

## LAWS ON SOCIAL MEDIA POSTING IN MALAYSIA

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Social media has raised various legal issues concerning individuals. Actions such as sharing, liking, retweeting and commenting may be taken as a republication of defamatory content and may contribute to an invasion of privacy or offence under Penal Code. Briefly, such constrain-free media system does not exist in this world.

### 1. DEFAMATION ON SOCIAL MEDIA

The advancement of technology has obliquely resulted everyone on social media to become a publisher. Individuals have the power through social media to disseminate news, information and comments, and such actions always have the tendency to be defamatory. According to the case of *Ayob Saub v TS Sambanthamurthi [1989] 1 MLJ 315*, defamation arises when it has been proven that these 3 elements are fulfilled: -

- (1) Defamatory material in nature which lowers the reputation of someone in the eyes of the public;
- (2) The content of the material is about them or identifies them (whether by words, photographs, a song, etc.); and
- (3) The material has been published to others.

Undoubtedly, the doer can in fact be found guilty for criminal defamation under **Section 499 of the Penal Code** which carries the penalty of two years imprisonment or fine or both.

Under **Section 233 of the Communications and Multimedia Act 1998**, any individual, via network service, makes, creates, solicits, or transmit comment, suggestion which is obscene, indecent, false, menacing, offensive with the purpose of distracting, abusing, intimidating, harassing any person committing an offense that is punishable by one year of imprisonment or a fine of RM50,000 or both.

In the case of *Syarul Ema Rena binti Abu Samah v Pendakwa Raya [ 2018 ] MLJU 1128*, the appellant was found guilty for writing an insult to the former Prime Minister in his comments on Facebook. The comment had mentioned Dato' Sri Najib Tun Razak and the members of parliament for signing an agreement, gracelessly expressing that the action would amount to selling out the country:- *“Kau memang pukimak Najib kalau benar ko sign TPPA Sialan anak haram kalau benar ko sign lah pukimak! Nak lepaskan diri kau! Kau jual negara! Apa babinya kau ni? Kami rakyat Malaysia sumpah 7 keturunan kau! Kenapa tidak dibentangkan di parlimen? 222 MP duduk dalam parlimen termasuk BN & PR BUTOH LAH! Sembang pasal rakyat! Malaysia bakal di jajah kembali Malaysia ada 222 ahli parlimen tak bertanggungjawab!”*

While for another case in 2018, a man was found guilty and punished for a term of three years imprisonment for disseminating pornographic picture of his ex-girlfriend via social media by uploading them on his blog through Blogspot and Wordpress websites.<sup>1</sup>

Any individual republishing a defamatory statement is also considered liable for defamation on the grounds of *M'Pherson v Daniels* case, since they have willingly chosen to circulate the message. They are unable suggest they merely repost what someone else has said or they are not liable for what the original poster has said.<sup>2</sup> In the case of *GS Realty Sdn Bhd v Lee Kong Seng [2018] MLJU 1902* in respect to the publication of defamatory statements on Facebook, the Court held that the Defendant was also responsible for the secondary publication i.e. posting of third parties (other Facebook users) on his Facebook page. This is because the Defendant was aware of the secondary comments posted by the third parties but did nothing to remove them. In fact, the third parties' comments were specifically responding to the Defendant's own postings, thus it can also be maintained that the Defendant had caused the publication by the third parties. On top of that, it is also possible to carry on with a civil suit for compensation.

## 2. OTHER OFFENCES

There are also other laws or provisions governing social media. For example, **Section 298 A (1) of the Penal Code** provides for insults that cause disharmony, disunity or feelings of enmity, hatred and ill-will on grounds of religion among the people from different religions in the country, providing up to five years 'imprisonment if found guilty. In 2019, a man was charged under such provision for uploading a caricature insulting Prophet Muhammad and his wife Saidatina Aishah on his Facebook page.<sup>3</sup> **Section 124H of the Penal Code** also provides for the dissemination of information, including through electronic means that incites violence or advises violent disobedience to the law or any lawful order, punishable with imprisonment for a term of up to five years.

Whereas in the case of *Pendakwa Raya v Mohd Syafrein Rashid [ 2015 ] 1 LNS 943*, under section 130J of the Penal Code, the accused was charged with attempting to support the Islamic State and attempting to be a member of their movement in Syria. In 2010, a security guard, Shahrom Mahdi was found guilty under **Section 292 of the Penal Code** for uploading pornographic pictures and disseminating them on six websites whilst in 2013, Fila Syahida Zulkipli was found guilty under the same provision by the Mukah Magistrates Court for recording an obscene video of a 15-year-old girl using her mobile phone and was fined for producing the obscene video.<sup>4</sup>

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<sup>1</sup> <http://www.astroawani.com/berita-malaysia/sebar-gambar-lucah-bekas-teman-wanita-lelaki-dihukum-penjara-3-tahun-173153>.

<sup>2</sup> <https://www.malaysiakini.com/news/380649>

<sup>3</sup> <https://www.nst.com.my/news/crime-courts/2019/02/464229/man-charged-2-counts-insulting-prophet-muhammad>.

<sup>4</sup> Zulhuda, Sonny. "Cyberlaw on pornography." (2015): 12

Apart from the Penal Code, the act of using social media for sexual grooming or uploading pornography may amount to an offence under **Sexual Offences Against Children Act**. Individuals also may be found liable for an offence under Section 4(1)(c) of the Sedition Act 1948 such as in the case of *Lee May Ling v Public Prosecutor & Another Appeal* [2018] CLJ 742. Liability for receiving forwarded message under Official Secrets Act 1972 is depicted in the case of *Public Prosecutor v Subbarau @ Kamalanathan* [2017] 6 MLJ 434 for having possession in his mobile phone softcopies of 2014 UPSR examination papers.

### 3. RIGHT TO PRIVACY

In the case of *Toh See Wei v Teddric John Mohr & Anor* [2017] 11 MLJ 67, Penang High Court Judge, Abdul Wahab JC explained in details with regards to recognition of violation of privacy as law of tort in Malaysia. Right of privacy means the right to be let alone, the right of a person to be free from unwarranted publicity and the right to live without undue interference by the government or any private individual in matters with which the public is not concerned. Essentially, there are four distinct kinds of invasion of privacy interest i.e.

- (1) Intrusion upon Plaintiff's seclusion or solitudes or into his private affairs;
- (2) Public disclosure of embarrassing private facts about Plaintiff;
- (3) Publicity which places Plaintiff in false light into the public eye; and
- (4) Appropriation for the defendant's advantage, or the plaintiff's names or likeness

Nonetheless, as illustrated in the case of *Lee Ewe Poh v Dr Lim Teik Man & Anor* [2011] 11 MLJ 835, the law does not recognize the invasion of privacy as an actionable tort because it is limited to matters of private morality and modesty of particular women. There is currently no specific piece of legislation to address this issue. Referring to the case of *Sivarasa Rasiiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, although the right to privacy was not specified in our Constitution as a fundamental right but it was inferred in Article (5) of the Federal Constitution. Nevertheless, recognition of such constitutional right may not be enforced by an individual against another for breaching of private individual right.

There were rumors that in the mid-2019, the new Whatsapp update may ban private conversation screenshot even though it still has to be rolled out on Whatsapp.<sup>5</sup> The government does not plan to block Facebook and Telegram, WhatsApp and other social networking sites as most Malaysians are using these channels for various purposes, but MCMC will monitor and actions will be taken in the event of any content that breaches the law.<sup>6</sup> Citizens can also lodge any complaints with MCMC, PDRM and other relevant authorities or enforcement agencies. MCMC has even recently set up email, WhatsApp line for complaints against insulting posts.<sup>7</sup>

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<sup>5</sup> <https://www.thestar.com.my/tech/tech-news/2019/04/26/new-whatsapp-update-may-ban-screenshots-of-conversations/>

<sup>6</sup> <https://www.bharian.com.my/node/98416>

<sup>7</sup> <https://www.thestar.com.my/news/nation/2019/08/17/mcmc-sets-up-email-whatsapp-line-for-complaints-against-insulting-posts>

Believably, it is also an opportunate time to look into defamation in the context of right of privacy. Malaysia also is trying to make every effort to advance with the implementation of specific cyber law in place to effectively control the flow of information or at least to filter spreading of defamation, obscene and pornography and negative influence via social media systematically.

## CONCLUSION

In today's digital world, social media, being a powerful channel, it is not alarming that social media has affected the law governing society and changed the law in which social media has become a landmine liability. The connection between defamation, privacy and data protection is seen as the next stage in the development of the law's engagement to issues of reputation. Everybody can discern that a poorly interpreted post or tweet can have significant personal consequences, but fewer people are aware of the laws governing the use of social media. Nevertheless, ignorance is not a court defense; hence, keyboard warriors need to be extra careful. Cyber law alone cannot curb crime on its own. This is a shared responsibility that needs contribution from each and every one.