



FACULTY OF LAW, UNIVERSITY OF MALAYA



# CELEST

CENTRE FOR LAW AND ETHICS IN SCIENCE AND TECHNOLOGY



## *Happy New Year!*

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Dr Zalina bte Abdul Halim, who is a senior lecturer at the Law Faculty, UM discusses how constant advancements in technology have pushed the traditional boundaries of communications and media.



## ***2018 Year-End Message from the Director***

It has been eight months since CELEST's first activity began when a group of researchers at the Law Faculty met to discuss how the Centre can serve as a focal point to promote legal research in science and technology. A number of laudable ideas were bounced about including organising seminars, hosting and collaborating with relevant experts at national and international levels, applying for research grants, roping in doctoral students to assist in research, and publishing books as well as journal articles. With dedication and enthusiasm, one can be optimistic that this will be achieved with time.



With artificial intelligence (AI) technology set to reshape many areas of our lives, it is apt for CELEST to embark on research in the field of AI and the law. In August 2018, CELEST invited Associate Professor Dr Chan Chee Seng from the Faculty of Computer Science and Information Technology, UM to talk on AI and how it affects our daily lives. Since then, some researchers from the Law Faculty have successfully secured grants to embark on research pertaining to the impact of AI on specific industries. CELEST has also collaborated with the University of Malaya eHealth Initiative research group to conduct research on the legal, ethical and governance challenges in eHealth. More recently, in late October, CELEST co-organised with the Applied Research Centre for Intellectual Assets and the Law in Asia, Singapore Management University a roundtable to discuss, among others, intellectual property protection for pharmaceuticals, drug-approval patent linkage and new technology trends, such as big data, AI, and blockchain. The academics hailed from Japan, Taiwan, China, Singapore, India, Germany and, needless to say, Malaysia. This year, there were several publications by researchers from CELEST on areas of law relating to science and technology. These include cloud computing, energy, the blockchain, data protection and privacy of genetic information

As we bid goodbye to 2018, we are reminded that we live in exciting times with intriguing challenges presented by the intersection between, on the one hand, science and technology and, on the other hand, law and ethics. Undoubtedly, this is a fertile ground for research. We look forward to what 2019 will bring. On this note, I wish all our readers a Happy New Year!

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## **Media Law in Malaysia: Time for a Makeover?**

**By Zalina Abdul Halim, PhD  
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### *Author's Biography*

*Dr Zalina Abdul Halim has been attached to the Faculty of Law, University of Malaya as a lecturer since 1997. She began her academic career as a tutor in August 1993 and, in 1995, she pursued her Master of Laws at the University of Melbourne, Australia. In 2012, she obtained her Ph.D. from the University of Manchester, the UK for her study on the Right to Know in Malaysia. Currently, she is a senior lecturer and, over the years, she has taught Land Law, Law and Society, Research Methodology, and Media Law. She is also the coordinator for the Faculty of Law industrial training programme.*

The media laws in Malaysia were from the pre-independence period, [1] inheriting the British common law ethos, structure and constraints to regulate the print and broadcast media. According to Geoffrey Robertson, a famous human rights barrister, the right to free speech is an English invention that is established in our sentiments if not in our law. [2] There is no written English constitution detailing a bill of rights, freedom of speech is a residual right if the speech does not infringe any law. These laws regulate traditional and electronic media. [3] They restrict freedom of expression and limit the sharing as well as receiving of information. At the same time, there is no statutory protection of privacy as a right recognised in the law. The Malaysian Federal Constitution which is written curtails the freedom of speech and expression with restrictions before such freedom is enjoyed by Malaysia.

More specifically, Article 10(1) of the Constitution reads, “[S]ubject to Clauses (2), (3) and (4) – (a) every citizen has the right to freedom of speech and expression”. Modern society has a plethora of modes of communication to express this freedom of speech. Modern communications enable anyone who has a communication gadget to instantaneously send, share, and receive information.

People access content from a myriad of static or mobile devices, through licensed and unlicensed service providers. Most of the media laws in Malaysia need to be reviewed and updated to address the impact of modern communications and its effects on society. Free speech is an indispensable condition for the complete development of an individual and conversely, is also an instigator of chaos, violence, and massacre of masses in an imperfect world.

### ***Freedom of Speech in the Malaysian Constitution***

The aforementioned Article 10(1)(a) of the Federal Constitution is a general provision and merely states that every citizen has the freedom of speech and expression. It has been interpreted as being narrow in scope as it does not explicitly provide for the other aspects of human rights, such as free speech and dignity of a person. Any interpretation of the constitutional right has to be within the four corners of the written Constitution. [4]

Parliament is given wide powers to enact laws to restrict speech as it deems necessary or expedient, and the executive has been given ample space by the judiciary to flexibly proceed mainly to preserve public harmony and security of the administration. The priority interests protected by the Federal Constitution are security, public order and morality. The common law limitations preserving parliamentary privileges [5] contempt of court, defamation and incitement to any offence are also included. [6] Further, a strict warning not to question the special position of the Malay Rulers and special privileges of the Malays and East Malaysian natives were added in a constitutional amendment in 1971.

**According to Geoffrey Robertson, a famous human rights barrister, the right to free speech is an English invention that is established in our sentiments if not in our law.**

The effect is to circumscribe discourse of public matters pertaining to government policies and implementation of affirmative action measures as a consequence of the race riots in 1969. Even parliamentarians have been examined for their discourses in Parliament. The impact on the society is frequent self-censorship and non-questioning of administrative governance. Morality and faith offending communicative acts are governed by the Penal Code which codifies offences such as criminal defamation in section 499 and blasphemy in section 298A. Movies which are to be screened must obtain a certificate of approval for exhibits that submit to the guidelines administered by the Censorship Board or risk being denied public release or being charged for exhibiting an unlawful film. [7]

Malaysian case law had adhered to the archaic definition of obscenity in *R v Hicklin* [8] which describes the term as the 'tendency to corrupt and deprave those whose hands the publication falls into'. This is unfitting in the light of modern communications where society is bombarded with various 'corrupting' influences every second through all means available online.

## Archaic Laws and Online Communications

The traditional media is constrained by the Printing Presses and Publications Act 1984, which requires licensing and imposes conditions for the print press. Content that is published by organised business media is controlled so as not to offend 'community standards'. However, online communications that cause grievances such as cyberbullying, sexual harassment, stalking and certain speeches lack proper laws proscribing them.

The Communications and Multimedia Act 1998 ('CMA') regulates the electronic media industry which combine the broadcast, telephony and online channels. The licensees are described as: network facilities provider, network service provider, applications service provider and content applications service provider. The regulator is the Malaysian Communications and Multimedia Commission which has to seek the Minister's approval for main decisions pertaining to licensing and regulating the economic, social and technical aspects.

**The traditional media is constrained by the Printing Presses and Publications Act 1984...However, online communications that cause grievances such as cyberbullying, sexual harassment, stalking and certain speeches lack proper laws proscribing them.**

It is an offence in section 233 to make, create, solicit or initiate any comment, request, suggestion, which is obscene, indecent, false, menacing or offensive with an intent to annoy, abuse, threaten or harass any person. The person responsible for the communication or someone who permits a network service or applications service provider under his control to be used for such an activity commits an offence liable to be fined not exceeding RM50,000 or imprisonment not exceeding one year. At first glance, section 233(1)(b) captures elements of cyberbullying as it covers repeated acts or otherwise of verbal and psychological harassment.

It can cover an indirect cyber harassment where it is persistent harmful online communications to third parties concerning a complainant but not directly to the victim/survivor but to social media sites maintained by the victim/survivor's friends and family members; or when a person makes harmful comments to the public about the victim/survivor'. [9]

These communicative acts can result in serious social and mental health issues e.g. depression. [10] If criminal law does not intervene, such acts can often easily escape by sheer anonymity. Section 211 CMA has the same punishment as section 233 prohibiting content that is indecent, obscene, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person. These two provisions are wide and apply the archaic Hicklin obscenity definition which does not address harmful online communicative acts such as cyberbullying. [11] sexual harassment and cyberstalking.

Guidance defining the meaning of these negative communications are found in the industry's Content Code formulated by the Content Forum.

However, the extent of abuse, threat and the invasion of privacy, is not specified. There is no case law yet on these points. There could be degrees of harm because the culpability of the communicative acts could range from minor to serious harm and these are also not addressed. The relevant provisions ought to be reviewed for clarity of offences and to prescribe various degrees of culpability. The common features of cyberbullying and cyber harassment are the use of electronic or digital means; the intention to cause harm; a sense of anonymity and lack of accountability of abusers as well as the publicity of actions.

The communication technologies used are email, instant messaging, social media, online gaming, or through phone images. The common social media platforms are Facebook, Instagram, Twitter, Snapchat, WhatsApp, Tumblr, and YouTube. It is a serious crime committed on children and possibly also by children. [12]

Malaysia does not have specific laws to deal with cyberbullying and cyber harassment. Other jurisdictions have laws that explicitly provide for the offences of harassment, putting people in fear of violence and stalking. The United Kingdom has the Protection from Harassment Act 1997. Section 7 of the Act states that "harassing a person" includes "alarming the person or causing the person distress". This is further explained by the UK Crown Prosecution Service (CPS) 'Stalking and Harassment Legal Guidance' that harassment includes "repeated attempts to impose unwanted communications and contact upon a victim in a manner that could be expected to cause distress or fear in any reasonable person". [13]

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However in Malaysia, soliciting and grooming children for sexual exploitation is covered under the Sexual Offences Against Children Act 2017 [Act 792]. Section 11 makes it an offence to sexually communicate or encourage a child to communicate sexually by any means whatsoever. Section 12 covers sexual grooming communication by any means with a child with the intention to commit or facilitate the commission of any offence. In addition, section 503 of the Penal Code criminalises the outraging of modesty acts.

**Digital technology increases the opportunity for violations of the right to privacy. Malaysia does not have a right to privacy except for violations of data usage for commercial transactions under the Personal Data Protection Act 2010 [Act 709].**

### **Lack of Privacy Protection**

Freedom of expression and privacy are mutually reinforcing rights. The right of privacy is essential to ensure an individual's autonomy, a pre-requisite to the meaningful exercise of freedom of expression particularly online. This allows respect and protection for human dignity and the individual's ability to live freely and engage with one another. Nevertheless, one's right of expression may impinge on someone else's right to privacy.

Digital technology increases the opportunity for violations of the right to privacy. Malaysia does not have a right to privacy except for violations of data usage for commercial transactions under the Personal Data Protection Act 2010 [Act 709]. Although according to the case of *Sivarasa*, the right to life in Article 5(1) of the Federal Constitution provides for a limited right to privacy, that right would arguably be confined to the contravention of individual rights by the legislature, the executive or its agencies.

The implied right had been viewed as not applying to privacy concerns between private individuals. [14] This is another limitation on the present media law regime for privacy as an actionable right of an individual as it is not directly recognised by law. It is also limited to a tortious invasion of a person's private morality, dignity, decency, and modesty.

In *Lee Ewe Poh v Dr Lim Teik Man & Anor*, [15] the doctor who treated the plaintiff for hemorrhoids was found liable for taking photographs of her private parts without her consent. The plaintiff who suffered humiliation, trauma and serious mental anguish as a result of photographing her private parts was granted damages.



Further, in the Court of Appeal case of *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors*, [16] the appellant, whose act of easing herself in the police truck after a raid at a nightclub was photographed by the defendant, successfully appealed to make the agencies involved in the raid to be jointly liable for the act of the defendant. She claimed that the officers (of the agencies of RELA and JAWI) had negligently failed to protect her well-being by allowing the defendant to snap the photographs. The defendant was held liable even though that case was not directly argued based on the tort of invasion of privacy.

## Moving Forward

The Malaysian government had much earlier announced their intention to review the current media laws. Unfortunately, the long wait has been futile. There is also no cross-media ownership restriction in the CMA. This allows for the concentration of media ownership and hampers media pluralism as well as diversity. Any reform requires much circumspection and in-depth analysis of other laws including a good awareness of developments in other jurisdictions. Many issues need to be examined especially in the light of advancements in technology and the constant evolution of media applications. It is high time for the laws governing the media industry in Malaysia to undergo a makeover so as to keep pace with technological developments and be of real relevance to Malaysians.

Many issues need to be examined especially in the light of advancements in technology and the constant evolution of media applications. It is high time for the laws governing the media industry in Malaysia to undergo a makeover...





## References

1. The Printing Presses and Publications Act 1948 [Act 58], Control of Imported Publications Act 1958 [Act 63], Telecommunications Act 1950 [Act 20], Broadcasting Act 1988 [Act 388], Official Secrets Ordinance 1950 and Official Secrets Ordinance of Sabah [Cap 90] and the Sedition Ordinance 1948 (revised in 1969 and amended in 2015).
2. Geoffrey Robertson and Andrew Nicol, (2008), Media Law. London: Penguin Books.
3. The electronic media is now governed by the Communications and Multimedia Act 1998 [Act 588].
4. PP v Pung Chen Choon [1994] 1 MLJ 566 (Supreme Court).
5. Houses of Parliament (Privileges and Powers) Act 1952 [Act 347].
6. Apart from common law principles, reputation is protected by the Defamation Act 1957 Act 286. Criminal defamation is provided in section 499 Penal Code. Contempt of court is governed by section 13 of the Courts of Judicature Act 1964 [Act 91] which empowers the High Court to punish any contempt of itself.
7. Film Censorship Act 2002 [Act 620] controls the public screening of films that infringe religious, cultural and moral values of the Malaysian society.
8. LR 3 QB 360.
9. Law Reform Commission, 'Issues Paper on Cyber-crime affecting personal safety, privacy and reputation including cyberbullying (LRC IP 6-2014), <[http://www.lawreform.ie/\\_fileupload/Issues%20Papers/ip6Cybercrime.pdf](http://www.lawreform.ie/_fileupload/Issues%20Papers/ip6Cybercrime.pdf)>, (8 Nov 2018).
10. Recommendation no 2, para 5.7, of the Commonwealth of Australia Senate Legal and Constitutional Affairs References Committee: Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying. The committee recommends that the Australian government approach cyberbullying primarily as a social and public health issue.
11. Defined by the Merriam Webster dictionary as "the electronic posting of mean-spirited messages about a person ... often done anonymously." The European Commission defines cyberbullying as repeated verbal or psychological harassment carried out by an individual or a group against others by means of online services and mobile phones. Generally understood as bullying taking place on the internet. According to the study of safe habits in the use of ICT by minors published by the INTECO in March 2009, cyberbullying is defined as harassment among peers in the ICT environment, and includes the act of blackmail, humiliation and insults from children to other children.
12. Cyberbullying is a form of psychological and physical violence that falls under Article 19 of the UN Convention on the Rights of the Child (UNCRC) that establishes children have a right to be protected from all forms of violence.
13. See [http://www.cps.gov.uk/legal/s\\_to\\_u/stalking\\_and\\_harassment/](http://www.cps.gov.uk/legal/s_to_u/stalking_and_harassment/) > (8 Nov 2018).
14. Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors. [2005] 3 MLJ 681 (Federal Court).
15. [2011] 1 MLJ 835.
16. [2009] 6 MLJ 826 (Court of Appeal).

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