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When Words Wound: Navigating the Fine Line between Free Expression and Hate Speech

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ABSTRACT

Freedom of expression is a cornerstone of democratic society, but its limits are often tested when speech crosses into hatred and incitement. This study examines how Malaysia regulates the boundary between free expression and hate speech within its constitutional and statutory framework, while situating the analysis against international standards. Using a qualitative approach, the research reviews constitutional provisions, statutes such as the Sedition Act 1948 and the Communications and Multimedia Act 1998, and leading case law. Comparative perspectives from the United States, South Korea, and China are included to highlight alternative models of regulation. The findings show that Malaysia's laws are broadly worded and inconsistently applied, creating uncertainty and a chilling effect on legitimate dissent. By contrast, international guidance such as the Rabat Plan of Action offers a more principled, harm-based approach. The study concludes that protecting free expression and curbing hate speech are not mutually exclusive, but require precise legal definitions, proportional enforcement, and stronger judicial safeguards.

Keywords:

Freedom of expression; hate speech regulation; human rights law

1. Introduction

Freedom of expression is widely recognised as a cornerstone of democratic society, but it has never been absolute. In Malaysia, Article 10 of the Federal Constitution guarantees freedom of speech, yet its extensive limitations reveal a persistent tension between individual liberty and public order [1]. This dilemma is not unique to Malaysia. Internationally, both the Universal Declaration of Human Rights (UDHR) [2] and the International Covenant on Civil and Political Rights (ICCPR) [3] affirm the right to express opinions, subject to restrictions necessary to protect the rights of others and maintain social harmony.

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Malaysia's constitutional framework, however, places significant qualifications on this right. As Mia, Islam, and Norullah [10] note, Article 10(1)(a) grants freedom of speech, but Article 10(2)(a) allows Parliament to restrict it on grounds such as security, public order, and morality. Edward, Azerin, and Althabhwai [9] further observe that judicial interpretation often reinforces these broad restrictions, leading to selective enforcement that undermines pluralism. Althabhwai *et al.*, [8] add that statutory controls on media expression reflect a broader "social contract" justification, whereby liberties are curtailed in favour of state-defined order without principled limits. Taken together, these studies illustrate that constitutional guarantees in Malaysia are frequently overshadowed by statutory and judicial practices.

The central challenge lies in distinguishing legitimate expression from hate speech. International law, through Article 20(2) of the ICCPR, obliges states to prohibit advocacy of hatred that incites discrimination, hostility, or violence [3]. The Rabat Plan of Action [4] provides a threshold test based on six factors: context, speaker, intent, content, reach, and likelihood of harm, to ensure only genuine incitement is penalised. More recently, the United Nations has expanded initiatives to combat hate speech, underscoring the global importance of proportionate, rights-based restrictions [7]. By contrast, Malaysia's statutory framework lacks clarity and proportionality. The Sedition Act 1948 and the Communications and Multimedia Act 1998 employ broad and open-ended language, blurring the line between harmful incitement and legitimate dissent.

Civil society organisations highlight this concern. Article 19 [5] stresses that vague drafting allows the criminalisation of almost any criticism of the state, while Human Rights Watch [6] documents their frequent use against political opponents rather than genuine hate speech. These critiques echo Edward *et al.*, [9], who emphasise how such laws, intended to preserve harmony, risk becoming tools of political control.

This study addresses a gap in the literature, where existing research either emphasises abstract constitutional guarantees or isolates single statutes without considering their combined operation in practice. By situating Malaysia's constitutional provisions, statutory framework, and judicial interpretation within a broader international and comparative context, this paper provides a more integrated perspective. Accordingly, its objectives are threefold: (i) to examine the legal frameworks governing freedom of expression and hate speech in Malaysia and internationally, (ii) to analyse how these frameworks are interpreted and enforced in practice, and (iii) to assess whether Malaysia's current regulatory landscape adequately balances freedom of expression with restrictions on hate speech. The significance of this study lies in its potential to guide proportionate and rights-consistent reforms, thereby strengthening democratic governance and promoting social cohesion in Malaysia.

2. Methodology

This study adopts a qualitative socio-legal approach, advancing beyond doctrinal description to normative critique. As Hutchinson incisively notes [11], doctrinal research must do more than catalogue legal rules; it must interrogate their moral and constitutional coherence. Accordingly, this analysis begins with a close reading of primary legal resources, including the Federal Constitution, the Sedition Act 1948, the Communications and Multimedia Act 1998 (CMA), and relevant provisions of the Penal Code, while also examining their judicial interpretation and practical enforcement. The Federal Court judge in *Mat Shuhaimi Shafie v Public Prosecutor* [2014] 6 MLJ 345 asserted that the Parliament has the power to determine the scope of speech restriction. Faruqi critiques this as a form of judicial abdication [12], arguing that it signals a retreat from the judiciary's constitutional duty to safeguard fundamental rights. This case serves as a lens through which to examine how Malaysia's courts mediate the balance between free speech and state interests in practice.

Secondary literature provides a critical framework for this inquiry. Harding famously describes Malaysia's constitutional protection of speech as fairytale geometry [13], an elegant illusion rather than an operative safeguard. Complementing such academic critique, NGO reports furnish empirical insight into enforcement patterns, where Article 19 highlights Malaysia's Sedition Act's vague drafting, which permits the criminalisation of almost any state criticism, while SUARAM documents [14] how CMA prosecutions disproportionately target political critics rather than genuine hate speakers, suggesting a chilling effect on legitimate expression.

The study also employs comparative analysis, placing Malaysia alongside three contrasting models, namely the United States, where robust First Amendment jurisprudence sets a high threshold for restricting speech; South Korea, which combines constitutional guarantees with targeted regulation of hate speech and defamation; and China, which exemplifies sweeping state control over online content.

This comparative dimension follows Dicey's maxim [15] that constitutionalism should be judged by the working of institutions, not their paper form. By assessing not only what Malaysia's legal texts prescribe but also how they are applied, enforced, and experienced, this methodology seeks to evaluate whether the existing legal framework effectively distinguishes protected expression from punishable hate speech and whether it does so in a proportionate and principled manner.

3. Literature Review

Article 10(1)(a) of the Federal Constitution ostensibly guarantees freedom of speech; however, this right is immediately undercut by Article 10(2)(a), which permits Parliament to impose restrictions deemed necessary or expedient. This formulation has been widely criticised for diluting the protection it purports to offer. Harding characterises it as a constitutional sleight of hand [13], transforming rights from defensive safeguards into instruments of compliance. This critique is reinforced by judicial interpretation. In *PP v. Ooi Kee Saik* [1971] 2 MLJ 108, the court curiously declared that necessity rests with Parliament, reinforcing a posture of judicial restraint rather than robust constitutional protection. This jurisprudential stance reflects a pattern of judicial restraint that weakens the constitutional promise of free expression.

Malaysia's legal framework for regulating speech is shaped by a cluster of statutes, each criticised for its vagueness and potential for overreach. The Sedition Act 1948 is a central instrument of control, criminalising speech likely to excite disaffection against the government. Article 19 argues that it fails to meet the principle of legal certainty, a key requirement of both domestic and international law. Faruqi adds that the Sedition Act is a colonial relic used to discipline dissent rather than to maintain public order [12]. Section 233 of the CMA 1998 penalises individuals for offensive communications, a term that Latif critiques as hopelessly indeterminate [16], resulting in unequal enforcement where criticism of the state is more likely to be criminal than incitement of hatred. Similarly, Section 298A of the Penal Code is also deemed problematic by criminalising actions causing religious disharmony; Faruqi contends that it entrenches majority religious privilege by silencing minority expression [12], thereby undermining pluralism. Collectively, these legal instruments are characterised by broad drafting, leaving significant discretion to enforcement agencies and creating a climate of legal uncertainty.

Government-led initiatives have also sought to shape public discourse, particularly online, by introducing campaigns like *Klik Dengan Bijak* (2012) and Meta-MCMC Collaboration on Online Safety Practices (2024) which purport to promote responsible online civility and media literacy among citizens and curb sensitive content related to race, religion, and royalty (3R). Ironically, these initiatives also reflect the government's broad interpretation of public order as a constitutional

ground for limiting free speech. SUARAM observes that these initiatives ring hollow when critics of government policies are jailed for social media posts [14]. Amnesty International echoes this contradiction [17], stating educational campaigns lack credibility when paired with the frequent use of vaguely worded laws to suppress criticism.

This paper analyses different approaches taken by leading states in balancing freedom of their people while still upholding regulations. In the United States, robust protection of the society prevails under the First Amendment of its Constitution, established in the landmark case of *Brandenburg v Ohio* (1969) 395 U.S. 444, where the Supreme Court held that speech is punishable only if it is directed to inciting or producing imminent lawless action [18], a test that protects even hateful expression in favour of a resilient public sphere. While this approach encourages more open debates to prevent harmful ideas, it also results in a highly permissive online environment where misinformation and hate speech often increase, raising concerns about the limits of expressions online.

South Korea, by contrast, enforces a more communitarian model. Although its constitution guarantees the freedom of speech, assembly, and press, these rights are not absolute. In practice, several laws significantly limit online and offline speech. For instance, the Korea Communications Standards Commission (KCSC) blocked 229 online posts in accordance with Article 7 of the National Security Act 1948, which stated that political content that is deemed to contain any praise towards North Korea can be subject to blocking. The commission also blocked 94 posts under the Antiterrorism Act, claiming that they promote terrorism by containing content that is sympathetic to North Korea. Furthermore, hateful speech can still be criminalised under the Information and Communications Network Act 2001, whereby the Supreme Court decision in 2008 highlighted that the penalties for racist online comments affirm the state's duty to preserve social harmony. Still, Park [19] warns that such laws might inadvertently stifle political satire and dissent.

On the other hand, China, led by the Chinese Communist Party (CCP), imposes substantial restrictions on speech, especially when freedom of expression is perceived as a threat to regime stability. Although the 1982 Constitution included freedom of speech, the Party still held on to control over journalism and publishing to further guide public opinion. Under the Cybersecurity Law 2017 and the Online Information Content Ecosystem Provisions 2020, any content deemed destabilising can be subject to censorship by the Cyberspace Administration of China (CAC) or the Ministry of Public Security without going through open court litigation, which is described by MacKinnon as networked authoritarianism [20], where hate speech, extremist content, and even legitimate critique are suppressed alike.

Malaysia's regulatory approach reflects the weaknesses of all three models without fully realising their strengths. Like China, it uses broad and vague legal provisions, but without the institutional clarity of a centralised administrative system. South Korea, on the other hand, engages in selective enforcement but lacks procedural safeguards and judicial oversight to prevent abuse. And in the United States, it relies on platforms for online content moderation, but without constitutional guarantees to protect individuals from state overreach. Consequently, Malaysia's framework operates less as a shield for expression and more as a sword of deterrence, discouraging political dissent and minority speech. This fragmented approach outlines the urgent need for a coherent and proportionate legal standard that distinguishes legitimate speech from harmful incitement while aligning with international human rights norms.

4. Results and Findings

In Malaysia, the restrictions on freedom of expression in traditional and modern media are often justified through the framework of Social Contract Theory, whereby the state asserts its authority to limit speech for the sake of public interest and societal harmony [8]. This rationale is evident in the case of *Mohd Fahmi Reza bin Mohd Zarin Iwn Pendakwa Raya* [2020] 7 MLJ 399. Fahmi, a political graphic artist, was convicted for uploading satirical content on Facebook, which the court deemed "false in nature" and intended to annoy. While the High Court upheld his conviction, after reviewing the evidence of the witness, the court was satisfied that although the communication in Appendix A to the charge was a fine and creative work of art created by the appellant to criticise the government and the authorities, it was nonetheless produced with the intent to injure others. Such communication did not entitle the appellant to present it to the public without a legal witness and was held not to fall within the provision of the Federal Constitution [8].

The enforcement of Malaysia's laws regulating offensive speech, principally the Sedition Act 1948 and the Communications and Multimedia Act 1998, has revealed a problematic pattern. governing offensive speech has uncloaked a concerning pattern through various events. These statutes, originally intended to preserve public order and societal harmony, are constantly being implemented inconsistently and selectively, raising concerns about their roles in balancing free expression and public interest.

The Centre for Independent Journalism (CIJ), a non-profit organisation advocating for media freedom, has repeatedly characterised the Sedition Act and CMA as among the most weaponised tools used against dissent [21]. CIJ's *Report on the State of Freedom of Expression in Malaysia 2024* documents how, throughout 2024, authorities relied on these repressive statutes to curb free speech, peaceful assembly, and online expression. The Sedition Act 1948 and CMA were consistently the primary legal mechanisms invoked in such actions [21].

Similarly, there has been a concern regarding the proposed amendments to the CMA 1998 and the introduction of the Online Safety Bill, which CIJ warned could expand state surveillance powers and introduce vague terminology such as "grossly offensive," which could potentially lead to selective and inconsistent enforcement [21]. This development signals a possible regression in digital rights protections, particularly as these amendments could criminalise legitimate dissent under the guise of regulating harmful speech.

The case of *Zulkiflee bin SM Anwar Ulhaque & Anor v Arikrishna Apparau & Ors* [2014] 3 MLJ 553 underlined the balance between state powers under sedition laws and constitutional rights, especially freedom of expression and livelihood. Acting under the Sedition Act 1948, police raided the appellant's premises, seized his book *Cartoon-O-Phobia*, and detained him on suspicion of seditious content. The Court of Appeal held that the legality of the arrest and initial seizure ruled that authorities may act on reasonable suspicion even in the absence of formal prosecution or publication bans. However, the continued detention of the books was held unlawful, as it infringed the appellant's right to livelihood under Article 5 of the Federal Constitution. This decision illustrates the judiciary's willingness, albeit limited, to safeguard constitutional rights when enforcement exceeds what is necessary.

Having said that, this concern was judicially validated and acknowledged in the recent case of *Heidy Quah Gaik Li v Government of Malaysia* (Civil Appeal No. B-01(A)-514-10/2023), where the Court of Appeal struck down the words "offensive" and "annoy" in Section 233(1)(a) of the CMA 1998 as unconstitutional for their vagueness and potential for arbitrary application. The case arose after activist Heidy Quah was charged in 2021 and 2023 for Facebook posts about conditions in immigration detention centres, which she defended as truthful and in the public interest [22].

The Court found these terms inconsistent with Article 10(2)(a) of the Federal Constitution, which sets out permissible restrictions on free speech, and Article 8, which guarantees equality before the law. The court warned that criminalising speech based on subjective criteria such as annoyance risks suppressing lawful expression simply because it was unpopular or uncomfortable [23]. Ultimately, this ruling represents a significant step toward aligning Malaysian free speech jurisprudence with international human rights standards, particularly Article 19 of the Universal Declaration of Human Rights (UDHR), which protects the right to seek, receive, and impart information and ideas through any form of media [23].

In the United States, the First Amendment sets a very high threshold before speech can be restricted, with the *Brandenburg v. Ohio* test allowing even harsh or hateful expression if it does not provoke imminent unlawful acts [24]. The strength of this model is that it prevents state interference and encourages open dialogue, but the weakness is that harmful content like fake news or extremist speech often circulates freely. Malaysia, on the other hand, places heavier limits on expression through broad legal tools, giving the state greater ability to curb dangerous speech. Yet, this greater protective reach comes at the expense of consistent legal safeguards and leaves room for arbitrary application [13].

South Korea's system balances freedom of expression with collective interests by allowing restrictions under laws such as the National Security Act and the Information and Communications Network Act [25]. The benefit of this model is that it provides structured legal channels and regulatory bodies to respond to online abuse and divisive content. However, it also risks narrowing public space for satire or political criticism [17]. Malaysia takes a similar protective stance but without the same institutional checks and oversight, which makes its enforcement appear more fragmented and uneven compared to South Korea's structured approach [26].

China implements a tightly controlled environment where the leading Communist Party exercises sweeping authority over online and offline speech through agencies like the Cyberspace Administration and legal statutes such as Cybersecurity Law 2017. From the government's perspective, this model's advantage is its clear central command and its ability to maintain order by swiftly removing content. The downside is the near-total absence of genuine freedom, with even lawful criticism being silenced [27]. Malaysia resembles this approach in using wide-ranging legal provisions to limit speech, but unlike China, it lacks a centralised system to enforce these rules consistently. This produces a less predictable framework, where restrictions operate more as a deterrent than as a coherent policy of stability [28].

5. Recommendations

To address the recurring problems of overbreadth, [29] vagueness, and inconsistent enforcement [30], a holistic reform agenda is required, combining legislative amendments, judicial innovation, and public education.

Malaysia should adopt a statutory definition of hate speech that is precise, narrow, and aligned with international standards. Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) which criminalizes any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence. However, the requirement of intent and possibility of imminent harm should be proven to combat abuse. [31] Such codification would ensure that dangerous and hateful speech is sanctioned while upholding the right to legitimate opinion and academic debate. Adopting this standard definition by the United Nations Human Rights would put Malaysia on the same position with international standards and practice consistency in court decisions.

Section 233 of the CMA 1998 has been widely criticised for its vague terms that invite arbitrary enforcement. [32] Reform should specify or redefine vague language by replacing subjective terms with clear harm-based thresholds such as the term "grossly offensive" defined by reference to objective community standards and risk of actual harm. By specifying its scope, the misuse of this Act can be reduced especially in cases against political opponents and trivial disputes. A reformed CMA would balance state interests with citizens' constitutional rights and reduce selective prosecutions [33].

Another significant step that should be taken is the revision of the Sedition Act 1948. This Act was enacted during the colonial era, having provisions that penalised criticism of the monarchy or government regardless of whether it incites harm or not. [34] This makes it outdated and incompatible with modern circumstances. The amendments should limit criminals' liability to speech that incites imminent violence or hatred likely to disturb public order, decriminalise peaceful criticism of government policies, public officials, and institutions. As a result, the modernised Sedition Act would align Malaysia with constitutional and democratic norms while still enabling action against truly dangerous speech.

Furthermore, Malaysian courts should integrate the *Rabat Plan of Action's six-factor test* to evaluate hate speech cases. The court should assess the socio-political climate and audience vulnerability and the level of influence or authority of the speaker, any intention to incite harm, the directness, tone, and form of the speech, level of dissemination and audience reach and proximity between the speech and actual harm occurring. This approach would ensure that courts distinguish between merely offensive expression and unlawful incitement, resulting in principled, predictable decisions.

6. Conclusion

The tension between free expression and hate speech continues to pose a profound challenge in Malaysia's evolving democratic landscape. The existing legal framework, characterised by overbroad provisions and vague terminology, creates uncertainty that simultaneously discourages legitimate discourse and permits the suppression of dissent under the guise of maintaining harmony. This dual effect undermines both the constitutional guarantee of free speech and the broader democratic objective of fostering an informed and participatory public sphere.

The analysis of statutory provisions, case law, and comparative models underscores that the path forward lies in establishing clearer legal definitions, narrowing the scope of restrictive legislation, and ensuring greater judicial consistency. The adoption of internationally recognised standards, such as the Rabat Plan of Action, would provide courts and lawmakers with principled criteria to distinguish between lawful expression and unlawful incitement, thus strengthening the rule of law.

Ultimately, addressing overbreadth, vagueness, and selective enforcement requires a collaborative effort between lawmakers, the judiciary, civil society, and the public. By filling the legal gaps and harmonising enforcement practices, Malaysia can prevent the misuse of speech laws as instruments of political control and instead ensure that they function as genuine safeguards against harm. Such reform would not only reduce the chilling effect on public discourse but also advance Malaysia's commitment to human rights, democratic governance, and social cohesion.

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