] Among the new offenses were seven relating to activity detrimental to parliamentary democracy, including:

- **Section 124B:** Whoever, by any means, directly or indirectly, commits an activity detrimental to parliamentary democracy shall be punished with imprisonment for a term which may extend to twenty years.
- **Section 124C:** Whoever attempts to commit an activity detrimental to parliamentary democracy or does any act preparatory thereto shall be punished with imprisonment for a term which may extend to fifteen years.
- **Section 124D(1):** Whoever, by any means, directly or indirectly, prints, publicizes, sells, issues, circulates or reproduces any document or publication detrimental to parliamentary democracy shall be punished with imprisonment for a term which may extend to fifteen years.
- **Section 124E(1):** Any person who, without lawful excuse, has in his possession any document or publication detrimental to parliamentary democracy or any extract

[253] "MCMC: BFM contravened license condition," *The Rakyat Post,* December 17, 2014, http://www.therakyatpost.com/news/2014/12/17/mcmc-bfm-contravened-licence-condition/ (accessed June 15, 2015).

[254] Penal Code (Amendment) Act 2012 (adding new sections 124B to 124N).

[255] Explanatory Statement to the bill introducing the amendments, http://www.icnl.org/research/library/files/Malaysia/Act%20to%20amend%20Penal%20Code.pdf.

therefrom, shall be punished with imprisonment for a term which may extend to ten years.[256]

The penal code defines "activity detrimental to parliamentary democracy" as "an activity carried out by a person or a group of persons designed to overthrow or undermine parliamentary democracy by violent or unconstitutional means."[257]

Restricting speech that is designed "to overthrow parliamentary democracy by violent or unconstitutional means" may be necessary in a democracy to protect national security or public order. However, the law is not being used to uphold democracy; it is being used to undermine it.

During July and August 2015, as the furor over the 1MDB scandal mounted and reports emerged that appeared to further implicate Prime Minister Najib in the scandal,[258] the government began using sections 124B and 124C to threaten and arrest those speaking out about those issues and those calling for rallies to protest the government's handling of the crisis. The use of a law designed to counter violent attempts to overthrow the government against peaceful protesters seeking accountability from the prime minister and the government is a clear abuse of the law and a serious infringement of freedom of assembly and freedom of expression. The right of individuals to criticize or openly and publicly evaluate their governments without fear of interference or punishment lies at the heart of protected speech.[259]

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[256] Additional new offenses include sabotage (sec. 124K), attempt to commit sabotage (sec. 124L), espionage (section 124M) and attempt to commit espionage (sec. 124N).

[257] Penal Code, sec. 130A(a).

[258] See, e.g. Tom Wright and Simon Clark, "Investigators Believe Money Flowed to Malaysian Leader Najib's Accounts Amid 1MDB Probe," *The Wall Street Journal,* July 2, 2015, http://www.wsj.com/articles/SB10130211234592774869404581083700187014570 (accessed July 2, 2015).

[259] See, e.g. UN HRC, General Comment 34, para. 38 ("[I]n circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the [ICCPR] on uninhibited expression is particularly high"); European Court of Human Rights, *Nilsen and Johnson v. Norway,* no. 23118/93, Judgment of November 25, 1999, ECHR 1999-VIII, www.echr.coe.int, para. 46 ("[T]here is little scope under Article 10 § 2 of the [ECHR] for restrictions on debate on questions of public interest.")*;* UN HRC, Decision: *Marques de Morais v. Angola,* Communication No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/2002 (2005), http://www1.umn.edu/humanrts/undocs/1128-2002.html (accessed April 14, 2014) (finding a breach of article 19 where author was imprisoned for articles he wrote criticizing the President of Angola); European Court of Human Rights, *Incal v. Turkey,* (no. 22678/93), Judgment of June 9, 1988, Reports 1998-IV, www.echr.coe.int (finding breach of ECHR article 10 when defendant imprisoned for strong criticism of governmental actions against the Kurdish population).

Use Against Tangkap Najib ("Catch Najib") Rally

In late July 2015, the Coalition of Youths for Malaysia (Gabungan Anak Muda Demi Malaysia or "Demi Malaysia"), a group of young activists, announced a rally for August 1 to urge Najib to resign over the allegations surrounding the 1MDB scandal, and to urge the authorities to take action against him.[260] On July 31, at the invitation of the police, several of the organizers went to Dang Wangi police station to discuss the plans for the rally. According to Adam Adli, spokesperson for the group and one of those who attended the meeting, the participants were assured by the police at Dang Wangi that no arrests would be made in advance of the rally.[261] Immediately after the meeting, however, organizers Adam Adli and Syukri Razab were arrested by police from Brickfields police station for "activity detrimental to parliamentary democracy" under section 124B of the penal code.[262] Both were remanded for six days,[263] later reduced to four days by the Kuala Lumpur High Court. According to Adli, the police questioning after his arrest centered on statements made at the July 29 press conference announcing the rally.[264] The police also arrested Mandeep Singh, who appeared voluntarily at the police station later that evening, under the same provision.[265]

According to a press release issued by Demi Malaysia after the rally, protesters who gathered in front of the Sogo department store were met with a heavy police presence and were instructed to disperse.[266] When some of the protesters began peacefully chanting that Najib should resign, the police began arresting people. In total, 29 people were arrested, including a 14-year-old girl who was there with her mother. Kuala Lumpur Police Chief Tajudin Md Isa issued a statement saying that those arrested would be investigated

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[260] Human Rights Watch email correspondence with Adam Adli, September 28, 2015; Hasbullah Anwan Chik, "#TangkapNajib gathering to go on this Saturday despite police warning," *The Malaysian Insider,* July 29, 2015, http://www.themalaysianinsider.com/malaysia/article/tangkapnajib-gathering-to-go-on-this-saturday-despite-police-warning (accessed September 2, 2015).

[261] Human Rights Watch email correspondence with Adam Adli, September 28, 2015.

[262] Ibid; Geraldine Tong, "TangkapNajib rally activists held at Jinjang," *Malaysiakini,* July 31, 2015, http://www.malaysiakini.com/news/306882 (accessed July 31, 2015).

[263] "Adam Adli, Syukri in remand for 6 days, Mandeep for 4 days," *The Malaysian Insider,* August 1, 2015, http://www.themalaysianinsider.com/malaysia/article/adam-adli-syukri-in-remand-for-6-days-mandeep-for-4-days (accessed September 15, 2015).

[264] Human Rights Watch email correspondence with Adam Adli, September 28, 2015.

[265] "Bersih activist Mandeep Singh latest to be arrested," *The Malaysian Insider,* July 31, 2015, http://www.themalaysianinsider.com/malaysia/article/bersih-activist-mandeep-singh-latest-to-be-arrested (accessed July 31, 2015).

[266] Demi Malaysia, press release, August 1, 2015, emailed to Human Rights Watch on August 1, 2015.

under section 124 of the penal code, as well as for unlawful assembly.[267] The arrest of individuals for peacefully exercising their right to assemble and criticize their government is inconsistent with international standards for protection of that right.

Use Against Participants in Peaceful Sit-in

In advance of the Bersih 4.0 rally, a group of students gathered in front of parliament on August 24 and announced that they would remain there until Najib resigned.[268] The following night at around 10:30 p.m., police arrested 17 people. The police requested that all 17 be remanded for seven days to allow time to investigate them for activity detrimental to parliamentary democracy under section 124B and for unlawful assembly, and the court granted a three-day remand.[269] On August 27, a High Court judge shortened the remand period for 16 of the students to two days and released them from custody.[270]

Use Against Bersih 4.0 Organizers

On July 29, 2015, Bersih announced that they would hold a rally from August 29 to 30 to call for institutional reforms to address corruption and for Prime Minister Najib to explain his handling of 1MDB or to resign.[271] The key demands of the rally were described by Bersih Chair Maria Chin Abdullah as being "for free and fair elections, a transparent government, the right to demonstrate, strengthening the parliamentary democracy system, as well as saving the national economy."[272]

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[267] "Protestors arrested under more serious section 124," *Malaysiakini,* August 1, 2015, http://www.malaysiakini.com/news/306999 (accessed September 15, 2015).

[268] Mayuri Mei Lin, "Students hold #OccupyParliament sit-in, vow to stay put until PM quits," *The Malay Mail Online,* August 24, 2015, http://www.themalaymailonline.com/malaysia/article/students-hold-occupyparliament-sit-in-vow-to-stay-put-until-p.m.-quits (accessed September 15, 2015).

[269] Kamles Kumar, "Cops remand 17 students over #OccupyParliament under anti-terrorist law," *The Malay Mail Online,* August 26, 2015, http://www.themalaymailonline.com/malaysia/article/cops-remand-17-students-over-occupyparliament-under-anti-terrorist-law (accessed September 15, 2015).

[270] Yiswaree Palanswamy," 16 #OccupyParliament protesters freed after judge shortens remand period," *The Malay Mail Online,* August 27, 2015, http://www.themalaymailonline.com/malaysia/article/16-occupyparliament-protesters-freed-after-judge-shortens-remand-period (accessed Septembe5 15, 2015). The remaining student faced additional possible charges under section 353 of the penal code for obstructing a police officer.

[271] Bersih news release, "Bersih 5: The Time Has Come," July 29, 2015, https://www.bersih.org/bersih-4-the-time-has-come/ (accessed September 28, 2015]); Hasbullah Awan Chik, "Bersih to march on August 29 to demand Najib's resignation," *The Malaysian Insider,* July 29, 2015, http://www.themalaysianinsider.com/malaysia/article/bersih-to-march-on-august-29-for-najibs-resignation (accessed July 31, 2015).

[272] Choong Boon Siew, "Bersih 4.0 organisers list five demands, propose institutional reforms," *The Sun Daily,* August 20, 2015 (accessed September 28, 2015).

Despite the fact that the organizers of the Bersih 4.0 rally submitted the requisite notice of the rally to the police and met with the police twice to discuss their plans and security for the rally,[273] the government branded the rally "illegal" and warned that action would be taken against the organizers.[274] Inspector General of Police Khalid Abu Bakar was quoted as saying that Bersih was "seeking to topple the government through illegal means."[275]

The Bersih 4.0 rally on August 29-30 was extremely well attended, well-disciplined and peaceful.[276] Bersih chair Maria Chin Abdullah, in a speech at the rally, called for a vote of no confidence in Najib by the Malaysian Parliament.[277] Prime Minister Najib, in a televised address the night of August 30 intended to mark Malaysia's National Day, stated, "We reject any form of street protests as it can threaten public order. It only burdens the people because it does not reflect maturity nor is it the right channel to air views in a democratic country."[278]

On September 1, seven of the organizers of the rally, including Bersih chair Maria Chin Abdullah and secretariat member Mandeep Singh, were summoned for questioning.[279] According to Fadia Nadwa, one of those summoned, they are being investigated for activity detrimental to parliamentary democracy, as well as concealing designs to commit an offense under penal code section 120, and unlawful assembly.[280]

The Film Censorship Act

Malaysia's 2002 Film Censorship Act prohibits the exhibition of any film, whether imported or domestically produced, without first obtaining approval from a board of censors

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[273] Human Rights Watch interview with Maria Chin Abdullah, London, September 28, 2015.

[274] "Human Rights group warms of repercussions if Bersih organisers hauled up," *The Malaysian Insider,* August 31, 2015. http://www.themalaysianinsider.com/malaysia/article/human-rights-group-warns-of-repurcussins-if-bersih-organisers-hauled-up (accessed September 1, 2015).

[275] Muzliza Mustafa, "Bersih deviating from true cause, rally should move to stadium, says IGP," *The Malaysian Insider,* August 17, 2015, http://www.themalaysianinsider.com/malaysia/article/bersih-deviating-from-true-cause-rally-should-move-to-stadium-says-igp (accessed October 4, 2015).

[276] The rally was monitored by two members of the Human Rights Watch staff.

[277] Meyuri Mei Lin, "We want no-confidence vote, says Bersih leader as thousands march in KL," *The Malay Mail Online,* http://www.themalaymailonline.com/malaysia/article/we-want-najib-to-quit-maria-chin-says-at-bersih-4-video (accessed October 5, 2015).

[278] Asrul Hadi Abdullah Sani, "Protesters are traitors with no national spirit: Najib," http://news.asiaone.com/news/malaysia/protesters-are-traitors-no-national-spirit-najib (accessed October 4, 2015).

[279] "Maria Chin, six others summoned by police," *My Sin Chew,* September 1, 2015, http://www.mysinchew.com/node/111118 (accessed September 1, 2015). The others called in for questioning include Bersih 2.0 depuy chair Sarajun Hoda, treaturer Masjaliza Hamzah, national representative Farhana Halim and Fadia Nadwa and activist Adam Adli.

[280] Human Rights Watch email correspondence with Fadia Nadwa, September 2, 2015.

appointed by the government, in clear violation of the right to freedom of expression.[281] Pursuant to section 6 of the act, showing any movie without prior approval, regardless of how innocuous it is, can result in a prison term of up to three years and a fine of no less than RM5,000 (US$1,210) and no more than RM30,000 (US$7,259). The act defines film broadly to include not only cinematograph films, but "a videotape, diskette, laser disc, compact disc, hard disc or other record."[282] As attorney Joshua Tay has pointed out,

Section 6 is absurd, as it can criminalise any video not approved by the censorship board, whether or not the content of the film has a negative effect on the public. This simply means even the possession, display, circulation, exhibition, distribution of innocent cartoons, wedding or family function videos, or even a normal video recorded from your smartphones are caught under Section 6, if there is no approval from the [Censorship] Board.[283]

Section 6 of the Film Censorship Act is an overly broad restriction on freedom of expression that can be and has been used for political ends.

The Prosecution of Lena Hendry

On July 3, 2013, the human rights group Pusat KOMAS organized a private screening at the Kuala Lumpur and Selangor Chinese Assembly Hall of the documentary film "No Fire Zone: The Killing Fields of Sri Lanka." The award-winning documentary reports on war crimes allegedly committed during the conflict in Sri Lanka and shows government artillery attacks on civilians and extrajudicial executions of captured Liberation Tigers of Tamil Elam (LTTE) fighters by government forces. The issues raised in the film have been the subject of United Nations Human Rights Council resolutions in which the Sri Lankan government has been criticized for failing to investigate alleged violations of the laws of war by both sides during the conflict.

According to Pusat KOMAS staff member Lena Hendry,

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[281] Film Censorship Act, http://www.agc.gov.my/Akta/Vol.%2013/Act%20620.pdf.

[282] Film Censorship Act, sec. 3.

[283] Mayuri Mei Lin, "Activist gets court nod to challenge constitutionality of film censorship law," *Malay Mail Online,* March 10, 2015, http://www.themalaymailonline.com/malaysia/article/activist-gets-court-nod-to-challenge-constitutionality-of-film-censorship-law (accessed March 11, 2015).

> On that same day, we had a lunch session screening of the film for members of Parliament. There was no problem, so we decided to go ahead with the evening screening. It was a private viewing, by invitation only. Later, we heard that some people from the Sri Lankan High Commission had visited the venue. It was during lunch, so only an intern was there. They said, "You cannot allow the film. It is full of lies."[284]

The Sri Lankan High Commission also communicated with the Malaysian Ministry of Foreign Affairs and the Censorship Board to urge that the film not be shown.[285] However, since the organizers from Pusat KOMAS had not received any official communication forbidding the film from being shown, they went ahead with the screening. Hendry said:

> There were about 130 people in the audience. Around 8:45 p.m., police and people from immigration and enforcement agencies, some 30-40 personnel, came and asked us to halt the screening. We explained that the screening had already started, so they let us finish. But the audience was told to stay back after so that the immigration people could check IDs, and confirm that there were no refugees. The police then took us, KOMAS staff, to the police station. They later told our lawyer that we were under arrest. We were eventually released on bail. In September, they said that I will be charged under the Censorship Act.[286]

Pusat KOMAS staff member Lena Hendry, Director Anna Har, and Executive Director Arul Prakesh were arrested. While no charges were filed against Har and Prakesh, Lena Hendry was charged, on September 19, 2013, with violating section 6(1)(b) of the Film Censorship Act. The charges against Hendry appear to be motivated by the Malaysian government's desire to appease the Sri Lankan authorities.[287]

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[284] Human Rights Watch interview with Lena Hendry, Kuala Lumpur, August 6, 2014.

[285] "Malaysia: Drop Charges for Film Screening," Human Rights Watch news release, October 20, 2103, http://www.hrw.org/news/2013/10/20/malaysia-drop-charges-film-screening.

[286] Human Rights Watch interview with Lena Hendry, Kuala Lumpur, August 6, 2014.

[287] "Malaysia: Drop Charges for Film Screening," Human Rights Watch news release, October 20, 2103, http://www.hrw.org/news/2013/10/20/malaysia-drop-charges-film-screening.

Callum Macrae, the director of the documentary, issued a statement after the arrest of the Pusat KOMAS staff explaining that he had shown the film in four Commonwealth countries.

My intention in coming to Malaysia was to bring to the attention of the government here the awful crimes of which the Sri Lankan government stands accused…. It is frankly very disturbing that the government authorities in Malaysia—instead of studying this evidence and then asking serious very serious questions of the Sri Lankan government about their responsibility for these crimes—instead seemed to be collaborating with the Sri Lankan Embassy in trying to keep the evidence from public view.[288]

Hendry challenged the constitutionality of section 6(1)(b) of the Film Censorship Act as a violation of freedom of expression under article 10 of the Malaysian constitution. On September 14, 2015, the Federal Court rejected her constitutional challenge and sent the case back for trial. At the time of writing, the lower court had not yet set a trial date.

The Peaceful Assembly Act of 2012

Over the past several years, the Malaysian government has been confronted with an increase in public protests against government or judicial actions, beginning with the launch of Bersih 2.0, the Coalition for Clean and Fair Elections, in 2010. A civil society coalition of lawyers, writers, NGO workers, and activists, Bersih organized large public rallies in 2011 and 2012.

In response, the Malaysian parliament hastily passed the Peaceful Assembly Act (PAA) in November 2012 with little consultation with civil society and in spite of the objections of The Malaysian Bar Council and other citizen's organizations.[289] The law was presented by the government as an advance in protecting the rights of assembly, as it formally revoked the provision in article 27 of the Police Act requiring police permission for public rallies.[290] While it was undoubtedly a positive development to eliminate the requirement for advance

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[288] Callum Macrae, "Statement Issued in Malaysia After the Arrest of Organizers of Screening," Kuala Lumpur, July 4, 2013, copy on file with Human Rights Watch.

[289] The Malaysian Bar, "Malaysian Bar's Memorandum on Peaceful Assembly Bill," November 24, 2011, http://malaysianbar.org.my/bar_news/berita_badan_peguam/malaysian_vars_memoraundum_on_peaceful_assembly_bill.html (accessed March 20, 2104).

[290] Peaceful Assembly Act of 2012, http://www.federalgazette.agc.gov.my/outputaktap/20120209_736_BI_JW001759%20Act%20736%20(BI).pdf.

permission, which police had used repeatedly to prevent pubic assemblies and to arrest those involved in rallies, the PAA itself is seriously flawed.

Article 20(1) of the Universal Declaration of Human Rights specifies that "[e]veryone shall have the right to freedom of peaceful assembly and association." Similarly, article 21 of the ICCPR provides that:

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public)*, the protection of public health or morals or the protection of the rights and freedoms of others.[291]

A restriction on the right to assemble can only be justified if it is (1) "provided by law"; (2) imposed for the purpose of safeguarding respect for the rights or reputations of others, or the protection of national security, public order (*ordre public*), or public health or morals; and (3) necessary to achieve that goal.

Notification Requirement

While the PAA does not (unlike the Police Act) require "permits" for assemblies, section 9(1) of the act requires organizers to provide the police with 10 days' notice before any assembly, along with detailed information about the proposed rally. Section 10 of the act requires the organizer of an assembly to provide, among other details, the name and address of all speakers at the assembly, as well as other more usual details such as time, location, the expected number of participants, and the details of any sound amplification equipment.

The requirement of notification in advance of an assembly is not, of itself, inconsistent with international norms where the notification procedure is not onerous and the purpose of the notification is to allow the state to facilitate the right to assemble and to take steps to protect public safety and the rights and freedoms of others.[292] The government does not,

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[291] The right to peacefully assemble is similarly protected by regional human rights treaties. Article 11 of the European Convention on Human Rights protects the right in terms almost identical to those in article 20 of the ICCPR.

[292] UN Commission on Human Rights, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association Maina Kiai, May 2012, UN Doc. A/HRC/20/27, para. 28; UN Human Rights Committee, Decision: *Kivenmaa v. Finland,*

however, need information about the speakers to facilitate the assembly and protect public safety, nor does it need notice a full 10 days in advance.[293] The notification process should be simplified and the time period for notice significantly shortened to fully protect the right to freedom of assembly. Most importantly, the notification requirements should not be used as an excuse to block or restrict peaceful protests.

Moreover, the law should be amended to include an exception to the notice requirement for spontaneous assemblies where it is not practicable to give advance notice. The ability to respond peacefully and immediately to some occurrence, incident, or speech is an essential element of freedom of assembly, and the authorities are required to protect and facilitate any spontaneous assembly so long as it is peaceful in nature.[294]

The Imposition of Criminal Penalties

Even more troubling than the onerous notice requirements in the Peaceful Assembly Act is that fact that, under section 9(5) of the PAA, anyone who organizes an assembly without giving the required notice can be charged with a criminal offense carrying a fine of up to RM10,000 (US$2,420). The government of Malaysia has used this provision extensively to arrest and prosecute organizers of peaceful protests against the government. Criminal penalties for failure to provide notice are a disproportionate consequence that unduly limits the right to freedom of assembly.[295]

Communication No. 412/1990, U.N. Doc. CCPR/C/50/D/412/1990, June 9, 1994, http://www1.umn.edu/humanrts/undocs/html/vws412.htm ("The Committee finds that a requirement to notify the police of an intended demonstration in a public place six hours before its commencement may be compatible with the permitted limitations laid down in article 21 of the Covenant."); OSCE Office for Democratic Institutions and Human Rights, Guidelines on Freedom of Peaceful Assembly, 2nd ed., para. 4.1 ("Prior notification should, therefore, only be required where its purpose is to enable the state to put in place necessary arrangements to facilitate freedom of assembly and to protect public order, public safety and the rights and freedoms of others.").

[293] OSCE/ODIHR Guidelines, para. 116 ("[T]he period of notice should not be unnecessarily lengthy (normally no more than a few days prior to the event)").

[294] OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, para. 4.2 ("Where legislation requires advance notification, the law should explicitly provide for an exception from the requirement where giving advance notice is impracticable...The authorities should always protect and facilitate any spontaneous assembly so long as it is peaceful in nature."); European Court of Human Rights, *Butka v. Hungary,* (No. 25691/04), Judgment of July 17, 2007, Reports 2007-III, para. 36 (finding the dispersal of a peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of assembly).

[295] UN HRC, Kiai Report, May 2012, UN Doc A/HRC/20/27, para. 29 ("Should the organizers fail to notify the authorities, the assembly should not be dissolved automatically and the organizers should not be subject to criminal sanction, or administrative sanctions resulting in fines or imprisonment.")

When the opposition PKR coalition organized a series of "Black 505" rallies throughout Malaysia in May and June 2013 to protest alleged malfeasance during the May 5 parliamentary elections, the government responded by arresting at least 43 people deemed to be rally organizers for failing provide the required notice 10 days in advance.[296] One of those arrested and charged was PKR Youth Leader Nik Nazmi bin Nik Ahmad, one of the organizers of a large, peaceful rally in Petaling Jaya Stadium in Kuala Lumpur on May 8, 2013.

Nazmi challenged the constitutionality of section 9(5) and, on April 25, 2014, the Malaysian Court of Appeal held that imposition of criminal liability for failing to provide advance notice of a peaceful rally to be a violation of the right to freedom of assembly under the Malaysian constitution.[297] The government appealed the case to the Federal Court, but finally dropped its appeal on May 12, 2015, acknowledging that the Federal Court has no jurisdiction to hear cases that originated in the Sessions Court.[298]

During the period between the Court of Appeal decision and the withdrawal of the government's appeal, however, the government continued to cite section 9(5) when arresting people for participating in assemblies. The government actually sought to charge Nik Nazmi under section 9(5) a second time for the same assembly only a day or two after the Sessions Court formally dismissed the first case. Once again, the Sessions Court dismissed the case, citing the decision of the Court of Appeal. The government appealed to the High Court, which also dismissed the case.[299]

Despite this, when Nik Nazmi was arrested in connection with the February 21, 2015, KitaLawan rally, he was told that the arrest was for violation of section 9(5) of the PAA as well as section 143 of the penal code, and the government cited section 9(5) of the PAA in

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[296] Human Rights Watch, *World Report 2014,* http://www.hrw.org/world-report/2014/country-chapters/malaysia.

[297] *Nik Nazmi Bin Nik Ahmad v. Public Prosecutor* [2014] 4 CLJ 944. On October 1, 2015, a different panel of the Court of Appeal issued a conflicting decision, finding that the imposition of such a criminal penalty was not a violation of the Malaysian Constitution. *Public Prosecutor v. Yuneswaran a/l Ramaraj,* Criminal Appeal No. J-09-229-09/2014, http://www.kehakiman.gov.my/directory/judgment/file/J-09-229-09-2014.pdf.

[298] V. Anbalagan, "Prosecution drops appeals against Nik Nazmi's acquittal in #Black505 case," *The Malaysian Insider,* May 12, 2015, http://www.themalaysianinsider.com/malaysia/article/prosecution-drops-appeal-against-nik-nazmis-acquittal-in-black505-case (accessed June 16, 2015).

[299] In March 2015, Nik Nazmi filed a civil suit against the Attorney General for malicious prosecution and misfeasance in public office in relation to the attorney general's decision to charge him a second time for the same offense after the case had been dismissed, and the decision to appeal the Sessions Court's dismissal of that charge. Human Rights Watch interview with attorney Syahredzan Johan, Kuala Lumpur, April 16, 2015.

its argument for remand.[300] Similarly, when he was arrested after the March 7 KitaLawan rally, section 9(5) was cited in his arrest and remand arguments.

Section 9(5) was also cited in the arrests of, among others, PKR Kelana Jaya Youth Chief Saifullah Zulkifli and PKR's Jingga 13 Head Coordinator Fariz Musa. The government's continued citation of a law that had been declared unconstitutional by the Court of Appeal—a ruling that was valid and binding even during the pendency of the government's appeal—shows lack of respect for the rule of law.[301] On October 6, 2015, five days after the Court of Appeal reversed its prior decision and ruled that section 9(5) is constitutional, the government charged Nik Nazmi for a third time with violating section 9(5) in connection with the Black 505 rally on May 8, 2013.[302]

Prohibition of "Street Protests"

Section 4(1)(c) of the Peaceful Assembly Act specifies that the right to assemble under that Act "shall not extend to…street protests," and section 4(2)(c) makes it an offense to participate in such a protest. A street protest is defined in the statute as "an open air assembly which begins with a meeting at a specified place and consists of walking in a mass march or rally for the purpose of objecting to or advancing a particular cause or causes."[303] The penalty for participating in a street protest is a fine not exceeding RM10,000 (US$2420).

The right to freedom of assembly applies to all types of assemblies, both static and moving,[304] and the blanket prohibition on street protests is a violation of international standards for protection of freedom of assembly.[305]

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[300] Human Rights Watch interview with attorney Melissa Sasidiran, Kuala Lumpur, April 16, 2015; Human Rights Watch email correspondence with Nik Nazmi, June 16, 2015.

[301] Malaysian Bar Council, "Press Release: Police Must Respect Constitutional Rights and Uphold the Rule of Law," March 22, 2015, http://www.malaysianbar.org.my/press_statements/press_release_%7C_police_must_respect_constitutional_rights_and_uphold_the_rule_of_law_.html (accessed October 5, 2015)("A decision of the Court of Appeal, until reversed by the Federal Court, remains enforceable and binding. It is not open to anyone, including the police, to ignore the decision even if an appeal or a review of the decision is pending.").

[302] Alyaa Azhar, "Black 505 rally – lawyer says Nik Nazmi can't be charged again," *Malyasiakini,* October 6, 2015, http://www.malaysiakini.com/news/314682 (accessed October 6, 2015).

[303] PAA, sec. 2.

[304] OSCE/ODIHR Guidelines, para. 17 ("A range of different activities are protected by the right to freedom of peaceful assembly, including static assemblies (such as public meetings, mass actions, 'flash mobs,' demonstrations, sit-ins and pickets) and moving assemblies (such as parades, processions, funerals, pilgrimages and convoys.")

[305] The Peaceful Assembly Act is flawed in other ways as well. Under the PAA, the police have essentially unlimited authority to impose conditions upon the conduct of an assembly. Section 15(2) of the act specifically allows imposition of conditions on,

Demonstrators gather to listen to speakers at the main stage during the second night of the two day, 34 hour long Bersih 4 rally in front of one of the entrances to Dataran Merdeka, in Kuala Lumpur on August 30, 2015. © 2015 Phil Robertson, Human Rights Watch

On September 9, 2015, more than six months after the KitaLawan protests during which thousands of people participated in mass marches, the authorities suddenly filed charges against eight activists and opposition politicians under section 4(2)(c) for unlawfully participating in "street protests" at those rallies. The charges, which came just over a week after the Bersih 4.0 rallies, were filed against Bersih Chair Maria Chin Abdullah, Bersih Secretariat Member Mandeep Singh, activist Adam Adli, Rozan Azan Mat Rasep, Fariz

among other things, "the conduct of participants during the assembly," and "any other matters" that the police deem "necessary or expedient in relation to the assembly." Any person who fails to comply with the restrictions imposed by the police faces a fine of up to RM10,000 (US$2,670). While the time, place, and manner of individual public assemblies can be regulated to prevent them from unreasonably interfering with public safety or other important interests such as national security, public order, or the rights and reputations of others, restrictions must be narrowly drawn to achieve that purpose. Care should be taken to facilitate assemblies within "sight and sound" of their intended target, and "the organizer of an assembly should not be compelled or coerced either to accept whatever alternative(s) the authorities propose or to negotiate with the authorities about key aspects, particularly the time or place, of a planned assembly." OSCE/ODIHR Guidelines, para. 101-103. The PAA also sets out, in the First Schedule, a long list of places near to which public assemblies are not permitted, including schools, places of worship, hospitals, fire stations, railways, petrol stations, public transport terminals, railways, docks, wharves, piers, bridges, and marinas. Taken together, this list of locations near which protests are forbidden to be held would, if enforced, create serious impediments to the legal holding of a public assembly in most urban areas in Malaysia.

Musa, PKR State Assemblyman Chang Lih Kang, PKR State Assemblyman Lee Chean Chung, and PKR MP Sim Tze Tzin.[306] At the time of writing, the case was pending trial.

Others Laws Used to Limit Freedom of Assembly

Faced with restrictions on use of the Peaceful Assembly Act, the government began using section 143 of the penal code, which criminalizes participation in "unlawful assemblies," as a basis to arrest protesters. Section 143 provides that anyone who participates in an "unlawful" assembly can be imprisoned for up to six months, fined, or both. Under section 141 of the penal code, an assembly is "unlawful" if the "common object" of those attending is:

(a) to "overawe" the government or any public servant by criminal force or show of criminal force;

(b) to resist the execution of any law, or of any legal process;

(c) to commit any mischief or criminal trespass, or other offence;

(d) "by means of criminal force, or show of criminal force," to any person, to take possession of their property or otherwise deprive them of a supposed right;

(e) "by means of criminal force or show of criminal force" to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Arrests Relating to the KitaLawan Rallies

While section 143 is clearly aimed at violent protests, it is now regularly being used against peaceful protesters. Even where the organizers have attempted to reach some agreement with the authorities prior to holding an assembly, the arrests have continued.

Several days before the KitaLawan rally held on March 7, the police contacted Nik Nazmi regarding the upcoming rally and he, along with representatives from DAP, PAS, and civil society representatives of the KitaLawan movement, went to the police station to meet with representatives of the police. According to Nazmi, the police suggested that the rally

[306] Adli and Musa were charged in relation to the February 28 rally; Abdullah, Singh, Tzin and Musa in connection with the March 28 rally, and Chong, Rozen and Chung in relation to the March 21 rally.

be held in a fixed area, but the organizers decided to stick to their decision to march.[307] After the meeting concluded, Deputy Inspector General of Police Noor Rashid Ibrahim announced that the planned rally was "illegal" because it would include speeches that "might be seditious, besides actions that could violate the penal code, including intimidating the government."[308] However, Malaysian lawyers told Human Rights Watch that the police do not have the authority to declare a rally illegal in advance.[309]

Following the rally, police arrested at least seven activists and opposition politicians, including Nik Nazmi, PKR Kelana Jaya chief Saifullah Zulkifli, and PKR's Jingga 13 head coordinator Fariz Musa, for allegedly violating section 143 and section 9(5) of the PAA, despite the fact that the assembly was peaceful.[310]

On March 16, 2015, Tian Chua was asked to come to the police station, but the police were too busy to deal with him as it was the day Nurul Izzah Anwar was arrested.

On Friday night, March 20, they again called me to come in. I said I was busy but would come in on Sunday. Nearly a dozen police officers came to my house at midnight. None of them were in uniform. They said they had been told to take me to the police station. I did not open the door and called my lawyer.[311]

After negotiations with Tian Chua's lawyer, the police agreed that he could come to the police station on Saturday morning. The next morning, he went to the police station and was arrested for violating section 143 of the penal code. The magistrate denied the request for remand and he was released the same day.

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[307] Human Rights Watch email correspondence with Nik Nazmi, June 16, 2015.

[308] "DIGP: Kita Lawan rally illegal 'for many reasons,'" *Malaysiakini,* March 5, 2015, http://www.malaysiakini.com/news/291003 (accessed April 12, 2015). Similarly, as discussed above, after the Bersih 4.0 organizers submitted notice of their intent to hold a rally and met with the police to discuss plans and security, the government declared the rally illegal several days before it was due to take place.

[309] Human Rights Watch interview with attorney Melissa Sasidaran, Kuala Lumpur, April 16, 2015; Malaysian Bar Council, Press Release: "Respect and Facilitate – and Not Deter – the Right to Assembly Peaceably and Without Arms," August 22, 2015, http://www.malaysianbar.org.my/press_statements/press_release_%7C_respect_and_facilitate_and_not_deter_the_right_to_assemble_peaceably_and_without_arms.html. Human Rights Watch asked the government to explain the legal basis for declaring an assembly illegal before it actually took place (see Appendix 1), but the government did not respond.

[310] Suaram, "Stop Criminalising Peaceful Assembly," March 10, 2015, http://www.Suaram.net/?p=6921 (accessed March 12, 2015).

[311] Human Rights Watch interview with Tian Chua, Kuala Lumpur, April 10, 2015.

On March 27, when Rafizi Ramli was arrested for sedition for a circular calling for party members to attend the March 28 rally, Tian Chua went to visit him. As he left, the police asked him to come back and make a statement.

I asked a statement on what and they said it was on the same case as Rafizi. I said I had not made a [public] statement [about the rally], and asked whether they would detain me overnight. The police said they had been told to detain me overnight, but I did not go back. I sent an SMS saying "I have a town hall meeting with all of my voters tomorrow morning because the Minister of Federal Territories is coming. I have to be there."[312]

The next morning, as soon as the minister left the town hall meeting, the police arrested Tian Chua in front of his constituents.

They took me to the station and kept me overnight so I would miss the Saturday afternoon KitaLawan rally. On Sunday morning they took my statement and showed me a lot of albums full of photos but did not apply for remand. They had already achieved their purpose of keeping me from the rally.[313]

As of the time of writing he has not been charged in connection with either investigation.

Arrests for the May 1 GST Protest

Similarly, after a largely peaceful rally against the newly imposed goods and services tax (GST), held on May 1, 2015, the government arrested a number of opposition politicians and civil society activists for participating in an "unlawful" assembly. The rally was attended by approximately 10,000 people and the Kuala Lumpur Police Chief, Datuk Tajudin Md Isa, later acknowledged the rally was largely peaceful.[314] While the police arrested 29 individuals, a number of whom were minors, for allegedly setting off smoke bombs, they also arrested or summoned for questioning numerous others, including eight opposition politicians, for participating in an "unlawful assembly" and, in some cases, for sedition.[315]

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[312] Human Rights Watch interview with Tian Chua, Kuala Lumpur, April 10, 2015.

[313] Ibid.

[314] Hasbullah Awan Chik, "Cops want A-G to review Peaceful Assembly Act," *The Malaysian Insider,* May 23, 2015, http://www.themalaysianinsider.com/malaysia/article/cops-want-a-g-to-review-peaceful-assembly-act (accessed June 16, 2015).

[315] The exact number of those arrested at the rally itself was disputed, with the police reporting 29 arrests and lawyers for those detained reporting at least 50 arrests. See "Conflicting claims on post-protest swoop," *Malaysiakini,* May 2, 2015, http://www.malaysiakini.com/news/297005 (accessed May 7, 2015); Nicholas Cheng, "59 anti-GST protesters arrested after

Among those arrested or summoned by the police were: former Bar Council President and former Bersih Chair Ambiga Sreenevasan, then-PSM Secretary General S. Arulchelvan, DAP National Organizing Secretary Anthony Loke, PAS Central Committee Member Mohamad Hatta Ramli, PKR Secretary General Rafizi Ramli, PAS's Shah Alam MP Khalid Samad, KitaLawan Secretariat Member Fariz Musa, Bersih 2.0 Secretariat Officer Mandeep Singh, and activist Hishamuddin Rais. The first four were arrested on May 1 and held overnight, and Ramli and Rais were called in for questioning on May 2, arrested, and released on bail later that day.

Other laws are also being used in the effort to restrict freedom of assembly. As Yap Swee Seng, former executive director of Suaram, commented:

> The government wants to crack down on demonstrations, which are a useful platform for civil society and political parties to mobilize people. . . With less ability to use the PAA, there is a trend of resorting to the penal code, charging people with obstruction, being a public nuisance, or obstructing public officials.[316]

Arrests for the Customs House Protest

Prior to the May 1 rally described above, another gathering protesting the new GST had taken place at the Kuala Lumpur Office of the Customs Service on March 23, 2015. On April 23, 2015, the government charged 50 protesters who had attend the March 23 protest with criminal trespass under section 447 of the penal code and with failure to disperse when ordered to do so under section 21(1)(d) of the PAA.

According to S. Arulchelvan, PSM secretary-general at the time and one of the organizers of the protest, approximately 100 people went to the customs office, where there was a booth set up so people could come and ask questions about how the tax would be implemented. When they arrived, the police were already in place, "so it appeared they had learned

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Friday's rally," *The Star,* May 1, 2015, http://www.thestar.com.my/News/Nation/2015/05/01/anti-gst-rally-twenty-arrested/ (accessed May 2, 2015).

[316] Human Rights Watch interview with Yap Swee Seng, Kuala Lumpur, April 14, 2015.

about what was going to happen."[317] He explained that when the first two members approached the counter, they were seized and the counter was then closed.[318]

Arulchelvan then told everyone to sit down, and told the police that they just had questions about the goods and services tax. He recounted what happened next:

> The customs director came and stood on the staircase. I asked him, "is customs prepared to implement the GST next week and are you ready to take questions?" The director gave a thumbs up. Someone else asked him "why is there no GST on lobster but there is GST on sardines?" The director said "don't ask me that – ask parliament." An elderly woman in the group gave him the list of questions we wanted answered and he left.[319]
>
> The police came and Arulchelvan told police that the group was waiting for the customs director to return and answer their questions.
>
> I told them, if he says he has no further answers for us we will leave. If you want to arrest us let us know and we will walk into the Black Maria [police van].[320]

The group offered to have two persons go to the director's office to pose the remaining questions but that suggestion was denied, so they continued to wait for the director to return. According to Arulchelvan:

> At 5 p.m. precisely, we were cordoned off with police. The police announced "office hours are over. You have five minutes to disperse." But the police were blocking us from dispersing. I told the police that, under the PAA, we have the right to peacefully assemble. While I was talking, the police grabbed the mike and started pushing people and arresting people. Police even arrested people who were trying to leave.[321]

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[317] Human Rights Watch interview with S. Arulchelvan, Kuala Lumpur, April 10, 2015.
[318] Ibid.
[319] Ibid.
[320] Ibid.
[321] Human Rights Watch interview with Tian Chua, Kuala Lumpur, April 10, 2015.

IV. Abusive Police Tactics and Selective Prosecution

The use of overly broad laws to crack down on dissent has been accompanied by a disturbing use of aggressive tactics that seem designed to harass and frighten those critical of the government. As Maria Chin Abdullah commented:

> Social activists and politicians get locked up for anything. They get detained, the government asks for the maximum remand and usually gets a three day remand… There is definitely a selective use of the laws.[322]

One area of concern is the aggressive arrest and detention of individuals under investigation whom police could simply ask to come to the police station to make a statement. After the KitaLawan assembly held on March 28, 2014, for example, six carloads of police, many of whom were carrying M16 assault rifles, came to the house of PAS MP Khalid Samad at 3:20 a.m. the following morning to arrest him for unlawful assembly.[323] According to his lawyer, Hanipa Maidan,

> Khalid was initially told he had made seditious remarks, but when the police took him to the magistrate the next day that was not raised. I challenged the request for remand and the magistrate refused to grant it. The court said Khalid should be released immediately, but the police continued to hold him. He was finally released at 9:30 p.m.[324]

He has not yet been charged with an offense.

As long-time activist and former head of the Women's Aid Organization Ivy Josiah commented:

> The current night time raids are intended to create that climate of fear—"if I speak out maybe they will come for me in the middle of the night"…They are back to doing what they used to do. They don't have to disappear you, or

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[322] Human Rights Watch interview with Maria Chin Abdullah, Kuala Lumpur, April 16, 2015.

[323] Human Rights Watch interview with Khalid's attorney Hanipa Maidin, Kuala Lumpur, April 14, 2015.

[324] Human Rights Watch interview with Hanipa Maidan, Kuala Lumpur, April 14, 2015.

> even lock you up. They just have to harass you and make your life difficult…The intent is to keep civil society so busy putting out fires that the core work is neglected.[325]

In some cases, the police appear to be using arrest and remand as a form of preventive detention. In the days preceding the KitaLawan rally scheduled for March 28, 2014, the police arrested several activists and politicians who were involved in the ongoing rallies. Rafizi Ramli and Hishamuddin Rais were arrested on March 27 and held until after the conclusion of the March 28 rally, and Tian Chua was arrested on the morning of March 28 and held overnight. Rais was seized by a group of men wearing plainclothes as he got out of a taxi the evening of March 27.

> As I leaned forward to pay the taxi they grabbed me. One put his arm around my neck and pulled me, squeezing my neck. They were not wearing uniforms and did not identify themselves.[326]

After being driven around Kuala Lumpur for a while, Rais was finally taken to Dang Wangi police station and detained overnight.

Maria Chin Abdullah, chair of Bersih, witnessed Rais being seized by men in plain clothes and thought that he was being kidnapped. She went to Dang Wangi station to report the kidnapping, saying:[327]

> At first they denied he was there, then they finally admitted it. I was taken upstairs and they started asking me questions about my police report on the kidnapping. The officer told me "by the way, you are on the list for investigation."[328]

The following day, the police asked that Rais be remanded for four days so that they could complete their investigation into violations of section 9(5) of the Peaceful Assembly Act

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[325] Human Rights Watch telephone interview with Ivy Josiah, Kuala Lumpur, April 14, 2015.
[326] Human Rights Watch interview with Hishamuddin Rais, Kuala Lumpur, April 16, 2015.
[327] Human Rights Watch interview with Maria Chin Abdullah, Kuala Lumpur, April 16, 2015.
[328] Ibid.

and section 143 of the penal code. Abdullah continued, "It was an attempt, I think, to assure that the rally on the 28th would fail. But we were not the organizers. It was sending a signal to scare the younger people."[329]

He was finally released at the end of his remand. While, as of the time of his interview, he had not been charged, he noted that "at any time they can trigger this bomb."[330]

Former PAS Deputy President and MP Mohamad (Mat) Sabu was arrested at 1 a.m. on March 28 by approximately 20 policemen, at least half of whom were wearing masks, and told that he was being investigated for sedition and unlawful assembly.[331] According to his attorney:

> He was taken first to the police station in Penang. They gave him a piece of paper saying he had been arrested under section 143 of the penal code. He was then taken to KL, to Dang Wangi police station. There he was told that there was another offense and given a piece of paper saying sedition act 4(1).[332]

When Sabu's attorney, Hanipa Maidin, asked the investigating officer the next morning the substance of his allegedly seditious statement, the investigating officer admitted that Sabu had not made any statements and said that he would not ask that Sabu be remanded. The police did not, however, release Sabu, and it was not until 9 p.m. that night that the police attempted to take his statement. Maidin continued:

> I asked the investigating officer what offense Sabu had committed. He did not respond. Once they finally started taking his statement it became clear that they were alleging he had been involved in the March 7 assembly. I told the police that it was impossible because Mat Sabu was in the UK from March 3 to 9. The police stopped taking his statement and I asked that he be released immediately.[333]

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[329] Ibid.
[330] Ibid.
[331] Human Rights Watch interview with Hanipa Maidin, Kuala Lumpur, April 14, 2015.
[332] Ibid.
[333] Ibid.

Sabu was finally released around 12 a.m. on March 29, long after the rally had ended. He has not, as yet, been charged in the case.

As seen in the case of Hishamuddin Rais, the police frequently request the maximum remand of four days where there is no apparent justification for doing so. According to Rais:

> They said "we need him for four days because we want to investigate about broken pots and pans during the March 7 rally. We need him present because we have photos and videos and want him to make identifications."….For three days I was sitting around in the lock-up. On the last day, they decided to talk to me.[334]

According to Rais' attorney Melissa Sasidaran, "None of these are good grounds for a remand under the law, but some magistrates will give it. Remand is being used to punish people before they are even charged."[335]

Rais noted that when he was finally questioned on the last day of his four day remand, he was not asked to identify anyone from photos or videos. "They asked very little. Just the basics like name, age and profession," he said.[336]

Rafizi Ramli was remanded for three days. While he was arrested during the afternoon of March 27, the police did not try to take a statement from him that day. Instead, they asked the magistrate, on March 28, to remand him for three days. According to Ramli:

> Everything in the investigation could have been done in one day. On Friday, they did not do anything. On Saturday, they tried to take my statement, which took about thirty minutes. They gave an excuse to the magistrate that they needed to get my signature on a daily basis for forensics to compare them. So on Saturday, Sunday and Monday I gave one signature. On

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[334] Human Rights Watch interview with Hishamuddin Rais, Kuala Lumpur, April 16, 2015.
[335] Human Rights Watch interview with Melissa Sasidaran, Kuala Lumpur, April 16, 2015.
[336] Human Rights Watch interview with Hishamuddin Rais, Kuala Lumpur, April 16, 2015.

> Sunday, the police took me to party headquarters to confiscate computers. It has nothing to do with evidence. It was all about justifying the remand.[337]

As the Malaysian Bar Council has stated:

> The detention of individuals overnight should only be to investigate based on evidence that the police have already gathered, and a remand order should only be sought to complete investigations, where there is a risk that the individual may tamper with evidence, or where the individual is likely to be a flight risk. The use of investigative powers to detain individuals under any other circumstances is a blatant abuse of these powers and should be seen as an act of intimidation, harassment and oppression. The overnight detention of individuals and extended remand orders without any basis would only serve to terrorise individuals, and would thus be wholly deplorable.[338]

While held in the prison lock-up, individuals are kept barefoot, given orange or purple prison uniforms to wear, and manacled at the back when being moved from place to place. Rafizi Ramli emphasized that "it is meant to break you mentally. These are [lock-up] rules written by colonialists. They are meant to embarrass you and make you feel less human."[339]

Even individuals who appear voluntarily at the police station to give a statement are frequently arrested the minute they arrive. In the words of attorney Melissa Sasidaran:

> It is ridiculous to arrest people who came in voluntarily. Once arrested, [the police] take the person to the lockup, where no investigation can take place. They don't do anything during the 24 hours they are allowed to hold you, then ask for remand because they have not "finished the investigation."[340]

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[337] Human Rights Watch interview with Rafizi Ramli, Kuala Lumpur, April 15, 2015. Several of those interviewed noted that the publicity around use of the prison lock-up rules against politicians raised awareness of the need to reform the rules governing the treatment of detainees there.

[338] "Investigative Powers of the Police Must Not be Abused to Intimidate, Harass, Oppress and Terrorise," Press release, Malaysian Bar Council, April 2, 2015, http://www.malaysianbar.org.my/press_statements/press_release_%7C_investigative_powers_of_the_police_must_not_be_abused_to_intimidate_harass_oppress_and_terrorise.htm.

[339] Human Rights Watch interview with Rafizi Ramli, April 16, 2015.

[340] Human Rights Watch interview with attorney Melissa Sasidaran, Kuala Lumpur, April 16, 2015.

By contrast, cases involving individuals perceived as sympathetic to the ruling coalition are generally handled quite differently, if they are pursued at all. While Human Rights Watch is not arguing that any of these individuals should necessarily have been charged with a crime, the disparate treatment of those perceived as supportive of the government and those opposed to it is extremely troubling.

When Mashitah Ibrahim, a former deputy minister in the ruling coalition, made a false claim that Malaysians of Chinese descent were "burning Qurans," she was not arrested or remanded, but simply interviewed and allowed to leave.[341] Similarly, when Agriculture and Agro-Based Industries Minister Ismail Saabri made a derogatory statement about Chinese businessmen, he was allowed simply to come in to the police station, give a statement, and leave in peace. When Home Minister Zahid Hamidi was questioned in parliament about why Mashitah and Saabri were not arrested or detained but simply questioned by the police, he responded that "only if they can't finish the investigation within 24 hours we will detain someone. For these two parties, we finished the probe by summoning them.[342]

At the time of writing, neither had been charged with any crime.

After former Prime Minister Mahathir issued a series of public statements criticizing Prime Minister Najib, IGP Khalid abu Bakar announced that Mahathir's statements were "not seditious."[343] When asked about the nine sedition charges against Zunar, who often criticizes Najib on the same topics, Khalid was quoted as saying, "he asked for it. You ask for it, you got it. So watch out."[344]

Similarly, when 50 people protested outside a church in Taman Medan, demanding that the church remove its cross, no arrests were made and the inspector general of police, whose brother was among the protestors, announced in a press conference that the

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[341] Ibid; Suaram, "IGP Must Resign for his Abuse of Power and Misconduct," Press release, March 25, 2015, http://www.Suaram.net/?p=6982 (accessed June 9, 2015).

[342] Ram Anand, "Zahid: Mashitah, Ismail freed due to swift probe," *Malaysiakini,* March 24, 2015, http://www.malaysiakini.com/news/293045 (accessed May 28, 2015).

[343] Adrian Wong, "Police Chief clears Mahathir of sedition," *Malaysiakini,* April 3, 2015, http://www.malaysiakini.com/news/294202 (accessed May 28, 2015).

[344] Ibid.

protesters were "not seditious."[345] While a number of people were ultimately investigated in connection with the protests, none were remanded, arrested, or even held overnight. In a written reply to a question posted by DAP MP Lim Guan Eng, Home Minister Zahid Hamidi said:

> No arrests were made on those involved in the protest since all of them showed up at the police station when directed to do so to facilitate investigations by giving their full statements. So there was no need to arrest, handcuff or remand them.[346]

One of the few government supporters to be charged with sedition, Malay Armed Forces Veterans Association President Mohamed Ali Baharom, also known as Ali Tinju, saw the charges dismissed after two months on orders of the attorney general.[347] Tinju faced sedition charges for urging a crowd to "unite and attack the DAP Chinese who are rude."[348]

As Malaysian Bar Council president Steven Thiru said in a May 7 press release, "such seemingly inconsistent treatment by the police lends to the perception that the police practise selective or unfair policing."[349]

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[345] Austin Camoens, "IGP: 'Cross' protest not seditious or criminal," *The Star,* April 20, 2015, http://www.thestar.com.my/News/Nation/2015/04/20/Cross-Protest-IGP/ (accessed April 21, 2015).

[346] "Taman Medan church protesters never arrested as they gave full cooperation, says Ahmad Zahid," *Malaysian Edition,* May 19, 2015, http://www.malaysiaedition.net/taman-medan-church-protesters-never-arrested-as-they-gave-full-cooperation-says-ahmad-zahid (accessed June 23, 2015).

[347] "AG drops sedition charge against Ali Tinju," *Malaysiakini,* September 17, 2015, https://www.malaysiakini.com/news/312658 (accessed September 17, 2015).

[348] "Ali Tinju charged with sedition," *The Malaysian Insider,* July 16, 2015, http://www.themalaysianinsider.com/malaysia/article/ali-tinju-charged-with-sedition (accessed September 17, 2015).

[349] "Right to Peaceful Assembly Rendered Illusory by Arbitrary Arrests and Oppressive Remand Orders," Malaysian Bar Council Press Release, May 7, 2015, http://www.malaysianbar.org.my/press_statements/press_release_%7C_right_to_peaceful_assembly_rendered_illusory_by_arbitrary_arrests_and_oppressive_remand_orders.html (accessed May 8, 2015).

V. Profiles of Critics Targeted by the Government

The following examples demonstrate in more detail the government's use of multiple laws to target outspoken critics.

Forbidding Cartoons: The Targeting of Zunar

Zulkiflee SM Anwar Ulhaque, better known as Zunar, has been a political cartoonist for nearly two decades, publishing books and magazines. Zunar described his philosophy as follows:

> The job of a cartoonist is to criticize the government of the day. In a country such as Malaysia, a cartoonist needs to do more than criticize—he needs to fight. A cartoonist must carry out the people's voices through cartoons because people are not allowed to express their frustrations themselves.[350]

Zunar uses his drawings to comment on Malaysian political issues such as the sodomy trial of ex-Deputy Prime Minister Anwar Ibrahim, racism, corruption, and the misuse of public funds, but also focuses on fundamental human rights issues such as the abuse of power, police force problems, and the independence of the judiciary. Zunar says that through his cartoons he hopes to supply alternative perspectives to the information usually available through government-controlled media outlets:

> I want the Malaysian people to realize that they are the ones who suffer from what the government does… In Malaysia not many people are brave enough to confront the government. But they can laugh at it. Laughter is the easiest protest—they can't prohibit laughter.[351]

While the government can't prohibit laughter, it appears not to find Zunar's cartoons humorous and has used a variety of laws, including the Printing Presses and Publications Act, the Sedition Act, and provisions of the penal code, to suppress and limit access to his work. In August 2009, a political cartoon magazine, *Gedung Kartun* (*Cartoon Store*),

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[350] Human Rights Watch interview with Zunar, Kuala Lumpur, April 10, 2015.

[351] "Zunar in Conversation with Martin Rowson," Free Word Centre, London, May 14, 2105, attended by Human Rights Watch researcher.

produced in collaboration with other cartoonists, was banned under section 7 of the Printing Presses and Publications Act and home ministry officers seized more than 408 copies of the book from Zunar's office.

In June 2010, the Malaysian government banned Zunar's political cartoon publications, *1Funny Malaysia*, and *Perak Darul Kartun* under section 7 of the PPPA, claiming that the contents were prejudicial to public order.[352] The authorities also confiscated hundreds of copies of the books from bookstores throughout the country and threatened to hold the booksellers legally liable in court if they continued to sell his books. According to Zunar, the authorities confiscated printing plates from the factory where one of the books was printed and threatened printing press owners with withdrawal of their printing license if they did not stop printing his books: "About 20 policemen raided my printer. They asked to see the owner of the license. And they said very clearly to him, 'Don't print Zunar's books.'"[353]

Zunar challenged the ban on the books in court and, in October 2014, the Malaysian Court of Appeal lifted the ban on *1Funny Malaysia* and *Perak Darul Kartun,*[354] finding that they were not a threat to national security or public order.[355] The Ministry of Home Affairs, in a letter dated November 10, 2014, notified Zunar that it intended to appeal the decision, insisting that his cartoons are prejudicial to public order, and on May 12, 2015, the Federal Court granted the government leave to appeal.[356] In the meantime, the books remain unavailable in Malaysia.

On September 24, 2010, several hours before the release of *Cartoon-O-Phobia*, a collection of his political cartoons which had appeared on the *Malaysiakini* website between December 2009 and September 2010, 10 police officers raided Zunar's office in the Brickfields section of Kuala Lumpur and seized 66 copies of the book. At the same time, 15

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[352] "Banning of Zunar's 1Funny Malaysia & Perak Darul Kartun," https://www.zunar.my/news/banning-of-zunars-1funny-malaysia-perak-darul-kartun-the-appeal-is-on-15th-july-2013/ (accessed June 17, 2015).

[353] Human Rights Watch interview with Zunar, Kuala Lampur, August 4, 2014.

[354] "Zunar and Malaysiakini's media statement on court challenge against ban on books," July 26, 2010, http://cijmalaysia.org/2010/07/27/zunar-and-malaysiakinis-media-statement-on-court-challenge-against-ban-on-books/ (accessed April 27, 2015).

[355] V. Anbalagan, "Court lifts ban on Zunar's cartoon books," *The Malaysian Insider,* October 9, 2014, http://www.themalaysianinsider.com/malaysia/article/court-lifts-ban-on-zunars-cartoon-books (accessed June 17, 2015.)

[356] "Putrajaya gets leave to ban cartoonist Zunar's books again," *The Malaysian Insider,* May 12, 2015, http://www.themalaysianinsider.com/malaysia/article/putrajaya-gets-leave-to-ban-cartoonist-zunars-books-again (accessed May 13, 2015).

police officers went to the printing factory to search for more books and continued their search the following day at the *Malaysiakini* office. Zunar was arrested for sedition and jailed for two days.[357] As Zunar describes it:

> In 2010, I published *Cartoon-o-phobia*. The police came and arrested me under the Sedition Act. They confiscated the book and the original cartoon. They kept me in a police lock up all night. Next morning, they produced me in court. They had moved me so many times, my lawyers did not know where I was. I appeared before the magistrate alone. I said, "The book came out yesterday. How do the police know it's seditious?" The magistrate asked the police, "Did you read the book?" The police said they had not. So the magistrate released me.[358]

Zunar filed a civil suit alleging that his arrest was unlawful, and seeking return of the seized books. While the court ordered that the books be returned, it found that his arrest was lawful, and both rulings were upheld by the Court of Appeal.[359]

In 2014, Zunar published two new political cartoon books: *The Conspiracy to Imprison Anwar,* about the sodomy prosecution of Anwar Ibrahim, and *Pirates of the Carry-BN.* The government intensified its efforts to silence him, proceeding against not just Zunar but all of those associated with him. On November 8, 2014, his three assistants were arrested and accused of violating the Sedition Act, the Printing Presses and Publications Act and the criminal defamation provision of the penal code by selling copies of his two new books.

They were asked things like "how do you know Zunar?" "Does he pay you to sell his books?" "Do you know this is a banned book?" My assistants responded that the book was not banned. All of the questions were designed to connect them with my business.[360]

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[357] Reporters Without Borders, "Cartoonist arrested on suspicion of sedition," Press Release, September 28, 2010, http://en.rsf.org/malaisie-cartoonist-arrested-on-suspicion-28-09-2010,38443.html (accessed June 17, 2015).

[358] Human Rights Watch interview with Zunar, Kuala Lampur, August 4, 2014.

[359] "Cartoonist Zunar loses court appeal over illegal arrest, book seizure," *The Malay Mail Online,* September 21, 2014, http://www.themalaymailonline.com/malaysia/article/cartoonist-zunar-loses-court-appeal-over-illegal-arrest-book-seizure (accessed September 20, 2015).

[360] Human Rights Watch interview with Zunar, Kuala Lumpur, April 10, 2015.

At the same time, 44 copies of the books were confiscated by the police. A few days later, Zunar's webmaster was called in for questioning under the Sedition Act. The webmaster, who had been maintaining Zunar's website without charge, subsequently decided that he could no longer do so because of the risk to his own business.[361]

On November 16, the police contacted the online payment company that processes payments for books sold through Zunar's website and demanded the names of everyone who had purchased one of his books.[362] The company had no choice but to comply. On November 20, Zunar himself was questioned at the police station for allegedly violating the Sedition Act, the Printing Presses and Publications Act, and the criminal defamation provision of the penal code.

On January 28, 2015, Zunar's office was again raided and more than 150 copies of *The Conspiracy to Imprison Anwar* and *Pirates of the Carry-BN* were seized. Zunar was scheduled to launch a new book, *Ros in Kangkong Land,* on February 14. He recounted:

> I went to the launch, but the books were not there. I found out the police had blocked the printer's lorry and taken all of the books being delivered to the launch.[363]

On February 28, he tried again to launch the book but a large number of police came to the event site and threatened to detain him if he proceeded. The book is still not available in bookstores in Malaysia. Zunar continued: "the fear is that not only will the police come and seize the book but that their business license [to run a bookstore] will be at risk."[364]

According to Zunar, an assistant who helps manage online sales of his latest book, *Sapuman - Man of Steal,* was told to appear for police questioning under the Sedition Act on October 5, 2015.[365]

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[361] Ibid.
[362] Ibid.
[363] Ibid.
[364] Ibid.
[365] Human Rights Watch email correspondence with Zunar, September 29, 2015.

Zunar says he continues to share his work, but the government actions have been effective in reducing his reach:

> I do what I want to do. Otherwise it creates self-censorship. But the book shop will not keep any of my books. Printers don't want to print my book. They all worry that they will have to deal with the police. They don't want the trouble. I will keep drawing. But the government is going to say, "Sure, keep drawing. But nobody wants to print your books. No one wants to sell your books." That way, the government has been very successful in what they did. It is sad. Today, in Malaysia, either you are a government supporter or an opposition supporter. There is no place for people.[366]

In addition to the continuing government efforts to prevent distribution of his work, Zunar is now facing the possibility of a lengthy prison sentence for tweets he sent commenting on political events. On February 10, 2015, the Malaysian Federal Court upheld the sodomy conviction of political opposition leader Anwar Ibrahim in what is generally considered to be a politically motivated case. Zunar sent nine tweets that day commenting on the verdict.

The following evening, he was arrested at his home by 10 police officers, escorted to the police station, held overnight, and then ordered remanded for several days. As Zunar has said:

> If I criticize a government official or judge and they don't like it, I am fine if they sue me for defamation. That is the democratic way. But they are using a criminal law against me. They came to my house at night, handcuffed me, and treated me like a criminal. That is not right.[367]

On April 3, Zunar was charged with nine counts of sedition—one for each tweet—and the prosecutor asked that he be required to post bail of RM5,000 ($US1,397) for each charge, for a total of RM45,000 (US$US12,580). According to Zunar:

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[366] Human Rights Watch interview with Zunar, Kuala Lumpur, August 4, 2014.

[367] Human Rights Watch interview with Zunar, London, May 18, 2015.

> The week before the hearing my lawyer was told it was only for one charge. At 3 p.m. the day before the charge hearing, they called her and told her that it would be nine charges. Because bail is per charge, I was facing very high bail with little time to put it together. It is like punishment before trial.[368]

The magistrate set his bail at RM22,500 (US$5,444). Zunar is currently out on bail awaiting trial. If convicted on all counts, Zunar faces up to 43 years in jail.

A defiant Zunar posted a new cartoon on Twitter after his release on bail, vowing to "draw until the last drop of ink." The cartoon showed Zunar manacled and with a metal chain on his neck, but still drawing with a brush in his mouth. According to Zunar, while he was detained the police also opened a separate sedition investigation in connection with his books *The Conspiracy to Imprison Anwar* and *Pirates of the Carry-BN.*

When asked whether he feels the sedition charges are connected to his political cartooning, Zunar responded "definitely…it is clearly a politically motivated charge." As he explained:

> They tried to ban my books, but I kept producing them. Then they went after booksellers and printers so on one would print or sell my books, but I kept producing them. Then they went after my webmaster and online pay portals so no one could buy my books, but I kept producing them. These charges are a way to finally silence me.[369]

Zunar is pessimistic about his chances at trial:

> This is politically motivated so my chances of getting off are almost zero. . . It is just normal fair criticism—they should just reply. But if they really want to put me in jail, they will.[370]

Human Rights Watch awarded Zunar the prestigious Hellman Hammett award, given to writers and artists who face persecution for their work, in 2011 and again in 2015.

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[368] Human Rights Watch interview with Zunar, Kuala Lumpur, April 10, 2015.
[369] Human Rights Watch interview with Zunar, London, May 18, 2015.
[370] Human Rights Watch interview with Zunar, Kuala Lumpur, April 10, 2015.

Wearing Down the Opposition: The Targeting of Rafizi Ramli

Rafizi Ramli, secretary general of the People's Justice Party (PKR), is certain that he is going to jail—he is just not sure which of the many cases the government has filed against him will ultimately send him there. Ramli is facing criminal charges under three different laws and is the subject of at least four sedition investigations and several investigations under section 143 of the penal code.

Ramli's trial for violating section 504 of the penal code began in March 2015 and is ongoing. The case arises from a statement quoted in online news portal *fz.com* and subsequently in *The Edge Financial Daily* on February 4, 2015, that suggested that the UMNO was attempting to undermine the ruling coalition in Selangor State (headed by the PKR) by using policies emphasizing race and religion. Among other things, Ramli was quoted as saying:

> You can only see the issues and also campaigns conducted by UMNO Selangor in the last few months and they harped on one issue which is race and religion. For many years we haven't seen this kind of demonstration in front or around places of worship, in front of churches and threats and people marching and protesting against Christians and so on. And of course in the last one or two weeks we have seen some violence, with Molotov cocktails being thrown. These are things that don't happen on their own. It's planned and endorsed and being carried out by UMNO Selangor.[371]

After a member of the UMNO filed a complaint, the police opened an investigation and asked Ramli to come in and give a statement.

According to Ramli, when he was first asked to give a statement, he was told that he was being investigated for sedition. However, since his statement was not about the government but about a political party, he opined "they apparently decided that they could not proceed with sedition charges."[372] On August 28, 2014, he was charged with violating

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[371] Azril Annuar, "Analyst: Will Rafizi Quit if Selangor is not toppled?" *fz.com,* February 4, 2014, http://www.fz.com/content/exclusive-will-rafizi-quit-if-selangor-not-toppled-analyst (accessed may 20, 2015).

[372] Human Rights Watch interview with Rafizi Ramli, Kuala Lumpur, April 15, 2015.

section 504 by insulting members of the Selangor UMNO. As previously discussed, the trial was ongoing at the time of publication.

Ramli is also facing criminal charges arising from the "Black 505" rally held on June 22, 2013, to protest the outcome of the 2013 general election. Ramli is charged with violating section 9(5) of the Peaceful Assembly Act by failing to give notice 10 days in advance of the rally. After the Court of Appeal held the imposition of criminal penalties for failure to give notice unconstitutional in a case involving an identical charge against Nik Nazmi, Ramli and his co-defendants moved to strike the charge against them. The Sessions Court refused to do so pending resolution of the government's appeal of the decision in the Nazmi case.[373] In light of the October 5, 2015, decision of the Court of Appeal holding, in contradiction to the decision in the Nik Nazmi case, that section 9(5) is not inconsistent with the Malaysian constitution, the case is likely to once again move forward.[374]

Ramli is also the subject of five different sedition investigations, two relating to his comments on the prosecution of Anwar Ibrahim. He said that, after the Court of Appeal decision:

> I felt that the mainstream media did not report what actually happened in court—it just reported rumor and innuendo. So, I wrote a small book setting out the facts of what actually happened in court. They said I was "running down the judiciary" and I was investigated for sedition.[375]

In February 2015, after the Federal Court affirmed Anwar Ibrahim's conviction, Ramli expressed his view of the verdict by sending a tweet showing a judge with dollar signs on

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[373] Joseph Sipalan, "Court strikes out acquittal for PAA charges against Padang Merbok four," *Malay Mail Online,* May 15, 2014, http://www.themalaymailonline.com/malaysia/article/court-strikes-out-acquittal-for-paa-charges-against-padang-merbok-four (accessed September 20, 2015).

[374] Ramli is also currently facing charges under section 97 of the Banking and Financial Institutions Act 1989 (BAFIA) for releasing confidential banking information. According to Ramli, he released a screen shot of government minister's banking records to expose his involvement in corruption. Possible penalties include up to three years in prison and a fine of up to RM3,000,000 (US$810,000). On August 3, 2015, the High Court granted a stay of the case pending Ramli's constitutional challenge to the law. That challenge is pending.

[375] Ibid. See also Dina Murad, "NGO files police report over Rafizi book," *The Star Online,* April 9, 2014, http://www.thestar.com.my/News/Nation/2014/04/09/NGO-Police-report-rafizi/ (accessed July 28, 2015); "Rafizi being probed over 'Reformasi 2.0' book," *Malaysiakini,* May 14, 2014, http://www.malaysiakini.com/news/262748 (accessed July 28, 2015).

his wig.[376] He was subsequently one of the many individuals investigated for sedition for criticizing the verdict.

He was also investigated for sedition in July 2014 after releasing information about what he viewed as the preferential treatment given by Bank Rakyat, a state owned bank, to a friend of the prime minister's wife when he defaulted on a large loan.[377] The police told him, during the investigation, that he was "trying to destroy confidence in the banking system."[378]

According to Ramli, the sedition investigation arising out of the KitaLawan rallies was the worst. Ramli, as secretary general of the PKR, wrote and distributed a circular to party members encouraging them to attend the rally on March 28. The police came to his house on the afternoon of March 28 and detained him under the Sedition Act. He was held overnight, and then remanded for three days, thereby ensuring that he would miss the rally. On March 29 the police took him to PKR headquarters, where they seized computers, a KitaLawan circular and a copy of Ramli's statement to the media.

Ramli was also arrested and questioned for sedition and unlawful assembly for his participation in the May 1 rally against the goods and services tax.[379] While he has not yet been charged in any of the sedition cases, he could be charged at any time, and the steady stream of investigations and charges eats deeply into his time:

> What it does, it wears you down. Every week you spend 2-3 days sitting in the court. It is a form of indirect harassment. It slows you down and takes you away from your responsibilities as an MP.[380]

Conviction in any of these cases would mean a five year disqualification from parliament after the conclusion of any sentence. Ramli said:

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[376] Ibid.

[377] Nigal Aw, "Sedition probe of Rafizi on Bank Rakyat letter," *Malaysiakini,* July 25, 2015, http://www.malaysiakini.com/news/269874 (accessed June 16, 2015).

[378] Human Rights Watch interview with Rafizi Ramli, Kuala Lumpur, April 16, 2015.

[379] Ida Lim, "PKR's Rafizi arrested for sedition, illegal assembly over anti-GST rally," *The Malay Mail Online,* May 2, 2015, http://www.themalaymailonline.com/malaysia/article/pkrs-rafizi-arrested-for-sedition-illegal-assembly-over-anti-gst-rally (accessed September 26, 2015).

[380] Ibid.

> They don't understand our mentality. I don't want to be in politics. I am in politics because I feel it is the best way to make change. I would be happier to just be an activist. I don't want to be a minister or hold high public office, so what they think will frighten me won't deter me.[381]

When asked how he feels about the possibility of going to jail, Ramli said:

> I know I am likely going in. I am prepared…It is part of the price that has to be paid to bring about political change…We need to make sure that every time one of us gets put in prison, there are others to take our place.[382]

[381] Ibid.
[382] Ibid.

VI. Other Laws that Restrict Freedom of Expression

The Malaysian government has shown clearly that, when the need arises, it is willing to search the statute books for laws to use against its critics. It is therefore crucial that overly broad laws with the potential for abuse be amended or repealed regardless of whether or not they are currently being used. The very existence of some of these laws, and the fear that they will be dusted off and used to harass, arrest, or prosecute, has a chilling effect on the free exchange of ideas that is at the heart of the right to free expression and democracy.

The Official Secrets Act of 1972 (amended 1986)

The Official Secrets Act (OSA) is a broad ranging law bill that penalizes receiving or disseminating a wide and undefined range of documents, particularly government documents.[383] The OSA also includes a very broadly worded offense of "spying." Although the law is only infrequently used, the breadth of its language and the severity of the penalties that can be imposed place a chill on freedom of expression.[384]

The OSA puts severe limitations on the ability of anyone in or connected to government to disclose government information. Section 8(1) of the act makes it an offense for any person who holds or has held office or has worked under contract for the government or been employed by any such person to:

(1) Communicate any "official secret or any secret official code word, countersign or password" that he received or had access to by virtue of his position to anyone other than those to whom he is specifically authorized to disclose it;

(2) Retain any such document or information when he has no right to retain it; or

(3) Fail to take reasonable care of such document or information.

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[383] Official Secrets Act (OSA), http://www.agc.gov.my/Akta/Vol.%202/Act%2088.pdf.

[384] Anwar Ibrahim's aide Mohamad Ezam Noor was convicted of violating the Official Secrets Act in August 2002 for passing on to journalists details of corruption inquiries into high-profile members of Prime Minister Mahathir Mohamad's ruling party. He was sentenced to two years in jail. "Malaysian court convicted Anwar ally," *BBC News,* August 7, 2002, http://news.bbc.co.uk/1/hi/world/asia-pacific/2177788.stm (accessed August 12, 2015). Nathaniel Tan, another Anwar aide and a PKR staff member, was arrested under the OSA in July 2007, but never charged. Andrew Ong, "OSA probe: 4 day remand for blogger," *Malaysiakini,* July 14, 2007, http://www.malaysiakini.com/news/69939 (accessed August 12, 2015).

It is also an offense for anyone to receive such a document or information "knowing or having reasonable ground to believe" that it is communicated in contravention of the OSA.[385] Section 9 of the act makes it an offense for "any person for any purpose prejudicial to the safety of Malaysia," to (1) retain *any official document,* (2) allow any other person to have possession of any official document, or (3) fail to return any official document that he finds or that otherwise comes into his possession.[386] Each of these offenses carries a possible penalty of up to seven years in prison.

Although purporting to control access to "official secrets," the statute provides no limitation on what may be classified as secret.[387] The imposition of criminal penalties for the disclosure of documents by public employees, without any requirement that the disclosure pose a real risk of harm, violates international standards for the protection of freedom of expression. According to the Global Principles on National Security and the Right to Information (the Tshwane Principles), criminal cases against those who leak information should be considered only if the information disclosed poses a "real and identifiable threat of causing significant harm" to national security.[388] Moreover, public interest in the disclosure should be available as a defense in any such prosecution.[389] Pursuant to the Tshwane Principles, journalists and others who do not work for the government should not be prosecuted for receiving, possessing or disclosing even

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[385] OSA, Sec. 8(2).

[386] Emphasis added.

[387] Section 2 of the OSA defines "official secret" to mean "any document specified in the Schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as 'Top Secret', 'Secret', 'Confidential' or 'Restricted', as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under section 2B." The Schedule referred to includes "Cabinet documents, records of decisions and deliberations and decisions of Cabinet committees; State Executive Council documents, records of decisions and deliberations including those of State Executive Council Committees; and documents concerning national security, defence and international relations." Section 2B allows a minister, Menteri Besar or the Chief Minister of a state to appoint any "public officer," defined as "any person holding any office or employment in or under any public service," to classify documents.

[388] The Global Principles on National Security and the Right to Information (Tshwane Principles), https://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf, princ. 43 and 46. The Tshwane Principles were launched in Tshwane, South Africa on June 12, 2013, to provide guidance to those engaged in drafting, revising, or implementing laws or provisions relating to the state's authority to withhold information on national security grounds or to punish the disclosure of such information. The Principles were drafted by 22 organizations and academic centers in consultation with more than 500 experts from more than 70 countries at 14 meetings held around the world, facilitated by the Open Society Justice Initiative, and in consultation with the four special rapporteurs on freedom of expression and/or media freedom and the special rapporteur on counter-terrorism and human rights.

[389] Tshwane Principles, princ. 43(a) ("Whenever public personnel may be subject to criminal or civil proceedings, or administrative sanctions, relating to their having made a disclosure of information not otherwise protected under these Principles, the law should provide a public interest defense if the public interest in disclosure of the information in question outweighs the public interest in non-disclosure.").

classified information to the public, or for conspiracy or other crimes based on their seeking or accessing such information.[390]

By criminalizing the disclosure, possession, or receipt of documents or information without the necessity of demonstrating that disclosure of such a document or information would threaten national security or public order, section 8 of the OSA fosters a culture of secrecy that runs counter to the public's interest in access to information about government activity.[391] Yin Shao Loong, executive director of Institut Rakyat, commented on the impact of the act:

> While charges are rarely brought under the Official Secrets Act, as a former civil servant I know the threshold is very low and it creates a real chilling effect on any whistleblowing. While there is a schedule of what the act theoretically covers, those working in government have a sense that you don't disclose things.[392]

The breadth of the act is even more troubling in the context of its definition of "spying," which carries a penalty of life imprisonment.[393] The OSA defines the offense of "spying" extremely broadly to include the making or receiving of any document that is "calculated to be," "might be" or is "intended to be" "directly or indirectly useful to a foreign country."[394] The statute does not require that the conduct result in any actual harm to national security, or even that it create an objective risk of such harm. Rather, it requires only that the individual be acting "for any purpose prejudicial to the safety or interest of Malaysia" and that the material be potentially "useful" to another country.

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[390] Tshwane Principles, princ. 47.

[391] The Ontario Superior Court of Justice invalidated a provision strikingly similar to Malaysia's Section 8 in Canada's Security of Information Act ("SOIA"), finding that it imposed impermissible restrictions on free expression in violation of the right to freedom of expression under Canada's Charter of Rights and Freedoms. *O'Neill v. Canada (Attorney General)*, 82 O.R. 3d 241, 2006.

[392] Human Rights Watch interview with Yin Shao Loong, Kuala Lumpur, April 14, 2015.

[393] Official Secrets Act, sec. 3 (Penalties for Spying).

[394] Section 3(a) prohibits approaching, inspecting or passing over a prohibited place; section 3(b) prohibits the making of any documents meeting the above standards; section 3(c) prohibits the obtaining, collection or dissemination of any secret password or sign or "any article, document or information" which meets the above standards.

Being "useful" to another country is not the same as being a threat to national security.[395] The statute is far too broad to be justified as "necessary" to protect national security, and too vague to enable, for example, journalists and academic writers to know for certain when they might fall afoul of the law. A journalist investigating a report of defective military equipment, or an academic writing about missile technology, could find themselves charged with "spying" on the theory that their writings "could benefit" other countries. Fear of that outcome is likely to lead to self-censorship.

Section 16, which governs all prosecutions under the OSA, provides that:

> The accused person may be convicted if, from the circumstances of the case, his conduct or his known character as proved it appears that his purpose was a purpose prejudicial to the safety or interests of Malaysia.

The ability to use the "known character" of a defendant to prove that he or she was acting for a purpose "prejudicial to the safety or interest of Malaysia" is an open invitation to the government to use the law against those known to be critical of the government.

Penal Code Section 203a: Disclosure of Information

Apparently feeling that the Official Secrets Act did not sufficiently restrict the possibility of disclosure of governmental information, in October 2013 the Malaysian government passed an amendment to the penal code to include further restrictions on the disclosure of such information. The new section 203(a) of the penal code, which went into effect on December 31, 2014, provides that:

> (1) Whoever discloses any information or matter which has been obtained by him in the performance of his duties or the exercise of his functions under any written law shall be punished with fine of not more than one million ringgit

[395] UN Human Rights Committee, Decision: *Keun-Tae Kim v. Republic of Korea*, CCPR/C/64/D/574/1994, January 4, 1999, http://www.refworld.org/docid/3f588eff7.html (accessed 4 April 2014)(finding no showing that "benefit" that might arise to North Korea from statements created any risk to national security that justified restricting the speech). See also UN Human Rights Committee, Decision: *Yong-Joo Kang v. Republic of Korea*, CCPR/C/78/D/878/1999, July 16, 2003, http://www.refworld.org/docid/404887efa.html (accessed 4 April 2014)(finding violation of article 19 where complainant was convicted of espionage for distributing pamphlets critical of the government where government did not show how pamphlets threatened national security).

[approximately US$242,000], or with imprisonment for a term which may extend to one year, or with both.

(2) Whoever has any information or matter which to his knowledge has been disclosed in contravention of subsection (1) who discloses that information or matter to any other person shall be punished with fine of not more than one million ringgit, or with imprisonment for a term which may extend to one year, or with both.

The new Section 203(a) goes beyond the already overly broad restrictions of the Official Secrets Act to criminalize the disclosure of *any* government information, whether or not it has been classified as "secret." This provision effectively eviscerates Malaysia's 2010 Whistleblower Protection Act, since that act excludes from its protection for disclosure of improper conduct any disclosures "specifically prohibited by law."[396]

Moreover, as set forth in the discussion of the Official Secrets Act, the imposition of criminal penalties on public employees without any showing that the disclosure poses a "real and identifiable threat of causing significant harm" and without providing a defense of public interest is inconsistent with international standards for freedom of expression.[397]

Evidence (Amendment) (No. 2) Act 2012

In May 2012, the Malaysian government pushed through parliament an amendment to the country's Evidence Act that has profound implications for online freedom of expression.[398] The stated purpose of the amendment, which inserted a new section 114A into the Evidence Act, is to identify and hold liable the individuals responsible for allegedly illicit (i.e., defamatory, seditious, or libelous) content published on the Internet. However, the amendment as drafted goes far beyond what can be justified by that goal. Section 114A

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[396] Whistleblower Protection Act 2010, www.bheuu.gov.my/pdf/Akta/Act%20711.pdf, sec, 6(1); Syahredzan Johan, "Goodbye to Whistleblowers," *The Star,* November 4, 2013, http://www.thestar.com.my/Opinion/Online-Exclusive/A-Humble-Submission/Profile/Articles/2013/11/04/whistleblower-goodbye/ (accessed October 6, 2015).

[397] Tshwane Principles, princ. 46.

[398] Evidence (Amendment) No. 2 Act 2012, http://www.federalgazette.agc.gov.my/outputaktap/20120622_A1432_BI_Act%20A1432%20BI-evidence%20(amendment)%20(no.%202).pdf (accessed March 18, 2014).

has been highly controversial, and the Malaysian Bar Council, among others, has called for its repeal.[399]

Applying to both civil and criminal cases in which allegedly illicit content is published on a webpage, section 114A presumes that the following groups or individuals are guilty of publishing the content in question:

1. Anyone whose name, photograph or pseudonym depicts him or her as the owner, host, administrator, or editor of the website on which the content appears, or anyone who in any way facilitated the publishing or re-publishing of the content;
2. Anyone who is registered with a network service provider as a subscriber of a network service from which the content originated; and
3. Anyone who has in his or her "custody or control" any computer from which the content originated.[400]

Given the law's breadth, many people can be "presumed liable" for the publication of illegal content–including many who are not, in fact, responsible. The law can be used against bloggers based on comments posted by their readers, victims of hacking or identity theft, web hosts from sites that invite public comment based on comments by readers, and even those who subscribe to the network that originated the content. Social media services and other internet intermediaries that host significant amounts of user-generated content could be held liable for third party content under this law, along with anyone who re-posts social media content found to be illicit.

While the presumption of liability created by the statute can be rebutted, by placing the onus on the defendant to disprove responsibility for publication the act subverts one of the fundamental protections for human rights—the presumption of innocence.[401] Given the broad definition of those presumed liable for content, many innocent people may find themselves under arrest and be placed in the difficult position of trying to prove their innocence. Fear of being presumed liable for content will have a substantial chilling effect

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[399] The Malaysian Bar, "Press Release: Repeal Section 114A of the Evidence Act 1950," August 13, 2012, http://www.malaysianbar.org.my/press_statements/press_release_repeal_section_114a_of_the_evidence_act_1950.html (accessed March 18, 2014).

[400] Section 114A, subsec. (1), (2) and (3).

[401] Article 11 of the UDHR provides that "[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

on freedom of expression online, with users fearful of allowing comments on web pages or blogs, or even of allowing others to use their wireless networks. Social media websites and other internet intermediaries that host user content could refuse to offer service in Malaysia or proactively self-censor user content out of fear of broad liability under this law. In his 2011 report to the UN General Assembly, former UN Special Rapporteur on Freedom of Expression Frank La Rue wrote that "holding intermediaries liable for the content disseminated or created by their users severely undermines the enjoyment of the right to freedom of opinion and expression, because it leads to self-protective and over-broad private censorship, often without transparency and the due process of the law."[402] He therefore recommended that "censorship measures should never be delegated to a private party and no one should be held liable for content on the Internet for which they are not the author."[403]

Penal Code Section 503: Criminal Intimidation

Section 503, the provision on criminal intimidation, provides that anyone who:

> threatens another with injury to his person, reputation or property, or to the person or reputation of anyone in whom the person is interested, with intent to cause alarm to that person, **or** to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.[404]

Generally speaking, the crime of intimidation involves the threat of violence or injury to person or property as a means of coercing that individual to commit acts he or she otherwise would not commit.[405] In many countries, criminal intimidation is limited to

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[402] La Rue Report, May 2011, UN Doc. A/HRC/17/27, para. 40.

[403] Ibid, para. 43.

[404] Emphasis added.

[405] See, e.g., Section 45-5-203 of the Montana Code 2013, http://leg.mt.gov/bills/mca/45/5/45-5-203.htm ("A person commits the offense of intimidation when, with the purpose to cause another to perform or to omit the performance of any act, the person communicates to another, under circumstances that reasonably tend to produce a fear that it will be carried out, a threat to perform without lawful authority any of the following acts: (a) inflict physical harm on the person threatened or any other person; (b) subject any person to physical confinement or restraint; or (c) commit any felony.") See also *Criminal Code of Canada,* sec. 423, http://yourlaws.ca/criminal-code-canada/423-intimidation.

threats intended to influence witnesses or others in judicial proceedings,[406] and intimidation for other purposes is dealt with by civil orders.

The Malaysian provision criminalizes intimidation outside of the judicial sphere,[407] and does so in very broad terms. Rather than limiting the restriction to speech that threatens harm to person or property, as is generally the case, the statute also penalizes speech that threatens reputational harm. The breadth of the restriction on speech is demonstrated by the explanation contained in the penal code itself, which notes that a threat to injure the reputation of a deceased person can constitute criminal intimidation.[408]

Moreover, by criminalizing speech that is intended "to cause alarm," rather than only speech intended to force action, the Malaysian penal code sets a very low standard for restricting speech. Under section 503, an individual could be imprisoned simply for threatening to report that an individual is corrupt, as such a threat could be viewed as having been made with "the intent to alarm" the person about whom the corruption allegation will be made. Indeed, almost any dispute between neighbors could become a criminal offense. For example, two neighbors may be arguing over noise levels. If one, in a fit of anger, threatens to tell people that his neighbor is a lout, such speech may well be intended to alarm the neighbor, and is indeed a threat to harm the neighbor's reputation. However, criminalizing such threats is not "necessary" to protect the rights of others or to preserve public order, nor is it the least intrusive way in which to do so.

Penal Code Sections 298 and 509: Offensive Speech

Section 509 criminalizes language that is "intended to insult the modesty of any person," providing a possible sentence of up to five years or a fine or both.[409] Section 298 of the penal code criminalizes expression of any kind that is "deliberately intended to wound the religious feelings of any person" and carries a possible penalty of up to one year in prison. Both provisions effectively criminalize speech that may offend others. However, freedom of

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[406] See, e.g., Section 51 of the United Kingdom Criminal Justice and Public Order Act 1994, c. 33, Part III, http://www.legislation.gov.uk/ukpga/1994/33/part/III/crossheading/intimidation-etc-of-witnesses-jurors-and-others.

[407] Malaysia has a separate criminal provision prohibiting intimidation of witnesses or others in a judicial proceeding. See *Abduction and Criminal Intimidation of Witnesses Act 1947*, http://www.agc.gov.my/Akta/Vol.%204/Act%20191.pdf.

[408] Penal Code sec. 503, Explanation.

[409] As noted earlier, Tian Chua was charged with violating this law for allegedly sweating at the police when they seized his phone and tablet.

expression is applicable not only to information or ideas "that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."[410] While such speech may be offensive, it should not be subject to criminal sanctions.[411] A prohibition on speech that offends someone's modesty or wounds someone's religious feelings, reinforced by criminal penalties, is neither necessary to protect a legitimate interest nor is it proportionate to the supposed interest being protected.[412]

Penal Code Sections 124G and 124I

As noted previously, the Penal Code (Amendment) Act of 2012 added 13 new offenses to the penal code. Six of those offenses relate to activity or documents "detrimental to parliamentary democracy" and,[413] if properly applied,[414] should be limited to activity or expression "designed to overthrow or undermine parliamentary democracy by violent or unconstitutional means."[415] Four of the offenses relate to espionage and sabotage,[416] and one relates to information that "incites violence" or "counsels violent disobedience to the law."[417]

The remaining two offenses, however, restrict expression more broadly. Section 124G provides that:

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[410] ECHR, *Handyside v. United Kingdom,* para. 49. See also UN Human Rights Committee General Comment 34, para. 11.

[411] While ICCPR article 19 permits restrictions to protect the "rights" of others, the term "rights" as used in the ICCPR refers to "human rights as recognized in the Covenant and more generally in international human rights law." UN Human Rights Committee General Comment 34, para. 28.

[412] UN Human Rights Committee General Comment 34, para. 34. See also UN Human Rights Committee, Decision: *Ballantyne v. Canada,* UN Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1, May 5, 1993, http://www1.umn.edu/humanrts/undocs/html/v359385.htm, par. 11.4 (restriction on advertising in English not necessary to achieve stated aim of protecting the francophone population of Canada).

[413] Penal Code sections 124B (activity detrimental to parliamentary democracy), 124C (attempt to commit activity detrimental to parliamentary democracy), 124D (printing, sale, etc. of documents and publication detrimental to parliamentary democracy), 124E (possession of documents and publication detrimental to parliamentary democracy), 124F (importation of document and publication detrimental to parliamentary democracy), and 124J (receipt of document or publication detrimental to parliamentary democracy).

[414] Penal Code sections 124B (activity detrimental to parliamentary democracy), 124C (attempt to commit activity detrimental to parliamentary democracy), 124D (printing, sale, etc. of documents and publication detrimental to parliamentary democracy), 124E (possession of documents and publication detrimental to parliamentary democracy), 124F (importation of document and publication detrimental to parliamentary democracy), and 124J (receipt of document or publication detrimental to parliamentary democracy).

[415] Penal Code, sec. 130A(a). The definition of "document or publication detrimental to parliamentary democracy" in section 130A(b) is somewhat broader but still largely limited to documents inciting violence or violent disobedience to the law. While it retains some potential for abuse, we have not addressed it in this report.

[416] Penal Code, sec. 124K (sabotage), 124L (attempt to commit sabotage), 124M (espionage), and 124N (attempt to commit espionage).

[417] Penal Code, sec. 124H.

> Any person who posts or distributes any placard, circular or other document containing any incitement to violence, or counselling violent disobedience to the law or to an lawful order, or likely to lead to any breach of the peace, shall be punished with imprisonment for a term which may extend to five years.

While the government may legitimately restrict expression inciting violence or counselling violent disobedience to the law, the restriction on expression "likely to lead to any breach of the peace" is both too broad and too vague to meet international standards. As previously discussed, an individual cannot know what statements are "likely" to cause someone to break the public peace, as that would require knowing in advance the person's subjective response to the words expressed. Section 124G thus fails to meet the requirement that any restriction on speech be formulated with sufficient precision to enable an individual to know what speech would violate the law.[418] The lack of clarity also leaves the provision subject to abuse by officials looking for a way to silence government critics or others who are saying things the government does not like.

More importantly, the restriction of expression that "is likely to lead to any breach of the peace" is not a proportionate response to the legitimate interest of protecting national security or public order. A poster or placard expressing support for a political candidate may cause someone supporting an opposing political candidate to get angry and start shouting or picking a fight, thereby breaching the public peace. The imposition of criminal liability on the person posting the placard, however, would be a disproportionate and invalid restriction of the right to freedom of expression.

Section 124I is similarly flawed. It provides that:

> Any person who, by word of mouth or in writing or in any newspaper, periodical, book, circular or other printed publication or by other means including electronic means spreads false reports or makes false statements likely to cause public alarm, shall be punished with imprisonment for a term which may extend to five years.

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[418] UN Human Rights Committee, General Comment 34, para. 25.

As previously discussed, "causing alarm" is a vague term, subject to abusive interpretation; what may seem like trenchant criticism to one may "cause alarm" in another—such as the target of the critical statement. As it is difficult to know in every situation whether an inaccurate statement—even made in good faith—could cause some person "alarm," the provision fails to provide the individual with sufficient guidance to enable him or her to regulate his conduct. More troubling, the vagueness of the language means that provision can be used to harass, investigate, and arrest those circulating information that the government does not like. Given the Malaysian government's recent response to allegations of corruption, this law poses a real risk that those reporting on or disseminating information about matters of public interest may find themselves charged with spreading "false" information "likely to cause public alarm," whether or not the allegations are true, or where the report is erroneous but was made in good faith.

The absence of an exception for reasonable publication is particularly troubling in relation to the press. As the Supreme Court of the Philippines has explained:

> Errors or misstatements are inevitable, in any scheme of truly free expression and debate. Consistent with good faith and reasonable care, the press should not be held to account, to a point of suppression, for honest mistakes or imperfections in the choice of language. There must be some room for misstatement of fact as well as for misjudgment. Only by giving them much leeway and tolerance can they courageously and effectively function as critical agencies in our democracy.[419]

Both section 124G and 124I restrict speech too broadly to meet international standards for the protection of freedom of speech and should be amended.

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[419] Supreme Court of the Philippines, *Borjal v. Court of Appeals,* G.R. No. 126466, 361 Phil. 1 (1999), http://www.lawphil.net/judjuri/juri1999/gr_126466_1999.html (accessed September 24, 2014); *Vasquez v. Court of Appeals,* G.R. No. 118971, 373 Phil. 238 (1999), http://www.lawphil.net/judjuri/juri1999/gr_118971_1999.html (accessed September 24, 2014).

VII. Recommendations

To the Government of Malaysia

- Amend Malaysia's criminal laws to conform to international standards for freedom of expression and freedom of assembly as set forth in the Universal Declaration of Human Rights and elaborated on in the International Covenant on Civil and Political Rights.[420]

To the Prime Minister and the Cabinet of the Government of Malaysia

- Develop a clear plan and timetable for the repeal or amendment of the laws identified below; where legislation is to be amended, consult thoroughly with SUHAKAM and civil society groups in a transparent and public way.
- Specific recommendations for repeal or revision of laws are as follows:
  - Repeal the Sedition Act in its entirety;
  - Repeal section 504 of the penal code to eliminate the criminal penalties for "insulting" speech;
  - Amend section 505(b) of the penal code to criminalize only speech that is intended to incite violence or serious public disorder, and clearly define those terms to ensure that they conform to international standards;
  - Amend section 505(c) of the penal code to limit application of the provision to speech intended to and likely to incite violence, discrimination, or hostility against an individual or clearly defined group of persons in circumstances in which such violence, discrimination, or hostility is imminent and alternative measures to prevent such conduct are not reasonably available;
  - Repeal sections 499-502 of the penal code to eliminate the offense of criminal defamation;
  - Repeal the Printing Presses and Publications Act in its entirety;

[420] In doing so, reference should be made to the guidance provided by the UN Human Rights Committee, the former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Frank La Rue, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai and UN Special Procedures of the OHCHR.

- Amend the Communications and Multimedia Act to:
    - Repeal sections 211(1) and 233(1) or significantly amend them to restrict their application to clearly defined categories of speech that pose a real risk to national security or public order, and where the restriction on speech is proportionate to the risk the speech creates, ensuring that the terms used in the law are clearly defined and limited in scope in order to limit the discretion of local officials in application of the law;
        - Hate speech should only be restricted where it clearly constitutes direct and intentional incitement to violence, discrimination or hostility against an individual or clearly defined group of persons in circumstances in which such violence, discrimination or hostility is imminent and alternative measures to prevent such conduct are not reasonably available.
        - Speech that is merely offensive or annoying should not be restricted under the law.
    - Eliminate the requirement that online "content applications providers" obtain a license. Licensing of internet service providers is not necessary to distribute limited frequencies as the Internet can accommodate unlimited points of entry and an unlimited number of users, so licensing is neither necessary nor proportionate as a restriction on freedom of expression;
    - Amend section 206(2) to specify the conditions that can be imposed on a radio license, and eliminate the discretion of the Minister to impose any conditions not specifically provided for in the provision;
    - Amend section 242 to eliminate the criminal penalties for failure to comply with the conditions of a license; and
    - Any further amendments to "strengthen" the Communications and Multimedia Act that are proposed by the government should be consistent with the international standards for freedom of

expression discussed in this report, and should be drafted in close consultation with SUHAKAM and Malaysian civil society.

- Repeal Section 6 of the Film Censorship Act to eliminate the criminal penalties for showing unapproved films;
- Amend The Peaceful Assembly Act to:
  - Repeal section 9(5);
  - Repeal the limitation on street protests in section 4(1)(c) and the 4(2)(c);
  - Repeal sections 4(1)(a) and 4(1)(e), which exclude children and aliens from the right to participate in assemblies, and sections 4(2)(a) and 4(2)(e), which impose criminal penalties on a non-citizen who organizes or participates in an assembly and on anyone who brings a child to an assembly;
  - Amend section 10 to limit the information required to be provided in advance of an assembly to that required to facilitate the assembly and ensure public safety, such as date, time, location and expected number of participants;
  - Amend section 9 to shorten the time period for advance notice and to provide an exception to the notice requirement for spontaneous assemblies where it is not practicable to give advance notice; and
  - Revise the law to make clear that the police do not have the authority to impose conditions on what is said at an assembly other than to restrict speech that constitutes direct and intentional incitement to violence, discrimination or hostility against an individual or clearly defined group of persons in circumstances in which such violence, discrimination, or hostility is imminent and alternative measures to prevent such conduct are not reasonably available.
- Amend the Official Secrets Act to:
  - Amend section 8(1) to criminalize only disclosures of clearly defined categories of documents, to require proof by the government that the disclosure poses a real and identifiable threat risk of causing

significant harm to national security, and to allow for a defense of public interest;

  - Repeal section 8(2) to eliminate the criminal penalties for receipt or disclosure of information by persons who are not government personnel;
  - Amend section 3 to penalize only conduct that the government can establish poses a real risk to national security.
  - Amend section 16 to eliminate the use of "known character" as a basis for showing that the defendant's purpose in acting was one prejudicial to the safety or interests of Malaysia.

- Repeal section 203A of the penal code, which criminalizes the disclosure of any government information regardless of whether that information is secret or whether the disclosure of said information poses a real risk to national security or public order;
- Enact a federal Freedom of Information law in which government information is presumed to be subject to disclosure unless there are compelling reasons that are consistent with human rights law to withhold them from the public;
  - The right to information should be interpreted and applied broadly, and the burden of demonstrating the legitimacy of any restriction on disclosure should rest with the public authority seeking to without information;
  - The law should withhold from disclosure only narrowly defined areas of information, such as defense plans, weapons development, and the operations and sources used by intelligence services; and
    - All oversight, ombudsmen, and appeal bodies, including courts and tribunals, should have access to all information, including national security information, regardless of classification level, relevant to their ability to discharge their responsibilities.

    - Repeal section 114A of the Evidence Act, which imposes liability on intermediaries for online content posted by others;
    - Repeal section 503 of the penal code to eliminate the offense of criminal intimidation. Criminal penalties for intimidation should be limited to Intimidation in relation to judicial proceedings, which is already subject to prosecution under the 1947 Abduction and Criminal Intimidation of Witnesses Act;
    - Repeal sections 298 and 509 of the penal code to eliminate the criminal penalties for "offensive" speech;
    - Amend section 124G of the penal code to eliminate the criminalization of posting or distributing placards or other materials that government officers determine are "likely to lead to any breach of the peace;" and
    - Repeal or radically revise section 124I of the penal code to limit application of the law to cases in which the government can prove that the publisher of the "false" news acted with knowledge the news was false and that its publication would cause actual damage to an individual, and that the publication did cause such damage.
- Sign and, within a year, ratify the International Convention on Civil and Political Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, and the International Convention on the Protection and Promotion of the Rights of All Migrant Workers and Members of Their Families—all of which contain protections for freedom of expression.

To The Minister of Home Affairs

- Establish a clear policy limiting the application of penal code section 143 to participants in assemblies who engage in violent conduct. Participation in a peaceful assembly should never be considered a violation of section 143;
    - Instruct the Inspector General of Police to inform all police departments about the specific details of this policy;
- Establish a clear policy limiting the applicability of penal code sections 124B and 124C to acts "designed to overthrow or undermine parliamentary democracy *by*

violent or unconstitutional means as specified in penal code section 130A.[421] Participation in peaceful assemblies, even assemblies calling for the resignation of government officials, should never be the basis for arrest or prosecution under these provisions;

  - Instruct the Inspector General of Police to inform all police departments about the specific details of this policy;

- Pending repeal of The Printing Presses and Publications Act, establish regulations to ensure that the law is not used to abuse rights. Specifically, the interim regulations should:
  - Provide clear, non-discriminatory criteria for the granting of a publishing license and a license to operate a printing press, making clear that a license cannot be denied unless the government can clearly demonstrate that denial is absolutely necessary to protect national security, public order, the rights or reputations of others or public morals;
  - Make clear that the publication of "controversial" news is not a sufficient basis for a decision to deny that publication a license;
  - Specify that the banning provisions of section 7 shall only be used in extremely limited circumstances where a publication poses a real and substantial risk to national security and public order, and that the offending portions of the content should, if possible, be severed to avoid banning of the entire publication. Make clear that a discussion of matters of public interest, however controversial or embarrassing to the government, is not a sufficient basis for a banning order to be issued under section 7; and
  - Immediately grant unconditional publishing licenses to Edge Communications for the publication of a print edition of *FZ Daily* and to Mini Dotcom for a print edition of *Malaysiakini*, and lift all publishing restrictions and bans on the books of cartoonist Zunar.

[421] Emphasis Added

To the Attorney-General's Chambers

- Drop all investigations and charges under the Sedition Act;
- Apply to the court to vacate the sedition convictions of Adam Adli, Safwan Anang and Hishamuddin Rais, related to speeches they made on May 13, 2013, protesting the outcome of the 2013 elections. Drop the sedition prosecutions of Tian Chua and Tamrin Ghafar for speeches made at the same rally;
- Drop all prosecutions and investigations for insulting speech and establish a clear policy that insulting someone should never be considered a criminal offense;
- Drop all charges and investigations against those who participated in or organized peaceful protests;
- End the abusive use of penal code sections 124B and 124C to arrest and charge peaceful commentators and protesters using their right to free expression to demand answers from Prime Minister Najib Razak and his government about the alleged corruption involving state sovereign wealth fund 1 Malaysia Development Berhad;
- Drop all the charges filed under the Film Censorship Act against Pusat Komas officer Lena Hendry in connection with the private showing on July 3, 2013, of the film "No Fire Zone: The Killing Fields of Sri Lanka;"
- Drop the government's appeal of the High Court ruling quashing the unjustified suspension of *The Edge Weekly* and the *FZ Daily* for their reporting on allegations of corruption related to 1Malaysia Development Berhad; and
- Instruct all prosecutors' offices that remand for a suspect should be requested only when there is strong and clear evidence that the individual is likely to flee, destroy evidence or interfere with the investigation.

To the Inspector General of Police

- Cease issuing orders via social media to police to undertake investigations based on tweets, Facebook posts, and other social media content. Remind all police departments that criticism of government and of public officials, including police, is normal and not criminal in a democratic society;

- Instruct all police departments that peaceful assemblies should not be considered "activity detrimental to parliamentary democracy" and that penal code sections 124B and 124C should not be used as a basis to arrest peaceful protesters or those planning peaceful assemblies, or to order them to appear for questioning;
- Instruct all police departments that it is their duty to facilitate peaceful assemblies, not to hinder them. Persons and groups who are organizing assemblies or rallies should be permitted to hold their events within sight and sound of their intended audience, and the police should take appropriate steps to protect the safety of all participants;
- Instruct all police departments to avoid late night or evening arrests of persons charged with crimes unless necessary to prevent flight or the destruction of evidence;
- Instruct all police departments that, unless there is a clear and compelling reason indicating that an individual will not comply with a police summons relating to an investigation, the individual should be permitted to appear voluntarily to give a statement; and
- Instruct all police departments that under no circumstances should arrest and remand be used as a form of preventive detention.

To the Malaysian Multimedia and Communications Commission

- Stop using the Communications and Multimedia Act to restrict public discussion of matters of public interest, including the allegations of official corruption and malfeasance regarding 1 Malaysia Development Berhad (1MDB). Disputes regarding the specifics of information posted online should be addressed in the public forum rather than through blocking access to that information;
- End the block on the website *Sarawak Report* and drop any criminal investigations against that website, its editorial team, and those who provide content to the site; and
- Pending the amendment of the Communications and Multimedia Act by the government, give clear guidance to your investigating officers that application of sections 211(1) and 233(1) should be strictly limited to speech that poses a real and significant risk to national security or public order. Commission officers should be

specifically informed that offensive or annoying speech should not be subjected to prosecution, and that hate speech should only be restricted where it constitutes direct and intentional incitement to violence, discrimination or hostility against an individual or clearly defined group of persons in circumstances in which such violence, discrimination or hostility is imminent and alternative measures to prevent such conduct are not reasonably available.

To the Minister of Foreign Affairs

- Use the position of Malaysia as a non-permanent member of the UN Security Council 2015-2016 to promote respect for freedom of expression and freedom of assembly among all member nations;
- Extend a standing invitation to all the UN Special Procedures, thereby enabling special rapporteurs to visit Malaysia without asking for an invitation;
- Prioritize visits by Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression David Kaye and Special Rapporteur on the Rights of Freedom of Peaceful Assembly and of Association Maina Kiai;
- Implement recommendations on freedom of expression, freedom of assembly and other civil and political rights made by other UN member states to Malaysia during its second Universal Periodic Review session at the UN Human Rights Council in October 2013; and
- Appoint a truly independent, non-partisan human rights expert as the next Malaysia Commissioner to the ASEAN Inter-Government Commission on Human Rights (AICHR) and invite AICHR to visit Malaysia to examine issues of freedom of expression and other civil and political rights, in consultation with Malaysian civil society.

To SUHAKAM (Human Rights Commission of Malaysia)

- Recommend that the Malaysian government immediately ratify the International Convention on Civil and Political Rights, and all other UN rights conventions dealing with key civil and political rights, like freedom of expression;
- Initiate an investigation into the use of criminal laws to harass and arrest members of the opposition, civil society activists, and ordinary citizens for peacefully

expressing their views or peacefully exercising their right to freedom of assembly, as outlined in this report;

- Provide policy memos and advice to government on important steps that should be taken in law and policy to address issues raised in this report and urge Malaysia to ensure that it complies with international standards for protection of freedom of expression and freedom of assembly;
- Issue strong public statements in cases of persons being harassed, investigated, or arrested for exercising their right to freedom of expression or freedom of assembly;
- Advocate strongly with government and opposition MPs to urge that SUHAKAM's recommendations on freedom of expression and freedom of assembly be reviewed and fully considered by parliament; and
- Systematically engage with NGOs, trade unions, and civil society organizations to investigate and expose violations of freedom of expression and freedom of assembly, and demand justice for the victims of these abuses.

To the UN Country Team and UN Resident Coordinator

- Engage with the Malaysian government at all levels, but especially the prime minister, Ministry of Home Affairs, and Ministry of Foreign Affairs, to demand that Malaysia comply with international human rights standards on freedom of expression and freedom of assembly;
- Urge the government to extend a standing invitation to the UN Human Rights Council Special Procedures that will enable regular visits by special rapporteurs;
- Encourage high level engagement and visits by the Office of the High Commissioner on Human Rights to engage with the Malaysian government on the need to respect the right to freedom of expression and freedom of assembly, and to offer technical assistance (as needed) to end legal and policy restrictions in Malaysian law on that right;
- Engage regularly with SUHAKAM and urge the Malaysia government to consult closely with the commission and seriously consider its policy advice and recommendations on how to protect freedom of expression in Malaysia; and

- Support Malaysian civil society organizations in their demands for reform that helps ensure greater respect for freedom of expression and freedom of assembly in Malaysia, and pressure the Malaysian government to end politically motivated crackdowns on opposition political figures and civil society activists.

To the United States, Japan, European Union Member States, Australia, Canada, New Zealand, India, and the Republic of Korea

- When visiting Malaysia on November 18-22 for the 27th ASEAN Summit, US President Barack Obama and leaders of other ASEAN dialogue partner governments should publicly raise concerns about violations of freedom of expression and assembly in Malaysia, and call on Prime Minister Najib to commit to a plan of legislative and policy changes to end the criminalization of these rights;
- Regularly and publicly raise concerns with the Malaysian government about the arrests of activists, opposition politicians, and ordinary citizens for exercising their right to freedom of expression and assembly, and demand the dropping of charges and immediate release of those already imprisoned for doing so;
- Instruct ambassadors based in Kuala Lumpur to regularly and continuously send diplomatic observers to events where authorities threaten to violate freedom of expression or assembly, and publicly report their findings about the events that occur, including making recommendations to government officials and the police to end abuses; and
- Encourage visits by your parliamentarians, senators, and congressmen to Malaysia to raise human rights concerns, engage with civil society groups and leaders, and publicly express concerns about the ongoing criminalization of free expression.

Appendix I: Letter to the Malaysian Government

August 10, 2015

Yab Dato' Seri Dr. Ahmad Zahid Hamidi
Minister of Home Affairs
Block D1 & D2, Complex D
Administrative Center
Federal Territories
Putrajaya 62546
Malaysia
Fax: +60-3-8889-1613
Email: ahmadzahid@moha.gov.my

Re: Criminalization of Peaceful Expression in Malaysia

Dear Minister Hamidi,

I am writing to request the Malaysian government's response and perspective regarding research that Human Rights Watch has recently conducted on the criminalization of peaceful expression in Malaysia. Human Rights Watch plans to produce and release a report on this topic later this year. Similar research is being conducted in a number of countries throughout Asia.

Human Rights Watch is an independent, nongovernmental organization that investigates and reports on violations of international human rights law in more than 90 countries. We produce reports based on our findings to urge action by governments and other stakeholders to address the problems we have identified and to hold accountable those responsible for human rights abuses. Human Rights Watch has worked on human rights issues in Malaysia for more than 25 years.

Human Rights Watch is committed to producing material that is evidence-based, accurate, and impartial. For this reason, we wanted to provide an opportunity for you and your staff to present your views and to add information that reflects your perspectives on the issue of

freedom of expression in Malaysia. We hope that you and your staff can answer the following questions so that your views are accurately reflected in our reporting:

I. Sedition Act

1. Could you please provide statistics showing the number of (a) investigations opened; (b) individuals arrested; (c) individuals charged; and (d) individuals convicted under the Sedition Act in each of the past five years, and during the first six months of 2015?
2. Could you please provide information on the number of individuals charged with sedition between 1990 and 2010?
3. Human Rights Watch understands that, in many cases, the government has opposed requests to stay prosecutions under the Sedition Act pending the issuance of the Federal Court's decision in the case filed by Azmi Sharom. Please explain the rationale for opposing such stays.
4. Having amended the Sedition Act to eliminate from that law statements or acts having the tendency to "bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State":
    a. Will the government dismiss the charges against all those arrested or charged for criticizing court judgments prior to the amendment?
    b. If not, what is the government's justification for pursuing those cases when it has concluded that the activity that is the subject of those prosecutions should no longer be criminal under the Sedition Act?
5. Is the government reconsidering its decision not to repeal the Sedition Act?

II. Peaceful Assembly

1. The government has reportedly cited section 9(5) of the Peaceful Assembly Act both as a justification for arrest and during arguments for remand of people arrested for participation in protests up until at least April 2015. What is the government's justification for continuing to cite a law that had been held unconstitutional by the Malaysian Court of Appeal in April 2014?

2. On March 5, 2015, Deputy Inspector General of the Police Noor Rashid Ibrahim was quoted in the press as saying that the rally planned for March 7, 2015 was "illegal" because it would include speeches that "might be seditious, besides actions that could violate the penal code." What was the legal basis for the government to declare an assembly illegal before it actually took place?
3. After the May 1 protest against the goods and services tax, the police arrested or called in for questioning at least 39 people, a number of whom were opposition politicians, for participating in an "unlawful assembly" under section 143 of the penal code even though Kuala Lumpur police chief Datuk Tajudin Md Isa publicly acknowledged the rally was largely peaceful. (These were separate from the 29 individuals arrested for allegedly setting off smoke bombs.) Please explain why the authorities considered the assembly unlawful under sections 141 and 143 of the penal code. By what method did the authorities determine who, of the thousands who participated in the assembly, was arrested or summoned for questioning?
4. What is the government's rationale for using penal code sections 124B and 124C, which appear to have been intended to address terrorism and security offenses, against those planning or calling for peaceful public assemblies?
5. Penal code section 130A(a) defines "activity detrimental to parliamentary democracy" as "activity designed to overthrow or undermine parliamentary democracy *by violent or unconstitutional means*." Please explain how planning for or engaging in a peaceful demonstration constitutes "violent or unconstitutional means."

III. Media and Internet Censorship

1. In October 2014 the government again denied Mini Dotcom the printing permit required under the Printing Presses and Publications Act (PPPA) for a print version of online news portal *Malaysiakini.* The government based its decision, according to the letter sent to Mini Dotcom, on the fact that *Malaysiakini's* news reports are "controversial in nature and do not have elements of neutrality." How does the government reconcile using that basis for denial when the Court of Appeal specifically held, in its decision overturning the government's previous denial of a permit to Mini Dotcom, that "merely inciting

controversy would by no means amount to a threat to public order, national security or morality, as any effective investigative journalism would result in controversy if it exposes the wrongdoings of any public authority"?

2. Although the Communications and Multimedia Act specifically states that "nothing in this act shall be construed as permitting censorship of the Internet," the government has used that law to block access to the website *Sarawak Report* and its reporting on possible corruption involving 1 Malaysia Development Berhad, to prosecute individuals for "offensive" comments on social media, and to investigate online news portal *The Malaysian Insider* for its reporting on a matter of public interest. Does the government now take the position that it can and should censor the Internet?

3. It has been reported that the government plans to strengthen the restrictions on social media under the Communications and Multimedia Act. What is the justification for doing so and what amendments are under consideration?

    a. Will the government ask for and accept input from civil society organizations on any proposed amendments before presenting them to Parliament for a vote? If yes, please outline what consultations are planned. If no, please explain why the government does not plan to consult with civil society.

IV. Abuse of Process

1. Since August 2014, the police have frequently arrested individuals and held them overnight or even for several days when there was no indication that they would not cooperate fully with the investigation. Can you explain why this has happened instead of requesting that the individuals come in voluntarily for questioning? A few examples of the cases we have documented, and for which we request your perspective, include:

    a. Eric Paulsen, who was arrested at 8 p.m. on January 12, 2015, held in the police lockup overnight, and remanded for two days even though he had already agreed to come in and give a statement to the police on January 14.

b. Managing Editor Lionel Morais, features editor Zulkifi Sulong, and Bahasa news editor Amin Shah Iskander from *The Malaysian Insider,* who were arrested at 7 p.m. on March 30, 2015, and held in the police lockup overnight, even though they had already agreed to cooperate fully with the investigation.

c. Nurul Izzah Anwar, a sitting member of Parliament, who was arrested at home at 6 p.m. on March 16 and held in the police lockup overnight.

d. S. Arulchetvan, the secretary general of Parti Sosialis Malaysia, who was arrested late in the day on February 19, the first public holiday of the Chinese New Year, and held overnight, for a statement he had made four days previously.

What is the government's justification for repeatedly requesting remand of persons viewed as sympathetic to the opposition when there has been no evidence that they would interfere with the investigation or abscond if released, given that Malaysian courts have ruled that remand "to complete investigations" under section 117 of the Code of Criminal Procedure is primarily intended to prevent a suspect from interfering with witnesses or evidence and to ensure that a suspect who might abscond is present to be charged with a crime? A few examples of cases we have documented, and for which we request your perspective, include:

> **Eric Paulsen:** The government asked that Eric Paulsen be remanded for four days on a charge of sedition, and he was actually remanded for two days, even though he had agreed, prior to his arrest, to come in and provide a statement. In that case, where Paulsen did not deny making the allegedly seditious statement and the only issue, therefore, was whether it was, in fact, seditious, it is also unclear what evidence he could possibly have interfered with. Could you please explain why the government felt it needed a four-day remand?
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> **Hishamuddin Rais:** The government asked for and received a four-day remand after Rais' March 27 arrest. Among the grounds cited as a basis for the remand was the need to have him identify people from videos of the March 7 KitaLawan rally. To our knowledge there was no showing that it was

necessary to detain him in order to conduct that investigation, and the police never actually asked him to make any identifications nor did they question him at all until the final day of the four-day remand. Could you please explain why the government sought a four-day remand in this case?

We would very much appreciate any information your offices can provide regarding these questions and the issues they raise. In order to reflect your responses in our report, we would need to have them no later than September 10, 2015.

We thank you in advance for your consideration.

Sincerely,

Brad Adams
Executive Director
Asia Division

cc: Tan Sri Dato' Sri Haji Mohamed Apandi bin Haji Ali, Attorney General of Malaysia
Tan Sri Dato' Khalid bin Abu Bakar, Inspector General of Police
YB Dato' Sri Dr. Halim Shafie, MCMC Chairman

Acknowledgments

This report was researched and written by Linda Lakhdhir, legal consultant for Human Rights Watch, with additional research by Meenakshi Ganguly, South Asia director. Additional assistance was provided by Alicia Minana, legal volunteer, Human Rights Watch. This report was edited by Brad Adams, Asia director; Dinah PoKempner, general counsel; and Joseph Saunders, deputy program director. Phil Robertson, deputy Asia director, provided additional review. Production assistance was provided by Daniel Lee, associate with the Asia division; Kathy Mills, publications specialist; and Fitzroy Hepkins, administrative manager.

CREATING A CULTURE OF FEAR

The Criminalization of Peaceful Expression in Malaysia

Prime Minister Najib Razak took office in April 2009 pledging to "uphold civil liberties" and exhibit "regard for the fundamental rights of the people." After the ruling coalition lost the popular vote in the 2013 elections, however, his government's commitment to reform dissipated and a crackdown on its critics began. That crackdown has intensified in the past year in the face of rising public discontent over issues ranging from imposition of a new tax to allegations of corruption.

Creating a Culture of Fear documents how Najib's government has used and abused a range of broad and vaguely worded criminal laws to arrest and prosecute opposition politicians, activists, journalists, and ordinary citizens, suspend critical news media, block websites, and declare peaceful protests "unlawful." It analyzes the laws used to carry out this wave of repression under international legal standards. Focusing largely on the period since the 2013 election, the report is based on an in-depth analysis of laws such as the Sedition Act, the Printing Presses and Publications Act, the Communications and Multimedia Act, the Peaceful Assembly Act, and various provisions of the Penal Code, interviews with civil society activists, journalists, lawyers, and opposition politicians targeted by the crackdown, and public statements by the government.

Human Rights Watch calls on the Malaysian government to drop all pending charges and investigations against those who are being prosecuted for the exercise of their freedom of speech or their right to participate in peaceful assemblies, halt the abuse of the legal process to harass and detain critics, and amend or repeal relevant laws to bring them into line with international human rights standards.

Cartoonist Zunar's depiction of the ongoing use of criminal laws to suppress dissent in Malaysia.

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