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MEDIA LAWS IN MALAYSIA - AN OVERVIEW

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MEDIA LAWS IN MALAYSIA - AN OVERVIEW

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I: Introduction

The mass media has a power and a responsibility to inform, to educate and to entertain. In addition, it can act as the conscience-keeper of society by exposing wrong-doing. It can supply an informal, expeditious and inexpensive grievance-remedial instrument to the public.

The triumphs of technology enable newspapers, radio, television and computer-based means of communication to reach out to virtually every section of society. Today the media performs its role in society to a degree of effectiveness that would have been difficult to imagine just a few decades ago. In most developed societies, the print and electronic media has emerged as the 'fourth estate' that effectively competes with the traditional branches of Government - the executive, the legislature and the judiciary - for the hearts and minds of the people.

In traditional political theory, the idea of an independent press is seen as an essential condition of a democratic and liberal society. But it is also generally agreed that just as free speech is an avenue to the truth and an instrument of our highest intellectual, aesthetic and political achievements, it is also an instrument of much mischief.

In most parts of the Third World, governments see the media both as a friend and as a foe and do their best to neutralise it or to force it to show commitment to the political, social and moral values upheld by the government. Third world critics of a free press fear that an unbridled and irresponsible media may hinder efforts at nation building and may exacerbate race and religious divisions in a multi-ethnic and economically impoverished society. They argue that Western-style press freedom should wait till the necessary structural changes are accomplished and a certain level of political and economic development is reached. As Tan, Min, Seng say:

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"For developing countries wrestling with the problem of independence, the concept of an apparently omnipotent Press holds no appeal. The hungry, the unemployed, the uneducated and the homeless exact immediate attention and action. At the same time, the disparate demands of competing races, languages and religions dictate adroit responses. Such exigencies of development and nation-building tend to engender strong, pragmatic policies which might compromise freedoms and rights deemed fundamental in the West."

Third world governments are also quick to remind us that the media should not try to emulate the adversarial role of the press in liberal democracies by opposing the government simply for the sake of opposing. Instead it should seek to become an ally and act as the medium for dissemination of the policies and programmes of the elected government.

There is also open wondering whether press freedom refers to the right of the public to know or the right of a few media moguls with wealth and power, and with an economic and political agenda of their own, to disseminate information selectively?

Questions are also asked about the role of the Third World media in this age of technological mastery of mass communication techniques by the First World. In the background of existing monopolies by Western-based multi-national corporations over the sources of information and the means of transmitting them, should the Asian and African world work towards redressing this imbalance by promoting alternative point of views which reflect our culture and values and show sensitivity to our world view? Or should our news and views, our concept of what is good and wholesome and our decisions on what is newsworthy reflect slavishly whatever is dished out to us by media barons from abroad?

Should the media be morally neutral and seek simply to cater to the hedonistic wishes and wants of its consumers? Or should it

seek to educate and to raise the conscience of society towards issues of concern? In societies dominated by the Western intellectual tradition of unlimited free speech and animated by militant secularism, capitalism and consumerism, any suggestion that the media should act with caution, conservatism and responsibility, or be forced to do so through the might of the law, is likely to be viewed with suspicion and outrage. If limits are to be imposed, can the government be trusted to set the limits? Where should the line between the might of the state and the rights of the citizens be drawn? Should we not trust the educated citizenry to make free choices? Should the press be trusted to regulate itself?

Some of these questions and fears are justified. But equally it needs to be noted that though the line between freedom and responsibility is not easy to draw, the entire history of constitutional and criminal law teaches that this line has to be drawn no matter what the difficulties are. As to the right of educated citizens to make free choices, not all citizens are educated to the problems of structural injustices and exploitation. In any case, in an atmosphere of monopolies, choices are hardly free. As to the need to allow the press to regulate itself, existentialist reality tells us that nowhere in the world has self-control worked without some goading by the law. It must also be noted that behind the veneer of the high constitutional principle of free speech which media practitioners hide behind, there often lurks a base commercial motive. Sex, sleeze and things sensational and trivial do sell well. The obsession with sensuality and eroticism brings in good advertisement-revenue and boosts sales.

It is in the light of these concerns and considerations that the Malaysian law on media freedom should be examined.

II: The Constitutional Framework

Everywhere in the world, including in Malaysia, the media has to operate within a legal framework. That framework is the subject matter of this essay.

Media laws in Malaysia can be studied under two broad heads:
1. Laws that regulate access to information.

2. Laws that impose restraints on publication of information and punish violations of these restraints.

The classification is not always easy to maintain because a number of laws like the Official Secrets Act can fall under both categories.

All restraints, whether on access to information, or on the right to publish, must have a constitutional basis. This is because unlike the United Kingdom, Malaysia has a supreme Constitution and the theory of parliamentary supremacy has no legal basis in the Malaysian legal system. Article 4(1) of the Federal Constitution proclaims the supremacy of the Constitution and declares that any law passed after Merdeka (independence) Day which is inconsistent with the Constitution shall be void to the extent of the inconsistency.

Under Article 10(1) of the Constitution, a fundamental right to "freedom of speech and expression" is conferred on all citizens. Freedom of the press or of the electronic media are not explicitly mentioned in the basic charter. But this omission has not prevented issues of press freedom from being litigated before the superior courts. This is understandable because in constitutional discourse it is generally understood that the right to "speech and expression" is a combination of many rights in many forms and includes communication by word of mouth, signs, symbols, gestures, works of art, music, sculpture, photographs, films, videos, books, magazines and newspapers.

In Article 10(1) the constitutional right applies only to citizens. But this does not mean that non-citizens are entirely unprotected. The Supreme Court, on one occasion, used the common law principle of natural justice to protect the legitimate expectation of a foreign journalist. The summary withdrawal of

1. Persatuan Aliran Kesederan Negara v Minister of Home Affairs [1998] 1 MLJ 442
his work permit was declared to be null and void.¹

The fundamental right conferred by Article 10(1) is subject to a number of constitutionally permissible restrictions provided for in Article 10(2)(a). Under this provision, the Federal Parliament is permitted to restrict free speech on the following grounds: security of the federation, friendly relations with other countries, public order, morality, privileges of Parliament, contempt of court, defamation, and incitement to any offence.

Further, Article 10(4) makes it lawful to prohibit the questioning of a number of matters which are deemed to be "sensitive" in the Malaysian body politic. These matters are right to citizenship, status of the Malay language, position and privileges of the Malays and the natives of Sabah and Sarawak, and the prerogatives of the Malay Sultans and the Ruling Chiefs of Negeri Sembilan.

In addition Article 149 permits legislative action designed to stop or prevent subversion, organised violence and crimes prejudicial to the public.

Article 150 confers power to take any legislative action if a proclamation of emergency has been issued in the Federation or any part thereof.

The above 14 grounds on which free speech can be restricted are, indeed, very broad. Nevertheless they constitute the general legal framework within which it is permissible for Parliament to enact restrictive legislation.

Relying on these fourteen permissible restrictions, Parliament has constructed an elaborate system of prior and subsequent restraints to regulate access to information and to punish unauthorised publication of information.

¹ John Peter Berthelsen v Director-General of Immigration [1987] 1 MLJ 134.
Access to information is specially vital in a democracy because discussion before decision is not possible without an informed citizenry. The 'right to know' must however be balanced with other competing and conflicting considerations. For this reason, along with statutes which facilitate public access to official and non-official information, there are also laws which restrain release or receipt of information. For example provisions in Banking Acts provide for banking secrecy. Budgetary or tax proposals, matters of legal professional privilege, commercial or personal information obtained in confidence, matters concerning law enforcement and detection of crime, cabinet minutes, matters relating to national security and international relations are almost always protected against disclosure.

**Legislation:** All laws in the country are numbered and printed in Government Gazettes and sold to the public at nominal cost. There is no copyright in relation to their reproduction and sale.

**Parliamentary Proceedings:** The two Houses of Parliament allow outsiders to witness their proceedings. Copies of Hansard are published and are available to the public. But there are rules against premature publication of Bills not yet laid before Parliament. Evidence before Select Committees and Committee Reports are withheld from the public till the Committee submits its Report to Parliament. It would be a contempt of the House if an embargoed Bill or Report were released without the prior permission of the House.

**Administration of Justice:** In the administration of justice, there is a high degree of openness and transparency. Judicial decisions are reported in law reports. Court proceedings are open to the public so that justice is allowed to suffer the scrutiny of ordinary people. But there are principles which permit the court to sit in camera, to withhold information from the parties on the ground of public interest, order names of parties or witnesses to be withheld from the public, and order remarks to be expunged. A large category of 'privileged information' like communication between a lawyer and a client can be withheld from the court.

Unlike proceedings before courts, the deliberations of tribunals
are not usually open to the public. The proceedings before Commissions of Enquiry and the Reports of such Enquiries are similarly not always opened to the public domain.

Local Authority Meetings: Meetings of Local Authorities are open to the public unless the local authority by resolution otherwise decides. The press and public, however, have no right to attend committee meetings.

Government Reports: All Ministries, specialised departments like the Socio-Economic Research Unit in the Prime Minister’s Department and most Statutory Bodies publish annual reports. These constitute a rich, though uncritical, source of official information.

Official Secrets: Malaysia does not have a Right to Information Act. There was a public demand for such a law in the 80s. The move led to some amendments to the secrets law but the request for more openness in government was not entertained. One major improvement, however, was that the categories of official information which are protected by the law against disclosure, were defined with greater precision.

The Official Secrets Act protects "official secrets" from unauthorised release. The gist of the law is that specified categories of official government information are not to be received, retained or released without prior authorisation. The penalties of the law include a mandatory jail sentence. Though the law is used sparingly, its effect on the information-seeker and the information-giver is considerable. Despite this some leakages still take place. The law has not succeeded in stopping "moles" or whistle-blowers in government departments from supplying jealously guarded information to foreign-based journalists. Information then filters into the country through the international media. Another reason why the leakage of government information cannot be plugged totally is that around the world, politicians indulge in selective and self-serving leaks to suit their political agenda.

Along with the OSA, a very large number of other laws like the Public Officers (Conduct And Discipline) Regulations 1993 forbid a public officer from publishing anything which is based on
official information.

**Protected Areas:** Under the Protected Areas and Protected Places Act, access is denied to any place which has been gazetted as a protected place.

**Commercial Information:** The prominence of private corporations in society and their power to affect the lives of citizens is enormous. The law, therefore, vacillates between the need for some openness and the desire of companies to keep their commercial information secret. Under the Companies Act, basic information about a company can be obtained from the Registry of Companies on payment of a fee. Land titles can be checked at the Land Registry. Similar information about Cooperative Societies, Societies and Businesses is available to the public. But the secrecy of bank accounts is jealously protected by the law, subject, however, to some exceptions where disclosure can be ordered to detect or prosecute criminal offences.

**Foreign News:** The Malaysian News Agency (Bernama) has a monopoly over non-visual news materials from abroad. Bernama's existence provides a filter through which all printed news from abroad has to pass before it becomes accessible to the Malaysian media.

**Imported Publications:** Under the Printing Presses and Publications Act there are powers to control the import of publications. Such control can also be exercised under the Customs Act and the Internal Security Act. The latter may also be used to ban any document, local or foreign, which endangers public order or national security.

**IV: Restraints on Publication**

A very large number of laws impose restrictions on the publication of information which may be in one's possession. These restraints may be in the form of censorship constituting prior restraints, or criminal penalties subsequent to publication. This has elicited the comment that sometimes there is freedom of speech but no freedom after speech!

The law's regulation of free speech is most prominent in the following areas: Advertising, Printing Presses and Publications.

Advertisements: Advertisements are regulated by innumerable provisions of the Penal Code, the Indecent Advertisement Act, the Betting Ordinance, the Lotteries Act, the Trade Descriptions Act, the Legal Profession (Practice and Etiquette) Rules, Medicines (Advertisement and Sales) Act, Companies Act, Defamation Act, the Copyright Act and the Trade Marks Act.

Newspapers & Printing Presses: Under the Printing Presses and Publications Act 1984, a licence is needed to use a printing press. There is an additional requirement to obtain a permit to print, import or publish a newspaper. Prior to the grant of the permit, monetary deposits may be required. Undesirable publications may be refused importation. The licence or permit may revoked or suspended or its transfer refused in the absolute discretion of the Minister. The Government has wide power to seize a printing press or a local or foreign publication.

Sedition: The Sedition Act, 1948 provides for the punishment of acts with a 'seditious tendency', a person's intention being quite irrelevant. Sedition could be committed in any one of the following ways: inciting disaffection against any Ruler or government; inciting unlawful changes to any lawful matter; inciting contempt for the administration of justice; raising discontent amongst the people; promoting ill-will between races or classes; questioning any 'sensitive issues' i.e. citizenship, the national language, special privileges of Malays and natives of Sabah and Sarawak and the status of the Malay Rulers.

Internal Security: The Internal Security Act, 1960 confers special powers relating to subversive publications. The Act also gives to the Minister of Home Affairs the power of preventive detention. While this Act is not directed towards media practitioners, they are, like every one else, subject to its sweeping clauses and are undoubtedly aware of the fine lines beyond which their conduct may be deemed to be a threat to national security.

Defamation: The Defamation Act, 1957 is a law frequently resorted
to by those who have been the victim of slander or libel by stories or features in the media. The Act has special clauses relating to slander of women and slander affecting professional or business reputation. The Act contains a number of defences which are available to anyone sued under the law. Among them are unintentional defamation, justification, fair comment, absolute privilege for reports of judicial proceedings and qualified privilege. In addition, apology is possible in mitigation of damages.

Protection of Intellectual Property: The Copyright Act, 1987 safeguards the economic and moral rights of authors in their created works. It allows them to obtain a "fair return" for their creations as well to control activities related to their work. Thus, the creator of a work has the right to control its reproduction, dissemination and distribution in any form whatsoever.

Protection under the law is accorded provided (i) the work is of a nature that is covered by the copyright legislation; (ii) the work is original in that it originates from the author and is not borrowed from elsewhere; (iii) it has been reduced to a material form; (iv) the author is a person qualified for the protection of the law or the work is eligible for protection.

Unlike patents, trademarks and designs, the benefits of the copyright law are automatic and do not require any registration or payment of deposit.

Works eligible for protection are literary, musical, artistic and dramatic works such as articles, books, adaptations and translations of books, musical compositions, paintings in one or more dimensions, plays, sound recordings, photographs, cinematograph films, broadcasts, computer programmes, typographical arrangements of published editions, engravings and drawings. The work must have been first published in Malaysia. If it is of foreign origin it is protected only if it is published in Malaysia within 30 days of first publication elsewhere.

Persons eligible for protection of the law are (i) producers, authors, writers and creators provided they are Malaysian citizens or Malaysian residents; (ii) Entrepreneurs who are eligible for "neighbourhood rights" because of their association
with the authors in the exploitation of their works; or (iii) citizens or residents of any country to which the Minister chooses to apply the Copyright Application to Other Countries Regulations 1990. The 1990 Regulations were made under section 59A of the Copyright Act 1987 to comply with Malaysia's obligations under the Berne Convention.

Copyright protection is not eternal. It is limited to a certain number of years depending on the nature of the work. Under the Copyright Act 1969 the duration of copyright for literary, artistic and musical works was the life of the author plus 25 years. For other works it was 20 or 25 years. The duration has now been extended to 50 years after the death of the author.

The law on copyright has undergone significant changes due to rapid technological developments which facilitate cross-border dissemination of literary and artistic works. International pressures have encouraged Malaysia to accede to the Berne Convention for the Protection of Literary & Artistic Works (Paris Text 1971). Malaysia acceded to this Convention in October 1990.

Official Secrets: Under the Official Secrets Act, 1972 and Amendment Act 573 the gist of the law is that 'official' government information cannot be received or released without prior authorisation. 'Official' connotes 'information from a government source'. A person receiving unauthorised information, no matter how innocently, has a duty to report the matter to the police and to divulge his source of information.

Other Restraints: Other significant offences to which media practitioners may become liable are contempt of Court; contempt of Parliament; Obscenity; and the Penal Code offences of causing disharmony, disunity, enmity and hatred; criminal libel; abetting mutiny; and wounding religious feelings.

Financial Reporting: Under the Securities Industry Act 1983, the particulars of financial journalists have to be entered in a register. Serious criminal offences can result from false or misleading statements or analyses which induce persons to deal in securities. Under section 86 a person shall not make a statement or disseminate information that is false or misleading in a way that is likely to induce the sale and purchase of securities by...
investors, or have the effect of raising, lowering, or maintaining the market price of shares.

Trade Descriptions: Under the Trade Descriptions Act, 1972, the basic thrust of the law is to prohibit false or misleading advertisements relating to goods, prices, services, accommodation or facilities which are provided in the course of trade or business.

Computer Crimes Legislation: The Computer Crimes Act 1997 provides for offences relating to misuse of computers. The law seeks to restrict unlawful access to computer-based information. Under section 3 it is an offence to knowingly cause a computer to perform a function with the intention of securing access to any programme or data without lawful authority. Section 5 deals with the doing of an act which the accused knows will cause unauthorised modification to computer based information. Section 6 makes it an offence to communicate, directly or indirectly, to an unauthorised person, a number, a code, a password or other words of access to another computer.

V: Other Indirect and Informal Restraints

The law is only one of the many means of social control. Besides the law, economic, political and other extra-legal factors impinge on the work of all owners and practitioners of the print and electronic media. An understanding of the law relating to the country's media requires a knowledge not only of the applicable statutes but also of the social and political milieu in which the media operates and the extra-legal restraints that are a part of the media practitioner's life.

Control over Utilities: The Government has significant influence over the utility services through which information is communicated. In many countries, the Government's control over posts and telecommunications enables it to compel uncooperative newspapers, radio and television to tow the line on specific issues.

International News Agencies: The control of news agencies by European and American interests enable prominent individuals and groups in the West to disseminate information in a highly
selective and West-centric way. Asian and African media houses are in no position to reject Western-dominated sources of supply (like Reuters, AFP, DPA, EL, TEL, BPI USNWR) and to be on their own in gathering information around the world. This may explain the heavy American and English bias in all reporting other than on matters of local politics.

Informal Requests: Beyond what the law permits, Governments everywhere make informal 'requests' to media owners to publish or withhold from publication certain types of information. Such requests cannot be taken lightly.

Share Ownership: Though the government's control over the media may be subject to legal limits, there are few safeguards against the power of those who own the controlling interests in the printing press, the television station or the newspaper. Nowhere in the world is the media free of control by its owners or shareholders. A "free press" is largely a myth. The seriousness of the problem is augmented because of the increasing control of the media by a few press barons. Media monopoly is as much a threat to a free press as the constraints of the law. If the shareholders are linked directly or indirectly with those in political power, then the control becomes even more acute. This is the situation of the daily press and the private television stations in Malaysia.

Globalisation Trends: In Malaysia, many legal and political restraints on the free flow of information are losing their effectiveness because of developments in modern information technology. For example it is difficult to envisage how laws on censorship and restriction on the import of foreign publications will cope with the globalisation trends set into motion by satellite transmissions, internet, e-mail and the fax machine. The political impact of these trends in Malaysia is as yet unmeasured. But what is clear is that news withheld in the local media is quite easily available through international sources. The setting up of the Multi-Media Super Corridor (MSC) is another development whose socio-political implications are yet to be comprehended.