'Activity Detrimental to Parliamentary Democracy': A Novel Crime[1]

by Gurdial Singh Nijar

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In 2012, the government introduced a raft of amendments to section 124 of the Penal Code under the chapter on Offences against the State. These created offences that are "detrimental to parliamentary democracy".

This phrase, as the then-de facto law minister told Parliament when moving this amendment, was inspired by the UK Security Service Act 1989, section 1(2):

> The protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.

This assumes that Parliament is the embodiment of the state — that it is supreme. But in Malaysia (unlike the UK where there is no written constitution) the Constitution, not Parliament, is supreme. There are limits to Parliament's powers. Where a constitution exists and is declared the supreme law of the land, then laws passed by Parliament are subject to judicial review to ensure they are in conformity with the constitution. This is a trite proposition harking back to the early 19th century US Supreme Court case of *Marbury v Madison*.

Hence administrative law allows any *ultra vires* acts of Parliament to be challenged as has been done successfully in cases such as *Nordin Salleh* [1992] 1 MLJ 697 and *Danaharta* [2004] 2 MLJ 257. There are also procedural limits to Parliament's exercise of its legislative functions: see Articles 2(b), 38(4), 66, 68, 159 and 161E of the Federal Constitution. The implications of Articles 4(1), 128 and 162(6) subject all — including Parliament — to the Constitution.

Indeed, the doctrine of the supremacy of Parliament is not part of Malaysian legal theory (see Shad, *Document of Destiny*, at p 74) — a position affirmed by the apex court in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112. Suffian LP's dictum in this case has been routinely quoted by our courts when dealing with constitutional matters: "The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please."

Hence equating the State with Parliament is misconceived. For this reason, the basis upon which the amendments to the Penal Code is premised appears to be fundamentally flawed.

Additionally, the term "parliamentary democracy" is not defined. Only activity detrimental to Parliamentary democracy is defined — as activity designed to overthrow or undermine parliamentary democracy by violent or unconstitutional means. Incorporated in the definition is the very term that needs to be defined. This seems like a major drafting error — for an offence that is punishable with a 20-year jail term.

[1] This is an expanded version of a talk at the Bar Council's Forum on section 124 of the Penal Code, 20 May 2016.

It is also an offence to possess or print or sell documents and publications that are detrimental to parliamentary democracy. Such documents are defined as those that have a tendency (in part even) to:

- excite organised violence against persons or property in Malaysia;
- do or support any act prejudicial to the security of Malaysia or maintenance/restoration of public order in Malaysia;
- inciting to violence; or
- counselling disobedience to the law thereof or to any lawful order or get support for the above. (section 130A, Penal Code).

So the thread that runs through these provisions makes clear the mischief, albeit in a way that is open to challenge, as earlier explained: to criminalise acts against the State that involve violence and disrupt public order. Importantly it is targeted to deal with a severe security risk because the life of the nation — and its democratic ethos — is threatened. So the law, in its inelegant construct, seems to be about grave threats to the national security of the country.

Instructively the Security Offences (Special Measures) Act 2012 ("SOSMA") — enacted shortly after these Penal Code amendments categorises these 124B–124N offences under Chapter VI of the Penal Code as "security offences": section 3 read with its 1st Schedule.

What is not an offence under these sections of the Penal Code are acts that are an exercise of the rights under the constitution. Indeed, our law reports are replete with decisions challenging the infirmities of Parliament's acts — both substantively and procedurally.

This will no doubt undermine the authority of Parliament. But this is not an offence.

This is made crystal clear in the explanation by the then-law minister when moving the amendment. This is what he said (as paraphrased):

It was meant to tackle terrorist activities. Such as the Al Maúnah episode — where a group of persons raided an armoury to secure arms with the avowed intention of overthrowing the government. "Unconstitutional" was when it clearly went against the Constitution such as usurping the powers of a sitting Prime Minister.

In *Secretary of State for Home Department v Rehman* [2003] 1 AC 153 the House of Lords, in discussing a similarly-worded provision, referred to the Johannesburg Principles on National Security, Freedom of Expression and Access to Information of 1995 as follows:

> Principle 2. Legitimate national security interests
>
> (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
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> (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

The House of Lords in *Rehman's case* made clear that "the interests of national security" cannot be used to justify any reason the Secretary of State has for wishing to deport an individual from the United Kingdom. There must be a real possibility of risk or danger to the security or well-being of the nation which the Secretary of State considers makes it desirable for the public good that (appropriate action be taken).

The decision accepted the statement by Professor Grahl-Madsen in *The Status of Refugees in International Law* (1966):

> A person may be said to offend against national security if he engages in activities directed at the overthrow by external or internal force or other illegal means of the government of the country concerned or in activities which are directed against a foreign government which as a result threaten the former government with intervention of a serious nature.

There must be a real possibility that the national security of the State may immediately or subsequently be put at risk by the actions of others. Interests of the state, include not merely military defence but democracy, the legal and constitutional systems of the state, clarified the House of Lords.

This is consonant with the pronouncement by the Malaysian Minister's statement when moving the amendments. The broader context that forms the backcloth of these offences relates to acts inimical to national security — the real threats to the nation state and its systems — and relate to law and order issues that involve, in the main, violent terrorist acts.

But charges under these provisions have been levied (or threatened) against students for protesting outside Parliament. Or proposing a vote of no confidence against the Prime Minister. It is to be noted that the then-UK

Prime Minister, Margaret Thatcher's colleagues did exactly that when her leadership was perceived by them as damaging to their Party's electoral prospects. A party coup brought about her downfall. (See Brazier, The Downfall of Margaret Thatcher (1991) 54 *Modern Law Review* 471.)

None of the "conspirators" were charged under the UK Security Service Act 1989!

Now this term "national security" is oftentimes nothing more than a cloak for legal authoritarianism. A law is enacted giving the broadest unbridled powers couched in vague language. This much has been acknowledged by the highest court in the UK in *A v Secretary of State for the Home Department* [2005] 2 AC 68.

Nine Law Lords heard this case involving detention without trial of suspected international terrorists under Part 4 of the Anti-Terrorism, Crime & Security Act 2001 (UK).

The pronouncements of the following Law Lords are notable in this context.

Lord Rodger: National security can be used as a pretext for repressive measures that are really taken for other reasons.

Baroness Hale: Unwarranted declarations of emergency are a familiar tool of tyranny.

Lord Walker: a portentous but non-specific appeal to the interests of national security can be used as a cloak for arbitrary and oppressive action on the part of government; and — national security can be the last refuge of tyrants

Look at the case against Datuk Seri Khairuddin Abu Hassan and Matthias Chang. Said the Inspector General of Police, supplying evidence of wrongdoing to outsiders (in this case the equivalent of the highest law officer of Switzerland and other countries, for offences alleged to have been committed in those jurisdictions) instead of to him amounts to an act of sabotage of Malaysia's economy and sovereignty.

Under the Whistleblower Protection Act 2010, protection is given to those who disclose improper conduct based on reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct. The complaint must be made to an enforcement agency in Malaysia: section 6.

The protection may be revoked if the whistleblower did not believe the statement to be true: section 11(b).

So the facts need to be investigated by whichever means legitimately possible before the whistle is blown.

In this context, it does not make sense to treat this ferreting of the facts by engaging the assistance of a country within whose jurisdiction an offence is allegedly thought to have been committed — as an act against national security amounting to an act of sabotage of Malaysia's economy and sovereignty?

Such acts can hardly be considered as 'sabotage' defined by section 130A(h) of the Penal Code as:

> (a) an act or omission intending to cause harm—
> (i) for the interests of foreign powers or foreign organizations;
> (ii) to premises or utilities used for national defence or for war; or
> (iii) to the maintenance of essential services; or ...

Recall that SOSMA was sought to be made applicable to section 124B of the Penal Code in the case against Khairuddin and Matthias — and punishable as a security offence. If it had succeeded, the accused's recourse to the protective provisions of the Criminal Procedure Code would have been denied.

Broader Context

These section 124 amendments of 2012 must be seen in the context of the successive enactment of a spate of repressive laws shortly after the Internal Security Act 1960 was repealed in 2012, namely:

- SOSMA (2012);
- Amendments to the Prevention of Crime Act 1959 (2014); and
- Prevention of Offences against Terrorism 2015 ("POTA").

In effect the 124B and related provisions:

(1) vest almost unfettered discretionary powers to the administrative/executive authorities; and
(2) are employed for purposes which give rise to serious anxiety about the legitimate propriety of their use.

With these armoury of laws, a citizen can be subject to a plethora of laws that admit of criminal charges with long prison terms, refusal of bail, special trial procedures outside of the normal Criminal Procedure Code safeguards and detention without trial for unlimited successive periods of two years.

Exacerbating this situation, there is the sustained claim by authorities that they have unfettered discretion with regard to other existing laws such as the Immigration Act — under which citizens have been banned from travel.

Loose language in the laws is always disconcerting. For example, under the Penal Code Chapter VI A Offences against Terrorism, it is not a "terrorist act" if it is advocacy, protest, dissent or industrial action and is not intended to, among others, create a serious risk to the health or safety of the public or a section of the public. Note the condemnation by officialdom of the BERSIH rallies as causing risk to the safety of a section of the public!

The only protection for a citizenry in these circumstances is the judiciary. If it succumbs to the argument that officialdom has unfettered subjective discretion to act in the interest of national security without a critical accounting of its actions, then the rule of law will be severely impaired. If there is an issue that a decision is not in fact based on grounds of national security then "the Government is under an obligation to produce evidence that the decision was in fact based on grounds of national security": *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 372, 402. (House of Lords)

This dismal outcome — where the judiciary abstains — must be resisted. Else legal authoritarianism will rule to subvert the fundamental construct of the supreme law of the land — the Federal Constitution.