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**RESTRICTIVE PROVISIONS OF THE COMMUNICATIONS AND  
MULTIMEDIA ACT 1998: A DISCUSSION**

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***Abstract***

The right to freedom of expression in Malaysia enjoys a constitutional protection under Article 10(1) (a) of the Federal Constitution and has been arguably well-guarded by an independent judiciary. The existence of countless legal restrictions to this right has never deterred the courts from its noble duty of scrutinizing executive and ministerial action which has impacted the fundamental rights of the people. The emergence of new technology inevitably demands more attention from the judiciary. The legislature has enacted Communications and Multimedia Act of 1998 (CMA) to give power to the authorities to monitor and control activities in the social media. Hence, this article will discuss the effects of two important provisions of the CMA that is Sections 211 and 233 and its ramifications upon netizens of the social media. For this purpose, the discussion adopts the doctrinal analysis by examining the existing primary and secondary materials gathered from multiple sources including statutory provisions such as Federal Constitution and Communications and Multimedia Act of 1998, case law and other legal and non-legal literatures. This article concludes that the CMA is clearly a modern legislation that acknowledges the existence of new technologies and that such technology must regarded as an asset to the country and its people. It is also a recognition to the industry of communications and multimedia. Furthermore, the cases revealed an indication that both sections 211 and 233 of the CMA 1998 appears to show that such law is used to silence the critics and comments against the ruling establishment.

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**Keywords:** Freedom of Speech and Expression, Media Social Law, Communication and Multimedia, Malaysia.



## **1. Introduction**

The right to freedom of expression in Malaysia enjoys a constitutional protection and has been arguably well-guarded by an independent judiciary. Article 10(1) (a) of the Federal Constitution provides for the right to freedom of speech and expression not in absolute terms. The presence of many legal restrictions to this right has never deterred the courts from its noble duty of scrutinizing executive and ministerial action which has impacted the fundamental rights of the people (Aziz, Ahmad & Manap, 2015). The emergence of new technology inevitably demands more attention from the judiciary as the right to freedom of expression widens and comfortably give access to more information and expands the freedom of expression of Malaysian netizens to new frontiers that has never before been experienced by Malaysians generally. The social media is facilitated by various service providers namely Facebook, Twitter, Youtube, Flickr, Tumbler, LinkedIn, Skype, Instagram, Pinterest and many more. As faced by the conventional rights to freedom of expression, this new popular sensation is not isolated from the common restrictions to deter acts of abuse and indiscretions. Legally the Communications and Multimedia Act of 1998 (CMA) has been enacted to give power to the authorities to monitor and control activities in the social media with the intention of deterring netizens from engaging in the social media in an abusive manner and to avoid irresponsible circulation of information. This article will discuss the effects of two important provisions of the CMA that is Sections 211 and 233 and its ramifications upon netizens of the social media. Such an unpopular move to curb such a popular activity for all walks of Malaysian life poses a challenge to the authorities concerned in the implementation and enforcement of the law.

## **2. Problem Statement**

The presence of many legal restrictions to this right has never deterred the courts from its noble duty of scrutinizing executive and ministerial action which has impacted the fundamental rights of the people. (Bari & Shuib, 2004) The emergence of new technology inevitably demands more attention from the judiciary as the right to freedom of expression widens and comfortably give access to more information and expands the freedom of expression of Malaysian netizens to new frontiers that has never been experienced by Malaysians generally. The social media is facilitated by various service providers namely Facebook, Twitter, Youtube, Flickr, Tumbler, LinkedIn, Skype, Instagram, Pinterest and many more. As faced by the conventional rights to freedom of expression, this new popular sensation is not isolated from the common restrictions to deter acts of abuse and indiscretions (Barendt, 2005).

## **3. Research Questions**

This article will discuss the effects of two important provisions of the CMA that is Sections 211 and 233 and its ramifications upon netizens of the social media.

## **4. Purpose of the Study**

This article is intended to discuss the effects of two important provisions of the CMA that is Sections 211 and 233 and its ramifications upon netizens of the social media. Such an unpopular move to

curb such a popular activity for all walks of Malaysian life poses a challenge to the authorities concerned in the implementation and enforcement of the law

## **5. Research Methods**

This article employed a qualitative doctrinal legal research as the article intends to discuss in-depth and detailed on the particular matters. By using qualitative methods many new aspects of problem can be identified and thus once they are identified, suggestion would follow resulting in the research result and findings being more beneficial and practical. For this purpose, the discussion adopts the doctrinal analysis by examining the existing primary and secondary materials gathered from multiple sources including statutory provisions such as Federal Constitution and Communications and Multimedia Act of 1998, case law and other legal and non-legal literatures.

## **6. Findings**

### **6.1. The Concept of Freedom of Speech and Expression**

Major human rights international instruments the likes of The Universal Declaration of Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) both provide for the right to freedom of speech and expression and recognize it as a universal right. Across the globe many national constitutions of countries such as the United States of America guarantees this right in its First Amendment. The Constitution of the Republic of Korea provides for such protection in Article 21 and in Germany it is enshrined in Article 5 of the Basic Law for the Federal Republic of Germany. Malaysia followed suit by the provision of Article 10 of the Federal Constitution. The United Nations Human Rights Committee further stated that freedom of expression is “a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights”, for whose enjoyment it form an essential basis.

Essentially the right to freedom of speech and expression ensures that individuals are entitled to the right of imparting, seeking and receiving information, opinions and ideas without unjustifiable unnecessary and excessive restrictions imposed by the States. This notion is applicable to the exercise of the right to freedom of expression both in the “real world” and cyberspace (Ismail, 2012).

A prominent constitutional law jurist has conceptualized that the constitution of free democratic states organize and control power, ensure human rights, balance competing claims of social and individual interests, mirror the culture and experience of the country and operate as vehicles of national progress and unity (Wheare, 1960:2-8). It is only correct to say that when the Reid Constitutional Commission recommended the provisions of protection of freedom of speech and expression amongst others is to echo this notion of a free people and country and forgo these enduring values in the generations to come. Worthy of its achievement the human being should be ready to commit themselves in ensuring justice and fairness for all through just principles and just outcomes (Bhat, 2004).

John Stuart Mill, an English philosopher viewed that freedom of expression allows different opinions and ideas in free competition of each other in open discussions. All for the goodness of seeking the truth. Although States may not be eye to eye with this discovery and may try to censor opinions and ideas (Mills, 2003). John Stuart Mill may have spoken this opinion in a world when such technology of

the social media was non-existent, but the relevance of his argument is still applicable and real. Ultimately freedom of expression would allow the individual access to various information, opinions and ideas which will assist him to make an informed decision and an autonomous judgement. For the young it would tremendously be of value for him/her to extend his critical thinking and develop his mental ability to greater heights. The social media in this regard could act to facilitate this vision and be of use to the authorities and the people both in positively turning technology as a tool for progress.

Such simple method of access to information is critical for transparency as it allows the citizens right from the grass roots to participate in governance no matter how minute it is. However, transparency measures must be to a large extent set rules on what information, under what form and measured in what-way and who it ought to be reported to.

## **6.2.CMA 1998: The Two Sections**

As discussed above, the social media could be used as a medium for progress of the human race where access to ideas and opinion has no boundaries and information would be unlimited. However, could over-access and unlimited data be abused and misused by the users i.e. netizens? There had been instances where the access to unlimited data will lead to uncontrollable use since the user does not have any clue on how to make use of such data. Or could such unlimited data access lead to unnecessary access to unwanted data such as pornography? This is where restrictions to the use of the social media come into the picture.

There is no doubt that many would find the implementation of such legal restrictions as negative and hostile to progressive thoughts and social development. However compelling public interest such as national security, public order, public morality and public security or in the context of Malaysia “acts prejudicial to the security of the Federation of Malaysia or parts of the Federation”, will take precedence over such sacred fundamental rights.

Section 211 of the CMA 1998 inter alia provides that content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person, shall not be provided by content applications service provider, or other person using a content application service. For any commission of offence under section 211, the offender may be punished by a fine up to RM50, 000 or imprisonment not exceeding one year and further fine of RM1000 for each day of the continuance of that offence after the offender had been convicted by the court. Furthermore, section 233 (1) (a) CMA provides the act of improper use of network facilities or network service by a person who is by means of any network facilities or network service or applications service knowingly makes, creates or solicits; initiates the transmission of, 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; or initiates a communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address, commits an offence. It also includes a person who knowingly by means of a network service or applications service provides any obscene communication for commercial purposes to any person; or

permits a network service or applications service under the person's control to be used for an activity described in paragraph (a), commits an offence.

This provision prohibits anyone from posting any negative remarks/photos/sign against anyone on the internet. However, it requires the prohibited remarks/photos/sign need to be obscene, indecent, or not true. Protection is accorded to anyone who has been hurt by any posting in the internet and would be able to seek protection under these sections. These provisions serve as a warning to those with intention to abuse the ubiquitous effect of the internet to share and spread derogatory materials against another. Deterrent measures are pertinent as once such materials have been published on the internet, it will be accessible to all and will cause irreparable damage to one's reputation even if what has been published is false. The false materials will affect the lives of others as the damage caused may not easily be erased. (Loh & Basir, 2012)

These sections of the CMA 1998 should be able to encourage mature, responsible and accountable conduct among netizens. There is a need for them to check their facts before producing or posting anything and to use the internet in a positive manner. The purpose of such legislation is to deter irresponsible people from abusing and misusing the internet.

However, the challenge lies in the interpretation and the usage of the dual provisions. Basically, the question arise as to what constitutes the act of indecent, false, obscene, menacing or offensive in character with intent to annoy, abuse, threaten or harass" as provided by Section 211 of the CMA. Clearly materials that are indecent, obscene, false could be understood by many but what are considered as "menacing" or "offensive" are ambiguous and must be cautiously applied by the authorities. Although the judiciary shall have the ultimate final interpretation of such terms, it also lies in their hands to strike a balance between the right of netizens to enjoy freedom of speech and expression and the applicable restrictions that is attached to that enjoyment. As usual vigorous scrutiny must be exercised where judicial review of any encroachment of a fundamental right is engaged by the executive authorities. For this to take place, what constitutes "menacing" and "offensive" should not be given a wide interpretation.

Examples of cases could be cited to show how the application of the two provisions so far. In *Rutinin Suhaimin v PP* [2015] 3 CLJ 838, the appellant was convicted for an offence under Section 233 of CMA and was sentenced to a fine of RM15,000 in default eight months imprisonment. The appellant was alleged to have entered a comment against the Sultan of Perak (the impugned entry). On appeal the appellant has argued that he did not make or initiate the transmission of the impugned entry despite the fact that his internet account has been used. The appellant argued that his computer and internet account were accessible by other persons and any user could have simply clicked the mouse and the computer would have been ready for used including his internet account. The appeal was allowed since the prosecution failed to establish beyond reasonable doubt that it was the appellant who made and initiated the transmission of the impugned entry.

As opposed to the above case, in *Ahmad Abdul Jalil v PP* [2015] 5 CLJ 822, appellant was charged for entering a comment against the Sultan of Johor and was fined RM20, 000 on his Face account. On appeal the appellant used similar argument in *Rutinin* (See also *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566, *Madhavan Nair v Public Prosecutor* [1975] 2 MLJ 264, *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120 and *Public Prosecutor v Lim Kit Siang* [1979] 23 MLJ 37) that is

the account belonging to his name could have been accessible to others and that the post could have been clicked by others. However, the witness who came from the enforcement department of the Commission of Communications and multimedia who testified that the source of the comment came from the Appellant's workplace. His appeal against the decision of the judge of 1st instance was rejected.

In the case of *PP v Muslim Ahmad* [2013] 5 MLJ 823, the respondent was charged at the Sessions Court for three offences under Section 233(1) (a) of the Communications and Multimedia Act 1998 for posting offensive comments against the Perak State government's official portal on 7th February 2009 and 8th February 2009 but was discharged and acquitted of all the charges. His defence was that he had not posted the said offensive comments and denied using the computer to send the comments. His alibi was that he was at his factory on the said dates. On appeal the decision of the Sessions Court was overturned and that his alibi was rejected and witnesses that he brought to corroborate his defence were not accepted as they were defective for non-compliance with Section 402A(1) of the Criminal Procedure Code. The High Court contended that the Sessions Court judge had erred in her decision and accepted the prosecution's contention that the particulars of the place where the accused claimed to be at the time of the commission of the offence and the names and addresses of the witnesses called to establish his defence were not provided.

The Malaysian Communications and Multimedia Commission (MCMC) initially imposed a blanket block on websites that published content related to Malaysia's 1MDB scandal in February 2016. The Malaysian Insider, a popular online news portal was blocked including other news sites like Sarawak Report and Asia Sentinel. These measures are seen as very hostile to media freedom.

The spirit and aspirations of the CMA 1998 among others is for Malaysian netizens to be able to enjoy this new technology and to be given the opportunity to impart healthy opinions and use available forum for discussion. This should not in any way discourage them from expressing their view, or comments based on facts just because it is a menace or offensive to the other person. In fact netizens must be encouraged to check their facts and tell the truth. (Ali, 2013)

Any comments and opinions given by anyone based on facts, tantamount to freedom of speech and expression which are protected by article 10 of the Federal Constitutions. Right of freedom of speech and expression is a right of every citizen and this right can only be restricted if it involved the interest of security of the Federation, public order, and morality.

Prosecuting a person merely for giving opinions and fair comments is a suppression of these rights curtailing the basic fundamental rights of Malaysian netizens which is against the spirit of our Federal Constitution. It is only logical that fair comments and opinions is not a threat to the security of the Federation, public order, and morality. Within this premise, section 3 (2) (a) and (b) of the CMA 1998 asserted to promote a civil society where information-based services will provide the basis of continuing enhancements to quality of work and life and to grow and nurture local information resources and cultural representation that facilitate the national identity and global diversity;

## 7. Conclusion

This article concludes that the CMA is clearly a modern legislation that acknowledges the existence of new technologies and that such technology must be regarded as an asset to the country and its people. It is also a recognition to the industry of communications and multimedia. Furthermore, the cases mentioned expressed that Sections 211 and 233 of the CMA 1998 seem to show that such law is used to silence the critics and remarks against the ruling establishment. This if true, is a dangerous precedent. The society must be open minded to acknowledge criticism, the same goes to the government. We need to promote and polish a society that cherish honesty, open to criticism and comments, and celebrate differences. (Manique, 2015) Think with open mind, give opportunity to ask questions, query the obvious which should be healthy for society within any generations. If the subject matter that has been posted is indecent, obscene, and false, it is only right that we should go against these menaces. However, as far as we do not want people to abuse the internet, all parties must ensure that the regulative framework will not be abused and used as a tool of oppression. Fair comments and criticisms that are constructive and intended for discussion are not a threat to the security of the Federation, public order, and morality. However, in this context despotic, bigotry, irrational behaviour/thinking should be ceased from continuing. Such restrictions must be formulated with sufficient precision to enable an individual/netizens to regulate his or her conduct accordingly. If sufficient guidance is available to enable them to determine what kind of expression is restricted and those that are allowed, any allegations of legal breach will be addressed efficiently and further breach could be prevented.

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