

To:

Hon. President of the Constitutional Court of the Republic of Indonesia

Case No : 2/PUU-VII/2009

Petition to Review Article 27 (3) Law No 11/2008 against the Indonesian Constitution 1945

OPINION

EXECUTIVE SUMMARY

Advising Solicitors have been instructed to explain the treatment of defamation on the internet under the laws of Singapore and to give an opinion on her government's policies, with particular emphasis on whether a new category of defamation has been created for the internet.

It is the opinion of the advising solicitors that the defamation laws of Singapore apply in same manner to the internet as to traditional medium. The only exception is the conferment of immunity to network service providers in the Electronic Transactions Act.

When dealing with the internet, Singapore's parliament has only created a new defence.

FACTS:

The Indonesian government introduced a bill related to electronic information and transaction in May 2008. This is Bill 11 IET, on Information and Electronic Transaction. Article 27(3) of this bill prohibits the distribution, transmission and/or enabling of access to insulting or defamatory materials stored electronically. Read together with Article 45(1), a new crime for defamation on the internet is created. The offence is punishable with imprisonment of not more than 6 years and/or a fine of 1 billion rupiah.

Prior to the introduction of the Bill, defamation is already a criminal offence under Chapter XVI of the Indonesian Penal Code (KUHP). For the various categories of defamation, the penalties range from imprisonment for a maximum of 9 months to a maximum of 4 years. Fines are varied but the maximum is 4,500 Rupiah.

The bill has since been enacted into law. This is Law No. 11 year 2008 on Information and Electronic Transaction.

The Indonesian government claims that it has studied legislations related to E-commerce and internet in Singapore. When drafting what is now Law No.11 year 2008, it has borrowed liberally the island republic's policies.

Article 27(3), Law No. 11 year 2008 is now being challenged in Indonesia's Constitutional Court for infringing the Indonesian Constitution.

Given Indonesian government's claim that Law No. 11 year 2008 follows Singapore's internet regulation and policies, the petitioners consider it appropriate to adduce evidence or opinion on Singaporean law relating to defamation and the internet.

INSTRUCTIONS

Advising solicitors have been requested to:

1. explain or summarise the law of defamation in relation to the internet in Singapore, in particular, criminal defamation; and
2. opine on:-
 - i. whether a new and separate category of defamation on the internet has been created; and
 - ii. the legislative intention or government policy on this subject.

SUMMARY OF THE LAW

In Singapore, defamation can either be commenced as a civil action (“civil law”) or a criminal action (“criminal law”).

The civil law on defamation in Singapore is common law, supplemented by the Defamation Act (Cap 75).

Under civil law, defamation is separated into slander and libel. The main distinction between them is that for libel to occur, the defamatory information has been reduced into writing or affixed in a “permanent” form. It is commonly accepted that information in emails and posted on websites are publication in permanent form.

Civil liability for defamation captures not only the author of the defamatory material but different participants in the chain of publication. In traditional print media, they include the editors, publishing house and printers. Mere mechanical publishers such as libraries, distributors, newsagents, retailers are also liable. However, they can avail themselves of the defence of “innocent dissemination”.¹

Criminal defamation is governed by Chapter XXI, Penal Code (Cap 224). Defamation is defined in s499, of the Code. Evidence that this general defamation applies to the internet is found in “Explanation 5” of the same section. The explanation reads:

“An imputation may be made or published in written, electronic or other media”.

There are no specific provisions dealing with defamation on the internet in the Penal Code.

The punishment for criminal defamation is imprisonment for a maximum period of 2 years, or a fine or both. No ceiling has been placed on the quantum which a guilty person can be made to pay.

Internet was introduced to Singapore around 1996. In 1998, when making the law related to e-commerce, the government has decided to introduce a defence for network service providers. This is Part III, Electronics Transactions Act (Cap 88). Section 10 of this Act grants immunity to “network

¹ *Viszetelly v Mudie’s Select Library Ltd* (1990) 2 Q.B. 170 (CA)

service providers” from civil and criminal suits for materials posted by 3rd parties if the network service providers merely provided technical means by which they can be accessed. “Network service providers” is not defined in the Act but is generally considered to refer to common carriers such as telcos and not to content hosts.

OPINION

It has not been Singapore’s legislative policy to create a new category of defamation for the internet, be it civil or criminal. This is evident from the law itself. The government had ample opportunities to do so, especially, when:

- (1) introducing the Electronic Transactions Act in 1998 and its amendment in 2004; and
- (2) amending the Penal Code (Cap 224) with the Penal Code Amendment Act 2007

had it been necessary. The fact that it did not is proof that the government considers the law of defamation flexible enough to accommodate the new medium. Most of importantly, when the Ministry of Home Affairs released its “Consultation Paper on the Proposed Penal Code Amendments” on 8 Nov 2006, it made clear that it was going to expand the scope of s499, the section dealing with criminal defamation.

For defamation in civil proceedings, the government has examined this issue when the Electronic Transactions Act (Cap 88) was introduced in 1998. s10 of the Act protects the network service providers from both civil and criminal liability. Another opportunity came when s10 was amended in 2004, by the Electronics Transactions Amendment Act 2004. The Amendment Act sought to amend only s10. It introduced the issue of copyright in s10(2).

For criminal defamation, not only has the Singaporean government examined the issue when enacting and amending the Electronics Transactions Act, it expressly examined the issue of criminal defamation with the Penal Code Amendment Act 2007. This is 9 years after the Electronics Transactions Act was first introduced.

The Penal Code Amendment Act 2007 was introduced to the public by the Ministry of Home Affairs on 8 Nov 2006 in its Consultation Paper. Feedback or submissions by the public was closed on 8 Dec 2006. The bill was presented to Parliament almost a year later on 17 Sep 2007. This was its first reading. It was read a second time on 22 Oct 2006 and was passed on 23 Oct 2007. The Ministry had more than 9 months to reconsider its position regarding the amendment on the defamation provision, s499. The public and Members of Parliament had, at least, one month each to consider this issue and submit their opinions.

In the Consultation Paper, it was made known that one of the aims is to bring the Penal Code up-to-date. Technological developments were taken into account. The proposed changes were categorised into:

- “A. Offences
- i) Expand and modify scope of existing offences
- ii) Introduce new offences
- iii) Repeal certain offences

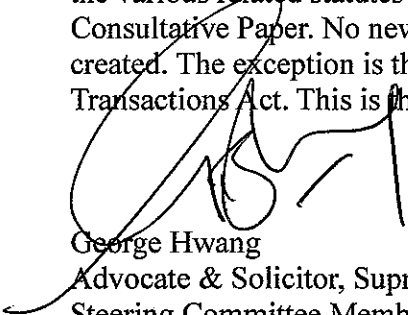
- B. Definitions, explanations, expressions
Update and clarify definitions, explanations and expressions
- C. Penalties
 - i) Review penalties of existing offences
 - ii) Set penalties for new offences

The paper expressly mentioned that the Bill seeks to expand the scope of s499, the provision on defamation. This is done through the introduction of "Explanation 5". This ensures that "the Penal Code keeps abreast of changes, especially technological changes". The bill could have introduced a new offence for defamation on the internet, which it did not.

Further, s500, which deals with punishment for defamation was left untouched. The government could have increased the penalty, like it did for some other provisions related to freedom of expression e.g. illegal assembly.²

The Penal Code Amendment Act 2007 (No. 51 of 2007), is the most extensive review of the Penal Code in 23 years. The Ministry of Home Affairs not only amended s499 but also singled it out in its Consultation Paper. This means that the issue of defamation on the internet has been on its "radar" prior to the release of the Consultation in Nov 2006. Other indications that it has studied the issue of electronic communications and criminal law are the amendments to the definitions. They include "electronic records". Instead of defining the term, an express cross-reference to the Electronics Transactions Act is made.

Therefore, we conclude that Singaporean government's policy on defamation on the internet is that the existing law is adequate. Such a policy has withstood the test of time. This is borne not only by literal interpretation of the laws passed by Parliament but also when one considers the legislative history of the various related statutes and provisions and finally, what the Ministry of Home Affairs revealed in its Consultative Paper. No new categories for defamation, especially, criminal defamation has been created. The exception is the creation of a defence for network service providers under the Electronic Transactions Act. This is the creation of a defence not offence.



George Hwang
Advocate & Solicitor, Supreme Court of Singapore
Steering Committee Member, International Media Lawyers Association
Member, Singapore Working Group for ASEAN Human Rights Mechanism (MARUAH)

Alfred Dodwell
Advocate & Solicitor, Supreme Court of Singapore
Member, S.E. Asia Media Legal Defense Programme
22 February 2009

² s143, Penal Code as amended by Penal Code Amendment Act 2007, First Schedule, Miscellaneous Amendments to Penalties, paragraph 50.