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Dear Influencer! Speak Freely but Ethically and Legally

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Abstract

An influencer may affect the way other people behave or think. In the contemporary realm, the importance of an influencer is undoubtedly significant. However, increased violations of rights practiced by the influencer are a worrying scenario. Study shows that majority of influencer lack legal education and awareness. This paper aims to analyse the legal discourse of the current influencer trend and explore the legal framework, which includes the constitutional scopes and limitations, the legislation governing freedom of speech, and the government policy in Malaysia to propose an appropriate guidelines for the influencer community. Utilising doctrinal and case studies alongside content and thematic analysis, this legal discourse is to provide a guideline to influencers on the legal limitation's framework.

Keywords: Freedom of Speech, Public speaking, online communication, communication law

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1.0 Introduction

The rise of social media platforms has ushered in an era of unprecedented opportunities for free expression and the exchange of ideas on a global scale. Billions of people around the world now can share their thoughts, opinions, and experiences with a vast online audience, breaking down traditional barriers to mass communication. However, this newfound freedom of speech and expression on social media has also given rise to complex challenges and debates surrounding the need for content moderation and regulation (Klonick, 2018; Freedom House, 2020; Khoo, 2018). It exposes many individuals to committing the offense of defamation, seditious communication, and other types of prohibited communications. Online speech poses new challenges to the tort of defamation and especially to the fair balancing between the right to freedom of speech and a person's right to protect his reputation. As social media companies like Facebook, Twitter, Tik Tok and YouTube have grown into powerful arbiters of online discourse, they have grappled with how to balance the protection of free speech rights with the need to combat harmful or illegal content, such as hate speech, incitements to violence, and the spread of misinformation (Gillespie, 2018; Klonick, 2018; Kahn, 2004). Free speech advocates have raised concerns about the potential for censorship and the lack of transparency around how content moderation decisions are made (Nunziato, 2020; United Nations Report, 2015). Others have argued that social media companies have not gone far enough in addressing the proliferation of harmful content, such as hate speech and disinformation campaigns, which can have serious real-world consequences (Citron &

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Norton, 2011; Vaidhyathan, 2018). While some nations have embraced a more hands-off approach, others have implemented strict laws and regulations that restrict certain forms of online expression, often in the name of maintaining public order or national security (Gomez, 2019; York & Zuckerman, 2019). Malaysian influencers often lack awareness of the legal implications of their statements on social media, which can lead to unintended consequences (Shukor & Rafie, 2015). This gap in understanding can result in legal issues related to freedom of speech as outlined in the Federal Constitution. This study examines Malaysia's legal structure surrounding freedom of speech, encompassing constitutional boundaries, relevant legislation, and governmental policies to provide guidelines for the influencer community. Through doctrinal research, case studies, and analytical methods, the paper aims to outline a practical guide for influencers regarding the legal constraints they face.

2.0 Literature Review

One of the key challenges to free speech in Malaysia is the existence of numerous laws that place broad restrictions on expression, such as the Sedition Act (Sreedaram & Ramayah, 2020; Khoo, 2018), the Communications and Multimedia Act, and the Printing Presses and Publications Act. These laws have been criticized for their vague and ambiguous provisions, which can be arbitrarily applied to silence dissent, criticism of the government, or discussions on sensitive topics like religion and race (Sreedaram & Ramayah, 2020; Khoo, 2018; Anuar, 2005). Another area of concern is the government's control over traditional media outlets, such as newspapers, television, and radio, through ownership patterns and licensing requirements. This has led to allegations of self-censorship and a lack of diverse perspectives in mainstream media (Sadhu Singh, 2021; Nain & Anuar, 2016; Abbott, 2004). Despite these challenges, civil society organizations and human rights advocates in Malaysia have continued to push for greater protection of free speech and the repeal or reform of restrictive laws. Several high-profile legal cases, such as the challenge to the Sedition Act by opposition politician Karpal Singh, have brought attention to the issue and prompted discussions on the need to strike a balance between protecting free speech and maintaining public order (Lim, 2017). The rise of digital communication and social media platforms has added new complexities to the freedom of speech debate. While these technologies have facilitated unprecedented opportunities for free expression, they have also raised concerns about the spread of misinformation, hate speech, and online harassment (Klonick, 2018; Gillespie, 2018). In summary, the literature on freedom of speech highlights the enduring importance of this fundamental right, while also exploring its complexities, limitations, and evolving challenges in the digital age. As new technologies and social dynamics emerge, the debate over the boundaries and regulation of free speech is likely to continue, reflecting the delicate balance between protecting individual expression and safeguarding societal interests.

3.0 Methodology

This study adopts a qualitative research method, exploring in detail certain problems and issues that exist within the practice of Freedom of speech among influencers in Malaysia. Doctrinal and case studies were conducted on both primary and secondary sources. The data collected were then analysed using thematic and content analysis. The selected themes were categorized according to the legislation that provides for the restriction of speech relating to the influencer's issues and online communication. Findings from legal cases were later integrated with the data from the doctrinal study.

4.0 Findings & Discussion

4.1 Freedom of Speech in Malaysia

The rights to freedom of speech (FoS) and expression are explicitly enshrined in the Federal Constitution. It generally allows every individual or organization, including influencers, to freely express their opinion. It is a tool to promote democracy (Sunstein, 1995) as Malaysia is a democratic country. However, the right is not absolute (Mia et.al, 2021). Part II of the Federal Constitution (FC) through Article 10 (1) provides for Freedom of Speech, Assembly & Association. Clauses 2 and 4 of Article 10 FC set the limitations to the freedom of speech. Generally, restrictions on free speech must be confined to those articulated in the Constitution. The laws restricting the right to the freedom of expression in Malaysia include, but are not limited to:

- a) Penal Code
- b) Sedition Act 1948
- c) Communication and Multimedia Act 1998
- d) Printing Presses and Publications Act 1984
- e) Defamation Act 1957

The following are the summarised findings of each legislation and cases that limit the influencer's freedom of speech. This may serve as guidelines for the current and future influencers.

Table 1: Integrated data for the influencer's community guideline on freedom of speech

| Legislations | Objectives | Prohibited act on FoS | Cases |
|--|--|---|--|
| Penal Code | The primary legislation dealing with criminal offenses in Malaysia in various aspects | <ol style="list-style-type: none"> Section 298 - any person with deliberate intention of wounding the religious feelings Section 298A- any person attempts to cause disharmony, disunity, or feelings of enmity, hatred or ill will; or prejudices or attempts to prejudice, or is likely to prejudice, the maintenance of harmony or unity; on the grounds of religion between persons or groups of persons professing the same or different religions. Section 503 of the Penal Code provides for any person who threatens another person with any injury to that person's body, or reputation. Section 504 of the Penal Code provides for any person who intentionally insults and thereby provokes another person. Section 505 of the Penal Code provides for anyone who makes, publishes, or circulates any statement, rumor, or report. Section 509 of the Penal Code provides that any person who utters any word, makes any sound or gesture with the intent to insult the modesty of another person. | <p>Sivakumar a/l Sockalingam & Anor v Yang Berhormat Peguam Negara, Malaysia [2022] explained that under section 298 of the Penal Code, it is an offence for a person who, with deliberate intention, to wound the religious feelings of any other person.</p> <p>Mamat bin Daud & Ors v Government of Malaysia [1988] dealt with a case where individuals were charged with acting as an unauthorized Bilal, Khatib and Imam at a Friday prayer in Kuala Terengganu.</p> <p>Roslan bin Awang Mohamaad v Pendakwa Raya [2022] section 503 also applies to threats committed online through social media platforms such as Facebook(threat to a minister in 2020) and Whatsapp(posting nude photos in 2021)</p> |
| Sedition Act 1948 | The Sedition Act criminalizes speech or publications that bring "hatred or contempt" against the government, the administration of justice, or the rulers. | <ol style="list-style-type: none"> Section 3(1)(a): bringing into hatred or contempt or exciting disaffection against any Ruler or any government. Section 3(1)(c): This encompasses bringing into hatred or contempt the administration of justice in the country. Section 3(1)(d): the raising of discontent or disaffection among the subjects or amongst the inhabitants of Malaysia or of any State. Section 3(1)(e): promoting ill-will and hostility between races or classes of the population Section 3(1)(f): the questioning of any provisions dealing with the right, status, position, privilege, sovereignty or prerogative established or protected by the Constitution in relation to citizenship, language, the special position of the Malays and the natives of Sabah and Sarawak and the sovereignty of the Malay Rulers. | <p>Azmi Sharom Case (2016), a law professor, was charged with sedition for comments made on social media criticizing the judiciary's handling of a political case. The Court of Appeal eventually overturned his conviction, ruling that his remarks were a valid exercise of freedom of expression.</p> <p>Amira Mutsara Case (2018) a student activist, was charged with sedition for allegedly posting remarks on Facebook that insulted the Sultan of Johor.</p> <p>Alvin Tan and Vivian Lee Case (2013) The two individuals were charged with sedition for posting remarks and images on Facebook that were deemed offensive to Muslims and Buddhists.</p> <p>Wan Mohd Azri Wan Deris (Papagomo) (2014) purportedly carried a Malay translation of a pamphlet detailing a Chinese plot to take over the country by taking advantage of weakened Malay leaders</p> |
| Communication and Multimedia Act 1998 | The Act provides a regulatory framework for the converging industries of telecommunications, broadcasting, and online activities. | Section 233, which criminalizes the improper use of network facilities or network services. Through this provision, the government through MCMC can impose restrictions or even block the media or the press if it thinks fit, or if any news published has confused the public. | <p>Samsudin Mokhtar v. Public Prosecutor (2020) Samsudin Mokhtar, a social media user, was charged under Section 233 for allegedly posting offensive remarks about the Johor Sultan on Facebook.</p> <p>Amizudin Ahmat v. Public Prosecutor (2011), Amizudin Ahmat, a blogger, was charged under Section 233 for allegedly posting remarks that insulted the Sultan of Perak. The court ruled that the remarks were seditious and upheld his conviction</p> |
| Printing Presses and Publications Act 1984 | The statute regulates the usage of printing presses, the printing, production, reproduction, activities of productions, and importation of print materials from abroad. | It is a criminal offense to post or use any printing press without a license granted by the Home Affairs Minister. The Press and publishers must comply with the requirements laid down in the PPPA as to avoid any legal implications. | Public Prosecutor v Pung Chen Choon[1995] 2 MLJ 156: "Malaysian Press is not as free as the press in India, England or the United States of America and cases from these jurisdictions are of little relevance" |
| Defamation Act 1957 | The legislation outlines the provision for defamation situations. Describing two types of defamation namely Slander and Libel together with the defenses against defamation. | <p>There are three elements of defamation, those are:</p> <ol style="list-style-type: none"> The words/statement must be defamatory; The words/statement must refer to the plaintiff; and <p>The words/statement must be published, that is communicated to at least one other person.</p> | <p>Gwee Tong Hiang v Boo Cheng Hau [2016] an imputation would be defamatory if its effect is to expose the plaintiff, in the eyes of the community, to hatred, ridicule, or contempt or to lower him or her.</p> <p>Dato' Sri Dr Mohamad Salleh Ismail & Anor v. Nurul Izzah Anwar & Anor(2021) The real question for determination related to the impression created in the mind of the ordinary, reasonable viewer after viewing the whole press statement.</p> <p>Mohd Khaidir Ahmad v Mohd Iqbal Zainal Abidin[2018] the defendant alleged that the plaintiff,</p> |

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|--|--|--|---|
| | | | who was an Assistant District Officer of Temerloh, had abused his power and was corrupt. In one of the postings, the defendant had uploaded a photograph of the plaintiff, his son, and his car with defamatory statements. |
|--|--|--|---|

The table above outlines the relevant legislation that the influencer needs to be aware of and the summary of the offenses relating to the influencer's activities online. The literal interpretation stated in the legislation was later integrated with the definition and scope that evolved through judicial activities. The table assists in explaining the basic guidelines for references of the influencers while involved in online communication activities.

5.0 Discussions

The study encountered some limitations, including confidentiality of data and lack of access to respondents for the interview. This study will be the base for another study that incorporates fieldwork data. The Freedom of speech and expression combines many rights in many forms which cover political, artistic, and aesthetic fields, including communication by word of mouth, signs, symbols, and gestures, and through works of art, music, sculpture, photographs, films, videos, books, magazines, and newspapers. Although the emergence of the influencer community reflected the upholding of rights to freedom of speech that encompass rights to information and rights to express one's view, the findings in the table above showed a deterioration of rights to privacy and morality. The cases in the table demonstrate the low awareness of online platform communication users, especially those with many followers or influencers. The influencers should understand the actual context of freedom of speech. The freedom of speech provided under Article 10, however, is not absolute. The House of Lords declared in *James v Commonwealth of Australia* that: "Free speech does not mean free speech: it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth. It means freedom governed by law." The paper emphasizes the need for increased legal awareness among influencers, suggesting that education on the legal implications of their online activities is crucial. This awareness can help them navigate the complexities of freedom of speech and avoid potential legal issues arising from their social media posts (Shukor & Rafei, 2015). Malaysia, a country that features its colonisation history, traditional culture that is shaped by religious beliefs, and a multiracial community, requires delicate control on freedom of speech. The limitations in the legislation were passed based on these concerns. These original limitations develop further by the interpretation made by the court. Currently, there is a lack of studies that compare the weaknesses of the legislation governing the influencer community. Some traditional and existing laws are dated and unable to address the new emerging issues. Future studies should undertake an in-depth study on this area.

6.0 Conclusion & Recommendations

In summary, while freedom of speech is technically guaranteed in Malaysia's constitution, the literature highlights significant limitations and restrictions imposed by the government through various laws and policies. These limitations have been the subject of ongoing debate and advocacy efforts by civil society organizations and legal scholars, who argue for the need to uphold this fundamental right while balancing it with legitimate concerns around public order and national security.

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Paper Contribution to Related Field of Study

This paper will explore the legal framework, which includes the constitutional scopes and limitations, the legislation governing freedom of speech, and the government policy in Malaysia. The authors recognise the glaring deterioration of morals and violation of the rights of freedom of speech, and it is hoped that the outcome of the legal discourse would benefit the Government and the community to uphold the aims of SDG16, namely peace, justice, and strong institutions.

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