

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations
Promoting human rights by protecting those who defend them

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Monday, September 8, 2014

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Attorney General Tan Sr. Abdul Gani Patail,
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Dear Sirs:

Re: Wrongful Prosecution of Lawyer N. Surendran

I am writing on behalf of Lawyers' Rights Watch Canada ("LRWC"). LRWC is a committee of lawyers that promotes human rights and the rule of law internationally through education, legal research and advocacy for lawyers and other human rights defenders in danger because of their advocacy. LRWC has special consultative status with the Economic and Social Council of the United Nations. More information about the work of LRWC is available at <http://www.lrwc.org>.

Background:

N. Surendran is a Malaysian lawyer and politician from the People's Justice Party and is currently in opposition as the Member of the Malaysian Parliament for Padang Serai. He is also the lawyer representing Anwar Ibrahim, the Leader of Opposition of Malaysia, in politically charged proceedings involving charges of sodomy. It is notable that prosecutions of Anwar Ibrahim have been ongoing since 2000 when he was first summarily arrested and removed as Deputy Prime Minister in the government of Mohamed Mahathir.

Mr. Surendran replaced Karpal Singh as Mr. Ibrahim's lawyer following Mr. Singh's tragic death in a car accident in May 2014. Mr. Ibrahim was originally acquitted, but in March 2014 the acquittal was overturned and he was convicted and sentenced to five years' imprisonment in

March 2014. He is free awaiting his October appeal. The March conviction meant that Mr. Ibrahim was unable to run in a local election. In a recent statement, Mr. Surendran said that the appellate court did not give proper consideration to claims that the sodomy charge was brought in order to prevent Anwar Ibrahim from running in a local election. The conclusion that the sodomy prosecution was politically and wrongfully intended to achieve a political purpose unrelated to criminal law is reasonable and perhaps inescapable.

As a result of this statement, made in the proper representation of his client, on 19 August 2014 Mr. Surendran was charged under the *Sedition Act*, which makes it a crime to bring “into hatred or contempt or to excite disaffection against the administration of justice in Malaysia.” After pleading ‘not guilty’ to this charge, he was slapped with a second charge of sedition for words allegedly uttered in a YouTube video posted on 8 August 2014 in which he stated that the sodomy proceedings against Mr. Ibrahim were “an attempt to jail the opposition leader of Malaysia”. If found guilty he will face the prospect of a fine and/or imprisonment up to three years for a first offence and up to five years for subsequent offences. It must also be noted that renowned human rights lawyer Karpal Singh, prior to his death in suspicious circumstances, had also faced charges of sedition for words uttered in open court in defence of his client Mr. Ibrahim, just as he had in 2000.

LRWC views these prosecutions for sedition as politically motivated attempts to prevent lawful speech and legitimate democratic dissent, contrary to both Malaysian law and Malaysia’s international law obligations arising from under the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

Defining Sedition

Sedition laws are now widely viewed as political tools, rather than criminal laws, and have been repealed or go unused in many countries. For example, the last charge of sedition in Canada was over 50 years ago in *Boucher v. The King*, [1951] S.C.R. 265. In setting aside the conviction, Lord Justice Watkins observed that the courts in all countries had rejected criminality based on the mere creation of ‘disaffection’, ‘discontent’, ‘ill-will’, or ‘hostility’ between different classes of subjects, concluding that “the seditious intention upon which a prosecution for seditious libel must be founded is an intention to incite to violence or to create public disturbance or disorder against the sovereign or the institutions of Government.”

The Malaysian *Sedition Act 1948* defines seditious intent in section 3, including to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government; to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia; and to promote feelings of ill will and hostility between different races or classes of the population of Malaysia. Section 4 makes it an offence to do, attempt to do, or conspire to do anything that has seditious intent, to utter any seditious words, or to publish, print, sell, possess, distribute or reproduce any seditious publication.

The Malaysian courts have interpreted these sections very broadly, making conviction an almost inevitable result of prosecution. For example, in order to obtain a conviction it is not necessary for the prosecution to prove that the words uttered did or even could have had any of the results described in section 3, only that the words or equivalent words were uttered. It is also clear from the jurisprudence that no defence lies in proof that the statements were true, nor that they were uttered without intent to incite seditious thought (see *P.P. v. Ooi Kee Saik & Ors*). In the result,

in Malaysia sedition is essentially an absolute liability offence that can be and is used to quash political dissent.

Purposive Interpretation - National Security

The original purpose of sedition laws is to protect national security. A restriction is not legitimate if its genuine purpose or effect is to protect interests unrelated to national security, including to protect a government from embarrassment or exposure of wrongdoing. The Johannesburg Principles further provide that for expression to be punishable as a threat to national security, it must satisfy three requirements: (1) the expression is intended to incite imminent violence; (2) it is likely to incite such violence; and (3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Under any reasonable interpretation, the breadth of interpretation of seditious intent in Malaysia – free as it is from any concern of intent or effect – goes far beyond the purpose of the law and cannot be justified.

Prosecution of Privileged Speech:

Under the common law and parliamentary traditions, both of which Malaysia received from Great Britain on independence, certain forms of speech that are considered fundamental to the operation of democracy and the rule of law are protected or ‘privileged’ from prosecution. Politically this includes comments made by members of Parliament in the House. In the context of the administration of justice, it has long been recognized that “[n]either party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office.” [see *R. v. Skinner*, 1772]. In fact, the Malaysian Bar Council, in supporting the application of absolute privilege in Malaysian courts, found *no reported precedent* in the British Commonwealth where a lawyer had been criminally charged for statements made during judicial proceedings.

Accordingly, LRWC views the use of sedition charges against opposition politicians and their defence counsel as not merely a political abuse of an overbroad criminal provision, but as an attack on the rule of law itself and the ability of lawyers to act as fearless advocates in the defence of clients accused with such crimes. The sedition charges against Mr. Surendran, like those against Mr. Singh, are intended not only to punish political speech but to undermine the role of defence counsel in an adversarial justice system, who has an obligation to fearlessly raise every issue, advance every argument, and ask every question, however distasteful, which he or she thinks will help his client’s case. These charges therefore constitute denials of fundamental justice that undermine faith in the justice system as well as the political system.

Universal Declaration of Human Rights

Article 10 of the UDHR provides that “everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. Article 11, paragraph 1 of the UDHR further states that “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense”. Among those guarantees, according to the United Nations Basic Principles of the Role of Lawyers, is that counsel “shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances....”

As a member of the United Nations, Malaysia is bound to uphold these human rights standards. As matters of customary international law they are automatically incorporated into domestic common law and may be applied by domestic courts (see for example Lord Denning in *Trendex Trading Corporation v Central Bank of Nigeria* [1977]), and the Malaysian Constitution provides at Art. 160 for the inclusion in Federal Law of “any custom having the force of law”.

Conclusion

Charging political leaders and journalists with sedition strikes at the heart of free democratic speech. Prosecuting the lawyers that defend those figures undermines the integrity of the rule of law and respect for the administration of justice by attacking the very institutions that are intended to uphold and apply the law. We ask the support of the Government of Canada, the United Nations and the Human Rights Committee, as well as all members of the UN to urge the Government of Malaysia to comply with its international and domestic obligations, to recognize and promptly address the deficiencies in and abuse of sedition laws, and to bring to an immediate end the prosecution of Mr. Surendran.

Respectfully,



Gavin Magrath, Barrister and Solicitor

Copied to:

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