

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

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OL MYS 5/2021

25 March 2021

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 43/4.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the enactment of The Emergency (Essential Powers) (No. 2) Ordinance 2021 ('The Ordinance') which criminalizes "fake news" regarding the COVID-19 pandemic and "fake news" regarding the emergency proclamation. The Ordinance was issued on March 11 2021, and entered into force on 12 March 2021 using powers conferred by the Emergency Ordinance 2021 (Essential Power), which was proclaimed on 12 January 2021 to curb the spread of the COVID-19 pandemic.

My predecessor raised his concerns about the incompatibility of Malaysia's Anti-Fake News Act, 2018, with international human rights standards in a communication sent to your Excellency's Government on 3 April 2018 ([OL MYS 1/2018](#)). In your Excellency's Government's response of 11 June 2018, the Government informed him that it "ha[d] decided to repeal [the Act]," and I am pleased to note that in October 2019 the Act was fully repealed. However, I am concerned the new Ordinance has revived many of the problematic provisions of the repealed 2018 Act, as well as has added provisions that raise further concerns.

The Ordinance defines "fake news" as "any news, information, data and reports, which is or are wholly or partly false relating to COVID-19 or the proclamation of emergency, whether in the forms of features, visuals or audio recordings or in any other form capable of suggesting words or ideas". (Article 2). It further specifies that the prohibition of fake news will cover "any written or digital publication" (Article 2).

Pursuant to Article 4, any person who, by any means, with the intent to cause, or which is likely to cause fear or alarm to the public, or to any section of the public, creates, offers, publishes, prints, distributes, circulates or disseminates any fake news will face a fine of up to ringgit 100,000 (about USD 24,000), or a jail term of up to three years.

Article 6 provides that any person having in his possession custody or control any publication containing fake news must remove content within 24 hours after a police officer or other authorized official tells them to do so. The Ordinance does not specify that a court order is necessary. Moreover, Under Section 7 of the ordinance, anyone who claims to have been affected by "fake news" can apply to a court, with no notice to those who wrote or posted the material, for an order to remove the content. Notice of the order can be served electronically including via email or through social media accounts (Article 7). Failure to remove the content can be penalized by a fine of up to

100,000 Malaysian ringgit (\$USD 24,000) and, in the case of a continuing offense, up to 300,000 ringgit (\$USD 72,000) for every day during which the material remains available (Article 6).

An appeal to set aside an order made under the Ordinance to remove a publication deemed to contain fake can be made within 14 days of receipt, however no appeals are permitted in cases deemed to be “prejudicial or likely to be prejudicial to public order or national security” (Article 8(3)). Article 9 further provides that where a person does not comply with an order to remove “fake news”, the court can grant police or ‘authorized officers’ power to do so.

Furthermore, Article 21 of the ordinance requires individuals, corporations, and social media companies to give police conducting a search access to “computerized data” stored in a computer or otherwise. While “computerized data” is not defined, the ordinance specifies that access includes “being provided with the necessary password, encryption code, decryption code, software or hardware and any other means required to enable comprehension of computerized data,” making it clear that the requirement applies to content. Failure to comply can be punished by up to one year in prison or a fine of up to 100,000 ringgit (USD 24,000) or both.

Under Articles 21 and 22 of the Ordinance, a police officer may require internet service providers to preserve and disclose traffic data, defined to include the communication’s “origin, destination, route, time, date, size, duration or type of underlying service,” by providing written notice. Failure to comply is punishable by up to one year in jail

Finally, in trials conducted under the Ordinance, some of the standard rules of evidence regarding the admissibility of documents and statements by the accused in Malaysia’s Evidence Act 1950 do not apply (See generally Articles 10 – 15). The Ordinance permits the admission of any document obtained by a police officer, “howsoever obtained,” and permits the prosecutor to submit a list of documents rather than produce the documents in court. Article 12 further provides that “any statement by an accused whether orally or in writing to ‘any person’ at ‘any time’ shall be admissible as evidence.” All offences established by the Ordinance are sizeable offences, meaning that police may arrest suspects without a warrant (Article 16). Furthermore, Article 27 provides complete immunity for any action taken by any officer involved in implementing this law.

1) General standards

Before detailing my concerns about these provisions, I would like to underscore that Article 19 of the Universal Declaration of Human Rights (UDHR) protects everyone’s right to maintain an opinion without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media. Under international human rights law, human rights apply online and offline. It is also long established by the Human Rights Council that permissible restrictions on the internet are the same as those offline (A/HRC/RES/32/13)

While Malaysia is not party to the International Covenant on Civil and Political Rights (ICCPR), the content of article 19 of the ICCPR is based on Article 19 of the

UDHR and thus should inform Malaysia’s obligations under international law. Under article 19(3) of the ICCPR, restrictions to the freedom of expression are permissible only when “provided by law”, and necessary for “the rights or reputations of others” or “for the protection of national security or of public order (ordre public), or of public health and morals”.

In the context of online freedom of expression, I should further like to recall “the need to address, *within the framework of international human rights law*, serious problems that arise in the context of digital technologies, including *disinformation*; incitement to hatred, discrimination and violence; terrorist recruitment and propaganda; arbitrary and unlawful surveillance; interference with the use of encryption and anonymity technologies; and the power of online intermediaries”¹ (emphasis added).

2) Requirement of legality

As held by the Human Rights Committee, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not (CCPR/C/GC/34, para. 25).

I am concerned about the overly broad definition of “fake news” in the Ordinance, which could criminalize legitimate expressions from the general public, journalists reporting on the COVID19 pandemic and human rights defenders debating about democracy and other political issues. The new ordinance fails to define strictly the offense of “fake news” and the level of intentionality required to trigger a punishment. In this context, I would like to recall the Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda”, in which the UN and regional freedom of expression experts stressed that “general prohibitions information based on vague and ambiguous ideas, such as 'false information' or information' or 'non-objective information', are incompatible and should be abolished”.² Allowing the executive power to determine what is true and what is false may in effect allow for the prosecution of anyone expressing minority, dissenting or even controversial opinions, including criticism of the government. I would like to underscore that international standards protect the “free communication of information and ideas about public and political issues between citizens, candidates and elected representatives” (CCPR/C/GC/34, para. 13). It is long established “that the human right to impart information and ideas is not limited to “correct” statements, and also protects information and ideas that may shock, offend and disturb (CCPR/C/GC/34, para. 49).

I am also concerned that the Ordinance also allows criminal punishment without requiring that the person or company disseminating the “fake” information knew that it is false, or intended to publish fake information (Article 4). Contrary to criminal law principles that require a guilty act (*actus reus*) and a guilty state of mind (*mens rea*), the intent to cause harm is not expressly required in the Ordinance. It may thus put at

¹ Joint Declaration on challenges to Freedom of Expression in the Next Decade from the UN and regional experts on freedom of expression, 2020

https://www.ohchr.org/Documents/Issues/Opinion/JointDeclaration10July2019_English.pdf

² <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21287&LangID=E>

risk those who share information believing it is true, or those who make critical comments based on a misunderstanding or misinformation.

The Ordinance further fails to distinguish between content producers and intermediaries such as Internet Service Providers (ISPs), social media platforms, or third-party commenters on news platforms, placing an equal obligation on all parties to observe 24-hour takedown notices made by police, which is likely to have a chilling effect on freedom of expression since intermediaries may self-censor content because of government pressure and avoid penalties.

3) Requirement of necessity

Under international human rights law, restrictions to freedom of expression must also pursue a legitimate aim, that is the respect of the rights or reputations of others, for the protection of national security or of public order, or of public health or morals, and be necessary and proportionate to protect that interest. Even if the Ordinance is meant to serve to protect a legitimate interest under international law, it further need to be necessary and proportionate to the interest to be protected.

The requirement of necessity implies an assessment of the proportionality of restrictions. The Human Rights Committee has moreover stressed that, in assessing proportionality, the “value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain” (CCPR/C/GC/34 para. 34).

In this context, I worry that the Ordinance may stifle legitimate expressions, especially those related to political or health issues. Concerning the content of political discourse, the Human Rights Committee stressed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. States parties should not prohibit criticism of institutions, such as the army or the administration (CCPR/C/GC/34 para. 38).

With regard to restrictions on online expression, I would like to recall that the Human Rights Committee concluded that it is also inconsistent with paragraph 3 to “prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government” (CCPR/C/GC/34, para. 43).

In a recent report, the Special Rapporteur on the right to health highlighted that “effective health system responses – in policy and law – at all times, including in a global pandemic, require access to information for all people.” (A/75/163). He underlined that the effective containment of COVID19, not just in the absence of a vaccine but even after a vaccine is available, depends on accurate and appropriate public health information being available and relevant to all. Similarly, my predecessor underlined, in his report on freedom of expression and disease pandemics, that “the penalization of disinformation is disproportionate, failing to achieve its goal of tamping down information while instead deterring individuals from sharing what could be valuable information” (A/HRC/44/49 para. 42).

4) Requirement of proportionality

I am particularly concerned at the heavy penalties stipulated in the ordinance, which appear to be inconsistent with the requirements of necessity and proportionality. Under international law, the restrictions must be the least restrictive means among those which might achieve the legitimate aim. In the context of “fake news”, I recommend that the authorities consider other approaches, such as the prohibition of “fake news” without criminal punishment, the promotion of independent fact-checking mechanisms, the dissemination of trustworthy information of public interest, state support for independent, diverse and adequate public service media outlets, and public education and media literacy, among many others.

Concerning the provisions permitting to decrypt information, I would like to refer your Excellency’s Government to the report of my predecessor (A/HRC/29/32), in which he underscored that court-ordered decryption is only permissible when it results from transparent and publicly accessible laws applied solely on a targeted, case-by-case basis to individuals and subject to judicial warrant and the protection of due process rights of individuals (para. 60). Those whose communications are decrypted must be notified at the earliest moment that protection of public safety or national security allows, which is critical for access to redress and remedy where rights have been violated. The ordinance does not make clear whether a court-authorized warrant is required for such disclosure, nor does it require notifying the person whose communications have been decrypted, which is especially concerning.

Furthermore, the power granted under the Ordinance to request data from internet service providers, raises serious privacy concerns, and should only be permitted when provided by law, proportionate, and necessary for the protection of a legitimate state interest, in line with international norms guaranteeing the right to privacy, protected by Article 12 of the UDHR and Article 17 of the ICCPR. I am further concerned that the provisions of the Ordinance place no limitations on the purposes for which authorities may request such data or how long the authorities may require it to be stored, do not meet this standard and could lead to indiscriminate surveillance.

I am also concerned about the right to a fair trial under the ordinance, given that some of the usual limitations imposed on the admissibility of documents and statements by the accused in Malaysia’s Evidence Act do not apply, raising concerns.

In this connection, I remain concerned by Article 27 which provides a blanket indemnity for the federal government or any authorized personnel from lawsuits and legal proceedings, and by doing so violates the right to an effective remedy, a cornerstone of international human rights law.

Finally, I express concerns at the extraterritorial application of the Ordinance (Article 3), which provides expansive jurisdiction, allowing authorities to target any person anywhere in the world, so long as the expression concerns Malaysia or the person affected by the commission of the offence is a Malaysian citizen. In addition to possibly contravening other international law provisions on extraterritorial jurisdiction, such a provision appears to violate international norms pertaining to freedom of expression which protect the right to seek, receive and impart information “regardless of frontiers”.

In light of the above concerns, I urge your Excellency's Government to reconsider its approach to "fake news", which severely affects freedom of expression beyond what is permissible under international law. I note that the Anti-Fake News Bill of 2018 was repealed due to the incompatibility of its provisions with international human rights law. Since the new Ordinance seems to revive several provisions of this legislation, I urge your Excellency's Government to take into account the concerns and observations mentioned above and those raised by my predecessor, suspend the implementation of the above provisions that would violate international law and standards, and take the necessary steps to protect freedom of opinion and expression, as guaranteed by Article 19 of the UDHR and Article 19 of the ICCPR. To that end, we recall that international standards provide for the participation of civil society actors in decision-making processes (A/HRC/RES/32/31 para. 14 (b and d)). We would thus respectfully urge your Excellency's Government to carry out a large public consultative process with all stakeholders with a view to bringing this Ordinance in line with international law.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned information.
2. Please indicate how the Ordinance is consistent with your Excellency's Government's obligations under international human rights law, especially the requirements of legality, necessity and proportionality under Article 19 of the UDHR and Article 19 of the ICCPR.
3. Please clarify how your Excellency's Government will assess the territorial scope of article 3 and its application to citizens abroad.

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. It 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.

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