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UNSHACKLING EXPRESSION:

A STUDY ON LAWS CRIMINALISING EXPRESSION ONLINE IN ASIA



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)

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Unshackling expression: A study on laws criminalising expression online in Asia

Coordinating committee

Gayatri Khandhadai (APC)
Pavitra Ramanujam (APC)
Geetha Hariharan

Project coordinator

Gayatri Khandhadai (APC)

Edition coordinator

Geetha Hariharan

Assistant editor, publication production

Lori Nordstrom (APC)

Graphic design

Monocromo
info@monocromo.com.uy
Phone: +598 2400 1685

Cover illustration

Ivana Kurniawati

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Unshackling Expression: A study on laws criminalising expression online in Asia

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Malaysia: A study on the criminalisation of free expression online

Chew Chuan Yang

Suara Rakyat Malaysia (SUARAM)
www.suaram.net

Introduction

Malaysia has a long history of curtailment of the right to freedom of expression. Prior to the inception of Malaysia as a nation-state, the Sedition Act 1948 was introduced by the British to curtail alleged subversive messages by individuals and groups who opposed British colonial rule. The repression of freedom of expression in that era was not only through the Sedition Act 1948, but also through security laws that were applied broadly against individuals who were not in agreement with Britain's proposition on the Federation of Malaya. Despite achieving independence in 1957, the pre-existing laws that curtailed freedom of expression were not repealed but gradually strengthened over the years. Similarly, abuse of security laws in restricting freedom of expression remains prevalent throughout the country's history.

Closer to the 21st century, Malaysia was rocked by the political divide created by former deputy prime minister Datuk Seri Anwar Ibrahim¹ at the height of the Asian financial crisis in 1998. When Anwar Ibrahim broke ranks with Tun Dr. Mahathir Mohamad, the prime minister of the day, demonstrations and protests calling for the resignation of the prime minister followed. The debacle ended with the imprisonment of Anwar Ibrahim for alleged corruption charges and a politically motivated sodomy charge. It was also in those turbulent years that Malaysia was first introduced to the internet and enjoyed the first taste of free flow of information and independent news.

Moving forward to 2017, statistics in the past few years show rapid internet adoption throughout the country. With constantly improving accessibility

due to low entry costs and widespread availability of service providers, Malaysia is now estimated to have roughly 24.1 million internet users – representing close to 70% of the nation's population. While there is limited access to the internet in selected parts of Malaysia, access and adoption rates have been relatively even and equal throughout the country.²

Unfortunately, the expansion of a civil space due to the prevalence of the internet was not without challenges. The spread of political opposition and popular mass movements through the internet was noted by the government. With this recognition came a response by the government and the ruling political party, which embarked on social media campaigns through trolls and “cybertroopers”, punitive legal measures to legally restrict and silence dissent, and disproportionate use of force to intimidate those involved and others that voice dissent.

The purpose of this report is to map the laws that affect online freedom of expression in Malaysia. In addition to the Sedition Act 1948, the Communications and Media Act 1998 (CMA) and the Malaysian Penal Code incorporate sections that have been used to criminalise online expression activities. In addition to the laws themselves, the report seeks to study legal judgments and draft legislation insofar as they relate to online freedom of expression. As the internet is a fast-evolving medium – and the law is always lagging to catch up – we also study recent incidents as an indication of governmental interpretation and use of laws to curtail and violate freedom of expression online.

We will begin by elaborating on the methodology for research, followed by a detailed look at the laws that are most often utilised to criminalise freedom of expression.

1 Deputy prime minister of Malaysia from 1993 to 1998.

2 Department of Communications and Multimedia. (2016). *Internet Users Survey 2016: Malaysian Communications and Multimedia Commission*.
www.mcmc.gov.my/skmmgovmy/media/General/pdf/IUS2016.pdf

Methodology

This report will analyse the criminalisation imposed upon freedom of expression online and whether there is any difference between general restrictions applied to freedom of expression and criminalisation of the same. This report will adopt legal analysis of court judgments on the criminalisation of freedom of expression and whether there are any distinctions on how the state perceives an offence under laws such as the Sedition Act 1948 when it applies online and offline.

However, there are some technical gaps in the study, as the criminalisation of freedom of expression online through the Communications and Multimedia Act 1998 is relatively new in Malaysia.³ As such, there are limitations in terms of reported court judgments on this matter. As of the time of writing, there are only three published high court judgments relating to the Communications and Multimedia Act 1998 and they do not address the crux of the issue of freedom of expression.

As such, with regard to examination of the criminalisation of freedom of expression under this law, an assessment will be made through media reports of cases and pre-trial treatment of those suspected of an offence.

The Malaysian legal framework for freedom of expression

Malaysia is a federation comprising 13 states and three federal territories. The Federal Constitution of Malaysia serves as the foundation of the country's laws and establishes the scope of powers for the three arms of government and the basic rights guaranteed to its people. In general, the direction of Malaysia as a nation-state is determined by the federal government, with the introduction of most if not all policies for the country driven by the political party that dominates the parliament.

Furthermore, Malaysia's system of parliamentary democracy is largely based on the Westminster system with two houses of parliament, an independent judiciary and an executive (cabinet), which is appointed by the prime minister who commands support in the parliament. While this system has largely worked well in the United Kingdom, in Malaysia the system's flaws manifest themselves through the upper house in parliament, which is overwhelmingly dominated by the ruling political party; a judiciary whose independence has been in

question since 1988⁴ and resurfaced recently;⁵ and an executive that utilises all arms of government (including but not limited to the Election Commission,⁶ law enforcement agencies, and other civil services)⁷ for political dominance.

In terms of rights, Article 10 of the Federal Constitution of Malaysia lays the foundation for freedom of speech, assembly and association. Article 10(1) (a) stipulates that every citizen has the right to freedom of speech and expression.⁸ In many situations, this article has been interpreted in a narrow manner which results in excessive power for the state to restrict and curtail freedom of speech and expression.⁹

State governments are usually not afforded any power to regulate and restrict freedom of expression. However, state governments have a degree of monopoly with regards to the establishment and enforcement of Islamic or Sharia laws.¹⁰ Traditionally, these laws held little repercussion for freedom of expression. However, there have been recent developments, such

- 4 The concern for the Malaysian judiciary's independence first surfaced in 1988 during the constitutional crisis where the chief justice of the day was sacked. Pakrisamy, S. (2008, 29 April). Comment: Tun Salleh and the judiciary. *The Malaysian Bar*. www.malaysianbar.org.my/members_opinions_and_comments/comment_tun_salleh_and_the_judiciary.html
- 5 Following the extension of the current chief justice's term after he has reached the age of retirement stipulated by the Federal Constitution of Malaysia, former judges, the bar council and activists have been criticising the chief justice's decision to accept the extension. Anbalagan, V. (2017, 26 June). Say 'no' to extension for chief justice, urges ex-top judge. *Free Malaysia Today*. www.freemalaysiatoday.com/category/nation/2017/06/26/say-no-to-extension-for-chief-justice-urges-ex-top-judge
- 6 Palansamy, Y. (2017, 20 January). Selangor lists six 'supersized' seats as examples of EC's alleged gerrymandering. *Malay Mail Online*. www.themalaymailonline.com/malaysia/article/selangor-lists-six-supersized-seats-as-examples-of-ecs-alleged-gerrymandering#Grgji1gjs1lH61.97
- 7 School teachers were in the past given show-cause letters for criticising government. See: Anbalagan, V. (2017, 30 March). Lawyer: Civil servants criticising govt can be charged with misconduct. *Free Malaysia Today*. www.freemalaysiatoday.com/category/nation/2017/03/30/lawyer-civil-servants-criticising-govt-can-be-charged-with-misconduct; Borneo Post Online. (2013, 16 June). Masing: Wrong for civil servants to oppose govt. *Borneo Post Online*. www.theborneopost.com/2013/06/16/masing-wrong-for-civil-servants-to-oppose-govt; Malay Mail Online. (2015, 15 June). Racism can unite a race 'for good', BTN says. *Malay Mail Online*. www.themalaymailonline.com/malaysia/article/racism-can-unite-a-race-for-good-btn-says#RkxPwS5GocRuSp1l.97 (The National Civics Bureau or BTN is a government agency which has in the past been known for espousing a neo-apartheid ideology of racial supremacy.)
- 8 Subject to clauses that refer to Article 149, which deals with legislation against subversion, action prejudicial to public order, etc. www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf
- 9 *PP v Azmi bin Sharom*, Para 37. www.kehakiman.gov.my/directory/judgment/file/GOJ_-_PP_v_Azmi_Sharom.pdf
- 10 Article 74(2) outlines the power of state legislatures in terms of law making, and Islamic law is one of the items which state assemblies still have power to determine with limited oversight by the federal government. In practice, the power to legislate religious law is far more complex, with influence from the respective state monarch and institutions.

3 Documented use to regulate social media abuses online emerged around 2013, with the first high court case reported only in 2015.

as where a translator of publications deemed to be Islamic in nature has been subjected to local state laws as opposed to federal law.¹¹ The development suggests that elements of Islamic or Sharia laws may impact on freedom of expression on par with federal laws passed by the parliament.

Laws which restrict freedom of expression are common in Malaysia and the application of the laws is largely supported and backed by legal jurisprudence which tends to interpret civil liberties enshrined in the Federal Constitution in a conservative or restrictive manner. An example of this can be seen in the cases involving Anwar Ibrahim, where the burden of proof and presumption of innocence were disregarded and elements of rule of law were violated.¹² A more recent example can be seen in the case of *PP v Azmi bin Sharom*, where the Federal Court ruled that the court has no power to determine whether a restriction imposed by the parliament is reasonable or otherwise.¹³

Examples of laws restricting freedom of expression in Malaysia include, but are not limited to:

- Sedition Act 1948, which renders comments, speeches, selected statements or publications as seditious, potentially resulting in a fine or imprisonment for offenders.
- Communications and Multimedia Act 1998, a broad law covering all aspects of telecommunication and multimedia which contains provisions that have been interpreted in manners that punish “hurtful” comments made online.
- Printing Presses and Publications Act 1984, a law that imposes criteria and requirements for print media which has been utilised to ban books, outlaw t-shirts related to civil activism and shut down print media.
- Selected sections of the Penal Code with explicitly repressive provisions such as Section 124B and other more innocuous sections such as Section 298,¹⁴ 298A¹⁵ and 499.¹⁶

In terms of the interpretation of the law, the Federal Court of Malaysia serves as the apex court. Due to the nature of most criminal cases relating to freedom of expression, the Federal Court only hears and decides on cases if there was an appeal or challenge on constitutional issues. For cases where no such challenges were filed by the defendant or the prosecutor, the case usually ends at the Court of Appeal, which has in the past ruled in favour of acquitting or discharging the defendant in line with a more progressive interpretation of freedom of expression.¹⁷

Curtailed freedom of expression online

In the past, freedom of expression has been largely restricted through the use of security laws. One of the laws that coloured Malaysian history in this aspect would be the Internal Security Act 1960 (ISA). Since its inception, there were documented incidents where political opponents were alleged to have been detained under the ISA.¹⁸ Over the years, the ISA was also used to silence civil dissent, notably in 1987 under “Ops Lalang”, where 106 individuals including NGO activists and intellectuals were arrested and detained.¹⁹ The pattern of suppression of freedom of expression was also seen in 1998 during the height of the Reformasi movement seeking to oust the prime minister of the day, Tun Mahathir Mohamad, following the fallout and persecution of Anwar Ibrahim,²⁰ and yet again in 2008 when political blogger Raja Petra Kamaruddin,²¹ MP Teresa Kok and journalist Tan Hoon Cheng were arrested and detained.²² Officially they were arrested for being a threat to security, peace and public order under Section 73(1) of the ISA. When inquired, the deputy inspector-general of police of the day reported that the journalist, Tan, was arrested for reporting a racist remark made by a politician from the ruling party; Teresa Kok was arrested for alleged involvement with a resident’s petition over a mosque; while Raja Petra was only alleged to be involved with activities that could cause unrest.

11 The case of Zaid Ibrahim, which will be further explored later in this report.

12 Anwar Ibrahim’s first trial in 1998 was met with a series of controversies and reversal of the rule of law; a similar turn of events was witnessed yet again in his more recent conviction for sodomy. See Thomas, T. (2008, 29 July). Comment: A second prosecution of Anwar Ibrahim – is it in the national interest? *The Malaysian Bar*. www.malaysianbar.org.my/members_opinions_and_comments/comment_a_second_prosecution_of_anwar_ibrahim_is_it_in_the_national_interest_.html?date=2017-06-01

13 *PP v Azmi bin Sharom*, op. cit.

14 Uttering words, etc., with deliberate intent to wound the religious feelings of any person.

15 Causing, etc., disharmony, disunity, or feeling of enmity, hatred or ill will, or prejudicing, etc., the maintenance of harmony or unity, on grounds of religion.

16 Criminal defamation.

17 In Safwan Anang’s sedition case, the Court of Appeal maintained a high threshold for a statement to be deemed seditious by the court and acquitted Safwan Anang. www.kehakiman.gov.my/directory/judgment/file/W-09-7-2016.pdf

18 Hansard, 30 July 1971. www.parlimen.gov.my/files/hindex/pdf/DR-30071971.pdf

19 <https://aliran.com/oldsite/hr/js3.html>

20 BBC. (1999, 15 November). A crisis unfolds: Timeline. (1999, 15 November). *BBC News*. news.bbc.co.uk/2/hi/special_report/1998/10/98/malaysia_crisis/204632.stm

21 One of the few known cases where an individual was detained under the ISA solely for his commentaries online. Raja Petra Kamaruddin is a controversial political blogger who has been active since far before the rise of the internet in Malaysia.

22 The Star Online. (2008, 13 September). Raja Petra, Teresa Kok and Sin Chew reporter arrested under ISA. *The Star Online*. www.thestar.com.my/news/nation/2008/09/13/raja-petra-teresa-kok-and-sin-chew-reporter-arrested-under-isa

Following the repeal of the ISA in 2012,²³ the Government of Malaysia no longer has access to this legislation and uses other laws such as the Sedition Act 1948, the Communications and Multimedia Act 1998, etc.²⁴ While the repeal of the ISA may have broadened the perceived space for civil discourse in Malaysia, the reality does not necessarily reflect this sentiment. As noted in the comment by the prime minister of the day, Najib Tun Razak, the abolition of the ISA was a political move aimed at recovering support²⁵ for the ruling coalition and the law itself was not “helping” the ruling coalition but actually enhancing the opposition’s progress. With this in mind, the “expansion” of space should be viewed with scepticism.

It should be noted that the repeal of the ISA took place in tandem with the introduction of new security laws such as the Security Offences (Special Measures) Act 2012 (SOSMA), which grants police similar power to detain individuals without trial.²⁶ The suspicion that SOSMA would be used in a similar manner was affirmed in 2015, following the arrest and detention of Khairuddin Abu Hassan and Matthias Chang.²⁷ In 2016, SOSMA was yet again used to arrest and detain the prominent chairperson of the Bersih 2.0 committee, Maria Chin Abdullah.²⁸

In addition to the liberal interpretation of security laws, it is also noted that in Malaysia there is rarely any distinction made for “offences” committed online and offline. It is common for laws that are applied offline to be applied online as well without any adjustments. Individuals arrested or detained for allegedly seditious posts online are often arrested and investigated for both an offence under the Sedition Act 1948 and under the Communications and Multimedia Act 1998.²⁹ This makes it possible and highly likely that the laws described below could be applied online at any juncture.

Security Offences (Special Measures) Act 2012

SOSMA is not a law that outlines specific crimes or punishment; it is technically a procedural law that replaces the Criminal Procedure Code if an individual is arrested for offences under Chapters VI, VI(A), VI(B) and VII of the Penal Code. These four chapters of the Penal Code cover, respectively, offences against the state, offences relating to terrorism, organised crime, and offences relating to the armed forces.

Some of the more controversial offences are located in Chapter VI of the Penal Code. Notable sections include Section 124B which outlines the offence of activity detrimental to parliamentary democracy; Section 124C which outlines the attempt to commit activity detrimental to parliament democracy; and others which address publications that are detrimental to parliamentary democracy (Section 124D) and possession of such publications (Section 124E).

In practice, under SOSMA, a police officer can, without warrant, detain an individual whom he has reason to believe to be involved in security offences for 24 hours.³⁰ A police officer with the rank of a superintendent or above may extend the detention for an additional 28 days³¹ for the purpose of investigation. An important point to note is that under SOSMA, individuals charged for an offence are not granted bail by default³² and there are no recorded cases where the court found the use of the law legitimate and granted bail; therefore, anyone charged would only be released at the conclusion of all legal proceedings. While Section 4(3) of SOSMA outlines that no person shall be detained for his political belief or activity, this law has still been utilised against civil society and political dissent.

Notable examples are those mentioned before, namely, the arrest and detention of Khairuddin Abu Hassan and Matthias Chang. Khairuddin Abu Hassan was arrested under Section 124K and 124L of the Penal Code following the reports he filed against 1 Malaysia Development Bhd (1MDB).³³ His lawyer, Matthias Chang, was subsequently arrested under Section 124K and 124L when he acted as a counsel for him.³⁴ While the two are no longer

23 The Star Online. (2012, 10 April). New Bill to replace ISA. *The Star Online*. www.thestar.com.my/news/nation/2012/04/10/new-bill-to-replace-isa

24 As noted by the SUARAM report for 2015, documented use of the Sedition Act 1948 and Communications and Multimedia Act 1998 increased substantially. See: www.suaram.net/wordpress/wp-content/uploads/2015/12/SUARAM-HR-OVERVIEW-2015-combined-ver1.pdf

25 Syed Jaymal Zahid. (2012, 9 July). Repeal of ISA politically driven, says Najib. *Free Malaysia Today*. www.freemalaysiatoday.com/category/nation/2012/07/09/repeal-of-isa-politically-driven-says-najib

26 Soong, K. K. (2016, 21 November). Sosma is the new ISA. *Free Malaysia Today*. www.freemalaysiatoday.com/category/opinion/2016/11/21/sosma-is-the-new-isa

27 More details of the case are available in the subsection on SOSMA.

28 More information on their arrest will be further explored later in this report.

29 Notable cases include those of Khalid Ismath and Zunar.

30 Section 4(1) SOMSA.

31 Section 4(5) SOMSA.

32 The law itself classifies all charges made in line with SOSMA to be non-bailable and extension of remand after the trial of first instance remains at the sole discretion of the public prosecutor.

33 Malay Mail Online. (2015, 23 September). Khairuddin rearrested under Sosma moments after court orders his release. *Malay Mail Online*. www.themalaymailonline.com/malaysia/article/khairuddin-rearrested-under-sosma-moments-after-court-orders-his-release#EKQ9prz7Ojzbtmu.97

34 Hamudin, N. (2015, 8 October). Matthias Chang arrested under Sosma. *The Sun Daily*. www.thesundaily.my/news/1576303

detained under SOSMA,³⁵ their case brought back the old spectre of repression of political dissent and criminalisation of freedom of expression under the ISA for members of civil society and the public.³⁶

The use of SOSMA to silence political dissent and criminalise freedom of expression was once again witnessed in the arrest and detention of Maria Chin Abdullah, the chairperson of Bersih 2.0.³⁷ On the eve of the Bersih 5 rally on 18 November 2016,³⁸ Maria Chin Abdullah and Mandeep Singh³⁹ were arrested at the Bersih office. During the raid of the office, lawyers were denied access to Maria Chin Abdullah and Mandeep Singh, and were also not allowed to witness the search. On the day of the rally itself, the police informed the counsels that Maria Chin Abdullah was detained under SOSMA in relation to an alleged offence under Section 124C of the Penal Code (124C outlines the offence of threat to parliamentary democracy).⁴⁰

It should be noted that thus far, the use of SOSMA has not applied to any issues that deal with freedom of expression online directly. However, the manner in which it has been applied suggests that it may be interpreted and utilised the same way as its predecessor the ISA. Furthermore, it is also noted that unlike the ISA, SOSMA is a procedural law by nature and its utilisation is dependent on the interpretation of an offence under Chapter VI of the Penal Code. On that note, there is no distinction or definition made in the relevant section that restricts it to “offline” events and incidents only, and thus it can be applied to any offence that surfaces online.

Sedition Act 1948

Since the abolition of the ISA, the Sedition Act 1948 is a popular go-to law for the silencing of political dissent by the government. As noted in the Suara Rakyat Malaysia (SUARAM) Annual Human Rights

Report in 2015 and 2016, the use of the Sedition Act 1948 hit a record high⁴¹ in the years that followed the repeal of the ISA.

In general, the crime of sedition is a colonial offence that was established in Malaysia prior to its independence.⁴² The law itself has been amended on several occasions in the past. However, coming into the digital age, the Government of Malaysia has not made any distinction in the application of the Sedition Act 1948. Human rights defenders (HRDs) and political dissenters have been arrested and charged for allegedly seditious speeches made during public forums, and also for articles written and published online.

A notable example where the Sedition Act 1948 was applied to online articles would be the case of Azmi Sharom in 2014. Azmi Sharom, a respected academic at the University of Malaya, was first charged for sedition over an article relating to an ongoing political crisis in Perak, which was published online.⁴³ He was charged under Section 4(1)(b) with an alternative charge under Section 4(1)(c) of the Sedition Act 1948 that outlines an offence of uttering any seditious statements and printing, publishing, selling, offering for sale, distributing or reproducing any seditious publications, respectively. After 17 months of delays, the public prosecutor requested for Azmi Sharom to be given a discharge not amounting to an acquittal.⁴⁴

In Azmi Sharom’s case, there was an attempt by his counsels to have the Sedition Act 1948 declared as unconstitutional and void. Unfortunately, the Federal Court rejected the counsels’ motion and further restricted the interpretation of freedom of expression in its decision. In Azmi Sharom’s decision, the Federal Court deemed the requirement for restriction of freedom of expression based on the concept of reasonableness would amount to “re-writing” Article 10(2) of the Federal Constitution and effectively sought to remove the need for reasonableness.⁴⁵

Apart from Azmi Sharom’s case, another notable case where the Sedition Act 1948 was applied

35 The Star Online. (2017, 28 April). Duo will not be tried under Sosma. *The Star Online*. www.thestar.com.my/news/nation/2017/04/28/duo-will-not-be-tried-under-sosma-khairuddin-chang-will-instead-face-banking-sabotage-charge

36 Doraisamy, S. (2015, 24 September). The spectre of ISA: Broken promises and freedom forgone. *SUARAM*. www.suaram.net/?p=7250; see also: Thiru, S. (2015, 15 October). Press Release: Respect the rule of law and release Dato’ Sri Khairuddin and Matthias Chang. *The Malaysian Bar*. www.malaysianbar.org.my/press_statements/press_release_%7C_respect_the_rule_of_law_and_release_dato_sri_khairuddin_and_matthias_chang.html

37 A popular mass movement demanding free and fair elections in Malaysia. www.bersih.org/about/background

38 Free Malaysia Today. (2016, 18 November). Police arrest Maria Chin after Bersih raid. *Free Malaysia Today*. www.freemalaysiatoday.com/category/nation/2016/11/18/police-arrests-maria-chin-after-bersih-raid

39 The manager of Bersih 2.0.

40 Brown, V. (2016, 19 November). Bersih 5: Maria Chin detained under Sosma. *The Star Online*. www.thestar.com.my/news/nation/2016/11/19/bersih-5-maria-chin-detained-under-sosma

41 The use of the Sedition Act 1948 in 2015 and 2016 is reported to be 220 and 12 times, respectively. See: www.suaram.net/wordpress/wp-content/uploads/2016/12/Overview-2016-Digital-Edition.pdf

42 The Sedition Act was passed in 1948 but Malaysia only achieved independence in 1957.

43 Free Malaysia Today. (2014, 1 September). Azmi Sharom next up for sedition charge. *Free Malaysia Today*. www.freemalaysiatoday.com/category/nation/2014/09/01/azmi-sharom-next-up-for-sedition-charge

44 Fadzil, F. (2016, 19 February). Court acquits Azmi Sharom of sedition charge. *The Star Online*. www.thestar.com.my/news/nation/2016/02/19/court-acquits-azmi-sharom-of-sedition-charge

45 *PP v Azmi Sharom* [2015] 8 CLJ 921 [37]-[40].

against HRDs can be seen in the arrest of Eric Paulsen in March 2015. Paulsen was arrested and subsequently charged for sedition for a tweet on the implementation of Hudud law in Malaysia.⁴⁶ Similar to the case before, Paulsen was charged under Section 4(1)(c) of the Sedition Act 1948 and was also briefly remanded.

Zulkiflee Anwar, better known as Zunar, was similarly arrested and subsequently charged for nine counts of sedition following his tweets criticising the judiciary for its alleged bias in the second sodomy trial of Anwar Ibrahim in 2015.⁴⁷ Since then, Zunar has consistently been “in trouble” with the law for his cartoons on current politics.⁴⁸

Besides political dissenters and HRDs, the Sedition Act 1948 has also been applied against controversial online personalities Viven Lee May Ling and Alvin Tan Jye Yee. The two posted on Facebook a controversial photo of them dining on a local dish, *bak kut teh*, that was well known to be non-halal – since pork is the main ingredient – during the month of Ramadan. The photo was accompanied by the caption “Selamat Berbuka Puasa [the greeting used when breaking the fast at the end of the day during Ramadan] (with Bak Kut Teh... fragrant, delicious and appetising)” alongside a halal logo.⁴⁹ On top of the charge of sedition, they were also charged under the Film Censorship Act⁵⁰ and Section 298A(1) of the Penal Code.⁵¹

Communications and Multimedia Act 1998

When it comes to online comments and internet-related items, the go-to provision for criminal action would be under Section 233 of the Communications and Multimedia Act 1998 (CMA). Section 233 is an ambiguous provision that can potentially cover any

comments made online that are interpreted as hurting someone’s feelings.⁵² The application of this law in this area is still relatively new. For most of its existence, it has had little to no role in the ongoing discourse on freedom of expression.⁵³

Unfortunately, in the last two years, this law has been applied broadly, with more than 180 cases of alleged social media abuse⁵⁴ reported by the Malaysian Communications and Multimedia Commission (MCMC) for the year 2016 alone. Offences that have surfaced under this law include *lèse majesté*, alleged fake news, satire, graphics that are perceived as insulting the prime minister, and a wide variety of other “affronts”.

Political activist and HRD Khalid Ismath was one of the earlier cases under the CMA. He was detained for comments allegedly insulting the members of the royal family and was subsequently charged for nine counts of sedition and four under the CMA, for tweets and Facebook posts. He was later kept in solitary confinement for almost three weeks before he was released on bail of MYR 70,000 (over USD 16,500).⁵⁵

After this case in late 2015, a myriad of other cases began to surface under Section 233 of the CMA. Malaysia witnessed mass arrests under this law in May 2016, when a group of football fans were arrested for comments that allegedly insulted a member of the royal family, who was also a manager of a football team.⁵⁶ The individuals detained were subjected to extended remand and held in detention for close to two weeks in the state of Johor.

Among the best-known cases under the CMA are those relating to Fahmi Reza, a well-known activist in Malaysia. His satirical depiction of Malaysia’s prime minister and of the “block notice” issued by the MCMC⁵⁷ online incurred the ire of the government, which led to his being subjected to

46 Tan, S. (2015, 23 March). Lawyer Paulsen to be detained until 6pm in sedition probe over hudud tweets. *Malay Mail Online*. www.themalaymailonline.com/malaysia/article/lawyer-paulsen-to-be-detained-until-6pm-in-sedition-probe-over-hudud-tweets#HJ5uweyAJltSCQs.97

47 Mei Lin, M. (2015, 3 April). Cartoonist Zunar slapped with nine counts of sedition over Anwar tweets. *Malay Mail Online*. www.themalaymailonline.com/malaysia/article/cartoonist-zunar-slapped-with-nine-counts-of-sedition-over-anwar-tweets#GfuXobcEILcrjqf5.97

48 Zolkepli, F., & Divakaran, P. (2016, 17 December). Zunar arrested at fan event. *The Star Online*. www.thestar.com.my/news/nation/2016/12/17/zunar-arrested-at-fan-event

49 Lim, I. (2016, 27 May). Vivian Lee jailed six months over ‘bak kut teh’ Ramadan photo. *Malay Mail Online*. www.themalaymailonline.com/malaysia/article/vivian-lee-jailed-six-months-over-bak-kut-teh-ramadan-photo#gP74mmWkxB3ppGX.97

50 Naidu, S. (2016, 14 April). Malaysian ‘sex blogger’ acquitted of charge under censorship act. *Channel News Asia*. www.channelnewsasia.com/news/asiapacific/malaysian-sex-blogger-acquitted-of-charge-under-censorship-act-8055984

51 Causing, etc., disharmony, disunity, or feelings of enmity, hatred or ill will, or prejudicing, etc., the maintenance of harmony or unity, on grounds of religion.

52 233(1)(a) “... any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person; 233(1)(b) - initiates a communication using any application service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity with intent to annoy, abuse, threaten or harass any person at any number or electronic address.”

53 The first reported case was in its early stages as of 2017, with the first case reported at High Court in 2016 (Zaid Ibrahim’s case).

54 Which usually falls under the purview of Section 233.

55 Malaysia Kini. (2015, 22 October). Amnesty declares Khalid Ismath ‘prisoner of conscience’. *Malaysia Kini*. www.malaysiakini.com/news/316782

56 #NetMerdeka. (2016, 6 June). Net freedom coalition condemns arrests under the CMA. *SUARAM*. www.suaram.net/?p=8051

57 Tzu Ging, Y. (2016, 10 June). Fahmi Reza charged again over clown face sketch. *Malay Mail Online*. www.themalaymailonline.com/malaysia/article/fahmi-reza-charged-again-over-clown-face-sketch#b1C3fMzwmvAQ8156.97

investigations and criminal prosecutions for creating and sharing the content in question.

Apart from activists and political dissenters who have been charged, an online news editor has also been charged for uploading a video of coverage of a press conference.⁵⁸ In this case, KiniTV Sdn Bhd, a media company, was charged under Section 233(1) (a) of the CMA while the editor-in-chief, Steven Gan, was charged under Section 244(1), which carries a similar punishment if found guilty.⁵⁹

Reflecting on the cases that Malaysia has witnessed in recent years, it is difficult to say how far-reaching this law can be in the criminalisation of freedom of expression. This law has shown itself to be highly flexible in its utilisation by the state, and also a law that can be utilised by non-state actors to push for government action even when the police report lodged has no merits or is false in nature.⁶⁰ This flexibility is interpreted by the communications and multimedia deputy minister as applicable for punishing WhatsApp group administrators if they failed to curb the spread of false information.⁶¹

In terms of the application of the law, there are also substantial concerns on the manner of application itself, which may create additional human rights violations on top of the criminalisation of freedom of expression. On the lighter end of the spectrum, there have been cases where individuals were harassed through persistent calls for questioning and investigations and were finally released with no further actions. At the other end, there have been cases where individuals were found guilty and faced fines and prison terms. One individual was fined MYR 120,000 (over USD 28,000) and sentenced to 30 months imprisonment in default; another individual was sentenced to 14 years imprisonment for 14 charges of allegedly insulting a member of royalty on Facebook.⁶² Fortunately, in

the case of the 14 counts, the person in question was allowed to serve his sentences concurrently.

Apart from the direct impact posed by Section 233 of the CMA, Section 263 also plays a substantial role in the criminalisation of freedom of expression in Malaysia. Unlike Section 233, Section 263 is targeted towards network service providers. The law itself technically compels network service providers to follow government directives in enforcing the law and requires the providers to enforce all Malaysian laws as part of their services. While the law itself may be innocuous, the provision is often cited by the government and utilised to compel internet service providers (ISPs) to block websites that have been deemed as illegal.⁶³

Penal Code offences

On top of the crime of sedition and the myriad of other possible offences under Section 233 of the CMA, the criminalisation of freedom of expression includes the application of selected sections of the Penal Code. Selected aspects of the Penal Code offences⁶⁴ used to criminalise freedom of expression have been addressed in the earlier portion of this report. On top of those provisions, there are other sections such as Section 298, Section 298A and Section 499.

Notable cases under Section 298⁶⁵ include the case of Aishah Tajuddin, a radio DJ who made a video highlighting the peculiarity that would result from the proposal by the Islamic Party regarding the implementation of Hudud law in the state of Kelantan.⁶⁶ On top of the attacks and threats posed against her by anonymous internet users (an issue to be further covered later in this report), she was called for investigation by the police under Section 298 of the Penal Code,⁶⁷ and was also reportedly investigated by the MCMC for causing mischief online.⁶⁸

More recently, a local English newspaper which published a controversial front page was called

58 Yatim, H. (2016, 18 November). M'kini editor-in-chief charged over AG videos. *Malaysia Kini*. www.malaysiakini.com/news/363282

59 Section 244(1) states that a senior officer (director, CEO or similar individual) can be jointly charged with the corporate body unless he or she is able to prove that the offence was committed without his or her knowledge, consent or connivance and he or she had taken all reasonable precautions and exercised due diligence to prevent the commission of the offence.

60 Yen, H. K. (2017, 24 May). Alibi given by man over charges he 'insulted Najib, Rosmah'. *Free Malaysia Today*. <http://www.freemalaysiatoday.com/category/nation/2017/05/24/alibi-given-by-man-over-charges-he-insulted-najib-rosmah/7>

61 CNA. (2017, 27 April). Malaysia may take action against WhatsApp admins for spreading fake news: Report. *Channel News Asia*. www.channelnewsasia.com/news/asiapacific/malaysia-may-take-action-against-whatsapp-admins-for-spreading-8796344

62 The Straits Times. (2016, 7 June). Youth sentenced to 1-year jail for insulting Johor royalty on Facebook. *The Straits Times*. www.straitstimes.com/asia/se-asia/youth-sentenced-to-1-year-jail-for-insulting-johor-royalty-on-facebook

63 BBC. (2016, 14 March). Blocked Malaysian insider news website shuts down. *BBC News*. www.bbc.com/news/world-asia-35800396

64 Chapter VI offences relating to threat to parliamentary democracy and its peers.

65 Uttering words, etc., with deliberate intent to wound the religious feelings of any person.

66 The video contains a scene where a hijab or headscarf mysteriously appears on the DJ upon entry to the state.

67 The Jakarta Post. (2015, 23 March). Cops to probe Malaysian station and journalist over hudud satire video. *The Jakarta Post*. www.thejakartapost.com/news/2015/03/23/cops-probe-malaysian-station-and-journalist-over-hudud-satire-video.html

68 Free Malaysia Today. (2015, 22 March). Blasphemy probe into BFM video. *Free Malaysia Today*. www.freemalaysiatoday.com/category/nation/2015/03/22/blasphemy-probe-into-bfm-video

for investigation under Section 298A and the Sedition Act 1948.⁶⁹ Following a show-cause letter from the Home Ministry and a follow-up meeting, the editor-in-chief and chief executive office were suspended indefinitely.⁷⁰ It is noted that while the investigation was made in relation to a print publication, there was no demarcation that would suggest that the front page would have avoided similar punishment if it were published online.⁷¹

On the one hand, civil society has traditionally advocated for the use of these sections in lieu of the Sedition Act 1948 and the Communications and Multimedia Act 1998, as they are far more defined and not easily subjected to the whimsical interpretation of law by the government. However, unrestricted use of this legislation may well place it among the list of laws that unjustly and disproportionately criminalise freedom of expression.

Other laws

The Printing Presses and Publications Act 1984 (PPPA) is another law that is often utilised to criminalise and restrict freedom of expression in Malaysia. Traditionally, this law was invoked to restrict or criminalise print publications. However, there is no guarantee that this law would not be interpreted to restrict online publications (e-books, etc). When we consider that the Sedition Act 1948 was not differentiated in its application to articles published online or in print media, there is a substantial possibility that the PPPA may be interpreted in a similar manner that could cut across the online and offline realms in the future.

On the eve of the Bersih 4 rally in 2015, the t-shirts and logo of Bersih 4 were declared illegal under the PPPA on the grounds of national security. At the same time, the Bersih website⁷² was also blocked by the MCMC through its powers under the CMA.⁷³ The joint application of laws in such a manner also raises the possibility that the act of criminalisation of publications under the PPPA may be used as a “legitimate” excuse to compel ISPs to

block or remove the offending items from access under the CMA.

However, it is noted that while the PPPA may have a strong influence that would easily compel print publications to follow an invisible line set by the government, the law itself may have very little repercussion for consumers and activists. For example, the novel *50 Shades of Grey* has been subjected to a ban under the PPPA, but can still be found in bookshops across the country. Similarly, a quick search online would show that the book is still easily available in e-book format on Google Play and other distribution channels.

In addition to the PPPA, another worrying aspect arising in recent years is related to the Islamic laws and principles that have been gaining traction in the Malaysian legal system.

With regard to Islamic or Sharia law, there is relatively wide power to regulate and criminalise freedom of expression. There are three identified manners in which Islamic or Sharia law has been applied to curtail freedom of expression. First, it can be used directly to criminalise freedom of expression, similarly to how the Sedition Act 1948 functions. This is seen in the case of Dr. Kassim Ahmad⁷⁴ where he was charged for insulting Islam⁷⁵ during a speech he delivered at a seminar.

Furthermore, Islamic or Sharia law has been and can be used to restrict publications, as seen in the case involving Ezra Zaid,⁷⁶ which raised substantial questions as to the scope of power afforded to Islamic law and whether these laws can affect, curtail and criminalise freedom of expression. Ezra Zaid and ZI Publications were charged under Section 16 of the Syariah Criminal Offences (Selangor) Enactment 1995.⁷⁷ At the time of this report, the constitutionality of this section is still pending hearing in the civil courts.

On top of the potential power to restrict publications, the power of the state religious authorities to issue a fatwa, which is not legally binding, raises an additional point of concern. While a fatwa does not necessarily hold legal sway, it can greatly affect public perception, which may lead to increasing

69 Malaysia Kini. (2017, 30 May). IGP: The Star investigated for sedition, inciting religious enmity. *Malaysia Kini*. www.malaysiakini.com/news/383967

70 The Star Online. (2017, 31 May). Two top editors of 'The Star' suspended. *The Star Online*. www.thestar.com.my/news/nation/2017/05/31/two-top-editors-of-the-star-suspended

71 The news which was published on the front page was similarly published online.

72 Malaysia Kini. (2015, 28 August). MCMC blocks four websites for promoting Bersih. *Malaysia Kini*. www.malaysiakini.com/news/310322

73 Malaysia Kini. (2015, 28 August). Bersih website blocked ahead of rally? *Malaysia Kini*. www.malaysiakini.com/news/310207

74 Siti Aziela Wahi. (2014, 27 March). Kassim Ahmad didakwa di mahkamah pagi ini. *Sinar Online*. www.sinarharian.com.my/semasa/kassim-ahmad-didakwa-di-mahkamah-pagi-ini-1.264386

75 Section 7(b) of Syariah Criminal Offences (Federal Territories) Act 1997.

76 Lim, I. (2017, 26 April). Ezra Zaid allowed to continue challenge of Jais arrest, prosecution over book. *Malay Mail Online*. www.themalaymailonline.com/malaysia/article/ezra-zaid-allowed-to-continue-challenge-of-jais-arrest-prosecution-over-book

77 Section 16 deals with religious publication contrary to Islamic law. <https://goo.gl/bzUxBa>

threats by non-state actors.⁷⁸ In addition, the recent debacle where the National Registration Department (NRD) refused to register a child with his father's name as his surname due to an existing fatwa⁷⁹ suggests that these decrees may indirectly influence the execution of secular legal provisions and become a basis for restriction of freedom of expression under secular law.

On a more positive note in terms of freedom of expression, Dr. Kassim Ahmad's case was heard by the Federal Court and the court affirmed the decision made by the Court of Appeal, which had ruled that his arrest was invalid. The grounds of judgment for his case were that an inappropriate law had been used to apprehend him. His arrest should have been made by local religious authorities, as opposed to the federal religious authority.⁸⁰

At this point, there is very little developed legal jurisprudence and precedents that chart the powers and the scope of the jurisdiction of Islamic or Sharia law, especially with regard to the influence of these laws on freedom of expression. In an ideal scenario, the civil courts would hear and adjudicate on the powers and scope of Islamic or Sharia law in regard to these issues in line with the Federal Constitution. Unfortunately, the development of the law in this area will unlikely be completed in the foreseeable future, and as such this report must conclude that Islamic or Sharia law can potentially be utilised in a manner that criminalises freedom of expression of the Muslim community.

Distinction in application between comments in the "real" and "online" world

Apart from offences under the CMA, which is exclusively used against online comments, most of the Malaysian laws are interpreted to apply to both online and offline offences without any additional distinction.⁸¹ The current state of affairs in terms of interpretation and implementation raises the possibility that a comment made online can potentially

result in a greater punishment when compared to a statement uttered in a physical public forum.

Khalid Ismath's case serves as an excellent illustration of this danger. As internet posting can potentially cut across various platforms and channels, an individual may be slapped with several charges despite the comments or posts being essentially the same, due to automated sharing between Facebook and Twitter, for example. The comments made by him would have traditionally been bound to an offence under the Sedition Act 1948. However, due to the online nature of his posting, some of his posts were subjected to charges that crossed into the CMA. In essence, not only was he technically placed under criminal action for an allegedly seditious statement, he was also charged for social media abuse.

Furthermore, the punitive measures under the CMA can be more onerous when compared to the Sedition Act 1948 and other laws. While the maximum prison sentence may not be as extraneous as those under the Sedition Act 1948, the MYR 50,000 (USD 11,800) fine that could be imposed may be far more damaging than a short prison sentence. For example, student activist Adam Adli⁸² and well-known activist Hishamuddin Rais⁸³ were both found guilty of sedition and fined MYR 5,000 (USD 1,180) respectively, whereas in the case of Wan Fatul Johari, who was charged under the CMA, he was fined for MYR 120,000 (USD 28,400) and underwent a 30-month prison sentence in default.⁸⁴ The difference in penalties under different laws is further illustrated in Table 1.

Extralegal state actions in criminalisation of dissent

Another concerning aspect with regard to the criminalisation of freedom of expression online arises from the manner in which an "offender" is arrested, detained and prosecuted. As an example, in the case described earlier relating to comments on football, the individuals arrested were taken into custody from various parts of Malaysia and subsequently brought for remand and detention at Johor Bahru, a practice which contradicts the Criminal

78 Blog posts condemning Sisters in Islam as a deviant group in line with the fatwa issued can be easily found and accessed online, which raises the question as to whether the fatwa itself galvanised attacks and threats against the group led by non-state actors.

79 The Star Online. (2017, 27 July). NRD D-G not bound by fatwa to decide surnames of illegitimate Muslim kids. *The Star Online*. www.thestar.com.my/news/nation/2017/07/27/nrd-dg-not-bound-by-fatwa-to-decide-surname-of-illegitimate-muslim-child

80 Astro Awani. (2015, 21 December). Mahkamah Rayuan putuskan pendakwaan ke atas Kassim Ahmad tidak sah dan batal. *Astro Awani*. www.astroawani.com/berita-malaysia/mahkamah-rayuan-putuskan-pendakwaan-ke-atas-kassim-ahmad-tidak-sah-dan-batal-86091

81 An issue that has been noted by this report on various accounts especially in cases highlighting the use of law in criminalisation of freedom of expression

82 Mei Lin, M. (2016, 18 February). Youth activist Adam Adli gets RM5,000 fine in place of jail term in sedition sentence. *Malay Mail Online*. www.themalaymailonline.com/malaysia/article/youth-activist-adam-adli-gets-rm5000-fine-in-place-of-jail-term-in-sedition#FTISEeJXXTD6f80e.97

83 The Star Online. (2016, 16 May). Hishamuddin Rais' jail term overturned by Appeals Court. *The Star Online*. www.thestar.com.my/news/nation/2016/05/16/hishamuddin-raiss-jail-term-overturned-by-appeals-court

84 www.utusan.com.my/berita/mahkamah/wan-fatul-johari-kanan-dibawa-keluar-dari-mahkamah-selepas-didapati-1.152543

TABLE 1.

Comparison of penalties under different laws*

Legislation	Prison sentence** (in years)	Fine (in MYR)	Both***
Sedition Act 1948	3 (or 5)****	5,000	Yes
Section 233 of CMA	1	50,000	Yes
Section 124C of Penal Code	15	–	No
Section 298 of Penal Code	1	–****	Yes
PPPA – Possession of material	–	5,000	No
PPPA – Production, publication, sales and distribution of material	3	20,000	No
Section 7(b) of Syariah Criminal Offences (Federal Territories) Act	2	3,000	Yes

* This is not a comprehensive comparison but only highlights some of the laws discussed in this report. ** Refers to the possible maximum sentence. *** Could be sentenced to both imprisonment and fine. **** In the event of a subsequent offence. ***** Not listed in the Penal Code, but read in line with Section 283(1)(a) Criminal Procedure Code, there is technically no limit but it shall not be excessive.

Procedure Code. Curiously, the arrests made in this case included those of a fisherman and his son, who were allegedly owners of the offending Facebook account.⁸⁵ The two were arrested off the coast of Malaysia while they were out fishing.⁸⁶

Furthermore, the practice of chain remand⁸⁷ was also utilised against those detained in this case. Some of the detainees were subjected to a detention period of close to two weeks, when their remand period should not be more than seven days.

On top of the peculiarities mentioned above, the Royal Malaysian Police maintains a Twitter watchdog account that occasionally calls out online users whom they deem offensive.⁸⁸ Similarly, the former Inspector-General of Police of Malaysia is also an avid user of Twitter and often makes comments praising the police force or calling out individuals whom he finds “offensive” or who have supposedly made “seditious” comments online. A good example of this can be seen when a well-known human rights lawyer and activist, Michelle Yesudas, commented on the rape threats made by non-state actors and members of the public in relation to the Aishah Tajuddin case. In that incident, the former Inspector-General of Police tweeted a demand for the activist to explain her tweet to the Royal Malaysian

Police and accused her of causing restlessness and panic among the public.⁸⁹

While there is limited repercussion on those who are called out by the former Inspector-General of Police, there are concerns that the public call-out and the threat of investigation posed by the Inspector-General of Police’s scrutiny on Twitter may eventually have a chilling effect on the rest of the internet users in Malaysia.⁹⁰

An interesting point to note is that the former Inspector-General of Police has in the past considered applications such as WhatsApp as part of social media as opposed to messaging applications.⁹¹ While the law does not discriminate between the platforms in which a message is delivered, the stance of the former Inspector-General may open up new avenues in which the state may intervene, with the presumption that private spaces, such as closed chat groups, form part of the public sphere of social media.

Non-state actors

In recent years, non-state actors have nurtured a growing role in the “enforcement” of morality in Malaysia. Many of the cases referred to below were initiated by individuals as opposed to government agencies. In addition to cases involving

85 My Metro. (2016, 1 June). Izlaily Nurul Ain Hussein. ‘Minah Pendek’ direman empat hari. *My Metro*. www.hmetro.com.my/node/141948

86 Malaysia Kini. (2016, 31 May). Polis cekup ‘Minah Pendek’ hina TMJ di tengah laut. *Malaysia Kini*. www.malaysiakini.com/news/343641#MO4VUz5IFoVIXesm.97

87 Chain remand is where an individual is repeatedly re-arrested at the end of the remand period. SUARAM has in the past documented cases where individuals were remanded in this way for 80 days. *Free Malaysia Today*. (2016, 15 March). Six men allege torture during 80-day remand. *Free Malaysia Today*. www.freemalaysiatoday.com/category/nation/2016/03/15/six-men-allege-torture-while-in-80-day-remand

88 PCIRC Official @OfficialPcirc (Police Cyber Investigation Response Centre). <https://twitter.com/officialpcirc>

89 “Mohon @chelle_yesudas jelas kan kpd @PDRMsia, apa yg dimaksudkan dgn tweet di bawah, jgn timbul kan keresahan rakyat” – rough translation: “Please @chelle_yesudas, explain to the Royal Malaysian Police what you mean by the tweet below, don’t cause worry (unrest) among the people.” <https://twitter.com/KBAB51/status/579854384235827200>

90 A phenomenon that has yet to manifest, as individuals are still more than happy to criticise and challenge political authorities on social media.

91 Rodzi, N. H. (2016, 12 January). IGP: Police targeting ‘immature Malaysians’ on social media. *The Star Online*. www.thestar.com.my/news/nation/2016/01/12/igp-police-to-monitor-social-media

unidentifiable non-state actors, there are cases such as that of Khalid Ismath, in which the report against him was made by an individual who serves in the Royal Palace.⁹²

Until the recent case of an arrest for online threats against Siti Kassim,⁹³ a prominent human rights lawyer and activist, internet users were largely allowed to threaten activists and other internet users with impunity. Comments calling for individuals like women human rights defenders (WHRDs) to be raped, killed or subjected to acid attacks⁹⁴ were common, with no actions taken against those issuing the threats. In some cases, the threat goes beyond social media posts in the public sphere and extends to private messages sent to HRDs. In the run-up to the Bersih 5 rally in 2016, several individuals affiliated with Bersih were sent a series of images based on a video of an execution by the so-called Islamic State.⁹⁵

Without a substantial change to the status quo relating to WHRDs, they will constantly be subjected to this additional element of danger and threats from non-state actors due to their gender, on top of the criminalisation of freedom of expression by the state.

It is noted that the Royal Malaysian Police is seemingly altering its stance on the matter and investigating reports made by activists regarding online comments that threaten their personal safety. It remains to be seen whether the initial actions of arresting individuals making death threats online will be followed by legal actions and sanctions.

Beyond the threats made against activists or other individuals, targeted attacks against communities are growing more common in Malaysia. One example would be the attacks faced by Sisters in Islam, such as frequent blog posts that demonise them or classify them as deviants.⁹⁶ Other common forms of attack are those faced by LGBTIQ activists.

Recent examples include the online witch-hunt against the organiser of a pride event in May 2017. An individual perceived as the organiser had his photo shared on a website that was notorious for demonising LGBTIQ communities.⁹⁷

Another activist who has in the past spoken up against the attacks against and demonisation of LGBTIQ activists also had his information listed publicly on the website, which resulted in individuals approaching his family home and threatening his personal safety. Due to the threats posed against him, the activist was forced to temporarily relocate out of fear for his own safety.

Apart from attacks against known or perceived activists, other individuals are also often exposed to online violence. In March 2017, a teenage girl was attacked online for a sign she had carried in a march, expressing her aspiration to become the first woman prime minister of Malaysia.⁹⁸

Unfortunately, there is a trend of cyberbullying and online violence that is growing in Malaysia, with little to no criminal action taken against perpetrators. The predicament faced at this juncture is a curious one, as Section 233 of the Communications and Multimedia Act 1998 was initially implemented to prevent and criminalise such behaviours, but has not been utilised in a manner conducive to reducing and mitigating cyberbullying and online violence.

Future violations through draft laws

At the time of writing in August 2017, there were two known laws affecting freedom of expression in Malaysia. Amendments to the Sedition Act 1948 were passed and gazetted in June 2015. Fortunately, the amendments are not yet in force, despite having appeared in the Federal Gazette.⁹⁹ While there has been no resistance or challenges against the legitimacy of applying the Sedition Act 1948 online, the amendments included the addition of the term “by electronic means” among other additions to the law, such as as heavier penalties and an alteration of the definition of “seditious” statements under the Act.

On finer inspection, the Sedition Act 1948 now criminalises propagation of a seditious comment or causing a seditious comment to be published as an offence. Furthermore, in the event where a seditious comment is published through electronic

92 An office that traditionally does not have any executive power but exercises substantial influence on selected matters.

93 Zack, J. (2017, 26 July). Cops arrest man who threatened to behead Kasim. *The Star Online*. www.thestar.com.my/news/nation/2017/07/26/cops-arrest-man-who-threatened-to-behead-siti-kasim

94 Malay Mail Online. (2017, 24 July). Lawyer Siti Kasim says getting death, rape threats. *Malay Mail Online*. www.themalaymailonline.com/malaysia/article/lawyer-siti-kasim-says-getting-death-rape-threats#x5TU09oezOyZml8J.97

95 Alhadjri, A. (2016, 18 October). Maria Chin, Ambiga to lodge report over death threat, say image is ‘too much’. *Malaysia Kini*. www.malaysiakini.com/news/359435

96 Searches on the subject of Sisters in Islam and alleged deviant practices would usually result in several blog posts condemning the NGO as deviants in line with the claims of state religious authorities. For example: <https://al-faedah.blogspot.my/2014/11/siapa-sis-sisters-in-islam.html>; <https://al-faedah.blogspot.my/2014/11/siapa-sis-sisters-in-islam.html>

97 Menara.my. (2017, 13 June). Iftar GAY terbesar Malaysia – Numan Afifi. *Menara.my*. www.menara.my/iftar-gay-terbesar-malaysia-numan-afifi

98 Joint Action Group for Gender Equality (JAG). (2017, 15 March). JAG condemns online attack on #WomensMarchKL. *Malaysia Kini*. <https://m.malaysiakini.com/letters/375734>

99 A1485, 4 June 2015.

means and the person who is making or circulating the seditious publication cannot be identified, action can be taken under the CMA to prevent access to it. Fortunately, beyond the alterations discussed above, the amendment itself does not include any provisions or additional punishment for seditious comments made online.

The other legal amendment that deals with the criminalisation of freedom of expression is the potential amendment of the Communications and Multimedia Act 1998. Although it has been a matter of discussion since 2015, there has been no concrete draft law tabled or released publicly. As of August 2017, the amendment had yet to be tabled in Parliament or produced in any form.¹⁰⁰ Rumours derived from the comments of ministers with regard to the amendment include the possibility of registration of bloggers and increased penalties for offences as part of the proposed changes.¹⁰¹

To this end, one can say that the proposed and known amendments to laws that directly affect the criminalisation of freedom of expression would not necessarily alter the current status quo in terms of criminalisation. However, the proposed amendments may well increase the “costs” of being found guilty for an offence.

Furthermore, amendments to the Criminal Procedure Code could be equally damaging in this regard. Amendments to the Criminal Procedure Code made in December 2016 removed a degree of judicial discretion in terms of sentencing for first time offenders when they are charged for a serious offence. Serious offence denotes an offence punishable by imprisonment for a term of 14 years or more.¹⁰² While most offences discussed above would not usually fall under this criterion, there are possibilities that future amendments would restrict or limit existing protections that could mitigate prosecution against human rights defenders.

Summary and conclusion

Reflecting on the overall circumstances described above, one would reasonably conclude that freedom of expression in Malaysia both offline and online is subjected to various degrees of criminalisation.

While criminalisation is not necessarily common in the greater scheme of things, cases documented by SUARAM suggest a trend in which an average person could be arrested, detained, harassed and prosecuted for a relatively innocuous comment made on Facebook or other online social media.

For better or for worse, the lack of distinction between the application online and offline of laws that criminalise freedom of expression means that all of the existing laws that penalise or restrict freedom of expression can cross over to application in the online sphere. As noted in some of the cases above, a comment made online could potentially be “double the trouble”, as an individual can be charged for a traditionally offline crime under laws such as the Sedition Act 1948, and at the same time, charged for an offence under the Communications and Multimedia Act 1998.

With the rise of social media applications and the growing popularity of instant messaging applications on a global level, with almost nationwide adoption, state authorities would naturally feel more inclined to extend their existing powers to cover these platforms. On one hand, the government would reiterate the need for “holistic” solutions and prevention with regard to issues of security, online fraud and “fake news”, and would utilise this as leverage for further control and punitive measures; on the other hand, the imposition of additional regulations with expanded regulatory powers afforded to a politically aligned entity would mean that legitimate interest in freedom of expression would likely be compromised to achieve the former.

With the rising prevalence of hate crimes and death threats against activists and other actors in the civil and political rights discourse, there is a growing need for laws that can restrict and criminalise such behaviours online and offline. Realistically, at this juncture, suggestions or implementation of any further regulations would likely be met with scepticism with regard to the sincerity of the laws and their implementation. This unfortunate dilemma leads to the question: How do we address the need for legitimate protection when the institution implementing it is not necessarily trustworthy?

100 Malaysia Kini. (2016, 9 March). Salleh: Amendments to internet laws won't be tabled now. *Malaysia Kini*. www.malaysiakini.com/news/333286

101 Astro Awani. (2016, 22 February). Amendment to Communications and Multimedia Act 1998 in March. *Astro Awani*. english. astroawani.com/malaysia-news/amendment-communications-and-multimedia-act-1998-march-95481

102 52B of the Penal Code.

UNSHACKLING EXPRESSION: A study on laws criminalising expression online in Asia

Freedom of expression and opinion online is increasingly criminalised with the aid of penal and internet-specific legislation. With this report, we hope to bring to light the problematic trends in the use of laws against freedom of expression in online spaces in Asia.

In this special edition of GISWatch, APC brings together analysis on the criminalisation of online expression from six Asian states: Cambodia, India, Malaysia, Myanmar, Pakistan and Thailand.

The report also includes an overview of the methodology adapted for the purposes of the country research, as well as an identification of the international standards on online freedom of expression and the regional trends to be found across the six states that are part of the study. This is followed by the country reports, which expound on the state of online freedom of expression in their respective states.

With this report, we hope to expand this research to other states in Asia and to make available a resource that civil society, internet policy experts and lawyers can use to understand the legal framework domestically and to reference other jurisdictions.

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