

THE PENAL CODE & CRIMINAL PROCEDURE CODE (AMENDMENT) ACT 1983 (ACT A 549)

The Penal Code and Criminal Procedure (Amendment) Act 1983 (hereinafter 'the Amendment Act') received Royal Assent on 18th February 1983 and became law upon being gazetted on 19th February 1983.

General Features

The amendment Act introduced significant changes in the Penal Code (F.M.S. Cap. 45) and the Criminal Procedure Code (F.M.S. Cap. 6).¹

Section 225 of the Penal Code is amended by removing references to imprisonment for life in paragraphs 4 and 5 of section 225. This is to clarify the position, for under section 3 of the Criminal Justice Ordinance 1953² any sentence of life imprisonment is to be deemed a sentence for a term of twenty years. In paragraph 4 of the section 225 of the Penal Code the expression of "imprisonment for life" is therefore superfluous, whilst under paragraph 5 of the expression "imprisonment for life or imprisonment for 2 terms not exceeding ten years" is now amended to bring it into line with the period of twenty years.

The section which generates a far greater interest and is of greater significance is the introduction of the new section 298A to the Penal Code. This new section introduces an offence which is couched in very wide language and is highly ominous in respect of the exercise of religious freedom in Malaysia.

The New Offence: Basic Features

Basically, section 298A makes it an offence for any person to cause or attempt to cause, on grounds of religion, disharmony, disunity, or feelings of enmity, hatred or illwill between persons or groups professing the same or different religions. It is also an offence for any person, on the grounds of religion, to prejudice or attempt to prejudice, or to do anything which is likely to prejudice, the maintenance of harmony or unity between persons or groups professing this same or different religions.³ This broad expression of the offence is followed by seven sub-sections that delineate the scope of the offence and lay down the punishment attached to the offence. The section provides for imprisonment for a term which may ex-

¹This note is modest in its scope and there is no intention to cover all ramifications of the Amendment.

²Section 3 reads "where any person is treated as having been sentenced or is hereafter sentenced to imprisonment for life, such sentence shall be deemed for all purposes to be a sentence of imprisonment for twenty years."

³Section 298A(1) (a) and (b).

tend to three years, or with fine or both. An increased penalty of five years imprisonment, or with fine or with both is provided under section 298A(2), if the offence is committed in or in the proximity of any place of worship or any assembly engaged in the performance of religious worship or religious ceremony.

Clause 4 of the Amendment Act introduces the new offence into section 130 of the Criminal Procedure Code, making it an offence cognisable by the Courts only by a complaint made by the Public Prosecutor or by some officer empowered by him on that behalf.

The Actus Reus Defined

The conduct of persons which attracts the operation of section 298A is widely defined:

- S. 298A (1) Whoever by words, either spoken or written, or by signs, or by visible representations, or by any act, activity or conduct, or by organising, promoting or arranging, or assisting in organising, promoting or arranging, any activity, or otherwise in any other manner —
- (a) causes, or attempts, to cause, or is likely to cause disharmony, disunity, or feelings of enmity, hatred or ill-will; or
 - (b) prejudices, or attempts to prejudice, the maintenance of harmony or unity, on grounds of religion, between persons or groups of persons professing the same or different religions.

From the breadth of the language used this is clearly intended to be an all embracing description of the proscribed conduct. Anxiety that the generality of the offence may be ambiguous in its application, prompted its further sub-division under three subsections: section 298A(3), (4) and (5). If any of these sub-section applies, a presumption arises that the general offence under section 298A(1) has been committed. Basically, the conduct which brings about the operation of the presumption of commission of the offence is:⁴

- (a) When any person alleges or imputes in any manner specified under section 298A(1) that any person or person who professes a particular religion has ceased to do so or should not be accepted as so professing that religion or belonging to it any more (Section 298A(3) (a) (i) (ii) (iii)).
- (b) When any person alleges or imputes in any manner specified under section 298A(1) that anything lawfully done by any religious official or authority appointed under any written law in the exercise of any the exercise of such power or discharge of any duty is not acceptable to such a person or that it does not accord with or fulfil the requirements of that religion. (Section 298A(3) (b)).
- (c) Where on the ground of religion a person who professes any particular religion uses for burial or cremation of a human corpse in a place other

⁴The full wordings of the sub-sections should be consulted.

- than the one which is lawfully for such persons professing that religion (Section 298A(4)).
- (d) The same situation as (c) described above, but including such advice to, or instigation of, other persons to conduct themselves in the manner prescribed under (c) and the questioning of usage of a place for worship which has been lawfully used for such purpose by persons professing that religion (Section 298A(4) (b) (i), (ii), (iii)).
 - (e) A person who is not a duly appointed religious official or religious authority established under any written law who purports to exercise any powers, or to discharge any duty or perform functions of a religious character. (Section 298A(5)).

The commission of any of the acts described above from (a) — (e) would attract a presumption that the provisions of section 298A(1) have been contravened. The use of this presumption is clearly to simplify the task of the prosecution. This is an example of an "evidential presumption"⁵ created by statute. The effect of the operation of the presumption as against the accused person would be:

- (1) The accused must give some reasonable evidence to exculpate himself, otherwise the issue will be found for the prosecution;
- (2) If the accused gives some reasonable evidence in rebuttal, it is for the Court as a finder of fact to decide on the balance of probabilities whether the facts are as he alleges; if so the presumption is rebutted.⁶

Additionally, the prosecution's task is further alleviated by section 298A(7) which reads:

"It shall not be a defence to any charge under this section to assert that what the offender is charged with doing was done in any honest interpretation of, any precept, tenet or teaching of any religion."

The other defences under Chapter 4 of the Penal Code, however are not taken away.

The Saving Provision: Subsection (6) of section 298A clearly removes the operation of the section from any religious authority or person acting in pursuance of or in accordance to any ruling or decision given by such authority as is established or conferred power under any written law. It is therefore crucial, for any case to come within the purview of the section 298A, that the authority or person committing the offence has no legal sanction by a written law.

⁵See Glanville Williams, *Criminal Law — The General Part*, 2nd Edition (Stevens), at p. 882; See also Bridge in 12 M.L.R. 273.

⁶*Ibid.* at p. 883.

On the Question of Interpretation of Any Aspect of the Religion

The statute provides for further simplification of the prosecution's task by section 298A(8) by enjoining the court in any proceedings under the new section where any question arises with regard to the interpretation of any matter in relation to any religion to accept the interpretation given by any religious authority referred to under subsection (6) of section 298A. In any religion other than Islam it is unclear who is the religious authority who is qualified to give such an interpretation.

Amendment to the Criminal Procedure Code: Section 4 of the Amendment Act inserts into section 130 of the Criminal Procedure Code a new section 298A and amends the 1st Schedule so that the offender under the new section is arrestable without warrant. The offence is also made non-bailable and non-compoundable.

A Short critique of the Amendment Act

The Amendment Act bears signs of its hasty passage, from the time of its proposal by the Government to its inclusion into the statute book.⁷ Though the Government held discussions with representatives of various non-Muslim groups on three occasions,⁸ it is clear that the Bill went through without any changes, notwithstanding the fears and anxieties expressed by these various groups.⁹

The wide applicability of the new offence to all religious faiths, and the consequential restriction it imposes on the right of propagation of religion may offend against Article 11(1) of the Federal Constitution. Although Article 11(4) allows the control or restriction of the propagation of any religious doctrine among persons professing the Muslim religion, the power to pass such laws is confined to State Legislatures (except in the case of the Federal Territory). With the wide definition of the offence under section 298A(1), it is possible that an attempt to propagate or promote one's faith among adherents of other religions will be considered as falling within the new offence. The claim by the Government that the Amendment Act is public order legislation and hence saved by Article 11(5) of the Federal Constitution represents a wide interpretation of the meaning of "public order";¹⁰ this interpretation whittles away the whole sphere of freedom of religion, as most Acts may as such be characterised as public order statutes.

⁷The public proposal of it was made by the Prime Minister at the 33rd UMNO General Assembly in September 1982. For a trenchant sociological critique and brief background of the Amendment Act, see Chandra Muzaffar, 'Controlling Religion' *Aliran Quarterly* Vol. 2, No. 4, p. 5.

⁸*Star Report* on the Dewan Rakyat Proceedings dated 11th December 1982.

⁹The Deputy Prime Minister considered that it is in the exercise of Federal powers to legislate on this as a matter of public order. See *Star Report* cited above.

¹⁰Compare the position in India: See M.P. Jain, *Indian Constitution* (Tripathi — 1978) at pp. 451-452.

Secondly, the omission of the words "deliberate intention" from the section (as compared to the present section 298 of the Penal Code) removes a condition of criminal liability which the original framers of the Penal Code deemed to be of vital significance. The Indian Law Commission commenting on the words "deliberate intention" said:

The intention to wound must be deliberate, that is, not conceived on the sudden in the course of discussion, but premeditated, it must appear not only that the party, being engaged in a discussion with another on the subject of the religion professed by that order, in the course of the argument, consciously used words likely to wound his religious feelings, but that he entered into the discussion with the deliberate purpose of so offending him.¹¹

The omission of the requirement of *mens rea* from the offence may have serious consequences for the freedom of profession, practice and propagation of religion.¹²

Thirdly, though it may be clear for those of the Muslim faith as to the identity of a religious authority,¹³ the term is extremely vague in relation to the heterogeneous groupings of non-Muslim faiths. This issue is a critical one as to the operational effects of the Amendment Act: Section 298A(5), (6) & (8).

In conclusion, the Government's hasty action in ensuring the passage of this new legislation is based on a simplistic belief of the efficacy of the law in solving a difficult political, communal and religious issues.¹⁴

There is a certain "naive instrumentalism" involved in the fashioning of such a law, and one is left with the question whether the erosion of our freedom of religion may be too severe and the cost to democracy too great.¹⁵

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¹¹Cited in Gour's *Penal Code of India*, 9th Edition, Vol. II (1972).

¹²The offence created appears to be of strict liability in nature.

¹³The various State Religious Councils set up under the State Administration of Muslim Law Enactments.

¹⁴See Chandra Muzaffar "Controlling Religion" *Aliran Quarterly* Vol. 2, No. 4, p. 5.

¹⁵See R.S. Summers, "Naive Instrumentalism and the Law" in *The Law, Morality and Society: Essays in Honour of H.L.A. Hart*, Edited by P.M.S. Hacker and J. Raz (Oxford — 1977).

