



**LEGAL RESTRICTIONS ON PUBLICATIONS
UNDER MALAYSIAN LAW**

BY

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ABSTRACT

The thesis seeks to examine legal restrictions on publications on matters of public interest. The framework chosen to examine these restrictions is the democratic system of government in Malaysia. The study analyses the way the laws and judges balance the democratic interest with other interests such as the interest of state secrecy and security. The law, *ex facie*, is not reasonably balanced with the demands of constitutional democracy as envisaged by the Federal Constitution. The research examines and analyses laws as found in statutes and case law. References are made to legal writings and views regarding the laws. The Federal Constitution provides for a parliamentary democracy which entails participation of the electorate in electing representatives and in governing. This requires receiving and processing of information by the electorate and interested parties. Restrictions on publications hinder these processes. However, the Federal Constitution also provides for protection of competing interests such as the interest of reputation, public order, state secrecy and administration of justice. These are legitimate interests that should be taken into account by the law. However, judges need to play their role as the protector of the Constitution in ensuring that these interests do not subvert constitutional democracy. In most cases, the courts have failed to cast the law as required by constitutional democracy. The courts have sometimes failed to balance those competing interests. It is possible for judges to mould the common law and to construe written provisions, to shape it in accordance with constitutional democracy. However, if judges still fail to do their tasks, the other option is to amend the law or to enact new law. This research also seeks to highlight Islamic perspectives on restrictions on publication relating to governance. *Shari'ah* provides for competing interests against publication such as the interest of reputation, security and public order. However, *Shari'ah* also calls for the need for enjoining good and forbidding evil even against those in power.

ملخص البحث

تهدف هذه الرسالة إلى دراسة القيود القانونية المفروضة على المنشورات والمطبوعات التي تمس المصلحة العامة في إطار النظام الديمقراطي في ماليزيا. تحلل الدراسة الطريقة التي انتهجها كل من القوانين والقضاة في موازنة بين المصالح المنبثقة نتيجة ممارسة الديمقراطية وغيرها من المصالح كتلك التي تتعلق بأمن وأسرار الدولة. ويبدو أن القانون غير متوازن مع متطلبات الديمقراطية المضمونة والموحاة من الدستور الفدرالي. هذا وقد استخدم البحث عدة مناهج متمثلة في التحليل القانوني للقوانين المدونة و القضايا القضائية. ونظرا لأن الدستور الفدرالي قد تكفل بحقوق المواطنين في اختيار الحكومة من خلال الانتخابات العامة، فلهؤلاء المواطنين حق الحصول على معلومات كافية كي يتمكنوا من إداء أصواتهم بشكل صحيح. وعلى هذا فرض القيود على هذه المعلومات عن منع صدور بعض المنشورات يحرم المواطنين من مزاولة بعض حقوقهم. ومن ناحية أخرى فإن الدستور قد تكفل أيضا بحماية المصلحة العامة وسرية الدولة وكذلك إدارة سير العدالة. لإزالة هذا التعارض فعلى القضاة دور بالغ الأهمية في التوفيق بين هاتين المصلحتين المتعارضتين حتى لا تضحي إحداهما على حساب أخرى. ويلاحظ أنه في معظم الأحوال لم تتمكن المحاكم من تطبيق القانون بما يتفق مع الدستور أو بعبارة أخرى لقد فشلت المحاكم في التوازن بين المصلحتين. وتقتصر الدراسة أنه بإمكان القضاة التغلب على هذه المشكلة بتصويب القانون العرفي وتفسير النصوص القانونية طبقا للنظام الديمقراطي الدستوري. وفي حالة عجز القضاة عن اتباع هذا المنهج فعلى المشرعين أن يعدلوا القانون الحالي أو يستأوا قانونا جديدا. وتلقى الدراسة أيضا الضوء على قيود النشر من وجهة نظر الشريعة الإسلامية حيث أنها من ناحية تقرّ بحرية النشر ومن ناحية أخرى وضعت حدودا لهذه الحرية في بعض الأحوال كتلك التي تمسّ السمعة والأمن وكذلك إذا كان الأمر يتعلق بالنظام العام. ومع ذلك فقد نادى الشريعة بالأمر بالمعروف، والنهي عن المنكر دون تفرقة بين الراعي والرعية.

APPROVAL PAGE

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Farid Sufian bin Shuaib

Signature

Date.....

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ABBREVIATIONS

AC	Appeal Cases, Law Reports
Adel L R	Adelaide Law Review
AIR	All India Reporter
AJIS	American Journal of Islamic Studies
AJISS	American Journal of Islamic Social Sciences
ALIRAN	Aliran Kesedaran Negara
ALJ	Australian Law Journal
All ER	All England Report
ALRC	Australian Law Reform Commission
Am J Comp L	American Journal of Comparative Law
Am U Int'l L Rev	American University International Law Review
Anglo-American LR	Anglo-American Law Review
Auckland Univ R	Auckland University Review
CA	Court of Appeal
Cambridge LJ	Cambridge Law Journal
Ch	Chancery Report
CJ	Chief Justice
Clev St L Rev	Cleveland State Law Review
CLJ	Current Law Journal
CLP	Current Legal Problems
CLR	Commonwealth Law Report
Cmd/Cmd/Cm	Command Papers, Parliamentary Papers
CNN	Cable News Network
Colum J Asian L	Columbia Journal of Asian Law
Colum L Rev	Columbia Law Review
Comm L & Pol'y	Communication Law & Policy
Cox CC	Cox's Criminal Cases
Crim LJ	Criminal Law Journal
Crim LR	Criminal Law Review
DLR	Dominion Law Report
ECHR	1. European Court of Human Rights 2. European Convention for the Protection of Human Rights and Fundamental Freedoms
ed.	Editor/edited by
edn.	edition
EHR	European Human Rights Reports
et al.	(<i>et alia</i>):and others
FC	Federal Court
FCJ	Federal Court Judge
FOI Review	Freedom of Information Review
Harvard LR	Harvard Law Review
HL	House of Lord
ibid.	(<i>ibidem</i>): in the same place
IUM LJ	International Islamic University Malaysia Law Journal
J	Judge
JCA	Judge of the Court of Appeal

JILI	Journal of the Indian Law Institute
JJ	Judges
JJCA	Judges of the Court of Appeal
JMCL	Journal of Malaysian and Comparative Law
KANUN	Jurnal Undang-Undang Malaysia
KB	King's Bench Division, Law Reports
KEADILAN	Parti Keadilan Rakyat or People's Justice Party
Ky	Kyshe's Reports
LJ	Lord Justice of Appeal
LQR	Law Quarterly Review
LR	Law Reports
LR (NSW)	New South Wales Law Reports
MARA	Majlis Amanah Rakyat
MCA	Malaysian Chinese Association
MIC	Malaysian Indian Congress
Melbourne Univ LR	Melbourne University Law Review
MLJ	Malayan Law Journal
Mon L R	Monash University Law Review
MR	Master of Rolls
n.d.	no date
n.p.	no place: no publisher
NC L Rev	North Carolina Law Review
NLJ	New Law Journal
NSW LR	New South Wales Law Report
NZLR	New Zealand Law Report
OJLS	Oxford Journal of Legal Studies
OR	Ontario Reports
PBUH	Peace Be Upon Him
PC	Privy Council
PL	Public Law
PM	Prime Minister
QB	Queen's Bench Division, Law Reports
QBD	Queen Bench Division Law Reports
s.l.	(<i>sinoloco</i>): no place of publication
s.n.	(<i>sine nomine</i>): no publisher
SALJ	South African Law Journal
SC	Supreme Court
SCC	Supreme Court Cases
SCJ	Supreme Court Judge
SCR	Supreme Court Reports
Sh LR	Shariah Law Reports
sic.	so, thus
SLR	Singapore Law Report
SR (NSW)	State Reports (New South Wales)
SUHAKAM	Human Rights Commission of Malaysia
SWT	Subhanahu Wa Ta'ala (Praise be to Allah and the Most High)
Syd L R	Sydney Law Review
Tas LR	Tasmania Law Review
TLR	Times Law Reports

trans.	translator/translated by
U Pa L Rev	University of Pennsylvania Law Review
UC Davis J Int'l L & Pol'y	UC Davis Journal of International Law and Policy
UKHL	United Kingdom House of Lords Decisions
UMNO	United Malays National Organisation
US	Reports of Cases in the Supreme Court of USA
UUCA	Universities and University Colleges Act 1971
VLR	Victoria Law Report
Vol.	volume
VR	Victorian Reports
Wash & Lee L Rev	Washington & Lee Law Review
WLR	Weekly Law Reports
Yale L J	Yale Law Journal

CHAPTER ONE

INTRODUCTION

BACKGROUND OF THE STUDY

Democracy relates to the concept of popular control of government and government organs such as political leaders and the courts. Popular control takes many forms such as popular elections and open and accountable government. To enable popular control in elections and in making government accountable, the people must be able to receive relevant information and to have access to the same. In this regard, it is important that there is freedom to publish relevant information and the freedom to have access to the same. The Federal Constitution of Malaysia makes for a democratic system of government. As such, it provides for periodically elected representatives to Parliament. The Federal Constitution also guarantees freedom of speech and expression. These freedoms are essential to the interests of democratic government. For instance, these freedoms are essential to ensure that the population receives relevant information regarding candidates and the government. Without in-depth discussion on the merit and demerit of candidates and without probing and discussing the performance of the existing government, it would be difficult for the electorate to make informed decisions in casting their votes.

However, the Federal Constitution also provides limitations on the exercise of these freedoms in considering other interests such as reputation, security and public order. These interests are legitimate and constitute competing interests from the interest facilitating popular control. The laws, such as the law of defamation, sedition and official secrecy, essentially seek to strike a balance between competing interests.

These interests should not negate one another. Balance needs to be struck to preserve the need of all interests. This study seeks to examine the laws relating to publications relating to popular control or on matters of public interests under the democratic framework provided by the Federal Constitution and how judges have interpreted the law in balancing the various interests.

OBJECTIVES

The objectives of this study are:

- 1) to investigate the position of democracy in the Federal Constitution;
- 2) to examine the necessity for freedom to publish matters on public interest under constitutional democracy;
- 3) to study competing interests justifying restrictions over publications on matters of public interest;
- 4) to study the existing restrictions on such publications; and
- 5) to analyse the balancing act judges adopted in dealing with the restrictions on such publications.

STATEMENT OF PROBLEMS

Laws on publications relating to popular control or on matters of public interest and application of the laws by the courts are not reasonably balanced with the demands of constitutional democracy.

HYPHOTHESES

The following s are the hypotheses that this thesis seeks to prove:

- 1) As the Federal Constitution prescribes for constitutional democracy, then laws restricting publications relating to popular control or on matters of public interest contravene constitutional democracy.
- 2) If judges fail to consider constitutional democracy in deciding relevant cases, then constitutional democracy will become illusory.

LITERATURE REVIEW

There are several books that discuss laws relating to publications in general. The book by Kamal Halili Hassan,¹ *Penulis dan Undang-undang* [Writers and Laws] (1990) provides an overview of laws relating to writers and publications. The author discusses relevant aspects of selected laws such as copyright, defamation, sedition, contract and contempt. The purpose of the book is to explain laws relating to writers. Thus, the book contains relevant provisions and cases. However, it is not exhaustive in its approach, it leaves out detailed discussion. The book does not discuss the justification for providing free speech to enable writers to contribute to popular control in the democratic framework or on matters of public interest. It is merely a descriptive work and not analytical.

An interesting book that discusses laws relating to publications is the book by Mohd Safar Hasim, *Akhbar dan Kuasa: Perkembangan Sistem Akhbar di Malaysia* [Newspapers and Power: Development of Newspapers System in Malaysia], (1996).²

¹ Kamal Halili Hassan, *Penulis dan Undang-undang* [Writers and Laws], Kuala Lumpur: Dewan Bahasa dan Pustaka, 1990.

² Mohd Safar Hasim, *Akhbar dan Kuasa: Perkembangan Sistem Akhbar di Malaysia* [Newspapers and Power: Development of Newspapers System in Malaysia], Kuala Lumpur: Penerbit Universiti Malaya, 1996.

The book contains 6 chapters. As the title suggests, the book discusses the theory of newspapers and power. In chapter 2, it discusses the theoretical relationship between the press, the government and the power to guide and to control the masses. Subsequent chapters discuss the history of newspapers publications in Malaysia and laws affecting it. The book explains the rationale and historical basis of some of the laws that exist today such as the Sedition Act 1957 and the Printing Presses and Publications Act 1984. This contributes towards a better understanding of the history of the laws. This helps in analysing whether the law maker sought to fulfil any competing interests. However, the book does not discuss in depth the present law such as the law of defamation, sedition and official secrecy.

Another book that discusses the general law on publications is Mohd Azizuddin Mohd Sani, *Hak Asasi & Hak Bersuara: Menurut Pandangan Islam dan Barat* [Fundamental Rights & Freedom of Speech: From the Perspective of Islam and the West], (2002).³ The first 4 from 10 chapters discuss the concept of fundamental liberties including views of politicians and statesmen and fundamental liberties in Malaysia. Although the book does not discuss the law in depth, the book discusses the history of freedom of expression in Malaysia, perspective of media practitioners and social scientists regarding freedom of expression in Malaysia.

Another type of literature is the one that discusses specific legal issues relating to publications. Christ R. Evans, in his book *The Law of Defamation in Singapore and Malaysia* discusses the whole range of defamation law.⁴ It explains the principles as found in the case law. However, the book does not discuss in depth the principles

³ Mohd Azizuddin Mohd Sani, *Hak Asasi & Hak Bersuara: Menurut Pandangan Islam dan Barat* [Fundamental Rights & Freedom of Speech: From the Perspective of Islam and the West], Bentong: PTS Publications & Distributor Sdn Bhd, 2002.

⁴ Evans, Keith R, *The Law of Defamation in Singapore and Malaysia*, Singapore: Butterworths Asia, 1993.

as found in the case law, particularly the question of consistency of the existing law with the Federal Constitution.

Another book of similar type that discusses official secrecy is Abdul Aziz Hussin, *Undang-Undang Berkaitan dengan Rahsia Rasmi* [Laws Relating to Official Secrets].⁵ The book discusses principally the Official Secrets Act 1972 as amended in 1986. The book basically reproduces the Act itself. However, the author does provide relevant case law and cross references among the provisions and other statutes. The book contains only two chapters. The first chapter provides a brief introduction on the law of official secrets and the history of the Act. The second chapter contains the Act with brief elaboration. The book is not an in depth or critical study of the law on secrecy.

The review of the above literatures sets out that there is a need to have theoretical grounding in discussing on publications. The writings of Mohd Safar Hasim and Mohd Azizuddin Mohd Sani shows the possible contribution to better understand the roles of freedom of expression in general and newspapers in particular when freedom to publish is connected to some interests such as the democratic interest. Unfortunately, the two writings do not embark on a comprehensive study regarding restrictions on publications in relation to the democratic framework. The writings also do not highlight the roles of the courts in circumventing the law on publications. Thus, the present study seeks to fill those gaps and to provide a framework for improving the present position.

Apart from books, there are several doctoral theses relating to publications in Malaysia. Juriah Abd Jalil had examined broadcasting law of Malaysia with respect

⁵ Abdul Aziz Hussin, *Undang-Undang Berkaitan dengan Rahsia Rasmi* [Laws Relating to Official Secrets], Kuala Lumpur: Dewan Bahasa dan Pustaka, 1997.

to television broadcasting and new media technologies.⁶ The study analyse broadcasting laws for instance the Communications and Multimedia Act 1998. It discusses the legal framework under which television broadcasting may operate. To investigate the position of the new media, the study analyse the position of television broadcasting with digital technology and copyright law. The study also examines the position of consumer protection. The study does allocate one chapter on freedom of broadcasting. It discusses the whole range of laws relating to free speech such as sedition and official secrecy. Regarding freedom of broadcasting, the study concludes that the laws limit and inhibit broadcasting material and coverage. This is an important contribution in looking at the restrictions on publications. However, since the focus of the study is on the overall legal framework of broadcasting and the new media, it has correctly limited its discussion on central issues under the freedom of broadcasting.

Another relevant thesis was written by Abdul Samat Musa.⁷ His thesis entitled *Freedom of Expression in English Law: Its Development and Limits* looks at the extent and the evolution of freedom of expression in England with emphasis on the historical perspective. The study painted with broad brush the development of the law, looking the development of freedom of expression from the 17th century to the 20th century. The study put the freedom of expression under the philosophical background of the natural rights and the concept of liberty. It also looks at the influence of various factors such as the absence of a written constitution in England. Generally, it was observed that the English courts approach the question of freedom of

⁶ Juriah Abd Jalil, *Legal Aspects of Television Broadcasting in Malaysia and the Challenge of New Media Technologies*, Exeter: University of Exeter, 2000, unpublished doctorate thesis.

⁷ Abdul Samat Musa, *Freedom of Expression in English Law: Its Development and Limits*, Manchester: University of Manchester, 1988, unpublished doctorate thesis.

expression as ordinary law and subject to the supremacy of Parliament.⁸ The study examines in detail various restrictions over freedom of expression including the law on prior restraints, defamation, contempt of courts, official secrets and public order. This study is important in putting the development of freedom of expression in England in its historical perspective. The study also manages to provide an overview of the various restrictions imposed on freedom of expression. The study highlighted approaches taken by the courts and proposal of law reforms produced by law reform commissions. However, the study only confines itself to the law in England. Furthermore, the study stop short of the development in the 20th century since the study was completed in 1988. Thus, it is imperative for a related study to be undertaken on the Malaysian law.

The two unpublished thesis shows the existence of prior study on the general area of freedom of expression. While Abdul Samat Musa emphasises the analysis of the development of the law on freedom of expression in England, Juriah Abd Jalil focus on broadcasting law in Malaysia. This shows extensive untapped research areas on freedom of expression in Malaysia. Thus, this study chooses to contribute to these developing areas and to view the relevant legal landscape with emphasis on restrictions on publications. This study also seeks to examine such restrictions under the democratic framework provided by a written constitution and to analyse the approach taken by the Malaysian courts in this regard.

SCOPE AND LIMITATION OF THE STUDY

The scope of the study – if it is put under the umbrella of freedom of speech - can be very broad. It may include for instance freedom of association and assembly. Thus,

⁸ At 29-30.

the study is limited to publications. The scope on relevant laws regarding publications is still wide. It may include for instance the issue of obscenity. Thus, it is further restricted by considering its relevance to publications relating to popular control and matters of public interests under the democratic framework. The research will look at legal restrictions imposed on publications on matters of public interest and consider it under the democratic framework provided by the Federal Constitution. Legal restrictions here refer to legislation and case law. Publications in this study refer to printed publications, broadcasting, film and internet publications. Although the discussion on restrictions entail the discussion on freedom of speech and expression, this study does not delve on the whole gamut of expression – including freedom of movement and assembly - since it will merit a study of its own and can be a subject of future research.

As the title suggests, this research is on the law of Malaysia. However, constant references to other jurisdiction are relevant to help in the development of the Malaysian law. The result, however, is not comparative in nature.

RESEARCH METHODOLOGY

This research is done by library research. It covers the theoretical and applied aspects of legal restrictions on publications under the democratic framework. The research is conducted by examining and analysing laws as found in statutes and case law. The study refers to, among others, the Printing Presses and Publications Act 1984, the Communications and Multimedia Act 1998, the Sedition Act 1948, the Internal Security Act 1960 and the Official Secrets Act 1972. Common law restrictions such as the law of defamation and contempt of courts require references to voluminous case law. References are also made to secondary sources in the forms of books, journals,

reports, newspapers articles and reports, conference proceedings and other periodical. References are also made to internet resources.

One of the objectives in this study is to look at the necessity of freedom to publish under constitutional democracy. This sometime requires the research to go beyond legal material. Therefore, the research has to refer to other disciplines under social science, for instance political science. Thus, to evaluate the impact of prior restraint on diversity of opinions, the research has referred to for instance Francis Loh Kok Wah & Khoo Boo Teik (Eds.). *Democracy in Malaysia: Discourses and Practices*⁹ and S Gan, James Gomez & U Johannan (Eds.). *Asian Cyberactivism: Freedom of Expression and Media Censorship*.¹⁰ This eclectic approach is inevitable because of the need to provide linkages between the law and democracy in action which sometime requires an interdisciplinary approach.

On Islamic law, the research will only highlight Islamic theoretical perspective, relying on some relevant Quranic verses and the Sunnah. The research also analyses some modern writings. A detail study will not be made on Islamic law since this is not a proper comparative study.

CHAPTERISATION

The thesis is divided into nine chapters. Chapter one discusses the background of the study, objectives, statement of problems, hypotheses, literature review, scope of the study and research methodology.

⁹ Loh, Kok Wah, Francis & Khoo, Boo Teik (Eds.). *Democracy in Malaysia: Discourses and Practices*, Richmond: Curzon Press, 2002.

¹⁰ Gan, S, Gomez, James & Johannan, U (Eds.), *Asian Cyberactivism: Freedom of Expression and Media Censorship*. Bangkok: Friedrich Naumann Foundation, 2004.

Chapter two provides the conceptual framework of the study. It discusses the meaning of democracy and its position in the Federal Constitution. The chapter examines at the relationship between democracy and the need for a free flow of information. The role of judges in applying the law under the ambit of the Federal Constitution will also be looked at. The chapter also looks at allowance given by the Federal Constitution for restrictions of publications – including publication relating to popular control of the government and matters of public interest - in fulfilling other competing interests. To analyse laws restricting publications to fulfil different competing interests, subsequent chapters – except the third chapter – looks at different laws fulfilling those interests. In each subsequent chapter, we study judges’ approach in balancing the demand of constitutional democracy and the competing interests. We suggest how the courts could mould the law to fit the constitutional democracy or legislature needs to intervene to amend existing law or to enact new law.

Before the study examines restrictions imposed under specific competing interests, the first kind of restriction that need to be examined is a restriction prior to publication. There is no specific interest to be served here because any interests could be served by prior restraint. The common factor here is restriction prior to publication. Chapter three discusses the licensing and control over publications and publishers. The licensing requirement of publications for the printed press, broadcasting and the internet may affect the ability to publish and the content of the publications.

If a person published, restrictions may be imposed by ascribing liability. Subsequent chapters will look at different competing interests in restricting publications. Chapter four examines restrictions on publications in the interest of deserved reputation. In the context of the democratic frameworks, matters of public

interest receive some exceptions and priorities over deserved reputation. Judges in awarding high amount of damages may inhibit publications.

The next interest examined is the interest of security and public order. Some of the laws use to suppress publications are the Sedition Act 1948 and the Internal Security Act 1960. How judges balance the need to enable free discussion of public interest with the need to maintain public order is important in determining the state of democracy and freedom to publish.

Chapter six discusses restrictions made in the interest of secrecy such as restrictions under the laws on official secrecy under the Official Secrets Act 1972. Here again performance of the judges in balancing the need of secrecy in the operation of the government with the interest of the populace to inspect and to be informed of the working of the government is important.

Chapter seven examines the interest to put restrictions on publications in the interest of the administration of justice. The power of contempt of court given to the judges to ensure a credible and efficient administration of justice. However, it is also of interest of the populace to know the performance of the judges and to provide feedback or criticism on the performance. Those are competing interests that need to be taken account under the democratic framework. However, judges should not be overwhelmed by such interests to the extent of subjugating altogether constitutional democracy.

Chapter eight provides Islamic perspective on restrictions for publications under the democratic framework. This may be useful to ensure that the law related to publications would be consistent with Islam.

Chapter nine provides the conclusion reached by this study. It contains an overall evaluation, analysis and proposals made in previous chapters.