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When Feelings Become Facts: The Evidentiary Crisis in Malaysia's Cyber Laws

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Abstract

Section 233(1)(a) of Malaysia's Communications and Multimedia Act 1998 criminalizes transmitting offensive (jelik), indecent, false, menacing, or offensive communications with intent to annoy, abuse, threaten, or harass. However, the term "offensive" remains ambiguously defined, relying on subjective societal norms and emotional interpretations, leading to inconsistent legal applications. This ambiguity complicates enforcement, as prosecutors must prove both the offensive nature of the content and the accused's malicious intent, while the accused face the additional challenge of rebutting Section 114A of the Evidence Act 1950, which presumes their liability for online content. The lack of clear judicial guidance exacerbates these issues, underscoring the need for legislative or precedential clarity to balance free expression with protection against digital harassment. This writing aims to highlight the current legal situation in Malaysia and the approach taken by criminal trial courts in addressing the evidentiary crisis surrounding Section 233 of Communications and Multimedia Act 1998. The study employs a qualitative research methodology, analyzing primary and secondary legal sources, including case law and statutory provisions, to assess the challenges in defining and proving "offensive" conduct. Key findings reveal significant inconsistencies in judicial interpretations, with courts relying on subjective societal standards and emotional responses to determine offensiveness. The study also identifies the disproportionate burden placed on the accused due to the presumption of liability under Section 114A of the Evidence Act 1950. To address these issues, this writing recommends legislative amendments to provide clear definitions of "offensive" conduct, grounded in Malaysia's socio-cultural context. Additionally, it calls for judicial guidelines to standardize the application of Section 233, ensuring fairness and predictability in enforcement. These measures would enhance legal certainty while safeguarding fundamental rights to free expression and protection from digital harassment.

Keywords: *Offensive (Jelik), Burden of Proof, Standard of Proof, Presumption of Law.*

Introduction

In the current unregulated development of information technology, it can be misused for criminal acts by one person against another. Due to this, there exists a need to establish a set of regulations to prevent misuse of existing technology that would bring harm to people. Such regulations are an undeniable necessity to protect societal rights towards ensuring a harmonious and peaceful existence. Due of this need, the Malaysian government tabled a law which was subsequently

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approved. This law is called the Communications and Multimedia Act 1998 (Act 588), aimed at safeguarding Malaysian society's interests and welfare by providing legislation to regulate the communications and multimedia industry, focusing on convergence and related matters.

Although the Communications and Multimedia Act contains various provisions, this writing limits discussion to Section 233, which stipulates certain actions prohibited by law, particularly provisions concerning offences related to "offensive (jelik)" communications. This chapter will explain the meaning of offensive conduct within the context of Section 233 of the Communications and Multimedia Act 1998, while discussing the legal approach regarding standards of proof for involved parties, whether prosecution or defence in such cases.

A study will be conducted through this writing to identify problems in charges involving the standard and burden of proof under Section 233 of the Communications and Multimedia Act 1998. Among the existing issues is the unclear interpretation of offensive conduct, which is not explicitly defined in the Act. This situation has fundamentally caused confusion and divergence in establishing benchmarks for determining standards and burden of proof regarding whether certain behaviour constitutes offensive conduct and thus violates the law. Such confusion creates public misunderstanding about offensive offences and leads to differing methodologies among courts, given that each case before the courts has a distinct factual background.

Materials and Methods

This study adopts a qualitative research methodology, emphasising a thorough examination of both primary and secondary sources concerning the offensive and the evidentiary crisis in Malaysia's cyber laws. Accordingly, this research employs both content analysis and critical analysis techniques to assess the gathered data (Ramalinggam Rajamanickam et al., 2019). Content analysis, can vary from simple word frequency counts to more complex conceptual interpretations. Primary sources, such as legal texts and official documents from Malaysia and other nations, form the basis of this study (Mohd Zamre Mohd Zahir et al., 2021). The careful collection of these materials is essential for ensuring the precision and depth of the research process and contributes to a comprehensive literature review (Nurul Hidayat Ab Rahman et al., 2023; Nurul Hidayat Ab Rahman et al., 2022; Mohd Zamre Mohd Zahir et al., 2022). The outcomes of this detailed analysis are presented and discussed in the paper's final section, offering a critical assessment of the findings.

Interpretation of Offensive Conduct

In Malaysia, legal provisions regulating online communication activities are set out in the Communications and Multimedia Act 1998 (Act 588). These provisions govern and establish certain online behaviors as criminal offenses when they involve what is referred to as offensive communication. The specific legal provisions concerning offenses related to offensive communication are outlined under Section 233 of the Communications and Multimedia Act 1998, which states as follows:

Improper use of network facilities or network service, etc.

233. (1) A person who—

(a) by means of any network facilities or network service or applications service knowingly—

(i) makes, creates or solicits; and

(ii) 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

(b) 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.

(2) A person who knowingly—

(a) by means of a network service or applications service provides any obscene communication for commercial purposes to any person; or

(b) 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.

(3) A person who commits an offence under this section shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both and shall also be liable to a further fine of one thousand ringgit for every day during which the offence is continued after conviction.

With specific reference to Section 233(1)(a)(ii), the terms used in relation to prohibited communications are: obscene (lucah), indecent (sumbang), false (palsu), menacing (mengancam), and offensive (jelik). The term "offensive" has been adopted colloquially in Malaysian jurisprudence to interpret the broader concept of "offensive" communications under Section 233 of the Communications and Multimedia Act 1998, though it does not appear in the original statutory text. While the Act's English version uses specific terms like "obscene, indecent, false, menacing or offensive," Malaysian courts have employed "jelik" as a culturally-grounded shorthand to describe content that violates local societal norms, encompassing not just sexual obscenity but also religious, racial and other forms of offensive expression. This judicial adaptation reflects an effort to localize the application of the law to Malaysian sensitivities, though the lack of a formal definition for "jelik" has led to some inconsistency in its interpretation across different cases.

Conduct or actions involving communications related to these terms are prohibited under Section 233, and such acts constitute criminal offences. However, there exists no statutory provision or guidelines to date that provide detailed definitions for these five terms under Section 233. This is significant because before any conduct can be deemed criminal, the law should clearly stipulate that such behaviour is socially unacceptable and constitutes an offence when committed.

Regarding offensive (jelik) communications, the term "jelik" is not defined in the Communications and Multimedia Act 1998, particularly in Section 233. Nevertheless, several interpretations exist concerning offensive (jelik) conduct that may serve as guidance. Reference may be made to linguistic definitions provided by Dewan Bahasa dan Pustaka. The Dewan

Bahasa Dictionary (Fourth Edition) defines "jelik" as encompassing multiple meanings, including bad, ugly, evil, and improper.

Consistent with this definition, the Student Dictionary (Second Edition) by Dewan Bahasa dan Pustaka (2005) similarly defines "jelik" as "not good, evil or bad." In English, according to Cambridge University Press & Assessment (Online Dictionary 2025), the term "jelik" refers to an "offensive" action that may be described as follows:

... (1) offensive, rude, or shocking, usually because of being too obviously related to sex or (2) showing sex or morally wrong, often describing something that is wrong because it is too large or (3) offensive, rude, or disgusting according to accepted moral standards.

Through such interpretation, the simplest way to determine whether conduct is offensive or not is by assessing if the communication was made in a crude manner that could cause someone to feel distressed, humiliated, or harassed by such actions. To properly understand the legal interpretation of the term "offensive", several decided cases from Malaysian courts serve as valuable references.

Among these, in *Jufazli Bin Shi Ahmad v. Public Prosecutor* [2022] 8 MLJ 684, the High Court formulated and provided the following interpretation of the term "offensive":

"The purpose of Section 233 of the Act is to address the "improper use of network services or facilities", where the objective of Section 233 is to eliminate obscene or offensive (jelik) material from being transmitted through these networks, but does not impose a complete prohibition based on the general moral standards of ordinary persons regarding what is considered "obscene or offensive".

Under Section 233(1)(a) of the Act, to determine whether material is obscene or offensive (jelik), it must be assessed against the recipient of the material at the receiving end, who must constitute "any other person", while "any person" under Section 233(1)(b) of the Act refers to anyone generally viewing the transmission. Unless and until it is seen by the recipient at the receiving end, the transmission will not satisfy the requirements under either Section 233(1)(a) or (b) of the Act.

The words "with intent" impose certain obligations on the prosecution to prove, through available evidence, the existence of the actus reus element. The act of committing the offence to satisfy "with intent to annoy, abuse, threaten or harass any other person" under Section 233(1)(a) of the Act must be proven, and the determination of whether the material's content results in "annoyance, abuse, threat or harassment" can only be known by the intended recipient who reads or views the material. This can only be established at the point where the recipient views the material.

Section 233 of the Act combines the "transmission" under the first part of Section 233 with the receipt of that transmission by another person, in order to satisfy the second part of Section 233 – namely, that the nature of the transmitted material is offensive (jelik) or obscene, and was done with intent to annoy, etc."

Based on the High Court's decision in the case of *Jufazli Bin Shi Ahmad*, the term "offensive" as interpreted by the Court refers to actions that reflect the general moral standards of society. Such actions must be accompanied by an intention to wound feelings, harass, threaten, or disturb others. According to the Court, determining whether the content of the material results in "wounding feelings, harassing, threatening, or disturbing" can only be ascertained by the person

targeted, reading, or viewing the material. In defining the term "offensive," there are also several writings related to the provisions of Section 233, including Offensive Content on The Internet (Ammar Abdullah Saeed Mohammed, Nazli Ismail Nawang, 2019), which attempts to explain its meaning. However, these writings do not provide a detailed explanation of "offensive" behaviour or what the law intends by "offensive." Nevertheless, parts of these writings refer to other elements as provided under Section 233(1)(a), and ultimately, the conclusion drawn in these writings is as follows:

In conclusion, section 211 of the Communication and Multimedia Act (CMA) describes that content on the internet is offensive if the content is: indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person. The content could be sound, text, or picture. In fact, it's really difficult to draw out a comprehensive definition, because what shall be deemed offensive content in a specific country, custom, or peoples may not be for others. It also differs and varies from age to age, region to region, from culture to culture and perhaps religion to religion. Also, it seems that the offensive content on the internet under section 211 and 233 of the CMA is very broad but, in the end, it's subject to the court's assessment whether the content falls under the types of offensive content described in section 211 and section 233 of the CMA.

The factual basis as a reference leading to the writing presenting such a conclusion is not elaborated in great detail, as the conclusion refers to the provisions of Section 211 of the Communications and Multimedia Act 1998 regarding the meaning of "offensive" when linking it to behaviour or actions that refer to something indecent, lewd, false, threatening, or offensive with the intent to wound feelings, harass, threaten, or disturb others. In short, the writing states that the provision under Section 233(1)(a)(ii) defines the meaning of "offensive," which can exist in the form of sound, text, or images, and it is left to the Court to exercise discretion in determining the existence of offensive conduct under Section 211 and Section 233 of the Communications and Multimedia Act 1998.

Based on the interpretation provided by the writing and case decisions such as *Jufazli Bin Shi Ahmad*, a precise definition cannot be specifically given for "offensive" communication, as offensive communication arises from an act that requires an assessment of its ultimate effect on the person intended or targeted by such dissemination or offensive behaviour—resulting in that person feeling wounded, harassed, threatened, or disturbed. Thus, it can be said that offensive communication leans more towards something involving the emotions or mental state of the person targeted by the "offensive" act. This makes the method of proof in such cases subjective and based on a reference point—namely, the differing sensitivities among individuals due to mental resilience or environmental factors shaped by personal life experiences. This situation may lead to differing approaches in adjudicating cases involving the element of "offensive," ultimately causing confusion in proving the "offensive" element. This is because the term "offensive" is not clearly defined under Malaysian law, particularly in the Communications and Multimedia Act 1998 and court-decided cases.

When the Communications and Multimedia Act 1998, as a statutory law, does not provide an interpretation of communication or conduct amounting to "offensive," such ambiguity will lead to confusion in practice, particularly in assessing whether an act or communication constitutes an offence under the Act. Furthermore, the term "offensive" has also not been clearly interpreted by the courts in criminal cases. If this issue is not addressed, the uncertainty and confusion arising from differing interpretations of the term "offensive" will result in inconsistent

approaches in interpreting the offence of "offensive" communication as provided under the Communications and Multimedia Act 1998.

In seeking a clear interpretation of the word or reference to "offensive" conduct, Section 213 of the Communications and Multimedia Act 1998 provides that there is a Content Code (2022) that may be referred to. The said provision of law is as follows:

Content Code

(1) A content code prepared by the content forum or the Commission shall include model procedures for dealing with offensive or indecent content.

(2) The matters which the code may address may include, but are not limited to —

(a) the restrictions on the provision of unsuitable content;

(b) the methods of classifying content;

(c) the procedures for handling public complaints and for reporting information about complaints to the Commission;

(d) the representation of Malaysian culture and national identity;

(e) public information and education regarding content regulation and technologies for the end user control of content; and

(f) other matters of concern to the community.

Based on the said provision, it is clear that the referenced offenses requiring interpretation may refer to the Content Code. However, the same issue persists as there is no specific reference to "offensive" conduct. The available reference is to the Content Code's interpretation of obscene content, as follows:

"6.0 Offensive Content

Offensive Content is material that includes expletives and profanity that is offensive to many people. Offensive Content includes the following:

(i) Crude References

Words which are considered obscene, lacking refinement of taste, foul, offensive, coarse or profane are prohibited including crude references to sexual intercourse and sexual organs. It is, however, permissible to use such words in the context of their ordinary meaning and not when intended as crude language.

(ii) Hate Speech

Hate speech refers to any portrayal (words, speech, or pictures, etc.), which denigrates, defames, or otherwise devalues a person or group on the basis of race, ethnicity, religion, nationality, gender, sexual orientation, or disability and is prohibited. In particular: descriptions of any of these groups or their members involving the use of strong language, crude language, explicit sexual references, or obscene gestures, are considered hate speech.

(iii) Violence

Where the portrayal of violence is permitted with appropriate editorial discretion as in news reporting, discussion or analysis and in the context of recognised sports events, care shall be

taken to consider the use of explicit or graphic language related to stories of destruction, accidents or sexual violence, which could be disturbing for general viewing."

If observed through such a content code, the reference to the interpretation of obscene content leans more towards actions involving sexual issues or behaviour and the dignity of an individual, which carries elements of decency and modesty. Nevertheless, the issue arising regarding this content code is that, to date, there has been no clear guidance from any court in Malaysia to deliver a decision determining the legal effect of the content code, whether for establishing the standard or burden of proof required by the prosecution or the accused.

The most recent and closest reference that can be made is a decision by the Sepang Sessions Court on 14.3.2025 in the case of *Public Prosecutor v. Aliff Syukri Bin Kamarzaman* (Criminal Trial Case No: BK-63-11-10/2022, BK-63-12-10/2022, BK-63-13-10/2022 & BK-63-14-10/2022). In this case, the accused faces four charges under Section 233(1)(a) of the Communications and Multimedia Act 1998 (Act 588) for allegedly posting an indecent video on his Instagram account (@aliffsyukriteriajaklaris) on 15 April 2022. The charge states that he knowingly created and transmitted this communication with the intent to hurt others' feelings. The offence was recorded on 24 April 2022 at approximately 2:00 PM at MCMC HQ in Cyberjaya, Selangor. If convicted, he faces a maximum penalty of a RM50,000 fine, one year's imprisonment, or both, plus an additional RM1,000 fine for each day the offence continues after conviction.

During the prosecution's stage of the trial, the commission's investigation officer and another senior officer were called to give evidence in court. The court was later informed that the content code serves merely as a guideline for commission officers in dealing with offences under Section 233 of the Communications and Multimedia Act 1998. Given that it is only a guideline, the accused's counsel raised the issue that the content code has no legal effect on the accused. At the close of the prosecution's case, the learned Sessions Court judge ruled that the prosecution had established a prima facie case against the accused, who was then directed to enter his defence. The case will continue for the accused to present his defence on 13.5.2025, 19.5.2025, and 22.5.2025 during the defence stage of the trial.

Since the case is still ongoing and no final decision has been rendered by the trial judge, a clear legal principle or guideline regarding the effect of the content code and its referenced interpretations will only emerge after the case is concluded or decided upon by a higher court in any subsequent appeal. This will present a novel legal issue to be further argued in the appellate court, serving to clarify all ambiguities, including establishing a clear legal definition of what constitutes offensive conduct or offenses under the law.

The Burden of Proof in Cases Involving Charges under Section 233 of the Communications and Multimedia Act 1998

Furthermore, it is widely known that the burden and standard of proof are crucial issues in any case, particularly in criminal cases. In this context, the existing legal provisions in Malaysia are as stipulated in the Evidence Act 1950 (Act 56) and the Criminal Procedure Code. The burden of proof in a criminal case is provided for under the Evidence Act 1950, while the standard of proof in criminal cases is prescribed by the Criminal Procedure Code.

The relevant provision concerning the burden of proof under the Evidence Act 1950 is Section 101. This section stipulates as follows:

"Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Based on the above provisions, it is clear that the law of evidence establishes the principle that the burden of proving a fact lies on the person who asserts the existence of that fact. This means the burden of proof for any fact rests upon the party asserting that such fact exists. In criminal cases, when the prosecution asserts that the accused has committed the alleged offence, the burden of proof falls on the prosecution to prove its claim or assertion. This burden is referred to as the "legal burden" in a case. The legal burden represents the obligation to establish a case.

Furthermore, in any lawsuit or court proceeding, the Evidence Act 1950 also stipulates that the burden of proof lies on the party who would fail in their claim or proceeding if no evidence were adduced by either side. This burden is expressly stated in Section 102 of the Evidence Act 1950 as follows;

"On whom burden of proof lies

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father. If no evidence were given on either side, B would be entitled to his possession. Therefore, the burden of proof is on A.

(b) A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved. Therefore, the burden of proof is on B."

Apart from the above two provisions, there are other sections in the Evidence Act 1950 that specify the burden of proof under particular circumstances. With these statutory provisions in place, it becomes straightforward for parties in a case to identify who bears the burden of proof, as this responsibility necessitates proving the asserted facts. In addition to determining aspects related to the burden of proof, there is also a need to identify the standard of proof required to establish a fact. This refers to the degree of certainty that must be achieved by the party legally responsible for discharging the burden of proof.

5. The Burden of Proof in Cases Involving Charges under Section 233 of the Communications and Multimedia Act 1998

In criminal proceedings or cases, Section 173 of the Criminal Procedure Code is the relevant legal provision when discussing the standard of proof in criminal cases. The standard of proof in criminal cases can be divided into two distinct stages. The first stage occurs during the prosecution's case, while the second stage takes place at the conclusion of the case.

For the prosecution stage, the standard required of the prosecution is that of establishing a prima facie case. This standard means that there exists a case requiring an answer from the accused (the defence). The legal meaning of a prima facie case can be found in Section 173(h)(iii) of the Criminal Procedure Code, which states as follows:

"... a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction."

When a prima facie case has been successfully established by the prosecution at the conclusion of its case, the accused shall then be called upon to enter their defence. This is expressly provided under Section 173(h)(i) of the Criminal Procedure Code as follows:

"If the Court finds that a prima facie case has been made out against the accused on the offence charged, the Court shall call upon the accused to enter on his defence."

In addition to Section 173(h) of the Criminal Procedure Code, another relevant provision concerning the standard of proof in criminal cases in Malaysia is Section 173(m)(i) of the same Code. This provision relates to the standard of proof required at the conclusion of a criminal case. This means that Section 173(m)(i) of the Criminal Procedure Code stipulates the evidentiary standard that must be met by the prosecution at the final stage of criminal proceedings. The provision states as follows:

"At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt."

Based on the aforementioned legal provisions, it is evident that there are statutory regulations governing the standard of proof required at both stages of a case namely at the conclusion of the prosecution's case and at the final determination of the entire case. It is precisely upon this burden and standard of proof that the court will base its decision regarding the accused's guilt or innocence.

6. The Shifting Burden of Proof in Cases Involving Section 233 of the Communications and Multimedia Act 1998 and Its Impact on the Original Burden and Standard of Proof in Criminal Cases

In all criminal cases in Malaysia, the fundamental legal principle states that the prosecution bears the burden of proof throughout the proceedings to establish the accused's guilt. This constitutes a basic tenet of the criminal justice system, grounded in the presumption of innocence unless proven guilty. However, exceptions are permitted by law when specific statutory provisions shift the burden of proof, as contemplated under Sections 103, 105, and 106 of the Evidence Act 1950. In the context of offensive communication offences, the burden of proof initially rests with the prosecution to prove the accused's guilt. Nevertheless, certain circumstances may arise that effectively transfer this burden to the defence, requiring them to disprove relevant facts or elements of the charge.

Regarding such exceptions to the burden of proof, reference may be made to the Federal Court case *Public Prosecutor v. Gan Boon Aun* [2017] 3 MLJ 12, where the court outlined the following legal principles:

"But there is a limit to what the prosecution could or could reasonably be expected to prove. "There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. Take an obvious example in the case of an offence involving the performance of some act without a licence. Common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant has not a licence when it is a matter of comparative simplicity for a defendant to establish that he has a licence. The position is the same with regard to insanity, which was one of the exceptions identified by Viscount Sankey LC in the passage of Woolmington v DPP [1935] AC 462 at 481…;" (AG of Hong Kong v Lee Kwong-Kut [1993] 3 All ER 939 at 950 per Lord Woolf). "… some inroads have of recent times been made upon this orthodox principle, and in many jurisdictions it is accepted that a burden of proof may for certain sorts of facts be upon the accused. Certainly, the second burden [in Woolmington] i.e. the duty of producing some evidence, ought in some instances to be upon the accused. The absence of affirmative pleadings in defense is no insuperable objection to such a result. The judicial experience with certain issues on criminal trials has seemed to justify such exceptions; and the fixing of a particular fact on this or the other party as a part of his case is in general only a question of sound policy as based on experience … A few courts seem in general to place on the accused some sort of burden of proof for any fact in the nature of excuse or mitigation. A few courts seem to place upon the accused the burden of showing that he acted in self-defense but he ought at least to have the duty of coming forward with some evidence …" (§2512 at p 537 - 543, Volume 9, Wigmore on Evidence (Chadbourn Revision 1981)).

There are exceptions to the general rule that an accused bears no onus of proof. Section 103 of the EA provides that "The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person". Illustration (b) to section 103 specifically requires B, who "wishes the court to believe that at the time in question he was elsewhere", to prove it. Section 103 of the EA requires a defence of alibi to be proved by the accused (see PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617 and Dato' Seri Anwar bin Ibrahim v PP [2004] 1 MLJ 177, which effectively held, and we agree, that section 103 of the EA is the provision, not section 402A(2) of the CPC, that governs the defence of alibi; see also Law of Evidence in Malaysia and Singapore by Rafiah Salim at page 10, where the learned author commented, and we agree, that section 402A(2) of the CPC only deals with the procedure to be followed when the defence of alibi is introduced)."

In matters concerning offensive communications transmitted via devices and the Internet, specific statutory provisions have been enacted that shift the burden of proof to the defence to disprove certain elements required under Section 233 of the Communications and Multimedia Act 1998. The relevant provision is Section 114A of the Evidence Act 1950, which establishes presumptions regarding publication. This section contains three distinct legal presumptions under subsections (1), (2) and (3), as follows:

"Presumption of fact in publication

114A (1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.

(2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.

(3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved."

As established by the High Court in *Ahmad Bin Abdul Jalil v. Public Prosecutor* [2015] 5 CLJ 480, the burden of proof in such cases shifts to the defence (the accused) to adduce sufficient evidence to rebut the statutory presumption. While the court ruled accordingly, it did not provide detailed clarification regarding the standard of proof required of the accused when presenting evidence to counter the legal presumption under Section 114A. This is evident from the High Court's decision, which states as follows:

"Having considered all the particulars set out and elucidated above, this Court hereby determines that it is appropriate to apply a rebuttable presumption under Section 114A of the Evidence Act 1950, that the accused and no other person uploaded the offending comment as specified in the charges in this case."

Additionally, in *Public Prosecutor v Rutinin Suhaimin* [2013] 2 CLJ 427, the High Court similarly ruled that the prosecution had successfully established a prima facie case, having considered the available evidence as referenced in the following judgment excerpt:

"The learned Sessions Court Judge adverted to the lack of direct evidence as fatal. He has erred in coming to the conclusion as he completely failed to consider the strength of the circumstantial evidence in this case. Circumstantial evidence must be given due weight if it points irresistibly, inexorably and unerringly to the guilt of the accused (see Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130, Sunny Ang v. PP [1965] 1 LNS 171). The circumstance evidence in this case came from PW1, the Telekom Malaysia Berhad witnesses and the forensic expert from Cybersecurity Malaysia. As outlined in the summary of evidence, the prosecution witnesses testified virtually unchallenged that the offensive remark in question was posted on the visitor book of HRH Sultan of Perak's homepage. The user's IP address was captured by PW1. This IP address was traced by the internet service provider (Telekom Malaysia Berhad) as having been assigned to the internet account of the accused person at the time the communication was made. PW4, PW5, PW6 and PW12 from Telekom Malaysia Berhad gave evidence that the internet account belonged to the accused. Furthermore, the transaction in question matched the MAC address of the computer that was found with an active internet connection in the shop of the accused person. As recounted earlier, the MAC address is the unique address given by the manufacturer of a particular device. The evidence of the prosecution witnesses simply means that the communication was made from the internet account and the computer of the accused person. The learned Sessions Court Judge considered the submission that the IP and MAC addresses could have been spoofed (impersonated) and that sufficient evidence was not adduced on this point by the prosecution. My respectful view is that the learned Sessions Court Judge had erred in so holding. The prosecution is not obliged to speculate on potential defences. If there was any evidence of impersonation, it is up to the accused to tender evidence to support such a defence. In any event, the prosecution witnesses testified that it is not possible to spoof both the IP address and the MAC address at the same time. As there is no expert opinion evidence to the contrary, the learned Sessions Court Judge should have not considered the possibility of spoofing in the instant case at the end of the case for the prosecution."

Based on these two cases, it is clear that if the accused fails to present any evidence contradicting the existing facts or elements provided under Section 114A of the Evidence Act 1950, then the court will determine that the accused has failed to rebut the legal presumption and ultimately decide that a prima facie case has been successfully proven by the prosecution, whereupon the legal process will proceed by calling the accused to give his statement at the defence case stage. For reference, the decision in *Ahmad bin Abdul Jalil* delivered by the High Court which reached such conclusion is as follows:

"Accordingly, this Court is satisfied and concurs with the conclusions reached by the Learned Sessions Court Judge (Criminal Division 2), Johor Bahru, Johor, in the grounds of judgment at pages 165 to 168 of the appeal record, that the prosecution has successfully established a *prima facie* case in relation to the charge under Section 233(1)(a) of the Communications and Multimedia Act 1998 (Act 588) brought against the appellant. In such circumstances, it is only proper that the appellant be called upon to enter his defence to the said charge."

Under normal circumstances, if the accused is called to enter his defence at the defence case stage, the legal burden to prove the case must still be discharged by the prosecution by proving its case beyond reasonable doubt. Such principle as provided by law forms the basis for Malaysian courts to determine whether the accused should be convicted or acquitted and discharged after all evidence and trial stages have been completed or undergone.

In *Mohd Fahmi Reza Bin Mohd Zarin v Public Prosecutor* [2020] 7 MLJ 399, the court determined that the decisive fact for conviction under Section 233(1)(a) of the Communications and Multimedia Act 1998 is clear, namely that the prosecution must prove the existence of the element of intent. In this regard, the court stated as follows:

"This Court finds merit in the prosecution's submission that, in determining whether the third element under Section 233(1)(a) of the Communications and Multimedia Act 1998 is satisfied, the applicable principle is that established in Ong Eng Guan v Public Prosecutor [1956] 1 MLJ 44, namely:

The point is not whether he annoyed the complainant, … but whether … he intended to annoy him …"

The well established legal principle concerning the burden and standard of proof borne by the prosecution in proving a criminal case may be observed through the Federal Court's decision in *Balachandran v Public Prosecutor* [2005] 1 CLJ 85, which ruled as follows:

"Section 180(1) of the Criminal Procedure Code ('CPC') makes it clear that the standard of proof on the prosecution at the close of its case is to make out a prima facie case while s. 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The submission of the appellant that the burden on the prosecution at the close of its case is to make out a case which is beyond reasonable doubt and not on a prima facie basis is therefore contrary to the clear and plain language of s. 180 and s. 182A of the CPC. It cannot be sustained."

Notwithstanding the Federal Court's ruling in Balachandran, there exists a decision perceived to have established a different standard of proof in cases involving Section 233, namely *Rutinin Bin Suhaimin v Public Prosecutor* [2014] 5 MLJ 282. In this case, the High Court ruled as follows:

"With respect there is no presumption in s 233(1)(a) for the appellant to rebut. The onus remained with the prosecution to establish beyond a reasonable doubt that it was the appellant who made and initiated the transmission of the impugned entry. Nothing less."

Guided by such judicial decisions, the trial court does not place the burden on the accused to prove or rebut the legal presumption, but maintains the burden of proving the case on the prosecution until the standard of beyond a reasonable doubt is met. Among the essential elements under Section 233 is the intent, which may be inferred from facts. The use of the term "with intent" in both Sections 211 and 233 indicates that an individual is only guilty if they commit an act of harassment, threat, or distress with intent. If a person commits an unlawful act but lacks intent, then under these provisions, no offence is established. Divergence in the benchmark for interpreting what constitutes offensive communication leads to inconsistency and uncertainty in the legal system. Such inconsistency and uncertainty may result in injustice to parties seeking justice through the criminal justice system. To determine the precise method applied by courts in adjudicating whether conduct is offensive in a given case—and the corresponding burden and standard of proof, reference may be made to trials involving offences related to offensive posts or conduct, which typically originate in the Sessions Court. This allows for close examination of the facts and evidence presented for proof.

In *Public Prosecutor v. Martina Abu Hanifa* [2022] 1 SMC 532, tried in the Ampang Sessions Court, the case serves as a concise reference for understanding how Sessions Courts adjudicate cases involving offensive conduct or communications. In this case, the Sessions Court Judge addressed and evaluated the offensive nature of the communication, which formed the crux of the charge. However, the court assessed the facts and found that the prosecution had relied on incorrect facts, differing from the actual elements of the charge.

This discrepancy was duly considered by the Sessions Court, which ruled as follows:

"The prosecution argued that the second essential element of the charge was that the accused's uploaded statement was false. However, upon reviewing the charge, the court found that the framed charge stated the accused had 'knowingly made and initiated the transmission of a comment offensive in nature...' The charge did not mention falsity as an element."

The Sessions Court Judge further assessed whether the conduct was offensive by referring to the definition in the Dewan Bahasa Dictionary (4th Edition) and made the following determination regarding offensive communication:

"The meaning of a comment deemed 'offensive' in nature is not defined in the Communications and Multimedia Act 1998. The Dewan Bahasa Dictionary (4th Edition) defines 'jelik' as 'bad, ugly, evil, or not good'. Therefore, the prosecution must prove that the alleged communication uploaded by the accused was of a 'bad, ugly, evil, or not good' nature.

The communication allegedly uploaded by the accused concerned an incident where SP3 purportedly refused to accept a police report attempted by the accused's friend. SP3 denied refusing to accept the report, stating that SP3 had drafted a report but the accused's friend left without completing it. This occurred after SP3 advised that it would be better for the victim to lodge the report personally. However, the court found that SP3's testimony regarding the alleged draft report was unsupported by other evidence. No draft report was tendered by the prosecution, and SP3's own entries in the Police Station Diary made after the incident also did not mention any draft report. SP8, as the investigating officer, likewise did not investigate whether a draft report existed as claimed by SP3."

Subsequently, the Sessions Court Judge ruled that the Prosecution had successfully proven the element of 'offensive' and interpreted the phrases in the following charge against the accused, deeming the words offensive because the terms used were inherently 'bad' in their original version as follows:

"Helo balai Polis Taman Bukit lndah Ampang ...kau kerja pejabat pertanyaan terima je report pengadu...kau bukan pegawai penyiasat tau...kau cuma penerima report ...buat kerja kau...kau tahu x...satu kesalahan x terima repot pengadu... yg dtg tu kawan baik aku tau...dua kali dia masuk... kau still kata xboleh buat laporan... budak pangkal 201398 ... penyelia kau xda ke??? Kau x di ajar ke... kau x boleh tolak report org awam...apa tujuan dia...itu hak dia...sila take action ok...kau salah mangsa erkk bile kau dah biasa tolak report org awam sebelum nie kannnn...watch out..."

The English translation is as follows:

"Hello, Taman Bukit Indah Ampang Police Station… You work at the inquiry counter—just take reports! You're not an investigating officer, just a report taker. Do your job! Do you even know that refusing to accept a complaint is an offence? That person who came is my best friend—he went there twice, and you still said you couldn't take his report? Officer number 201398, don't you have a supervisor? Weren't you trained? You can't reject public reports—what's your problem? It's their right! Take action, okay? You've wronged the victim here, eh? You always reject public reports, don't you? Watch out…"

Through the Sessions Court's findings in this case, it fundamentally did not elaborate in detail how the said words could amount to offensive conduct justifying the Court's conclusion that the uploaded words were indeed offensive in nature. The Sessions Court Judge then linked such actions to freedom of speech that must be regulated when the public wishes to criticise public officials' misconduct generally, and should not use words that are bad and unfit to be heard or read.

The Sessions Court Judge also ruled that the words deemed offensive as charged were intended to hurt someone, determining as follows:

"Based on the principles established in the aforementioned cases, in determining whether the communication was made with intent to cause harm to another person, such intention may be inferred from the nature of the communication itself. The Court must consider whether the communication by its very nature had a tendency to cause hurt to others, rather than examining whether the recipient was in fact aggrieved by the statement. In the present case, the uploaded statement deliberately referenced the officer's identification number 'SP3' and employed expressions including 'don't you have a supervisor... weren't you taught...' and 'you've wronged the victim huh since you usually reject public reports before this right...', which demonstrate such tendency."

By referring to the words used, it can be concluded that they were indeed intended to wound the feelings of a person with the stated 'badge number'. If it were done to criticise the actions of a public officer, there was no need to use bad words that could cause hurt feelings. From such findings, the Sessions Court determined that the element of intent to cause harm to another person was established by assessing the existence of facts demonstrating a tendency to cause hurt, rather than examining whether the individual was actually aggrieved by the statement. By referencing the officer's identification number and the language used - including 'don't you have a supervisor... weren't you taught...' and 'you've wronged the victim huh since you usually reject

public reports before this right...' - the Court ruled these demonstrated a tendency to cause hurt. Consequently, the prosecution was held to have satisfied the burden of proof regarding intent by only needing to establish such 'tendency'.

It is indeed commonly known that every criminal case tried by the Court differs in terms of facts or incidents. Nevertheless, no part of this case provides reference to clarify the benchmark, reference, or comparison to facilitate determination by any party including the Court regarding whether certain words or phrases have a 'tendency' and whether such words constitute offensive conduct, ultimately concluding the perpetrator's intent to commit an offence under Section 233 of the Communications and Multimedia Act 1998.

At the conclusion of the prosecution's case, while elements concerning the offensive nature of the post and intent to hurt someone were proven by the prosecution, one critical element - specifically, the identity of the party who uploaded and knowingly made/transmitted the communication as charged - failed to be proven. Consequently, the Sessions Court Judge ruled at the close of the prosecution's case that, upon maximum evaluation of the evidence presented, the prosecution had failed to establish a prima facie case, thereby ordering the accused to be discharged and acquitted without being called to enter his defence

7. Difficulty in Interpreting Offensive Conduct Due to The Requirement of Intent, which is Inherently Subjective

As provided under Section 233, offensive communication relates to a person's feelings. Such circumstances create ambiguity for the public as they are inherently subjective. Furthermore, there remains no clear guideline on the scope or interpretation of 'offensive communication.' If unaddressed, this will invite endless confusion or controversy, as reflected in the legal analysis reported by Leon Duguit as follows:

On the contrary, without indeed dismissing the problem of objective law, man has for centuries made it of secondary importance and wished to solve first the whole insoluble problem subjective law. Endless controversies have been raised on idea of subjective law. But whatever the proposed solution, problem always reduces itself to this: are there certain which have, permanently or temporarily; a quality of their own which gives them the power to impose themselves as such upon other wills? If this power exists, there is a subjective law, which is thus a quality peculiar to certain wills, a quality which causes the wills which possess it to impose themselves upon other wills, which are in their turn burdened with a subjective duty toward the wills possessing this power.

The expression 'subjective law' is the subject of the criticisms and the same jests as the expression 'objective law' I uphold the one and the other for the same reasons. So much the worse for those who will not make the distinction between these two very different things, and who wish to continue to designate entirely different things by the same word 'law' (Objective Law, Columbia Law Review, No.8 Vl. XX, 1920).

Through Leon Duguit's writings, his perspective on subjective legal provisions is that they often compel individuals to pursue improvements or changes to resolve issues arising from such subjective laws. This rarely occurs with objective laws, and due to the nature of these subjective laws, they frequently generate controversy in their enforcement or implementation. Although both are termed and applied as 'laws,' their application and approach differ, raising questions about their coexistence. Moreover, subjective laws often face public criticism due to their ambiguous purpose and implementation, being contingent on other factors – including

determinations of intent and reliance on the enforcing authority's power to establish them as binding laws for society.

It is commonly understood that any law's interpretation and enforcement are grounded in local culture, practices, or societal norms. Without clear guidelines for interpreting specific laws defining the scope of conduct amounting to offensive communication, the public will remain in a state of dilemma or confusion on this matter.

8. Comparison of laws related to Section 233 of the Communications and Multimedia Act 1998 with corresponding legislation in the United Kingdom and India

The United Kingdom and India may serve as comparative jurisdictions to examine similarities or differences in legislation corresponding to Section 233 of Malaysia's Communications and Multimedia Act 1998. Both nations share historical ties with and have influenced Malaysia's criminal legal system, and the development of Malaysian criminal law frequently references legislation from these two countries.

In the United Kingdom, the Malicious Communications Act 1988 contains provisions which, in their original text, state as follows:

1. Offence of sending letters etc. with intent to cause distress or anxiety.

(1) Any person who sends to another person—

(a) a letter, electronic communication or article of any description which conveys—

(i) a message which is indecent or grossly offensive;

(ii) a threat; or

(iii) information which is false and known or believed to be false by the sender; or

(b) any article or electronic communication which is, in whole or part, of an indecent or grossly offensive nature,

is guilty of an offence if his purpose, or one of his purposes, in sending it is that it should, so far as falling within paragraph (a) or (b) above, cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.

Under Section 1 of this Act, it is an offence to send or deliver a letter or other article that is offensive or highly offensive, or which contains a threat, with the intent to cause distress or anxiety to the recipient. This includes electronic communications such as emails, social media messages, and text messages. Through this provision, it resembles Section 233 of Malaysia's Communications and Multimedia Act 1998.

However, under the Communications Act 2003, there exists another provision addressing offensive conduct or communications, which contains the following legal provision:

Section 127. Improper use of public electronic communications network

(1) A person is guilty of an offence if he;

(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or

(b) causes any such message or matter to be so sent.

(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he;

(a) sends by means of a public electronic communications network, a message that he knows to be false,

(b) causes such a message to be sent; or

(c) persistently makes use of a public electronic communications network.

With reference to Section 127(1) concerning grossly offensive conduct or communications, reference is made to a UK case, *DPP v Kingsley Smith*, where the trial court, in interpreting the definition of grossly offensive communication, ruled as follows:

"the [offender] intended his message be grossly offensive to those to whom it related; or that he was aware at the time of sending that it might be taken to be so by a reasonable member of the public who read or saw it."

The decision in Kingsley Smith was upheld and referenced by the Divisional Court in *DPP v Busetti* [2017] EWHC 359. The case facts concern an incident during a nighttime party in November 2018. The accused had recorded a video on his mobile phone depicting the burning of Grenfell Tower, an event in 2017 that resulted in 72 fatalities. The accused subsequently sent this video to two WhatsApp groups with limited membership, though it went viral after being shared beyond these groups to other social media platforms. Based on these facts, the Court ruled as follows in determining that such conduct was grossly offensive and constituted an offence under Section 127(1)(a):

"For the offence s.127(1)(a) to have been committed the sender must have intended or been aware that the message was not simply offensive but grossly offensive. The fact that the message was in bad taste, even shockingly bad taste, was not enough."

Based on these cases, UK guidelines for criminal cases involving offensive conduct or communications establish a general reference standard: the determination of whether an act or communication is offensive must involve not merely offensive conduct in ordinary circumstances, but conduct that is grossly offensive. Additionally, it must involve the accused's intent or behaviour demonstrating full knowledge that the transmitted message concerned a fire incident and fatalities constituting not just offensive conduct, but grossly offensive conduct.

In the UK, the prosecution bears the burden of adducing evidence to prove their case to the court's satisfaction, establishing not merely offensive behaviour, but grossly offensive behaviour, for the communication to constitute an offence.

In India, offences related to online offensive conduct differ from Malaysia's framework. Legislative developments in India's legal system have led to amendments in provisions governing offensive posts or communications. These originated from rulings on Section 66A of the Information Technology Act 2000, whose original provisions state as follows:

Punishment for sending offensive messages through communication service, etc.

Any person who sends, by means of a computer resource or a communication device;

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

Section 66A was inserted via amendment on 5.2.2009 (No.13, The Gazette of India, New Delhi, 2009) by the Indian government, making offensive communication an unlawful behaviour punishable under this provision. Upon examination, Section 66A specifically referenced grossly offensive conduct, not merely offensive conduct under ordinary circumstances. Although initially enacted, this provision was subsequently challenged on constitutional grounds for violating Article 19(1)(a) of the Indian Constitution. In *Shreya Singhal v. Union of India,* AIR 2015 SC 1523 (24.3.2015), the Indian Supreme Court declared Section 66A unconstitutional due to its infringement on freedom of speech.

In *Shreya Singhal*, the Indian Supreme Court also referenced UK jurisprudence to define offensive conduct, particularly *Director of Public Prosecutions v. Collins* [2006] 1 WLR 2223, citing the House of Lords' interpretation of Section 127(1)(i) of the Communications Act 2003 (United Kingdom):

"The parties agreed with the rulings of the Divisional Court that it is for the Justices to determine as a question of fact whether a message is grossly offensive, that in making this determination the Justices must apply the standards of an open and just multi-racial society, and that the words must be judged taking account of their context and all relevant circumstances. I would agree also. Usages and sensitivities may change over time. Language otherwise insulting may be used in an unpejorative, even affectionate, way, or may be adopted as a badge of honour ("Old Contemptibles"). There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates."

The Indian Supreme Court, in its judgment, affirmed that determining offensiveness is an overly broad concept. Before concluding whether conduct is offensive or grossly offensive, several other factors must be considered. Such an approach renders it neither a clear-cut offence nor establishes a definitive threshold for determining guilt under Section 66A, ultimately making the provision itself an unclear and unconstitutional law.

The Indian Supreme Court's findings on interpreting such offensive conduct may be observed through the following ruling"

"These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is "grossly offensive" or "menacing." In Collins' case, both the Leicestershire Justices and two Judges of the Queen's Bench would have acquitted Collins whereas the House of Lords convicted him. Similarly, in the Chambers case, the Crown Court would have convicted Chambers whereas the Queen's Bench acquitted him. If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as "grossly offensive" or "menacing" are so vague that there is no

manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66A and the authorities who are to enforce Section 66A have absolutely no manageable standard by which to book a person for an offence under Section 66A. This being the case, having regard also to the two English precedents cited by the learned Additional Solicitor General, it is clear that Section 66A is unconstitutionally vague."

By examining the legal developments in India, we observe that difficulties exist in providing a specific interpretation for offensive conduct. After considering factors including citizens' freedom of speech and their right to clear laws for societal compliance and government enforcement, India's highest court took the drastic measure of striking down Section 66A to prevent constitutional violations, deeming it an overly vague and indeterminable law.

Conclusion

The law currently lacks clear provisions defining or interpreting what constitutes "offensive" conduct. This absence of precise legal guidelines creates confusion among the public, as subjective interpretations dominate enforcement. Without amendments to the Communications and Multimedia Act 1998 (Act 588) to establish explicit standards, this ambiguity will persist, leading to confusion or inconsistent applications of the law and potential infringements on fundamental rights. Such confusion will lead to legal injustice for any person investigated or charged under Section 233 of the Communications and Multimedia Act 1998. Although the provisions in the Evidence Act 1950 are clear regarding the burden of proof, the confusion in interpreting "offensive communication" creates uncertainty in determining to what extent the prosecution and defence have fulfilled their respective responsibilities or burdens of proof to establish their case to the standard required by law. Nevertheless, the interpretation of offensive communication still cannot be specifically and clearly identified for use by parties in a criminal case, including the court examining all facts presented before it by the parties to obtain justice.

The absence of clear legal provisions defining or interpreting what constitutes "offensive" conduct under Section 233 of the Communications and Multimedia Act 1998 creates significant ambiguity in enforcement. This lack of precision not only fosters confusion among the public but also risks inconsistent judicial outcomes, as determinations of offensiveness remain heavily reliant on subjective societal norms and individual sensitivities. Without explicit legislative guidance or authoritative judicial precedents, the application of this provision may lead to arbitrary interpretations, undermining both legal certainty and fundamental rights.

To uphold justice and fairness, it is imperative for Malaysia's legal framework to address this gap by introducing clear, context-specific definitions of "offensive" conduct. Legislative amendments or binding judicial guidelines should be enacted to establish objective standards, ensuring that the law balances the protection of individuals from digital harassment with the preservation of freedom of expression. Clarity in legal provisions is essential to ensure fair and predictable enforcement while balancing freedom of expression while balancing freedom of expression with protections against digital harm.

Accordingly, conduct amounting to offensive should be provided in clear form or explanation within the legal system, given that "offensive" conduct fundamentally constitutes a presumption based on an individual's feelings towards an action that causes discomfort, disturbance or anger. Section 233 only states the existence of a situation created with intent to wound feelings, harass, threaten or disturb others.

Without clear legal guidelines on the interpretation of "offensive" conduct or communication, confusion regarding the burden and standard of proof borne by the prosecution and defence in criminal cases under Section 233(1)(a)(ii) will persist. Such provisions do not provide clear guidelines on whether a communication amounts to "offensive" under Section 233. Furthermore, while the court determines whether a communication is "offensive", an accused person must have knowledge that certain behaviour constitutes unlawful offensive communication. Additionally, Section 114A of the Evidence Act 1950, which relates to presumptions regarding published facts, also applies to cases involving Section 233 of the Communications and Multimedia Act 1998.

As a conclusion to this study, it is recommended that amendments be made to provide clear and easily understandable guidelines based on Malaysia's societal context regarding what constitutes or characterises behaviour or communication deemed "offensive" by law - to the extent of causing distress - thereby clarifying to the general public that such actions, if committed, constitute a criminal offence chargeable under Section 233 of Act 588.

This recommendation is based on the fact that perceptions or matters involving human emotions are subjective. Therefore, this should not be enforced as a blanket rule against society, given that individual or societal views on what constitutes "offensive" behaviour vary due to multiple factors, including socio-political, cultural and value systems.

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