ARTICLE 19

Malaysia: “Anti-Fake News Act”

April 2018

Legal analysis

Executive summary

In April 2018, ARTICLE 19 analysed the "Anti-Fake News Act" of Malaysia, which entered into force on 11 April after being published in the Gazette. ARTICLE 19 is deeply concerned that it will severely undermine freedom of expression in Malaysia.

The Act establishes a totalitarian regime for policing the "truth", with potential six-year custodial sentences and practically limitless fines. "Fake news" is ambiguously defined. A person may be imprisoned or fined without the Government needing to prove that their expression caused harm to any legitimate interest, or that the person intended that harm to occur. It essentially grants unfettered discretion to authorities to target expression they dispute the veracity of, or simply do not like. As such, its content-based offences are much broader than those that already exist in legislation like the Sedition Act, Communications and Multimedia Act, or Penal Code.

The Act also co-opts online intermediaries, such as search engines and social media platforms, in addition to administrators or owners of social media pages, into the Government's censorship efforts. Criminal penalties create strong incentives for the removal of content the Government may object to, without regard to human rights, and without transparency or due process.

Where a person is "in control of" so-called "fake news", they must remove so-called "fake news" on notice, and without a court order. Failure to do so "immediately" is criminalised. In addition, the courts are given sweeping powers to demand private parties, on request of users or the executive, remove entire publications containing "fake news", with severe fines for non-compliance. These *ex parte* proceedings require no consideration of human rights, and in many cases individuals' content will be removed without their being notified or having any opportunity to make representations, and with appeal rights limited only to the respondent to an order (and not necessarily available for authors or owners of offending content). On matters pertaining to national security and public order, there is no right to appeal, giving the government broad powers to request removals without the possibility of challenge.

The jurisdictional scope of the Act extends beyond Malaysia's territory, allowing for the targeting of any person or entity if the expression concerns Malaysia or affects Malaysians. The potential impact of the Act on freedom of expression is therefore truly global.

The rapid enactment of the Act ahead of elections, without any effective public consultations, raises significant concerns regarding the protection of freedom of expression in Malaysia in the months ahead. The criminal offences it contains, and the regime of intermediary liability it paves the way for, is likely to have a significant chilling effect on open debate, in particular on criticism of the government, and especially online. As Malaysians go to the polls, they are clearly being told that opposition and criticism will not be tolerated.

Summary of recommendations

1. The Anti-Fake News Act should be repealed in its entirety;
2. The Malaysian Government should comprehensively reform other laws that unjustifiably limit the right to freedom of expression, in particular by repealing the Sedition Act and reforming the Communications and Multimedia Act;
3. The Malaysian Government should enact legislation to protect online intermediaries, such as search engines and social media companies, from criminal and civil liability for content that third parties create or share on or through their platforms;
4. The Malaysian Government should ratify the ICCPR without delay.

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Introduction

The Anti-Fake News Act (the Act) was adopted by Parliament on 3 April 2018, and came into effect following its publication in the Gazette on 11 April.[1] In this legal analysis, ARTICLE 19 sets out relevant international human rights law standards pertaining to freedom of expression and "disinformation" or "fake news", and examines in detail the various ways in which the Act does not comply with these standards.

ARTICLE 19 has extensive experience in analysing laws pertaining to the right to freedom of expression, including in the context of freedom of the media, freedom of expression online, defamation, and national security, including in Malaysia.[2] We have also made submissions to UN mechanisms regarding the freedom of expression situation in Malaysia, most recently on the occasion of Malaysia's third Universal Periodic Review.[3]

Prohibitions on "fake news" are a serious freedom of expression concern. We note that they are appearing with increasing frequency, seemingly in response to US President Trump's popularising of the term during and since the 2016 US Presidential Election campaign, and amid growing concerns, in the US and elsewhere, of the influence of propaganda actions by foreign governments over national democratic processes.[4] The Act is likely to be the first of several in the region, as other Parliaments consider similar initiatives.[5]

ARTICLE 19 is concerned that this legislation was effectively fast-tracked ahead of the General Election scheduled for 9 May 2018, and therefore did not receive adequate scrutiny from the Parliamentary Select Committee, or broader stakeholders and public, including media actors, the legal community, and civil society organisations. It is at these times that robust and open debate is most essential, and is also when freedom of expression is most vulnerable.

Enacting ambiguous legal duties of "truth", as the Act does, creates a powerful instrument for the government to control public discourse, including journalism, as well as all forms of online discussion and debate. Providing draconian sentences of up to 6 years' imprisonment, and astronomical fines, sends a clear signal to Malaysians, as well as the media, civil society, and human rights defenders, that the cost of contradicting the Government is high. The Act also places intermediaries in a precarious situation, incentivizing their complicity in government censorship, without providing due process or protections for users' rights.

Our analysis concludes that the Act should be repealed in its entirety, and broader reforms instituted to bring Malaysia's legal framework for freedom of expression in line with international human rights law. We stand ready to provide further assistance to the Malaysian Government and stakeholders in these efforts.

[1] Anti-Fake News Act 2018, Act 803, date of royal assent 9 April 2018; available at: http://www.federalgazette.agc.gov.my/outputaktap/20180411_803_BI_WJW010830%20BI.pdf
[2] See, for example: ARTICLE 19, Malaysia: Communications and Multimedia Act, 24 March 2017; available at: https://www.article19.org/resources/malaysia-communications-multimedia-act/
[3] ARTILCE 19, Malaysia: joint submission to the UPR, 5 April 2018; available at: https://www.article19.org/resources/malaysia-joint-submission-universal-periodic-review/
[4] ARTICLE 19, Free speech concerns amid the 'fake news' fad, 18 January 2018; available at: https://www.article19.org/resources/free-speech-concerns-amid-fake-news-fad/
[5] Singapore starts landmark public hearing on fake news, Reuters, 14 March 2018; available at: https://www.reuters.com/article/us-singapore-politics-fakenews/singapore-starts-landmark-public-hearing-on-fake-news-idUSKCN1GQ18C

International human rights standards

ARTICLE 19's comments on the Act are informed by international human rights law and standards, in particular regarding the right to freedom of expression.

We note that Malaysia has not signed or ratified the International Covenant on Civil and Political Rights (ICCPR), despite making commitments during its last Universal Periodic Review in 2013 to consider this.[6] Nevertheless, we consider the obligations set out in the ICCPR to largely reflect customary international law, and should therefore guide the interpretation of guarantees for freedom of expression in Article 10(a) of the Malaysian Federal Constitution, as well as other international human rights instruments to which Malaysia is a State party.[7]

The right to freedom of expression

The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR),[8] and given legal force through Article 19 of the ICCPR.[9]

The scope of the right to freedom of expression is broad. It requires States to guarantee to all people the freedom to seek, receive or impart information or ideas of any kind, regardless of frontiers, through any media of a person's choice. The UN Human Rights Committee (HR Committee), the treaty body of independent experts monitoring States' compliance with the ICCPR, has affirmed that the scope of the right extends to the expression of opinions and ideas that others may find deeply offensive.[10]

While the right to freedom of expression is fundamental, it is not absolute. A State may, exceptionally, limit the right under Article 19(3) of the ICCPR, provided that the limitation meets a "three-part test". This requires that the limitation must be:

- **Provided for by law**, any law or regulation must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly;

- **In pursuit of a legitimate aim**, listed exhaustively as: respect of the rights or reputations of others; or the protection of national security or of public order (ordre public), or of public health or morals;

- **Necessary in a democratic society**, requiring the State to demonstrate in a specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[11]

The HR Committee has made clear that, for laws pertaining to national security in particular, it is not compatible with Article 19(3) of the ICCPR to invoke limitations "to suppress or withhold

[6] ARTICLE 19 joint UPR submission, *op. cit.*, at para. 5.
[7] See, for example: Convention on the Rights of the Child, at Article 13; Convention on the Rights of Persons with Disabilities, at Article 21.
[8] Through its adoption in a resolution of the UN General Assembly, the UDHR is not strictly binding on states. However, many of its provisions are regarded as having acquired legal force as customary international law since its adoption in 1948; see: *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit).
[9] The ICCPR has 167 States parties, excluding Malaysia.
[10] See HR Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011, para 11.
[11] *Ibid.*, at paras. 22 and 34.

from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information."[12]

In the context of elections, while the HR Committee acknowledges the legitimacy of seeking to protect voters from intimidation or coercion, they urge that such laws "must not impede political debate."[13] This reflects the principle that "in circumstances of public debate concerning public figures in the public domain and public institutions, the value placed by [the ICCPR] upon uninhibited expression is particularly high."[14]

Additionally, Article 20(2) ICCPR provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law.

Limits on "disinformation", "fake news", and "propaganda"

"Fake news", "disinformation", and "propaganda", are all terms that are not defined under international human rights law. Protecting persons from "fake news", "disinformation", or "propaganda" is not, as such, a legitimate aim for justifying restrictions on the right to freedom of expression under Article 19(3) of the ICCPR.

As four special mandates on freedom of expression cautioned in their 2017 Joint Declaration, the label of "fake news" is increasingly being used by persons in positions of power to denigrate and intimidate the media and independent voices, increasing the risk of such persons to threats of violence, and undermining public trust in the media.[15]

An important point of principle remains that "the human right to impart information is not limited to 'correct statements', [and] that the right also protects information and ideas that may shock, offend or disturb." The four special mandates made clear that "general prohibitions on the dissemination of information based on vague and ambiguous ideas, including 'false news' or 'non-objective information', are incompatible with international standards for restrictions on freedom of expression."[16]

Freedom of expression online and intermediary liability

At the international level, several human rights bodies and mechanisms have developed soft law guidance on freedom of expression online and intermediary liability.

The UN Human Rights Council (HRC) recognised in 2012 that the "same rights that people have offline must also be protected online."[17] The HR Committee has also made clear that limitations on electronic forms of communication or expression disseminated over the Internet must be justified according to the same criteria as non-electronic or "offline" communications, as set out above, while taking into account the differences between these media.[18]

[12] General Comment No. 34, *op. cit*., at para 30.
[13] *Ibid.*, at para. 28.
[14] *Ibid.*, at para. 38.
[15] Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, adopted by the UN Special Rapporteur on Freedom of Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017.
[16] *Ibid.*
[17] HRC Resolution 20/8 on the Internet and Human Rights, A/HRC/RES/20/8, June 2012.
[18] General Comment No. 34, *op cit*., at paras 12, 39, 43.

While international human rights law places obligations on States to protect, promote and respect human rights, it is widely recognised that business enterprises also have a responsibility to respect human rights.[19] In meeting their obligations, States may have to regulate the behaviour of private actors in order to ensure the effective exercise of the right of freedom of expression.

Importantly, the UN Special Rapporteur on freedom of opinion and expression (Special Rapporteur on freedom of expression) has long held that censorship measures should never be delegated to private entities.[20] In his June 2016 report to the HRC,[21] the Special Rapporteur on freedom of expression, David Kaye, enjoined States not to require or otherwise pressure the private sector to take steps that unnecessarily or disproportionately interfere with freedom of expression, whether through laws, policies, or extra-legal means. He further recognised that "private intermediaries are typically ill-equipped to make determinations of content illegality,"[22] and reiterated criticism of notice and takedown frameworks for "incentivising questionable claims and for failing to provide adequate protection for the intermediaries that seek to apply fair and human rights-sensitive standards to content regulation," i.e. the danger of "self- or over-removal."[23]

The Special Rapporteur on freedom of expression recommended that any demands, requests and other measures to take down digital content must be based on validly enacted law, subject to external and independent oversight, and demonstrate a necessary and proportionate means of achieving one or more aims under Article 19(3) of the ICCPR.[24]

The international freedom of expression mandates have further expressed concerns at "attempts by some governments to suppress dissent and to control public communications through [...] efforts to 'privatise' control measures by pressuring intermediaries to take action to restrict content."[25] Their 2017 Joint Declaration emphasises that:

> [I]ntermediaries should never be liable for any third party content relating to those services unless they specifically intervene in that content or refuse to obey an order adopted in accordance with due process guarantees by an independent, impartial, authoritative oversight body (such as a court) to remove it and they have the technical capacity to do that.

They also outlined the responsibilities of intermediaries regarding the transparency of and need for due process in their content-removal processes.[26]

[19] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (The Ruggie Principles), A/HRC/17/31, 21 March 2011, Annex. The UN Human Rights Council endorsed the guiding principles in HRC resolution 17/4, A/HRC/RES/17/14, 16 June 2011.
[20] Report of the Special Rapporteur on freedom of expression, 16 May 2011, A/HRC/17/27, paras. 75-76.
[21] Report of the Special Rapporteur on freedom of expression, 11 May 2016, A/HRC/32/38; para 40 – 44,
[22] Ibid.
[23] *Ibid*., para. 43.
[24] *Ibid*.
[25] 2017 Joint Declaration, *op. cit.*
[26] Manilla Principles on Intermediary Liability; available at: https://www.manilaprinciples.org/

Analysis of the Act

Definitions

ARTICLE 19 finds that the Act adopts broad definitions for key terms, upon which ambiguous offences enable authorities to censor any expression on the basis of its supposed veracity.

Section 2 of the Act defines "fake news" in the following terms:

> [A]ny news, information, data and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas

This definition appears to be intentionally broad, and enables, on the basis of the offences outlined subsequently in the Act, law enforcement authorities to target any expression in which they are able to point to factual inaccuracies. Indeed, what is considered verifiable versus what is false or partially false, is inherently subjective, making even more significant the possibilities for abuse.

Section 2 of the Act also makes clear that the term "publication" applies to any form of writing, including in digital or electronic forms, as well as to "copies", "reproductions" or "replications." This extends the reach of the Act beyond the authors of "fake news" to anyone who assists in its distribution, regardless of whether they agree with or endorse its substance.

The breadth of this definition, and subjectivity of its key terms, make the offences in the Act indeterminate in scope. It is therefore impossible for a person, be it the author of potentially "fake news", or persons who share or host that content, to know whether they would be held liable under the law. The potential for arbitrary application is significant, and thus individuals may self-censor to avoid expressing opinions or ideas that may lead to censure, and even close platforms or discussion forums to avoid becoming an accessory to an offence.

This ambiguity is incompatible with the requirement of "legality" for limitations under Article 19(3) of the ICCPR, which requires any law or regulation to be formulated with sufficient precision to enable individuals to regulate their conduct accordingly.

Offence of "fake news"

Section 4(1) of the Act makes it a criminal offence for:

> Any person who, by any means, maliciously creates, offers, publishes, prints, distributes, circulates or disseminates any fake news or publication containing fake news [...]

Penalties include fines up to 500,000 ringgit (approximately 90,600 GBP), imprisonment up to a period of six years, and in the case of a "continuing offence", to additional fines of 3,000 ringgit for every day the offence continues. Section 4(2) additionally gives the Court the authority to order any person convicted of the offence to apologise.

ARTICLE 19 considers that, for the reasons outlined above regarding the definition of "fake news", this offence is overly ambiguous, and therefore not "provided for by law" under Article 19(3) of the ICCPR.

Moreover, the falsity of information is not a legitimate basis for restricting freedom of expression. The definition of "fake news" in Section 2 applies regardless of any intent to spread false information or knowledge of its falsity; the label may apply even to information which is partially true, but which contains mistakes. The definition does not connect the expression to any particular harm, for example harm to public order or incitement to violence, the prevention of which would correspond to one of the listed legitimate aims under Article 19(3) of the ICCPR.

Section 4(1) criminalises creating, offering to share, or sharing false or partially false information, *without regard to the consequences of that act*. This raises the following concerns from a freedom of expression perspective:

- **Legitimate aim:** the falsity of information is not a legitimate basis for restricting expression under international human rights law. As outlined above, international and regional freedom of expression mandates have stated that "general prohibitions on the dissemination of information based on vague and ambiguous ideas, including 'false news' or 'non-objective information', are incompatible with international standards for restrictions on freedom of expression."[27]

- **Necessary in a democratic society:** it is not clear what pressing social need this offence responds to. While Section 4(1) requires the information be shared "maliciously", it still requires no intent for a *particular or specified harm* (e.g. creation of a risk to public order, or incitement to violence), nor likelihood of that harm occurring as a direct consequence of the accused's act.

  In a democratic society, intentionally creating or sharing "fake" information may be in the public interest. For example, artists may engage in satire and parody, knowingly using imitation and fabrication to convey their opinions and ideas, or a blogger on social media may re-post a politician's "false" statement in the context of sharing to their audience the fact that they were made. The standard of "malice" as framed in Section 4(1) does not constrain its reach significantly, since ill-intent without a specific purpose or harm means little. If a person is characterised as feeling hostility towards a particular target in sharing "fake news", for example, this may be considered sufficient. Strong differences of opinion or anger over political wrongdoing, which may connect to feelings of dislike towards a person, for example, may be framed as evidence of a person acting "maliciously".

  An offence may be committed even where the so-called "fake news" is "offered" or "created", implying that an offence can be committed prior to the publication, circulation or distribution of the information. A publisher or distributer may also be held liable under Section 4(1) where they are not the author of the content, provided they have knowledge of its falsity and share it with "malice". The expansive definition of "publication" in Section 2 would include forms of "re-publication" such as sharing the post of another, hyperlinking to it, demonstrating the significant reach of the provision in the digital age. This definition could also apply to hosting content on a platform one is moderator or owner of (see "intermediary liability", below).

  The absence of a pressing need for restrictions is underscored by the availability of a variety of non-coercive means to promote the public's right to know and increase the possibility of false information being countered with accurate information. These include efforts to support media pluralism and independence, to educate the public in media and digital literacy, and to enact policies to ensure government officials disseminate reliable and trustworthy information.[28]

[27] 2017 Joint Declaration, *op. cit.*
[28] 2017 Joint Declaration, *op. cit.*

- **Proportionality:** the penalties provided, up to six years in prison (reduced from 10 years in earlier drafts) and significant fines, for conduct where it is not necessary to even prove a particular harm to a legitimate government interest, is grossly disproportionate. The possibility of heightened fines for "continuing" violations raises particular concerns in the digital age, when offending content, once circulated, is difficult to curtail and may continually be re-published. Without a cap on the potential level of fines, there is the potential for astronomical fines.

A series of "illustrations" immediately follows Section 4(1) in the Act. ARTICLE 19 is concerned that several of the "illustrations" demonstrate that the Act is in part conceived to target political expression in public discourse, in particular around accusations of fraud. For example, illustration (g) provides:

> A gives a speech during a public forum held at a public place. In his speech, A informs that Z has misappropriated moneys collected for charitable purposes knowing that the information is false. A is guilty of an offence under this section.

None of the illustrations provide clear guidance on how the essential elements of the offence should be interpreted, in particular the standard of "malice", or how to address other ambiguities.

ARTICLE 19 observes that offering examples of how an offence would apply in particular circumstances does nothing to narrow its potential application in practice. It is the wording of the offence which is determinative, and therefore illustrations, no matter how narrowly drawn, cannot bring provisions in the Act which are impermissibly broad into compliance with international human rights law.

We also note that even though the term "malice" replaced the term "knowledge" during the drafting of Section 4(1), none of the illustrations were altered to reflect this change. Many appear to centre criminal liability on mere "knowledge", raising questions over how significant the addition of the term "malice" is in practice.

While the illustrations may address conduct that the State has a legitimate aim in limiting, Article 19(3) of the ICCPR still requires the offence to be as narrowly tailored as possible, to comply with the principles of legality and necessity under the three-part test, as well as for sanctions to be proportionate. For example, Section 4(1) would have to specify that an essential element of the offence is an actual or likely harm to a specified interest, as well as intent for that harm to occur.

Criminal offences, and in particular custodial sentences, will often be disproportionate when applied to speech. For example, in cases of defamation, where an individual experiences unfair attacks on their reputation causing them substantial harm, the appropriate course of redress should be through civil defamation laws that comply with international human rights law.[29] Such laws should provide, for examples, defences of truth and reasonable publication on matters of public concern.[30] The illustrations imply that defamation cases would be tried as criminal "fake news" matters, which would clearly violate international human rights law. ARTICLE 19 urges that such harms are instead deal with through the relevant civil laws.

[29] ARTICLE 19, Defining defamation: Principles of freedom of expression and protection of reputation, 2017; available at: https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf
[30] *Ibid.*, at principle 10 and 12.

Moreover, ARTICLE 19 notes that Article 211 of the CMA already criminalises the provision of "false" content online, though it requires intent to "annoy, abuse, threaten or harass any person." Section 4(1) of the Act is significantly broader, removing any *intent* requirement to cause a specific harm, hinging criminal culpability on ambiguous notions of malicious intent detached from any specific purpose or harm. Article 211 of the CMA does not comply with international human rights law,[31] and is routinely abused to silence dissent and criticism of the government.[32] This underscores the possibility, and indeed likelihood, that Section 4(1) of the Act will be similarly abused, and thus is not necessary in a democratic society.

Intermediary liability

While online intermediaries, such as social media platforms or search engines, are not specifically mentioned in the Act, both the Section 4(1) offence, and an addition offence set out in Section 6, could be interpreted to provide for such liability.

Section 4(1) is broad, and hinges criminal liability on acts that include distribution, circulation, and dissemination. These terms are not defined in Section 2, and could apply beyond a person authoring or sharing content to persons who own or operate the platforms on which offending content is published or posted. Presumably, the requirement that the accused have "knowledge" of the offending content would limit their liability in circumstances where they have been notified of the offending content. Unlike Section 6 of the Act (below), there would be no immunity offered for removing that content, however.

Given the more specific offence set out in Section 6, it seems the potential application of Section 4(1) to intermediaries is unintended, and reflects poor drafting. This underscores the extent to which the provision lacks the quality of law required for compliance with Article 19(3) of the ICCPR.

Section 6 appears to target intermediaries and others who have "control" over third party content much more directly. Section 6 provides:

> 6. (1) It shall be the duty of any person having within his possession, custody or control any publications containing fake news to immediately remove such publication after knowing or having reasonable grounds to believe that such publication contains fake news.
>
> 6. (2) Any person who fails to carry out the duty under subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit, and in the case of a continuing offence, to a further fine not exceeding three thousand ringgit for every day during which the offence continues after conviction.

Under these provisions, intermediaries like social media platforms, hosts, and search engines, may be considered to be in "possession, custody or control" of information posted on their services, even though they do not necessarily interfere with the content. The same may also be said of administrators of social media pages or profiles, who allow third party content to appear on their pages.

Section 6 of the Act applies a lower *mens rea* (intent) standard than Section 4(1), requiring only that an accused has "reasonable grounds to believe" they are in control of violating content (rather than "knowledge"). Liability also hinges upon the failure to immediately remove the content, rather than upon mere possession or other action. This "notice and takedown" model of intermediary liability raises numerous problems:

[31] *Op. cit.*
[32] Joint UPR Submission, *op. cit.*

- There is no guidance on what constitutes "reasonable grounds to believe". A single user complaint through a platform's complaint mechanism may satisfy this, even when a platform or administrator may not have adequate information to judge the veracity of the content. This may be further complicated, as platforms' terms of service, against which user complaints are ordinarily judged, may not prohibit "fake news" as such.

- A platform would be legally required to remove content without a decision from an independent, impartial and authoritative oversight body, such as a court, regarding the lawfulness of the content. The intermediary is therefore placed in this position of determining legality, and considering the rights of an accused in making a removal decision. The excessive penalties are likely to incentivise the over-removal of content, to avoid the potential for the intermediary being held liable. The low intent requirement exacerbates this problem further, creating no counter incentive (such as immunity from liability) where a platform considers in good faith that removal unjustifiably interferes with an individual's right to freedom of expression.

- The idea of "immediate" removal is both impractical and dangerous for freedom of expression, as it would essentially require automated content removal on the basis of user-complaints. This is something that cannot be done accurately with current filtering and artificial intelligence technologies, and something over which international human rights standards require human oversight.

- The level of penalties available under of Section 6(2) to intermediaries, or by virtue of Section 13 (below) to their owners, officers or other staff, is grossly disproportionate.

For these reasons, the potential application of Sections 4(1) and 6 to intermediaries (as well as administrators and other page owners) for third-party content, is not necessary in a democratic society under Article 19(3) of the ICCPR. Indeed, as the international and regional freedom of expression mandates urged in their Joint Declaration:

> Consideration should be given to protecting individuals against liability for merely redistributing or promoting, through intermediaries, content of which they are not the author and which they have not modified.

Orders for content removal

Section 7 of the Act provides that persons "affected" by "fake news" may petition the Court for the "removal" of the offending publication. This may be done *ex parte*, i.e. without the consent or notification of other parties concerned. Failure to comply with an order is a criminal offence under Section 7(6), with a fine of up to 100,000 ringgit.

Section 7 provides no guidance regarding the person against whom an order can be made, making clear that it may include persons who are not criminally responsible under the Act. It is therefore foreseeable that intermediaries, as well as others with "control" over third-party content, such as social media page administrators, may be the targets of such orders.

Section 7 provides broad discretion to the Court in making a removal order. As the proceedings are *ex parte,* there is no requirement for the Court to notify the respondent, the original author, or the person who posted the content (who will often not all be the same person). It is particularly concerning that the Court is not expressly required by the Act to give consideration to these individuals' freedom of expression rights, especially given that they will likely not be present to make their own arguments on this matter.

In making an order, Section 7(4) only requires minimal particulars (i.e. the specific information to be contained in the order), even though the standard form of the order (provided in the Second Schedule) provides space for further information. A respondent will therefore not necessarily learn the identity of the complainant, the nature of their complaint, the legal basis for the order, or the Court's reasoning for granting an order (including whether or not they considered the respondent or other affected persons' rights). When the original author or person who posted the content is not the respondent, they may never come to learn of the legal proceedings, and will only see that their content has been removed.

The potential scope of a removal order is also very broad. Section 7 of the Act makes clear that the power applies regarding a "publication" containing fake news, as opposed to the violating content or "fake news" only. Section 2 defines the term "publication" expansively, and the standard form for a removal order in the Second Schedule does not direct the Court to be specific regarding the location of violating content. The Court is not therefore required (or even encouraged), in the interests of necessity or proportionality, to order the severing of violating content from non-violating content for removal. A partial factual error in one article on a news website, for example, could lead to the removal of the entire news website from the Internet. We note that in relation to website blocking, the HR Committee has specified:

> Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. 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.[33]

Moreover, Section 7 does not define "removal" in technical terms, or limit its jurisdictional scope: it may therefore not satisfy an order to simply restrict access to particular content in Malaysia, creating the potential for enforcement of the Act to have significant extra-territorial reach (see more below).

ARTICLE 19 notes that a limited right of appeal for the respondent of an order is provided in Section 8, limited to within 14 days of receipt of an order (exercise of this right does not amount to a stay of a Section 7 order, as set out in Section 8(2)). Permissible grounds of appeal are not listed, and the right of appeal does not extend beyond the respondent of an order to other persons who may be impacted, such as the original author of the disputed content, or persons who have shared it. As outlined above, these persons may not even be notified about the proceedings, and will therefore have no avenue to assert their rights after a removal.

Section 8(3) of the Act excludes any right to appeal entirely where the complainant is the Government and the "fake news" is allegedly "prejudicial to public order or national security". There is no specification, as required by Article 19(3) of the ICCPR, that the government prove the necessity and proportionality of a removal order that is requested on these grounds. This creates the impression that on these matters the judiciary is expected to defer to the Government, and does not have a role in scrutinising their claims or upholding fundamental rights. Even if the government provided reasons with which a Court is satisfied, this should not limit an individual's right of appeal, in particular since the original proceedings would have been *ex parte*.

[33] General Comment No. 34, *op. cit.*, at para. 43.

The Section 7 removal order powers, and limitations regarding the Section 8 right to appeal, raise significant transparency and due process concerns impacting on individuals' freedom of expression rights. These are, of course, in addition to the substantive basis for the removal orders.

Lastly, ARTICLE 19 considers the available fines for failure to comply with Section 7 orders, as set out in Section 7(6), to be grossly disproportionate.

Where a person subject to a Section 7 order fails to remove content pursuant to that order, in addition to being criminally liable, Section 9 of the Act allows the Public Prosecutor to apply to the Court to direct a police officer or an authorised officer under the CMA 1998 to "take the measures necessary" to remove the publication. This procedure is also *ex parte*, is not subject to appeal, and raises the same concerns as above. As Section 9 raises the costs of failure to comply with Section 7 orders, it decreases the likelihood that respondents will challenge those orders, for example as part of their private responsibilities to respect human rights.[34]

Financial assistance

Section 5 of the Act makes it a criminal offence to directly or indirectly make available financial assistance, either intending, knowing or having reasonable grounds to believe, that it will be used, in whole or in part, to commit an offence under Section 4(1) of the Act. Penalties include fines of 500,000 ringgit, (approximately 90,600 GBP), as well as imprisonment for up to six years.

Section 5 raises serious concerns for freedom of expression and freedom of association. Since the conduct described in Section 4(1) of the Act should be protected expression, it follows that associating with, including by funding, persons engaged in that expression, should not be penalised. The more expansive *mens rea* requirement in the provision makes it even more far-reaching.

ARTICLE 19 is concerned that there is the real danger that the provision will be used to target persons who invest in or donate to media outlets engaged in investigative journalism, or civil society organisations engaged in human rights advocacy, where the government disagrees with the expression of those entities. Even without its enforcement, the provision may create a chilling effect on financial support to the media and civil society, significantly undermining their sustainability.

As the Special Rapporteur on the right to freedom of peaceful assembly and association has made clear, the ability of associations to access resources is not distinct from the right to freedom of association, as protected under Article 22 of the ICCPR, and subject to the limitations set out in Article 22(2).[35]

Accessorial and corporate liability

We note that Section 10 of the Act provides accessorial liability for "abetment" of offences under Section 4(1), with the same penalties available. This may extend concerns regarding Section 5 to other forms of non-financial assistance a person may provide to journalists or human rights defenders in the course of their work.

[34] Ruggie principles, *op. cit.*
[35] Report of the Special Rapporteur on freedom of peaceful assembly and of association, June 2013, A/HRC/23/39, at paras. 19 and 20.

Section 13 of the Act provides criminal liability for the director, chief executive officer, manager, secretary or "other similar officer of the body corporate", where an offence under Section 4(1) of the Act is committed by a body corporate. ARTICLE 19 notes that similar mechanisms of corporate criminal liability under Section 244(1) of the CMA have previously been used to target senior executives in media organisations.[36]

Jurisdictional scope

ARTICLE 19 is concerned that Section 3 of the Act provides for its extra-jurisdictional application, if the "fake news concerns Malaysia or the person affected by the commission of the offence is a Malaysian citizen."

Section 3 appears designed to provide scope for the authorities to restrict the access of Malaysians to international sources of information. It may become the basis for seeking the removal of content created or shared by persons, including media organisations, based abroad, and ultimately blocking sources of information that do not comply with those requests. Fear of arrest may also intimidate critics of the Malaysian government, including citizens and others in the diaspora, from travelling to Malaysia. As noted above, the powers for Courts to order content "removal" is not restricted jurisdictionally: if an order is executed to remove content from the Internet entirely, rather than simply to make it unavailable in Malaysia, it would impact the freedom of expression rights of people globally.

Moreover, ARTICLE 19 is concerned that these provisions ignore the principle that States should not interfere with the free flow of information outside of their own territory. Expanding the applicability of the Act beyond Malaysia's borders may interfere with the sovereign right of other States to make determinations regarding the content in accordance with their own legal frameworks and international human rights law obligations.

As outlined above, the right to freedom of expression applies "regardless of frontiers", and it is illegitimate to limit expression solely on the basis that it originated outside of a State's territory. Any limitations on such trans-boundary communications must still meet the requirements of Article 19(3) of the ICCPR. For the reasons outlined above, the offences under the Act do not meet those requirements.

[36] Malaysia: Drop charges against independent news portal Malaysiakini, ARTICLE 19, 18 May 2017; available at: https://www.article19.org/resources/malaysia-drop-charges-against-independent-news-portal-malaysiakini/

Conclusion

ARTICLE 19 finds the Act, on the whole, to be dangerous to the exercise of freedom of expression in Malaysia. We are particularly concerned that it will negatively impact individuals’ rights in the context of the upcoming election, and set a negative example in a region where similar legislative approaches are under consideration by other Parliaments.

For these reasons, we recommend that the Malaysian Parliament immediately consider the repeal of the Act, while simultaneously taking measures to repeal and amend other provisions of Malaysian law which do not comply with international human rights law on freedom of expression.

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, freedom of expression and equality, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19’s overall legal expertise, the organisation publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at http://www.article19.org/resources.php/legal.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org.

For more information about the ARTICLE 19’s work in South East Asia, please contact Matthew Bugher, Head of South East Asia at ARTICLE 19, at matthew@article19.org.