

CHAPTER II

A LEGAL ANALYSIS OF SUBVERSION

Subversion is one of the most controversial areas in the constitutional law of Malaysia. There is yet to be a legal definition of subversion in Malaysia. Courts in Malaysia are very reluctant to give a clear, specific and direct definition of the term 'subversion.' Judges in the Malaysian Courts have taken a very evasive attitude and approach when deciding cases involving subversive elements. As a result of this lacuna many difficulties had arisen in categorising whether a person falls under this class or order.

What actually is 'subversion'? Who can be called a subversive element? The government at present seems to be fond of using the term 'subversive elements' in their propaganda work to eliminate subversion. These arbitrary accusations on the part of the government had created fear and anxiety in the opposition parties¹ in Malaysia and inhibits the healthy process of opposition in the country. It is within the scope of this study to try and

¹ Before the start of Indonesian Confrontation, Dr. Lim Cheng Eui (an opposition member then) appealed to the Prime Minister (Tengku Abdul Rahman), for the sake of parliamentary democracy, "to adopt a fatherly attitude and encourage the growth of healthy opposition in this country instead of merely condemning other parties as subversive, communal, racist, chauvinist or Communist." Straits Times, May 1, 1962.

draw the line of distinction between what is subversion and what is not. Under this chapter it is proposed to make a comparative study of the American position with the Malaysian position.

The term 'subversion' comes from the word 'subvert'. The New National Dictionary by Collins² gives the meaning of 'subvert' as to overthrow, especially a government. The term 'subversion' is the act of overthrowing a government. However, this definition cannot be accepted as a legal definition as it is inconclusive and very vague. It is therefore necessary to consider the definition through other methods.

The Position in the U.S.A.

The United States of America, which is situated far from the Communist countries, is not immune to subversion. In January 25, 1941 the assembly and senate passed a resolution setting up a committee of three Senators and four assemblymen and empowering it to investigate, ascertain, collate and appraise all facts causing or constituting interference with the National Defence of California.³ The Tenney Committee as it is called, was given the task of investigating subversive activities in California. Because of its strategic

² Collins, The New National Dictionary, London and Glasgow p. 483.

³ Walter Gillborn, The States and Subversion, Cornell University Press, New York 1952.

location California is a main target for the Communist Conspiracy, and the Communist agents were spreading their insidious propaganda from positions of influence and power throughout the state.

The Committee's appraisal of the nature and extent of the Communist movement runs as follows:-

"..... a world wide Communist conspiracy directed from Moscow has swept Eastern Europe and is moving ahead in China and other Asiatic Countries. The grand objective of this conspiracy is to capture America, and war between Russia and the United States is inevitable and imminent. The Communist Party in the United States is the local agent of this world wide conspiracy, and its basic aim is the abolition of our present system of government and the establishment of a Soviet dictatorship in its place, thus, every Communist in the United States is a potential traitor, saboteur and espionage agent of Soviet Russia"⁴

The objectives of the Committee were to expose subversive activities and to introduce legislations from time to time on the

⁴ Ibid., p. 21.

subject. In order to achieve these objectives the Committee assumed a duty to compel the public at large to comply with its standards of conduct with reference to Communists.

The first step taken by the legislature towards the problem of regulating subversive activities was taken in 1952. It resulted from the emergency created by the Korean War. The Governor of California issued a proclamation in September, 1950 calling the legislature into an extraordinary session with the purpose to "consider and act upon legislation relating to civil defense, disaster relief and subversive activities, etc."⁵ There was a nationwide allegation that Communists are in the government. A number of bills and proposed constitutional amendments calling for loyalty oaths and investigations and providing for the compulsory registration of members of subversive groups were immediately introduced.

The constitutional amendment provided that no person or organization shall advocate the overthrow of the government of the United States by force or violence or other unlawful means or advocate the support of a foreign government against the United States. However the legislative proposals for compulsory registration of members of subversive groups were dropped when Congress passed the Internal Security Act of 1950.⁶

⁵ *Ibid.*, p. 49.

⁶ *Ibid.*, p. 51.

Likewise, in Illinois, the Broyles Commission was set up to investigate subversive activities throughout the State. It is to be noted that during the Commission investigations, Illinois was not devoid of laws designed to curb subversion. It is unlawful in Illinois to advocate the reformation or overthrow, by violence or other unlawful means, of the representative form of government secured by the constitution of Illinois.⁷ It is unlawful for any person to publish or knowingly sell or distribute any printed matter which advocates the violent overthrow of the constitutional form of government.⁸ In addition, it is unlawful for any person to organize or join any society, the object of which is to advocate the reformation or overthrow of the existing form of government by violence or other unlawful means.⁹

Although there are many laws against subversion, the American State legislatures had enacted statutes containing well over 300 enactments aimed at curbing subversive activities. However, one hesitates to define the term 'subversion'. Subversion says the legislatures, is to be stifled or investigated. But at the very least, the general agreement among the legislatures, is that

⁷ See Ill. Rev. Stat. c 38, Sect. 558 (1947), constitutionally sustained in People v. Lloyd, 304 Ill. 23, 136 N.E. 505 (1922).

⁸ Ibid., sect. 559.

⁹ Ibid., sect. 560.

subversive activities can be classified under certain category.

Hence the American position can be summarised as follows. Subversive activities include:

- i. The use of violent or otherwise unconstitutional means to change the country's political or economic institutions.
- ii. The commission of espionage, sabotage, and other crimes of ^{stealth} stealth in behalf of foreign enemies or domestic cliques.
- iii. The bearing of arms against the United States, or other affirmative behavior in aid of hostile forces; and
- iv. The entry into a conspiracy to perform these acts or the actual though unsuccessful attempt to do them.¹⁰

From the summary above one can analyse the American position of 'subversion' as the act of overthrowing a constitutionally constituted government through unlawful means. It should be noted that to bring certain acts as falling under the ambit of subversion one common essential ingredient that must be fulfilled is that the acts committed are of a violent nature.

The Malaysian Position

As far as the Malaysian position is concerned there are no attempts on the part of the legislature as well the courts to define or at least give a clear position of subversion or subversive activities. Not a single piece of legislation intending to curb or control subversion has defined the term. Therefore, in trying to discover what subversion is, the provisions of the legislation would not be helpful.

However, the relevant provision is contained in Part XI of the Malaysian Federal Constitution which provides special powers against subversion and emergency powers. The provision¹¹ provides that if an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:-

"to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property;¹² or to excite disaffection against the Yang Di Pertuan Agong or any government in the Federation;¹³ or to promote feelings of

¹¹ Malaysia, Federal Constitution, Article 149 (1).

¹² Ibid., Clause (1) (a).

¹³ Ibid. Clause (1) (b).

ill-will and hostility between different races or other classes of the population likely to cause violence;¹⁴ or to procure the alteration, otherwise than by lawful means, of anything by law established;¹⁵ or which is prejudicial to the security of the Federation or any part thereof,¹⁶ any provision of that law designed to stop or prevent that action is valid

The above provision which is intended to control subversion sets out the action that has been taken or threatened. It can be interpreted that these actions can amount to acts of subversion. The provision gives the power to the government to promulgate laws against these actions notwithstanding that it is inconsistent with any of the provisions of articles 5,¹⁷ 9¹⁸ or 10.¹⁹ These are articles enshrining the fundamental liberty of individuals.

The Act which was passed under article 149 (1) in the

¹⁴
Ibid., Clause (1) (c).

¹⁵
Ibid., Clause (1) (d).

¹⁶
Ibid., Clause (1) (e).

¹⁷
Fundamental liberty of a person.

¹⁸
Prohibition of banishment, and freedom of movement.

¹⁹
Freedom of speech, assembly and association.

Internal Security Act²⁰ which is meant to fight subversion and anti-national acts. The long title of the Act states that "an Act to provide for the internal security of Malaysia, preventive detention, the prevention of subversion, the suppression of organised violence against persons and property in specified areas of Malaysia, and for matters incidental thereto." By this Act the government was given the power of preventive detention of subversive elements²¹ and terrorists.²²

It is useful to refer to this Act in seeking the meaning of subversion. The preamble of the Act begins:-

"whereas action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia to cause, and to cause a substantial number of citizens to fear, organised violence against persons and property; and to procure the alteration, otherwise than by lawful means, of lawful government of Malaysia by law established and whereas the action taken and threatened is prejudicial to the security of Malaysia, and whereas Parliament considers it necessary to stop or prevent that action"

²⁰ 1960 (no. 18).

²¹ Internal Security Act 1960, Sect. 8(1).

²² The word terrorists is defined under sect. (2)(a-c) of the Internal Security Act 1960.

It seems that the legislature adopted clause (a), (d) and (e) of article 149 of the Federal Constitution. It would suffice if a person causes a substantial number of citizens to fear or organised violence against persons and property. In other words, it is not necessary for a person to actually commit overt acts of violence so as to be apprehended under this Act.

In regards to the next requirement, the government has a very wide and arbitrary power²³ of arresting a person whose action, taken and threatened, is prejudicial to the security of Malaysia.

Under the Act the Minister has a subjective satisfaction of determining whether a person has acted in any manner prejudicial to the security of Malaysia or to the essential services thereof or to the economic life thereof. In deciding to detain a person under the Act, the Minister must give grounds for the detention, only these grounds are not necessarily objective. The court cannot go behind the detention order to question whether there are sufficient grounds.²⁴ Therefore, it is left to the discretion of the Minister

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In February, 1976 the Malaysian Bar Council called upon the Attorney-General to release five men who were re-arrested under the Internal Security Act after they were acquitted and discharged by the High Court, without their defence being called, for the alleged murder of a barber. The secretary of the Bar Council said that the re-arrest immediately after their acquittal was "against the concept of the rule of law, particularly when no reason for such arrests was given." *The New Straits Times*, Feb. 1976.

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Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia (1969)
2 MLJ 129.

to term whether the act of a person is subversive.

So in comparing the Malaysian position with the American, one can safely conclude that there is a very wide contrast between the two. In America, the term 'subversion' has a narrower meaning as compared to Malaysia. Subversion in the United States of America is bent towards the unconstitutional means of overthrowing or replacing the legally or constitutionally constituted government. It need not be so in Malaysia.

Another major difference is that in America the laws against subversion are set out in statutes and it is much easier for the authority to decide on what subversion is. The position is vague in Malaysia, especially with the provision of "acting in a manner prejudicial to the security ^{of} Malaysia"²⁵. Under this heading any action taken by persons can be deemed as acting prejudicial to the security of the country. Thus it can be seen that subversion in Malaysia means not only an attempt to overthrow the government but also to act prejudicial to the economic well being of the country or to cause fear or violence against persons or property. The subversive activity need not be investigated as practised in America.

²⁵ Internal Security Act. Sect. 8(1).