



HATE SPEECH IN MALAYSIA: THE NECESSITY FOR
SPECIFIC LEGISLATION

BY

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ABSTRACT

Hate speech has been an issue of heated debate amongst legal scholars and human rights activists. The need to guard free speech is important, but so is the need to protect the victim and to preserve public interest and peace within the society. The conflict between the exercising of individual liberty as opposed to collective rights becomes the primary focus of this research. In addressing the issue, fundamental theories of free speech was discussed first to determine if there are justifiable restrictions on free speech. The researcher also put forth an approach to interpreting human rights that may balance better between individual liberty and collective rights. In addition, reasons for regulating hate speech were briefly explained. The focus shifted to the Malaysian context by discussing the position of free speech and hate speech in the Federal Constitution, so as to determine if hate speech can and should be specifically legislated in Malaysia. In doing so, the grounds for limiting free speech provided for in the Constitution that could be applicable to hate speech were discussed. The researcher also explained the nature of race relations in Malaysia; taking into account the recent instances of racial and religious animosity as well as instances of hate speech that has added fuel to the fire of tension of racial and religious tension. The researcher employed legal methodology, specifically doctrinaire analysis of primary and secondary documents. This research is reform oriented, whereby the researcher focused her evaluation on the existing problems surrounding a legal issue and suggest the necessary recommendations. Historical analysis of documents was also conducted on documents pre and post-Independence to ascertain the legal framework in Malaysia when it comes to free speech. The researcher has also conducted qualitative interviews with legal and human rights experts in order to ascertain whether hate speech should be specifically legislated against; and if so, what are the issues that need to be considered. At the end of the study, the researcher highlighted the dangers of hate speech on the individual, society and the state, which is why it is important to have a specific legislation on hate speech. The results of the interviews also supported the necessity of having a carefully drafted legislation. Lastly, the researcher put forth some recommendations of legal issues that need consideration if and when Malaysia is to have such a law. This research can be useful in the process of lawmaking and drafting of public policies, as the thesis highlighted an issue that is highly relevant and reflective of current events which shows the importance of having hate speech laws for the maintenance of racial and religious harmony. If a specific hate speech law is introduced after taking into account all the relevant legal issues, we may stand to have better protection against hate speech without transgressing unnecessarily on the individual's right to free speech.

ملخص البحث

لقد أصبح خطاب الكراهية قضية جدل ساخنة بين الباحثين القانونيين والناشطين في مجال حقوق الإنسان. فالحاجة إلى حماية حرية التعبير أمر مهم، و كذلك هو الحال بالنسبة لحماية الضحية والحفاظ على المصلحة العامة والسلم داخل المجتمع. من هنا جل هذا البحث ليركز بشكل أساسي على الصراع بين ممارسة الحرية الفردية مقابل الحقوق الجماعية. وذلك من خلال مناقشة النظريات الأساسية لحرية التعبير لتحديد ما إذا كانت هناك قيود مبررة على حرية التعبير. وقد طرحت الباحثة نهجا لتفسير حقوق الإنسان من شأنه أن يوازن بشكل أفضل بين الحرية الفردية والحقوق الجماعية كما تم الشرح بإيجاز أسباب تنظيم خطاب الكراهية. يركز هذا البحث على السياق الماليزي من خلال مناقشة الموقف من حرية التعبير وخطاب الكراهية في الدستور الاتحادي، وذلك لتحديد ما إذا كان بالإمكان تشريع قانون يتعلق بالخطاب الكراهية. ولمعرفة ذلك، تم مناقشة أسباب الحد من حرية التعبير المنصوص عليها في الدستور والتي قد تكون قابلة للتطبيق على خطاب الكراهية. كما أوضحت الباحثة طبيعة العلاقات بين الأعراق في ماليزيا. مع الأخذ بعين الاعتبار الحالات الأخيرة من العداة العنصري والديني وكذلك حالات خطاب الكراهية التي صبت الوقود على نار التوتور العرقي والديني. وظفت الباحثة منهجية قانونية، وتحديد المنهج التحليلي للوثائق الأولية والثانوية. واعتبارا للمنحى الإصلاحي للبحث، ركزت الباحثة في تقييمها على المشاكل والقضايا القانونية القائمة واقترحت التوصيات اللازمة. كما أجرت تحليلا تاريخيا لوثائق ما قبل وبعد الاستقلال للتأكد من الإطار القانوني في ماليزيا عندما يتعلق الأمر بحرية التعبير. إضافة إلى اللقاءات نوعية مع خبراء القانون وحقوق الإنسان من أجل التأكد مما إذا كان خطاب الكراهية على وجه التحديد بحاجة إلى قوانين تشريعية ضده؛ وإذا كان الأمر كذلك، ما هي القضايا التي تحتاج إلى النظر فيها. في نهاية الدراسة، أبرزت الباحثة مخاطر خطاب الكراهية على الفرد والمجتمع والدولة، وأهمية وجود تشريع محدد بشأن خطاب الكراهية كما طرحت بعض التوصيات القانونية التي تحتاج أن توضع بعين الاعتبار عندما تمتلك ماليزيا مثل هذا القانون. وسيفيد هذا البحث في عملية سن القوانين وصياغة السياسات العامة، لأن الأطروحة سلطت الضوء على قضية ذات صلة متعلقة للغاية وعاكسة للأحداث الجارية والتي تدل على أهمية وجود قوانين لخطاب الكراهية للحفاظ على الإنسجام العرقي والديني. فإذا تم تقديم قانون محدد لخطاب الكراهية بعد الأخذ في الاعتبار جميع المسائل القانونية ذات الصلة، صار بالإمكان حماية المجتمع من مخاطر خطاب الكراهية دون إنتهاك على حق الفرد في حرية التعبير.

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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Public Order (Preservation) Act, 1958 (Act 296 of 1958)
Sedition Act, 1948 Revised 1969, (Act No. 15 of 1948)

CHAPTER ONE

INTRODUCTION

1.0 INTRODUCTION

Hate speech has been an issue of heated debate amongst legal scholars and human rights activists, because it poses a crucial question: whether such speech should be allowed following the fundamental principles to free speech, or should hate speech be restricted considering the negative, offensive, discriminatory and oftentimes violent consequences it brings upon the victim and society in general? The need to protect free speech is an important one, but so is the need to preserve public interest and peace within the society. The conflicting rights and interest between promoting free speech and restricting hate speech becomes the primary focus of this thesis. In order to discuss the issues surrounding the conflict, it was necessary to analyse the fundamental theories of free speech and find if there are indeed justifiable restrictions for hate speech.

The protection of free speech is believed to be so vital in forming a democratic nation that the international community and the United Nations in particular, have codified principles defending free speech in the Universal Declaration of Human Rights. Be that as it may, the acceptance of these principles does not always translate to practical realisation or enforcement of free speech in all respects. In many instances, governments tend to have limitations on free speech for the preservation of certain values certain governments hold dear, such as for the protection of morality, the harmonious balance of the society and for purposes of national security. On these same grounds, hate speech and hate offences are being condemned in many countries

for transgressing the inviolable right to free speech. The researcher has observed that the reason why certain countries have such contrasting views as to hate speech laws is due to the differing theories of free speech that countries apply.

This thesis has made critical analysis of the main philosophies of free speech. In doing so, the researcher has discussed the seemingly absolute freedom of speech theory propounded by scholars such as John Stuart Mill and distinguished it from other theories that allow for restrictions on speech, such as the Asian Values. The researcher has also put forth a theory of human rights guided by religious values in order to balance both the people's right to free speech and the right to be protected from offensive hate speech. The researcher hopes that by coming up with a modified theory, Malaysia may see better enforcement of free speech by only allowing restriction against hate speech when it meets certain specific requirements.

After analysing the theories of free speech and identifying the theories which allow for restrictions on speech, the researcher found it necessary to discuss the issue of hate speech in general. The researcher explained the brief historical instances of racism and how it has perpetrated hate speech. Then, the researcher discussed the arguments in favour of hate speech legislation and subsequently compared the legal framework for addressing hate speech in different jurisdictions; namely the United States of America and Britain.

The researcher then discussed the problem of hate speech in Malaysia in detail. The Malaysian situation is particularly important to be considered, as hate speech can cause considerable damage considering the fact that Malaysian citizens come from diverse religious and cultural backgrounds. According to the report on the population of Malaysia and its basic demographics of 2010, the official statistics showed that Malaysians comprise of 67.4% Bumiputeras, 24.6% Chinese, 7.3% Indians and 0.7%

other races.¹ In a country where there is such a diversity of races and religions, it is not surprising for racial riots or offences to occur. Among the reasons which attributed to the riots of May 13, 1969 were due to dissatisfaction of the social and political developments post Merdeka amongst the Malays and non-Malays,² the controversial issue of the special position of the Malays and the racial insults uttered by both the opposition parties and the Alliance.³ All this has caused tension and strained race relations after the 1969 elections. Since then, there have been more reports and occasions of similar nature, such as the violence of Kampung Dato' Harun.

At present, the interaction between the plural races in Malaysia has improved and can even be seen as admirable and a model to other plural societies. However, it would be naive to think that racial tensions have disappeared completely. A slight provocation is all it takes to have suppressed tension erupt and its consequences could be devastating for our society.⁴ Despite the cultural and religious diversity of the Malaysian people, and considering the events that have occurred which show the sensitive nature of Malaysia's citizens when it comes to hate speech, it appears that the legal framework in Malaysia for tackling this problem is weak.

Currently, there is no specific legislation to address hate speech issues and offences. There are some provisions that may generally address certain aspects of hate speech offences, but these offences must be sourced from various Acts. As an example, S. 298A of the Malaysian Penal Code makes it an offence if one creates disharmony, disunity or enmity on the grounds of religion. Hate speech can be argued

¹ See Laporan Taburan Penduduk dan Ciri-Ciri Demografi 2010, *Jabatan Perangkaan Malaysia*, <http://www.statistics.gov.my/portal/index.php?option=com_content&view=article&id=1215&Itemid=89&lang=bm> (accessed 23rd August 2014).

² Soong, K. K., *13 Mei: Dokumen-dokumen Deklasifikasi Tentang Rusuhan 1969 Malaysia*, (Petaling Jaya: Suaram Communications, 2008), at 53.

³ Soong, K. K., *13 Mei...*, & Comber, L., *13 May 1963: A Historical Survey of Sino-Malay Relations*, (Kuala Lumpur: Heinemann Educational Books (Asia) Ltd, 1983), at 63.

⁴ Teik, G.C., *Racial Politics in Malaysia*, (Petaling Jaya: FEP International Sdn Bhd, 1989), at 7.

to fall under this ambit. There is also the Sedition Act, whereby S.4 of the Act criminalises any action, utterances, or even preparation to commit acts seditious in nature. Under the same section, any publication with seditious content is also an offense. Even a parliamentary member's privileges while parliament is in session under A. 63 of the Federal Constitution do not extend to seditious acts or words the member may say, which can be chargeable under S.4 of the Sedition Act. In addition, S. 8B of the Printing Presses and Publications Act also allows for suppression of publication by a person convicted of an offense in respect to that particular publication deemed by the Minister to be a threat to national security, public order, morality and so on. For instance, if someone was found guilty of writing a seditious article, which is an offence under S. 4 of the Sedition Act, then such publication can be suppressed.

Having analysed the Malaysian law, it would appear that there are legal provisions existing that could have the effect of criminalising hate speech if the speech can be proven to fulfil the specific elements of the offence. However, the current legal position with respect to the issue of hate speech in Malaysia is ambiguous in nature, with certain provisions giving too much discretion to the Minister in detaining a person. This gives rise to allegations of abuse of power and the lack of respect for fundamental human rights by the people. These vague provisions also bring about the question whether such general laws really meet the needs of the people in handling the problem of racial hostilities that may result as a consequence of hate speech.

Another important fact which the researcher has stressed on in this thesis is: if the perpetrator does get prosecuted, not much is done to distinguish between racially motivated offences or hate speech and the normal offences mentioned above. The motive behind hate speech which is racial or religious intolerance is not sufficiently

addressed. The researcher suspects this may be the reason why discriminatory and offensive ideology remains and thrives among certain members of society until today.

Therefore, this thesis has discussed in detail arguments for the legislation of hate speech law in order to address racially and religiously motivated crimes; and took into consideration the grounds for its legislation according to the Federal Constitution. As should be done before any law is to be proposed in order to ascertain its necessity and effectiveness, the researcher also endeavoured to ascertain the opinions of certain members of relevant professions with regard to the seriousness of problems among the society caused by hate speech. The data, collected by way of interview, was able to identify their opinions on the position of hate speech, and ascertain what are the difficulties that surround its possible enforcement.

At the end of this thesis, the researcher was able to discuss certain important legal issues that need serious consideration before the process of drafting and enacting a new law which would have the effect of criminalising hate speech and offences can begin. Among the issues highlighted by the researcher was the need to narrow down the scope of hate speech which may be penalised, and so on. It is the researcher's wish that this thesis will highlight to the relevant parties just how necessary it is to have a specific legislation governing hate speech. The researcher also hopes this thesis will contribute in helping the Government to achieve a balance between respecting the right to free speech and safeguarding the peace of Malaysian citizens by having properly planned hate speech laws in order to ensure a conducive environment for the country's development.

1.1 STATEMENT OF PROBLEM

Malaysia has witnessed terrible racial riots in the past and continues to experience conflicts of racial or religious nature. It was reported by a number of newspapers that the sensitivities of Malaysians with regard to offensive hate speech have led to several controversial events amongst the people that are of a racial or religious nature, such as the demonstrations using a cow's head and the discovery of severed pigs heads at several mosques,⁵ to name a few. Looking at these incidences, the researcher believes that Malaysia should exercise regulation when it comes to hate speech. At present, there are laws which may have the effect of regulating hate speech but the researcher believes there is a need to have a specific legislation governing the issue in order to maintain peace and stability in the long run.

1.2 OBJECTIVES OF THESIS

- 1) To critically analyse the main theories on free speech and outline a theory that is best suited for the local conditions of Malaysia, which does not transgress without justification on the rights of the people to free speech.
- 2) To analyse historical and current events that reflect the tensions amongst the various races and religious followers caused by hate offences and hate speech in order to justify the importance of hate speech regulation for the preservation of peaceful racial relations.
- 3) To study, through doctrinal analysis, the negative effects of hate speech and how it affects the victim, society and security of the country.

⁵ See newspaper reports by Razak Ahmad, "Pigs Head Found at Malaysia Mosque Amidst Allah Row", *Reuters*, <<http://www.reuters.com/article/2010/01/27/us-malaysia-religion-idUSTRE60Q00B20100127>>; "Pigs head left at Malaysia Mosques after Allah Row", *BBC News*, <<http://news.bbc.co.uk/2/hi/8482267.stm>>; "Malaysian Fury Over Pigs Head Insult at Mosques", *The Telegraph*, <<http://www.telegraph.co.uk/news/worldnews/asia/malaysia/7081832/Malaysian-fury-over-pig-head-insult-at-mosques.html>> (accessed 12th May 2013).

- 4) To explore in detail the arguments for and against hate speech regulation.
- 5) To determine the expert opinion on (through semi-structured interviews of purposefully selected experts) Malaysia's race relations, identify the extent of the problem caused by hate speech and ascertain the necessity of legislating against it.

1.3 HYPOTHESIS

- 1) Theories of human rights and free speech that are devoid of religious values or morality could help in creating a selfish society that is indifferent to the suffering of others when exercising their own rights, and such theory is not suitable to be applied in the Malaysian context.
- 2) Racial tensions caused by insensitive and offensive exercise of free speech among the people, if unchecked, can cause psychological effects on the victims as well as create hatred between the races that can result in racial hostilities and riots which affects social development and disrupts public order.
- 3) Having a specific hate speech regulation which is *only* used when certain legal requirements are met could help to preserve peaceful relations between people of different races and religions without jeopardising their right to free speech.
- 4) Laws regulating against hate speech could help in ensuring that all people are treated with respect and dignity, irrespective of race and avoid future violent offences that usually stem from hate speech.

1.4 LITERATURE REVIEW

It is undeniable that the right to free speech and democracy are among the most fundamental of human rights, particularly because it is believed to be one of the most

powerful and significant political developments. Despite there being many theories of free speech, some scholars such as Barendt believe that the most famous and influential one is the theory that free speech is particularly pivotal to maintain a real democracy.⁶

It is difficult to achieve democracy without freedom of speech, for the two concepts go hand in hand. The right to speak without fear and oppression is among the pillars of a free country. So important is democracy (and free speech, incidentally) that even ‘autocratic’ rulers are forced to admit adherence to these values, or feel the need to come up with some version of democracy, namely ‘Thai Style Democracy’ as observed in Thailand and elaborated by Hewison and Kitirianglarp.⁷

However, many writers opine that even with the countries which appear to be most democratic, what is enshrined in the Constitution may differ greatly from the practical implementation of that right.⁸ In fact, the research conducted by Cross reinforces Cohn’s belief and indicates that constitutional guarantees offer little protection of rights, for much of its enforcement depends on political variables of the State.⁹ From the analysis of the existing literature by Cohn, Cross and other writers, a pattern emerges which shows that what a State may claim in principle could be very different in actuality.

The differences in State practice with regards to free speech enforcement can be attributed to the varying philosophies of free speech a particular state adopts. After much research on the literature available, the researcher believes it is crucial to

⁶ Barendt, E., *Freedom of Speech*, (New York: Oxford University Press, 1985), at 23

⁷ Hewison, K., and Kengkij Kitirianglarp, “Thai-Style Democracy: The Royalist Struggle for Thailand’s Politics”, in *Saying The Unsayable: Monarchy and Democracy in Thailand*, edited by Ivarsson, S. & Isager, L., (Copenhagen: NIAS Press, 2010), at 197.

⁸ Cohn, W.A., How Free is Free Speech? *The Free Library*, 2009, at 23, <[http://www.thefreelibrary.com/How free is free speech? Free speech appears to be a unifying...-a0206688451](http://www.thefreelibrary.com/How+free+is+free+speech?Free+speech+appears+to+be+a+unifying...-a0206688451)>

⁹ Cross, F.B., “The Relevance of Law in Human Rights Protection”, *International Review of Law and Economics*, vol. 19, no.1 (1999): at 87-98

properly analyse the main theories on free speech and then ascertain the best model of free speech to be adopted in Malaysia. This would give respect to one of the most cherished of all civil and political rights, without negating the values that protect Malaysians as a nation. In order to do so, it is worthy to focus on theories of free speech coming from three countries, namely:

- (i) The United States;
- (ii) Britain; and
- (iii) Malaysia and Singapore.

The researcher believes it is important to critically analyse the theory of John Stuart Mill, whose concepts becomes the central reference of most free speech debates. According to this influential English philosopher, almost all forms of restriction are considered as unjustified interference from the ruling government. Mills is of the opinion that the executive is trying to impose upon the people a belief or value system deemed to be correct, even though after the years pass, it is usually proven that what was once thought to be the true and moral is actually not. Hence, according to his theory, even ideas deemed immoral or dangerous to society should not be punished or restricted.¹⁰

Mill's theory has been the foundation for many later scholars, particularly from the American jurisdiction such as Robertson¹¹ and Cohn, who also feel that speech should not be regulated, as restricting it would only serve to exacerbate the spread of the 'morally perverse' idea.¹² According to Houser, the theory of Furneaux is also as strong in influence. Furneaux maintains that society's most sacred values are capable of maintaining themselves from offensive attack and in turn the values

¹⁰ See generally Mill, J.S., *On Liberty*, edited by Shields, C.V., (New York: MacMillan Publishing Company, 1956).

¹¹ Robertson, G., *Freedom, the Individual and the Law*, (London: Penguin Group, 1989), 181.

¹² Cohn, W.A., at 25.

become stronger within a society. The writer elaborates to say that these principles create the basis for America's strong view of not having bare regulation against hate speech. It is to be mentioned that in some instances indirect regulation of hate speech succeeded, such as in situations when there is intent to intimidate. However, the position in the United States, and defended by many of their scholars such as Houser and Strossen, remains: generally laws restricting hate speech are usually struck down as being unconstitutional.¹³

It would appear from the existing literature that the legal scholars from the English jurisdiction have a slightly different approach than their American counterparts. In Britain, although free speech is highly prioritised, their legal system does recognise the need to restrict hate speech, particularly because Britain is made up of a myriad of races. The similarities in cultural and racial composition between Britain and Malaysia becomes among the reason the researcher believes it is necessary to properly study Britain's stand on hate speech and its surrounding issues. Mason has written on the position of hate crimes, speech and its effects to the victim in Britain.¹⁴ Rumney explains the history behind incitement and hate speech law in Britain, in comparison with the absolutist position in America. He goes on to find through his research that hate speech laws, if implemented properly, need not result in wide spread problems on the people's right to freedom of expression.¹⁵ Malik, on the other hand, specifically analyses the consequences of the Crime and Disorder Act 1998 on the people's right to freedom of speech. The author has noted that if an offence or

¹³ Houser, J.K., "Is Hate Speech Becoming the New Blasphemy? Lessons from an American Constitutional Dialectic", *Penn State Law Review*, vol. 114, no. 2 (2009): at 598-607; & Strossen, N., "Incitement to Hatred: Should There be a Limit?" in *Southern Illinois University Law Journal*, vol. 25 (2001): at 244.

¹⁴ Mason, G., "A Picture of Hate Crime: Racial and Homophobic Harassment in the UK", *Current Issues in Criminal Justice*, vol. 17, no. 1 (2005).

¹⁵ Rumney, P.N.S., "The British Experience of Hate Speech Regulation: A Lesson For First Amendment Absolutists?", *Common Law World Review*, vol. 32 (2003): at 159.

unlawful speech were deemed to be racially aggravated and had a detrimental effect on public interest as well as undermining the right to equality of others, there would be an additional criminal sanction imposed.¹⁶ In that respect, it can be argued that Britain's stance is slightly similar to the theory of Asian Values, though the latter is often alleged to be autocratic in nature and the former is not.

The theory that emanates from Asia is made popular by Asian leaders such as Tun Mahathir Mohamad and Lee Kuan Yew. Goodroad, Davis, Engle and Ramraj are amongst some of the writers that have critically studied the Asian Values theory propounded by influential Asian leaders such as Mahathir Mohamad and Lee Kuan Yew.¹⁷ Mahathir Mohamad was a great believer and defender of this theory through his books and speeches both regionally and internationally, always proclaiming the distinctiveness of Asians from their Western counterparts. Mahathir has been consistent in his views that Asians must uphold their values and need not be too influenced by Western ideals. In his book he elaborates on the foolishness of Asian communities in imitating the West without regard to whether the values that we imitate are in conflict with our own traditions. Oftentimes, he observes that the Asian community are too eager to part with their own principles and copy what is being practiced in the West, not bearing in mind the advantages or disadvantages of such a compromise in values.¹⁸ In his keynote address,¹⁹ he goes on to explain that

¹⁶ Malik Maleiha, "Crime and Disorder Act 1988- Racially Aggravated Offences", in *King's College Law Journal*, vol. 10 (1999): at 128.

¹⁷ Goodroad, S.L., "The Challenge of Free Speech: Asian Values V. Unfettered Free Speech, an Analysis of Singapore and Malaysia in the New Global Order", in *Ind. International & Comparative Law Review*, vol. 9, no.1 (1999): at 261; Davis, M. C., "Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values", in *Harvard Human Rights Journal*, vol. 11 (1998); Engle, K., "Culture and Human Rights: the Asian Values Debate in Context", *N.Y.U Journal of International Law and Politics*, vol. 32 (2000); & Ramraj, V. V., "The Post September 11 Fallout in Singapore and Malaysia: Prospects for an Accomodative Liberalism", *Singapore Journal of Legal Studies*, (2003): at 462.

¹⁸ See generally, Mahathir Mohamad, *The Challenge*, (Selangor: Pelanduk Publications (M) Sdn Bhd, 1986).