RE: KARPAL SINGH

OPINION

I. - Introduction

1. Karpal Singh is one of the lead counsel appearing for the defence of Anwar Ibrahim[1]. In April 1999 Mr. Anwar was convicted by Mr. Justice Paul of corruption and was sentenced to 6 years' imprisonment. The trial was highly controversial. Great concern has been expressed both in Malaysia and internationally as to the fairness of the trial, the nature of the prosecution evidence and the restrictions placed on the conduct of the defence by the trial judge. Mr. Anwar is currently on trial before Judge Arrifin Jaka on a charge of sodomy. On 11th September 1999 during the course of this second trial Mr. Singh referred to a medical report which showed that the levels of arsenic in Mr. Anwar's body were alarmingly high. Mr. Anwar is of course in custody. In commenting on this report Mr. Singh is alleged to have said words to the effect that:

> "It could well be that someone out there wants to get rid of him….. even to the extent of murder…I suspect people in high places are responsible for this situation"

2. Both the trial judge and the Attorney General (who was leading for the prosecution) treated the allegations of arsenic poisoning with appropriate concern. It was agreed on all sides that an independent medical investigation was essential. There was no suggestion that Mr. Singh had acted or spoken in any way improperly. Yet almost a month later, on 8th October 1999, the Attorney General authorised the prosecution of Mr. Singh for sedition. The sedition alleged is the utterance of the words quoted above. The trial of Mr. Singh is fixed for 18th July 2000.

3. As far as we know this is the first case anywhere in the World in which a lawyer has been accused of sedition in respect of words spoken in the defence of his client. It is our view that such a prosecution strikes at the heart not only of the immunities of lawyers in respect of the conduct of their professional duties but even more importantly at the right of an individual to fair trial. Our concern is so great that we feel it appropriate to take the unusual course of publishing an opinion setting out in detail our views as to why this prosecution is misconceived.

II - Five Fundamental Points

4. At the outset we wish to make five fundamental points. First, this opinion is not a piece of special pleading for the legal profession. We stress throughout that the privileges of a lawyer are necessary to enable him properly to serve the interests of justice and to present the case of his client free from fear and pressure. Indeed the immunity in respect of statements made in court is available to all who participate in legal proceedings whether they be judges, lawyers or witnesses. It is the interests of justice and the rights of the individual that must be paramount.

5. Secondly, we do not seek to interfere in a judicial process. Of course, the principles of independence that we wish to uphold apply as much to judges and prosecutors as to defence advocates. The courts of Malaysia must be free to take their own view of the merits of any case. But we are hopeful that in forming a view of this unprecedented case, both the parties and the trial judge will be assisted by our exposition of what we believe to be the relevant principles. We seek to assist, not to impose our views.

6. Thirdly, the case of Mr Singh does not stand alone. Since the mid-1980's there has been mounting concern at the erosion of human rights in Malaysia, especially those relating to freedom of expression and of threats to the independence both of the bar and of the judiciary. Such concerns have been voiced by, amongst others: Amnesty International[2]; Human Rights Watch[3]; The Lawyers Committee for Human Rights[4]; the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy - himself a Malaysian; the Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression[5]. Perhaps most important of all is the very recent report "*Justice in Jeopardy: Malaysia 2000*". This is a report compiled by 3 eminent jurists[6] on behalf of the International Bar Association (IBA), The ICJ Center for the Independence of Judges and Lawyers, the Commonwealth Lawyer's Association and the Union International Des Avocats. This detailed and powerful report concludes that:

> "…there are well-founded grounds for concern as to the proper administration of justice in Malaysia in cases which are of particular interest, for whatever reason, to the government…The central problem appears to lie in the actions of the various branches of an extremely powerful executive, which has not acted with due regard for the other essential elements of a free and democratic society based on the just rule of law. Such due regard requires both a clear grasp of the concept of the separation of powers and also an element of restraint by all branches of the executive. These have not always been evident. There must be a truly independent judiciary, fully prepared at all times to do justice for all, whether strong or weak, rich or poor, high or low, politically compliant or outspoken. There must be an autonomous bar which is allowed to render its services freely so as to enable it to fulfil the purposes set out in its governing statute. Repression of fundamental liberties should be maintained only if and to the extent that it is

absolutely necessary. There is real cause for concern in all of these areas."[7]

7. The consensus of grave concern expressed by so many well-respected international bodies fortifies us in our view that it is right to publish this opinion.

8. Fourth, we are British barristers. The legal profession in England and Wales is a "split profession" comprised of both barristers and solicitors. But of course in many countries this distinction is unknown. Many of the cases that we cite refer to the rights or privileges of a barrister or of counsel. We accept, however, that the principles they espouse must be applied to all lawyers and advocates whatever their status and nationality. Again, since we are common lawyers, the majority of the cases we cite are from England, the Commonwealth and the United States. However this does not imply that we view the issues from a narrow perspective. Relevant international instruments and in particular the Basic Principles on the Role of Lawyers show that the principles developed by the common law are virtually identical to those of other developed systems.

9. Fifth, we concentrate in this opinion on the rights and immunities of these engaged in criminal trials and on the impropriety of using the law of sedition to limit or suppress those rights and immunities. We will not attempt to address in detail the very similar issues that may arise in relation to civil proceedings.

III - Summary of Conclusions

10. We begin with a summary of the background to the case and a more detailed analysis of the facts as we understand them to be. We then go on to submit that:

A. In the majority of common law jurisdictions the law of sedition has become virtually a dead letter. It is widely acknowledged that it is a political offence which has a chilling effect upon fundamental and human rights notably those of freedom of conscience and expression. In those jurisdictions where it is still an offence its scope is very narrow.

B. On the other hand, the scope of the offence created by the Sedition Act 1948 in Malaysia is very wide. In a number of the reported cases it has been interpreted by the courts in such a way as to broaden its scope and to criminalize almost any expression of hostility towards or strong disagreement with the government of the day.

C. The broad scope of the Malaysian offence of sedition breaches international human rights standards.

D. Nonetheless, sedition in Malaysia is not an offence of strict liability. There are strongly arguable defences open to Mr Singh under the Malaysian law of sedition.

E. Alternatively, if there is a case against Mr Singh under Malaysian law then he is entitled at common law to immunity from both civil and criminal proceedings because he made the statements relied on in court whilst representing a client in legal proceedings.

This immunity is not exclusive to lawyers. It is equally available to judges and witnesses.

F. The immunity is lost only by conduct in bad faith which threatens the integrity of the legal process which the immunity itself is designed to protect. Such conduct may only properly be the subject of criminal proceedings where it constitutes any of the offences or perjury or perverting the course of justice or crimes associated therewith such as conspiracy and attempt.

G. Since lawyers have duties not only to their clients but also to the courts before which they appear and to justice it is of particular importance that the lawyer's immunity is maintained. The argument is not that lawyers deserve special privileges and immunities because they are lawyers. It is rather that they must have those immunities - and only those immunities - which are necessary to the proper discharge of their onerous duties to their clients and to justice.

H. The Basic Principles on the Role of Lawyers, an instrument endorsed by the United Nations General Assembly, confer immunities upon lawyers that reflect those arising at common law. But they go further than the common law in that they require governments actively to protect the lawyer's immunities.

I. To prosecute anyone for sedition in relation to statements made in the course of legal proceedings strikes at the heart of the right to fair trial.

J. To prosecute a lawyer for sedition for statements made in the course of legal proceedings strikes at the heart of the independence of the lawyer. This independence is essential to the maintenance of the rule of the law and the protection of human rights.

K. We acknowledge that there must be effective sanctions against the lawyer who abuses his position. In order to preserve the independence of both lawyers and of the courts it is vital that save in the most serious cases, sanctions should be administered by the lawyer's professional body. The primary source of discipline for breach of standards must be those bodies that are responsible for setting them.

L. In the most serious cases, it may be necessary to bring proceedings for contempt. The common law authorities show that even a high degree of annoying, foolish and ill-judged behaviour and criticism may not constitute contempt.

M. The Disciplinary Board of the Malaysian Bar Council and the Malaysian courts have ample powers to deal with any allegation of impropriety by Mr. Singh, either through professional sanctions or through the exercise of the common law power of committal for contempt. Malaysian judges have extended the contempt jurisdiction substantially beyond its common law limits. We believe that they were wrong to do so. But if Mr. Singh's conduct does not constitute contempt even by Malaysian standards then it could not conceivably constitute sedition.

N. On any fair analysis of the facts Mr Singh has behaved perfectly properly. On the face of it he was courageously and vigorously defending his client.

IV - The Background

11. Malaysia is a federation with a parliamentary system of government based upon periodic multiparty elections. The ruling coalition of political parties, the Barisan Nasional, has been in power since Malaysia's independence from Britain in 1957. The current Prime Minister, Dr Mahathir Mohamed, has been in power since 1981.

A – The Arrest of Anwar Ibrahim

12. Until 2nd September 1998, the Deputy Prime Minister was Anwar Ibrahim. It was widely assumed that he was being groomed to be Dr Mahathir's successor. On 2nd September 1998 he was dismissed from his post of Deputy Prime Minister; his membership of the leading political party (UMNO) was withdrawn on the following day. On 20th September 1998 Anwar Ibrahim led approximately 35,000 demonstrators through Kuala Lumpur, calling upon Dr Mahathir to resign. During the night of 20th September 1998 he was arrested by police. He was told that he was being detained under the Internal Security Act 1960. This legislation provides for detention without trial or charge for up to 60 days and has attracted great criticism from international organisations[8] . Anwar Ibrahim was detained incommunicado.

13. On 24th September 1998, Malaysia's most senior police officer, the Inspector-General of Police, Abdul Rahim Noor, stated publicly that Anwar Ibrahim was "safe and sound" and would soon be tried in court. On 29th September 1998 Anwar Ibrahim was brought to court in Kuala Lumpur and charged with 5 offences of corruption and 5 offences of sodomy. It was clear that he had been assaulted whilst in custody: he had a swollen eye and a bruised arm. He complained of having been handcuffed and blindfolded whilst being beaten by an unidentified police officer. The complaints were articulated on his behalf by the lawyers representing him. There have never been any suggestions that those lawyers (who included Karpal Singh himself), might be subject to prosecution on charges of sedition for having suggested that Mr Anwar had been assaulted by officers of the state whilst in custody.

14. An internal police inquiry into Anwar's injuries submitted a report to the Attorney-General on 5th January 1999. It concluded that he had been assaulted by the Royal Malaysia Police but was unable to identify the perpetrator. Just two days later, Abdul Rahim Noor resigned, having accepted responsibility for Anwar Ibrahim's injuries.

15. After giving evidence to a specially-instituted Royal Commission during which he admitted that he had "lost his cool" and had personally carried out the assault upon Anwar Ibrahim, Abdul Rahim Noor was charged with causing grievous bodily harm[9] . Following representations made by Mr Rahim's lawyers, their client pleaded guilty to a lesser charge of "causing hurt. He was fined $530 and sentenced to two months' imprisonment in mid-March 2000. He

was granted bail (as he had been before pleading guilty) pending an appeal against sentence being brought by both parties.

B – Anwar Ibrahim's Corruption Trial

16. The ten charges that Anwar Ibrahim originally faced were reduced to four each of corruption and sodomy. The corruption charges were heard first and the trial attracted enormous international media attention and criticism. The details of the trial have been methodically covered elsewhere, not least the IBA report. We do not propose to go over old ground, but it is necessary to identify the important features of that trial insofar as they relate to the charge now laid against Karpal Singh.

17. The trial judge was Justice Augustine Paul. He was appointed by the Chief Justice. Justice Paul was a recent appointee to the High Court bench and an even more recent appointment to the Criminal Division, although he had presided over many criminal trials. His appointment to the Anwar trial was a surprise but the defence lawyers did not object to it.

18. The prosecution case lasted many weeks and involved the calling of many witnesses to give evidence that Mr Anwar had committed sexual misconduct. The evidence was strongly challenged. At the close of the prosecution case the judge allowed a prosecution application to amend the charges with the result that the prosecution no longer had to prove the underlying facts of sexual misconduct in order to obtain a conviction on the charges of corruption. The defence lawyers objected vigorously but in vain. The consequence of the ruling was that the defence was prevented from calling rebuttal evidence relating to the many allegations of misconduct that had so sullied Mr Anwar's reputation during the prosecution case.

19. Furthermore, Mr Justice Paul ruled that the defence could not adduce evidence of "political conspiracy", notwithstanding the fact that the main plank of Anwar Ibrahim's defence to the charges was that he had been framed by just such a political conspiracy. Complaints by Mr Anwar about the Judge's decision were met with demands for his lawyers to control their client. We note at this stage that the declared reason for not admitting evidence of political conspiracy was that it was irrelevant. Whilst we believe that the judge's ruling was wrong, we point out that he did not suggest that by merely calling evidence of political conspiracy the defence (i.e. defendant and lawyers) might be exposing themselves to the risk of prosecution for sedition.

20. An application was made for the Judge to disqualify himself on the basis that there had not been a fair trial. After the application had been lodged, the Judge asked the parties to summarise their cases to the court. The defence team refused to do so until the Judge dealt with the application to disqualify. When the defence maintained this position the Judge suggested that

they were in contempt of court, *en masse*. However, within two days, the Judge agreed to hear the application, which was dismissed.

21. There were other occasions when Anwar Ibrahim's lawyers were subjected to considerable pressure:

a) one of his lawyers, Zulkifli Nordin, was detained under the ISA on 29th September 1998 and released on 27th October, shortly before the start of the trial; he was deprived of sleep and interrogated as to his links with Anwar Ibrahim[10];

b) another defence lawyer, Zainur Zakaria, filed an affidavit accusing the prosecution pressurising a friend of Anwar Ibrahim, a man called S. Nallakaruppan, to give evidence against him in exchange for reducing firearms charges that were to be laid against Mr Nallakaruppan. This affidavit was supported by a statutory declaration written by Mr Nallakaruppan's lawyer, Manjeet Singh Dhillon. Instead of considering the truth of the claim, Justice Paul found Mr Zainur in contempt of court for having filed slanderous pleadings and sentenced him to three months' imprisonment. The Judge refused him bail pending appeal, although bail was subsequently granted by the Court of Appeal[11]. The Judge also issued a warrant for the arrest of Mr Dhillon, although this was withdrawn when Mr Dhillon appeared before Justice Paul to apologise for the fact that his affidavit had been used in the Anwar trial[12].

22. On 14th April 1999, following the longest criminal trial in Malaysian history, Anwar Ibrahim was convicted on all four counts of corruption. He was sentenced to six years' imprisonment on each charge, to run concurrently. He lodged an appeal against conviction and sentence. We understand that the appeal was heard by the Court of Appeal on 28th February 2000. It was refused on 29th April 2000 (in respect of both conviction and sentence).

C – Anwar Ibrahim's Sodomy Trial and Suggestions of Arsenic Poisoning

23. Having been convicted of corruption, Mr Anwar is now on trial in respect of one count of sodomy. His co-defendant is Sukma Darmawan. The trial judge is Datuk Arifin Jaka.

24. During the course of this second trial, it was noticed by Mr Anwar's family and lawyers that he was losing weight and hair. The defence sent a sample of Mr Anwar's urine under a pseudonym to the Gribbles Pathology Laboratory in Melbourne, Australia. The tests were carried out on the sample in August 1999. The pathologist's report indicated that the level of arsenic in Mr Anwar's creatine[13] was 230ug/g. An individual who is exposed to arsenic during the course of his or her work should have a reading of below 17ug/g. We understand that the results were first made public at a press conference given by Mr Anwar's wife, but we have not seen the details of what she said.

25. On 10th September 1999, Mr Singh raised the Gribbles report in open court. He claimed that the level of arsenic in Mr Anwar's blood exceeded safe levels. Our account is taken from the *New Straits Times* report dated 11th September 1999.

26. Mr Singh gave details of the analysis to the court. He said: "It shows that the level is beyond danger…The family, including Datuk Seri Anwar Ibrahim is alarmed at the position". He asked for an immediate adjournment so that his client could be sent for medical treatment, saying that Mr Anwar's life was in jeopardy.

27. Judge Jaka then asked how Mr Anwar felt. He replied "I am generally feeling okay…but I am not my usual self. When I saw the report I was quite concerned". He added that he had lost both weight and hair.

28. Mr Singh said that the defence proposed to bring a doctor from abroad so that an independent report could be obtained. The lawyer continued: "If he is slowly being poisoned, something must be done about it", adding that an "inquiry" should be held. He described the situation as serious as it concerned Mr Anwar's health and well-being. He said that "It could well be that someone out there wants to get rid of him…even to the extent of murder". He went on to ask that whoever was responsible be charged with attempted murder and added that he had advised his client to lodge a police report to initiate an investigation. He went on to say: "I suspect people in higher places are responsible for the situation".

29. The judge reacted to the claims calmly: he displayed concern for Mr Anwar's wellbeing and ordered him to be sent to hospital for examination. This was the course of action that had been requested by Karpal Singh. The judge went on to say that the matter should be left in the hands of the doctors to decide what if anything had happened to the defendant. It is important to note that at no stage did the judge even hint that Karpal Singh had acted improperly either in informing the court of the contents of the pathologist's report or in the manner in which he did so.

30. Just as important was the reaction of the prosecutor. The leader of the prosecution team is the Attorney-General himself, Sri Mohtar Abdullah. He agreed that if the report were true, it would be a very serious matter, and agreed with the suggestion that there should be an inquiry into the circumstances of the poisoning. He counselled caution against pointing the finger of blame too early or even jumping to the conclusion that any poisoning was deliberate. He said: "It could be a case of deliberate poisoning by someone or some persons unknown whether in the prison or in the precinct of the court or it could be accidental poisoning through food or drink consumed by the accused not only in prison but in this court precinct…As the Public Prosecutor, I give assurance if evidence shows a deliberate criminal act to injure or poison Datuk Seri Anwar, I will act and leave no stone unturned".

31. Tests were performed by Malaysian, English and Australian doctors upon hair and urine samples after the claims were made public[14]. As we understand it they concluded that although there was arsenic present in Mr Anwar's body, it was not at a dangerous level. The Malaysian doctors confirmed that Mr Anwar's physical problems were real and suggested that his condition be monitored. We have not ourselves seen any of the reports.

E. – The Charge against Karpal Singh

32. On 8th October 1999, a complaint of sedition was lodged against Karpal Singh in respect of the words he used on 10th September whilst defending his client. A formal criminal charge was laid on 14th January 2000[15]. The charge (in translation) reads as follows:

> "That you on 10th September 1999 at about 9.10 a.m. in the High Court Kuala Lumpur in the Federal Territory of Kuala Lumpur in the trial of Public Prosecutor –vs.- Dato' Seri Anwar bin Ibrahim (WPPJ45-51-95) and Public Prosecutor –vs.- Sukma Darmawan Sasmitaat Madja (WWPJ45-26-99) during the course of your submissions over the issue in relation to allegations of arsenic poisoning of Dato' Seri Anwar bin Ibrahim did utter the following seditious words, namely, "It could well be that someone out there wants to get rid of him…even to the extent of murder. I suspect that people in high places are responsible for the situation." and you have thereby committed an offence under section 4(1)(b) of the Sedition Act, 1948 (act 15) punishable under section 4(1) of the same Act."

33. We note that the words upon which the charge is based are taken out of context. The charge contains no reference to the various suggestions by Mr Singh that an inquiry should be instituted nor that a further report should be obtained. Nor does the charge in any way reflect the thrust of Mr Singh's submissions, namely that his client was in poor health and his condition needed to be monitored.

34. Mr Singh was admitted to bail after a friend stood surety in the sum of RM3,000[16]. Mr Singh's trial has now been fixed for 18th July 2000. It is understood that Justice Paul has been allocated to hear the case.

35. Mr Singh is not merely a well-known and well-respected lawyer. Until he lost his parliamentary seat in the November 1999 elections, he had been a Member of Parliament for the opposition Democratic Action Party (DAP) for some 30 years. He is the deputy chairman of the DAP and has played a prominent role in criticising the government of Dr Mahathir. He was detained under the Internal Security Act in 1987, notwithstanding being able to prove that some of the grounds upon which his detention was ordered were manifestly untrue. His attempts to bring applications for *habeus corpus* were celebrated, both politically and legally[17]. He has also

been the defendant in a civil action whereby the plaintiff applied for a declaration that Mr Singh (not in his role as lawyer) had committed a seditious libel[18]. The action was dismissed on the basis that the plaintiff had no *locus standii*. The judge did not address the question of whether or not Mr Singh had in fact committed a seditious libel. The prosecuting authorities did not pick up the baton dropped by the unsuccessful plaintiff in that case.

36. Karpal Singh's work has attracted hostility from Dr Mahathir. In an interview in London on 4th February 2000[19], the Prime Minister volunteered to his interviewer that he had joked about hanging and shooting "all the lawyers" during a Cabinet meeting. He went on to say:

> "I cannot be against all the lawyers. Only against some of the lawyers maybe. I don't see why I should like Karpal Singh, for example, but not all the lawyers. But there are some lawyers who of course go all out and say things which are nasty. Then I would like very much to hang the lawyers, these particular lawyers. But of course this is just a wish. It is not going to materialise."

37. We note that since the commencement of the second trial, Mr Singh has argued that Dr Mahathir be called as a witness in Mr Anwar's trial. He asked for a *sub poena* against Dr Mahathir. However, in mid-April 2000, Judge Jaka rejected the arguments for a witness summons[20]. It is reported that Mr Anwar's reaction to this was to consider abandoning his defence altogether[21]. We note also that on 27th September 1999 Mr Singh submitted that Judge Jaka disqualify himself from hearing the rest of the trial, on the basis that in the early 1990's the judge had been a director and substantial shareholder in Dataprep Holdings, a company now run by Dr Mahathir's son. Although Judge Jaka swiftly refused the application, he did not suggest that any criminal or disciplinary charges should be brought against Mr Singh for having made the application in the first place. Mr Singh made this application less than a fortnight before the complaint against him was presented.

F. – Reaction to the Charge

38. The Malaysian Bar Council has adopted a motion urging the chief prosecutor to withdraw the charge[22]. The newly-elected President of the Malaysian Bar Council, Sulaiman Abdullah, said that the resolution "sends a very strong signal to persons in authority that lawyers are not prepared to just lie down and die. They are going to stand up for what they believe are the fundamental rights in order to carry out their obligations".

39. Amnesty International issued a press release on 17th January 2000:

> "Charging political leaders and journalists with sedition threatens to strike at the heart of free speech in a democratic society. Charging lawyers with sedition for statements made in court in

defence of their clients threatens the rights of fair trial. When such prosecutions appear to fall solely on opposition figures, public confidence in the rule of law and administration of justice risks being seriously undermined."

V – The Malaysian Legal Profession

40. Over a course of years there have been many occasions when the Malaysian bar has been the subject of various degrees of pressure or criticism from the Malaysian government:

a) In 1978, an amendment to the Legal Profession Act 1976[23] prevented Members of Parliament and State Legislative Assemblies, trade union leaders, political party officers and other prominent individuals from becoming members of the Bar Council. We believe this to be an unnecessary and unwarranted interference with the Bar's right and capacity to order its own membership and affairs.

b) In 1977, following vociferous protests by the Bar to new provisions allowing detention without trial[24], including the passing of a Resolution that lawyers boycott cases involving the operation of particular provisions, the government further amended the LPA 1976 by authorising the Attorney General to issue "Special Admission Certificates" to legal practitioners from foreign jurisdictions. The decision of the Attorney General would not be open to judicial challenge. If enforced, these amendments would allow for the possibility of the membership of the Bar being radically changed at the instance of the Attorney General. The amendments were not brought into force at the time and have, as observed in the IBA report, "lain fallow for over 20 years". However, they were brought into force on 1st February 1999.

c) In 1996, the current Attorney-General made a speech at the Annual Dinner of the Medico-Legal Society of Malaysia in which he stated:

> "…because the Bar Council comprises only private practitioners, the Bar Council often forgets that it is a body corporate created by statute…It frequently speaks as if it is a private law association, or an NGO, or an opposition political party. It does not understand, nor seek to understand the various sensitive issues facing the Government…My Chambers are presently preparing a paper with recommendations to the Government to reform the legal profession and, hopefully, with proper medication, a few minor surgeries, implantations and transplantations here and there, the legal body will be cured of its many ills and live a long and healthy life, contributing to the well-being of our Nation."

It is a cause for concern that such a prominent member of the Malaysian executive should imply that if the Bar Council does not both stop making public criticisms and submit to reforms, it might not live a long and healthy life.

d) As already noted, Dr Mahathir himself has made no secret of his dislike for outspoken lawyers;

e) In November 1999, the Malaysian Government sought, and was granted, an injunction preventing the Malaysian Bar Council from meeting to discuss a perceived loss of confidence in the judiciary on the grounds that anyone participating in such a discussion would be committing sedition[25].

f) There have also been a number of criminal prosecutions and civil suits brought against high-profile and outspoken leading members of the Malaysian legal profession. A number will be analysed later in this opinion[26].

g) There have been occasions when police pressure has been exerted against prominent lawyers. We have mentioned above the pressures brought to bear on Mr Anwar's lawyers during his corruption trial, particularly the arrest and detention of Zulkifli Nordin[27]. Similarly, a lawyer acting for the leading human rights activist Irene Fernandez whilst she was being investigated under the Printing Presses and Publication Act 1984, was asked to attend a police station and disclose details of his communications with his client. Although he attended the police station, he refused to disclose any privileged information.

41. The attitude of the government towards the independence of the judiciary also gives rise to concern. Until 1988, the Malaysian Federal Constitution provided for the separation of powers between the branches of government. During the 1980's the judiciary defended the rule of law and incurred the displeasure of the government following a number of cases in which government decisions were overturned. The Constitution was amended so as to radically alter the basis of judicial power. Previously, judicial power was conferred directly by the Constitution itself. Now, the judiciary has only such jurisdiction and powers as may be conferred by federal law[28]. Inevitably, this change involves a fundamental shift in the balance of power. The increasing tension between the judiciary and the legislature resulted in the removal of three senior Supreme Court judges, including the Lord President of the Supreme Court[29], in 1988.

42. The IBA report analyses in greater detail than we have done the threats to the independence of the bar and the judiciary. We set out its recommendations in full at pp78-79 and pp83-87 of the report, which indicate the nature of the threats perceived by the authors of the report.

a) The autonomy of the Bar Council should not be threatened or diminished and the right of lawyers to freedom of association must be permitted.

b) The Bar Council should be allowed to render its services freely without fear or favour, so as to enable it to fulfil its statutory purposes. This includes its right to provide constructive criticism of government action and to make such views public.

c) The government should refrain from speaking out publicly against the Bar Council and its members. It should recognise and respect the role of the Bar Council and its right to fulfil its objectives independently which is guaranteed by Article 24 of the UN Basic Principles on the Role of Lawyers[30].

d) The police should be fully trained regarding the role of the lawyer and refrain from

exerting undue pressure on lawyers when the latter are acting in their professional capacity. The police should be advised that lawyers are duty-bound under the law to protect the confidentiality of all communications with their client and should not be coerced or pressed to disclose any part to anyone.

e) The executive should recognise the independent constitutional position of the judiciary and have a proper understanding of what that involves. It is the failure to understand that by a very powerful executive that has been, by far, the single most important factor in bringing about the present unsatisfactory position.

f) The executive should conduct its business in such a way so as to not interfere with the independence of the judiciary in any way. Equally important, it should be careful to conduct its business in such a way as not to be seen by the reasonable observer to be interfering in the independence of the judiciary. Reasonable perception is every bit as important as the truth in a matter of this kind.

VI - Submission A. Sedition in common law jurisdictions

43. The Act under which Mr Singh has been charged is the Sedition Act 1948. It is a colonial law surviving from times of British occupation. Although we acknowledge Malaysia's jurisprudential independence, it is our view that an outline of the development of sedition in England, the rest of the Commonwealth and in the United States would be of assistance to those dealing with this case.

A – England

44. Sedition and its sister offence, seditious libel, are common law offences. Its origins can be traced back to the beginning of the seventeenth century[31] . Since then, the history of sedition has rather followed the political fortunes of censorship in general. The offence was conceived at a time when it was assumed that the monarch was divinely ordained. Accordingly, it was thought wrong for the "common man" to criticise the actions of the king. However, as the twin notions of democracy and freedom of expression have flourished, so the scope of sedition has been restricted and minimised.

45. The orthodox definition remains that given by Stephen[32] :

> "Sedition consists of any act done, or words spoken or written and published which (i) has or have a seditious tendency and (ii) is done or are spoken or written and published with a seditious intent. A person may be said to have a seditious intention if he has any of the following intentions, and acts or words may be said to have a seditious tendency if they have any of the following tendencies: an intention or tendency to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs or successors, or the government and

> constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established, [or to incite any person to commit any crime in disturbance of the peace][33] or to raise discontent or disaffection among Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects".

46. The apparent breadth of the above definition is offset by Stephen's second paragraph, adopted as correct by Cave J. in *R. v. Burns*[34] :

> "An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to secure their removal, matters which are producing or have a tendency to produce, feelings of hatred and ill-will between classes of Her Majesty's subjects, is not a seditious intention"

47. The *caveat* contained within the second paragraph indicates that sedition is not a crime of strict liability: lawful criticism is a good defence to such a charge. Cave J. went further in *Burns*:

> "…if you come to the conclusion that they were activated by an honest desire to alleviate the misery of the unemployed – if they had a real bona fide desire to bring that misery before the public by constitutional and legal means, you should not be too swift to mark any hasty or ill-considered expression which they might utter in the heat of the moment".

48. This is a necessary limitation upon the operation of the offence: otherwise, any suggestion that the government was acting unwisely or improperly would or might be met with a charge of sedition, which would clearly be a gross interference with freedom of expression and democracy.

49. The common law imposed another limitation upon sedition: a requirement that there be a tendency towards violence or insurrection. In *R. v. Sullivan*, Fitzgerald J. addressed the jury as follows[35] :

> "Sedition in itself is a comprehensive term and it embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the Empire. The objects of sedition generally are to induce discontent and insurrection and to stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion".

50. This theme was continued by Coleridge J. in *R. v. Aldred*[36], in his summing-up to the jury:

> "…whoever by language, either written or spoken, incites or encourages others to use physical force or violence in some public matter connected with the State, is guilty of publishing a seditious libel. The word "sedition"…implies violence or lawlessness in some form".

51. The case of *Aldred* is notable also for Coleridge J's observation that sedition was rarely prosecuted because it was so liable to be abused. He also pointed out that the type of audience addressed by the defendant would be a matter to be taken into account in determining whether or not the words spoken had a seditious tendency. So, there is, we submit, a great distinction between addressing a baying mob and addressing a properly constituted court of law.

52. The next decision of an English court was that of the Privy Council in *Wallace-Johnson v. The King*[37] (1940). The Privy Council rejected a constitutional challenge to the law of the Gold Coast relating to sedition, but approved the development of the English common law as demonstrated in *Sullivan*, *Aldred* and others. We know of no prosecution for sedition in England since *R. v. Caunt* in 1947[38]. In 1991 the refusal of a magistrate to issue a summons for seditious libel against the author of *The Satanic Verses*, Salman Rushdie, was upheld by the Divisional Court[39]. The Law Commission was charged with investigating the arguments for and against the maintenance of sedition and similar offences in 1977[40]. Having conducted an exhaustive analysis of English and Commonwealth authorities, and having adopted the definition of sedition contained in the Canadian case of *Boucher v. R.*[41], the Commission noted that in order to commit sedition, an individual would necessarily have to commit another offence(s)[42]. Those other offences carry heavy sentences. The Commission concluded:

> "We think that it is better in principle to rely on these ordinary statutory and common law offences than to have to resort to an offence which has the implication that the conduct in question is "political". Our provisional view, therefore, is that there is no need for an offence of sedition in the criminal code".

53. The Law Commission's suggestion has not been acted upon. We submit that the reason for this is that there are no longer any prosecutions for sedition in England. Therefore reform of this obsolete offence is not a high priority for the legislature. We submit that it is virtually inconceivable that there will ever be another prosecution for sedition in England. Indeed, a relatively recent decision of the Privy Council indicates that an offence such as sedition would be highly unlikely to withstand judicial scrutiny. In *Hector v. Attorney-General of Antigua*[43], a "false news" case brought against the editor of a newspaper, the Privy Council held that s.33B of the Antigua Public Order Act 1972, which criminalized the printing or distribution of "any false statement likely to undermine public confidence in the conduct of public affairs", contra-

vened the right to freedom of expression enshrined in s.12(1) of the Constitution. Lord Bridge, giving the judgment of the Court, said (at p.608):

> "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. At the same time it is no less obvious that the purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalizes statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion."

B. – Canada

54. In Canada, the law relating to sedition was emphatically restricted in the landmark case of *Boucher v. R.*[44] . The Canadian Supreme Court gave judgment in a case where the Government of Quebec attempted to prosecute a Jehovah's Witness who had distributed leaflets entitled "Quebec's Burning Hate for God and Christ and Freedom is the Shame of all Canada". Jehovah's Witnesses had long complained about the treatment they had suffered in Quebec and the leaflets contained complaints that the police and the justice system applied laws against Jehovah's Witnesses in a discriminatory manner. The leaflet also alleged that prosecutions against Jehovah's Witnesses were being improperly driven by members of the Catholic elite. The leaflets did not advocate violence or disorder notwithstanding their passionate tone.

55. The Supreme Court analysed the law of sedition encompassing Stephen's definition. The Court noted that the offence had its roots in an era when statesmen and political leaders were generally considered to be above reproach and answerable only to God. Kerwin J. held:

> "There is no modern authority which holds that the mere effect of tending to create discontent or disaffection…but not tending to issue in illegal conduct[45] , constitutes the crime [of sedition], and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of our daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality".

56. The Court's conclusion was that "nothing short of direct incitement to disorder and violence is a seditious libel". In reaching that conclusion, the Supreme Court provided the clearest state-

ment that neither passionate criticism nor incitement to mere disaffection can constitute the offence. The Court also made it clear that the freedom to criticise the organs of central government extended to criticisms of the administration of justice. It acknowledged the power of the courts to deal with individuals who bring the administration of justice into disrepute by way of proceedings for contempt of court. There has been no prosecution for sedition or seditious libel since that of Mr Boucher. Bearing in mind the coming into force of the Canadian Charter of Rights and Freedoms in 1982, it may be assumed that his case was the last.

57. The Supreme Court in *R. v. Zundel*[46], a "false news" case, took a similar approach. It was the third prosecution for spreading false news since the creation of the Canadian Criminal Code in the late 19th century[47] and related to the publication and distribution of a leaflet promoting the idea that the Holocaust was a lie framed by a worldwide Jewish conspiracy. The Supreme Court overturned the conviction and, with reference to the Charter of Rights and Freedoms, declared the law of false news to be unconstitutional. The Court stated[48] that criminalizing false news

> "…makes possible conviction for virtually any statement which does not accord with currently accepted "truths", and…could be used (or abused) in a circular fashion essentially to permit the prosecution of unpopular ideas."

C. – India

58. The crime of sedition is set out in s.124A of the Indian Penal Code. Under the imperial regime, the courts construed the provision widely. Sedition was made out in circumstances where a speech tended to induce feelings of hatred or contempt towards the government. It was not dissimilar to the definition in Stephen's *Digest.*

59. After independence and the adoption of a rights-based constitution[49], the Supreme Court of India undertook a comprehensive reconsideration of the offence. In *Kedar Nath v. State of Bihar*[50], the Court narrowed the application of the offence to a state almost identical to that now existing in English law:

> "It is only when the words, written or spoken, etc, have the pernicious tendency or intention of creating public disorder or disturbance of law and order that the law steps in to prevent such activities in the interest of public law and order."[51]

60. The courts of India have therefore acknowledged that mere criticism of the government, however strongly worded, is regarded as being protected by the Constitution and Article 19 in particular.

D. – South Africa

61. Sedition remains a common law offence in South Africa. However, its ambit was severely restricted even before the end of the apartheid regime. The South African courts' attitude to such offences is best illustrated by the case of *R. v. Roux*[52]. The charge in that case was an offence under the law of *crimen laesae venerationis*, which is defined as words scandalising or dishonouring the King and government. The Defendant had published an article claiming that King George was the figurehead of the imperialists and noting a number of abuses that had been committed against the majority Black population in his name. Having doubted whether the offence still existed at all, Justice Curlewis turned to examine the scope of the law even if it did exist:

> "…the words of the article complained of in the summons would certainly not fall within the definition of the crime as…they cannot be construed as seditious or as an incitement to the taking up of arms against the King or as inducing a mutiny or insurrection whereby the welfare of the King and the State is placed in jeopardy…We must interpret the language complained of by the light of modern thought and freedom of speech and not by the light of the restricted ideas of the middle ages."[53]

62. Given the socio-political background existing at the time, the liberal approach taken in *Roux* might be thought to be somewhat surprising. There was a clear requirement of incitement to rebellion in order to constitute the offence. Moreover, the reference to the words used in that case not being "seditious" strongly suggests that sedition, too, cannot be made out without incitement to violence of some sort.

63. Whatever the position in apartheid and pre-apartheid days, it is clear that the new South African Constitution would not permit a prosecution for sedition in the wide terms apparently permitted under the Malaysian Sedition Act. The Constitution is rights-based and Section 16 guarantees freedom of expression[54]. When called upon to do so, the courts have jealously guarded that freedom, particularly in respect of political criticism. In one of the earliest post-apartheid cases, *Holomisa v. Argus Newspapers Ltd.*[55], the court noted that "the success of our constitutional venture depends upon robust criticism of the exercise of power"[56]. This is an important reminder of the crucial link between freedom of expression and the proper operation of democracy. It is submitted that the South African approach is particularly significant because South Africa has learned the lessons from an undemocratic political system.

E. - Australia

64. Like the other jurisdictions already mentioned, Australia once had a broadly defined offence of seditious libel. It was contained in s.24 of the Commonwealth Crimes Act 1914. Its similarity

to the current Malaysian law is striking and betrays the offence's origins in English law. Section 24 made it a crime:

> "a) to bring the Sovereign into hatred or contempt; (b) to excite disaffection against the Sovereign or the Government of Constitution of the United Kingdom or against either House of the Parliament of the United Kingdom; or (c) to excite disaffection against the Government of Constitution of any of the King's dominions".

65. Australia has seen a number of prosecutions for sedition, but they attracted enormous criticism. As a result, s.24 was amended by the Federal Parliament so as to limit sedition to statements or actions carried out "with the intention of causing violence or creating public disorder or a public disturbance"[57] . There have been no prosecutions since the amendment in 1986.

66. More recently, the *Fifth Interim Report* of the Committee of Review of Commonwealth Criminal Law (1991) proposed that Australian law should be amended so that only violent interference with the democratic process should constitute sedition.

67. We note that the Australian courts have restricted the scope of sedition even though there is no formal Bill of Rights. In *Australian Capital Television v. The Commonwealth*[58] , the High Court stated:

> "[E]ach member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia."

F. – United States of America

68. In 1840, President Jefferson pardoned all individuals who had been convicted of sedition and Congress repaid their fines. The Sedition Act 1798 was held by Congress to be unconstitutional and invalid.

69. Given that sedition has not been a crime in the United States for over 150 years, the American courts have had little opportunity to comment upon it. However, the courts have on many occasions defended the primacy of freedom of expression. In one such case, *Garrison v. Louisiana*[59] , a noted decision of the Supreme Court, Justice Black observed that "under our Constitution there is absolutely no place in this country for the old, discredited English Star Chamber law of seditious criminal libel".

70. The conclusion of Justice Black was confirmed by the Supreme Court in *New York Times v. Sullivan*[60] where it was stated that "no court of last resort in this country has ever held, or even

suggested, that prosecutions for libel on government have any place in the American system of jurisprudence".

71. There is no federal law that is even approximately equivalent to sedition. State laws have attempted to criminalise anti-government protests, but they have invariably met with defeat in the Supreme Court. Notably, in *Brandenburg v. Ohio*[61] , the convictions of Ku Klux Klan leaders in respect of inflammatory statements hinting that they would resort to violence if certain race equality laws were not repealed, were overturned. In a case that might be considered a predecessor of *R. v. Zunkel* in Canada, the Supreme Court held that no law could criminalise speech criticising the organs of government (federal, state and local) unless the speech is:

> "directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action."[62]

72. The decision in *Brandenburg*, which is one of the most celebrated decisions of the Supreme Court during the Warren era, establishes a very high hurdle for any sedition-type law: not only must there be an intention for the words to result in violence, but there must be an objective likelihood of such violence occurring. The inclusion of such an objective element to the offence distinguishes American law from the law of the Commonwealth nations already discussed.

VII - Submission B – The Scope of Sedition in Malaysia

A – The Sedition Act

73. The Sedition Act 1948 ("the Act") was enacted by the British colonial government to deal with perceived communist insurrection. Malaysia gained independence in 1957 and the Sedition Act remained in force by virtue of the operation of Article 162(1) of the Constitution, which preserved the pre-existing statutes and created the power of the Malaysian government to amend and repeal them.

74. During the political unrest of 1969, a State of Emergency was declared and Parliament was suspended. The Emergency (Public Order and Prevention of Crime) Ordinance has never been repealed. In 1969, the Sedition Act was amended under the emergency powers so as to broaden its scope. Also, a protective time-limit requiring prosecutions to be brought within 6 months of the offending speech or publication, was repealed. In addition, Parliamentary privilege was eroded so as to expose MPs to prosecution under the Sedition Act for speeches relating to citizenship, national language, special rights for Malays and the sovereignty of the rulers. Parliamentary privilege still exists in relation to other forms of criticism that would otherwise be criminalized by virtue of the Act.

75. The relevant sections of the Act are set out in full, to assist in understanding the breadth of its provisions.

2. Interpretation

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

3. Seditious tendency

(1) A "seditious tendency" is a tendency-

(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government; or

(b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established; or

(c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State; or

(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State; or

(e) to promote feelings of ill-will and hostility between different races or classes of the population of Malays; or

(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions, of Part III of the Federation Constitution or Articles 152, 153 or 181 of the Federal Constitution.

(2) Notwithstanding anything in subsection (1) an act, speech, words, publication or other thing shall not be deemed to be seditious by reason only that it has a tendency-

(a) to show that any Ruler has been misled or mistaken in any of his measures;

(b) to point out errors or defects in any Government or Constitution as by law established (except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (f) of subsection (1) otherwise than in relation to the implementation of any provision relating thereto) or in legislation or the administration of justice with a view to the remedying of the errors or defects;

(c) except in respect of any matter, right, status, position, privilege, sovereigny or prerogative referred to in paragraph (f) of subsection (1);

(i) to persuade the subjects of any Rulers or the inhabitants of any territory governed by any Government to attempt to procure by lawful means the alteration of any matter in the territory of such Government as by law established; or

(ii) to point out, with a view to their removal, any matters producing or having a tendency to produce feelings of ill-will and enmity between different races or classes of the population of the Federation, if the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency.

(3) For the purpose of proving the commission of any offence against this Act the intention of the person charged at the time he…uttered any seditious…shall be deemed to be irrelevant if in fact…the words…had a seditious tendency.

4. Offences

(1) Any person who-

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

(b) utters any seditious words; or

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

(d) imports any seditious publication

shall be guilty of an offence and shall on conviction, be liable for a first offence to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding three years or to both.

5. Legal proceedings

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

76. These provisions are extremely wide. Section 3(1) is the heart of the Act. Expression of a very broad range of opinions may amount to sedition. It is noticeable that the charge against Mr Singh does not specify how his words are alleged to have been seditious i.e. which subsection of 3(1) he has breached. This omission is disturbing since, in the absence of further particulars, Mr Singh cannot know the precise basis of the case against him and prepare his defence. We imagine that the prosecution will argue that 3(1)(a) has been breached by bringing into hatred or contempt or exciting disaffection against any Ruler or against any Government. However, we do not discount the possibility that 3(1)(c) will be relied upon, namely bringing the administration of justice into disrepute, on the basis that the conditions of Mr Anwar's detention are an aspect of the administration of justice. However the case against Mr Singh is to be put, we invite close attention to the exceptions from liability created by s.3(2), particularly s.3(2)(b):

in Malaysia pointing out errors or defects in Government with a view to remedying those errors or defects is not an offence.

B – The Malaysian Courts' approach to sedition

77. The first reported authority was that of *Public Prosecutor v. Ooi Kee Saik & Others*[63] . This case related to the criticism by the defendants of the Government's decision to detain a particular individual and of its policy of racial segregation. In deciding that Ooi Kee Saik and the other defendants (including Fan Yew Teng) were guilty of sedition[64] , the judge held as follows:

a) there was a deliberately created distinction between Malaysian law and English law;
b) he rejected the "liberal interpretation of the provisions of s.124A of the Indian Penal Code[65] as adopted by courts in India which brought the Indian law of sedition to par with English law";
c) under Malaysian law an incitement to violence need not be proved;
d) a defendant is conclusively presumed to have intended the natural consequences of his "verbal acts";
e) it is immaterial whether the words used did or even could have produced one of the unlawful consequences set out in s.3(1);
f) it is immaterial whether the words used are true or false;
g) the judge, in dealing with the issue of freedom of expression, held that there was still freedom of expression in Malaysia but that it ends precisely where the law of sedition begins.

78. In *Public Prosecutor v. Fan Yew Teng*[66] , which involved the same defendant as was involved in the 1971 trial, Abdul Hamid J. cited extensively from the decision in *Ooi Kee Saik.* Prior to convicting the defendant and imposing a $2,000 fine with a 6-month custodial sentence in default, the judge said:

> "The [Sedition] Act is in no way directed at any law-abiding citizen, nor is it directed at those whose words are expressive of only a tendency to point out errors or defects in the Government or Constitution as by law established, even though the condemnation may be couched in the strongest possible language. It is lawful and not actionable so long as the criticism is fair and temperate. It is evident from the Act that the Government, like the court or any other institution, does not enjoy immunity from fair criticism. However I am constrained to say that fair criticism, however strong would not infringe the Act unless the words used have a tendency to produce any of the consequences set out in subsection (1) of s.3."

79. Fan Yew Teng appealed to the Court of Appeal[67] . His lawyer was Karpal Singh, who did not appear below. In dismissing the appeal, the Court held (even though the point was not in issue)

that it is unnecessary in sedition cases for the prosecution to specify which of the 6 tendencies in s.3(1) it relies upon; further, it is open to the prosecution to pick and choose from the tendencies even as the trial is progressing. The Court confirmed the ruling in *Ooi Kee Saik*, that it is immaterial whether the words spoken are true or not and held that Malaysia has a "unique position" in respect of its law of sedition.

80. One of the lesser-known Malaysian authorities is *Public Prosecutor v. Oh Keng Seng*[68] . Despite the *obiter dictum* of the court in *Fan Yew Tang*, Mr Justice Agaib Singh held that the failure of the prosecution to state which of the 6 tendencies it was relying upon rendered the charge defective. However he himself amended the charge so as to specify that s.3(1)(a) and (e) were the relevant provisions. He went on to state as follows:

> "Freedom of speech is a fundamental right of criticism in a democratic country. No democracy worth its name can do without it for if it claims to cherish the ideals of a government by the people for the people it must allow free discussion on all matters pertaining to the political and social life of the people…[The Judge went on to state that such freedom stopped at the boundary of sedition.]…*Bona fide* and fair criticism of government policies and of opposition political parties is not within the mischief of the Sedition Act…The question here is whether the speech delivered by the accused on June 23rd 1972 is seditious within the ambit of the Sedition Act or whether it is a *bona fide* discourse on political and social matters and on the contemporary political situation."

81. The case is notable for the judge's ringing endorsement of freedom of expression and his principled analysis of the constituent elements of sedition. However the defendant was convicted. He appealed[69] but he met with failure. The Federal Court dismissed his appeal and held that the trial judge had demonstrated "remarkable confusion" when he ruled that the prosecution had to identify which elements of s.3(1) it was relying upon. Importantly, the Federal Court did not doubt the judge's more philosophical analysis cited in the paragraph above nor his references to a defence of lawful criticism.

82. In *Public Prosecutor v. Mark Koding*[70] , a Member of Parliament was prosecuted for sedition in respect of questions asked during the course of his maiden Parliamentary speech. A legislative provision had removed the immunity that previously attached to Members of Parliament. The Federal Court had confirmed that this was the legal position at an earlier interlocutory hearing[71] and that the limitation upon Parliamentary privilege was a valid one. It was held that the court should look at the speech as a whole as well as the offending part of the words relied upon. The unprecedented restrictions on parliamentary privilege were upheld. However, a distinction must be drawn between the immunity that attaches to Members of Parliament and that which we submit applies to lawyers. In the case of the former, the immunity was qualified by operation of legislative provisions. In the case of the latter, we will argue that the immunity is

derived from common law principles and is not restricted by statute.

83. The defendant in the case of *Public Prosecutor v. Param Cumaraswamy*[72] was vice-Chairman of the Malaysian Bar Council at the time. He is now the United Nations Special Rapporteur on the Independence of the Judiciary. Mr Cumaraswamy issued an open appeal to the Board of Pardons for commutation of the death sentence on a man convicted of possession of a firearm without a licence. He referred to the case of an MP convicted of shooting someone dead using a licensed firearm. The MP's sentence had been commuted. He contrasted the severity of treatment of the poor with the leniency shown to the rich. He was charged with sedition. Chan J. first examined the English and Indian authorities on sedition. He then found that none of the 3 separate s.3(1) tendencies relied on had been proved. He stressed that the terms "disaffection" and "discontent" in s.3(1)(a),(c) and (d) implied some feeling directed against (as he put it) "authority". He said[73] :

> "…authority in this regard means the Yang di-Pertuan Agong, the Rulers, the Government and the administration of justice. For instance it is not sedition to incite or raise discontent or dissatisfaction among the people of the Tan Sri Ahmad Noordin Committee of Enquiry over their report on the BMF loan scandal, at the Singapore Government over the arrest of Mr Tan Coon Swan, the President of the MAC or at the decision of the referee at a football match. An appeal to the Board of Pardons pointing out possible discrimination could not come within this definition."

84. Finally, the case of *Lim Guan Eng v. Public Prosecutor*[74] attracted considerable international attention and criticism. The defendant, a prominent opposition politician, was charged with sedition arising out of a speech in which he criticised double standards in the administration of justice. At trial and upon appeal he was represented by Karpal Singh. This case is not particularly significant from a purely legal perspective, not least because it was conceded upon appeal that the words spoken were seditious within the meaning of the Act. It is worthy of note for two reasons: the identity of the defendant and the severity of the 18-month custodial sentence eventually imposed by the Federal Court (the trial judge had originally imposed a fine, but the prosecution cross-appealed against sentence).

85. It follows that the scope of the law of sedition in Malaysia as interpreted by a number of judges is far wider than in any of the jurisdictions to which we have referred. It has been suggested that the law of sedition in Malaysia is more severe than in other countries because it suits the Malaysian temperament (by Shah J in Ooi Kee Saik). But this surely begs the question. In any jurisdiction a broad judicial interpretation of an offence such as sedition makes possible its abuse by the authorities in order to suppress free speech. This situation gives rise to serious concern.

86. Moreover, the law is in a state of some confusion. In particular, it is unclear to what extent the defence set out in s.3(2) survives as a useful tool. We submit that upon the present authorities (and particularly in the light of *Oh Keng Seng* and *Param Cumaraswamy*) a defendant can still avail himself of the defence of bona fides and lawful criticism. We also encourage the approach taken in *Cumaraswam*y, namely to subject each element of each s.3(1) tendency to independent scrutiny in an attempt to establish whether it truly has been breached.

VII - Submission C - International Human Rights Law and the Sedition Act

87. Whatever view is taken of the precise ambit of the Malaysian law of sedition, it is our view that it offends against the right to freedom of expression as recognised by international human rights law.. Accordingly, we briefly set out the relevant law on that right.

88. Malaysia is not a party to the major conventions on human rights. It is, however, a member of the United Nations[75] . All members of the United Nations pledge themselves to take joint and separate action to achieve the purposes of the organisation, including the promotion and encouragement of universal respect for, and observance of, human rights and fundamental freedoms for all. The Universal Declaration of Human Rights, the consequence of General Assembly resolution 217A (III) is the leading source of international human rights law. It is the document most commonly relied upon in relation to the human rights that United Nations member states have pledged to encourage and uphold.

89. The right to freedom of expression is one of the most jealously protected rights in modern international law. It is to be found in a prominent position in all major human rights instruments[76] . We propose briefly to analyse the jurisprudence of the European Convention of Human Rights ("ECHR"), which is the most actively-litigated human rights instrument, in order to illustrate how far short of globally accepted standards the Sedition Act falls.

90. Article 10(1) of the ECHR provides :

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…"

91. Article 10(2) of the ECHR provides the following qualification to the right embodied in Article 10(1):

> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or

public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

92. The European Court of Human Rights has frequently referred to freedom of expression as "one of the essential foundations of a democratic society"[77]. It is important to appreciate that the right protects not only well-argued, rational speech, but also valueless and/or offensive words. In *Handyside v. UK*[78], the European Court held :

> "[Freedom of 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. Such are the demands of…pluralism, tolerance and broadmindedness, without which there is no democratic society."

93. Two aspects merit particular attention:

a) in the area of criminal defamation, the Court has on several occasions found violations of Article 10 where domestic law requires the defendant to establish the truth of his publication[79] or opinion[80];

b) criticism of government is provided with "extra" protection. In *Castells v. Spain*[81], the applicant had been convicted of insulting the government. He had written an article in which he accused the Spanish police of having murdered Basque activists and suggested that the authorities were protecting those policemen from prosecution. However, the European Court held that the conviction violated Article 10. Whilst acknowledging that a government was entitled to protect itself from defamation, the Court suggested that a government's dominant position required it to display restraint before resorting to the criminal law particularly where other means were available for replying to unjustified attacks and criticisms. In the Court's view:

> "In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion[82]."

94. It can be seen, then, that the European Court has taken a strict line in ensuring that the right to express oneself is an effective one[83]. Any restraint upon the exercise of that right pursuant to Article 10(2) must bear the following characteristics in order to be valid:

a) it must be "prescribed by law"; this means that the offence must be certain in domestic law. We submit that the interference with freedom of expression in the case of Karpal Singh does not satisfy this test since his prosecution is an unprecedented interference with the special situation of a lawyer speaking in defence of his client in criminal proceedings. Mr Singh could have had no way of foreseeing that his words would

attract prosecution for sedition.

b) It must pursue a legitimate aim i.e. one of the aims listed in Article 10(2). However a legitimate ground for restriction cannot be used as a pretext for a measure that is really aimed at another purpose.

c) It must be necessary in a democratic society; this, in turn, has been subdivided into the following four parts.

   i) Is there a "pressing social need" for some restriction[84] ?

   ii) If so, does the restriction in question correspond to that need?

   iii) If so, is it a proportionate response to that need?

   iv) In any event, are the reasons advanced by the authorities for the restriction "relevant and sufficient"[85] ?

95. We submit that most and perhaps all of the prosecutions brought under the Sedition Act, including the prosecution of Karpal Singh, would be regarded by the European Court as being clear violations of Article 10. We also have no hesitation in submitting that such prosecutions would violate other international human rights instruments, including the UDHR.

VIII - Submission D. – It is Strongly Arguable that Under Malaysian Law Karpal Singh is Not Guilty of Sedition and has No Need to Rely on any Immunity

96. It is submitted that the Malaysian practice in relation to sedition has been to treat statements made in open court as being immune from prosecution. For example none of the repeated attempts by Mr Singh and other defence lawyers to call evidence suggesting a political conspiracy against Mr Anwar engineered by the highest officers of the state, were ever met with sedition charges. Similarly there was never any suggestion that it was seditious to suggest in open court that Mr. Singh had been assaulted after his arrest. Mr Singh could have had no way of knowing that his comments would or might lead to a prosecution for sedition. Hence, to obtain a conviction in this case the prosecution must persuade the Malaysian courts to extend the scope of the Sedition Act further than in any previous case. They will have to demonstrate that the Act criminalizes politically controversial statements made in court by defence advocates even though such statements have enjoyed for many years a practical immunity.

97. In this case, Karpal Singh was addressing a single judge of the Malaysian High Court. Obviously, his words were likely to be reported in the media. We cited earlier the view of Coleridge J. in *Aldred*, that in determining whether words had a seditious tendency, it would be necessary to take into account the audience being addressed. If Karpal Singh had spoken at great length of a government plot to kill Mr Anwar whilst standing on a soap box at the gates of the detention centre and whilst addressing a large crowd of armed Anwar supporters, one can envisage disorder being a foreseeable consequence of his words. However, a judge, whose profession demands a calm demeanour and a degree of aloofness from the heat of the proceedings before

him, is unlikely to be affected by the rhetoric of advocates before him. Indeed, in this case the Learned Judge reacted quite calmly to Mr Singh's address, asking how the Defendant felt and adjourning the trial so that Mr Anwar could obtain medical attention.

98. Reliance is placed upon *Public Prosecutor v. Param Cumaraswamy*[86] : it will be remembered that Dato' Cumaraswamy's words were held not to be seditious notwithstanding their apparent criticism of the administration of justice because they were held to have been directed at the Pardons Board rather than at the public in general. The trial judge so held even though the statement complained of had been made directly to the press and public. The case of Karpal Singh is even clearer in this regard: his address was submitted directly to Judge Jaka.

99. There are additional defences available to Mr Singh in this case. The first arises from s.3(2)(b) of the Sedition Act. This section, it will be recalled, provides that words etc. do not have a seditious tendency where they criticise "errors or defects" in the Government with a view to their being remedied.

100. We of course take no position on whether Mr Anwar was in fact being poisoned or, if so, who may have been responsible. But it was Mr Singh's submission, on the basis of the Gribbles report, that it was possible that people in high places were responsible for poisoning Mr Anwar. If this was true, then it would amount, at the very least, to an "error or defect" in government. Mr Singh called for an adjournment and an inquiry. It is strongly arguable that he was trying to "remedy" the defect and that accordingly, he has an absolute defence under the terms of s.3(2)(b) of the Sedition Act.

101. Further, we submit that in Malaysia a statement made *bona fide* is not seditious[87] , and also that Mr Singh was acting *bona fide* when he addressed the court. It would be extremely difficult for the prosecution to prove[88] that an individual making a statement upon the basis of independent expert evidence was acting *mala fide*. There was, at the time that he addressed the Learned Judge, a great deal of factual evidence supporting Karpal Singh's submission:

a) Mr Anwar was clearly unwell: he had lost much weight and was losing his hair;
b) Mr Singh had read the contents of the Gribbles report: this concluded that the level of arsenic in his client's blood was many times the permissible safe level. There was no reason to suppose that the report was wrong. Mr Singh was entitled to base his submissions upon the conclusions of an independent pathology laboratory in a foreign jurisdiction with high scientific standards.
c) The very high levels of arsenic reported in the Gribbles analysis could hardly be explained by an accident. How could a prisoner have accidentally become exposed to such high levels of a toxic substance? Given the lack of any credible accidental explanation, it was reasonable to suspect that the poisoning was deliberate.
d) The evidence available to Mr Singh was certainly consistent with deliberate poisoning

by someone within the prison system acting on authority given at a higher level.

e) Mr Anwar himself had already been subjected to a very serious assault by an individual in a "higher place"[89] (the Inspector General of Police) whilst he was in custody[90]. This fact had already been acknowledged by the Malaysian authorities through the bringing of charges against Mr Rahim.

f) Mr Singh merely voiced his suspicions. He deliberately asked for a second opinion and an inquiry. He said "It **could well be** that….": this is clearly only a hypothesis. He went on to say "I **suspect** that people…". Mr Singh stopped a long way short of saying that he believed or knew that there was a plot to kill Mr Anwar – essentially he did no more than float the possibility of such a plot.

102. Finally, it is strongly arguable that the very vagueness of Mr Singh's phrase "people in higher places" prevents the words from being seditious. Only if the words are clearly directed towards rousing disaffection against the Government or the Ruler might they be seditious. At the highest, it is submitted that the words might arouse disaffection against the authorities charged with looking after Mr Anwar whilst he is in detention. We rely upon the case of *Param Cumaraswamy* quoted above as to the need for an incitement directed against "Authority".

103. It may be suggested that the case comes within s.3(1)(c) i.e. seditious tendency in relation to the administration of justice. We do not see how such a submission could succeed. Controversial statements cannot be said to "bring into hatred or contempt or to excite disaffection against the administration of justice" merely because they are made in court.

104. It is therefore submitted that under Malaysian law, Mr Singh's submissions should not be characterised as seditious. We invite the Malaysian prosecuting authorities to take account of the above arguments in considering whether or not it is appropriate to continue with this prosecution.

IX - Submission E. Immunity in respect of statements made in the course of legal proceedings before a court

105. At common law, absolute privilege attaches to any statements made by judges, witnesses and advocates during the course of judicial or quasi-judicial proceedings. It is now well established that the only exceptions to this privilege relate to perjury, contempt of court and perverting the course of justice. In *R. v. Skinner*[91] the defendant, a Justice of Peace, had said of a grand jury:

> "You have not done your duty; you have disobeyed my commands; you are a sedious (sic), scandalous, corrupt and perjured jury".

106. He was indicted for criminal defamation. In quashing the indictment Lord Mansfield said:

> "Neither party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the Court may take notice of them as a contempt and examine on information. If anything mala fides is found on inquiry it will be punished suitably"

107. This classic statement of the rule has been cited with approval on many occasions. For example, in *Royal Aquarium v Parkinson*[92] Lopes L.J. said :

> "The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action for libel or slander lies whether against judges, counsel, witnesses, or parties for words spoken in the course of any proceeding before any court recognised by law and this although the words were written or spoken maliciously, without any justification or excuse, and from personal ill-will or anger against the party defamed. This "absolute privilege" has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech exist."

108. The scope of this "absolute privilege" regarding statements made in judicial proceedings is very broad. Its protection attaches to "everything said in court by the Judge, jurors, advocates and witnesses and indeed media reporting of words actually spoken" (*Kelley v Corston*[93] per Judge LJ). It must apply also to the contents of documents tendered as evidence (*Carter Ruck on Libel and Slander*[94] .) However, in one sense the phrase "absolute privilege" is a misnomer. If anyone utters defamatory words in the course of proceedings in court[95] he is immune from civil action for defamation no matter how malicious his words. But malicious accusations made in bad faith might very well constitute a contempt of the court. And if they were made on oath they could constitute perjury even though not actionable in the civil courts.

109. This principle of immunity has been most frequently applied in civil proceedings, particularly those relating to defamation. There are numerous civil cases cited in the jurisprudence. For example the appendix to the United States Restatement 2d at para.586 cites 49 civil cases under the title "Defamation Defences".

110. But cases where the principle has been applied as a bar to criminal proceedings are far rarer. The reason was given by Deane and Dawson JJ in *Jamieson v The Queen and Brugmans v The Queen*[96] , a decision of the High Court of Australia.

> "It is true that, until recently, there has been a dearth of cases in which common law courts have been called upon to quash a criminal proceeding or conviction by application of the principle.

> That is not, however, surprising. It could scarcely be expected that prosecuting authorities would institute proceedings in disregard of a general proposition of common law principle which had been enunciated by Lord Mansfield and subsequently endorsed by strong authority including a unanimous Court of Exchequer Chamber constituted by ten judges."

111. Of course *Skinner* was a criminal case. But, as far as we are aware the only modern criminal cases in which the question of absolute immunity has arisen are 3 Australian cases of which *Jamieson* was the last. Each involved a prosecution for an attempt to defraud by the issue of civil proceedings where (allegedly) the plaintiff knew that the basis of his claim was false. In *R. v. Jurca*[97] , Herron DCJ, sitting at first instance, quashed the indictment. He held that since the claim was filed in the course of a judicial proceeding the claimant was entitled to absolute privilege against all civil and criminal proceedings relating to it. However in *R. v. Beydoun*[98] on very similar facts the Court of Appeal of New South Wales allowed a prosecution appeal against the quashing of an indictment. *Jurca* was distinguished on the basis that whilst there was immunity for "statements made in the course of proceedings" there was none attaching to the "instigation" of proceedings. This extremely narrow distinction - which is of course irrelevant to the present case - was rejected by the High Court of Australia in *Jamieson (supra)* and on that point *Beydoun* was overruled.

112. However it is striking that in all 3 cases it was accepted that, subject to certain exceptions the principle of absolute immunity applied to criminal cases. The exceptions were defined thus by Hunt J. in *Beydoun*:

> "Criminal prosecutions for defamation or for conspiracy to defame based directly upon statements made in the course of and with respect to judicial proceedings remain excluded as would any other offence so based except for perjury (and its associated crimes) and contempt "

113. Deane and Dawson JJ put the exceptions in very similar terms in *Jamieson*:

> "Substantive administration of justice offences (such as perjury contempt of court and depending on the circumstances, perverting the course of justice) and offences associated therewith (such as conspiracy and contempt)"

X - Submission F - Immunity from criminal proceedings is lost only by statements made in bad faith which threaten the integrity of the legal process.

114. This is established by the 3 Australian cases cited in paras.112-114 above. It is instructive to consider the reasons why everybody who makes statements in the course of legal proceedings should enjoy the immunity. Many distinguished judges have commented on them. In the Canadian case of *Bretherton v Kaye*[99] Gillard J. said:

> "It is in the public interest that a person who is taking part or filling a role in litigation should be independent and encouraged to speak freely, so that the true facts may be ascertained, so that the credibility of witnesses may be accurately assessed, and so that the evidence and law may be frankly and candidly discussed to ensure that a correct and just result is obtained in the litigation."

115. In *Rondel v Worsley*[100] Lord Morris spoke to similar effect at p.251. The immunity, he said, is designed to ensure that trials are conducted without "the avoidable stress and tensions of alarm and fear to those who have to play a part in them".

116. Other authorities give a clear indication as to why the exceptions to immunity are all offences against justice. In the Australian case of *Cabbassi v Vila*[101] Starke J said :

> "the law protects witnesses and others not for their benefit but for a higher interest namely the advancement of public justice"

117. The most helpful statement on this point is that of Gaudron J. in *Jamieson* at p594:

> "Perjury, contempt and perverting the course of justice are offences which serve to protect the integrity of the judicial process. The privilege which attaches to statements made in the course of legal proceedings also serves important functions in relation to that process: it promotes resort to the courts for the resolution of justifiable issues, and it prevents the judgements of the courts from collateral attack"

118. Thus if a judge, lawyer or witness conducts himself in a way which undermines the very interests of justice which the immunity is designed to protect, he forfeits the right to claim it. Conduct which constitutes a contempt or an attempt to pervert is the very opposite of what the advocate is obliged to do in the interests of justice. Therefore it is not protected from criminal proceedings. It follows that in order to lose that protection the conduct must in every case threaten what Gaudron J. called in *Jamieson* "the integrity of the legal process".

119. Before leaving this topic it is important to make one thing clear. The immunity can be claimed only in respect of statements and actions having some relation to proceedings. So if an offence of murder or theft or criminal damage is committed in a courtroom it may be prosecuted in the ordinary way: it is inconceivable that it could in any way relate to the conduct of proceedings. If in the course of a case anyone were to harangue the jury box or the public gallery inviting its occupants to take to the streets and attack (say) the police, then there is no doubt that he could be properly prosecuted for any appropriate offence known to the law of the country in question. Such offences might include incitement to riot or sedition, although they might also be dealt with as a contempt.

XI - Submission G. The special position of the Advocate

120. It follows from these principles that a defendant in criminal proceedings must be allowed the freedom to advance his case with the minimum of interference. If it is relevant to his defence to make serious allegations against the state authorities that - for example - he has been framed; beaten up by the police; the victim of an official conspiracy to convict, injure or kill him, then he must be permitted to make them and to call evidence and advance argument to support them. On the one hand, if the allegations are or may be true, then it is vital that they be aired in open court and investigated. On the other, if they are untrue, then the state's remedy is to disprove them rather than to try to prevent them from being made or to punish the maker for committing a political offence.

121. So if Mr. Anwar himself had said the words complained of in this case to the trial judge there could be no question of his being prosecuted for sedition. Even if the allegations were wholly untrue and concocted they would amount at worst to contempt and/or perjury and/or an attempt to pervert the course of justice.

122. A defence advocate cannot be in a worse position than his client. Therefore it is well established that counsel has a wide latitude in addressing a court on behalf of his client (*Re Pollard*[102]) and that cogent evidence is required to establish that any remark was not made bona fide but for an improper purpose such as that of insulting the court (*Ex parte Pater*[103]). Similarly in *Swinfen v. Lord Chelmsford*[104] it was said that the duty undertaken by an advocate is one in which the client, the court and the public have an interest because the due and proper and orderly administration of justice is a matter of vital public concern.

123. In 1963 Lord Denning perhaps the most widely respected common law judge of the last half of the 20th century spoke of counsel's duty thus:

> "Appearing, as the appellant was, on behalf of an accused person, it was, as I understand it, his duty to take any point which he believed to be fairly arguable on behalf of his client. An advocate is not to usurp the province of the judge. He is not to determine what shall be the effect of legal argument. He is not guilty of misconduct simply because he takes a point which the tribunal holds to be bad. He only becomes guilty of misconduct if he is dishonest. That is, if he knowingly takes a bad point and thereby deceives the court" (*Abraham v Jutson*[105]).

124. We stress the use of the words "dishonest" and "knowingly" by Lord Denning. It indicates the degree of latitude that is granted to lawyers in the course of their duties. This suggests that anything less than dishonest behaviour (even if it is offensive and/or grossly negligent) will not amount to misconduct.

125. Again, a barrister has no right to disregard his client's instructions. In *R v Mclaughlin*[106], a New Zealand case a conviction for rape was quashed because counsel declined to call alibi witnesses whom he personally thought to be unreliable. Counsel called no evidence and relied on a defence of consent by the complainant. The Court of Appeal held that the appellant had been deprived of the opportunity to put his defence and that therefore justice had been denied him. It was held that a barrister has no right to disregard his instructions:

> "The barrister may not take it upon himself to disregard his instructions and then conduct the case as he thinks best"

126. Defence advocates frequently find themselves having to advance defences and to call evidence of whose veracity they are very suspicious. But the interests of justice and the right of the defendant to a fair trial require that they conduct a criminal defence regardless of their own opinions. If the court finds that the defence is false, the defence evidence perjured and the supporting documents forged, the advocate is not liable for any kind of offence merely because he has advanced them on instructions as true.

127. Indeed there are powerful reasons for arguing that, if the advocate is to discharge his onerous duties, he requires more protection than anyone else engaged in the judicial process. In *Munster v. Lamb*[107] Brett M.R. referred to the relative positions of judge counsel and witness and said that of the 3 classes:

> "…a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law is privileged; and the reason of that rule covers a counsel even more than a judge or a witness."[108]

128. Further a lawyer has duties both to the court and to his client as Lord Reid observed in *Rondel v Worsley*[109], at p227:

> "Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to

> the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce."[110]

129. Lord Reid's dictum was relied on In *Lewis v Ogden*[111] by the High Court of Australia in quashing a finding of contempt against a barrister who commented to the jury that the trial judge had shown a strong disposition to favour the prosecution case. At p.689, the Court said:

> "…we must keep firmly in mind the high responsibility which counsel has to ensure that his client's case is fully and properly presented, especially at a criminal trial. It has been recognised on many occasions and by judges of great distinction that the responsibility of counsel in representing his client may require him to plead his client's case fearlessly and with vigour and determination."

130. In *Bretherton (supra)*[112] Gillard J held that absolute privilege attaches to the words of counsel appearing at a public enquiry, saying at p.125 that counsel was obliged to probe evidence for reasons of "public information and confidence". He went on:

> "In order to carry out this aim as competent counsel unfettered by fear of the consequences should be briefed to assist"

131. How could an advocate balance these sometimes competing duties if he was subject to the fear of possible prosecution merely for arguing his client's case in a way which offends the government or other state authority?

132. Having stressed the importance of the lawyer's immunity it is only fair to recognise the force of one (limited) argument against it. At common law a lawyer may - subject to good faith - claim immunity from 3 types of proceeding: first, civil actions for defamation; second, prosecutions and third, civil claims for negligence by his client. Nobody doubts the necessity of immunity for the first and second of these categories. But the third is controversial. In *Rondel v Worsley* (*supra*) the House of Lords held barristers immune from actions by their clients in respect of drafting of pleadings, work whilst litigation was still pending and at the trial itself. Legislation in other common law jurisdictions has enacted similar rules[113]. However in recent years this approach has attracted mounting criticism. In particular there are many who think that a negligent lawyer should not be immune from being sued by a client who has suffered loss or damage by his negligence and that competent advocates have no need of this immunity. The matter is currently under review by the House of Lords.

133. However the abrogation or restriction of the barrister's immunity from action for negligence by a dissatisfied client would not in any way affect the argument in favour of the other 2 types of immunity. In relation to his lawyer a client is in a position quite different from that of anybody else. A client is entitled to expect a high standard of care and skill from his lawyer in the protection of his interests. Arguably he should have the same right of civil redress against a negligent lawyer as he would have against any other professional who caused him loss and damage through negligence. But these considerations cannot apply either to a civil action by a third party for a tort such as defamation or to a prosecution. Neither the third party civil action nor the prosecution could conceivably be based on negligence or a duty of care.

134. A very recent Malaysian case, decided on 22nd January 2000, is *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram.* It is an unreported decision of the Malaysian High Court[114]. The case arose out of a bitter probate dispute between various members of a family, some of whom are advocates. During the course of probation proceedings, various allegations of incest were made by the defendant against the plaintiff's husband. This resulted in defamation proceedings being brought in respect of nine separate instances of alleged defamation. Two are of interest for the present purposes: on the first occasion, the defendant, acting in person, handed to the court a written submission during the course of the probate proceedings. The submission was in support of an application to strike out and accused the plaintiff's husband (who became the plaintiff in the defamation proceedings) of being "a slimy creep and an incestuous bastard"). The second instance concerned a further written submission presented to the court which essentially repeated the substance of the allegations made on the first occasion, accusing Mr Thiruchelvasegaram of having "lust of the flesh of his own daughter". The other seven instances of alleged defamation took place outside the course of court proceedings.

135. The defendant claimed, *inter alia*, that all remarks in both of the documents were protected by absolute and qualified privilege. She also pleaded justification. Mr Justice Foong dealt first with the claim of justification. He found that "this claim of incest is not proved, even on the balance of probability"[115]. The Learned Judge went on to criticise the claim of interest in scathing terms:

> "I have a strong belief that this approach was contrived and carried out in this manner because if a police report is made and upon investigation found to be untrue, then the maker of the police report can be charged for making a false report. By this other approach, the objective of damaging the plaintiff with this defamatory allegation is achieved without the maker having to face criminal prosecution, even though this allegation of incest is false."[116]

The Learned Judge's finding is significant, because it amounts to a finding that the defendant deliberately made the allegation in court rather than elsewhere in order to avoid the possibility

of criminal prosecution: she made the allegation knowing it to be false.

136. Mr Justice Foong went on to address the question of privilege. He cited with approval the dictum of Lopes LJ in *Royal Aquarium v Parkinson*[117] . He held in respect of the alleged defamer:

> "...The defendant has claimed that she made it as counsel for Jega and for herself personally as a party in Suit 61. For this, she is entitled to be protected by absolute privilege…It is immaterial whether such proceedings take place in open court or in private and whether they are final or of a preliminary nature – see paragraph 13.3 of *Gatley on Libel and Slander* (9th edition)."

137. Having relied upon the public policy need for a court of justice to operate without fear of subsequent proceedings, Mr. Justice Foong went on to consider the position of an advocate or a witness who

> "…makes a statement of another person, while in the course of legal proceedings, which is false and/or with malice and/or irrelevant."

138. He relied upon the decision of the English Court of Appeal in *Munster v. Lamb*[118]

> "…which announced that no criminal prosecution or civil libel can be maintained against such defendant. And this is all for the sake of public policy as elaborated earlier. I find much favour with this proposition…"

139. The Learned Judge went on to cite from the judgement of Brett M.R. in *Munster v. Lamb*:

> "If the rule of law is otherwise [i.e. if the rule of law does not provide immunity for advocates], the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make it a rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included , who have been guilty of malice and misconduct."[119]

140. Finally, Mr Justice Foong, relying upon the dictum of Lord Mansfield in *R. v. Skinner*, held that counsel or those who represent themselves who make irrelevant, malicious defamatory remarks should be dealt with by way of contempt of court. Contempt of court is the "prevention or remedy against such abuse"[120] . His judgement provides additional support for the argument that the proceedings against Mr Singh must fail under Malaysian law: Mr Singh is entitled to invoke his immunity as an advocate.

141. The way in which these principles operate in a criminal trial is illustrated by *R. v. Macfadden*

and others.[121] . A number of men had been convicted of offences related to IRA terrorism. The prosecution relied against some defendants on the presence of their fingerprints on incriminatiing items. The defence in each case challenged the Crown experts' identification of the respective prints and alternatively contended that if the prints were rightly identified they must have been planted by someone. This in turn led the Crown to call numbers of additional witnesses, some of whom were cross-examined at length, and all of whom were brought before the Court solely in order to show that they, at all events, had not planted the fingerprint in question. On a number of occasions the trial judge in the presence of the jury made strong ciriticsm of the conduct of defence counsel. The Court of Appeal held that these criticisms did not render the trial unfair or the verdicts unsafe.

142. Three points are significant. First it was a case - like that of Mr. Singh - where the defence were making serious allegations against the authorities. Indeed those allegations were stronger than anything said by Mr Singh: in *McFadden* defence counsel were suggesting in terms that there had been planting, whereas Mr Singh went no further than suggesting a possiblity that the authorities were responsible for poisoning his client. Nonetheless the Court of Appeal made clear that "there was here no question of misconduct on the part of counsel in the sense of any deliberate wasting of time for personal advantage or for any other motive".

143. Secondly, the Court held that " A judge who considers that he has cause to complain of the professional conduct of a barrister may make his complaint to the Bar Council but he has no power himself to take disciplinary action in that regard. He can, of course, commit to prison a barrister who is guilty of contempt of court". There was no suggestion that counsel behaving improperly might be prosecuted for anything remotely resembling sedition.

144. Thirdly, after the hearing of the appeal the Professional Conduct Committee rejected complaints against defence counsel's conduct. Furthermore the Chairman of the Bar subsequently restated the principles that govern the conduct of defending counsel:

> "It is the duty of counsel when defending an accused on a criminal charge to present to the court, fearlessly and without regard to his personal interests, the defence of that accused. It is not his function to determine the truth of falsity of that defence, nor should he permit his personal opinion of that defence to influence his conduct of it. No counsel may refuse to defend because of his opinion of the character of the accused nor of the crime charged. That is a cardinal rule of the Bar, and it would be a grave matter in any free society were it not. Counsel also has a duty to the court and to the public. This duty includes the clear presentation of the issues and the avoidance of waste of time, repetition and prolixity. In the conduct of every case counsel must be mindful of this public responsibility. Where the defence of the accused is that a fingerprint on an article, although his, was not put on the article by him, or that he never had in his possession an article which the prosecution claim was found on him (in other words that

such evidence had been "planted"), it is the duty of counsel to present that defence to the jury. Where the accused's defence leads to the conclusion from the evidence as a whole, that one or more identifiable persons were responsible for the "planting", then it is counsel's duty, not only to the accused but also to the court, to pursue that defence and to put this allegation in cross-examination. Where, because of the instructions of the accused, a number of persons, whom the accused cannot identify, could have been responsible for the "planting" then it is counsel's duty to test and probe the evidence for the prosecution in order to demonstrate the opportunity open to someone to have done the alleged "planting". In the absence of a basis for accusing a witness of responsibility for the "planting" of evidence, counsel should not put in cross-examination that that witness is responsible. But he must put the allegation of opportunity and the general allegation that "planting" has taken place, not necessarily to all the prosecution witnesses, but to that witness or witnesses whom counsel thinks most appropriate so that the prosecution have a proper opportunity to deal with the allegation by the accused. To do anything less would be to deny the prosecution the opportunity to rebut that defence and would deny to an accused the right to have his defence considered by the jury."

145. This statement is regarded as an authoritative statement of the duty of counsel defending an accused.

XII - Submission H. International standards as to the lawyer's immunity reflect the common law. The Basic Principles provide an additional protection for lawyers

146. The Basic Principles on the Role of Lawyers were adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders in Havana, 27 August to 7 September 1990[122].

147. The recitals refer to the UN Charter as an affirmation by the peoples of the world of a determination to achieve justice and international cooperation in promoting human rights; the principles of equality before the law; the right to fair and public hearing by an impartial and independent tribunal; "all the guarantees necessary for the defence of everyone charged with a penal offence" and the right to communicate and consult with counsel. They continue:

> "Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled requires that all persons have effective access to legal services provided by an independent legal profession.
>
> Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all who need them and cooperating with governmental and other institutions in furthering the ends of justice and public interest, the

Basic Principles, set forth below, should be respected and taken into account by governments within the framework of their national legislation and practice and should be brought to the attention of other persons, such as judges, prosecutors, members of the executive and legislature and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers"

148. Principle 1 is fundamental:

> "All persons are entitled to call upon a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings."

149. Thus a client is entitled to look to his lawyer to protect all of his rights. The obligation of both lawyers and governments to protect such rights is underlined by principle 4 obliging governments and professional associations to promote programmes to inform members of the public about the rights and duties of lawyers and their "important role in protecting their fundamental freedoms"

150. Principles 12 - 15 deal with the lawyer's "duties and responsibilities". They may be divided into 2 parts. There are obligations towards the client as set out in principles 13 and 15. Principle 13 obliges a lawyer to advise a client; to "assist" him "in every appropriate way"; to take legal action to protect his interests and to "assist" him before "courts tribunals and administrative authorities where appropriate". Principle 15 provides:

> "Lawyers shall always loyally respect the interests of their clients"

151. But in addition, Principles 12, and 14 impose obligations upon lawyers to uphold the principles of ethics, justice and human rights:

> "12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice….
>
> …14. Lawyers in protecting the rights of their clients and in promoting the cause of justice shall seek to uphold human rights and fundamental freedoms recognised by national and international law and shall at all times act freely and diligently in accordance with the law and recognised standards and ethics of the legal profession."

152. Principles 16 - 18 provide "guarantees for functioning lawyers".

> "16. Governments shall ensure that lawyers
>
> (a) are able to perform all of their professional functions without intimi-

dation, hindrance, harassment or improper interference…and

(b) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken **in accordance with recognized professional duties, standards and ethics** [our emphasis].

17. Where the security of lawyers is threatened as a result of discharging their functions they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients causes as a result of discharging their functions."

153. Principles 23 - 29 provide for "Freedom of Expression and Association". Principle 23 guarantees to lawyers the freedoms of expression, belief association and assembly guaranteed to other citizens and obliges them to conduct themselves

> "in accordance with the law and the **recognised standards and ethics of the legal profession**" [our emphasis].

154. Similarly, Principle 24 entitles lawyers to form professional associations. It is provided that the executive bodies of such associations shall be elected by their members and shall exercise their functions "without interference". Principle 25 provides:

> "Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients **in accordance with the law and recognised professional standards**" [our emphasis].

155. It will be seen that in these passages a distinction is made between national law and recognised professional standards and ethics. Similarly Principles 26 - 29 provide for charges and disciplinary proceedings:

> "26. Codes of professional conduct shall be established by the legal profession through its appropriate organs, or by legislation, **in accordance with national law and custom and recognised international standards and norms**. [Our emphasis.]
>
> 27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously. Lawyers shall have the same right to a fair hearing, including the right to be assisted by a lawyer of their choice

28. All disciplinary proceedings against lawyers shall be determined in accordance with the code of profession conduct and other **recognised standards and ethics of the legal profession** and in the light of these principles." [Our emphasis.]

156. We offer the following comments. Any defendant in a criminal trial has the right that his lawyer should "protect and establish (his) rights" (Principle 1). Principle 14 imposes on the lawyer a corresponding duty to act and speak in order to uphold his client's human rights and fundamental freedoms. There is no right more fundamental then the right to life. It follows that where a lawyer has information that suggests that his client's life may be in danger then he is duty-bound to bring that information to the attention of the court before which his client's case is pending. If the information suggests that someone may be seeking to kill his client then again the lawyer is obliged to draw the attention of the court to that danger. He must seek to protect his client's life. He cannot do so unless he is allowed to make frank submissions to the court free from the fear of prosecution.

157. The Basic Principles impose strong obligations on governments to protect lawyers in the performance of their duties. By Principle 16[123] a government is obliged:

a) not to prosecute and not to impose any sanctions "for any action taken in accordance with recognised professional duties, standards and ethics" and
b) to prevent others from prosecuting or imposing such sanctions.

158. For example, a lawyer must be protected from any private prosecution in respect of what is done in accordance with his recognised professional duty, standards or ethics.

159. In this context the term "recognised" is crucial. What is "recognised" as proper conduct must depend on internationally accepted standards (as embodied for example in the Basic Principles themselves) supplemented by national disciplinary rules. Suppose a lawyer is accused of behaving improperly by insulting a judge in open court. A criminal charge is brought against him. A ruling by the lawyer's national bar association or other body responsible for professional discipline that his conduct was not improper by recognised standards must be conclusive in his favour. The Basic Principles prohibit a government from unilaterally setting standards of professional conduct for its lawyers different from those recognised by professional association(s) of the country concerned. To prosecute a lawyer for conduct recognised by his fellow professionals as proper contravenes this principle.

160. This interpretation of the term "recognised professional duties, standards and ethics" is borne out by other provisions of the Basic Principles (see the recitals quoted above as to the "vital role" of professional associations of lawyers in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements and

Principles 23, 25 and 29). It is important to note that these are internationally accepted minimum standards ("Basic Principles"). In adopting the Basic Principles the international community has accepted that it is for lawyers to determine what are the recognised standards - not for governments. Thus if the Malaysian Bar Council were to decide after proper enquiry that Mr. Singh had behaved in accordance with proper professional standards then he would be entitled to protection of Principle 16 and to immunity from any prosecution[124] .

161. Principle 20 creates a specific "civil and penal" immunity for relevant statements made "in good faith" in pleadings or in appearances before courts or tribunals. It goes further than Principle 16 since it confers a civil immunity in addition to the immunities from prosecution and sanctions conferred by Principle 16.

162. However, as regards criminal proceedings it seems that Principle 20 adds nothing to Principle 16. A statement not made in good faith could hardly be said to be in accordance with "recognised professional duties, standards and ethics". Suppose an advocate conspired with his client to adduce evidence which both knew to be false. Neither Principle 16 nor Principle 20 could be a bar to his prosecution together with his client for an offence against the administration of justice.

163. As to the concept of good faith it is noteworthy that Lord Mansfield referred to conduct *mala fide* as being contemptuous. But it is important not to dilute the concept of good faith. Words may be uttered in court hastily and/or foolishly and/or intemperately and/or insultingly and still be in good faith. The lawyer's immunity, whether at common law or under the Principles is forfeited only by improper conduct calculated to undermine the very interests of justice that the immunity exists to protect.

164. Furthermore it is well accepted in all developed legal systems that the obligation of good faith does not require that the lawyer himself believes his client's instructions. If he has instructions regarding relevant matters then he must present his client's case in accordance with them. This point is vividly illustrated by the case of *McFadden (supra)*. It is submitted that Principle 18 is very important in this context. It provides for the independence of the lawyer. No matter how much a client is hated or vilified, his lawyer must not be "identified" with him or his cause. It therefore affirms the common law principle that a lawyer, being independent, is not to be criticised for honestly advancing a case based upon his instructions.

165. It is submitted that the Basic Principles embody concepts that are familiar to the common lawyer:

a) the crucial importance of an independent legal profession as a safeguard for fundamental freedoms and human rights;

b) the duties of lawyers to both their clients and to justice;
c) the duty of lawyers to protect human rights;
d) their immunity from proceedings in respect of statements made in good faith;
e) the need for regulation and discipline by professional bodies rather than by governments.

166. In some respects the Basic Principles go further than the common law, which merely prescribes the lawyers' duty and defines his immunity. The Basic Principles, however, impose positive obligations on governments to uphold the rights of lawyers and to ensure that they are not in any way impeded in carrying out their duties. But what greater impediment could there be to a lawyer defending a client than the fear that if he offends the government he may be prosecuted for sedition? There is no greater threat to the independence of lawyers than the threat of prosecution for what is essentially a political offence, particularly where as in Malaysia the offence is so loosely defined. Therefore, since the Basic Principles are so clearly designed to protect that independence, prosecution of a lawyer for sedition in relation to his defence of a client on a criminal charge must be contrary to their letter, their spirit and purpose.

167. It seems that there is only one significant difference between the common law rules and the Basic Principles. Principle 20 affords immunity only for relevant statements made in good faith. In the common law authorities it was often said that even malicious and irrelevant statements were immune from suit for defamation. This difference of approach is probably not of any importance in the present case, which is not one of defamation. But, in any event it may be more apparent than real. Gatley suggests that there should be "some minimal requirement of relevancy" for the immunity to arise at all (9th ed. at p293). Moreover, as noted above, even though a malicious and irrelevant statement is protected from action for defamation it might very well constitute a contempt of court or, if made on oath, perjury.

168. We submit that as a member of the UN, Malaysia is bound by Articles 55(3) and 56 of the UN Charter to take joint and separate action for the achievement of universal respect for and observation of human rights and fundamental freedoms. Malaysia is of course also bound to act in accordance with UN resolutions and the declarations of the UN on human rights of which the Basic Principles are an example.

169. There are a number of other international instruments which are entirely consistent with the Basic Principles. Thus The Declaration of the Right and Responsibility of Individuals adopted by the General Assembly in 1999 provides:

> "Everyone has the right, individually and in association with others, to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels".

> "9(3) To the same end, everyone has the right, individually and in association with other, inter alia,…[t]o offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms."

170. The Latimer House Guidelines for the Commonwealth were developed to renew and enlarge on the commitments made by Commonwealth countries to the principles set out in the Harare Declaration of 1991. By these guidelines, the Commonwealth (to which Malaysia belongs) committed to ensuring that law and procedure reflect the guiding principle of Part V11 article 3 that:

> "An independent, organised legal profession is an essential component in the protection of the rule of law."

XIII - Submission I. Prosecution for sedition in relation to statements made in court undermines the right to fair trial.

171. The right to fair trial is protected by a number of human rights instruments (for example Article 14 ICCPR and Article 6 ECHR). In all civilised countries the trial process is founded on a respect for and a desire to discover the truth. This is never more important than in criminal cases where the accused can be properly convicted only on the clearest proof of his guilt. Different systems have evolved different modes of trial for achieving this result and for ensuring the fairness of the trial. Some systems of trial are adversarial and others investigative, a distinction which very loosely reflects the different traditions of common law and civil law systems. There are many different types of tribunal throughout the world. For example a criminal trial may take place before one or more judges; before one or more judges sitting with a jury or with assessors; before magistrates lay or professional or before a court martial. Again the rules of evidence and procedure vary widely. To take only one example it is well known that in the civil law tradition hearsay evidence is more readily admitted than at common law.

172. These differences of modes of trial, rules of evidence and procedure exist because different societies have evolved different techniques for the discovery of the truth in a criminal trial. In any society committed to the rule of law it is vital that the witnesses and advocates on both sides be free to give their accounts and advance their arguments free from pressure and fear of the consequences to themselves. It is for this reason that all developed legal systems seek to protect witnesses from intimidation. For example in the case of a gangland killing witnesses whose testimony could convict the guilty man may be subject to threats or may be in fear of the safety. It is important in such situations that state authorities take appropriate measures to protect the witness. Equally the state should protect defence witnesses who may be under threat or in fear. It would be entirely wrong for a policeman to visit a potential defence witness

and threaten him that he will suffer adverse consequences if he gives evidence. The state is not entitled to seek to suppress defence evidence and testimony by threats.

173. But the offence of sedition, and in particular sedition as interpreted in Malaysia is likely to have precisely this effect if it is used to prosecute for statements made in the course of court proceedings. Sedition is a political offence that is aimed at the suppression of dissent and controversy. In some cases it may be an essential feature of the defence to make serious allegations against the state. It may be the accused's defence to a charge of assault that he was defending himself against agents of the state who were trying to kill him; that he has been framed by the intelligence services or that his prosecution was a politically motivated frame up. If, however, allegations of this kind are regarded as seditious and criminal in themselves then nobody could ever advance a controversial defence without fear that the very attempt to defend himself against one charge might attract prosecution for another.

174. Furthermore, if the courts of the country in question hold - as do the Malaysian courts - that the truthfulness of a statement is not a defence to a charge of sedition then the consequences are appalling. Suppose that in country X a man is falsely accused of treason. He is beaten up by the police to extract an untruthful confession. Perjured and suborned witnesses are called to testify against him. The fear of prosecution for a political offence would have a profoundly chilling effect upon his right and ability to defend himself. Neither he nor his witnesses nor his lawyers would be able to make allegations against the state or its agents without fear of prosecution. Because of the generality and vagueness of the offence it would be impossible to know which allegations, testimony or submission would attract prosecution. Convictions for sedition could be obtained for the making of truthful allegations which established the innocence of the accused. For example if a doctor were to give truthful evidence that he had for years treated prisoners in the facility where X had been detained and that they were as a matter of routine tortured during their interrogation, he might be subject to prosecution for sedition even though his evidence was accepted by the court of trial.

XIV - Submission J. Prosecution for sedition of a lawyer for statements made in the course of legal proceedings undermines the independence of lawyers

175. It is a *sine qua non* of the fearless representation of their clients that lawyers are independent. This is true of all lawyers, no matter what field of law they practice in; but it is particularly important in the arena of criminal defence, for it is in there that the lawyer opposes the forces of government. If a lawyer defending an individual on a criminal charge is capable of being intimidated by the prosecution or of being inhibited in his conduct by pressure from government officials, then he will be unable properly to present the case for his client. It is therefore vital to the administration of justice that lawyers are independent. Indeed there are occasions when a lawyer must assert independence even from his own client where, for example, the

client wishes him to act unethically or dishonestly.

176. The importance of the principle of independence is reflected by the emphasis it receives in international instruments relating to the rights and duties of lawyers:

a) as already noted, the Basic Principles on the Role of Lawyers is predicated on the independence of lawyers;

b) the Council of the Bars and Law Societies of the European Union[125], the officially recognised organisation in the European Union for the legal profession[126] adopted a Common Code of Conduct ("CCBE Code") in Lyon in 1998; rule 2.1.1 states as follows:

> "The many duties to which a lawyer is subject require his absolute independence free from all other influence, especially such as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his independence and be careful not to compromise his professional standards in order to please his client, the court or third parties";

c) le Règlement Intérieur de l'Order des Avocats à la Court de Paris provides:

> "La profession d'avocat est une profession libérale et indépendente…";[127]

d) the Law Society of England and Wales Guide to the Professional Conduct of Solicitors states:

> "A solicitor shall not do anything in the course of practising as a solicitor, or permit another person to do anything on his or her behalf, which compromises or impairs or is likely to compromise or impair any of the following: (a) the solicitor's independence or integrity[128]

e) the attitude of the Bar Council of England and Wales is amply illustrated by the statement of the Chairman of the Bar following the case of *MacFadden (supra)*;

f) the Estatutuo General de la Abogacià Espa'ola 1982 provides:

> "El Abogado, en cumplimiento de su misión, actuará con toda libertad e independencia…";[129]

g) the International Bar Association published in 1988 a document entitled "*Standards for the Independence of the Legal Profession*". It was adopted by the IBA in May 1988 in New York. They are very similar to the Basic Principles which they antedate by 3

years. They provide, *inter alia*, as follows:

> "**Preamble**
>
> The independence of the legal profession constitutes an essential guarantee for the promotion and protection of human rights and is necessary for effective and adequate access to legal services…Professional associations of lawyers have a vital role to uphold professional standards and ethics, to protect their members from improper restrictions and infringements, to provide legal services to all in need of them, and to co-operate with governmental and other institutions in furthering the ends of justice.
>
> **Rights and duties of lawyers**
>
> 6. Subject to the established rules, standards and ethics of the profession the lawyer in discharging his or her duties shall at all times act freely, diligently and fearlessly in accordance with the legitimate interest of the client and without any inhibition or pressure from the authorities or the public.
>
> 7. The lawyer is not to be identified by the authorities or the public with the client or the client's cause, however popular or unpopular it may be.
>
> 8. No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions or harassment by reason of his or her having legitimately advised or represented any client or client's cause.
>
> 11. Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in god faith in written or oral pleadings or in his or her professional appearances before a court, tribunal or other legal or administrative authority.
>
> 14. Lawyers shall not by reason of exercising their profession be denied freedom of belief, expression, association and assembly; and in particular they shall have the right to:
>
> (a)take part in public discussion of matters concerning the law and the administration of justice;
>
> (b)join or form freely local, national and international organisations;
>
> (c)propose and recommend well considered law reforms in the public interest and inform the public about such matters.
>
> **Lawyers' Associations**
>
> 17. There shall be established in each jurisdiction one or more independent self-governing associations of lawyers recognised in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join in addition other professional associations of lawyers and jurists."

177. A lawyer must be free from all pressure and improper influence intended to inhibit him in the conduct of his client's case. Just as it is essential to the cause of justice that neither side presents

false or misleading arguments, so it is at least as important that each side presents all of its valid arguments. Accordingly, there should be nothing to inhibit a lawyer from presenting any argument which is unpopular or distasteful to the opposing party if such argument may be helpful to his client's case. It is only through the free exchange of arguments that a court or tribunal can be assisted to reach a just conclusion.

178. The threat of prosecution for sedition against lawyers who make submissions in court which are unwelcome to the state is fundamentally incompatible with their independence and threatens its very existence. Moreover the right to be represented by an independent lawyer is an essential element in the right to fair trial. If an accused cannot rely on his lawyer to give him advice and to represent him fearlessly then his right to a fair trial is still further undermined.

XV – Submission K. Save in the most exceptional cases where very serious crimes have been committed sanctions for a lawyer's misconduct should be administered at the instance of courts and professional bodies. This is vital in order to protect the independence of lawyers and of courts.

179. By "most exceptional cases" we have in mind situations where the conduct is so serious as to go beyond contempt or an offence against discipline. An example would be participation of a lawyer in a conspiracy to present a perjured case to a court or to corrupt witnesses. There is not a great deal of relevant authority in common law jurisdictions. We submit that this is because truly democratic governments do not try to interfere with the independence of the courts and of the legal profession with regard to professional misconduct and discipline. However, in practice we submit that two principles are well recognised in common law jurisdictions. First the trial judge has a general power to control and punish conduct which amounts to an interference with the administration of justice by the threat and use of the contempt power. Secondly, members of a professional disciplinary body are "the guardians of the proper standards of professional and ethical conduct". This phrase was used by the Court of Appeal in the Canadian case of *re Prescott*[130] to describe the Benchers of the Law Society of British Columbia.

180. In *R. v. General Council of the Bar ex p. Percival*[131] , the Divisional Court considered an application for judicial review of a decision of the Bar Council's Professional Conduct Committee to prefer the lesser of two charges against a particular barrister. The applicant was another barrister working in the same chambers who had accused a colleague of being dishonest. The Divisional Court held that the Professional Conduct Committee exercised a jurisdiction delegated by the judges themselves. Accordingly, decisions of the Committee were amenable to judicial review. This decision sets a high threshold for judicial interference: limited to those cases where there is a breach of the rules of natural justice or the decision of the Committee is unreasonable in the "Wednesbury" sense[132] . The decision of the Divisional Court confirms that it is the professional body that should have primacy of jurisdiction in cases of alleged

professional misconduct and that it must be afforded a great deal of latitude it in the exercise of its powers.

181. Again, our submissions with regard to professional discipline are supported by the Basic Principles. The recitals stress the "vital role" of professional associations "in upholding professional standards, protecting their members form persecution and improper restrictions and infringements...". Principle 25 obliges associations and governments to cooperate in order to avoid improper interference with lawyers in carrying out their duties.

182. This principle must surely be infringed where a government prosecutes a lawyer for his behaviour in court even though neither the trial judge nor his professional association have suggested that it was in any way improper. Indeed, Principles 26 and 29 oblige the professional associations to establish codes of conduct and to determine disciplinary proceedings in accordance with recognised standards and ethics of the legal profession.

183. In paragraphs 176-179 we pointed out that prosecution for sedition could be used as a weapon against defence lawyers in such a way as to undermine both their independence and the right of defendants to fair trial. But in addition such prosecutions threaten the independence of the courts and of the professional bodies. They usurp those powers of control and discipline over individual lawyers traditionally exercised by courts and professional associations. The cumulative threat to and effect of a number of such prosecutions upon the independence of the both the Malaysian courts and the Bar Council would be profound.

XVI - Submission L. The scope of contempt at common law

184. Contempt of court is a broad instrument designed to prevent a variety of misdemeanours that are regarded as interferences with the administration of justice. There is jurisdiction in both a criminal and a civil context i.e. proceedings may be brought by a state authority or by parties to litigation. A particular species of contempt of court has evolved through the common law[133] to protect the administration of justice during the course of proceedings. This species of contempt is known as "contempt in the face of the court".

185. Summary jurisdiction may be exercised for contempt in the face of the court, permitting the immediate trial of alleged contempts. In *Morris v. Crown Office*[134] , Lord Denning said of the offence:

> "The phrase "contempt in the face of the court" has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and

> must have, power at once to deal with those who offend against it. It is a great power – a power instantly to imprison a person without trial – but it is a necessary power."

186. It is necessary to establish not only that the words or acts complained of interfere with the administration of justice but also that they were calculated so to interfere. Thus both an *actus reus* and *mens rea* are required. In the 1997 English case of *R. v. Schot and Barclay*[135], the Court of Appeal confirmed that an intention to impede or create a real risk of prejudicing the administration of justice had to be proved.

187. In recent years concerns as to the propiety of summary proceedings save in exceptional cases have been expressed. Summary proceedings may result in a failure to allow defendants proper facilities for the preparation of their defence as in *Schot and Barclay.* Reservations over summary proceedings for contempt have also been expressed in Canada[136] and Australia[137]. But there has been no retreat from the requirement of mens rea.

188. The contempt jurisdiction is exercisable over all participants in the judicial process: parties, witnesses, members of the public and advocates. An advocate who wilfully insults a judge in the course of proceedings may or may not thereby interfere with the course of justice. When the remarks which are said to be wilfully insulting are relevant to the issues to be determined by the court and are germane to the client's case, there is unlikely to be a contempt[138]. In *Maharaj v. Attorney-General for Trinidad and Tobago*[139], the appellant, who was counsel at the Trinidadian Bar, accused a particular judge of "unjudicial conduct" during the course of an application for that judge to disqualify himself from sitting in any cases in which the appellant was briefed. In holding that the appellant had made a "vicious attack on the integrity of the court" the judge sentenced him to 7 days' imprisonment for contempt of court. The Privy Council quashed the conviction on the basis that insufficient particulars had been given of the alleged offence and approved the words of Lord Goddard in the Privy Council in *Parashuram Detaram Shamdasani v. King-Emperor*[140]:

> "Their Lordships would once again emphasize what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended."

189. The requirement that the summary contempt jurisdiction be exercised sparingly reflects the latitude granted to participants in the legal process. It is a latitude granted to all participants, including lawyers and indicates that judicial institutions are robust: the reason why there are so few prosecutions (still less convictions) is because the administration of justice is not easily interfered with. However, the retention of the jurisdiction is designed to cope with a small

minority of situations where there is genuine interference. We submit that the same principles must apply to all proceedings for contempt, whether summary or not.

190. Lawyers are not granted any special exemption from proceedings for contempt of court. In our submission, where judicial proceedings are contemplated for behaviour alleged to interfere with the administration of justice, contempt of court is the appropriate offence to be charged; although we support the restriction of its use to the most serious situations.

XVII - Submission M. The ample powers of the Courts of Malaysia and of Disciplinary Board of the Bar Council to deal with any allegation of impropriety by Mr Singh

191. The Disciplinary Board of the Malaysian Bar Council has sufficient powers to deal with alleged misconduct in court. Disciplinary machinery is established by Part VII of the Legal Profession Act 1976. Section 93 establishes a Disciplinary Board consisting of a High Court or Supreme Court judge appointed by the Chief Justice to be chairman of the Board, the President of the Bar Council and 15 practitioner members of not less than 15 years' experience. Its quorum is 7 members.

192. Under s.94(2), the Disciplinary Board has the power to strike off the Roll or suspend from practice for any period not exceeding 5 years anyone guilty of any misconduct. Section 93 defines misconduct to include "dishonest or fraudulent conduct in the discharge of his duties[141] ", "breach of any rule of practice and etiquette of the profession made by the Bar Council under this Act or otherwise[142] " and "being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute[143] ".

193. Any complaint of misconduct is to be investigated by an investigating committee. The presentation of complaints is governed by s.99:

> "**99. Complaint against advocate and solicitor or pupil**
> (1)Any complaint concerning the conduct of any advocate and solicitor or of any pupil shall be in writing and shall in the first place be made or referred to the Disciplinary Board which shall deal with such complaint in accordance with such rules as may from time to time be made under the provisions of this Part.
> (2)Any court, Judge, Sessions Court Judge or Magistrate or the Attorney General may at any time refer to the Disciplinary Board any complaint against an advocate and solicitor or a pupil.
> (3) Nothing in this section shall be taken to preclude the Bar Council or a State Bar Committee from making any complaint of its own motion to the Disciplinary Board against an advocate and solicitor or a pupil."

194. It can be seen, therefore, that there are many people who have sufficient *locus* to present a complaint. They include the judge in the case and the Attorney General. In Mr Singh's case, it will be recalled that the Attorney General was in court and contributed fully to the discussion about Mr Anwar's health. If it was thought by either Judge Arifin or by the Attorney General that Mr Singh had been guilty of conduct unbefitting of an advocate in the words and manner of his submission, then either or both could have presented a complaint to the Disciplinary Board. That they did not do so strongly suggests that neither saw anything improper in Mr Singh's conduct.

195. We submit that in the first place, allegations of misbehaviour should be dealt with by way of professional discipline. We rely upon the decision of the Supreme Court of Malaysia in *Ayer Molek*[144] . The present Chief Justice stated that presentation of a complaint to the Disciplinary Board was the way to deal with matters of professional misconduct. In reaching that decision, the Chief Justice is likely to have paid regard to the fact that the Disciplinary Board is a body with teeth: in the 6 years between 1993 and 1999, there were suspensions in 59 out of 361 cases. This suggests that there is considerable and effective scrutiny of complaints by the Bar and the Board.

196. If it was thought (wrongly, we would submit) that presentation of a complaint to the Disciplinary Board was insufficient a response to Mr Singh's submissions, there would remain the possibility of bringing contempt proceedings against him. We emphasise that we do not accept any suggestion that Mr Singh's conduct was improper in any way let alone that it was so serious that it merits the bringing of contempt proceedings. Our purpose in addressing the issue of contempt is to show the proper course of dealing with a lawyer who has behaved improperly in court proceedings.

197. The Malaysian courts have recently been very willing to find lawyers in contempt of court. This has attracted considerable criticism. The IBA report states:

> "The use and threatened use of the contempt power in certain cases in Malaysia has given concern as to the true independence of the judiciary. It also gives concern as to the ability of lawyers to render their services freely."[145]

198. We agree with the observation that over-frequent use of the power to commit for contempt interferes with the ability of lawyers to render their services freely. Contempt of court is a doctrine of last resort, for use in only the most serious cases, not a stick with which to beat every antagonistic or unruly lawyer.

199. The fears voiced by the IBA are based upon, *inter alia*, the following cases of lawyers being found to be in contempt of court:

a) *Attorney General v. Manjeet Singh Dhillon*[146] ; the Defendant was Secretary of

the Bar Council and in that capacity affirmed an affidavit on behalf of the Council supporting an application for leave for an order of committal to prison of the Acting Lord President (during the 1988 judicial crisis, after the suspension of the former Lord President). The Supreme Court found that he was guilty of contempt of court through an attempt to prevent, frustrate and interfere with a sitting of the Court. He was fined $5,000. No proceedings were instituted against the Bar Council itself, notwithstanding the fact that Mr Dhillon's liability was vicarious.

b) MBf Capital Bhd & Anr v. Tommy Thomas & Another[147] ; an action for defamation claiming enormous dameges was brought against the defendant, who was then the Secretary of the Bar Council, and a firm of lawyers, Skrine & Co. in relation to published criticisms that they had made of certain aspects of two large commercial cases. The defamation action was settled, but Mr Thomas made a statement to the press indicating that he had been pressurised into making the statement by his insurers. He immediately retracted that statement. He accepted having committed a contempt of court and sought only to mitigate. The judge took a grave view of Mr Thomas' behaviour and sentenced him o 6 months imprisonment. The case is now being appealed.

c) The law firm, Skrine & Co., applied for the judge in the defamation case referred to above to disqualify himself because of "a real likelihood that a fair trial…will no longer be possible". The judge refused the application and the matter was appealed. The Court of Appeal let it be known that if the application was not immediately withdrawn, notices for contempt would follow because the application was misconceived and intemperate. The warnings intimidated Skrine & Co. into withdrawing the application.

d) We have already referred to the case of Zainur Zakaria, who was committed for contempt by Justice Paul at the outset of the first Anwar trial after he had applied to have two prosecutors excluded from the case on the ground that they had attempted to fabricate evidence against him. Mr Zakaria was committed to custody and although he was ultimately granted bail, his appeal against both conviction and sentence has yet to be heard. The IBA report concludes:

> "The Zakaria case has troubled lawyers greatly. It is no one's case that Mr Zakaria did not act *bona fide*. This was not a case of wilful contempt. Nor does it become one simply because he refused to apologise for the *bona fide* reason of not wanting to jeopardise his client's interest to save himself. Therefore, quite apart from the intricacies of the law of contempt, the decision puts lawyers in a professional dilemma…If lawyers, as a profession, feel that the *bona fide* discharge of their duty would result in action and imprisonment for contempt, they would be justified in seeking a change in the law of contempt."

200. The IBA report continues to criticise the strict liability basis of the law of contempt in Malaysia. It concludes:

> "The real purpose of the law of contempt is to prevent conduct which prejudices the right to a fair trial, and not actions which individual judges perceive offensive to their dignity. Unprofessional conduct should be dealt with by the professional bodies after the conclusion of the main hearing except in cases where the continuation of the process in a fair manner is impossible. Furthermore, the use of contempt has a direct impact on the ability of lawyers to provide effective legal counsel – a guarantee of the right to a fair trial."[148]

201. We wish to make it clear that we too are very concerned over the extended contempt jurisdiction now exercised by Malaysian judges. We do not wish to be understood as supporting that extension. To the contrary: we submit that holding advocates strictly liable for contempt is open to the objections that we have argued in sections F – J above. Our point is a quite different one. Given the relative frequency with which contempt proceedings are brought against lawyers in Malaysia, one might have expected Mr Singh, had he behaved at all inappropriately, to have been dealt with for contempt of court. In fact, Judge Arifin has at no stage suggested that he was considering contempt proceedings. It is submitted that it is highly significant that the trial judge did not seek to exercise the enhanced powers to deal with contempt of court which the Malaysian judiciary have developed. Of course if Mr Singh was not guilty of contempt by Malaysian standards then *a fortiori* he was not guilty of the much narrower species of the offence recognised by the common law.

202. In our view, if Mr Singh committed an offence of sedition in court, he would necessarily be committing a contempt of court, since by committing any such offence in court he would surely be interfering with the administration of justice. Since Mr Singh's submissions did not amount to a contempt of court, how could they be seditious?

XVIII - Submission N. The propriety of Mr Singh's conduct

203. Above, we set out the arguments that Karpal Singh's words were not seditious even under Malaysian law. However, we would not wish to rest our submission that his conduct was entirely proper on so narrow a basis.

204. We have already made the point that he had information consistent with an officially sanctioned attempt to poison his client. Faced with that alarming situation he was not obliged – to use the vivid words of the President of the Malaysian Bar Council – to "lie down and die". The opposite is the case. It was his obligation to his client and to justice to make forceful submissions which would draw the attention of the court to the danger. In a case where the defence is

that there has been a politically inspired prosecution against the accused based upon false evidence, his advocate must be entitled to rely on evidence suggesting that there may have been an attempt to kill the accused whilst in custody. The advocate is obliged to advance any matters as to which he is instructed. Moreover, as we have submitted, there was a further reason why Mr Singh was under a positive obligation to bring to the attention of the court anything which was consistent with such an attempt having taken place: he was duty bound to take steps to protect his client's right to life.

205. What if the report on which his submissions were based was, for any reason, false? This makes no difference unless it can be proved that he knew it to be so. In that event it might be appropriate to take disciplinary proceedings or, if it could be considered an extremely serious case, proceedings for contempt. But we can see no conceivable basis for alleging that he was acting in bad faith. If he was acting in good faith, he has a complete immunity against any kind of prosecution.

206. The duty of an advocate is very succinctly summarised in rule 16 of the Legal Profession (Practice and Etiquette) Rules of the Malaysian Bar:

> "An advocate and solicitor shall while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interest of his client, the interest of justice and the dignity of the profession without regard to any unpleasant consequences to himself or to any other person."

This, we submit, is precisely what Mr Singh did.

207. For the reasons that we have developed, to bring a prosecution for a political offence against an advocate in respect of a statement made in court whilst defending a client on a serious criminal charge threatens not only the independence of the legal profession, but also the fundamental right of the individual to a fair trial.

Michael Birnbaum QC

James Laddie

[1] Mr Anwar is the former Deputy Prime Minister of Malaysia.

[2] (*Assault on the Judiciary* (1989) and *Malaysian Human Rights Undermined: Restrictive Laws in a Parliamentary Democracy* (1999)).

[3] Human Rights Watch is an independent organisation established in 1978 and which monitors human rights around the world. It publishes an annual report that has, for the last three years, criticised the deteriorating human rights situation in Malaysia. Human Rights Watch, like the better known Amnesty International, is frequently critical of

the human rights records of major Western democracies, including the United States and the United Kingdom.

[4] *Justice on Trial: Malaysia's Assaults on Lawyers* (April 1999).

[5] The report of the Special Rapporteur, Mr Abid Hussein, was presented to the United Nations Economic and Social Council on 23rd December 1998. Amongst the concluding observations are these: "The Special Rapporteur is concerned at the extent of the limitations on the right to freedom of opinion and expression in the national legislation of Malaysia. With regard to the use of laws to protect the security and the integrity of the State, the Special Rapporteur is compelled to conclude that certain wording in and the implementation of these laws, in particular…the Sedition Act…fail to offer adequate protection of the right to freedom of opinion and expression as provided for by applicable international human rights law, including Article 19 of the Universal Declaration of Human Rights." (See para.66 of the Report.)

[6] The members of the commission were the Honourable Lord Abernethy, Judge of the Court of Session (Supreme Court), Scotland and Past President of the International Bar Association's Judges' Forum; the Honourable Mr Justice McNally, Appellate Judge of the Supreme Court, Zimbabwe; and Dr Rajeev Dhavan, Senior Advocate (India) and a Commission member of the International Commission of Jurists.

[7] See p.77 of the IBA report ("Conclusion and Summary of Recommendations").

[8] For detailed discussion of the Internal Security Act 1960, see the IBA Report, p.69-70 and Amnesty International's report, *Human Rights Undermined: Restrictive Laws in a Parliamentary Democracy*, p.13-26.

[9] Dr Halim Manzar, a forensic consultant, gave evidence to the Commission of Inquiry that Anwar Ibrahim had suffered "many injuries in potentially lethal places".

[10] This incident is covered in the Amnesty International report "*Human Rights Undermined*", September 1999, pp.78-9.

[11] In August 1999, the American Bar Association awarded Mr Zainur its annual human rights award. The US-based Lawyers' Committee for Human Rights commented "US lawyers take notice of the extreme risk that lawyers such as Mr Zainur face when standing up for fundamental rights and make clear that these are unacceptable conditions for the practice of law. That recognition and support is essential to the brave advocates who stand up in the face of such risks".

[12] Although Mr Dhillon did not retract the allegations contained within the affidavit, namely that improper pressure was placed upon Mr Nallakaruppan.

[13] Creatine is a substance excreted in urine upon which chemical tests can be performed.

[14] Samples of Mr Anwar's hair and urine were analysed by two laboratories connected to the National University of Malaysia Hospital, by the Perth Chemistry Centre and by Guy's and St Thomas' Hospital in London.

[15] A sedition charge was brought on the same day against the vice-president of Keadilan (another opposition party), Marina Yussof. Since she and Karpal Singh were charged, further prosecutions for sedition have been brought, against Zulkifli Sulong, editor of the opposition Partie Islamic SeMalaysia newspaper "*Harakah*", and also the publisher of that newspaper, Chia Lim Thye.

[16] The prosecution had asked bail to be set at RM5,000 but did not request the confiscation of Mr Singh's passport, acknowledging the likelihood of Mr Singh attending for his trial.

[17] See *Minister for Home Affairs Malaysia and another v. Karpal Singh* [1988] 3 MLJ 29 and [1988] 3 MLJ 85.

[18] *Tengku Jaffar bin Tengku Ahad v. Karpal Singh* [1993] 3 M.L.J. 156.

[19] The interview can be read in full on the World Wide Web: <http://www.malaysiakini.com>

[20] The Judge agreed with prosecutors who had argued that Dr Mahathir would not have any relevant evidence to put before the court.

[21] Another defence lawyer, Christopher Fernando, told the court that Mr Anwar's "confidence in the administration of justice has been completely eroded…His immediate reaction now is to abandon this trial because he feels his chances of succeeding are slim". Judge Jaka did not threaten either Mr Fernando or Mr Anwar with proceedings

for either sedition or contempt of court.

[22] "The attorney-general is urged to withdraw criminal prosecution against lawyer Karpal Singh for statements uttered in the course of judicial proceedings."

[23] The LPA deals with, *inter alia*, professional legal education, rules of admission to the Bar, professional practice, etiquette, conduct and discipline and the Bar Council's disciplinary powers. The amendment was s.46A.

[24] The provisions in question were the Emergency (Essential) Security Cases Regulations (ESCAR).

[25] The injunction was granted in the High Court by Justice Dr Kamalanthan Ratnam in Civil Case No.S2-23-93-1999 (19th November 1999); the decision has been appealed.

[26] The sedition cases in issue are: *Public Prosecutor v. Param Cumaraswamy* ([1986] 1 M.L.J. 512 and [1986] 1 M.L.J. 518) and *Lim Guan Eng v. Public Prosecutor* [1998] 3 M.L.J. 14; Large commercial enterprises have claimed enormous damages for defamation against lawyers or law firms: Tommy Thomas, Skrine & Co and Param Cumaraswamy. In the case of Dato' Cumaraswamy, the suit has been maintained despite a ruling of the International Court of Justice that he was immune by virtue of his status as United Nations Special Rapporteur ((*Dato' Param Cumaraswamy's case v. MBf Capital Bhd* [1997] 3 M.L.J. 300 and [1997] 3 M.L.J. 824).

[27] This episode is dealt with in more detail at para.21(a) above.

[28] Article 121(2)(b)

[29] Having been suspended in May 1988, the Lord President (the highest-ranking member of the Malaysian judiciary) was dismissed in August 1988 following a finding that he was "guilty of misbehaviour in the form of bias against the government".

[30] Article 24 of the UN Basic Principles on the Role of Lawyers establishes the right of lawyers "to form and join self-governing professional associations". See para.154 below.

[31] See the judgment of Coke C.J. in *De Libellis Famosis*, (1606) 5 Co.Rep. 125a, vol.128.

[32] *Digest of the Criminal Law*, 9th ed., Art.114

[33] The words in brackets were not included in earlier editions of the *Digest*, but Stephen emphasised in a footnote that they were intended to clarify rather than widen the definition.

[34] (1886) 16 Cox 355; this was a case where the Defendants had used inflammatory language to a crowd of political protesters immediately before a riot.

[35] (1868) 11 Cox 44, at p.45; the Defendants published articles praising Irishmen who had been hanged in England for their part in the Irish uprising against the British; specifically, the charge related to the words "…we will purge our native soil from the curse of British misrule"; see also Cave J. in *Burns* (*ante*), where the jury were required to determine whether the Defendants incited the crowd to "violence" or to "a disturbance of the public peace".

[36] (1909) 22 Cox 1; this trial was of publishers of an article applauding political assassins during the Indian uprising against colonial rule.

[37] [1940] A.C. 231

[38] This was a prosecution of a newspaper editor at the Liverpool Assizes on 17th November 1947; he had written an editorial that on one view encouraged violence against Jews at a time when the Jewish resistance movement, Haganah, was fighting the British in Palestine; the defendant was acquitted. The case is not reported, but it is discussed briefly at (1947) 64 LQR 203.

[39] *R. v. Chief Metropolitan Stipendiary Magistrate, ex p. Choudhury* [1991] 1 Q.B. 429, p.453; 91 Cr.App.R. 393, DC. The Divisional Court specifically approved the formulation of the offence of sedition as contained within the judgment of Kellock J. in *Boucher v. R.* [1951] 2 D.L.R. 369, in particular the requirement that there be an intention to promote violence, public disturbance or disorder.

[40] See the Law Commission Working Paper No.72 (1977) "Codification of the Criminal Law: Treason, Sedition and Allied Offences".

[41] [1951] 2 D.L.R. 369.

[42] For example, incitement to riot and incitement to commit offences against the person or against property.

[43] [1990] 2 W.L.R. 606.

[44] [1951] 2 DLR 369.

[45] See also the English Law Commission, *ante*.

[46] [1992] 2 S.C.R. 731

[47] The Supreme Court found that the offence of spreading false news does not exist in any other free and democratic country. A distinction should however be drawn between spreading false news (in a racial context) and inciting racial hatred, which is an offence in Canadian law.

[48] At p.769

[49] Article 19 of the Constitution guarantees freedom of expression, subject to restrictions for the purpose of protecting public order and national security.

[50] AIR (1962) SC 955

[51] *Ibid*., p.969

[52] 1936 AD 271

[53] At p.280-281

[54] This is subject to the usual narrow exceptions, including "incitement of imminent violence".

[55] 1996 (2) SA 588

[56] *Ibid*., at p.609

[57] The amendment was made via the Intelligence and Security Act, No. 102, sections 12-13.

[58] (1992) 177 CLR 106 (HC); see also *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1 (HC).

[59] 379 U.S. 64 (1964), p.80

[60] 376 U.S. 254 (1964)

[61] 395 U.S. 444 (1969)

[62] *Ibid*., at p.447

[63] [1971] 2 M.L.J. 108

[64] The conviction was later overturned (*sub nom Fan Yew Teng v. Public Prosecutor* [1971] 2 M.L.J. 271) by the Federal Court of Criminal Appeal on a point relating to a lack of pre-trial procedures. An appeal to the Privy Council by the Public Prosecutor on the pre-trial point also failed (*Public Prosecutor v. Fan Yew Teng* [1973] 2 M.L.J. 1). Neither the Federal Court of Criminal Appeal nor the Privy Council discussed the substantive law of sedition.

[65] I.e. the provisions of the Indian Penal Code dealing with sedition.

[66] [1975] 1 M.L.J. 176.

[67] [1975] 2 M.L.J. 235; the Court of Appeal is the second-highest court in Malaysia, after the Federal Court.

[68] [1979] 2 M.L.J. 174.

[69] [1980] 2 M.L.J. 244.

[70] [1983] 1 M.L.J. 111. The judge Mohd Ahmed J. said at p117 "The law of sedition in this country is difficult to understand due to its artificial nature".

[71] [1982] 2 M.L.J. 120.

[72] [1986] 1 M.L.J. 518. The judge's decision to refuse the submission at the close of the prosecution case is reported at [1986] 1 M.L.J. 512.

[73] *Ibid.,* p.525.

[74] [1998] 3 M.L.J. 14

[75] Malaysia became a member of the United Nations on 17th September, 1957.

[76] Article 19 of the UDHR provides that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference…". Article 19(2) of the International Covenant on Civil and Political Rights, to which Malaysia is not a signatory, provides that "Everyone shall have the right to freedom of expression"; the exercise of the right is subject to such legal restrictions as are "necessary" for respect of the rights or reputations or others, or for the protection of national security, public order, public health or morals (Article 19(3)).

[77] See for example *Handyside v. UK* (1979) 1 EHRR 737; *Jersild v. Denmark* (1994) 19 EHRR 1; *Goodwin v. UK* (1996) 22 EHRR 123.

[78] (1979) 1 EHRR 737, at para.49.

[79] *Lingens v. Austria* (1986) 8 EHRR 407.

[80] *Thorgiersen v. Iceland* (1992) 14 EHRR 843, where the applicant's conviction for criminal defamation in respect of an article alleging police brutality was ruled to have been an interference with his Article 10 rights that was not proportionate to the legitimate aim of protecting the reputation of the police force. The applicant's article was based upon rumours rather than fact.

[81] (1992) 14 EHRR 445.

[82] *Ibid.*, at para.46.

[83] In *Sunday Times v. UK* (1980) 2 EHRR 245, the Court held that what is at stake is "a freedom of expression that is subject to a number of exceptions which must be narrowly construed".

[84] See *Handyside v. UK* (1992) 14 EHRR 445, at para.48.

[85] See *Barthold v. Germany* (1985) 7 EHRR 383.

[86] See para.83 above.

[87] See *Fan Yew Teng* (the citation from the decision of Abdul Hamid J.) and *Oh Keng Seng*, above.

[88] Even to a civil standard of proof, let alone to a criminal standard.

[89] Karpal Singh used the words "I suspect that persons in a higher place are responsible" during the course of his submissions before the court. These words are now relied on against him.

[90] During the course of his submissions, Mr Singh mentioned the assault on his client.

[91] [1772] Lofft 55; 98 E.R. 529.

[92] [1892] 1 QB 431 at 451

[93] [1998] 3 WLR 246 at 252

[94] 9th ed. at p.185.

[95] There has been much discussion as to how far the immunity applies to bodies which are not courts but which exercise a judicial or quasi-judicial role. That discussion and the authorities are irrelevant to the present issues. For the purposes of this opinion we confine our analysis to what is said before a court of a law.

[96] [1993] CLR 574

[97] [1986] 6 NSWLR

[98] [1990] 22 NSWLR 256

[99] [1971] V.R. 111

[100] [1969] 1 A.C. 191

[101] ([1940] 64 C.L.R. 130 at 141 approved by Lord Diplock in Saif Ali v Sydney Mitchell and Co. [1980] AC 198 at

222).

[102] [1868] L.R.2, P.C, .106

[103] [1868] 5 B.and S. 299; 10 L.T. 376; in this case, a barrister who complained of the appearance of the jury "in violent and abusive language" and despite admonition from the court, was dealt with by way of contempt of court.

[104] (1860) 5 H and N 890

[105] [1963] 1 WLR 658

[106] [1985] 1 NZLR 106

[107] [1883] 11 Q.B.D 596

[108] *Ibid.*, at p.603-4

[109] [1967] 3 W.L.R. 1666; [1969] 1 A.C.191.

[110] See also to similar effect the Indian case of *Re Divarka Prasad Mithal* ([1923] ILR 46 121)

[111] [1984] 153 CLR 682

[112] See note 99, above.

[113] Both Australia and New Zealand enacted statutes upon attaining independence whereby the immunity granted to English lawyers as of the date of independence was the immunity that applied to Australian and New Zealand lawyers. In other words, the antipodean immunity is statutorily derived from the immunity in England: the relevant legislation is the Legal Profession Practice Act 1958 s.10(2) (Aus.) and the Law Practitioners Act 1955, s.13 (NZ).

[114] The court reference is: GUAMAN SIVIL NO: S2 (S5)–23-04-1997 tried together with GUAMAN SIVIL NO: S5-23-08-1997.

[115] *Ibid.*, at p.27.

[116] *Ibid.*, at p.29.

[117] See para.107 *supra*.

[118] See para.127 *supra*.

[119] (1883) 11 Q.B.D. 588, at p.604.

[120] *Thiruchelvasegaram*, at p.33.

[121] 62 Cr.App.Rep. 187

[122] U.N. Doc. A/CONF.144/28/Rev.1 at 188 (1990). They were endorsed by the United Nations General Assembly in resolutions 45/121 (14th December 1990) and 45/166 (18th December 1990). It is understood that Malaysia was not a signatory to the Basic Principles, but has, in correspondence, acknowledged its recognition of Principle 16 (see below).

[123] By a letter dated 23rd January 1998 addressed to the Special Rapporteur on the independence of judges and lawyers, the Malaysian government acknowledged that it takes "full cognisance of Principle 16 of the United Nations Basic Principles on the Role of Lawyers".

[124] We note that the Malaysian Bar Council has already given staunch support to Mr Singh – see para.38 above.

[125] It is more usually known by the acronym CCBE (Conseil des barreaux de l'Union européenne).

[126] The CCBE consists of 18 delegations whose members are nominated by the Bars and Law Societies of the 18 Member States. The Bars of Cyprus, the Czech Republic, Estonia, Hungary, Poland, the Slovak Republic, Slovenia, Switzerland and Turkey are represented by observer delegations.

[127] ("The lawyer's profession is a liberal and independent one".)

[128] Practice Rule 1

[129] ("A lawyer, in fulfilling his duties, will act with complete freedom and independence…", at Article 42).

[130] [1971] 19 D.L.R.; the determinations of the Defendant Society that particular conduct was unbecoming a member and contrary to the interest of the public and the profession could not be set aside by the court where the determinations were based upon evidence; realistically, the determinations are conclusive unless they either breach rules of natural justice or are perverse in the sense that no reasonable body could have reached such a conclusion.

[131] [1990] 3 All E R 137

[132] *Per* the decision in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, where it was held that a decision of a body holding a discretionary power may be reviewed by the courts where the body's decision was one that no reasonable tribunal could have reached.

[133] The power to deal with contempt in the face of an English magistrates' court is established and controlled by s.12 of the Contempt of Court Act 1981. Virtually identical provisions are found in s.118 of the County Courts Act 1984.

[134] [1970] 2 Q.B. 114.

[135] [1997] 2 Cr.App.R. 383. This case concerned two jurors who were found to be in contempt and sentenced to 30 days' imprisonment by the trial judge when they declared that their consciences precluded them from returning true verdicts according to the evidence. Their appeals against conviction were successful.

[136] See *B.K. v. R.* (1995) 129 D.L.R. (4th) 500 (Supreme Court of Canada).

[137] See *The Magistrates' Court at Prahan v. Murphy* [1997] 2 V.R. 186 (the Court of Appeal of Victoria).

[138] *Lewis v. Ogden* [1984] 153 CLR 682.

[139] [1977] 1 All E.R. 411.

[140] [1945] A.C. 264 at 270.

[141] Section 93(3)(c).

[142] Section 93(3)(d).

[143] Section 93(3)(o).

[144] [1995] 2 M.L.J. 833, at p.846.

[145] IBA report at p.21.

[146] [1991] 1 M.L.J. 167.

[147] [1999] 1 M.L.J. 139.

[148] IBA report, at pp.29-30.