

Regulation of Hate Speech in Malaysia

Introduction

Hate speech is a conduct that is often frowned upon by the society, yet its regulation in Malaysia remains to be loosely provided for both offline and online media platforms. According to the United Nation's Strategy of Plan and Action on Hate Speech, hate speech is defined as any kind of communication in speech, writing, or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are.¹ In other words, such communication attacks one's religion, ethnicity, nationality, race, colour, descent, gender, or other identities that one may hold. Until now, there are no Malaysia laws that explicitly define hate speech. One contentious question that is often brought up is whether hate speech falls within the ambit of freedom of speech?

Hate speech in the context of freedom of speech and expression

Article 10(1)(a) of the Federal Constitution grants every person the right to freedom of speech and expression. There are several limitations to such right as provided under clause 2(a). However, the clause does not expressly mention hate speech as one of its limitations. It appears that regulation of hate speech in Malaysia must derive indirectly from some other legislations. This may be insufficient to cover numerous possible forms of hate speech on both offline and online platform, considering that Malaysia is a democratic society which strongly emphasizes the significance of expressing honest opinions. Therefore, it is crucial to review the existing laws and punishments regulating hate speech in Malaysia.

Penal Code

Currently, one legislation that indirectly regulates hate speech in Malaysia is the Penal Code.² For hate speech on grounds of religion, section 298 of the Act provides that the utterance of words, making of sounds and gestures, or placing of objects with deliberate intent to wound the religious feelings of any person is an offence punishable with imprisonment for a term which may extend to one year or with fine or with both. Meanwhile, section 298A states that whoever causes among others, disharmony, disunity, or feelings of enmity, hatred or ill will, or prejudicing, the maintenance of harmony or unity, on grounds of religion will be punished with imprisonment for a term of not less than two years and not more than five years.

One issue regarding these two provisions is that, it only indirectly covers hate speech on grounds of religion. It must be remembered that the law should evolve in par with the ever-changing society. Nowadays, hate speech does not only circulate around matters

¹ *United Nations Strategy and Plan of Action on Hate Speech*. (n.d.). Retrieved June 30, 2020, from <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf>.

² Act 574 (Revised 1997).

concerning religion. This is especially the case in Malaysia where the society consists of diverse races with different cultures, ethnicities, and backgrounds. This creates multiplicity of opinions that are often clash with one another and eventually causes hatred among different classes of people. Subsequently, this arises the need to reform the law to provide a holistic approach in regulating hate speech. One proposal is that the law on hate speech must cover all possible basis for hate speech.

Taking the United Kingdom as an example, the country has the Public Order Act 1986 where one of its purposes is to control the stirring up of racial hatred.³ Section 18 of the Act specifically prohibits the use of threatening, abusive, or insulting words or behaviour with the intent to cause racial hatred. Also, there is another complimentary legislation namely the Racial and Religious Hatred Act 2006 which specifically regulates hatred against persons on racial and religious grounds.⁴ These two Acts, as compared to the Penal Code, provide a wider scope for regulating hate speech where the laws particularly require the presence of intention to cause hatred, either on religious or racial grounds. This is one thing that should be added into the framework of hate speech laws in Malaysia, in addition to other grounds as well. Apart from racial and religious grounds, the enactment of new laws in Malaysia should also regulate hate speech on grounds of gender, age, profession, ethnicity, or any other grounds that frequently incite hatred among the society in Malaysia.

Other than that, section 505 of the Penal Code can also be invoked to regulate hate speech. The section states that whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both. However, one problem with this provision is that, it requires the persons provoked by the insults to break the public peace. In real life circumstances, hate speech does not necessarily break the public peace. Consequently, this makes it difficult for hate speech to always be regulated under the provision. A new law that excludes the requirement of public peace infringement should be formed. This way, more situations amounting to hate speech can be covered.

Communications and Multimedia Act 1998

Another notable legislation that indirectly deals with hate speech in Malaysia is the Communications and Multimedia Act 1998⁵ which applies to online hate speech. The relevant provision is section 211 which prohibits content applications service provider from providing content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person. Under subsection (2), failure to do so will render the person liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both and shall also be liable to a further fine of one thousand ringgit for every day or part of a day during which the offence is continued after conviction.

Section 233 may also be applicable to regulate online hate speech where improper use of network facilities or network services constitutes as an offence under the Act. Subsection

³ Chapter 64.

⁴ Chapter 1.

⁵ Act 588.

(1) elaborates that whoever by means of any network facilities or network service or applications service, knowingly makes, creates or solicits, and initiates the transmission of any forms of communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person will be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both. The offenders will also be liable to a further fine of one thousand ringgit for every day during which the offence is continued after conviction. The punishments are the same for someone who knowingly permits a network or applications service under his control to be used for obscene communication for commercial purposes to any person.⁶ This appears to include online intermediaries.

An infamous case relating to the offence under the Act is the case of ***Mohd Fahmi Reza bin Mohd Zarin v Public Prosecutor***.⁷ In this case, the appellant was charged under section 233(1)(a) of the Act for posting a clown sketch of the previous Prime Minister on his Facebook page. Although he claimed it to be a mere parody and political satire, the court nonetheless held that he had violated section 233(1) as the sketch was posted to injure and incite hatred towards the government. In contrast, in the case of ***Rutnim bin Suhaimin v PP***, the appellant was convicted for an offence under section 233 of the Act for posting an offensive remark against the then Sultan of Perak on the online visitor book of His Royal Highness.⁸ He was later acquitted as the court found that the computer and the Internet account of the appellant were accessible by third parties. There was no actual evidence that the appellant had actually made and initiated the transmission of the impugned entry. It was merely inferred to be him since the computer and the Internet account belonged to him. This case illustrates how an innocent person can easily be accused under the Act merely due to the widespread use of the Internet.

It is undeniable that the Communications and Multimedia Act 1998 provides considerable amount of punishments to regulate online hate speech in Malaysia. However, one flaw of the Act is that, the relevant provisions are too broad in its application. This may result in abuse of power where people including the government may use the provisions as a tool to stifle undesirable content and political dissent for personal purposes. Even though hate speech should be curbed at all cost, but a clear distinction between honest opinions and criticism must be drawn. The Act has been gravely criticized as it was said to have been widely used as a means to target social media users.⁹ It is agreeable that sometimes, social media users have the capability to incite hatred towards different groups of people or the government. However, the Act cannot simply be invoked by someone who disagrees with opinions conveyed by another.

Hence, the said Act must be reformed or at least reviewed, to prevent its rigidity. Comparing the Act with the Network Enforcement Act in Germany is a good start to provide a new framework for the regulation of hate speech. In Germany, the Network Enforcement

⁶ Subsection 2 to Section 233 of the Communications and Multimedia Act.

⁷ [2020] 7 MLJ 399.

⁸ [2014] 5 MLJ 282.

⁹ *Malaysia: Communications and Multimedia Act must be urgently revised*. (2017, March 24). Retrieved June 30, 2020, from <https://www.article19.org/resources/malaysia-communications-and-multimedia-act-must-be-urgently-revised/>.

Act, which is also known as NetzDG, is an Act enacted to improve enforcement of the law in social networks.¹⁰ Under section 2(2) of the Act, the law applies to social media networks whereby intermediaries are obliged to delete or block such hate speech contents upon notification within 48 hours. Furthermore, section 4(2) imposes heavy offences for failure of the intermediaries to conform with the law, with a regulatory fine of up to five hundred thousand euros. The law has also been criticized in Germany for providing overboard provisions. However, what is different in this legislation is that, the punishments imposed are more severe than the Communications and Multimedia Act. Subsequently, in Germany, social media companies have hired more reviewers to analyze, address, and deal with allegedly illegal content or other contents that might violate NetzDG policies. Although it may be perceived as a drawback to some, but it eventually ensures accountability of social network providers in regulating hate speech on their respective platform. Hence, the Act in Malaysia must also impose heavier punishments not only to those who incite hatred on social media, but also to the concerned social network provider who acts as intermediaries.

Sedition Act 1948

The scope of hate speech regulations in the Sedition Act 1948¹¹ must also be reviewed in order to see what can be proposed for improvement. Generally, the Act governs matters concerning the publication of words with seditious tendency. However, there is provision under the Act that also indirectly regulates hate speech, which can either be online or offline. The relevant provision is section 3(1)(e) whereby the publication of words with the tendency to promote feelings of ill will and hostility between different races or classes of the population of Malaysia is considered as a seditious tendency. The literal wording of the section seems to suggest that offences relating to hate speech can fall within that provision. However, one thing that is lacking from this Act is that, it does not anywhere define what amounts to "ill will" or "hostility". Consequently, it provides vagueness as to whether hate speech can be construed as a conduct that promote feelings of ill will and hostility or otherwise. Instead, it is up to the court to determine the extent of its application to regulate hate speech.

When seditious tendency under section 3(1)(e) is successfully established, the guilty person will be liable under section 4(1) to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both. For a similar subsequent offence, that person shall be liable to imprisonment for a term not exceeding five years. In addition, publication found in the possession of that person or used in evidence at his trial shall be forfeited and may be destroyed or otherwise disposed of as the court directs. Meanwhile, any person who without lawful excuse has in his possession any seditious publication shall also be guilty of an offence and shall, on conviction, be liable to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding eighteen months or to both.¹² Although the punishments are extensive, but the Act does not consider the

¹⁰ Germany Network Enforcement Act.

¹¹ Act 15.

¹² Subsection 2 to Section 4 of the Sedition Act 1948.

intention of the guilty person.¹³ This is rather unfair and rigid because the element of intention is important for the court to rightfully establish hate speech.

Conclusion

All in all, based on the examination of hate speech laws in Malaysia, it is clear that Malaysia needs to specifically regulate hate speech that occurs in both offline and online platforms. Although there are certain laws and punishments that indirectly regulate hate speech, but it is still inadequate to regulate every form of hate speech in current society. Plus, some of the laws and punishments are too broad and unsuitable with the scope of hate speech nowadays.

Apart from the mentioned proposals earlier, some other proposals for a framework to regulate hate speech are first, "hate speech" must be clearly and explicitly defined under legislation. The question of what amounts to hate speech, what form of speech that can be considered as hate speech, and the specific punishment for hate speech must be well-provided in a new legislation. Moreover, the laws regulating hate speech if possible, should be incorporated under the Malaysia's Public Order (Preservation Act) 1958.¹⁴ The purpose of the Act is to restore and maintain public order in Malaysia, in which hate speech might disturb such maintenance and restoration.

The previous Religious Affairs Minister, Datuk Dr Mujahid Yusof Rawa had proposed three new legislations to regulate hate speech in Malaysia. This includes the National Harmony and Reconciliation Commission Act, the Anti-Discrimination Act, and the Religious and Racial Hatred Act. It was proposed after Dr. Zakir Naik was said to have stirred racial feelings among Malaysians and after the issue of the government attempting to introduce *khat* calligraphy into vernacular schools' syllabus. However, since there was a change of government, the proposed legislations remain undeveloped. These proposed legislations would definitely bring huge and significant changes to the current position on the laws of hate speech in our country. Hopefully, these legislations can be enacted in the near future to specifically cater to the laws on hate speech.

¹³ Section 3(3) of the Sedition Act 1948.

¹⁴ Act 296.