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SEDITION AND ITS NEW CLOTHES IN SINGAPORE

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In all the important common law jurisdictions surveyed here, seditious libel means defiance or censure of constituted authority leading to foreseeable harm to public order. In sharp contrast, the *Sedition Act* in Singapore, it was recently decided, makes allegations of censure of constituted authority and foreseeable harm to public order unnecessary, with the result that the offence, created by s. 3(1)(e) read with s. 4 of the *Sedition Act*, is transformed into a hybrid offence of blasphemous libel wider than the offence of blasphemous libel against a group of persons created by s. 153A of the *Indian Penal Code, 1860* and the common law offence of blasphemous libel. This article argues that the decision cannot be defended and that furthermore, where the constitutional freedom of expression of a citizen is implicated, the *Singapore Constitution* would require the *Sedition Act* to be modified in order to differentiate between class divisive publications that threaten public order and those that do not.

I. INTRODUCTION

This article is divided into two parts. The first part inquires into the nature of sedition, in particular that aspect of it known as seditious libel, under the common law and in important common law jurisdictions. It seeks to dispel the popular myth that sedition is an act of rebellion against the state, which Janet Coleman for instance captures when she entitles her book *Against the State: Studies in Sedition and Rebellion*.[1] There is this notion, she seems to be saying, of the objective rightful or legitimate state which is entitled to be protected against censure. When, however, the nature of seditious libel is actively investigated by a comparative review of seditious libel laws in important common law jurisdictions, the conclusions are very different. First, there is in law no concept of a libel offence against the abstract state. Instead, seditious libel is conceived of in terms of two fundamental and indispensable elements, namely censure of constituted authority (not the state) and foreseeable harm to public order. Second, there is, however, a degree of variance in the way foreseeable harm to public order is conceptualised (or contextualised); in every instance, seditious libel bears on the freedom of expression, and constitutional engagement is inevitable.

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[1] London: Penguin Books, 1995.

Against this comes the second part of this article, concerned with *Public Prosecutor v. Ong Kian Cheong*[2] which will not be forgotten for a long time as being the first sedition case in Singapore which went to trial.[3] If the interpretation reached in this case of the critical provisions of the Singapore *Sedition Act* is right,[4] the result in effect will be a very different and far reaching concept of seditious libel, almost approximating to the popular myth just mentioned. The second part seeks, however, to show that that interpretation is flawed, that nothing so radical was contemplated by the *Sedition Act*, and that the Act has the same object as common law seditious libel of protecting the relation between subject and constituted authority, by criminalising public discourse which abusively censures constituted authority so as to produce foreseeable harm to the public order. Moreover, as elsewhere, constitutional engagement is inevitable, with important implications for the particular category of seditious libel which was concerned in that case.

II. Common Law Seditious Libel

In England, seditious libel is still a common law offence[5] and there has been remarkable coherence and stability in the common law's requirement that to sustain a conviction for seditious libel, there must be allegation and proof of censure of constituted authority and foreseeable harm to public order.[6] The identification and acceptance of these two elements as constituent and central to all forms of seditious libel have partly been achieved through the moulding and systematising contributions of Holdsworth, the prince of historians of the common law, and Stephen, the eminent author of the *Indian Evidence Act, 1872*[7] and *A History of the Criminal Law of England*,[8] as judicial references to their views amply indicate. In his review of the case law, for example, Holdsworth clearly fore-fronted authority when he ascribed the seditious libel law to a concept of paternal authority which to defend would be both undignified and inefficacious.[9] Stephen in his *History of the Criminal*

[2] [2009] SGDC 163. See also Thio Li-ann, "Administrative and Constitutional Law" (2009) 10 Sing. Ac. L. Ann. Rev. at 12-17.

[3] In an earlier case, *Public Prosecutor v. Koh Song Huat Benjamin*, [2005] SGDC 272, the accused pleaded guilty.

[4] Cap. 290, 1985 Rev. Ed. Sing., s. 3(1)(e) read with s. 4.

[5] By the mid-19th century, prosecutions for common law seditious libel became rare as a result of the availability of specific statutory offences. The *Treasonable and Seditious Practices Act, 1795* (U.K.), 36 Geo. III, c. 7, and the *Seditious Meetings Act, 1795* (U.K.), 36 Geo. III, c. 8, also known as the 'Gagging Acts', the 'Two Acts' or the 'Grenville and Pitt Bills', were prominent for a time until they expired in 1848. More recent examples are the specific statutory offences created by the *Race Relations Act 1965* (U.K.), 1965, c. 73.

[6] The controversial aspects of the law related to the functions of the jury in libel trials and the question whether it was sufficient to aver an intention to publish material which as a matter of law censured persons in authority or whether it was also necessary to aver in addition a wicked intention to censure. In Stephen's view, after passage of Fox's *Libel Act, 1792* (U.K.), 32 Geo. III, c. 60, and Lord Campbell's *Libel Act, 1843* (U.K.), 6 & 7 Vict., c. 96, the second view came to prevail as a matter of practice. *Cf. R. v. Lemon*, [1979] A.C. 617 at 641 (H.L.).

[7] Act No. 1 of 1872.

[8] London: Macmillan, 1883 [*History of the Criminal Law*].

[9] H.S. Holdsworth, *A History of English Law*, 2nd ed., vol. VIII (London: Methuen, 1937) at 342.

Law had equally stressed this when he formulated art. 93 of his *Digest of Criminal Law*[10] to encompass the bringing of the Crown, the government, legislature, or the courts of justice into hatred or contempt, or the exciting of subjects to attempt to alter the law by unlawful means, or the raising of discontent or disaffection amongst her Majesty's subjects, or the promotion of feelings of ill will and hostility between different classes of Crown subjects.

On a superficial reading of art. 93, the elements of an attack on constituted authority and foreseeable harm to public order seem to be missing from the category of class divisive writings.[11] However, in *Boucher v. R.*,[12] the Supreme Court of Canada concluded that both elements were here equally indispensable.[13] Not only had Stephen accurately depicted the common law, but as a matter of principle, "[t]he clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality".[14] Incidentally, the 'minority' (Taschereau, Cartwright and Fauteux JJ.) held that an intention to create ill will or hostility between different classes of His Majesty's subjects was not seditious unless it was also an intention to incite resistance to lawfully constituted authority (omitting incitement to violence).[15] There was thus near unanimity as to the requirement of lawfully constituted authority; the disagreement between the majority and minority related solely to the exact definition of the foreseeable harm to the public order.

The Supreme Court of Canada of course is not alone in concluding that the elements of defiance of constituted authority and foreseeable harm to public order must be satisfied as much and no less where the seditious intention is the intention to promote ill will or hostility between the different classes of subjects.[16] In England too, where the common law definition of seditious libel is still relevant, albeit now only slightly in practice, the leading authority, *R. v. Chief Metropolitan Stipendiary Magistrate, Ex. parte Choudhury*, is fully in agreement.[17] Dismissing the alternative seditious libel charge, the English Court of Appeal found the analysis

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[10] *A Digest of the Criminal Law (Crimes and Punishments)* (London: Macmillan, 1883) [*Digest of Criminal Law*]. Stephen's *Digest of Criminal Law* was adopted in the draft *Criminal Code* recommended in 1879.

[11] Stephen purported to have extracted the language of this category of seditious libel from existing case law, in particular *O'Connell v. R.* (1844), 11 Cl. & F. 155 (H.L.), and *R. v. Burns* (1886), 16 Cox's Criminal Law Cases 355 (Central Criminal Court).

[12] [1951] S.C.R. 265.

[13] Kellock J., in particular, accepted Stephen's predicate that seditious libel involved the relation between rulers (constituted authorities) and their subjects, and his explanation that its criminalisation was a compromise between a high and low view of that relation. The high view posited that public censure of the superior of the subject was wrong if it was likely to diminish his authority. The low view posited that the sovereign was an agent and servant by delegation, so that public censure was a right of the subject to find fault with his servant, to be prohibited only if it had an immediate tendency to produce breach of the peace: *ibid.* at 294. Later in his judgment, he specifically endorsed as correct Stephen's identification of a direct tendency to public disorder as opposed to immediate breach of the peace as the compromise between the high view and low view which the common law reached, saying: "It therefore clearly appears that in the view of Stephen himself, his definition must be read at the least as implying an intention to incitement to violence": *ibid.* at 275-276.

[14] *Ibid*. at 288.

[15] Renfrit C.J. (dissenting) took an entirely different tack, seeing the Canadian statute as precluding recourse to common law.

[16] *Cf. R. v. Sharkey* (1949), 79 C.L.R. 121 (H.C.A.) at 150, Dixon J.

[17] [1991] 1 Q.B. 429. Note that the House of Lords dismissed a petition for leave to appeal.

in *Boucher v. R.*[18] compelling and thought it necessary merely to add that "[b]y constituted authority what is meant is some person or body holding public office or discharging some public function of the state".[19] As seditious libel serves to protect the government and the public against scurrilous and extreme attacks upon the Crown or government institutions, an attack on religion (abstract libel) therefore is not seditious libel. Nor is an attack on a religious figure who is not part of lawfully constituted authority.

In the light of this elucidation of the common law,[20] the isolated contrary view advocated in a Malaysian case must be rejected. In *Public Prosecutor v. Param Cumaraswamy (No. 2)*,[21] Chan J., without the benefit of citation of *Boucher v. R.*,[22] argued that Stephen did not make incitement to violence or the tendency or the intention to create public disorders the gist of art. 93.[23] The judgment of the Canadian Supreme Court in *Boucher v. R.* amply proves otherwise.[24]

III. The Law in the United States

Two general points arise from the above demonstration: first, the need to protect the relation between constituted authority and subject implies that there can be no abstract seditious libel protecting some religion or philosophy, or the like, and second, the clash between an authoritarian concept of a benign master and the notion of popular democracy must be resolved by prescribing the requisite degree of foreseeable harm to the public order which will determine the outer limits of what is permissible censure of constituted authority. There is concurrence in these general points in a rich body of decisions of the United States ("U.S.") Supreme Court on the *First Amendment*.[25] In fact, there is a surfeit of literature and we must be very selective when space is a serious constraint.[26]

What has been described as the 'symbolic dissent cases' will amply illustrate the rejection of abstract seditious libel in the U.S.. Popularly denominated the 'burning flag cases', these are cases where a person makes his censure or displeasure of government policies known by burning the national flag.[27] Typically, no one is

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18 *Supra* note 12.

19 *Supra* note 17 at 453.

20 Post-World War II, seditious libel became a rare offence in England, where it remains a common law offence, and in Canada, where it is a statutory offence which employs the common law definition of seditious libel.

21 [1986] 1 M.L.J. 518 (H.C.).

22 *Supra* note 12.

23 *Supra* note 21 at 521.

24 *Supra* note 12.

25 U.S. Const. amend. I. [*First Amendment*]. The *Fourteenth Amendment* (U.S. Const. amend. XIV) may also be relevant as it protects freedom of speech and of the press as due process rights.

26 Matthew D. Bunker, *Critiquing Free Speech: First Amendment Theory and the Challenge of Interdisciplinarity* (Mahwah, N.J.: Lawrence Erlbaum Associates Publishers, 2001) examines no less than 5 theories of *First Amendment* case law; namely, the marketplace theory, the self-government theory (of Alexander Meiklejohn), the checking value theory (of Vincent Blasi), the individual autonomy theory, Steven Shiffrin's dissent theory, and Lee Bollinger's tolerance theory.

27 Including the flag salute case, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 at 642 (1943) where Jackson J. said: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion".

hurt and no public disorder or risk of public disorder manifests or exists. So the focus is not on public danger or the risk of it; and the concern is exclusively with the question whether the *U.S. Constitution* invalidates legislation which makes burning the national flag an offence. In seeking to uphold the constitutionality of flag desecration offences, state legislatures have resorted to a wide range of arguments including in the main, the protection of national unity, the protection of national sovereignty, even the protection of national property. All such arguments based on abstract concepts have failed; albeit there is no consensus as to why they have thus failed, save that they indicate what Laurence Tribe has called the "contents distinction", namely that regulation of the contents of speech is presumptively violative of the *First Amendment*.[28]

Non-symbolic dissent cases are preoccupied with the second element of seditious libel, namely foreseeable harm to the public order. This element is implicated because the *First Amendment* guarantees freedom of speech; and it is necessary therefore always to ensure (put negatively) that the constitutional safeguards of free speech are not undermined or (put positively) that they are not abused by speech tending to disrupt or disturb the public order. The second and more positive and wider formulation is arguably a better conception. But be that as it may, in the U.S., the test of foreseeable harm to the public order is that there must be a *clear and present* danger to public order. Unlike the common law test of direct tendency to disturb the public order mentioned earlier, the clear and present danger test is two-pronged, because it measures both the scale of the danger and the probability of its occurrence. (A single-pronged test looks merely at probabilities and fixes the danger precociously).[29] Two versions of the test are found in the recent cases. There is the test formulated by Learned Hand J.[30] If the gravity of the "evil" discounted by the improbability of its occurring does not exceed the costs of abridgment of free speech, there can be no invasion of free speech so as to avoid the danger.[31] As Smolla points out, there is an inverse relationship between gravity of the danger or harm and probability of occurrence in Learned Hand J.'s formula; and free speech may be curtailed even though the probability of occurrence is as low as a mere likelihood, as long as the harm is great.[32] Harm and probability of occurrence have equal weights in this balancing formula. Under the later version of the clear and present danger test, laid down in *Brandenburg v. Ohio*,[33] the test avoids balancing between harm and proximity. Unless there is a likelihood of imminent use of force or violation of law, free speech is merely abstract teaching of the moral propriety of racist violence and cannot be invaded. Likelihood means appreciable and not fanciful tendency but this must be taken together with imminence

28 *American Constitutional Law*, 2nd ed. (Mineola, N.Y.: Foundation Press, 1988) at 790.

29 See Rodney A. Smolla, *Free Speech in an Open Society* (New York: Alfred A. Knopf, 1992).

30 In *U.S. v. Dennis*, 183 F.2d 201 at 206 (2nd Cir. 1950) aff'd 341 U.S. 494 (1951), where he said that a court must "ask whether the gravity of the evil discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. In symbols, regulate if but only if $B < PL$, where B is the cost of regulation (including any loss from suppression of valuable information), P is the probability that speech sought to be suppressed will do harm, and L is the magnitude (social cost of the harm)". *Cf.* Richard A. Posner, "Free Speech in an Economic Perspective" (1986) 20 Suffolk U.L. Rev. 1.

31 See Posner, *ibid*.

32 *Gitlow v. New York*, 268 U.S. 652 (1925) [*Gitlow*].

33 395 U.S. 444 (1969).

of violence or unlawful action. The quality of danger is measured by its imminence and if imminent danger is likely, the speech or writing can be prohibited as a crime.

To complete this outline, there is one notable line of reasoning to which attention should be drawn. In the rich body of case law and scholarly literature seditious libel has spawned, *Gitlow v. New York*[34] stands apart in legitimising 'legislative pre-certification'. The Supreme Court in that case could be seen to have developed the idea that there are certain speeches which by their very nature are dangerous to public peace and security.[35] A weaker strand of reasoning is that this is merely presumptive and not intended to dispense with proof of foreseeable harm in every instance, but merely to reverse the burden of proof. Inherent in both strong and weak interpretations of the majority judgment is a typology of classes of utterances which concedes that the legislature is competent to isolate generic classes of speech in which harm is presumptive. However, although the reasoning has not been rejected in the modern cases, the case is today more notorious for the powerful dissent of Holmes J., who dismissed the notion that there were speeches which by their nature incited disturbance to the public order and those which did not. "Every idea is an incitement", he expostulated.[36] "The only difference between the expression of opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result".[37]

IV. Seditious Libel in Malaysia

The majority reasoning in *Gitlow* may seem to some to parallel somewhat the method employed in Malaysia to insulate seditious law provisions from constitutional attack; only the latter is more extreme in its effects. There, art. 10(4) of the *Federal Constitution* [*Malaysian Constitution*] states that:

> In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2) (a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.[38]

By virtue of art. 4(2)(b), the validity of any law which Parliament under art. 10(2)(a) has deemed necessary or expedient to pass to impose restrictions on freedom of speech shall not be questioned. Article 10(1) guarantees freedom of expression to citizens while art. 10(2) permits Parliament to pass legislative restrictions on the art. 10(1) freedom if deemed necessary or expedient in the interest of national security or public order.

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[34] *Supra* note 32 at 654.

[35] Dealing with the statutory crime of criminal anarchy created under the *New York Penal Law*.

[36] *Supra* note 32 at 673.

[37] *Ibid*.

[38] The references to Part III *etc.* are not relevant for our purposes.

The effect of these constitutional provisions is that foreseeable harm to security or public order need not be demonstrated in each individual prosecution. In *Public Prosecutor v. Pung Chen Choon*,[39] the Supreme Court held that:

> [A]rt 4(2)(b) of the Constitution expressly prohibits the questioning of the validity of any law on the ground that such a law 'imposes restrictions as are mentioned in art 10(2) of the Federal Constitution but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in art 10(2)'.[40]

In other words, a relational class test is imposed. If the speeches in question fall within the enumerated classes 'in pith and substance', they are irrebuttably presumed to have foreseeable harmful effects on public peace or security.[41] Thus, as further elaborated by the court, a law to abridge freedom of expression which *could possibly*, not *would*, lead to disturbance of public order, and which is not a law that only affected the individual, leaving the tranquillity of society undisturbed, would without more fall within the orbit of permitted restrictions in the interest of public order. In this way, the *Malaysian Constitution* has gone a long distance in insulating foreseeable harm and arguably the element of defiance of authority also from judicial scrutiny.

V. Seditious Libel in Australia

So that there will be no doubt about the range or latitude of solutions which have been adopted when defining foreseeable harm to public order, three further statutory solutions, those adopted in Australia, the West Indies and India, will be considered. As in the U.S., the courts in all three jurisdictions have had to examine the constitutional validity of laws of seditious libel. In the first instance, it will be sufficient to notice in outline the decision in *R. v. Sharkey*[42] where the High Court of Australia was called upon to pronounce on the constitutionality of ss. 24A, 24B and 24D of the *Crimes Act 1914-1946*.[43] This Act created statutory offences of sedition (such as publishing words expressive of a seditious intention under s. 24D) and defined a seditious intention in s. 24A(1) as follows:

> Subject to subsection (2) of this section an intention to effect any of the following purposes, that is to say—… or (g) to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth, is a seditious intention.

In *R. v. Sharkey*, the Crown relied *inter alia* upon paragraph (g) of s. 24A(1) in conjunction with ss. 24B and 24D to sustain the validity of the charges against Sharkey who had allegedly uttered words recommending Australians to welcome an invasion by Soviet Russia. The defence relied heavily on the argument that these provisions were beyond the legislative power of the Commonwealth. Rejecting the argument, Latham C.J., Rich, McTiernan, Williams and Webb JJ. of the High Court

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[39] [1994] 1 M.L.J. 566.

[40] *Ibid*. at 575.

[41] In fact, what is pertinent there as in Singapore is not so much foreseeable harm as foreseeable threat to public order. See text below.

[42] *Supra* note 16.

[43] Cth.

of Australia upheld the validity of the impugned paragraph. Dixon J. dissented on this point.

On paragraph (g), there was no doubt in any of the judgments (including the dissenting judgment) that, apart from the words "so as to endanger…the Commonwealth", it contemplated a promotion of ill will or hostility between classes which would endanger public order; and not a promotion of ill will or hostility between classes *per se*. The only question was whether the Federal legislative power extended to the subject matter of internal public order so that the Commonwealth Parliament could legislate for the maintenance of the peace, order or good government of the Commonwealth. This in turn depended on whether one could conceive of a sphere of public order of exclusive concern to the Commonwealth as distinct from the internal public order of member states. The majority essentially said that there was such a sphere of public order. Latham C.J. (with Rich J. in broad agreement) would read the reference in the paragraph to endangering the peace, order or good government of the Commonwealth as "a reference to that peace, that order and that government which the Commonwealth may lawfully protect, maintain or undertake; that is, to peace, order and good government as lawfully established under the Constitution".[44] McTiernan J. relied on a more general conception of sedition, as in its nature an offence against the State; so that "[w]here the State is the Commonwealth it has power to punish a seditious offence against itself".[45] Williams J. saw the offence as committed against the Commonwealth as a "body politic".[46] As one of the functions of the Commonwealth is "to make laws for the peace, order and good government of the Commonwealth with respect to defence",[47] it was not beyond the Federal legislative power for Parliament to punish words intended to promote feelings of ill will and hostility between different classes of His Majesty's subjects so as to endanger the defence of the Commonwealth.

Dixon J., however, denied the validity of paragraph (g) because the maintenance and preservation of internal order was exclusively a state concern and the Commonwealth could not legislate on subject matters reserved to the states unless "in some way the functions of the Commonwealth are involved or some subject matter within the province of its legislative power or there is some prejudice to the security of the Federal organs of government to be feared".[48] However, the added words "so as to endanger the peace, order or good government of the Commonwealth" could not "authorize legislation upon matters which are *prima facie* within the province of the States upon grounds of a connection with Federal affairs that is only tenuous, vague, fanciful or remote".[49] In his opinion, the words were "incapable of any definite meaning which would provide the necessary connection with the subjects of Federal power, with the administration of the Federal Government or with the security of any of its institutions".[50] Therefore, unlike Williams J., Dixon J. could not have been persuaded that merely because the words uttered by Sharkey touched on

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44 *Supra* note 16 at 138.
45 *Ibid*. at 158.
46 *Ibid*. at 159-160.
47 *Ibid*. at 160.
48 *Ibid*. at 150.
49 *Ibid*. at 151.
50 *Ibid*. at 153.

defence of the Commonwealth, there was a sufficient connection to peace, order or good government of the Commonwealth so that Parliament could invoke the Federal legislative power to protect the inner tranquillity of the Commonwealth, as opposed to the defence of it.

Ultimately then, the dissenting judgment was an insistence that general connections to public order would not be sufficient at least so far as the penal law was concerned, and seemed to be a more appropriate check on overreaching penal laws. However that may be, the Australian experience usefully shows that the element of foreseeable harm must have a degree of specificity, especially where the legislative power has been exactly allocated among the component jurisdictions of a Federal state.

VI. Seditious Libel in the West Indies: Antigua and Barbuda

In the second instance, s. 3(b) of the *Constitution of Antigua and Barbuda*[51] guarantees every person freedom of expression including freedom of the press while s. 12 states that "no person shall be hindered in the enjoyment of his freedom of expression". Section 12(4) then adds that nothing contained in or under authority of any law shall be held to be inconsistent with or in contravention of s. 12 to the extent that the law in question makes provision that is reasonably required in the interests of public order. So the formula used in calibrating the foreseeable harm to public order is not 'necessary or expedient in the interest of public order' but "reasonably required". How is this constitutional baseline to be determined? According to counsel's submissions to the Privy Council in *Hector v. A.G. of Antigua and Barbuda*,[52] there were two questions to be answered: (1) Was the law in question in the interests of public order? (2) Was it reasonably required in the interests of public order?[53] Counsel submitted that the law in question, s. 33 of the *Public Order Act*, was one in the interests of public order, because in making false speech likely to undermine public confidence in the government an offence, s. 33 was preventative and intended to be a step taken earlier to preclude any threat to public order resulting from the undermining of public confidence.[54] As to (2), counsel submitted this was to be answered with reference to the facts and the context. If, he argued, a significant segment of the public would be affected by the speech and the speech went to the root of public confidence in the conduct of public affairs generally, then the criminalisation of the speech would be reasonably required in the interests of public order.[55]

Lord Bridge of Harwich, delivering the judgment of the Privy Council, did not expressly approve or disapprove of this two-step analysis of the constitutional safeguards to free speech. He simply rejected both submissions by reference to the otioseness of the offence created by s. 33(b).[56] The offence in question was one of

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[51] *Antigua and Barbuda Constitution Order, 1981* (U.K.), S.I.1981/1106, Schedule 1, online: Ministry of Legal Affairs, Government of Antigua and Barbuda <http://www.laws.gov.ag/acts/chapters/cap-23.pdf> [*Constitution of Antigua and Barbuda*].

[52] [1990] 2 A.C. 312.

[53] *Ibid*. at 314.

[54] *Ibid.* at 314-315.

[55] *Ibid*. at 316.

[56] *Ibid.* at 319.

three created under the same section. The first two clearly were constituted by false speech likely to cause fear or alarm in or to the public, or likely to disturb the public peace.[57] The third, the offence in question, was constituted by false speech likely to undermine public confidence in the conduct of public affairs. It appeared thus that "in so far as it is necessary to make provision in the criminal law in the interests of public order against the dissemination likely to disrupt or disturb public order, the whole field is effectively covered" by the first two offences.[58] The third was thus not reasonably required in the interests of public order. If conduct in the third sense "is also of such a character that it is likely to disturb the public order", it is already covered.[59] If, on the other hand, such conduct is not likely to do so, "a law which makes it a criminal offence cannot be reasonably required in the interests of public order by reference to the remote and improbable consequences that it may possibly do so".[60] The unspoken premises are hence that nothing is reasonably required in the interests of public order unless it will directly affect public order in the sense that the conduct to be proscribed will directly and likely lead to public disorder if it were left unchecked.

VII. Seditious Libel in India

In the case of India, the most conspicuous feature of its statutory law of seditious libel is the difference between s. 124A and s. 153A of the *Indian Penal Code, 1860*.[61] The former criminalises seditious defamation (libel or slander) defined narrowly as exciting or attempting to excite feelings of disaffection (as originally enacted) to the Government established by law or bringing or attempting to bring into hatred or contempt the Government established by law (added in 1898).[62] The latter criminalises speech or writing akin to blasphemous libel (as the commentaries suppose)[63] and is more elaborately defined as promoting or attempting to promote feelings of enmity and hatred between different religious, racial or language groups or castes or communities, or doing an act which is prejudicial to the maintenance of harmony between such groups or castes or communities and which is likely to disturb public tranquillity.

The fate of s. 124A has been remarkably varied. Up until the 1950s, the Privy Council's view of what it involved stood unchallenged and resolute. In *Bal Gangadhar Tilak v. Queen-Empress*,[64] the Privy Council rejected an attempt to introduce the element of incitement to violence or reasonable likelihood of or tendency to disorder into the section, much as they did in *Wallace-Johnson v. R.*[65] which was an earlier appeal from the Gold Coast. In *Emperor v. Sadashiv Narayan*,[66] notwithstanding that the amendments to s. 124A had introduced an additional class of seditious intention,

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57 *Ibid.* at 318-319.

58 *Ibid*. at 318.

59 *Ibid*. at 319.

60 *Ibid*.

61 No. 45 of 1860 [*Indian Penal Code*].

62 *Indian Penal Code Amendment Act, 1898* (Act 4 of 1898).

63 See *e.g*., *Gour's Penal Law of India*, 11th ed. (Allahabad: Law Publishers, 2000).

64 Indian Law Reports 22 Bombay 112.

65 [1940] A.C. 231.

66 All India Reporter 1947 Privy Council 82.

namely the bringing of the government into hatred or contempt, the Privy Council adhered to their earlier view. The reason given was that the widening of the section to include 'bringing into hatred or contempt' did not make any difference to the need to construe statutory provisions in their own terms without recourse to the common law.

When the *Indian Constitution*[67] came into force on 26 January 1950, art. 13(1) voided all laws in force immediately before the commencement date to the extent of inconsistency with the *Constitution*, in particular with arts. 19(1) and 19(2). The former guaranteed freedom of speech and expression to all citizens while the latter upheld the operation of any existing law in so far as it related to libel, slander, defamation, contempt of Court or any matter which offended against decency or morality or which undermined the security of, or tended to overthrow, the State. The question soon arose as to whether s. 124A as the Privy Council had construed it was void by virtue of art. 13(1) read with art. 19. In *Romesh Thappar v. State of Madras*,[68] his Lordship Patanjali Sastri J. in the Supreme Court observed that it was. He explained that the effect of art. 19(2) was to set very narrow and stringent limits on permissible legislative abridgment of free speech; the constituent assembly having, as he observed, rejected the wider formula of undermining the public order when settling for the formula of undermining the security of the state. As a consequence, "unless a law restricting freedom of speech and expression is directed solely against the undermining of the security of the State or the overthrow of it, such law cannot fall within the reservation under clause (2) of article 19, although the restrictions which it seeks to impose may have been conceived generally in the interests of public order".[69] The critical point was that it was not good enough that s. 124A was a statute which maintained public order. To be valid under art. 19(2) it had to be a statute which maintained the security of the state; and that it was not. Accordingly, the Punjab High Court acting on these observations held in *Tara Singh Gopi Chand v. The State*[70] that s. 124A was void under art. 13(1).

This decision provoked an immediate reaction. A constitutional amendment in 1951, effective 18 June 1951 and with retrospective effect, was passed ostensibly to validate s. 124A by adding the interest of public order to the list of grounds in art. 19(2) providing justification for abridging freedom of expression.[71] Clause (2) was amended to read as follows:

> Nothing in sub-clause (a) of clause (1) shall affect the operation of existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.

To date no further amendments have been thought necessary.

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67 *The Constitution of India of 1950* [*Indian Constitution*].
68 All India Reporter 1950 Supreme Court 124.
69 *Ibid*. at 129.
70 All India Reporter 1951 Punjab 27.
71 *Constitution (First Amendment) Act, 1951*, s. 3(a).

What have the Indian courts said about the new clause (2)? They have held that the new clause is capable of justifying s. 124A as a law reasonably required in the interest of public order, provided a requirement of foreseeable harm is read into the section. Thus, despite the isolated positive views in one case,[72] there is little doubt that the overwhelming weight of authority is to that effect, that s. 124A must be read as if it included the words 'with a tendency to create disorder'.[73] In the words of the Supreme Court in *Kedar Nath Singh v. State of Bihar*, "[i]t is only when the words, written or spoken, *etc.* which 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 order".[74] Prosecutions under s. 124A are accordingly limited by the *Indian Constitution* to acts involving an intention to create disorder or disturbance of law and order or incitement to violence.[75]

As for s. 153A, Indian legal scholars recognise it as creating an offence somewhat akin to the common law offence of blasphemous libel,[76] occupying a kind of intermediate ground between seditious libel (under s. 124A) and group libel (under s. 505 of the *Indian Penal Code*). A word of explanation is necessary when it is said that s. 153A creates an offence akin to the common law offence of blasphemous libel (or blasphemy). The offence here is not to be assimilated to the common law offence, which is unique, for it protects the Christian religion from scurrilous attack (and not so much the adherents to the religion) and will not be extended to all religions.[77] Unlike the common law offence, however, s. 153A, inverting the order, protects specific adherents to a religion from being defamed or censured for their profession of faith.[78] Consequently, it would be more correct to describe the offence as one of blasphemous libel against an individual or a group of individuals

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72 *Debi Soren v. State*, All India Reporter 1954 Patna 254 at 259 (H.C.).

73 See *Sagolsen Indramant Singh v. State of Manipur*, All India Reporter 1955 Manipur 9 (H.C.); *Ram Nandan v. State*, All India Reporter 1959 Allahabad 101 (H.C.).

74 All India Reporter 1962 Supreme Court 955.

75 *Ibid*. See *Gour's Penal Law of India, supra* note 63 at 1242-1243.

76 A more recent definition in *R. (on the application of Green) v. City of Westminster Magistrates' Court*, [2007] EWHC 2785 (Admin) at para. 16 emphasises the abstract quality of blasphemous libel as follows:

> The gist of the crime of blasphemous libel is material relating to the Christian religion, or its figures or formularies, so scurrilous and offensive in manner that it undermines society generally, by endangering the peace, depraving public morality, shaking the fabric of society or tending to be a cause of civil strife.

For an historical account, see Lord Sumner's judgment in *Bowman v. Secular Society Ltd.*, [1917] A.C. 406 at 454 *et seq.* (H.L.).

77 Although modern formulations have moved from attack on established doctrines of the Christian religion to outraging and insulting the religious feelings of professors and adherents, it remains the case that the subject is the religion and not the adherent. There is no necessity to specify in the charge any adherent or group of adherents and the test is whether an ordinary Christian would be outraged or offended. The focus is on the general body of Christian believers. The statutory offence of blasphemy is more specific. It has been said that the *Blasphemy Act, 1697* (U.K.), 9 & 10 Will. III, c. 32, "should be construed as imposing, in the case of persons educated in or who have at any time professed the Christian religion, certain additional penalties for the common law offence rather than as creating a new statutory offence": *Bowman v. Secular Society Ltd.*, *ibid*. at 446, Lord Parker. See also *Wingrove v. United Kingdom* (1996), 24 E.H.R.R. 1.

78 To cater to a pluralist society it was necessary to remove the abstractness of common law blasphemous libel by directing attention to distinct groups of believers. As Lord Scarman noted in *R. v. Lemon, supra*

(a kind of hate speech covering incitement to racial or religious hatred). *Gour's Penal Law of India* entertains no doubt as to the constitutional validity of s. 153A if it is, as indeed it has been, construed to require attention to the *manner* in which the offending words are said and not merely the *matter* which has been said.[79] As s. 153A so construed requires proof of the *mens rea* of wilfully intending to cause enmity and hatred, *Gour's Penal Law of India* argues that it is clearly a reasonable restriction in the interest of public order.[80] In *P.K. Chakravarty v. Emperor*, Rankin J. said:

> Section 153A I.P.C. does not mean that any person who publishes words that have a tendency to promote class hatred can be convicted under that section. The words 'promotes or attempts to promote feelings of enmity' are to be read as connoting a successful or unsuccessful attempt to promote feelings of enmity. It must be the purpose or part of the purpose of the accused to promote such feelings and, if it is not part of his purpose, the mere circumstance that there may be a tendency is not sufficient.[81]

The emphasis on 'wicked' intention or purpose at least makes the link to tendency to public disturbance clear; so that there is a real likelihood of immediate or imminent public disorder, and the interest of public order is affected.

VIII. SINGAPORE'S *SEDITION ACT*

The discussion thus far has demonstrated a strong consensus on the element of defiance of constituted authority, and a diversity of approaches to the element of foreseeable harm to public order. The remainder of this article will consider Singapore's *Sedition Act*, in particular the extent to which these elements must exist before a charge of seditious libel is valid. Like the Australian, Canadian, Indian, and Malaysian, the Singapore law of sedition is statutory. In Singapore (as in Malaysia), the *Sedition Act*, as first enacted in 1938 and as continued up until now, stands apart from the *Penal Code*.[82] The Singapore Act is different in several material respects

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note 6 at 658:

> When nearly a century earlier Lord Macaulay protested in Parliament against the way the blasphemy laws were then administered, he added (*Speeches*, p. 116): "If I were a judge in India, I should have no scruple about punishing a Christian who should pollute a mosque" (1922) C.L.J. 127, 135. When Macaulay became a legislator in India, he saw to it that the law protected the religious feelings of all.

There is a simple reason for focusing on individual adherents. As A. Lester Q.C. argued in *R. v. Chief Metropolitan Stipendiary Magistrate, Ex. parte Choudhury, supra* note 17 at 434, "If the law of blasphemy were to protect all religions there would be conflict with the fundamental right of free expression under the common law" and "very difficult problems would be posed".

79 *Supra* note 63 at 1454-1455.

80 *Ibid*. at 1455-1456.

81 All India Reporter 1926 Calcutta 1113 (H.C.), cited in *State of Bihar v. Ghulam Sarwar*, All India Reporter 1965 Patna 393 at 396 (H.C.).

82 Cap. 224, 2008 Rev. Ed. Sing. The Act is a code, and for the principles by which a code should be interpreted, see *Wallace-Johnson v. R.*, *supra* note 65. However, while as a general rule we must construe a code ignoring the common law preceding it, we must not go to the other extreme of assuming that the common law is never relevant; especially on matters of fundamental definition. See *Boucher v. R.*, *supra* note 12; and the valuable lesson in *Chong Fook Kam v. Shaaban*, [1968] 2 M.L.J. 50 that a code

from comparable Commonwealth legislation. First, it includes the promotion of ill will or hostility among different classes, unlike the Canadian legislation (which predicates the common law definition) and is similar to but not the same as the partly re-worded statutory definition in the Australian legislation. On the other hand, its definition of 'seditious tendency' is wider than the shorter (and exhaustive) definition found in the Indian and the Gold Coast legislation. Second, it does not require proof of seditious intention but whatever may be the specific intention of the speaker or publisher, it will suffice that the speeches or writings possess a *seditious tendency*, a unique feature it shares with the Malaysian statute.[83] The offence thus is constituted not by publishing with a seditious intention but by issuing a publication with seditious tendency.

To elaborate a little on this difference, we may note that under the Canadian, Australian and Indian statutes, the charge must allege a seditious intention. This means that *knowledge of the contents* of the publication, which may be self-evident in the case of self-publication, is critical. If a person issues a publication knowing that it contains words inciting disobedience to constituted authority, with a direct tendency to public disruption, he is guilty of seditious libel. The existence of a specific seditious intention will be inferred. In the light of developments after the passage of Fox's *Libel Act 1792*,[84] the focus on specific intention also implies that the answer to the crime is not to be found solely in the contents of the speech. The surrounding circumstances, particularly the context in which the utterance was made, may be highly pertinent. For instance, the same speech in an academic conference, though given forcefully and with enthusiasm, is less likely to be given with a seditious intention. The publisher's motive also plays a part in the proof of seditious intention. If sinister, his intention is seditious. If his motive is innocent (*e.g.*, if it is to seek help, or constructive action), his seditious intention is lacking.[85]

By shifting the focus to seditious tendency, the Singapore Act immediately stresses that the sole intention that is relevant is the *intention to publish*, and purports to make motives and context irrelevant since there is no concern with a more specific wicked intention;[86] although whether this fully succeeds is questionable.[87] The implication is that if the words have the requisite seditious tendency, it is of no consequence that the speaker had no seditious intention; for instance, that he intended to criticise the government but not to bring the government into ridicule, or that the fact that the government was brought into contempt was a happenstance, the result of the peculiarities of his audience which he did not foresee.[88] Knowledge

may embody existing law that is uncontroversial. More recent cases indicate that even where change is clear, the common law background is relevant for a full appreciation of the breadth and depth of the change. See *Aswan Engineering Establishment Co. v. Lupdine Ltd.*, [1987] 1 W.L.R. 1 at 6 (C.A.).

83 The Malaysian statute was copied from the *Sedition Ordinance, 1938* (S.S.) (No. 18 of 1938).

84 *Supra* note 6. The Act was passed to remove doubts about the functions of juries in libel cases.

85 *Cf. R. v. Lemon, ibid.* at 646 in which it was held that "[g]uilt of the offence of publishing a blasphemous libel does not depend on the accused having an intent to blaspheme but on proof that the publication was intentional (or, in the case of a bookseller, negligent (Lord Campbell's *Libel Act 1843*)) and that the matter published was blasphemous".

86 See also *Sedition Act,* s. 3(3).

87 In substance, the seditious tendency must be proved from the contents of the publication but it seems questionable whether one can ignore even the context and circumstances envisaged or contemplated by the publication.

88 *Sedition Act*, s. 3(2) requires legitimate criticism to be objectively ascertained again from the contents.

of the contents therefore ceases to be critical. The only relevant intention is the intention to speak the words or publish them, and the speaker's inability to foresee the seditious tendency of the publication or his underestimation of any such tendency is immaterial. Where the author of the words is another, the publisher is permitted a defence of reasonable ignorance of the seditious tendency of the words published.[89] This is where knowledge of the contents or the lack of it comes in, as a defence. It is not incumbent on the prosecution to prove knowledge of the contents, but the absence of reasonable knowledge of the seditious contents is for the accused to prove as a defence.

Comparison with Stephen's art. 93 mentioned earlier is instructive since it is a fact that the entire s. 3(1) of the *Sedition Act* was copied from art. 93. For the sake of ease of reference both provisions are reproduced here:

> Section 3(1)—A seditious *tendency* is a *tendency*—
> (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.
>
> Article 93—A seditious *intention* is 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 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 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.
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> [emphasis added to both passages]

By comparing s. 3 with art. 93, we easily see that seditious tendency is none other than Stephen's "seditious intention", with "tendency" replacing "intention". This re-formulation of art. 93 was in fact as Stephen advocated and recommended in *History of the Criminal Law*, when he said: "If nothing else had to be regarded in legal definitions except clearness and symmetry, a seditious libel ought to be defined with reference to the tendency of the matter published and without reference to the intention of the author".[90] Section 3(1)(e) thus restores what Stephen argued was the correct and original meaning of "seditious intention" until its corruption by practice derived from Fox's *Libel Act 1792*. The remaining obvious differences involve the substitution of such phrases as "citizens of Singapore" for "Her Majesty's

[89] *Ibid*., s. 6(2). Thus, negligent publication remains criminally actionable.
[90] *Supra* note 8 at 362. *Sedition Act*, s. 3(2) was also copied again almost verbatim from Stephen's art. 94.

subjects", "the Government" for "the Government and Constitution…", and in particular, "'races or classes of the population of Singapore" for "classes of Her Majesty's subjects".

IX. Is Defiance of Constituted Authority Dispensed With?

The more facile differences just pointed out lead us to the critical question of whether there are fundamental differences in the Singapore conception of seditious libel. In this respect, the first question we must address is whether a seditious tendency under s. 3(1)(e) is necessarily directed at lawfully constituted authority. In *Public Prosecutor v. Ong Kian Cheong*, counsel for the defence raised this issue.[91] He mounted a defence on behalf of the Ongs to the effect that a publication charge alleging the seditious tendency defined by s. 3(1)(e) must contain an allegation that the publications were directed at censuring constituted authority; with the implication that the charges were defective as disclosing no offence at law since that element was missing.[92] On this, the district judge directed himself that the words of s. 3(1)(e) were plain and unambiguous. Without explicitly referring to the defence argument, he implied that the words of the section were silent on the relevance of constituted authority and could not be expanded by adding the requirement of constituted authority.

It is difficult, with respect, to defend the court's conclusion. On the face of the section, there was an obvious difference between the first three paragraphs and the last two, and a more subtle difference between the penultimate and the last paragraph. These differences precluded the court from reaching the conclusion that the definitional provision was plain and unambiguous; the more so where a penal statute was involved. Further, the conclusion was far from following the holistic appraisal which is recommended for a definitional provision.[93] Where an operative provision is cast in disjunctive terms, there is no necessity that there must be a clear theme or common thread running through them. But a definitional provision of an exhaustive as opposed to inclusive character announces an essential sameness, so that we should rather presume, unless the contrary is compelling, that its many aspects are struck on the same anvil or cast in the same mould.[94]

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[91] *Supra* note 2. The Ongs were jointly prosecuted and convicted on three charges, namely that they had in substance published a seditious publication to three different persons on three different occasions respectively; these charges alleging two offences under s. 3(1)(e) read with s. 4(1)(c) of the *Sedition Act*, and one offence under s. 12(c) read with s. 4(1)(b) of the *Undesirable Publications Act* (Cap. 338, 1998 Rev. Ed. Sing.). There was an additional fourth possession charge, alleging in substance an offence under s. 3(1)(e) read with s. 4(2) of the *Sedition Act*. In this article, the publication charges under the *Sedition Act* are of exclusive interest (for purposes which will be obvious) and little will be said directly about the charge under the *Undesirable Publications Act* or the possession charge. In relation to the seditious publication charges, the fact that the Ongs had not intended to create ill will or hostility between different races or classes of the population of Singapore (their intention was to evangelise their Christian faith) was immaterial.

[92] A copy of the defence submissions was kindly provided to the author.

[93] I phrase the principle of statutory interpretation in this way in order to embrace specific considerations of *ejusdem generis*, *noscitur a sociis* as well as more general considerations of context and purpose.

[94] This is the *ejusdem generis* principle which applies whenever the particular or specific classes which are enumerated identify a class or genus to which a more general class should be restricted. See *Bennion on Statutory Interpretation*, 5th ed. (London: LexisNexis, 2008) at 1231-1245.

The first three paragraphs of s. 3(1) (*i.e*. paragraphs (a) to (c)) clearly have maintenance of lawful government as their subject, while paragraph (d) in context can only mean exciting disaffection amongst citizens as a result of the government's external policies or policies regarding citizens and non-citizens or as a result of the acts of some institution not necessarily part of the government but perpetuated by the government; why should the Act be concerned with disaffection amongst citizens in relation to (say) China's treatment of Tibetan dissidents if the government of Singapore is not implicated? The first four paragraphs in other words show that the gist of the offence is defaming constituted authority by verbal or written vilification of the government, the law, and the administration of justice, and by stirring up discontent amongst the citizenry through defaming government external policies or policies regarding nationals and non-nationals. The fifth paragraph, paragraph (e), must similarly be referring to a mode of impugning constituted authority by divisive accusations of government partiality or prejudice which stir up differences between population classes. Construing paragraph (e) in the light of the preceding four paragraphs, it could only have been intended to embody one of the many forms of seditious libel and must be construed so as to require proof of defiance of constituted authority.

We have moreover seen that the *Sedition Act* attained its present form in 1938. Throughout the period leading up to the *Sedition Ordinance, 1938*, s. 298 of the *Penal Code* stood unaltered. It created and still creates the distinct and different offence of blasphemous libel against an individual, and was supplemented as of 1 February 2008 by its expansion to include racial libel and the addition of s. 298A to cover blasphemous or racial libel against a group or class of the population. There was nothing in the *Sedition Act* to suggest that paragraph (e) was intended to anticipate s. 298A of the *Penal Code* and to range beyond libel of the government to blasphemous libel of groups of persons. Indeed, the rejection of the Indian s. 153A in the parliamentary proceedings in 1938 seemed conclusive on this point.[95] In the legislative preference for Stephen's definition of seditious libel over s. 153A's definition of group libel, there was nothing to indicate that there would be a fundamental alteration in the concept of seditious libel.

To be more clear that the several paragraphs of s. 3(1) (including paragraph (e)) were merely several manifestations of seditious libel sharing the same common element of censure of constituted authority, there are finally arguments that nothing of the fundamental pre-existing common law encapsulated in Stephen's art. 93 which was copied in s. 3(1)(e) can be regarded as abolished or abrogated as being inconsistent with the status of Singapore as a republic. We have already seen that paragraph (e) has reference to lawfully constituted authority from the several passages cited in *Boucher v. R.*[96] So it is sufficient to cite a few more passages from Stephen's *History of the Criminal Law* to confirm that as a general rule, before a writing can be held to disclose a seditious intention, it must further appear that

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[95] This was a deliberate legislative decision inasmuch as in 1938, Parliament (the Legislative Council) debated and rejected a bill which was similar to s. 153A of the *Indian Penal Code*. Before the 1938 enactment, the offence of exciting disaffection against the government was created by s. 124 of the *Penal Code* (as in India) and other forms of seditious libel were made offences by the *Seditious Publications Ordinance* (S.S.) (No. 11 of 1915).

[96] *Supra* note 12.

the intended, or natural and probable, consequence is to produce disturbance to the authority of a lawfully constituted government. The general introduction makes this clear. At that place, Stephen said, "[a]ll these offences [seditious words, seditious libels and seditious conspiracies] presuppose dissatisfaction with the existing government, and censure more or less express upon those by whom its authority is exercised, and the offences themselves consist of the display of this dissatisfaction in the various manners enumerated".[97] More specifically and apart from paragraph (e), Stephen implied that paragraph (d) was drafted to cover political libels such as occurred in the case of *Carlile*.[98] That means that the two elements also apply here. Against this backdrop, how much of the pre-existing law encapsulated in art. 93 and embraced in s. 3(1)(e) should be regarded as inconsistent with the relational change from "classes of Her Majesty's subjects" to "races or classes of the population of Singapore"?

The answer must be, nothing at all. When Stephen drafted art. 93, the concept of subject had a core and an extended meaning. Persons born within the dominions and allegiance of the Crown were subjects in the core sense.[99] Persons who were born outside these dominions of British subjects were subjects in the extended sense as provided for by statutory law such as the *Labourers, Artificers, etc. Act, 1350*.[100] The formulation of art. 93 in terms of the relation between her Majesty or her government and her subjects was therefore understandable since nationality was then an unknown concept; being a statutory concept which entered the law books much later in 1948 via the *British Nationality Act, 1948*.[101] Consistent with this, the *Sedition Ordinance, 1938*, passed when Singapore was part of the Colony of the Straits Settlements and before nationality became a legal concept in the common law, followed the reference in art. 93 to the Crown's subjects. After Singapore became a sovereign republic, one would expect the phrase to be changed to "citizens of Singapore"; and so it was.

To be sure, in 1938, the legislature added "or inhabitants of the Colony" to the phrase "His Majesty's subjects" in order ostensibly to ensure that publications directed at causing disaffection among those inhabitants of the Colony who were not Crown subjects would also be caught by the definition of seditious tendency in paragraphs (c) and (d); similarly class divisive publications would also be caught by paragraph (e). There was again nothing exceptional in this. This change was intended simply to accommodate the extended notion of political allegiance which had developed after Stephen drafted art. 93. By the end of the 19th century, the concept of sovereignty had become territorial in nature and had ceased to be conceived by reference to political allegiance in virtue of birth.[102] In particular, the concept

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[97] *Supra* note 8 at 298.

[98] *R. v. Carlile* (1819), 1 State Trials, New Series 1387; discussed in *ibid*. at 372-373.

[99] William Blackstone, *Commentaries on the Laws of England*, 1st ed. reprinted (London: Dawsons of Pall Mall, 1966) c. 10.

[100] (U.K.) 25 Edw. III St. 2, c. 1-7.

[101] (U.K.) 11 & 12 Geo. VI, c. 56.

[102] Thus, Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) at 76: "[i]t has been a characteristic of political power at least in the modern world that it is exercised territorially, normally with a claim of exclusive legitimacy in respect of a more-or-less definite territory".

of criminal jurisdiction and triability had evolved into a largely territorial notion.[103] In line with these developments, the relation of ruler and subject, which was the subject of the law of seditious libel, now meant the relation of ruler and subject in the extended territorial sense. To reflect this, the legislature in 1938 did what was in order, by inserting the additional and expanded reference to residents of the Colony (hence the enlarged class of subjects and residents) and by referring to the inhabitants of the Colony (to cover both subjects and residents of the Colony).

Could all this nevertheless have changed when Singapore became a republic so that the term "races or classes of the population of Singapore" used in s. 3(1)(e) somehow acquired thereby a new and different sense? Could the *Constitution of the Republic of Singapore*[104] have established a different relation between constituted authority and subject, bringing into being a different order of sovereignty of the people, in which constituted authority became the servant of the people? Or did it re-establish the same sovereignty of the President in Parliament that inhered in the Queen in Parliament of the U.K.? The *Singapore Constitution* was neither a constitution of conquest nor one of popular suffragette.[105] It was drawn up by the legislature of the state of Singapore for the purposes of establishing a republic, a new state with a new name. That legislature was a continuing legislature, inheriting and invested with the plenary and absolute powers and authority of the colonial ruler, the Queen in the U.K. Parliament, both when it legislated to join with Malaysia and when it left the union. The *State Constitution of Singapore*,[106] as an Act of Parliament to further Singapore's membership of the Federation of Malaysia, did not take away and could not take away the general and unrestricted power of a successor Parliament (in which the power of unilateral reversal remained vested) to unilaterally secede from the Federation.[107] Accordingly, no new relation between ruler and subject could have come into existence, but the same relation in existence under colonial rule continued with a change in composition of the rulers, after the creation of the Republic of Singapore. If so, it can hardly be contended that the reference in s. 3(1)(e) to the population of Singapore is an allusion to the fact that sovereignty now belongs to the people and that seditious libel against the people or a segment of the people of Singapore, as distinct from seditious libel against constituted authority, has become a legal possibility, indeed, a *fait accompli*, after independence.

However that may be, the fact that in defending the court's conclusion one would need to poise a sea change in the concept of seditious libel on this slender fulcrum is telling. The change from "Her Majesty's subjects" to "population of Singapore" was

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[103] See *MacLeod v. A.G. for New South Wales*, [1891] A.C. 455 (P.C.). See also *Public Prosecutor v. Pong Tek Yin,* [1990] 3 M.L.J. 219 (H.C.).

[104] 1999 Rev. Ed. [*Singapore Constitution*].

[105] See A.J. Harding, "Parliament and the Grundnorm in Singapore" (1983) 25 Mal. L. Rev. 351. See also Sing., *Parliamentary Debates*, vol. 24, col. 430 at 430-436 (22 December 1965), where the then Prime Minister, Mr. Lee Kuan Yew referred to the transfer of "all further executive and sovereign authority over Singapore" from the Federal Government and where he explained the decision to exclude art. 13 of the *Federal Constitution of Malaysia*. I am grateful to Assistant Professor Arun Thiruvengadam for drawing my attention to this point.

[106] *Sabah, Sarawak and Singapore* (*State Constitutions*) *Order-in-Council, 1963* (S.I. 1493/1963).

[107] See A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed. by E.C.S. Wade (London: Macmillan, 1959). *Cf. R. v. Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2)*, [1991] A.C. 603 at 658-659, Lord Bridge (H.L.).

not calculated to produce and is incapable of producing the sea change which inverts the relation of ruler and subject which is to be protected from censure beyond the prescribed limits. In the light of the changes in wording to s. 3(1)(e), it appears more cogent to conclude that the two formulations (s. 3(1)(e) and art. 93) say and were intended to say virtually the same thing. The essence of s. 3(1)(e) which remains unchanged is that the proscribed writing or speech is one that involves accusations that a constituted authority or the government is pursuing class or race divisive policies.[108]

X. Is Foreseeable Threat to Public Order Necessary?

In *Public Prosecutor v. Ong Kian Cheong*, defence counsel mounted a second defence on behalf of the Ongs at their trial.[109] This was a constitutional defence to the effect that to be consistent with the *Singapore Constitution*, s. 3(1)(e) had to be read to require an allegation and proof of foreseeable harm to public order inasmuch as the freedom of speech of a citizen (and the Ongs were and are citizens) could only be abridged in the interest of national security or public order. This constitutional argument was also rejected; to be more accurate, the court did not deal with the defence directly. How are we to analyse this challenge to see whether there is yet again another critical difference in Singapore's *Sedition Act*?

Article 14(1)(a) of the *Singapore Constitution* proclaims the citizen's freedom of speech. This freedom is not absolute and may be abridged in accordance with art. 14(2), which provides that Parliament may by law impose on the rights conferred by art. 14(1)(a) such restrictions as it "considers necessary and expedient in the interest of the security or public order of Singapore".[110] Thus, even if the words of s. 3(1)(e) were plain, the provisions of the section must be scrutinised for constitutional compliance or conformity, and being a pre-constitution enactment, the section must be brought into conformity by the addition of words to the statute to the extent necessary to ensure constitutional conformity.[111]

No one will dispute that the phrase "in the interest of public order" will extend to preventative law which is intended to be a step taken earlier to preclude any threat of harm to public order, as distinct from law intended to prevent harm to public order. One cannot, however, stop there. Article 14(2) does not say that restraints on

[108] *Cf. R. v. Sharkey*, *supra* note 16 at 150, Dixon J., on para. 1(g) of s. 24A(1) of the *Crimes Act 1914-1946*.

[109] *Supra* note 2 at paras. 44-45.

[110] The accused did not rely on their freedom to manifest their religious belief which is ensured by art. 15(1) of the *Singapore Constitution*; albeit there was some evidence that their act of evangelising or proselytising was within the core of their beliefs. There is a simple reason that they could not have done so; the criminal law which they were alleged to have violated did not purport to address their religious rights. A law of sedition may indirectly do so but constitutional rights are protected against *direct* and *deliberate* impairment by the executive or legislature, not *indirect* and *incidental* impairment. This is clear from the provisions of art. 15(4) that art. 15 does not authorise any act contrary to any general law relating to public order, public health or morality. Incidentally, this also explains why in India, the constitutionality of s. 153A of the *Indian Penal Code* has always been dealt with in terms of the freedom of expression and not the freedom of religious belief where blasphemous libel is concerned. In such cases, the true conflict is one of freedom of expression. *Cf.* Thio, *supra* note 2 at 13, who thought it clear that the Ongs had a right to religious propagation unless, as provided by art. 15(4), the act of religious propagation was contrary to any general law relating to public order, public health or morality.

[111] *Cf. A.G. of the Gambia v. Momodou Jobe*, [1984] A.C. 689 at 702 (P.C.).

freedom of expression are valid as long as Parliament *deems* they are necessary or expedient in the interest of public order. It says rather that Parliament must *consider* them necessary or expedient. This constitutional stricture would not of course permit the courts to substitute their own views as to what will be necessary or expedient. There must not be an examination or scrutiny of alternative measures or restrictions which could just as effectively keep the public peace and good order. The courts must also not purport to weigh the measure under review to consider whether it really is necessary given that other restrictions already and sufficiently cater to the problem or given the existence of other strong public order laws such as laws outlawing public assembly which already keep the risk of public disturbance in check. Neither the comparative effectiveness of the restraint nor its situational effectiveness is an inquiry to be pursued in judicial proceedings. On the other hand, the meaning of art. 14(2) cannot be so trivial that everything Parliament considers is necessary or expedient must be taken or deemed to be so in the absence of proof of bad faith. An art. 14(2) review cannot be reduced solely to a check on legislative bad faith. This extreme interpretation of art. 14(2) would leave the citizen with no real freedom of expression because the bad faith of Parliament would virtually be impossible to prove; and every abridgment of his freedom of expression would in effect be valid if enacted by Parliament as statutory law.

With reference to what art. 14(2) means for s. 3(1)(e), surely at minimum, in order for s. 3(1)(e) to be considered by Parliament necessary in the interest of public order, *i.e.* in order for Parliament to have considered paragraph (e) necessary in the interest of public order, paragraph (e) must bear a rational nexus to and have a direct or exclusive effect on threats of harm to public order in all the circumstances envisaged by the section. From the terms of the *Sedition Act*, the object, purpose and design of paragraph (e) must be determined to see if Parliament must have considered it necessary in the interest of public order to impose the restriction as a preventative step.

That, however, is where there are serious doubts so far as s. 3(1)(e) as it stands is concerned. The definition of seditious tendency in paragraph (e) read literally suggests that a tendency to promote ill will or hostility between the different classes of the population of Singapore is enough of a direct threat to public order irrespective of context and actual circumstance. It will reach any discussion of a question of public interest relating to race, religion, or same sex relations since such discussion is likely to promote ill will or hostility between different classes. However, not all of such discussion will have reference to and amount to a direct threat to public order in all contexts and circumstances. If the consequences of the promotion of ill will or hostility will not be the same in terms of threatening public order irrespective of subject matter, context and circumstance, paragraph (e) will have been framed too widely and Parliament will have failed to consider it necessary in the interest of public order. In some contexts in particular, the promotion of ill will and hostility will not threaten public order if the arousing of feelings of ill will or hostility is not accompanied by express incitement to public disorder. For instance, a blasphemous libel directed at an individual can arouse feelings of ill will or hostility between different classes when reported in the newspapers. On a literal reading of paragraph (e), the newspaper report would be a seditious publication and the publisher of the report would have committed an offence of sedition, even though the report

does not incite to public disorder and the reasonable anticipation or likelihood of public disturbance is absent. Again, an insignificant segment of the public may be affected by the speech, or the divisive remarks may have been so obscured by the inarticulateness of the speaker as to lose their threatening effects, or action taken by members of the audience may quell the threat to public order that could otherwise have materialised.

The fact that s. 3(1)(e) has not been considered necessary in the interest of public order is not fatal to its validity. At the very minimum, s. 3(1)(e) (the law abridging freedom of expression), if not considered necessary, must have been considered expedient in the interest of public order. This scrutiny of a restraint on freedom of expression is not as stringent as where the restraint must be considered necessary in the interest of public order. It means more modestly that the restraint must not only be thought desirable but, as the Oxford English Dictionary says, must also be considered fitting or conducive to the prevention of threats of harm to the public order in the majority of reasonably predictable contexts; albeit it will not be unconstitutional by reason only that in some more unusual contexts expediency is absent. Proportionality is of course entailed, for the expedience of a measure is not unmeasured but always commensurate. Thus, we may say that the criminalising of a tendency of exciting disaffection against the government in a small newly established country is a fitting and expedient preventive response to the high level of threat to public order which most predictable acts of exciting disaffection will pose. But how will we expediently strike a balance in the desire to preclude threats to public order, when the threat to public order and the potential quantum of harm to the public order flowing from class divisive speech is hugely variable in context and circumstance? On certain religious matters, the threat may be large while on gender matters, it may be small. As these contexts are varied and fluid in the sense of shading easily into one another, there is rationally only one way to differentiate between class divisive publications in terms of the threat posed to public order. This is to divide them into those which directly threaten public order and those which do not. If so, how can it be said that Parliament has considered that paragraph (e) is expedient in the interest of public order if it has not differentiated between class divisive publications that directly threaten public order and those which do not? It is not possible to say that class divisive publications always pose a greater threat to public order than publications tending to engender hatred of the government and that consequently it is a fitting response to proscribe *all* class divisive publications irrespective of context and circumstance and effect as a threat to public order.

In evaluating the fitness of any criminal law in the interest of public order, there is a tendency to fall into the tempting argument that it is nevertheless a fitting response to proscribe all class divisive publications based on race or religion irrespective of threat to public order, in view of "the especial sensitivity of racial and religious issues in our multi-cultural society".[112] That perhaps may be the correct view to take in these

[112] See *Public Prosecutor v. Koh Song Huat Benjamin*, *supra* note 3 at para. 6. References could also be made to Senior Minister of State for Home Affairs, Ho Peng Kee's comments on ss. 298 and 298A of the *Penal Code* during the Second Reading of the *Penal Code (Amendment) Bill*: Sing., *Parliamentary Debates*, vol. 83, col. 2175ff (22 October 2007). See also the Ministry of Foreign Affairs' response in "MFA Press Statement: MFA's Response to the Press Statement of Mr Githu Muigai, UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related

times, but the correct answer must always be that which the *Singapore Constitution* as it was drafted in earlier times, gives. That Constitution, as has been seen, draws the line at class divisive publications which pose a foreseeable threat to public order. Unlike most other Constitutions which stress foreseeable harm to public order, it has already preferred the greater protection of public order in a multi-cultural society. If the view is that this is insufficient and all publications bearing on racial and religious issues should be proscribed, then let the *Singapore Constitution* be amended along the lines of the *Malaysian Constitution*. Until that is done, however, the tempting argument must be resisted.

The tempting argument that the regulatory interest justifies all must also be resisted. We must take care not to conflate constitutional issues with the fitness of regulatory laws such as censorship laws and thereby transform s. 3(1)(e) into a regulatory law much like a censorship law, arguing that is what art. 14(2) approves of. Censorship laws, properly understood, address not so much freedom of speech but the commercial interest in free speech. The right to free speech is not a right to insist that laws must provide affirmative conditions whereby I may exercise or be encouraged to exercise free speech. Certainly, no one yet seriously supposes that it correlates to duty on the part of constituted authority to encourage free speech. Accordingly, if I am prevented from reading a book but the book is banned from distribution for the sake of the regulatory interest, I cannot complain of violation of my right to free speech. If I am prohibited from selling the book, only my commercial interest is affected but my commercial interest is not a matter of constitutional protection.[113] Similarly, the banning of a book may affect the commercial interest of publishers and distributors. But commercial parties are not under any duty to provide materials for or exercise their right to free speech and cannot complain that their freedom of speech has unjustifiably been curtailed. The fundamental lesson is that essential criminality and censorship regulation inhabit separate realms. Although seditious libel and censorship laws may in some quarters seem to address the same subject of the limits of free speech, it would be a grave error to suppose that what justifies censorship must also be sufficient justification for making class divisive speech or writing a seditious speech or writing.

In his study of censorship, Peter Coleman has traced the history of regulation of dissent through the use of censorship laws.[114] This history contains important points of censorship policies with many lessons for regulators. Coleman shows that there is inconsistency in addressing non-*ad hoc* publications and importers. There is also obvious overlapping coverage.[115] Another important point is that the decision to ban a publication is administrative not judicial; and Coleman's account of changing

Intolerance" (28 April 2010), online: Ministry of Foreign Affairs <http://app.mfa.gov.sg/2006/press/view_press.asp?post_id=6002> under the heading "Restrictions on Discussion of Sensitive Issues".

[113] However, if as in *Public Prosecutor v. Ong Kian Cheong*, *supra* note 2, an accused is charged under the *Undesirable Publications Act* in respect of distribution of objectionable publications, not for the purposes of commercial gain but for propagation of religion, freedom of expression, rather than the regulatory interest, is implicated, in substance. The question whether the Act can be invoked for the purposes of sustaining such a charge will also require the court to consider the constitutional strictures of art. 14(2).

[114] *Obscenity, Blasphemy, Sedition: 100 Years of Censorship in Australia*, rev. ed. (Sydney: Angus & Robertson, 1974).

[115] *Ibid*. at 13-14.

censorship attitudes is replete with shifting administrative policies. Such policies have grappled with standards of appraisal such as the average householder test, may take into account the fact that other publications equally indecent or objectionable are circulating, and typically require some pre-selection; since it would not be possible to examine all publications for the purposes of considering whether to censor them. References have also been made to the policy to inform importers so that they would not be surprised in importing banned books at huge costs and loss, which policy explains the promulgation of a clear list of banned publications. We learn also that it is good policy to abandon the practice of informing importers that books they had imported were detained for examination, because it tends to generate publicity for doubtful books. In short, once the nature of censorship is understood, its so-called expediency in terms of the regulatory interest is of a very different kind. It would be quite wrong to attempt to justify criminality under s. 3(1)(e) in this way.

So then, if s. 3(1)(e) as it stands does not relate necessarily to threats to public order or cannot be said to have been considered a fitting response to threats to public order that accusations of divisive policies may pose, a literal reading of paragraph (e) would not be compatible with the abridgment of free speech permitted by art. 14(2). To bring s. 3(1)(e) into conformity with the *Singapore Constitution*, we must therefore read into s. 3(1)(e) words which will differentiate between class divisive publications which directly threaten public order and those which do not. The section must be read as if it contained the additional words 'so as to threaten public order' with the result that a charge which does not allege that the publications in question promote ill will or hostility between classes so as to threaten public order will disclose no offence known to law.

XI. Hate Speech Differentiated

Without exact demonstration, this article will conclude on a brief note differentiating hate speech (which includes blasphemous libel against individuals) and seditious libel. Seditious libel, as has been shown, predicates censure of constituted authority. Individual blasphemous libel and its extended notion of group libel are entirely different. Both seditious libel and individual or group libel share the common feature that truth is no defence. Apart from that, however, unlike the former, the latter is constituted by the intention to vilify, ridicule others and in the case of blasphemous libel against individuals, the intention to vilify or ridicule the religious feelings of an identifiable group of others as would be likely to lead to a breach of the peace. In other words, s. 153A of the *Indian Penal Code*, properly understood, creates the different offence of blasphemous libel, as to which the element of constituted authority is irrelevant. If the essence of blasphemous libel is that each individual within the group is vilified or ridiculed by reference to the religious characteristic unique and exclusive to all of them, then it follows that the Indian courts have correctly appreciated that a charge under s. 153A requires exact class specification. In *Khan Gufran Zahidi v. State*,[116] the Allahabad High Court held that a charge under s. 153A of the *Indian Penal Code* was bad as it indicated the wrong classes of the citizens of

[116] (1964) Allahabad Law Journal 545.

India. In *Narayan Vasudev Phadke v. Emperor*,[117] Wassoodew J. said of the phrase 'between different classes of the citizens of India' in s. 153A:

> [T]he expression 'classes of His majesty's subjects' in section 153-A of the Code is used in a restrictive sense as denoting a collection of individuals or groups bearing a common and exclusive designation and also possessing common and exclusive characteristics which may be associated with their origin, race or religion, and that the term 'class' within that section carries with it the idea of numerical strength so large as could be grouped in a single homogeneous community.[118]

One would not and should not impose these requirements on a charge of seditious libel.

XII. Conclusion

The conclusions which this article has reached are a strong criticism of the decision in *Public Prosecutor v. Ong Kian Cheong*.[119] As a result of its omission to venture beyond the so-called plainness of the language of s. 3(1)(e) to deal seriously with the constitutionality of the *Sedition Act*, the court in effect transformed the offence created by s. 3 read with s. 4 of the *Sedition Act* into a hybrid offence of blasphemous libel even wider than the offence of blasphemous libel against a group of persons created by s. 153A of the *Indian Penal Code* and the common law offence of blasphemous libel. As construed, it is wider than the former because no allegations and proof of intention to harm and of exact grouping would be necessary. It is wider than the common law offence of blasphemous libel because no allegation and proof of intention to disturb public order would be necessary and a mere intention to publish material with a tendency to blaspheme a religion would be sufficient for the purposes of establishing *mens rea*. On the other hand, the principles extracted from the earlier multiple jurisdictional survey of seditious libel laws reveal an impressive unity in focusing on constituted authority and a range of reasonable choices, not obligatory outcomes, when it comes to foreseeable harm of public order. According to the constitutional arguments of this article, s. 3(1)(e) aligns with these principles because the *Singapore Constitution* requires it to be read as criminalising publications which threaten public order by censuring constituted authority for pursuing class divisive or racial policies.

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[117] All India Reporter 1940 Bombay 379 (H.C.).

[118] *Ibid.* at 381.

[119] *Supra* note 2. The court plainly thought this was a clear case; the law was clear and the facts were clear. Yet, if, as popularly imagined, sedition is a crime against the state, or if less popularly imagined, sedition is a crime against organs of the state (constituted authorities), it seems surprising that such a result could be possible. By distributing religious tracts impugning Islam, the Ongs would seem to have impugned a religion, not the state, and if the decision is correct, it propounds in effect or produces the effect that you can commit seditious libel against a religion. Moreover, the Ongs could have published what is popularly referred to as hate speech if they had the requisite intention to insult and hurt. As they did not have the requisite intention, the result if correct would overstate the criminalisation of hate speech, and that being the case, deserves to be scrutinised.