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SEDITIOUS IN SINGAPORE! FREE SPEECH AND THE OFFENCE OF PROMOTING ILL-WILL AND HOSTILITY BETWEEN DIFFERENT RACIAL GROUPS

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In 2005, the archaic laws of sedition were summoned to counteract speech considered offensive to racial and religious groups in Singapore. Under the *Sedition Act*, it is seditious to, *inter alia*, promote feelings of ill-will and hostility between different races or classes of the population. In a later case involving religious proselytisation, a Christian couple was charged and convicted of sedition under the same section. This article examines this new phenomenon. It investigates the manner in which these laws have been employed and jurisprudentially developed to restrain speech on race and/or religion in Singapore. The article argues that the current state of the law is highly problematic for its adverse impact on free speech as well as for its conceptual confusions with alternative bases for restraining speech. It contends that failure to extricate the existing conceptual confusions is adverse to free speech and community integration in the long run. A threefold legal framework is proposed to provide clearer guidance on inter-racial and inter-religious interaction within the Singaporean society.

I. INTRODUCTION

In 2005, the Singapore blogosphere was scandalised by reports of blatant online racism. A local blogger had parodied the *halal* logo, placing it next to a pig's head and, among other derisive and vulgar assaults on the Malay-Muslim community and its customs, compared Islam to Satanism.[1] His blog entry sparked a slew of racial slurs attacking both Malays and Chinese in Singapore. In another part of the blogosphere, a different blogger caused furore with a post entitled "The Second

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1 *Public Prosecutor v. Koh Song Huat Benjamin* [2005] SGDC 272 [*Koh Song Huat Benjamin*]; Chong Chee Kin, "2 charged with making racist remarks on Net" *The Straits Times* (13 September 2005), online: SGCollect.com <http://www.sgcollect.com/forum/lofiversion/index.php/t45392-50.html>.

Holocaust" advocating genocide against the Malays.[2] These bloggers and another were charged and convicted of sedition.[3] Under Singapore's *Sedition Act*,[4] it is seditious to "promote feelings of ill-will and hostility between different races or classes of the population".[5] This is a significant restraint on freedom of speech. Freedom of speech is constitutionally guaranteed under art. 14 of the *Constitution of the Republic of Singapore*.[6] The official justification is that such restraint is necessary to preserve the public interest of maintaining peaceful and harmonious relations between the different racial and religious groups in the country.

Situating this racialised fracas in the context of Singapore's underdeveloped state of nationhood is necessary in order to fully appreciate the gravity of the issue. Singapore is a racially and religiously diverse society composed of three main racial groups: the Chinese who form the clear majority at 74.1 percent, the Malays who are the largest minority group at 13.4 percent and the Indians at 9.2 percent.[7] This diversity and the lack of a common nationality, in the sense of a shared sense of community arising from commonalities such as race, language, religion and/or even a shared baptismal experience in history, have made independent statehood exceedingly difficult. The large coincidence of race and religion within the population deepens social cleavages since religious differences and disputes may also be perceived as racial in nature.[8]

As such, at the point of independent statehood, not only did a Singaporean nation not exist, there was also a clear and urgent sense that it had to be invented.[9] Searching for the optimal way to mediate racial-religious relations so as to ensure peaceful interaction between different groups within the population was and remains one of the main obsessions of the government.[10] For instance, the first and only constitutional

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2 "Third racist blogger sentenced to 24 months supervised probation" *Channel News Asia* (Singapore) (23 November 2005), online: VR-Zone <http://forums.vr-zone.com/chit-chatting/44764-third-racist-blogger-sentenced-24-months-supervised-probation.html>.

3 It should be clarified that there is no such offence as sedition; what the law criminalises are words, publications and conduct with seditious intent. Nonetheless, for convenience, it is commonplace to use the term "sedition" to refer to such an offence: U.K., The Law Commission, *Codification of the Criminal Law: Treason, Sedition and Allied Offences*, Second Programme, Item XVIII, Working Paper No. 72 (London: Her Majesty's Stationery Office, 1977) at 41 [*Working Paper No. 72*]; Jogeschandra Chaudhuri, *The Principles of the Law of Sedition* (Calcutta: Weekly Notes Printing Works, 1898) at 4.

4 Cap. 290, 1985 Rev. Ed. Sing. [*Sedition Act*].

5 *Ibid*., s. 3(1)(e).

6 1999 Rev. Ed. Sing. [*Singapore Constitution*].

7 This is based on the 2010 census results: Sing., Department of Statistics, Ministry of Trade and Industry, *Census of Population 2010 Advance Census Release: Key Demographic Trends* at 5, online: Department of Statistics, Singapore <http://www.singstat.gov.sg/pubn/popn/c2010acr/key_demographic_trends.pdf>.

8 Most Malays were Muslims, most Indians were Hindus while most Chinese were Buddhists or Taoists. A small number of Indians and Chinese were also Christians.

9 See generally Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, 2nd ed. (London: Verso, 2006) at 6. Anderson defines the nation as "an imagined political community", one that is imagined as "both inherently limited and sovereign", one which was and had to be invented, not awakened.

10 I characterise the primary approach to mediating majority-minority relations in Singapore as one of "judicious balancing", which depends heavily on active state intervention: Jaclyn Ling-Chien Neo, "The protection of minorities and the Constitution: A judicious balance" in Li-ann Thio & Kevin Y.L. Tan, eds., *Evolution of a Revolution: Forty years of the Singapore Constitution* (New York: Routledge-Cavendish, 2009) 234.

commission in post-independence Singapore was convened to examine and recommend ways to safeguard the interests of racial, linguistic and religious minorities,[11] with a view to assuring minorities that they would not be subjugated to the caprices of the majority. This is necessary in the backdrop of the 1964 racial riots, which have largely been attributed to political and media inflammation of latent distrust between the Chinese and Malay racial groups in Singapore.[12] These riots precipitated Singapore's expulsion from the Federation of Malaysia as a constituent state, thrusting the country into unexpected and uncertain statehood.

The recent use of the law of sedition to counteract racist speech in Singapore is motivated by the resulting state fixation with ensuring peaceful interaction between different racial-religious groups in the country. Initially introduced in Singapore through the *Sedition Ordinance, 1938*,[13] sedition laws were used by the British colonials to restrain freedom of speech, particularly that of the press, for the purpose of preserving political control over the colony. The current version of the *Sedition Act* had its genesis in the Malaysian *Sedition Ordinance, 1948*. It was gazetted after the Malaya-Singapore merger to extend to Singapore as a constituent state of the Federation of Malaysia.[14] Singapore retained the law after its separation from Malaysia in 1965. The invocation of such laws to restrain speech on race and/or religion is however novel in Singapore.[15] This new strategy serves to communicate the government's strong disapproval of certain types of speech on race and religion as being harmful and objectionable. While absolute free speech has never been entirely supportable, and indeed, there exists a broad range of limits on free speech grounded in multiple theoretical bases, such possibly broad-ranging state proscription of speech needs to be interrogated and justified.

This article examines this new phenomenon. It investigates the manner in which these laws have been employed and jurisprudentially developed to restrain speech on race and/or religion in Singapore. It questions the current limits imposed via sedition

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[11] The Wee Chong Jin Constitutional Commission was tasked to deliberate upon and make recommendations on the question of minority rights in 1965. In its report, the Commission concluded that ensuring equal rights for all individuals and citizens would be the primary safeguard for protecting the interests of racial, linguistic and religious minorities: Sing., Constitutional Commission, "Report of the Constitutional Commission 1966" in Kevin Y.L. Tan & Thio Li-ann, *Tan, Yeo & Lee's Constitutional Law in Malaysia & Singapore*, 2nd ed. (Singapore: Butterworths Asia, 1997) 1020 at para. 11.

[12] For an account, see generally Albert Lau, *A Moment of Anguish: Singapore in Malaysia and the Politics of Disengagement* (Singapore: Times Academic Press, 1998).

[13] Straits Settlements, *Sedition Ordinance, 1938*, No. 18 of 1938. See also Tan Jing Quee, "Background and Impact of the *Fajar* Sedition Trial" in Poh Soo Kai, Tan Jing Quee & Koh Kay Yew, eds., *The Fajar Generation*: *The University Socialist Club and the Politics of Postwar Malaya and Singapore* (Petaling Jaya: Strategic Information and Research Development Centre, 2009) 122.

[14] Malaysia, *Sedition Ordinance, 1948*, No. 14 of 1948. The Ordinance was gazetted on 29 May 1964 to extend to the States of Singapore, Sabah and Sarawak: "Sedition Act extended" *The Straits Times* (30 May 1964), online: National Library Board <http://newspapers.nl.sg/Digitised/Article/straitstimes19640530.2.10.aspx>.

[15] It should be noted however that Malaysia has employed its sedition laws against speech touching upon race since 1971, after the 1969 racial riots, which led to a state of emergency and the suspension of Parliament. When Parliament reconvened after this time of crises, sweeping constitutional and legislative measures were passed to curtail freedom of speech and association, including expanding the scope of the Malaysian *Sedition Act*, *1948*, Act 15 [*Malaysian Sedition Act*] to absolutely prohibit criticism of the government's pro-Malay policy. It should also be noted that Australia passed new sedition laws in 2005 making it a seditious offence to urge racial and/or religious groups to use force or violence against another group. The laws have since been amended to remove them from the sedition framework.

laws. This article argues that the current state of the law is problematic on several conceptual and practical grounds. Part II provides a brief historical background and conceptual examination of the law of sedition. Part III analyses the sedition cases in Singapore. Part IV suggests a threefold legal framework to manage speech on race and/or religion which seeks to balance free speech concerns with legitimate interests arising from the State's ideal of ensuring peaceful relations between the different groups. Part V provides concluding observations.

II. Sedition: A Historical and Conceptual Understanding

A. *The Politicised Nature of Sedition and the Freedom of Speech*

Sedition is an inherently political and politicised offence. The crime of sedition targets words, conduct and publications that censure "public men for their conduct as such, or upon the laws, or upon the institutions of the country".[16] The word "sedition" is derived from the Latin word "*seditio*", which literally means "a going aside",[17] *i.e.* departing from established authority and norms. It emerged as an offence against the State as part of the 17th century laws on treason.[18] Offences against the State, strictly speaking, are distinguished from offences against public order such as unlawful assembly and rioting, which affect the peaceful and orderly conduct of life for the general public.[19] Treason targets overt acts of 'betrayal' (coupled with the intention to betray),[20] whereas sedition laws are used against speech that stirs up opposition to the established authority of the State.[21] Sedition has been said to "precede treason by a short interval".[22] The

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16 James F. Stephen, *A History of the Criminal Law of England*, vol. II (London: Macmillan & Co., 1883) at 348 [*Stephen*].

17 H.P. Gupta & P.K. Sarkar, *Law Relating to Press and Sedition in India*, 1st ed. (New Delhi: Orient Publishing Company, 2002) at 140.

18 Laurence W. Maher, "The Use and Abuse of Sedition" (1992) 14 Sydney L. Rev. 287 at 291-292, online: AustLII <http://www.austlii.edu.au/au/journals/SydLRev/1992/21.html>.

19 Public order is a broad concept, although it should be accepted that a mere infraction of the peace or a breach of law and order, *per se*, does not necessarily mean that there is a breach of peace that leads to public disorder. Instead, for an action to be considered as public disorder, it must disrupt or have the potential to disrupt the even tempo of life of the community, public safety and tranquillity. See *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 Current Law Journal 300 (Federal Court of Malaysia) [*Darma Suria Risman Saleh*].

20 The crime of treason involves two elements: "an intention to betray (which may take either of two forms, levying war or adhering to enemies) and an over[t] act… The intention identifies the seriousness of the offense and the culpability of the actor. The act shows that the actor has gone beyond thoughts to action and thereby protects the sphere of ideas and opinion from interference by the government": Herbert L. Packer, "Offenses against the State" (1962) 339 The Annals of the American Academy of Political and Social Science 77 at 79.

21 Katharine Gelber, "Critique and Comment: The False Analogy between Vilification and Sedition" (2009) 33 Melbourne U.L. Rev. 270 at 280, online: Melbourne University Law Review <http://mulr.law.unimelb.edu.au/go/33_1_9_Gelber>.

22 *R. v. Sullivan* (1868), 11 Cox's Criminal Cases 44 (Dublin Commission Court, Green-Street) where "the defendants Sullivan and Pigott were… indicted for printing and publishing seditious libels upon Her Majesty's Government in their newspapers—the *Weekly News* and the *Irishman*". See discussion in Walter R. Donogh, *A treatise on the law of sedition and cognate offences in British India, penal and preventive*, *with an excerpt on the acts in force relating to the press*, *the stage*, *and public meetings* (Calcutta: Thacker, Spink & Co, 1911) at 12-16, online: Internet Archive

purpose of the offence of sedition is therefore the preservation of the existing state apparatus.[23]

Sedition is often approached as a constitutional issue, rather than a strictly criminal law enquiry, because it restricts and represses free speech, in particular political speech.[24] It has been argued that sedition laws are incompatible with democracy and its guarantees of free political speech. Stephen, author of the model statutory framework for the offence of sedition in the colonies, ironically observed in 1883 that it was obvious that "the practical enforcement of this doctrine was wholly inconsistent with any serious public discussion of political affairs" and "so long as it was recognised as the law of the land all such discussion existed only on sufferance".[25] In fact, one might argue that sedition is entirely paradoxical to democratic government:[26]

> If on the other hand the ruler is regarded as the agent and servant, and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because being a multitude he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms a part. He is finding fault with his servant. If others think differently they can take the other side of the dispute, and the utmost that can happen is that the servant will be dismissed and another put in his place, or perhaps that the arrangements of the household will be modified. To those who hold this view fully and carry it out to all its consequences there can be no such offence as sedition.

Modern day sedition laws are often justified on only very narrow grounds, and with extremely narrow applicatory force to speech aimed at subverting the existing democratic regime. In general, freedom of speech may be limited if the exercise of such freedom purports to procure an alteration of law and/or government outside the constitutional framework, or "produces extra-legal change [which] undermines the process of rational deliberation that is the *a priori* value of a democratic system".[27] Even free speech proponents concede that "people should not be able to rely on freedom of speech derived, here, primarily from the argument from democracy, for the purpose of going outside the process of democracy".[28]

<http://www.archive.org/stream/onlawofsedition00dono#page/12/mode/2up>. See discussion of the case in Donogh at 12-20. Seditious speech is spoken, seditious libel is written.

23 Maher, *supra* note 18 at 292.

24 It has been observed, for example, that "the American student makes the acquaintance of this body of law in his study of constitutional law rather than of criminal law": Packer, *supra* note 20 at 82.

25 Stephen, *supra* note 16 at 348.

26 *Ibid*. at 299-300. Note therefore that in Britain, for example, changed ideas of representation and democratic government meant that the law changed to allow more criticism of government. As such, fewer sedition charges could be brought because of the increased possibility of the popular backlash. See Maher, *supra* note 18 at 291. See also William H. Wickwar, *The Struggle for the Freedom of the Press: 1819-1832* (London: George Allen & Unwin, 1928).

27 Frederick Schauer, *Free Speech: A Philosophical Enquiry* (New York: Cambridge University Press, 1982) at 190.

28 *Ibid*.

B. *Sedition and Preservation of the Political Status Quo*

Sedition laws, however, remain perturbing from any liberal-democratic perspective because they inevitably serve the interests of the existing authority. The British colonials employed sedition laws to perpetuate their empire. Even when the liberalisation of the British press had significantly restricted the scope of sedition laws in Britain, the empire continued to apply the broadest scope of sedition laws in the colonies.[29] For example, in the 1954 *Fajar Trial* in Singapore, the British sought to employ the laws of sedition to suppress student activism against the empire. The editorial in *Fajar*, the student publication of the Socialist Club[30] at the University of Malaya,[31] was exceedingly critical of Western colonial strategy in stemming the rising tide of discontent and demands for independence.[32] Titled "Aggression in Asia",[33] the editorial characterised the West, *i.e.* the British, as "the aggressor in modern history" and lamented that "Asia has suffered bitterly from Western barbarity".[34] The publication signified the rising post-war intellectual opposition to colonialism in Singapore and Malaysia, part of a trend of increasing political awareness and discontent with colonial rule after the Second World War. In May 1954, the colonial government arrested the entire editorial board of *Fajar* and charged the 8 students involved in its publication for seditious publications.[35]

The local court acquitted the students after a brief trial. The Singapore District Court held that the articles were not seditious but instead fell within the scope of legitimate criticism. The judgment indicated a strong idealistic commitment to freedom of speech and association, in particular a prioritisation of political speech and activism. The Court gave high regard to the freedom of press, holding that "allowances must be made for a certain amount of latitude to writers in the public press".[36] It also gave due regard to the ability of the educated English-speaking audience to "think

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[29] For example, after the Cyprus violence arising from agitation for union with Greece in 1931, the British government made it a sedition offence to express the "intention to bring about a change in the sovereignty of the Colony". Britain had declared Cyprus to be a Crown Colony in 1925. The Attorney-General of Cyprus condemned the law as being illiberal, but the colonial office justified this as necessary even as late as 1954: U.K., H.C., *Parliamentary Debates*, 5th ser., vol. 531, col. 2142 (28 October 1954) (Alan Lennox-Boyd), online: Hansard 1803-2005 <http://hansard.millbanksystems.com/commons/1954/oct/28/cyprus>.

[30] Formed in February 1953, the Socialist Club was the first political club to be established in the University and aimed to "(a) stimulate student political discussion and activity; (b) propagate socialist thought; (c) support the University of Malaya Students' Union in demands for student rights; (d) study the means for unity in Malaya". See Confidential Telegram No. 308 from the Governor of Singapore to the Secretary of State for the Colonies, London, (R) H.C.F/M. (8 June 1954).

[31] Now the National University of Singapore.

[32] Tan, *supra* note 13 at 123.

[33] Interestingly, Lee Kuan Yew, who went on to become the first Prime Minister of independent Singapore, was counsel for the Fajar students, whose case was argued by Queen's Counsel Mr D.N. Pritt. See "Eight university students freed: No sedition, the judge rules" *The Straits Times* (26 August 1954) 7, online: National Library Board <http://newspapers.nl.sg/Digitised/Article/straitstimes19540826.2.97.aspx>.

[34] Tan, *supra* note 13 at 123. The editorial is reproduced in its entirety at Appendix 2 of Tan at 313-314.

[35] Lim Cheng Tju, "A Personal Journey In Search Of Fajar" *s/pores* (10 April 2007), online: s/pores <http://s-pores.com/2007/04/fajar/>.

[36] "Grounds of Judgment" in *R. v. Poh Soo Kai and 7 ors*, 1st Criminal District Ct, Case No. 113 and 199 of 1954 (16 September 1954).

for themselves".[37] The judgment was heralded as a political victory, signifying a shift in public opinion in Singapore against the empire.[38]

The irony of independence and post-colonialism lies not only in the replication of oppressive structures and practices by the post-colonial government but also in how new governments often become more effective in perpetuating these 'legacies'.[39] In 1966, shortly after independence, two Barisan Socialis Members of Parliament, Chia Thye Poh and Koo Young, were charged for and convicted of publishing a seditious article in the December 11 issue of *The Barisan*, the party publication. The article accused the People's Action Party ("PAP") government of "plotting to murder" political detainee, Lim Chin Siong,[40] who had attempted suicide in prison. Lim was the co-founder of the PAP, which has formed the government after every general election since independence. Lim was ideologically left and was detained without trial in February 1963 under the *Preservation of Public Security Ordinance, 1955*[41] (then one of Singapore's preventive detention laws) for allegedly subversive communist activities.[42] It was alleged, amongst others, that Lim and his associates aimed to establish a 'Communist Cuba' in Singapore. The sedition trial against Chia and Koo must be seen as part of the continuing legacy of colonialism's legal structures guarding against challenges to state power.

As a stratagem to counter threats to state power, sedition prosecutions have preceded preventive detentions under the *Internal Security Act*[43] in both Malaysia and Singapore. Chia Thye Poh, for example, was detained for 23 years without trial under the *ISA* in October 1966, and became the longest-serving detainee in Singapore's history.[44] Notably, Singapore's and Malaysia's internal security laws are colonial transplants. The parallel to the more archaic coupling of sedition with treason is noteworthy.

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37 "Grounds of Judgment" in *R. v. Poh Soo Kai*, *ibid.* stated: "The offending articles in this case are in the English language and the paper Fajar has a very limited circulation. They are circulated among the educated class of the population and these people can think for themselves."

38 See generally Tan, *supra* note 13 at 123; Sing., *Parliamentary Debates*, col. 1228 at 1235 (24 November 1955) (Lee Kuan Yew).

39 As Anghie observed, "[t]he postcolonial state… engaged in its own brutalities: women, minorities, peasants, indigenous peoples and the poorest were the victims": Antony Anghie, "Evolution of International Law: colonial and postcolonial realities" (2006) 27 Third World Quarterly 739 at 749.

40 Chia Poteik, Cheong Yip Seng & Yeo Toon Joo, "MPs found guilty, fined $2,000 each" *The Straits Times* (27 July 1966) 11, online: National Library Board <http://newspapers.nl.sg/Digitised/Article/straitstimes19660727.2.82.aspx>.

41 No. 25 of 1955, Sing.

42 This was part of Operation Coldstore. Although it was carried out when Singapore was still a self-governing state under British rule, it was authorised by the Internal Security Council which comprised representatives from the British Colonial, Malaysian Federal and Singapore PAP governments. For a personal account by a political detainee under Operation Coldstore, see generally Said Zahari, *The Long Nightmare: My 17 Years as a Political Prisoner* (Kuala Lumpur: Utusan Publications & Distributors Sdn Bhd, 2007).

43 Cap. 143, 1985 Rev. Ed. Sing. [*ISA*].

44 See generally Amnesty International, *Report of an Amnesty International Mission to Singapore, 30 November to 5 December 1978* (London: Amnesty International Publications, 1980); "Ex-detainee Chia Thye Poh muzzled for trip" *Associated Press* (19 July 1997), online: Singapore Window <http://www.singapore-window.org/0719scmp.htm>.

III. Seditious in Singapore: Analytical Difficulties of the Seditious Offence of Promoting Feelings of Ill-will and Hostility between Different Races

A. *Two Cases: Public Prosecutor v. Koh Song Huat Benjamin and Public Prosecutor v. Ong Kian Cheong*

The 2005 case of *Koh Song Huat Benjamin*[45] is the first reported case where the heavy hand of sedition was invoked against speech on race and religion. For convenience, the relevant section, s. 3(1) which defines seditious tendency is reproduced:[46]

> A seditious tendency is a tendency—
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> (a) to bring into hatred or contempt or to excite disaffection against the Government;
> (b) to excite the citizens of Singapore or the residents in Singapore to attempt to procure in Singapore, the alteration, otherwise than by lawful means, of any matter as by law established;
> (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Singapore;
> (d) to raise discontent or disaffection amongst the citizens of Singapore or the residents in Singapore;
> (e) to promote feelings of ill-will and hostility between different races or classes of the population of Singapore.

As discussed earlier, two bloggers were charged for having made racist "invective and pejorative remarks"[47] against the Malay-Muslim communities.[48] A third was charged separately. Their vitriol was apparently in response to a forum letter by a Malay-Muslim lady who suggested that cab companies should not allow uncaged pets to be transported in taxis because "dogs may drool on the seats or dirty them with their paws".[49] Her concern was more than a matter of hygiene. Muslims in Singapore, being from the Syafie school of thought, are not allowed to touch dogs that are wet, including their saliva.[50] Her request was to modify a general practice to accommodate the religious requirements of a minority group.

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45 *Koh Song Huat Benjamin*, *supra* note 1.

46 In James F. Stephen, *A Digest of the Criminal Law (Crimes and Punishments)*, 4th ed. (London: MacMillan, 1887) at 66, Sir Stephen defined seditious intention as "an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs and successors, or the Government and Constitution of the United Kingdom, as bylaw 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 raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects".

47 *Koh Song Huat Benjamin*, *supra* note 1 at para. 1.

48 They were charged under s. 4(1) read with s. 3(1)(e) of the *Sedition Act*. Section 4(1) reads: "Any person who (a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act which has or which would, if done, have a seditious tendency; (b) utters any seditious words; (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or (d) imports any seditious publication, shall be guilty…".

49 Chong, *supra* note 1.

50 *Ibid*.

The bloggers pleaded guilty; one was sentenced to one month in prison, while the other, whose comments were considered less offensive, was sentenced to a nominal custodial sentence of one day and a fine of $5,000.[51] The District Court opted for deterrence sentences on principled and contextual grounds. On the former, the court explained that the offence of uttering seditious speech is "*mala per se*".[52] On the latter, the court justified deterrence on the basis of the specific historical and present context of Singapore's diverse society, combined with the heightened Islamic sensitivities in the post 9-11 security climate.[53] According to the court, racial and religious issues are especially sensitive in Singapore's "multi-cultural society, particularly given our history of the Maria Hertogh incident in the 1950s and the July and September 1964 race riots; and the current domestic and international security climate".[54]

On these two bases, the District Court propounded for the first time the "right of another's freedom from offence" as a constitutional interest to be balanced against the right to freedom of expression.[55] The Court did not however further expound upon the nature or scope of this right to freedom from offence, and how it should be balanced against free speech rights. It only went on to moralise on the need for respect for persons of different racial groups as appropriate social behaviour, as distinct from legal duty. The court stated:[56]

> It is only appropriate social behaviour, independent of any legal duty, of every Singapore citizen and resident to respect the other races in view of our multi-racial society. Each individual living [here] irrespective of his racial origin owes it to himself and to the country that nothing is said or done which might incite the people and plunge the country into racial strife and violence. These are the basic ground rules. *A fortiori*, the Sedition Act statutorily delineates this redline on the ground in the subject at hand. Otherwise, the resultant harm is not only to one racial group but to the very fabric of our society.

This entanglement between social duties and legal reasoning is problematic in that it causes uncertainties as to the legal limit of acceptable speech on race and/or religion in the country.

In the 2009 case of *Public Prosecutor v. Ong Kian Cheong*, sedition as promoting ill-will and hostility between different racial groups was extended to cover evangelical activity where proselytising speech 'offended' persons of other religions.[57] The case concerned the private actions of individuals. The defendants were a middle-aged Christian couple who mailed comic tracts from Chick Publications because,

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51 Interestingly, the judge noted that "an offence under section 4(1)(a) of the *Sedition Act* is rare": *Koh Song Huat Benjamin*, *supra* note 1 at para. 5.

52 *Ibid.* at para. 6.

53 *Ibid.*

54 *Ibid.* This reference to the domestic and international racial and religious relations mitigates (but does not entirely refute) Hor and Seah's criticism of judicial over-reliance on legislature's predetermination that the type of speech specified in the Act necessarily has the tendency to cause public order is overly rigid and precludes a consideration as to circumstances surrounding the speech. Michael Hor and Colin Seah, "Selected Issues in the Freedom of Speech and Expression in Singapore" (1991) 12 Sing. L. Rev. 296 at 336.

55 *Koh Song Huat Benjamin*, *supra* note 1 at para. 8.

56 *Ibid.*

57 *Public Prosecutor v. Ong Kian Cheong* [2009] SGDC 163 [*Ong Kian Cheong*].

according to them, "sending out such tracts would be a good way to evangelize so that people [would] come to realize the saving grace of Jesus Christ".[58] The tracts variously criticised Islamic and Catholic doctrines, and characterised the two as false religions.[59] Some Muslim recipients were angered by the tracts and filed complaints with the police, who traced the accused couple down. The couple was charged for contravening the *Sedition Act*, as well as the *Undesirable Publications Act*.[60] The District Court convicted the couple, and sentenced them each to a total of 16 weeks' imprisonment.[61]

The court concluded that "Christian publications or tracts denigrating Islam, its followers or the Catholic Church and other religions will undoubtedly promote feelings of ill-will or hostility between Muslims, Malays, Roman Catholics and people of other religions".[62] It appeared to rely on both objective and subjective tests. The Court opined that:[63]

> Any reasonable person reading the tracts [which level a pointed attack by one religion on another]… will have no doubt in his mind that the tracts have a seditious tendency *i.e.* a tendency to promote feelings of ill-will and hostility between races or classes of the population of Singapore.

The Court went on to buttress this objective perspective by referring to the actual views of the complainants:[64]

> [The complainants] Irwan, Isa and Farharti are all Muslims who have read the tracts they received from [both the accused]. They have all stated that the tracts have a tendency to promote feelings of ill-will and hostility between Muslims and Christians. They were angry after they read the tracts which they felt have been sent by Christians to convert them. Their evidence clearly proves that the publication[s] have a seditious tendency…

The Court further held that there is no requirement that the impugned speech be directed at the maintenance of government.[65] Neither is it necessary for the speech to have been made with the "intention to incite violence or create public disturbance or disorder against the sovereign or the institutions of government".[66]

These judgments raise several conceptual and practical difficulties, which fall broadly under three classes of criticisms. Firstly, the current state of sedition laws in Singapore imposes overly broad restraints on free speech. Secondly, the judgments appear to equate or at least confuse the protection of groups against vilification (or,

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58 *Ibid*. at para. 41.

59 The tracts included "Who is Allah?", "The Pilgrimage", "Allah Had no Son", "The Sky Lighter", "Man in Black", "Are Roman Catholics Christians?", "Back from the Dead?", "The Beast", "Why is Mary Crying?", "Squatters" and "The Little Bride": *ibid.* at para. 4.

60 Cap. 338, 1998 Rev. Ed. Sing. This article is not concerned with that segment of the judgment.

61 They each only had to serve 8 weeks' imprisonment because two of the sentences ran concurrently.

62 *Ong Kian Cheong*, *supra* note 57 at para. 77. Note that in the earlier case of *Koh Song Huat Benjamin*, *supra* note 1, the District Court did not have to address the issue of whether the words uttered were seditious because the accused persons had pleaded guilty.

63 *Ibid.* at para. 59.

64 *Ibid*.

65 *Ibid.* at para. 47.

66 *Ibid.* at para. 46.

in the court's words, "denigrat[ion]")[67] with sedition, which is founded on distinct theoretical grounds. Thirdly, using sedition to disproportionately 'protect' one racial-religious group can be counter-productive to the objective of maintaining peaceful relations between the different racial-religious groups.

B. *Low Threshold for Finding Sedition: Inadequate Protection for Free Speech*

1. *The constitutional protection of free speech and its authorised limits*

The alleged right of a person to be free from offence, first expounded in *Koh Song Huat Benjamin*,[68] is not a constitutionally authorised limit on freedom of speech under art. 14 of the *Singapore Constitution*.[69] In guaranteeing that "every citizen of Singapore has the right to freedom of speech and expression",[70] art. 14(2) only authorises legislation restricting speech on the basis of "security", "friendly relations with other countries", "public order or morality", the protection of parliamentary privileges and provision against contempt of court, defamation or incitement to any offence. As such, even the most literal interpretation of art. 14 would require that any restraint on speech allegedly promoting feelings of ill-will and hostility between different races or classes should be limited on the basis of one of the expressed categories. An appropriate category would be 'public order'. This limits 'freedom from offence' to only such scope as would impact public order. Public disorder is a disruption to the tranquillity of the community on a massive scale.[71] It is more than a mere infraction of the peace or a breach of law and order,[72] but less than a threat to the preservation of a State.

The need to ground 'freedom from offence' in 'public order' is necessary because 'freedom from offence' is vague and subject to ambiguous interpretation, which could place undue constraint on one's freedom of speech. What exactly constitutes 'offence'? How much 'offence' is required to limit free speech? How does one measure 'offence'? Should 'offence' be objectively determined or does it depend on the subjective experiences and feelings of the subject of speech? Things become more complicated when dealing with the 'feelings' of a group. Can a group experience 'offence'? Who are the legitimate representatives of the group? Can the idiosyncratic feelings of a segment of the group be attributed to an entire group?

At the very least, an objective test needs to be adopted to determine if a specific publication or speech is offensive to other racial and/or religious groups. A court cannot simply rely on the subjective feelings of the subject group. Feelings are an unreliable basis upon which to find a constitutional violation.[73] Furthermore, some people are more prone to finding offence than others. While a subjective test may appear responsive to the recipient or audience, it renders speakers concerned with

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67 *Ibid.* at paras. 10, 15, 16, 55.
68 *Koh Song Huat Benjamin*, *supra* note 1 at para. 8.
69 *Singapore Constitution*, *supra* note 6.
70 *Ibid.*, art. 14(1)(a).
71 *Darma Suria Risman Saleh*, *supra* note 19 at para. 12.
72 *Ibid.* at para. 8.
73 Lisa S. Roy, "The Establishment Clause and the Concept of Inclusion" (2004) 83 Or. L. Rev. 1 at 34.

racial and religious issues in Singapore hostage to the possibly irrational sensitivities of some segments of society or, more specifically, segments of some groups.

It is therefore highly problematic that the District Court in *Ong Kian Cheong*[74] appeared to have relied on the testimony of the Muslim complainants that they "were angry after they read the tracts which they felt [had] been sent by Christians to convert them"[75] in finding that the publications had seditious tendencies. It is further problematic that the Court appeared to have placed reliance on the conclusion made by the police officer and the complainants that "the tracts have a tendency to promote feelings of ill-will and hostility between Muslims and Christians".[76] The question of whether speech has a seditious tendency should be a question of law, to be determined by the court, and not one that depends on the subjective feelings of witnesses. The court should not have relied on or even referred to the opinions of the complainants or police officers in this regard.

2. *The twofold test of incitement and purpose for sedition*

The abandonment of the two constraining elements of 'incitement' and 'purpose' in Singaporean jurisprudence lowers the threshold for finding seditious speech, substantially limiting the scope of free speech. In other parts of the Commonwealth, the common law offence of seditious libel (as well as the statutory codification of the same) requires more than speech directed at another racial or class group that could cause feelings of ill-will and hostility.[77] As the Supreme Court of Canada held in *R. v. Boucher*, the leading case in the Commonwealth, "[p]roof of an intention to promote feelings of ill-will and hostility between different classes of subjects does not alone establish a seditious intention".[78] Here, a group of Jehovah's Witnesses had issued a pamphlet accusing the Roman Catholic clergy of persecuting their members and unjustifiably influencing the courts and the administration of justice against them. The court held that the pamphlet issued by the Jehovah's Witnesses was not sedition (even though it attacked a religious group) because firstly, there was no proof of incitement to violence and, secondly, the words were not "for the purpose of disturbing constituted authority".[79]

This twofold *mens rea* test for seditious speech, *i.e.* (i) intention to incite the audience to violence; and (ii) directed at subverting the established government, is also the operative legal standard in England.[80] The Divisional Court endorsed the *Boucher* position in the case of *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury*.[81] Here, the Court held that Salman Rushdie's *The Satanic Verses*

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74 This was not an issue that the District Court in *Koh Song Huat Benjamin*, *supra* note 1 was concerned with, since both accused persons in that case pleaded guilty to seditious speech.

75 *Ong Kian Cheong*, *supra* note 57 at para. 59.

76 *Ibid*.

77 Chaudhuri, *supra* note 3 at 21.

78 *Boucher v. R.* [1951] 2 D.L.R. 369 at 382-384 (S.C.C.) [*Boucher*].

79 *Ibid*. at 382-384.

80 The required *actus reus* of sedition is that the words uttered have a tendency to incite public disorder. This means either that (i) they are likely to incite ordinary people, whether likely to incite the audience actually addressed or not; or that (ii) though not likely to incite ordinary people, they are likely to incite the audience actually addressed. It is not sufficient that the accused uttered offensive words: David Ormerod, *Smith and Hogan Criminal Law: Cases and Materials*, 12th ed. (New York: Oxford University Press, 2008) at 1061.

81 [1990] 3 W.L.R. 986 at 1004 (Q.B.) [*Choudhury*].

was not seditious libel because there was no evidence that it was an attack on the institutions of government. The Court held that:[82]

> [T]he seditious intention upon which a prosecution for seditious libel must be founded is an intention to incite to violence or to create public disturbance or disorder against His Majesty or the institutions of government. Proof of an intention to promote feelings of ill will and hostility between different classes of subjects does not alone establish a seditious intention. Not only must there be proof of an incitement to violence in this connection, but it must be violence or resistance or defiance for the purpose of disturbing constituted authority.

Thus, speech directed at a racial or class group is merely intermediate to the final objective of subverting the government.[83]

This conforms to the theory of sedition as preserving the existing state apparatus. Seditious speech should have political content in the sense of implicating the State, even where it only refers to a racial or class group. A literal interpretation of s. 3(1)(e) is misleading since it departs from this theoretical foundation. This interpretation of the section is justified only if it is read in isolation from the rest of the sections. On the other hand, a harmonious interpretation of s. 3(1) would require that s. 3(1)(e) be read in conformity with the rest of the provisions to address the vertical relationship of the disaffected individual and the State. Conceptual clarity thus necessitates the twofold requirement of intent and purpose in finding the necessary *mens rea* for seditious speech as promoting feelings of ill-will and hostility between different groups.

The alternative, *i.e.* the rejection of the twofold test, transformatively expands the meaning of the concept of sedition from one that regulates the vertical relationship between the individual and the State, to one that controls the horizontal relationship between individuals or groups within the State, with deleterious impact on the scope of free speech and inter-communal interactions. In neither *Koh Song Huat Benjamin* nor *Ong Kian Cheong* was the guilty speech political in nature. The persons concerned were not criticising state policy or governmental officials.[84] While the accused persons may have been blameworthy, their 'crime' was not one against the State, but one against persons within the State, and their neighbours if you like. A failure to conceptually distinguish the two and clarify the nature of sedition is adverse to free speech and community integration in the long run.

C. *The Conceptual Confusion of Equating Denigration with Sedition*

Further conceptual confusion arises from the District Court's apparent equation of seditious speech with denigrating speech in *Ong Kian Cheong*. The Court stated that "Christian publications or tracts denigrating Islam, its followers or the Catholic Church and other religions will *undoubtedly* promote feelings of ill-will or hostility between Muslims, Malays, Roman Catholics and people of other religions".[85] This raises the question as to whether the Court had in mind hate speech-type legislation

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[82] *Choudhury*, *ibid.* at 1004-1005.

[83] Gelber, *supra* note 21 at 283.

[84] For a contextual examination of the conceptual confusion between sedition and vilification in the Australian context, see *ibid.*

[85] *Ong Kian Cheong*, *supra* note 57 at para. 77 (emphasis added).

which seeks to protect members of groups, usually vulnerable groups, from vilification. Hate speech is not seditious speech.[86] The Oxford English Dictionary defines "denigrate" as to "[b]lacken the reputation of a person etc" or to "defame, decry".[87] Denigration involves intent to harm the subject of speech, and is a more suitable test for hate speech-type legislation which aims to protect the subject of the speech.

Hate speech-type legislation proceeds on the theoretical proposition that legislation restricting free speech is necessary to protect certain vulnerable groups from harmful speech. In contrast to the classical theory of sedition where harm to racial or class groups is merely incidental to that of the State, hate speech-type legislation defends these groups as a matter of intrinsic value. A broader meaning of harm is adopted—one that takes into account the psychological and emotional health of persons belonging to the group, as well as a longer term view of harm. Hate speech is identified as laying the foundation for the mistreatment of members of the subject group by ascribing negative stereotypes to members of that community.[88] Not only does it undermine their dignity and equality, hate speech also causes members of the groups to be fearful and withdraw from full participation in society, with adverse consequences for the core democratic values of equality and participation.[89]

It would of course be a mistake to ignore the realities of young multi-racial states like Malaysia and Singapore, and its attendant problems of creating a social foundation for political continuity. Some constraints on freedom of speech are necessary to prevent harm to certain vulnerable groups. Nevertheless, hate speech-type legislation is more conceptually appropriate for this purpose especially since it conceives of the group as having intrinsic value deserving of protection. In fact, this is more consistent with the proposition in *Koh Song Huat Benjamin* that the right to freedom from offence can be a competing value to be balanced against the constitutional right to freedom of expression.[90]

D. *Disproportionate Practice, Unintended Marginalisation and Community Integration*

The possible perception of a lack of even-handedness could undercut the very purpose of prosecuting persons for racist speech in Singapore, which is to preserve peaceful relations between different racial and/or religious groups. This perception may arise from state practice so far as it appears to disproportionately favour the Malay-Muslim community. Up till now, sedition charges have only been brought against those who criticise Islam or the Malay-Muslim community. In June 2006, the government declined to prosecute a blogger for posting offensive content against Christians. He

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86 For a comparative analysis between the two in the context of Australia, see Kathleen Mahoney, "Hate Vilification Legislation and Freedom of Expression: Where Is the Balance?" (1994) 1 Austl. J. H. R. 353, online: AustLII <http://www3.austlii.edu.au/au/journals/AJHR/1994/21.html>.

87 *Shorter Oxford English Dictionary*, 6th ed., vol. 1 (Oxford, New York: Oxford University Press, 2007) at 644.

88 Gelber, *supra* note 21 at 285.

89 Mahoney, *supra* note 86.

90 *Koh Song Huat Benjamin, supra* note 1 at para. 8.

had posted a cartoon on his blog depicting Jesus as a zombie biting off a boy's head.[91] The blogger not only ignored an online message asking for the cartoon's removal, he went on to post more caricatures of Christ to spite the sender.[92] A complaint was made but after investigations, the police issued a statement saying that they (in conjunction with the Attorney-General's office) decided not to prosecute; no substantive reasons were provided.[93] More recently, in January 2010, three youths were arrested by the police for offensive postings about Indians on a Facebook group. They were released on bail and have not been charged.[94]

With its theoretical association with the State, the manner in which sedition laws are used sends a message symbolically conflating the targeted interest with that of the State's. If used to protect a specific group disproportionately, sedition has the potential to marginalise other groups as being unimportant to state interest. Conventionally, an implicit feature of sedition as creating ill-will and hostility between different races and classes is that it is invoked against the race or class most identified with state interests. For example, when the House of Lords held in *O'Connell v. R.*[95] that it was seditious to attempt to "make the English be hated by the Irish, or the Irish to be hated by the English",[96] this was arguably because the English were the race most closely identified with the established authority. It was not for the purpose of protecting a group from denigration.

Furthermore, judicial intervention may reinforce racial differences, deepening existing cleavages rather than integrating the different groups. Consciousness of social realities in judicial reasoning must be balanced against being overly quick to conflate religious differences with racial ones. In *Ong Kian Cheong*, for instance, the District Court had to make the connection between race and religion in order to justify a conviction under s. 3(1)(e) which only refers to "different races". It reasoned that although the tracts were religious in nature, and as such, impacted the relations "between Christians and Muslims", they were also racial in nature because "[i]t is well known in Singapore that persons of the Malay race are Muslims or followers of Islam".[97] That may well be the social reality, but this obscures the distinction between racial differences and religious differences.

Race is immutable, whereas religion is not. Although persons of Malay descent are conventionally Muslims, that is not a permanent social fact. In the same vein, persons not of Malay descent may also embrace Islam as their religion. In Singapore, where the *Singapore Constitution* guarantees the right to profess, practise and

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91 T. Rajan, "Warning for blogger who posted cartoon of Christ" *The Straits Times* (21 July 2006) 4, online: UCLA Asia Institute <http://www.international.ucla.edu/asia/news/article.asp?parentid=49563>.

92 Zakir Hussain, "Blogger who posted cartoons of Christ online being investigated" *The Straits Times* (14 June 2006) 1, online: UCLA Asia Institute <http://www.international.ucla.edu/asia/article.asp?parentid=47589>.

93 Rajan, *supra* note 91.

94 Rachel Chang, "ISD investigation not less serious than being arrested: DPM" *The Straits Times* (10 February 2010), online: National University of Singapore <http://www.spp.nus.edu.sg/ips/docs/media/yr2010/ST_ISD%20investigation%20not%20less%20serious%20than%20being%20arrested%20DPM_100210.pdf>.

95 (1844), 11 Cl. & F. 155 at 404, 8 E.R. 1061 at 1155 (H.L.).

96 This case was decided less than 50 years after the 1798 Irish Rebellion that led to much bloodshed.

97 *Ong Kian Cheong*, *supra* note 57 at para. 77.

propagate one's religion, and there being no laws prohibiting religious conversion,[98] boundaries between different religious beliefs are less rigid and far more porous than those between different races. Taking an overly rigid view on religious differences may obstruct the capacity for different groups to integrate. This is true especially where the State, through the judiciary, sets up the Malay-Muslims as a separate and implicitly antagonistic group against the rest of the population. This worrying mindset is evidenced by the District Court's own statement that "[i]n the Singapore context, the Muslim population mainly comprises people of the Malay race and peoples of other races [are] either free thinkers, atheists, Christians or worshippers of other religions".[99] This dichotomy of Malay-Muslims versus the Rest undercuts the integration process, and may lead to misapprehension and unwarranted resentment against the Malay-Muslim community.

IV. Conceptual Disentanglement: Hate Speech, Public Order Offence and Sedition

There is a need to extricate the existing conceptual melange in the law so as to meaningfully provide a comprehensible framework for inter-racial, inter-religious interaction. In the context of societies that remain divided by racial-religious distinctions, the need to prevent inter-racial hostilities is critically intertwined with state interest in protecting vulnerable minorities, as well as public order concerns. Public disorder may eventually threaten the existence of the State. These three interests (protection of minorities, public order and preservation of the State) can be mapped into existing legislation to provide a clearer framework for inter-racial, inter-religious interaction. These are, first, hate speech-type legislation, which targets deliberate or intentional racism or religious disparagement; second, public order-type legislation, which addresses speech causing or likely to cause adverse impact on public tranquillity; and third, sedition proper, which counteracts threats to the state. The first focuses on ill intent, objectively determined, and aims to protect groups from disparagement that will impact their capacity to participate fully in the polity. The second and the third focus on the likely consequence of speech, with the former aiming to maintain public order, which is at a lower threshold to the preservation of the state. Some overlap among the three would be unavoidable. Nevertheless, the conceptual distinctions are critical to direct the development of the law so as to usefully guide individual and communal behaviour.

A. *Hate Speech-type Legislation and Minority Protection*

Hate speech-type legislation aims to protect groups, particularly vulnerable minorities, from denigration. An existing law that can be employed to achieve this is s. 298 of Singapore's *Penal Code*,[100] which makes it an offence to "[deliberately] wound

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98 *Singapore Constitution*, *supra* note 6, art. 15(1). For a critical analysis on issues of religious freedom and religious propagation that the case of *Ong Kian Cheong* raises, see Li-ann Thio, "Contentious Liberty: Regulating Religious Propagation in a Multi-Religious Secular Democracy" [2010] Sing. J.L.S. 484.

99 *Ong Kian Cheong*, *supra* note 57 at para. 48.

100 Cap. 224, 1985 Rev. Ed. Sing.

the religious or racial feelings of any person". The section reads:[101]

> Whoever, with *deliberate intention* of wounding the religious or racial feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, or causes any matter however represented to be seen or heard by that person, shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both.

The requirement of *deliberate intent* is a significant and apposite limiting element for the crime, and sends the right message. In targeting persons with deliberate intent, it would address the root of the problem, which is intentional racism or religious disparagement. The fact situations in *Koh Song Huat Benjamin* and *Ong Kian Cheong* could possibly render both cases within the scope of s. 298.[102] In a recent case, an air-conditioning repairman was charged under s. 298 for deliberately leaving envelope-sized cards questioning the doctrine of Prophet Muhammad on the windshields of Muslim residents in a car park. He was convicted and sentenced to two weeks' imprisonment.[103]

Focusing on the deliberate intent of the speaker appropriately narrows the scope of the law to only persons who are most blameworthy, *i.e.* those who intend to vilify and offend.[104] Convicting persons under this section signifies that intentional disparagement is socially deplorable. Moreover, while s. 298 is not limited in its application to minority groups, it can be used to primarily protect racial and religious minorities from vilification. This limit on free speech may be constitutionally justified under "public morality", one of the permitted categories of restrictions under art. 14(2)(a), or even as part of the government's commitment to protecting racial and religious minorities under art. 152(1) of the *Singapore Constitution*.[105]

Section 298 may be further supplemented by s. 298A(a) in countering intentional disparagement of racial or religious groups. This new s. 298A(a) reads:

> Whoever—
>
> (a) by words, either spoken or written, or by signs or by visible representations or otherwise, knowingly promotes or attempts to promote, on grounds of religion or race, disharmony or feelings of enmity, hatred or ill-will between different religious or racial groups…
>
> shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both.

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[101] *Ibid.*, s. 298 (emphasis added).

[102] A court would have had to interpret "any person" to mean persons in abstract, though this should not be an impediment.

[103] Khushwant Singh, "Jailed for 'wounding feelings' of Muslims" *The Straits Times* (7 August 2010).

[104] It is uncertain if the accused persons in *Ong Kian Cheong*, *supra* note 57 would have been convicted under s. 298 since they did not have clear intention to wound the feelings of the Muslim or Roman Catholic recipients, and had as their main objective religious proselytisation.

[105] Article 152(1) of the *Singapore Constitution*, *supra* note 6 states: "It shall be the responsibility of the Government constantly to care for the interests of the racial and religious minorities in Singapore".

This section was included in the *Penal Code* in 2007.[106] For the sake of conceptual clarity, this section should have been a standalone provision, instead of being entangled with sub-provision (b) which, properly speaking, addresses a different issue, namely the maintenance of public order.

B. *Public Order-type Legislation: Peaceful Racial-religious Relations as a Function of Public Tranquillity*

It is not hard to see that inter-racial and/or inter-religious conflicts can cause public disorder. Section 298A(b) legally constitutes peaceful racial-religious relations as a matter of public order. The sub-section reads:

> Whoever—
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> …
>
> (b) commits any act which he knows is prejudicial to the maintenance of harmony between different religious or racial groups and which disturbs or is likely to disturb the public [tranquillity],
>
> shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both.

Section 298A(b) thus has the potential of distinguishing public order from subversion, which is the underlying object of sedition laws, and is therefore a narrower limit on free speech. The conjunctive element of disturbing or likely to disturb public tranquillity should be strictly construed. Furthermore, the test for 'likelihood' should not be placed at too low a threshold, although the specific social context of Singapore's diverse population should be a relevant factor. While a high threshold modelled after the well-known American test of 'clear and present danger'[107] may not reflect the needs of the Singaporean society,[108] it should not mean that the slightest and narrowest possibility of disturbance should be adequate. Likelihood requires something more.

C. *Preserving the Character of the State and the Malaysian Anti-example*

Sedition laws should thus be reserved for a narrow area of preserving the State or the foundational elements of the State. This expands the common law offence only slightly. Not only is the law directed at maintaining the existence of the State, its Constitution and its institutions, it can also be directed at preserving the character of

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[106] Through the *Penal Code (Amendment) Act 2007*, No. 51 of 2007.

[107] This test was first articulated by Justice Holmes in *Schenck v. United States*, 249 U.S. 47 (Sup. Ct. 1919). See further *Brandenburg v. Ohio*, 395 U.S. 444 (Sup. Ct. 1969).

[108] The Singapore Court of Appeal recently rejected the application of this test to contempt of court, clarifying that "the 'clear and present danger' test does not represent the law in Singapore": *Shadrake Alan v. Attorney-General* [2011] 3 Sing. L.R. 778 at paras. 38-50 (H.C.). In an earlier case concerning the religious freedom of Jehovah's Witnesses in Singapore, Yong Pung How C.J. (as he then was) rejected the similar test of 'clear and immediate danger': *Chan Hiang Leng Colin and others v. Public Prosecutor* [1994] 3 S.L.R.(R.) 209 at para. 59.

the State. This reintroduces the twofold test of 'intent' and 'purpose'. There must be an intention to incite (or a reckless disregard in inciting) the audience to violence against the State, and the speech must be directed at the maintenance of the government or a fundamental tenet of the State. In the case of Singapore, such a fundamental tenet would be its multi-racial and multi-religious character. This would mean that sedition laws could appropriately be invoked against persons who suggest, for example, that Singapore should be a Chinese nation or a Muslim nation, etc. Prosecution signifies the state's disapproval of racial and/or religious chauvinism. As such, something more than just racist speech or speech disparaging of other religions is required.

This expansion of sedition laws is of course subject to misuse and could be used to reify discriminatory ideologies. Malaysia provides an anti-example of how sedition laws have been used to actualise a Malay-dominant state.[109] Since 1971, after the 1969 racial riots led to a state of emergency and the suspension of the Malaysian Parliament, the *Malaysian Sedition Act*[110] has been employed to deter criticism of the government's adopted policy of affirmative action for the Malay majority and other forms of preferential treatment for the Malays. This was facilitated by sweeping revisions to the *Federal Constitution* imposing broad restraints on speech on a traumatised nation.[111] It was argued in Parliament that the restrictions were necessary "to entrench the most important, indeed the most basic, provisions of our Constitution".[112] The new s. 3(1)(f) of the *Malaysian Sedition Act* makes it seditious "to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the *Federal Constitution* [citizenship] or article 152 [language], 153 [Malay privileges] or 181 [sovereignty of the Malay rulers] of the *Federal Constitution*".[113]

Consequently, in the first reported case after the 1971 revision to the *Malaysian Sedition Act*, an opposition politician was convicted of sedition for accusing the incumbent government of practising a "policy of segregation" and favouring one racial group (the Malays) over the other racial groups in the country.[114] In a later case, an attempt to invoke the *Malaysian Sedition Act* against a politician from the ruling coalition for advocating the closure of Chinese and Tamil vernacular schools (thus implicating the linguistic rights of minorities under art. 152 of the *Federal Constitution*) was unsuccessful.[115] This was despite the accused suggesting in his

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[109] The Malaysian example is instructive because Singapore's *Sedition Act* has its origins in the Malaysian statute. The *Sedition Ordinance*, *supra* note 14 was a consolidating statute; it incorporated into a single ordinance the then existing seven sedition ordinances for operation throughout the newly established federation. The bill includes a new provision which will enable a court to suspend publication of a newspaper which has published seditious matter and to prohibit circulation of a seditious publication. The acting Attorney-General, Mr Peter Bell, introducing the bill, said the new provisions would actually put into effect what was already provided in the civil side of the law in regard to suspension of publication of libels: "Councillors Approve New Sedition Ordinance" *The Straits Times* (7 July 1948) 1, online: National Library Board <http://newspapers.nl.sg/Digitised/Article/straitstimes19480707.2.16.aspx>.

[110] *Malaysian Sedition Act*, *supra* note 15.

[111] It has been observed that harsh sedition laws are often reactionary responses to political crises in which survival seemed at stake: Packer, *supra* note 20 at 82.

[112] Malaysia, Senate, *Malaysian Parliamentary Reports* (5 March 1971) at 38.

[113] Malaysia, *Emergency (Essential Powers) Ordinance*, No. 45/1970, which came into force on 10 August 1970.

[114] *Public Prosecutor v. Ooi Kee Saik & Ors* [1971] 2 M.L.J. 108 at 109 (H.C.).

[115] *Public Prosecutor v. Mark Koding* [1983] 1 M.L.J. 111 (Federal Court, Kuala Lumpur).

speech that the Chinese and Indian Malaysians were "foreigners" and that unless the schools and languages were restricted, "[the] country would be supplanted by alien identities".[116]

These cases, and others, served to rigidify a Malay-dominated character of the state, with deleterious consequences for the rights and interests of racial-religious minorities in the country. This and other governmental policies and legal developments that served this racialised political agenda have contributed to the gradual deterioration of inter-racial relations in Malaysia. Prohibiting discussions on Malay privileges and the dominant use of the Malay language, as well as the invocation of sedition laws against legitimate criticism, has had an adverse impact in a political environment where such privileges have become a source of ill-will and hostility between the different racial groups. It is no wonder that current contestations over what the character of the Malaysian state should be—truly multi-racial or Malay-dominant—has inevitably implicated the use or at least threats of sedition prosecutions.[117]

Thus, as should be evident by now, sedition laws are highly politicised. They can be used to preserve a desirable political status quo or undesirable ones such as colonialism and racist structures. Insofar as the Singapore government seeks to employ sedition laws to preserve multiculturalism as a fundamental character of the state, the invocation of sedition laws may be justified, but only on such narrow grounds and for extraordinary circumstances.

V. Conclusion

The continuing presence of the offence of sedition must be recognised as somewhat incongruent, even archaic, in any democracy. In England, where the common law of sedition was first developed, the law fell into disuse for a long time, and was finally abolished on 12 January 2010 under s. 73 of the *Coroners and Justice Act, 2009*.[118] The United Kingdom Law Commission had recommended in 1977 that the law be abolished because it had become redundant ("there is likely to be a sufficient range of other offences covering conduct amounting to sedition") and subject to abuse ("overtly political motives").[119] There has been increasing civil society pressure

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[116] Author's translation.

[117] See generally Yow Hong Chieh, "Nurul Izzah probed for sedition" *The Malaysian Insider* (22 September 2010), online: The Malaysian Insider <http://www.themalaysianinsider.com/malaysia/article/nurul-izzah-probed-for-sedition/>; Boo Su-Lyn, "Najib's NEM could be seditious too, says Kit Siang" *The Malaysian Insider* (23 August 2010), online: The Malaysian Insider <http://www.themalaysianinsider.com/malaysia/article/najibs-nem-could-be-seditious-too-says-kit-siang>. The NEM is supposed to transform Malaysia's affirmative action policy to one based on need, rather than race: "PM: New Economic Model to benefit all" *The Star* (30 March 2010), online: The Star Online <http://thestar.com.my/news/story.asp?file=/2010/3/30/neweconomicmodel/20100330095105&sec=neweconomicmodel>. While a large proportion of the Malay population would fall within the need-based policy, this significantly alters the ideology from one that is pro-Malay on the basis of some supposedly 'special' status to one that is more egalitarian. This shift would offend ultra Malay nationalists like members of Perkasa.

[118] (U.K.), 2009, c. 25.

[119] *Working Paper No. 72*, *supra* note 3.

in Commonwealth countries including Malaysia and India to repeal their sedition laws.[120] New Zealand repealed its sedition laws in 2007.[121]

Nevertheless, the continuing existence and, in fact, the rise, of inter-racial and inter-religious hostilities in countries around the world highlight the need for legislation to manage such inter-group relations as part of state interest. This is exacerbated by fears of terrorism in the security climate post 9-11. For example, in 2005, Australia amended its laws to include as seditious offences urging force or violence within the community as part of its anti-terrorism measures.[122] This expansion of the meaning of sedition was heavily criticised for conceptual confusion and for being overly restrictive of liberties,[123] eventually leading to a 2010 amendment re-characterising the offence as one of "Urging Violence".[124] This clarifies the purpose of the provision as targeting acts of incitement of actual violence, and is expected to be more permissive of free speech.

Clearly, there is a need to resolve ambiguities and confusions in the law of sedition in Singapore, especially since they impact fundamental constitutional rights such as free speech and religious freedom. The existing state of the law has the capacity to generate an unnecessary chilling effect on speech. Without clarity, individuals would find it difficult to navigate the line between acceptable and seditious speech. This severely undermines an agreed ideal of the rule of law, which is to provide rules that are fixed and announced beforehand so as to allow persons to "foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge".[125]

Furthermore, to prohibit open discussion on race and religion in a diverse society may be counter-productive in the long run. Repressing open communication may lead to suspicion, resentment and division, thereby impeding true integration and the

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120 "Barodians rally for Binayak Sen, demand repeal of sedition Act" *Indian Express* (31 Jan 2011), online: Indian Express <http://www.indianexpress.com/news/barodians-rally-for-binayak-sen-demand-repeal-of-sedition-act/743989/>; "Repeal Sedition Act, Bar urges Govt" *The Star* (15 June 2010), online: The Star <http://thestar.com.my/news/story.asp?file=/2010/6/15/nation/6472040&sec=nation>.

121 The *Crimes (Repeal of Seditious Offences) Amendment Act 2007* (N.Z.), 2007/96 was passed on 24 October 2007, and entered into force on 1 January 2008: "Sedition laws to be abolished" *The Nelson Mail* (8 May 2007) 2.

122 Under the 2005 version of s. 80.2(5)(a) to The Schedule of the Australian *Criminal Code Act 1995* (Cth.) [*Australian Criminal Code*] as introduced by the *Anti-Terrorism Act (No. 2) 2005* (Cth.), a person commits an offence if he "urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished)" and "the use of the force or violence would threaten the peace, order and good government of the Commonwealth". The penalty is imprisonment for 7 years.

123 Austl., Commonwealth, Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (Report No. 104) (N.p.: Ligare, 2006), online: AustLII <http://www.austlii.edu.au/au/other/alrc/publications/reports/104/ALRC104.pdf>.

124 See Schedule 1 of the *National Security Legislation Amendment Act 2010* (Cth.). See summary in Austl., Australian Law Reform Commission, *Sedition*, online: Australian Law Reform Commission <http://www.alrc.gov.au/inquiries/sedition>; see also Austl., Attorney-General's Department, *Australian Government response to ALRC Review of sedition laws in Australia - December 2008*, online: Attorney-General's Department <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoALRCReviewofseditionlawsinAustralia-December2008>.

125 F.A. Hayek, *The Road to Serfdom* (London: Routledge, 1944) at 80. See further Joseph Raz, "The Rule of Law and its Virtue" in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 210.

creation of a true community. Current states of peace may be nothing more than a mere *modus vivendi*. A balance needs to be drawn between harmony and integration. Restrictions on speech about race and/or religion should be mitigated by the long-term goal of integrating the population towards creating a shared sense of identity. This requires some measure of free, open and reasoned debate about racial and religious differences, and how to possibly bridge those differences and foster a commitment to a shared identity. Such integration, in order to foster genuine understanding and authentic community amongst different racial-religious groups,[126] cannot rely solely on state initiatives but has to be organically developed. This may sometimes even entail groups confronting and debating competing views, which can be a discomforting process. Nonetheless, a reasonable and rational approach to diverse views may be a necessary process towards mutual understanding and respect. We have to recognise that the conditions for community integration and consequently the boundaries of acceptable speech are fluid and contested.[127] What is required is a shared commitment to peaceful and respectful resolution of differences. Thus, while the state should be vigilant in averting open inter-racial hostilities *à la* the 1964 racial riots, and indeed in inhibiting speech or conduct that have a real risk of leading to such hostilities, a more nuanced approach is necessary so as not to stifle the flourishing of a truly authentic Singaporean community.[128]

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[126] Free exchange of ideas is especially critical for proponents of deliberative and participatory democracy. For example, Post has argued that citizenry participation in democratic conversation is crucial for the formation of authentic, democratic public opinion: Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge: Harvard University Press, 1995) at 179-196. For deliberative democrats, public deliberation is central to legitimating the legislative process. For Habermas, this means allowing all reasons to be shared during the deliberative process of public reason, and in contrast to Rawls, this would include religious reasons: Jürgen Habermas, "Religion in the Public Sphere" (2006) 14 European Journal of Philosophy 1; further see, for example, John Rawls, "The Idea of Public Reason" in James Bohman & William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* (Cambridge: MIT Press, 2002) 93 and "Postscript" in James Bohman & William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* (Cambridge: MIT Press, 2002) 131.

[127] Writing in the context of the Danish cartoons controversy, Bleich argues for a middle position between protecting the cartoons absolutely as speech and censoring them; he says "[a]ll sides must be free to speak their minds, subject to the limitations of incitement and hate speech… It is through the careful juxtaposition of multiple arguments that citizens are persuaded to condemn or to applaud the cartoons, or to develop more complex and nuanced feelings about their effects on the world": Erik Bleich, "On Democratic Integration and Free Speech: Response to Tariq Modood and Randall Hansen" in Tariq Modood *et al.*, "The Danish Cartoon Affair: Free Speech, Racism, Islamism, and Integration" (2006) 44 International Migration 17 at 22, online: Middlebury College <http://www.middlebury.edu/media/view/255008/original/On_Democratic_Integration_and_Free_Speech_-_Response_to_Tariq_Modood_and_Randall_Hansen.pdf>.

[128] Amitai Etzioni, "The Responsive Community: A Communitarian Perspective" (1996) 61 American Sociological Review 1 at 1.