Columbia University Expert Meeting

Freedom of Expression and Information in Malaysia/South East Asia

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General overview of South East Asia – a region of approximately 600 million people

Table 1

No	Country	Legal System
1	Malaysia	English common law/personal sharia law applicable to Muslims
2	Singapore	English common law
3	Burma	English common law
4	Thailand	Civil law system based on a codification of among others, French, English and Indian laws
5	Indonesia	Civil Law (Dutch)
6	Philippines	Combination of Civil Law (Spanish) and Common Law (US)
7	Vietnam	Civil Law (French) and Communist Legal theory
8	Cambodia	Civil Law (French)
9	Laos	Civil Law
10	East Timor	Civil law - Indonesia
11	Brunei	English common law/personal sharia law applicable to Muslims

Table 2

STATE	PRESS FREEDOM INDEX (2013)[1]	PRESS FREEDOM INDEX (2011-2012)[2] SOURCE: Reporters Without Borders ("RWOB")	PRESS FREEDOM INDEX (2010)[3] SOURCE: RWOB	PRESS FREEDOM INDEX (2009)[4] SOURCE: RWOB	PRESS FREEDOM INDEX (2008)[5] SOURCE: RWOB
THAILAND	135 (1st)	137 (4TH)	153 (5TH) Significant event: March 2010 Red-Shirts Protest	130 (4TH)	124 (2nd)
INDONESIA	139 (2nd)	146 (6TH)	117 (1ST)	101-102 (1ST)	111 (1st)
CAMBODIA	143 (3rd)	117 (1ST)	128 (2ND)	117 (2ND)	126 (3rd)
MALAYSIA	145 (4th)	122-124 (2ND)	141 (4TH)	131 (5TH)	132 (4th)
PHILIPPINES	147 (5th)	140 (5TH)	156 (6TH)	122 (3RD) Significant Event: 23 November 2009 Maguindanao massacre	139 (5th)
SINGAPORE	149 (6th)	135 (3RD)	137 (3RD)	133 (6TH)	144 (6th)
BURMA	151 (7th)	169 (8TH)	174 (9TH)	171 (9TH)	170 (9th)
LAOS	168 (8th)	165 (7TH)	168 (8TH)	169 (8TH)	164 (7th)
VIETNAM	172 (9th) [Note: lowest ranking in the index is 179]	172 (9TH)	165 (7TH)	166 (7TH)	168 (8th)

[1] http://en.rsf.org/press-freedom-index-2013,1054.html
[2] http://en.rsf.org/press-freedom-index-2011-2012,1043.html
[3] http://en.rsf.org/spip.php?page=classement&id_rubrique=1034
[4] http://en.rsf.org/spip.php?page=classement&id_rubrique=1001
[5] http://en.rsf.org/spip.php?page=classement&id_rubrique=33

Issues for discussion

1. Most important 5 case law related to expression and information and why?

Malaysia

When understanding the nature of freedom of expression and information in Malaysia, it is important to note that almost all cases relating to freedom of expression have a central theme of not offending the 3 "R"s. The 3 "R"s refer to the issue of Race, Religion and Royalty.

So long as any media organisation, politician or individual steers clear of the 3 "R"s, they will not attract any prosecution. Article 10 of the Malaysian Federal Constitution guarantees freedom of expression but in reality laws have been passed to curtail this freedom. Article 10 makes specific reference to the government's ability to curtail this freedom.

Some of the offending Acts of Parliament include:

(a) Sedition Act

(b) Printing Presses and Publications Act

(c) Communications and Multimedia Act

Cases – Sedition Act

(1) Public Prosecutor v Oh Keng Seng

This case explains the reasoning of the court with regards to sedition, freedom of speech and how the limitations imposed by law are applicable.

The accused, Oh Keng Seng was charged with seditious tendency for uttering seditious words in Mandarin. The reasoning of the judge discussed four main issues and they are:

i) whether the accused speech uttered in Mandarin was bona fide and fair criticism of the government
ii) that the intention of the accused is irrelevant if in fact of the words have a seditious tendency which is p rovided for under section 3(3) of the Sedition Act
iii) that the prosecution was not obliged to prove that the speech uttered by the accused contained anything that was true or false etc.
iv) whether the accused had succeeded in proving on a balance of probabilities that the speech delivered by the accused came within any of the permissible limits set out in section (2) of the Sedition Act

With regards to the first issue bona fide and fair criticism of the law is allowed as long as it is within the bounds of 3(3) of the Sedition Act 1948.

However, the trial judge emphasised that although freedom of speech is one of the hallmarks of a democratic right utmost care must be taken to ensure that it does not have any seditious tendency as defined under the Sedition Act.

On the second issue, the trial judge agreed with the prosecution's argument that the intention of the accused when he made the speech was irrelevant if in fact the words have seditious tendency which is provided for in section 3(3) of the Sedition Act.

Although the act quite clearly defines what amounts to seditious tendency the interpretation of its applicability is subjective.

It would also mean that if the speaker is unaware of the content of his speech he could still be charged with sedition because the intention of the speaker is not taken into account.

The third issue is an extension of the second issue which discusses what needs to be proved in order to claim seditious tendency.

It has been established in the case against the accused that the prosecution is not obliged to prove that anything said in his speech was true or false or that it caused any disturbance or a breach of the peace.

This contradicts the definition in the Act that the words must have seditious tendency because seditious tendency cannot be proved if the prosecution is not obliged to evidence the above.

Nevertheless, the trial judge placed importance on preserving harmony especially in a multi-racial community and the lessons learned based on past historical events like the May 13 incident.

On the final issue, the judge declared that the accused had not succeeded on a balance of probabilities that the speech delivered came within the permissible limits as set out in section (2) of the Sedition Act.

The accused was fined RM2000 in default of six months imprisonment.

(2) Public Prosecutor v Ooi Kee Saik and Ors

The defendant, Ooi Kee Saik, and others were charged of the offence of sedition under S 4(1) (b) of the Sedition Act 1948. The defendant was found to have uttered seditious words in his speech, in which he accused the Alliance government of practicing on the ethnic-based policies. The other defendants, Fan Yew Teng are charged with publishing them in the Rocket news magazine and while Kok San and Lee Teck Chee were charged with printing the speech in the Rocket magazine.

On the grounds that the defendant uttered seditious words challenging the special position and privilege of the Malays (Muslims) under Article 152 and 153/181, the judge found the defendant guilty of having uttered seditious words which came within the Sedition Act 1948 S 4(1), S 2 and S 3 (1).

In his judgment the court rejected the argument of the lead counsel for defendants, for the need to follow the common law principles of sedition in England, of which the words are likely to incite violence, tumult or public disorder. The court also rejected that the intention of the speaker is a necessary ingredient in proving the offence.

What the prosecution has to prove, in the judge's ruling, is that the accused have actually spoken the words. In choosing a more literal interpretation of the statute instead of a more liberal interpretation, the judge's reasoning took into account that certain sections of the Sedition Act 1948 were amended to regulate inflammatory speech.

The court noted that the right to freedom of expression is fundamental for any democratic institution; he noted that such freedom is not an absolute right but must be within reason to maintain an effective balance.

With reference to the other defendants who were charged for sedition in publishing offensive material, the judge found them guilty based on evidence of knowledge and awareness of the alleged incident.

Each of the accused was fined RM2,000 in default of six months imprisonment.

Note: The Sedition Act remains the single most dangerous legislation threatens freedom of expression in Malaysia. It creates a strict liability offence where intention of the maker is irrelevant. What amounts to a "seditious tendency" is extremely subjective and the use of the Sedition Act today is not reflective of the purpose to which the Sedition Act was created.

Cases – Printing Presses and Publications Act

(3) Mkini Dotcom Sdn Bhd v Home Minister & Ors (2012)

Here, Mkini Dot Com, owner of an Internet news portal, Malaysiakini applied for a printing permit under the Malaysian Printing Presses and Publications Act. The Malaysian Home Minister has an absolute right when deciding if a printing licence (renewable yearly) is granted. The Home Minister rejected MKini Dot Com's application.

The High Court took a liberal approach and recognised that the right to a free press is a Constitutional right, and that it is a right and not a mere privilege as contended by the Home Ministry. The considerations raised by the Deputy Home Minister to justify his refusal of the printing permit were all found to be without basis at all, and were irrelevant considerations.

However, the court found that the evidence was insufficient to rule that the Minister had acted in bad faith or for an ulterior purpose.

The Court also held that "the decision is one that is fraught with the infirmities such that is has been a perverse decision, which a reasonable person similar circumstanced as the [Deputy Minister], would not have decided the manner in which he did. The [Deputy Minister] had misconstrued the extent of his powers when he treated the power under [the Printing Presses and Publications Act 1984 (Act 301)] in relation to the issuing of a printing permit as one that is a privilege, as opposed to it being a right, that has its origin entrenched in Article 10 of the Federal Constitution. The decision by the [Deputy Minister] is defective for want of

procedural fairness for affording no reason for the rejection of the application in as much as it has been littered with illegality, unreasonableness and in defiance of logic .. " -

Although the PPPA was amended in 2012 where the need to renew licenses annually and adding a small measure of judicial oversight to the home minister's unchecked power to approve or reject license applications, it is still an onerous piece of legislation. New publications still require initial approval and licenses still may be arbitrarily revoked. Other means of control include calls from the ministry offering "advice" to editors and prison terms and fines for "maliciously" printing so-called false news. The home minister maintains absolute discretion over licensing of printing presses.

Cases- Communications and Multimedia Act

(4) PP v Rutinin Bin Suhaimin

The accused was charged with committing an offence under section 233 of the Communications and Multimedia Act 1998 for posting remarks on a website insulting a Sultan of one of Malaysia's many states. Despite the accused not having his defence called by the court of first instance, on appeal, this decision was overturned. The High Court (Appeal) felt that the posting of comments against the Sultan warranted the accused to explain his defence

For there to be an offence under s. 233 of the CMA, the following ingredients must be met:

a) The accused person initiated the communication in question.

b) The communication in question is either indecent, obscene, false, menacing, or offensive in character; and

c) The accused had intention to annoy, abuse, threaten or harass any person.

There have been at least 10 cases where individuals were charged and convicted for posting comments deemed insulting to various royalty members. It is also very troubling that prosecution has been brought against commenters rather than the blog owners/webmasters.

Others notable cases

(5) Tiong King Sing v Ong Tee Keat (2013)

The Malaysian High Court ruled that journalists are not required to reveal sources in a defamation case. However this protection is only limited to defamation suits involving private parties. It is not clear if it will apply where it involves an enforcement agency or any action brought by the government.

(6) Berjaya Books (Owners of the Borders Franchise) v Federal Territory Islamic Religious Department (2013)

Berjaya Books which owns Borders, succeeded in challenging a raid, search and seizure of Irshad Manji's controversial book "Allah, Liberty and Love" by the Federal Territory Islamic

Religious Department at a Borders outlet. The High Court was of the view that as the book was not subject to any prohibition at the material time, the raids conducted were therefore illegal.

The High Court also felt that the Religious Department should have been made known to the public what publication was contrary to Islamic law. The High Court also held that the charge against the Borders outlet manager Nik Raina, for allegedly distributing the book was an infringement of Article 7 of the Federal Constitution.

Article 7 states that no person shall be punished for an act, which was not punishable by law when it was done.

However, Nik Raina, the Manager still faces a separate charge under Islamic Sharia Law.

(7) Freedom of Information in Malaysia

Malaysia has no freedom of information legislation, what it has is a restrictive regime under the Official Secrets Act. However, demands for FOI legislation have been growing and a national campaign was started in 2005. Below is a background of the developments since 2005.

In May 2009, the Selangor state government committed to the enactment of a FOI law. A State law was passed in 2011. No other states in Malaysia have FOI laws.

South East Asia

(8) Singapore – James Dorsey v WSG (2013**)**

The Singapore Court of Appeal overturned an order that a journalist should disclose his sources for an article he had written on his blog about the relationship between World Sports Group (WSG) and Mohammed Bin Hammam, a former Fifa Vice-President and one-time President of the Asian Football Confederation (AFC), who is now banned from the game. The Court of Appeal held that the country's lower court was wrong to issue the order and quashed it.

(9) Thailand – the case of Chiranuch Premchaiporn/Leste Majeste

Chiranuch Premchaiporn, the webmaster of a Thai online newspaper Prachatai.com, w a s charged with ten alleged violations of the 2007 Thai Computer Crimes Act (CCA.

The charges against her in this case stemmed from her alleged failure to remove comments deemed offensive to the monarchy from the Prachatai web board quickly enough. The Court found Chiranuch guilty for one out of the ten charges, and she received a one year in prison sentence and a 30,000 baht fine. The court then took into account that as this was her first offence, her sentence was reduced to a suspended sentence of eight months and a 20,000 baht fine.

This decision is one of many Leste Majeste cases in Thailand. The use of the Computer Crimes Act has had a chilling effect on freedom of expression. The Computer Crimes Act is vague and seeks to limit freedom of expression by not only making an individual who writes or

posts a comment, image, or video online potentially criminally liable, but also making the providers of internet services, such as web board moderators, equally liable.

Section 14 of the CCA allows for jail terms of up to 5 years if individuals or webmasters are found to have imported to a computer "false computer data in a manner that it is likely to damage the country's security or cause a public panic… any computer data related with an offence against the Kingdom's security under the Criminal Code".

Section 15 CCA states that the service provider found to “intentionally supporting or consenting to” the use of the computer for this purpose is equally liable as the person committing the offence. This must be juxtaposed with the principal offence and in this case it was that of Leste Majeste.

Section 112 of the Thai Penal Code states that "Whoever defames, insults or threatens the King, Queen, the Heir-apparent or the Regent, shall be punished (with) imprisonment of three to fifteen years."

Chiranuch Premchaiporn failed to remove comments deemed to be damaging to the monarchy quickly, and in not doing so, violated the CCA and Leste Majeste laws.

2. National trends in terms of issues/decisions?

No	Country	Determining Issues and trends
1	Malaysia	Race, Religion and Royalty and use of the Sedition Act
2	Thailand	Royalty (use of Leste Majeste laws)
3	Vietnam	Anti-State Propaganda, Freedom of Speech and Democracy (Penal Code offences)
4	Indonesia	Religion and Morals
5	Singapore	Race and Religion and Economic Issues
6	Philippines	Focus appears to be on cybercrime legislation and impunity

3. Are court deliberations taking account of international, regional norms?

STATE	INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)	OPTIONAL PROTOCOL 1 TO THE ICCPR	INT'NAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)
BURMA			
CAMBODIA	YES (26 May 1992 a)	[6]	YES
INDONESIA	YES (23 Feb 2006 a)		YES
LAOS	YES (25 Sep 2009)		YES
MALAYSIA			
PHILIPPINES	YES (23 Oct 1986)	YES	YES
SINGAPORE			
THAILAND	YES (29 Oct 1996)		YES
VIETNAM	YES (24 Sep 1982)		YES

In Malaysia, the use of international and regional norms is very limited. It is merely persuasive as far as domestic courts are concerned. Malaysia is only a party to the Convention on the Rights of the Child and Convention on the Elimination of all Forms of Discrimination against Women.

It is axiomatic that the Malaysian Government will not ratify a convention which it perceives as limiting it from maintaining the status quo as it sees fit. Even if it did, it would have been so heavily pitted with reservations so as to have left the convention weak and pointless.

As long as Malaysia is not a party to these international norms, the courts are slow in adopting international norms in their decisions.

[6] Note: Cambodia is not a state party to Optional Protocol 1 to the ICCPR. It merely signed the said treaty on 27 September 2004. But Cambodia did not ratify the said treaty.

4. How do court decisions influence information flows, expression, media, and journalism?

Malaysia: Case study of Utusan Malaysia

Utusan Malaysia is a Malay language daily owned by the ruling party in Malaysia. Utusan Malaysia has in the past published numerous statements about the Malaysian opposition, Chinese community and non-Malay/Muslim population. It has courted many defamation law suits.

Interestingly Utusan Malaysia has been of late on the losing end of various defamation law suits. Examples include:

a) October 2011 – Awarding an opposition MP, MYR60,000 (USD20,000) for publishing a headline that suggested that he was not a fit Muslim

b) December 2011 – Awarding Lim Guan Eng, an opposition Chief Minister MYR200,000 (approximately USD65,000) for publishing a headline suggesting that the opposition Chief Minister was an anti-Malay/Muslim racist;

c) June 2012 – Awarding Lim Guan Eng, an opposition Chief Minister MYR200,000 (approximately USD65,000) for publishing a headline suggesting that the opposition Chief Minister wanted to abolish Malaysia's "Affirmative Action" policy;

d) December 2012 – Awarding Karpal Singh, an opposition Member of Parliament MYR50,000 (approximately USD15,000) for publishing a headline suggesting that the MP was an anti-Malay/Muslim racist;

e) January 2013 – Awarding Anwar Ibrahim damages (to be assessed) for publishing statements that Anwar Ibrahim supported homosexuality in Malaysia;

f) July 2013 – Awarding Nizar Jamaludin, Malaysian opposition politician the sum of MYR250,000 (approximately USD80,000) for saying that Nizar had incited people to hate a Sultan;

Utusan Malaysia has continued news that is dishonest, racially polarizing, defamatory, and damaging to the nation.

This is because Utusan Malaysia receives backing from Umno, the ruling party in the Malaysian government who had in November 2013, ordered all Government Linked Companies to increase their advertisement spending in Utusan Malaysia on grounds that it is a form of "national service".

This allows Utusan Malaysia to survive as a newspaper and to continue its dishonest, racially polarizing, defamatory and damaging reporting notwithstanding what the courts have ruled.