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The Law Of Sedition In Malaysia: An Introduction

By

Shad S Faruqi
THE LAW OF SEDITION IN MALAYSIA: AN INTRODUCTION

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The Sedition Act was enacted by the British in 1948. It was amended after the racial riots of 1969 to ensure that racial sensitivities will not again be provoked by the operation of normal democratic processes.

Section 2 of the Act states that any act, speech, words or publication are seditious if they have a 'sedition tendency'. What amounts to a 'sedition tendency' is illustrated in section 3(1) in six paragraphs. The definition is extremely broad and open-ended as the illustrations indicate.

1. It would be a seditious tendency to bring into hatred or contempt or to excite disaffection against any Ruler or government. The term 'disaffection' does not mean the absence of affection and regard but means disloyalty, enmity and hostility: PP v Param Cumaraswamy (1986) 1 MLJ 518 at 524.

2. It would be a seditious tendency to excite subjects to seek alteration other than by lawful means of any matter by law established.

3. It would be a seditious tendency to bring into hatred or contempt the administration of justice in the country.

4. It would be a seditious tendency to raise discontent or disaffection amongst the subjects.

5. It would be a seditious tendency to promote ill-will and hostility between races or classes.

6. It would be a seditious tendency to question the provisions of the Constitution dealing with language, citizenship, the special privileges of the Malays and the natives of Sabah and Sarawak and the sovereignty of the Rulers.

It is obvious from what has been stated above that the definition of 'sedition tendency' in section 3(1) is indeed very broad. Terms like 'raise discontent or disaffection amongst the subjects' could encompass a very large number of situations including industrial action and political opposition to the government. The only safeguard against excessive use of the law to suppress free speech would be the forebearance of the government.

Based on decided cases and comments the following legal points emerge:

1) The absence of intention to cause violence, discontent, ill-will etc is irrelevant. Unlike the UK or India incitement to violence, tumult or public disorder is not a necessary ingredient of the crime of sedition in Malaysia: PP v Param Cumaraswamy (1986) 1 MLJ 513 at 516 & 517. As long as the words were intentionally published and they had a tendency to cause ill-will etc., the offence is complete.
2) The prosecution need not prove that the act, speech, words or publication in question actually caused hostility, ill-will or disaffection. All that the prosecution has to prove is that the impugned speech had a seditious tendency, whether or not such words or speech sow any seeds of disaffection.

3) Whether the publication has a seditious tendency or not is for the judge to decide. There is no trial by jury in Malaysia.

4) It is no defence for the accused to argue that his words were, in fact, true and honest. The truth or falsity of the seditious statement is irrelevant: PP v Ooi Kee Saik (1971) 2 MLJ 108; Fan Yew Teng v FP (1975) 2MLJ 235.

5) Sedition can be committed either in public or in private.

6) On the same set of facts, the speaker, the printer and the publisher of a speech may all be prosecuted as in Ooi Kee Saik's case in 1971.

7) The law of sedition applies even to parliamentary proceedings: Article 63(4) of the Federal Constitution. Members of Parliament are not exempt from the law of sedition for their 'parliamentary words or actions'. This is illustrated in the case of Hark Koding v PP (1982) 2 MLJ 120.

8) Not only is it an offence to print or publish seditious matter, it is also an offence to possess or import them. (s. 4(2)).

9) Courts have the power to suspend a newspaper containing seditious matter; order seizure of the offending press and impose a prohibiting order for one year on the person who is convicted, prohibiting him from taking part in publishing, editing, writing for any newspaper (s. 9). Failure to comply with such prohibition may lead to further conviction as well as a charge of contempt of court (s. 9(2)).

10) On the application of the Public Prosecutor, the High Court has the power to prohibit circulation of seditious publications. The order may be made ex parte and can last indefinitely. But the affected party has a right to petition the court to discharge the order (s. 10(7)).

11) Wide powers of arrest and search, with or without warrant, exist under sections 8 and 11.

Safeguards

1) Section 3(2)(a) of the Sedition Act says that a speech is not seditious if its tendency is only to show that any Ruler has been misled or mistaken in any of his measures.

2) Section 3(2)(b) states that a speech is not seditious if its tendency is to point out errors or defects in the implementation or administration of government policies with a view to remedying the errors or defects.

What this means is that mere criticism of government is not sufficient to constitute sedition. Implementation of government policies and programmes can be questioned. But the existence of rights, privileges, powers etc cannot be put to debate.

In actual practice, however, implementation of policies and existence of rights may not be so easy to distinguish. There is a very thin line between what is permissible and what is seditious. Whether the tendency of the words or acts was to bring the government into hatred or contempt or to point out errors or defects in the government involves a fine distinction indeed. The courts are expected to discover the balancing line between power and liberty and the might of the state and the rights of the citizens.
3) Except in relation to sensitive matters, it is permissible to try to seek by lawful means the alteration of any matter established at law.

4) There is a defence of innocent and non-negligent dissemination (s. 6(2)). No person shall be convicted if the publication was printed, sold or distributed without his consent, knowledge, and without any want of due care.

   Melan b Abdullah v PP (1971)

5) Innocent receivers of seditious publications are protected if they surrender the publication as soon as the nature of the content has become known to them (s. 7).

6) If the accused can prove that the publication was unintentional, this may be a defence.

7) In order to convict the accused, the testimony of one witness is not sufficient. Corroboration is necessary. (S. 6(1)).

8) The offending passage must be read in context and as a whole: Kodini v PP (1962). The presiding judge is entitled to look at the audience addressed. Language which may have a tendency to incite youths may not have such tendency with professors or divines. The judge is entitled to take note of the contemporary situation. In times of war, emergency or discord, a tendency to bring about one of the undesirable results may be more easily imputed than in times of peace and harmony: PP v Ch Keng Seng (1977) 2 MLJ 206.

9) Police cannot prosecute on their own. The Public Prosecutor's written consent is necessary.

Conclusion

Malaysia's Sedition law is quite unique. The concept of sedition is much broader than in the UK, Ireland, India and Australia. A Malaysian lawyer is unable to give a nicely cut up and dried definition of what constitutes free speech and what constitutes sedition. This legal uncertainty is very much in favour of the prosecutor. It also means that what is seditious is not just a legal but also a political issue.

On ideal democratic standards, the law in Malaysia is open to many criticisms for its breadth and for its far-reaching implications on political life in the country. But most Malaysians acknowledge that it is based on the peculiar circumstances and needs of Malaysian society.

In conclusion I wish to make two observations. Firstly, there must be some outlet - discreet though it may have to be - for raising issues of concern to the disparate groups of this country. The Houses of Parliament provide the ideal setting for a frank and free discussion. But the unusual aspect of Malaysian law is that even parliamentary proceedings are not exempt from the law of sedition. The reason is to prevent parliamentary debates from causing tension or unrest outside the House. One wonders, however, whether such unrest could be avoided by a less drastic remedy which would be more in keeping with democratic norms. On some well-defined issues which are deemed to be "sensitive" the two Houses of Parliament could exercise their parliamentary privileges to exclude the press, visitors or outsiders from the public gallery. The Houses could sit in secret session for the rest of the day. They could forb not Hansard and everyone else from publishing the minutes of the proceedings on that sensitive issue. Standing Orders 93 and 94 of the Dewan Rakyat and 85 and 86 of the Dewan Negara provide for such a possibility.

Secondly, I propose that the penal provisions of the Sedition Act should be backed by adequate statutory machinery for promoting conciliation and harmonious race relations. Many countries like the United Kingdom are experimenting in this area - and with some success. May be there are some lessons for us in the way their Race Relations Acts have sought to mould hearts and minds of their people.
PRESS FREEDOM

The idea of freedom of speech (including freedom of press) raises two broad philosophical and jurisprudential issues:

1. Is press freedom a luxury that the Third World can ill afford due to the formidable threats and challenges faced by democratic governments in nascent societies?

2. Does press freedom refer to the right of the public to know or the right of a few men with wealth and power to disseminate information selectively?

The law can be discussed under two broad headings:
I : Restraints on Access to Information
II : Restraints on Publication.

I : Restraints on Access to Information

1. A right to attend and publicize judicial proceedings
   a) The doctrine of 'open court'
   b) Court of Judicature Act 1972 (Act 91), Sections 13 & 15
   c) Juvenile Courts Act (Act 90), Section 5A
   e) Court's power to withhold names of justices (R v Felixstowe Justices ex p Leigh [1987] 1 All ER 551) and to protect identity of a witness or defendant (R v Malvern Justices ex p Evans [1988] 1 All ER 371).
   f) Concept of public interest privilege

2. Access to official government information
   a) A right to know. The concept of open government. Freedom of Information Act
   b) Public Officers (Conduct & Discipline, Chapter D) General Orders 1980
   c) Official Secrets Act, 1972
   d) Protected Areas & Protected Places Act 1959, S. 4
   e) Local Government Act 1966, s.23: meetings to be open to the public.

3. Access to non-governmental information
   b) Companies Act, 1965
   c) National Land Code, 1965 (Act 56/1965)
   d) Banking & Financial Institucions Act, 1989, Act 372, ss. 96-102
   e) Security Industry Act 1983, Sections 56, 88, 90

II : Restraints on Publication

The restraints may be prior or subsequent so as to affect freedom of speech or freedom after speech.

1. The Constitution - Article 10(1)(a) - freedom of speech and expression - its scope.
2. Constitutionally permissible restrictions on free speech: Art. 10(2)(a) & 10(4)

* security of the federation
* friendly relations with other countries
* public order
* morality
* privileges of Parliament
* contempt of court
* defamation
* incitement to any offence
* the questioning of "sensitive matters".

3. Articles 149 (subversion) and 150 (emergency)

4. Statutory Limitations on the freedom

a) Printing Presses and Publications Act 1984 (Act 301)
   S.3: Licence to use printing press
   S.5: offence to print, import, publish newspaper without permit
   S.6: grant of permit
   S.7: undesirable publications
   S.9: undesirable publications may be refused importation
   S.10: Deposits
   S.13: revocation, suspension and transfer of licence and permit
   S.18: power of seizure or detaining printing press or publication

b) Sedition Act, 1948
   - This Act provides for the punishment of acts with "seditious tendency", a person's intention being quite irrelevant.
   - PP v Ooi Kee Saik [1971] 2 MLJ 108
   - Lau Dak Kee v PP [1976] 2 MLJ 229
   - Melon Abdullah v PP [1971] 2 MLJ 280
   - Fan Yew Teng v PP [1975] 2 MLJ 235
   - PP v Mark Koding [1983] 1 MLJ 111
   - 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 languages, special privileges, status of rulers.

c) Internal Security Act, 1960 (Act 82).
   - S. 8: powers of preventive detention
   - S. 22 - 31: special powers relating to subversive publications.

d) Defamation Act, 1957 Act 286
   - S. 4: slander of women
Defences available to journalists

S. 7: Unintentional defamation
S. 8: Justification
S. 9: Fair comment
S. 10: Apology in mitigation of damages
S. 11: Absolute privilege for reports of judicial proceedings
S. 12: Qualified Privilege

e) Copyright Act 1987 (Act 332)
S. 7: Works eligible for protection are literary, musical or artistic works, films, sound recordings and broadcasts.
S. 4: Such works are protected if 'first published' in Malaysia or, if published elsewhere, published in Malaysia within 30 days.
S. 10: Copyright subsists if author is a citizen of or a permanent resident of Malaysia.
Ss. 17-23: Duration of copyright protection is 50 years.

f) Official Secrets Act, 1972 & Amendment Act A 573
- Sections 2, 4, 7A, 7B, 8, 11
- PP v Lim Kit Siang [1979] 2 MLJ 37

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.

g) Contempt of Court
* Concept of "imminent and pending proceedings"
* refusal to reveal source of information
* Judicial Proceedings (Regulation of Reports) Act, 1962, Section 3.
* Courts of Judicature Act, 1964, S. 13
  PP v Straits Times (1971) 1 MLJ 69

h) Contempt of Parliament
Houses of Parliament (Privileges and Powers) FM Ordinance, 1952

i) Obscene Publications
- Indecent Advertisement Act 1953 (Act 259) Sections 3, 4, 5, 6
- Penal Code section 292: sale of obscene books.

j) Penal Code offences
- S. 298 A: causing disharmony, disunity enmity, hatred
- S. 499, 501: Criminal libel
- S. 131: abetting mutiny
- S. 298: wounding religious feelings

- S. 34: particulars of financial journalists
- S. 86: False or misleading statements
- S. 87: inducing persons to deal in securities.

l) Trade Description Act 1972
m) Broadcasting Act 1988, Act 338 - an Act to provide for the control of broadcasting services

n) Control over Advertisements

- Indecent Advertisement Act 1953 Act 259, ss. 3-6
- Medicines (Advertisement & Sale Act 1956, ss.3-5
- Trade Description Act 1972
- Advocates & Solicitors Conduct & Etiquette Rules, r. 37, 45, 46
- TV Advertising Code
- Government Guidelines for Cigarette Advertisements
- Code of Advertising Practice by ASA

- Case of John Peter Berthelsen

p) Commodity Trading Act 1985 Act 324

5. Extra-Legal and Hidden Restraints

a) Government's control over the means of communication. Its monopoly or near monopoly over electricity services, posts and indirectly over telecommunications.

- Public Order Preservation Act (Act 296) s.9

b) Government or private agencies' control over sources of information

- Bernama Act 1967
- Reuter, AP, UP etc.

c) Informal "requests" to newspapers by the Government

d) Control over newspapers by its owners/shareholders resulting in

e) Media monopoly by Government or private interests

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DEFAMATION

The law on this point is contained in the Defamation Act 1957 and in common law.

Definition: Defamation is the publication of a statement which reflects on a person's reputation and tends to lower a person in the estimation of right-thinking members of society generally or makes them shun or avoid that person.

Forms: Defamation can be in two forms

(a) Libel: This is in a "permanent" form. But broadcasts are to be treated as libel and not slander (S.3). It is a tort as well as a crime in certain circumstances. It is actionable per se.

(b) Slander: This is not in permanent form eg. by way of word of mouth. It is never criminal. To succeed in an action, special damage must be proved except in relation to slander of women (S.4), slander affecting official, professional or business reputation (S.5) and slander of title (S.6).

Essential Requirements of Defamation:

1. The words must be defamatory in their natural and ordinary meaning or by reason of an innuendo i.e. a special meaning understood by people having knowledge of particular extrinsic facts. Here vulgar abuse is not enough to constitute defamation.

2. A reasonable man (i.e. a right thinking member of society) should regard the words as defamatory.

3. There must be intention to publish. If the words were published without the authority of the defendant, there is no publication.

4. The words must refer to the plaintiff directly or indirectly through an innuendo.

5. There must be "publication" to some "third person".

6. Defendant's lack of knowledge of the defamatory character of the words is not material. It is no defence to say that the defendant was merely repeating what others had said.

Defences:

1. Unintentional defamation: The words were published "innocently" i.e. with reasonable care, without intention to refer to the plaintiff, and the words were not defamatory on their face. The defence will succeed if there is an offer of amends and a sufficient apology. (S.7).

2. Justification or Truth: It is sufficient to prove that the words were substantially true: Abdul Rahman Talib v Seenivasagam. (S. 8).

3. Fair Comment (S. 9): The comment or expression of opinion is on a matter of public interest; it is based on true facts; it is without malice; it is fair in the sense that it is honestly held.

4. Absolutely Privileged Occasion (S.11(1):
   4.1 Reports of Malaysian judicial proceedings, reports of judgements, sentences or findings are absolutely privileged if they are fair, accurate, contemporaneous and the proceedings were publicly heard before a lawful court.

   4.2 Comments on judicial proceedings if fair and bona fide.

   4.3 Official parliamentary papers (Federal Constitution Article 63(3)).
5. Qualified Privilege

5.1 Under the common law: This is available if there is absence of malice and a duty-interest relationship between the Speaker and the Listener.

5.2 Under S. 12(1) of the Defamation Act: Publication in a newspaper is qualifiedly privileged if there is absence of malice, the report is fair and accurate, it relates to matters within Part I of the Schedule to the Defamation Act viz proceedings of Commonwealth legislatures, international organisations of which Malaysia is a member, of an international conference to which the government sends a representative, of Commonwealth courts and court martials, of a public enquiry by the government. Similarly, extracts from any register kept in pursuance of law which is open to inspection by the public or notices, advertisements, reports issued by any court, judge or public officer are eligible for qualified privilege.

5.3 Under S. 12(2) subject to contradiction and explanation: Publication in a newspaper is qualifiedly privileged if the report is fair and accurate, the aggrieved party is allowed to make a contradiction or explanation, and the report relates to matters mentioned in the Act and Part II of the Schedule. These matters are: reports of public meetings of a local authority, Commission, Tribunal or Committee of Enquiry appointed under the law or by any public officer, Board or body exercising functions under any written law. Similarly, fair and accurate report of proceedings of the following are eligible for qualified privilege if there is opportunity for explanation or contradiction: a general meeting of a public company or corporation in Malaysia, or any notice by the government, a public officer or local authority.

6. Mitigation of Damages (S.10)

6.1 The Defendant can plead mitigation if he had made an offer of apology before the commencement of the action or at the earliest possible opportunity.

6.2 Newspapers can plead mitigation if the libel was inserted without malice, without negligence and there is full apology.

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