

**Freedom of expression implications
of the Federal Court decision in *Heidy
Quah Gaik Li vs Government of
Malaysia***

Analysis by ARTICLE 19

Introduction

On 6 February, the Malaysian Federal Court partly [reversed](#) a landmark [2025 decision](#) of the Court of Appeal in [Heidy Quah Gaik Li vs Government of Malaysia](#), representing a serious setback for freedom of expression in Malaysia.

The Court of Appeal had ruled in August 2025 that the words ‘offensive’ and ‘annoy’ in Section 233 of the Communications and Multimedia Act (CMA) 1998 were unconstitutional, as they breached two articles of the Federal Constitution: Article 8, which guarantees the right to equality, and Article 10(1)(a), which guarantees the right to freedom of speech and expression. The 2025 Court of Appeal judgment was viewed as [a major win](#) for freedom of expression in curbing the detrimental impacts of the CMA. Section 233 criminalises any online communication that is “obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person”, so freedom of expression and equality advocates viewed the ruling as an effective step towards protecting these freedoms.

Yet, the case took a disappointing turn in February, when the Federal Court ruled that words ‘offensive’ and ‘annoy’ in Section 233 of the CMA did *not* violate the Constitution. The overturning of the Court of Appeal’s decision was only partial, as the Federal Court did affirm the Court of Appeal’s finding that there was no basis to prosecute the Respondent in this appeal, Heidy Quah, on the grounds that her post was ‘offensive’ and communicated ‘with the intent to annoy’.

We welcome the Federal Court’s affirmation that political views and controversial issues are protected under Article 10(1)(a) of the Federal Constitution even if they cause discontent or anger. However, we are concerned that the same judgment appears to contradict this principle by seemingly exempting expression that targets the constitutional monarchy or offends religious sensitivities from the scope of protection, even though such expression can also be deeply political in nature. The Court also makes broad reference to ‘hate speech’ ‘not amount[ing] to free speech’, without distinguishing between different forms of ‘hate speech’. Some categories described as ‘hate speech’ may still fall within the scope of protected expression and should not be subject to blanket restrictions.

In this context, the Federal Court ruled that the problem of unwarranted prosecutions under Section 233(1)(a) of the CMA can be addressed by ‘reading down’ the section, namely only to cover cases in which there is ‘an express intent to annoy another user or a body of users’. Thereby, it held, Section 233(1)(a) can cover speech which is intended to cause injury or harm, and thus, according to the Court, fall outside the scope of the right to freedom of speech and expression. This finding preserves what we believe to be an unacceptably broad provision, which as [our previous analysis](#) of the CMA has shown, fails to meet the three-part test of legality, legitimacy, necessity and proportionality. It also increases the risk of continued applications such as those seen in the case of Heidy Quah.

Beyond the question of the unconstitutionality of the words ‘offensive’ and ‘annoy’, we continue to call for the full repeal of Section 233. ARTICLE 19, along with many other civil society organisations in

Malaysia, has long [campaigned and advocated](#) for the repeal of Section 233 of the CMA and has consistently emphasised that it fails to meet international freedom of expression standards.

Over the years, Section 233 has been used to [crack down](#) on free speech and as a tool in clamping down on criticism and dissenting voices. The CMA creates a chilling effect on freedom of expression, causing individuals in Malaysia to self-censor, especially when using social media platforms, due to fear of criminal penalties or prosecution. Unless it is repealed, there can be no assurance that it will not be misused in the future to undermine freedom of expression.

Responding to the Court's key arguments

In the following analysis, ARTICLE 19 responds to some of the Court's key arguments, as summarised in its press summary.

1. Whether the right to freedom of speech and expression excludes communications which are 'harmful'.

Court press summary (paras. 5-6): 'The right to freedom of speech and expression under article 10(1)(a) of the FC is not absolute but is inherently qualified to exclude communications which are harmful in character. What does not fall within the purview of free speech and expression are communications with intent to cause harm or injury to another individual or group of persons. Such expressions do not serve any constructive purpose as intended by article 10(1)(a) of the FC, such as to further democratic dialogue, disseminate information or express opinions which are premised on fact or advanced in an effort to search for the truth.'

ARTICLE 19's response: The Court is correct in stating that the right to freedom of expression is not absolute. This is consistent with both the Federal Constitution and international human rights law. Yet we disagree with the Court's reasoning that communications deemed 'harmful' or lacking a 'constructive purpose' fall outside the scope of protection. Article 10(1)(a) guarantees that 'every citizen has the right to freedom of speech and expression' without conditioning that right on speech being constructive, truthful, or non-harmful. Rather than defining the scope of protected speech by reference to its value or character, the Federal Constitution sets out specific and limited grounds upon which expression may be restricted. There is a material difference between excluding certain categories of speech from protection at the outset and recognising that all expression falls within the scope of protection but may only be restricted in accordance with clearly defined constitutional limitations and strict legal standards. It is the State who must justify that the limitation falls within the permitted grounds and satisfies the applicable legal standards. Shifting speech outside the scope of protection altogether, as the Federal Court seems to suggest, weakens those constitutional safeguards.

International human rights law equally requires that limitations on *any* kind of speech must fulfil a number of strict conditions. Under Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR), any restrictions must meet a three-part test. First, any restriction must have a basis in law, which is publicly available and accessible, and **formulated with sufficient precision** to

enable citizens to regulate their conduct accordingly. Second, the restriction **must pursue a legitimate aim**, exhaustively enumerated in Article 19(3) of the ICCPR. Third, any restriction must be necessary and proportionate.

While Malaysia is not a party to the International Covenant on Civil and Political Rights (ICCPR), these requirements are grounded in Article 19 of the Universal Declaration of Human Rights (UDHR), as [noted](#) by the UN Special Rapporteur in 2018. Section 4(4) of the Human Rights Commission of Malaysia Act 1999 recognises the UDHR as a guiding tool for fulfilling its responsibilities to promote and protect human rights in the country. Malaysian courts have also regularly cited international human rights conventions, including the ICCPR, in cases involving fundamental liberties under the Federal Constitution. (See [Subramaniam a/l Letchimanan v The United States of America and another Appeal](#), The Court of Appeal, [2021], paras 72-74; [Mat Shuhaimi bin Shafiei v Public Prosecutor \[2014\]](#) The Court of Appeal; [Chong Ton Sin \(berniaga sebagai Gerakbudaya Enterprise\) & Anor v Menteri Dalam Negeri & Anor \[2022\]](#) MLJU 2245, HC para 38).

2. Whether the right to freedom of speech and expression excludes ‘hate speech’ and ‘speech which offends religious sensitivities’

Court press summary (para. 6): ‘The obvious examples of speech that do not amount to free speech in this jurisdiction include hate speech and speech which offends religious sensitivities.’

ARTICLE 19’s response: As noted in our previous point, the proper approach to freedom of expression analysis is not to ask whether certain categories of speech fall outside the scope of protection, but whether any restriction imposed on that speech is constitutionally permissible. In this regard, the Court appears to overstate the types of speech that may be prohibited by broadly referring to ‘hate speech’ and ‘speech which offends religious sensitivities’. Not all such speech may be lawfully restricted. The Federal Constitution only allows for the restrictions ‘*on the rights conferred by paragraph (a) of Clause (1) [...] as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence*’.

International human rights law and standards also do not allow for general restrictions on ‘hate speech’ and ‘speech which offends religious sensitivities’. International human rights bodies have emphasised that expressions that [‘offend’, ‘shock’, or ‘disturb’](#) the public or a segment thereof firmly fall within the scope of the right to freedom of expression. These are the demands of pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. Furthermore, international human rights law does protect individuals from speech they might consider [blasphemous or otherwise offensive](#).

As to ‘hate speech’ specifically, not all forms of hate speech are to be treated in the same way – there are forms of ‘hate speech’ that must be prohibited under international law, forms that may be prohibited and forms of ‘hate speech’ which should be protected from restriction even if it raises concerns in terms of intolerance and discrimination, and merits a critical response by the State.

3. The protection of political views and expression on controversial issues

Court press summary (paras. 7, 16 and 18): ‘It should, however, be made clear that discontent or anger arising from the expression of political views and more controversial issues do not constitute harm as envisaged in article 10(1)(a) of the FC. Such communications comprise free speech, as that is the essence of freedom of speech and expression. It promotes dialogue to enhance the existing system of government and democracy.’

‘In the context of Malaysia which is a plural and multi-racial society, the issues of race and religion are of primary concern. Section 233(1)(a) of the CMA ensures that communications which are intended to offend the sensitivities of each of the plurality of races that comprise its population are prohibited.’

‘Furthermore, the system of constitutional monarchy in Malaysia is a fundamental feature of the FC. Communications targeted at attacking the constitutional role of this institution with intent to annoy, abuse, threaten or harass would also fall within the purview of section 233(1)(a) of the CMA.’

ARTICLE 19’s response: We welcome the Federal Court’s affirmation that political views and controversial issues are protected under Article 10(1)(a) of the Federal Constitution. However, the Court’s broad caveat relating to race, religion, and royalty undermines said affirmation. Indeed, political speech will often be deeply interlinked with the issues of race, religion, and royalty. They should not be considered out of scope because they are deemed ‘harmful.’ The previous point outlines that offensive speech in principle remains protected under freedom of expression standards. In addition, in [General Comment No. 34](#), the UN Human Rights Committee asserted that speech of a political nature enjoys heightened protection, emphasising that ‘in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high’. Such figures and institutions have to tolerate more, rather than less, criticism than ordinary citizens, since they are directly involved in matters of public concern. In addition, although the ICCPR provides that the protection of the reputation or rights of others is one of the legitimate grounds to restriction of freedom of expression, this concerns only the protection of individuals or, in some instances, to groups of persons. It cannot be interpreted to cover institutions, religions, beliefs, ideas or symbols.

4. Whether ‘reading down’ section 233(1)(a) of the CMA can avoid unwarranted prosecutions

Court press summary (paras. 14 and 15): ‘The problem of unwarranted prosecutions in the context of section 233(1)(a) of the CMA can be addressed by “reading down” the section in order to narrow the types of cases falling within its purview, as well as to set the requisite thresholds to warrant the

bringing of a prosecution. The power of the courts to strike down legislation under article 4(1) of the FC should only be resorted to when the legislation or a part of the legislation is found to be unconstitutional. Applying the principle of “reading down” to the phrase “offensive with intent to annoy”, it follows that the core of the phrase is its *mens rea* portion, i.e., “with intent to annoy”. This means that it is only when “offensive” communication is undertaken with an express intent to annoy another user or a body of users, that there is sufficient basis to prosecute for a transgression of section 233(1)(a) of the CMA.’

ARTICLE 19’s response: To satisfy the requirement of legality, criminal provisions must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly. The law must clearly define what conduct is prohibited and provide safeguards against arbitrary or discriminatory interpretation and enforcement by authorities. Terms such as ‘offensive’ and ‘annoy’ fail to meet this standard. They are inherently subjective and lack the precision required. Concepts so elastic that they can encompass robust political debate, satire, criticism of public institutions, or discussions on race and religion undermine legal certainty and create a serious chilling effect. If virtually any expression may be considered ‘offensive’ to someone, freedom of expression becomes contingent on subjective sensitivities and enables arbitrary enforcement. This is not cured by the reference to the intent requirement, which does not sufficiently narrow the scope of the offence to meet the legality requirement or limit the risk of arbitrary interpretations.

We therefore find the Federal Court’s reasoning unpersuasive and continue to agree with the Court of Appeal, which [found](#) the words ‘offensive’ and ‘annoy’ created a serious chilling on everyday speech, particularly how ‘the real prospect of being charged is enough to defer free speech’. The Court of Appeal also [observed](#) that when ‘all types of speeches could potentially be offensive then freedom of speech has become illusory, and enforcement becomes arbitrary’.

The risk of arbitrary interpretation is not a hypothetical one. There is a well-documented trend of authorities relying on this provision to target expressions. The regulatory bodies responsible for the CMA in Malaysia, specifically the Malaysian Communications and Multimedia Commission (MCMC), as well as the police, lack independence both in law and in practice. Since the introduction of CMA in 1998, Section 233 has often been [used](#) – either as a standalone offence or together with other laws – to investigate, arrest, charge, and convict individuals who have criticised the government and institutions or shared opinions about issues such as race, religion, or royalty. This is in contravention of Section 3(3) of the CMA, which expressly provides that the Act must not be interpreted as permitting the censorship of the internet. Most recently, Section 233 has been used against a range of different types of speech, including [satire](#), artistic expression and other speech considered [blasphemous](#), as well as against [LGBTQI+ event organisers](#), [youth advocacy](#) on national admission in public universities, and a [book editor](#).

The Court of Appeal’s finding that the words ‘offensive’ and ‘annoy’ were unconstitutional therefore constituted an essential check on the ability of authorities to censor individuals’ speech. With the Federal Court’s overturning of that finding, the scope for broad and subjective enforcement is once again significantly expanded, weakening constitutional protections and increasing the risk of arbitrary enforcement.

5. Whether the role and function of Section 233(1)(a) of the CMA is to ensure right to freedom of expression

Court press summary (paras. 9-10 and 21): ‘The purpose of section 233(1)(a) of the CMA is to regulate the improper use of network facilities and services, with a view to providing a safe online environment. It serves to protect individuals and communities from suffering harm as a result of such improper use. In other words, section 233(1)(a) of the CMA targets communications that fall outside the purview of the freedom of speech and expression. Therefore, it does not have the effect of infringing that right as guaranteed under article 10(1)(a) of the FC. Put differently, the function of section 233(1)(a) of the CMA is to ensure that the right to freedom of speech and expression, as set out in article 10(1)(a) of the FC, is protected such that speech and expression which falls outside of the purview of article 10(1)(a) of the FC is not used to damage, affect or distress other network users.’

‘In Malaysia, network facilities and services comprise a public service funded by the public for the purposes of facilitating communication. As such, the Government has a duty to protect the public from harassment, nuisance and disruption in the use of such communication networks.’

ARTICLE 19’s response: We agreed with the Court that the government has a duty to protect the rights of individuals, including their right to freedom of expression. We also agree that communication online can at times have a silencing effect on certain communities or voices that warrant a State response to protect freedom of expression. As noted above, some forms of ‘hate speech’ – particularly those amounting to incitement to discrimination, hostility, or violence – may require restrictive measures. However, the State’s obligation to respect, protect, and fulfil human rights must be discharged through measures that themselves comply with human rights standards. Enacting vague and overly broad criminal provisions, such as Section 233 of the CMA, undermines the very rights the State purports to safeguard.

Above we have discussed how Section 233 fails to meet the requirements of legality, legitimacy, necessity and proportionality. In addition, we find it important to emphasise that when the government seeks to address issues of racism, ‘hate speech’, harassment, and bullying, this must be done first and foremost not through censorship but through enabling measures that address the root problem of these issues. Too often, censorship of contentious issues or viewpoints fails to address the underlying social roots of the kind of prejudice that undermines the right to equality. For example, restricting freedom of expression will on its own be ineffective in combating religious and racial hatred, and adequate protection and social inclusion of multicultural society require broader and holistic policy measures.

International initiatives have provided a growing body of standards and recommendations to guide government efforts to combat intolerance and ‘hate speech’. In particular, [Human Rights Council Resolution 16/18](#) sets out a universally agreed action plan by states for addressing prejudice based on religion or belief. The [Rabat Plan of Action](#) provides practical legal and policy guidance to states on implementing Article 20(2) of the ICCPR. These documents propose a whole society approach and a range of positive policy measures to combat ‘hate speech’ that do not rely on criminal

penalties, including facilitating interfaith dialogue, training government officials, promoting media pluralism, and creating ‘equality bodies’ to address conflict and intolerance. The government and courts should be guided by those recommendations.

6. The application of Section 233(1)(a) of the CMA ‘in the context of the digital world’

Court press summary (para. 8): ‘The words “offensive” and “annoy” within section 233(1)(a) of the CMA are to be understood in the context of the digital world, more particularly, the world of social media, which has seen a rise in various forms of online harassment, doxxing, malicious pranks, hoaxes and content which is racist or attacks religious sensitivities in a derogatory manner.’

ARTICLE 19’s response: The Court appears to suggest that ‘the context of the digital world’ is a relevant criterion in determining the boundaries of permissible speech. International human rights law [asserts](#) that the same rights enjoyed offline must also be protected online. We acknowledge that online expressions can spread rapidly and widely, which may increase the potential for harm to reach a larger audience more quickly. However, subjecting online speech *per se* to stricter limitations than offline speech is not permissible. The decisive question remains whether any restriction satisfies the three-part test: legality, legitimacy, and necessity and proportionality. The scale or speed of digital dissemination may be relevant to assessing harm in a particular case, but it cannot justify vague or expansive limitations that would not be permissible offline.