

Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

REFERENCE:
OL MYS 6/2018

28 December 2018

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 34/18.

Your Excellency's Government has made several important and encouraging commitments to restore and protect freedom of expression in Malaysia. In light of these commitments, I am writing to provide a preliminary analysis of proposed and adopted legislation in the areas of sedition, press freedom, defamation, "fake news," official secrets and film censorship, taking into consideration your Excellency's Government's obligations to respect, protect and promote the right to freedom of expression under international human rights law.

I. INTRODUCTION

Upon the election of the Pakatan Harapan coalition in May 2018, your Excellency's Government promised to fight corruption and to "abolish laws that are oppressive and unfair". In addition, the new Government has communicated to me its intention to reform laws and policies widely viewed as inconsistent with the country's obligations under international human rights law. For instance, in June 2018, your Government responded to a communication concerning the Anti-Fake News Act of 2018 (ref. no MYS 1/2018), assuring this mandate that the Government had already begun the process of repealing the Act.

At present, I understand that several laws that restrict freedom of opinion and expression in Malaysia remain in force. In past communications to your Excellency's Government, my predecessors and I have raised concerns about the legality, necessity and proportionality of these restrictions, and their disproportionate impact on journalists, artists, activists and other members of civil society. Specifically, we have raised concerns relating to the following laws : the **Sedition Act** (ref.no MYS 1/2015, MYS 8/2014, MYS 6/2014, MYS 4/2013, MYS 5/2012), the **Printing Press and Publications Act** (ref. no MYS 2/2016, MYS 3/2015), the **Communications and Multimedia Act** (ref. no MYS 2/2018, MYS 2/2016, MYS 3/2015), sections of the **Penal Code** (ref. no MYS 12/2013), the **Anti-Fake News Act** (ref. no MYS 1/2018), and the **Film Censorship Act** (ref. no MYS 2/2017, MYS 3/2014, MYS 10/2013, MYS 6/2013). Recommendations pertaining to several of these legislations were also provided by my predecessor following his official visit to Malaysia in 1998 (E/CN.4/1999/64/Add.1) with a view to providing guidance on legislative revisions in order to bring the laws into compliance with international standards.

In addition to the aforementioned laws, I would like to bring the attention of your Excellency's Government to concerns regarding the **Official Secrets Act, Section 114(A) of the Evidence Act**, and the proposed **National Harmony Act**, which also implicate the right to freedom of opinion and expression in Malaysia.

Information I have received suggests that some of these laws continue to be enforced by law enforcement and other government agencies, highlighting the urgency of rights-oriented reforms. Even if the Government rarely utilizes some of these laws, their very existence would continue to exert a significant chilling effect on freedom of expression in the country.

II. OVERVIEW OF INTERNATIONAL OBLIGATIONS

Before addressing my specific concerns with the aforementioned laws, I would like to remind your Excellency's Government of the internationally recognized standards governing the right to freedom of opinion and expression under Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights (ICCPR). While Malaysia is not currently a State party, the Government pledged to ratify the Covenant in connection with the third cycle of the Universal Periodic Review in November 2018.

Article 19(1) of the ICCPR protects the right to "hold opinions without interference." Article 19(2), which protects the right to freedom of expression, states that this right shall include the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his [or her] choice." Under Article 19(3), any restrictions on freedom of expression must be "provided by law", proportionate, and necessary for "respect of the rights and reputations of others", "for the protection of national security or of public order, or of public health and morals". The General Assembly, the Human Rights Council and the Human Rights Committee have concluded that permissible restrictions on the Internet are the same as those offline.¹

Article 19(3) establishes a three-part test for permissible restrictions on freedom of expression:

- a. *Restrictions must be provided by law.* Any restriction "must be made accessible to the public" and "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly."² Moreover, it "must not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."³
- b. *Restrictions must only be imposed to protect legitimate aims, which are limited to those specified under article 19(3).* The term "rights...of others"

¹ See General Assembly resolution 68/167; Human Rights Council resolution 26/13; U.N. Human Rights Committee, General Comment No. 34

² General Comment 34 (CCPR/C/GC/34).

³ *Id.*

under article 19(3)(a) includes “human rights as recognized in the Covenant and more generally in international human rights law.”⁴

- c. *Restrictions must be necessary to protect legitimate aims.* The requirement of necessity implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions “target a specific objective and do not unduly intrude upon the rights of targeted persons.”⁵ The ensuing interference with third parties’ rights must also be limited and justified in the interest supported by the intrusion. Finally, the restriction must be “the least intrusive instrument among those which might achieve the desired result.”⁶

The ICCPR is based on the Universal Declaration of Human Rights (UDHR) and reflects rights articulated in a number of other international agreements that Malaysia has ratified or signed. Under Article 29 of the UDHR, any restriction on freedom of expression should be “solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”. Malaysia has also ratified the Conventions on the Rights of the Child (CRC) and Convention on the Rights of Persons with Disabilities (CRPD), and has signed the ASEAN Declaration of Human Rights, all of which reflect the right to freedom of expression articulated in the UDHR and the ICCPR.

III. CONCERNS

In light of these standards, I would like to bring to your attention the following concerns:

A. Sedition Act

I am pleased to note that the Government has announced that it has suspended enforcement of the Sedition Act and that it plans to repeal the law. Section 3 of the Act broadly criminalizes any act with a “seditious tendency”, including any act that conjures feelings of “hatred”, “contempt”, “disaffection”, “discontent”, “ill will”, or “hostility”. I remain concerned that the vague language of the Sedition Act could result in disproportionate restrictions on freedom of expression. There are no specified parameters or examples of what constitutes “seditious tendency” and the Act does not provide a definition for “sedition.” The 2015 Sedition (Amendment) Act broadened the scope of the Act to cover online statements, extend the prohibition of seditious expression to any expression that “promote[s] feelings of ill will, hostility or hatred...*on the grounds of religion*” (emphasis added), and remove the defense for expression made “in the administration of justice with a view to the remedying of the errors or defects.”

⁴ *Id.*

⁵ A/HRC/29/32; see also U.N. Human Rights Committee, General Comment No. 34 (CCPR/C/GC/34).

⁶ General Comment 34 (CCPR/C/GC/34).

The broad remit of the Sedition Act confers excessive discretion on the Government to suppress criticism, political campaigning or the expression of unpopular, controversial or minority opinions. In the past, the Government has brought charges under the Sedition Act against opposition politicians, human rights activists and lawyers for disseminating information through the internet and traditional media outlets.⁷

Furthermore, the Sedition Act gives the Government authority to impose criminal liability on any person who shares--or even prepares to share--information or opinions which the Government could construe as seditious. The Human Rights Committee has concluded that States must take extreme care to ensure that any provisions relating to national security are crafted to avoid suppressing information of legitimate public interest or prosecuting journalists or their sources.⁸ Accordingly, I am concerned that the Act's prohibition on information sharing could be invoked to threaten, intimidate and silence journalists, whistleblowers and potential sources seeking to disseminate information in the public interest.

B. National Harmony Act

A draft of the National Harmony Act (NHA), which is intended to replace the Sedition Act, has not yet been released to the public. The Government has expressed its intention to pass the NHA, along with an Anti-Discrimination Act and a Religious and Racial Hatred Act, in order to punish those who instigate racial or religious hate. Under these laws, "instigators of racial and religious hate" could face up to seven years in prison or a fine of RM100,000". Although the details of these draft laws are unclear, the NHA reportedly includes broad restrictions on expression concerning race and religion. I am concerned that this law will effectively nullify any effort to repeal the Sedition Act, and preserve the Government's authority to disproportionately restrict freedom of expression.

C. Printing Press and Publications Act

Section 7(1) of the Printing Press and Publications Act (PPPA) bans the publication and dissemination of content that is "likely to alarm public opinion" or "likely to be prejudicial to public interest or national interest". Section 3 also requires any printing press or other media outlet to obtain a license to from the Ministry of Home Affairs. In 2012, amendments to the PPPA were passed, permitting media outlets to challenge the Ministry's decision to suspend or revoke their license before a court of law.

While the requirement of judicial review is a step in the right direction, I am concerned that the PPPA still provides the Government with broad leeway to stifle press freedom and disproportionately restrict the public's right to access to information. The unilateral executive authority to grant licenses fosters the perception that media outlets with licenses have direct connections to the Government, weakening their credibility and independence and public confidence in the media. I am concerned that this influence,

⁷ See communications sent to your Excellency's Government, ref. no. MYS 6/2014, MYS 8/2014, MYS 1/2015, MYS 3/2015, and MYS 7/2016.

⁸ General Comment 34 (CCPR/C/GC/34).

combined with the opacity of the licensing process, interferes with the right of people in Malaysia to access information through independent media sources.

I am also concerned that the Government's power to refuse licenses on broad grounds affords it the discretion to censor journalists and other media sources that broadcast or disseminate information critical of the Government. The Government's authority to revoke licenses may also incentivize media outlets to withhold the publication of critical information, for fear of losing their license to publish. The threat of revocation could also be strategically deployed to deter the publication of information or to compel the disclosure of journalists' sources. Even though decisions to revoke licenses are subject to judicial review, the inherent uncertainty and high costs associated with judicial challenges are likely to mire media outlets in a prolonged and expensive legal process.

Information received indicates that the PPPA has been used to silence media outlets that have published information that negatively implicates the Government. In 2015, the Minister of Home Affairs reportedly suspended two independent news entities under the PPPA after they published information about the 1MDB corruption scandal. Although the Minister claimed that this decision was based on an analysis of the papers' publications over the past decade, the suspension occurred within a month of the papers' publication of information concerning government corruption connected to 1MDB.

D. Communications and Multimedia Act

Section 233 of the Communications and Multimedia Act (CMA) prohibits online content that "is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person". Section 233 prohibits the "improper use of network service providers" to disseminate such content; persons found to "permit" such use are held to commit a criminal offence. Section 211 prohibits "content application service providers" from providing content banned under Section 233, and implies that employees of such providers may be personally held criminally liable if the provider fails to heed this prohibition. Section 263 requires online service providers to use their "best endeavour[s]" to "prevent the network facilities" they own or operate from "being used in, or in relation to, the commission of any offence under any law of Malaysia."

Section 233's broad criminalization of online content is a disproportionate restriction on freedom of expression. The use of subjective terms such as "indecent", "obscene", "false", "menacing", or "offensive" gives the Government largely unfettered discretion to target government criticism or unpopular or controversial opinions. For example, in 2015, charges under Section 233 were filed against editors of a newspaper for a story they published about a rejected proposal to amend federal law. That same year, Sections 233 and 263 were cited as the Government's basis for compelling network services providers to block hundreds of websites encouraging people to attend the Bersih 4 Demonstration, a political rally. The Government has also repeatedly invoked Section 233 to arrest and prosecute individuals for making critical remarks of the Government on social media.

Furthermore, the CMA imposes overbroad liability on online service providers for content-based offences, creating undue pressure on providers to censor online content. In my 2018 report to the Human Rights Council, I have found that “obligations on companies to restrict content under vague or complex legal criteria without prior judicial review and with the threat of harsh penalties” invariably raise pressure on them to remove lawful or legitimate content “in a broad effort to avoid liability.”⁹ I am concerned that the CMA has precisely this effect, creating a privatized regime of online censorship that disproportionately restricts the freedom of expression of people in Malaysia as well as their right to seek, receive and impart information.

I am encouraged by the Government’s September 2018 pledge to reform Section 233. However, the Government’s limited focus on reforming Section 233 omits reconsideration of other provisions of the CMA that authorize disproportionate restrictions on freedom of expression. Furthermore, recent reports of the Government’s reliance on Section 233 to penalize comments made on social media cast doubt about the Government’s commitment to reform the CMA.

E. Penal Code

The provisions of the Penal Code criminalizing defamation raise concern that they are unnecessary and disproportionate. Section 499 makes it an offence to make or publish any “imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation.” Under Section 499, truth is only a defense if “it is for the public good that the imputation should be made or published.” Under Section 500, the punishment for defamation is imprisonment of up to two years, a fine or both. Sections 501 and 502 also make it an offence to print or engrave defamatory statements, and to sell any such “printed or engraved substance.”

I am concerned that these offences do not meet international human rights standards on the permissible scope of anti-defamation laws. The Human Rights Committee has concluded that defamation and libel laws should be crafted with care to ensure that they comply with [the criteria of legality, necessity and proportionality], and that they do not serve, in practice, to stifle freedom of expression”.¹⁰ In particular:

“All such laws, in particular penal defamation laws, should include such defenses as the defense of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defense.”¹¹

⁹ A/HRC/38/35.

¹⁰ General Comment 34 (CCPR/C/GC/34).

¹¹ *Id.*

The Committee has also emphasized that criminal defamation laws should be reserved only for “the most serious of cases,” and that “imprisonment is never an appropriate penalty.”¹²

These standards indicate that the prohibition of defamation under the Penal Code is overbroad and poses a grave risk to freedom of expression. The limited defense of truth raises serious concern that individuals will be prosecuted for making truthful statements, particularly about government officials and public figures. The lack of a public interest defense exacerbates this concern. Furthermore, the possibility of imprisonment is inherently disproportionate.

F. Anti-Fake News Act

In a communication sent to your Excellency’s Government earlier this year (ref. no MYS 1/2018), I urged the Government to reconsider the passage of the Anti-Fake News Act, which raises concerns of legality, necessity and proportionality. In your Excellency’s Government’s response of 11 June 2018, the Government informed me that it “has decided to repeal [the Act],” and that the “process to do so has already begun.”¹³ However, recent reports indicate that the Senate has blocked the bill to repeal the Act. This development is concerning, and I renew the concerns I previously expressed about the Act’s vague and overbroad criminalization of any news that is “wholly or partly false.” I urge the Government to take all necessary measures to ensure its repeal.

G. Official Secrets Act

I am concerned that the Official Secrets Act (OSA) unduly restricts government transparency and inhibits the right of people in Malaysia to seek, receive and impart information about the Government. Section 2 of the OSA defines an “official secret” as any information and material designated as “Top Secret”, “Secret”, “Confidential” or “Restricted” by a Minister or a designated government official. The Government does not have to provide reasons for any of these classifications. Under Section 8(1), the wrongful communication, possession or control of official secrets is an offence punishable by a penalty of between one to seven years’ imprisonment.

In my 2015 report to the General Assembly, I have found that “national legal frameworks establishing the right to access information held by public bodies should be aligned with international human rights norms. Exceptions to disclosure should be narrowly defined and clearly provided by law and be necessary and proportionate to achieve one or more of the above- mentioned legitimate objectives of protecting the rights or reputations of others, national security, public order, or public health and morals.”¹⁴ The Government’s authority to unilaterally classify any material as an official secret is at odds with these standards, and gives it sweeping discretion to withhold information that is in the public’s interest to know. In fact, reports indicate that the OSA

¹² *Id.*

¹³ Reply to communication ref. no MYS 1/2018.

¹⁴ A/70/361.

has been invoked to classify evidence of government corruption as an “official secret” and to criminalize its dissemination.

The lack of a public interest defense is also disconcerting. I have found that “State law should protect any person who discloses information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authority, waste, fraud or harm to the environment, public health or public safety. Upon disclosure, authorities should investigate and redress the alleged wrongdoing without any exception based on the presumed motivations or “good faith” of the person who disclosed the information.”¹⁵ The lack of any such defense, coupled with the threat of harsh penalties, creates a significant chilling effect on whistleblowing activity that may disclose critical information about government fraud, waste or abuse.

H. Film Censorship Act

Because film is a protected medium for raising awareness and engaging the public, I am concerned that the Film Censorship Act (FCA) disproportionately restricts artistic expression and the right to seek, receive and impart information through art. Section 10 of the FCA provides the Board of Censors with the authority to approve a film “without any alteration,” “with such alternation as it may require,” or to refuse approval of the film. The FCA does not publicize the criteria under which the Board determines approval. However, in a response to communication MYS 6/2013, the Government has clarified that it sometimes declines to punish the distribution of films that contradict some of the guidelines in the FCA if it finds that these films “do not contribute to controversy and dissonance within the society”.¹⁶

Section 6 of the FCA makes it an offence to possess, “circulate, exhibit, distribute, display, manufacture, produce, sell or hire” any film that has not been approved by the Board of Censors. This offence is punishable with a fine up to RM30,000 and imprisonment of up to three years.

The FCA’s failure to define the criteria for the approval of films effectively establishes a secret regime of film censorship that is susceptible to executive abuse and overreach. The broad authority to prosecute the dissemination of unapproved films, along with the threat of harsh criminal penalties, also provide the Government with a powerful tool to censor and suppress artists, activists and critics. For example, in 2013, the previous Special Rapporteur raised concern with the arrest and detention of human rights defenders that organized a private screening in Malaysia of a documentary film about human rights violations and atrocities in Sri Lanka.¹⁷

IV. CONCLUSION

¹⁵ *Id.*

¹⁶ Reply to communication ref. no MYS 6/2013

¹⁷ Communication sent to your Excellency’s Government, ref. no MYS 6/2013.

The changes already underway in Malaysia and the human rights commitments that your Excellency's Government have expressed are encouraging and a step in the right direction. Together with my team on the mandate, I have had many fruitful conversations with civil society, academics and other inter-governmental organizations such as UNESCO about Malaysia's reform agenda, particularly on issues pertaining to freedom of expression. I urge the Government to seize this momentum to reconsider outdated or abusive laws that unduly restrict freedom of expression, and to pass legislation and take other affirmative measures that protect this fundamental right. I also urge the Government to initiate the process of ratifying the International Covenant on Civil and Political Rights and other major international human rights treaties. Finally, I wish to renew my 2015 request to your Excellency's Government to conduct an official visit to assess the situation of freedom of expression in Malaysia. I stand ready to discuss these issues with your Excellency's Government, provide international human rights guidance and share best practices.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression