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Breaking Views

Sedition under the law of this country – N.H. Chan

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JUNE 10 – Prelude: Please read it before reading the article

I write this article so as to apprise the people who, in the mind of the general public, have taken the law into their own hands through the harassment of law abiding citizens of this country with the threat of using the Sedition Act 1948 on them.

They should not have done it without first taking expert legal advice on the technical and difficult law of sedition under the Act.

After you have read this article, I am sure you will agree with me that the law of sedition is not easy for a layman to understand.

Even lawyers and judges have found great difficulty in understanding it – let alone an uninitiated policeman.

If the police are not careful, one of these days they will find themselves at the receiving end of a suit for malicious prosecution, false arrest or whatever the victims of their harassment would throw at them.

I hope you will bear with me if this time I am not able to explain difficult law in simple language as much as I would like to. It is at a time like this that I really appreciate the great ability of the late Lord Denning who was so adept at explaining difficult law to us ordinary folk.

1870 India lives on in 21st century Malaysia

In 1986, I was the judge who tried Mr Param Cumaraswamy for sedition under s 4(1)(b) of the Sedition Act 1948. At the end of the trial, I acquitted him.

But first, a little bit of history – it is necessary to understand the historical development of how this bit of archaic legislation from 1870 India migrated to Peninsular Malaya in 1948 (Sabah in 1964 and Sarawak in 1969), and how this law has been implanted in modern Malaysia.

While other countries of the Commonwealth, of which Malaysia is a member, have advanced into the modem age, in this country, time has stood still. We are still in the time of Sir James Stephen in 1870 British India.

This was pointed out by Sinha CJ in *Kedar Nath v State of Bihar* [1962] AIR, SC 955:

"Section 124A was not placed on the Statute Book until 1870, by Act XXVII of 1870. There was a considerable amount of discussion at the time the amendment was introduced by Sir James Stephen …."

The result of my research into the law of sedition is embodied in the judgment of *PP v Param Cumaraswamy* [1986] CU (Rep) 606. I am sorry for not being able to give you the MU citation – it happened so long ago and I do not have access to a law library. At page 619, I said:

"Sir James Stephen, you will remember, was the Judge whose definition of sedition appeared as article 93 of the Digest of the Criminal Law. In facts Section 124A which Sinha CJ had reproduced in the passage which I have just read was the work of Stephen J. Nowhere in 124A of the Indian Penal Code did Sir James include the further qualification of incitement to violence or inciting others to public disorders as an ingredient of the offence.

"As I have said earlier (see my decision when I called on Mr Cumaraswamy to enter on his defence), 'Although it may appear to be the position in English case law that incitement to violence or inciting others to public disorders is an essential ingredient of sedition, it is not so in a criminal code which has as its model Stephen's definition'."

Incitement to violence or inciting others to public disorder is not an ingredient of sedition

Sir James Stephen was the author of Section 124(A) of the Indian Penal Code. He did not in drafting that section make incitement to violence, or the tendency or the intention to create public disorders, the gist of the offence of sedition.

Nor did he make them the gist of the crime in his definition in Article 93 of the Digest. And Article 93 of the Digest was used as the model for the crime of sedition in the Criminal Code of the Gold Coast.

So that when we look at Section 124(A) of the Indian Penal Code or at the Criminal Code of the Gold Coast on sedition, or our own Sedition Act (which I have previously said was modelled on Stephen's definition), we are merely looking at the definition of sedition as apprehended by Sir James Stephen, and not at English case law ... which had developed separately from Stephen's definition.

Stephen's definition has been codified as the law of the Gold Coast and of this country. And *Wallace-Johnson v The King* [1940] AC 231 has laid down that since the law is contained in a code, "the Court must look for the ingredients of the offence from the codified law and not import principles which have been established by English case law, and that, accordingly there cannot be imported into the offence (as created under the codified law) the additional ingredient of incitement to violence or inciting others to public disorder."

The view expressed by Sinha CJ in the Indian Supreme Court in Kedar Nath cannot by any means be supported. In my judgment, the correct view is that as laid down by the Privy Council in *Wallace-Johnson*.

Therefore, as I have explained above, incitement to violence or inciting others to public disorder is not an ingredient of the offence of sedition in this country.

Nor is intention an ingredient of the crime of sedition

Having got that off my chest, the next thing I need to explain is why ***mens rea*** is not a necessary ingredient of the crime of sedition under our Sedition Act 1948.

As every law student knows, mens rea is Latin for "intention".

Here is how I explained it in *PP v Param Cumaraswamy*. I said at page 612:

"I have shown that the model for subsection 8 of Section 326 of the Criminal Code of the Gold Coast was Stephen's definition of sedition in Article 93 of the Digest. In *Wallace-Johnson* the Privy Council has laid down that incitement to violence is not a necessary ingredient of the crime of sedition under the Criminal Code of the Gold Coast. *A fortiori*, inciting others to public disorders is not a necessary ingredient of sedition.

"In Stephen's definition and as well as the Criminal Code of the Gold Coast, a seditious intention is an essential ingredient, but Stephen in Article 94 of the Digest had expressed the view that intention is no more than the natural consequence of the words, and the Privy Council in *Wallace-Johnson* has held that it is not necessary to prove actual intention. It is enough if the words are seditious by reason of their expression of a seditious intention as defined in the section.

"It looks as if it was with hindsight that the Sedition Act came to be drafted. If intention requires no more mens rea than an intention to publish the words which were published; if it is not necessary to prove actual intention because seditious words are words which are 'expressive of a seditious intention' as defined in the section, then the gravamen or an essential ingredient of sedition is not *mens rea* (intention) but an *actus reus* (Latin for guilty act). That is, the words must have a tendency (a seditious tendency) to achieve one or more of the objects specified.

Instead, all that the prosecutor needs to prove is a seditious tendency

This is what I said in *Param Cumaraswamy*, page 611:

"In both the Stephen and the Criminal Code of the Gold Coast definitions an intention to achieve one or more of the objects specified in the definition is an essential ingredient of the crime of sedition. The important question is whether the 'intention' must be proved. In Article 94 of the Digest (4th edition) Stephen put it thus:

"In determining whether the intention with which any words were spoken, any document was published, or any agreement was made, was or was not seditious, every person must be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.'

"Stephen's view did not require any more mens rea than an intention to publish the words which were published. It would not be necessary to prove an actual intention to achieve any one of the objects specified."

In the Privy Council case of *Wallace-Johnson v R* [1940] AC 231, it was argued on behalf of the appellant Wallace-Johnson, see page 234:

"(a) that both in English common law and in the Criminal Code in question there must be some evidence of intention outside the mere words of the instrument before a seditious intention can be said to exist; and (b) that in the present case, when the document is read, there cannot be found in it any seditious intention at all; and therefore before the appellant can be convicted there must be some evidence of seditious intention extrinsically, and, there being none, this conviction cannot stand on any ground."

The judgment of the Privy Council was read by the Lord Chancellor, at p 240, in which he said:

"Seditious words," in the terms of sub-s 8, "are words expressive of a seditious intention".

Then he went on to say, at page 241:

"The submission that there must be some extrinsic evidence of intention, outside the words themselves, before seditious intention can exist, must ... fail ... If the words are seditious by reason of their expression of a seditious intention as defined in the section, the seditious intention appears without any extrinsic evidence. The Legislature of the Colony might have defined 'seditious words' by reference to an intention proved by evidence of other words or overt acts. It is sufficient to say they have not done so."

The headnote in the report of *Wallace-Johnson* has summarised accurately what was said by the Lord Chancellor. It reads, at page231, thus:

"If the words complained of are themselves 'expressive of a seditious intention' as defined in the section they are 'seditious words'. It is not necessary to produce any extrinsic evidence on intention, outside the words themselves, before seditious intention can exist. If the words are seditious by reason of their expression of a seditious intention as defined in the section the seditious intention appears without any extrinsic evidence."

So that in this country, instead of saying "seditious words" are words which are "expressive of a seditious intention", in our Sedition Act, we say they are words with a "seditious tendency".

This is how Section 3(1) of the Sedition Act 1948 of this country states it:

3. (1) A "seditious tendency" is a tendency –

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

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

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

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

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

(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Articles 152, 153 or 181 of the Federal Constitution. *(This paragraph did not appear in the original form of the sub-section.)*

As can be seen from the provisions of Section 3(1) of the Sedition Act, above, intention is not an ingredient of the crime of sedition, and all that need be proved by the prosecution is a seditious tendency as defined in Section 3(1).

This is established by Section 3(3) which says:

3. (3) For the purpose of proving the commission of any offence against this Act the **intention** of the person charged at the time he did or attempted to do or made any preparation to do or conspired with any person to do any act or uttered any seditious words or printed, published, sold, offered for sale, distributed, reproduced or imported any publication or did any other thing shall be deemed to be **irrelevant** if in fact the act had, or would, if done, have had, or the words, publication or thing **had a seditious tendency**. *(I have supplied the emphasis which is in bold type.)*

Then, how are we to decide whether the words have a seditious tendency

Although it is unnecessary to prove "intention": see Section 3(3) of the Act above, it is necessary to prove that the words have a tendency to achieve one or more of the objects specified in Section 3(1) of the Act.

In deciding whether the words have this tendency, it is proper, and here I would like to use the words of Coleridge J in *R v Aidred* (1909) 22 Cox CC 1, p 3,:

"... to look at all the circumstances surrounding the publication with the view of seeing whether the language used is calculated to produce the results imputed; that is to say, you are entitled to look at the audience addressed, because language which would be innocuous, practically speaking, if used to an assembly of professors or divines, might produce a different result if used before an excited audience of young and uneducated men."

On the other hand, here I would like to use the language of Cave J in *R v Burns* (1886) 16 Cox CC 355, page 365:

"A man cannot escape from the consequences of uttering words with a [seditious tendency] solely because the persons to whom they are addressed may be too wise or too temperate to be seduced [by those words]."

Therefore, the words are seditious (1) if they are likely to incite or influence the audience actually addressed or (2) if they are likely to incite or influence ordinary people even though the audience addressed was unaffected by the words.

What is not seditious

Stephen in Article 93 of the Digest gave the definition of what is not seditious. Almost identical provisions are to be found in the Criminal Code of the Gold Coast.

With regard to the Gold Coast provisions, this is what the Privy Council said in *Wallace-Johnson*, at page 240:

"Question will necessarily arise in every case, as in this case, as to the facts to which it is sought to apply these definitions. Fine distinctions may have to be drawn between facts which justify the conclusion that the intention of the person charged was to 'bring into hatred or contempt … the Government of the Gold Coast,' and facts which are consistent only with the view that the intention was no more than, in the words of a later part of subsection 8, 'to point out errors or defects in the Government ... of the Gold Coast.'"

In the Sedition Act of this country, we have Section 3(2). The subsection specifies the circumstances or situations which are not seditious.

Fine distinctions may have to be drawn between facts which justify the conclusion that there was a tendency to achieve one or more of the objects specified in Section 3(1), and facts which are consistent only with the view that the tendency was no more than to do the acts or things mentioned in Section 3(2).

Provided that in doing any of the acts or things mentioned in Section 3(2), the words used do not have the effect of achieving any of the objects specified in Section 3(1).

There is a similar provision to our Section 3(2) in the Criminal Code of the Gold Coast: see the proviso to subsection 8 of Section 326 of the Gold Coast Code. While in this country it is Section 3(2) of the Sedition Act 1948 which reads:

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

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

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

(c) **except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in paragraph (1)(f) –**

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

(ii) to point out, with a view to their removal, any matters producing or having a tendency to produce feelings of ill will and enmity between different races or classes of the population of the Federation,

If the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency.

[I have put the words in bold type to show that they were not found in the original text of sub-section (2)]

Did Lim Kit Siang commit sedition?

Now that you know the law of sedition as much as any expert on the subject, we shall examine the law to find out if Lim Kit Siang has, in fact, committed the crime.

As I have understood from the Internet, all that he did was to point out that the biggest mistake that Najib made in the so-called Perak debacle was to approach the sultan for the appointment of Zambry as Mentri Besar – that step, as we all know, started the political and constitutional impasse in Perak.

Had Najib not seen the Ruler but, instead, had he advised the Barisan Nasional assemblymen to obtain a vote of no confidence against Nizar at the time, he would have succeeded and there would have been no constitutional crisis in Perak.

By his rash action to have Zambry appointed Mentri Besar when Nizar is still holding the office of Mentri Besar, he had caused the impasse in Perak.

Najib had actually committed a serious political misjudgment. Since then he had been unable to extricate himself out of the political quagmire which he had orchestrated.

Since Lim Kit Siang's criticism was only directed at Najib for his personal misjudgment in the whole episode, it would not be possible for any prosecutor to establish a "seditious tendency" under Section 3(1) of the Sedition Act.

This is because paragraphs (a) and (b) of the subsection concern a seditious tendency against a Ruler or Government – so these provisions do not apply to a personal criticism of Najib in his handling of the affair.

Paragraph (c) concerns a seditious tendency against the administration of justice – definitely this does not apply to a criticism of Najib's handling of the matter.

In paragraph (d) the seditious tendency is to raise discontent and disaffection among the people – so it does not apply.

Paragraph (e) deals with race and class, and paragraph (1) deals with privileges, sovereignty etc – so they too do not apply to a personal criticism of Najib' s miscalculation of the situation in Perak.

Therefore, since it is impossible, based on the above circumstances, to establish a "seditious tendency" against Lim Kit Siang for his criticism of Najib's conduct in the Perak debacle, Lim Kit Siang has not committed any offence under the Sedition Act.

As such, what the police did to him was unwarranted and an inexcusable harassment of a respected politician.

Such bullying methods by the police should be frowned upon by all right thinking people.

By their bad behaviour in the matter, the police have done a great disservice to the Government of the day which eventually may reflect adversely against them in the next election.

As a consequence of such outrageous act of harassment which the police have perpetrated against the people, the police were, in fact, promoting feelings of ill will against the Barisan Nasional government which is the government of the day.

I wonder if they could have brought themselves within the meaning of "seditious tendency" under Section 3(l)(e) which says "(1) A 'seditious tendency' is a tendency (e) to promote feelings of ill will ... between different ... classes of the population of Malaysia" – i.e. between the people and the Barisan Nasional government?

Perish the thought. But then, why were they doing this to the government? Were they trying to ensure a change of government at the next general election? Your guess is as good as mine.

I remember when I was a serving judge, we would never dream of doing anything that would jeopardise the standing of our employer, the Government of Malaysia.

Sometimes we would take a member of the executive government, like a minister or a public official, to task if they have done wrong but it must be done in a judgment.

As a serving judge, it is taboo to criticise the government of the day out of court.

But nowadays we find the police jeopardising the position of their employer, the government of the day, by their overt action of harassing some members of the general public.

Don't these people realize that such actions would have an adverse effect on the government come next election?

I suppose there are some people who think that it is all right for such an undesirable trend to continue like a cancer among the law enforcement agencies.

And what about Karpal Singh?

All that Karpal Singh said was that the sultan can be sued. And the next thing we hear is that he has been charged for the crime of sedition.

We all know that Karpal Singh was speaking as a lawyer. And why is it wrong for a lawyer to say someone can be sued?

All of us know that a ruler can be sued in the Special Court, albeit with leave of the court, for certain things, such as in an action in contract or tort, and also he could be prosecuted for certain crimes.

There is no provision in Section 3(1) of the Sedition Act which says that saying that a sultan can be sued is a seditious tendency.

Moreover, Section 3(2)(a) totally absolves Karpal Singh of any wrongdoing under the Sedition Act for his remark. Section 3 (2) (a) says:

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

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

Rightly or wrongly Karpal Singh thought that the ruler could be sued by way of a judicial review for what was perceived by him as the unconstitutional appointment of Zambry as Mentri Besar.

Judicial review was thought by many lawyers at the time to be the proper course to take to correct the mistaken step taken by the ruler in the appointment of a new Mentri Besar when the incumbent Mentri Besar is still in office.

So that by virtue of paragraph (a) of subsection (2) of Section 3 of the Sedition Act 1948, what Karpal Singh had said about suing the sultan would not be treated as seditious even though the words spoken by him would show that the ruler was mistaken in his measure to appoint another Mentri Besar when the incumbent is still in office.

***PP v Param Cumaraswamy* is still the law on the Sedition Act 1948**

The law of sedition which I have referred to in this article is taken from my judgment in *PP v Param Cumaraswamy* [1986] CU (Rep) 606 which was decided almost 23 years ago.

Cumaraswamy is authority for the statement of the statute law of sedition as it stands. It is also useful for its concise treatment of the Sedition Act 1948.

To this day, it is still the law of the land as it has not been overruled by any higher court.