

ARTICLE 19

Legal Analysis

**Malaysia: Emergency (Essential Powers)
(No. 2) Ordinance 2021 (Fake News
Ordinance)**

June 2021

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Executive Summary

In this analysis, ARTICLE 19 reviews the Malaysian Emergency (Essential Powers) (No. 2) Ordinance 2021 (the 'Fake News Ordinance' or 'Ordinance'), adopted in March 2021, for its compliance with international freedom of expression standards. It builds on ARTICLE 19's previous analysis of the Anti-Fake News Act 2018 (the '2018 Act'),¹ citing its repressive nature and ramifications for freedom of expression in the country. The 2018 Act, widely condemned, was repealed in October 2019 by the Malaysian Parliament.

The Perikatan Nasional government advanced similar repressive measures on 'fake news' that were rejected by the Malaysian Parliament in 2019. This time, the Ordinance was promulgated without parliamentary approval using COVID-19 as a pretext. Parliament has been suspended during the state of emergency announced in January 2021, which has resulted in a vacuum in democratic oversight. The Ordinance comes at a critical moment when COVID-19 cases and deaths have spiked in Malaysia and open public access to information is crucial.

ARTICLE 19 finds that the Fake News Ordinance is a problematic governmental measure because it not only revives the draconian provisions of the 2018 Act but also takes some of them further into areas that are irrelevant to public health or the COVID-19 pandemic. The Ordinance significantly threatens freedom of expression in Malaysia at a time when more information and scrutiny by the media and civil society is paramount. During a public health emergency, open and transparent media can save lives.

ARTICLE 19 highlights the following concerns regarding the Ordinance:

- It creates criminal liability for anyone who writes, reports or publishes anything relating to the pandemic or the proclamation of emergency that is at least 'partly false' and may 'cause fear or alarm' to individuals (including government officials), criminalising a broad swath of speech, including that protected by the right to freedom of expression;
- It creates criminal liability for media organisations, social media platforms, and civil society organisations who may host content or otherwise support or provide other financial assistance for that content, both domestically and outside Malaysia;
- It grants police officers broad powers to arrest individuals under the law without a warrant;
- It allows the police and government officers to cause takedowns of content, without meaningful due process or allowing an opportunity for the respondents to defend themselves;
- It supersedes provisions of the fundamental laws of evidence in Malaysia that have been in effect since 1950, incorporating a presumption of guilt and severely limiting the rights of the accused as well as rights to counsel; and
- It raises alarming data privacy concerns, allowing the government to compel any host to decrypt user information, as well as to store and disclose personal user data, without any notice to the user, opportunity for appeal, or judicial oversight.

In practice, the Ordinance will operate to prevent any criticism of the government's COVID-19 response. It provides no legal recourse and virtual immunity for the government in using the Ordinance to silence

¹ ARTICLE 19, Malaysia: 'Anti-Fake News Act' – Legal analysis, April 2018, available at: <https://www.article19.org/wp-content/uploads/2018/04/2018.04.22-Malaysia-Fake-News-Legal-Analysis-FINAL-v3.pdf>.

dissent or suppress freedom of expression. The provisions are not well-defined in law, and thus fail the test of legality under international law. The Ordinance is neither necessary to pursue legitimate aims, proportionate to achieving those aims, nor the least intrusive instrument amongst measures which might achieve the desired result.

The rapid enactment of the Ordinance without any effective public consultation or legislative oversight raises significant concerns regarding the protection of freedom of expression and access to information in Malaysia, particularly during the critical period of the COVID-19 pandemic.

ARTICLE 19 calls on the Malaysian government to immediately repeal the Ordinance.

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Introduction

In January 2020, King Al-Sultan Abdullah declared a nationwide state of emergency in Malaysia to curb the spread of COVID-19. The Emergency (Essential Powers) (No. 2) Ordinance 2021 (the 'Fake News Ordinance' or 'Ordinance') was passed in March 2021, repeating nearly verbatim key provisions of the Anti-Fake News Act 2018, which was repealed in October 2019 by the Malaysian Parliament following local and international backlash on human rights grounds.

The Ordinance, which was promulgated without parliamentary oversight, begins by justifying its necessity in light of the 'grave emergency threatening the security, economic life and public order of the Federation arising from the epidemic of an infectious disease, namely Coronavirus Disease 2019 (COVID-19).'¹ However, ARTICLE 19 is deeply concerned that the Ordinance is not a necessary or proportionate response to concerns about the pandemic for the following reasons:

- The Ordinance was passed with no legislative or democratic oversight;
- Broad sections of the Ordinance are lifted verbatim from the 2018 Anti-Fake News Act, which was repealed months before the pandemic even began; and
- Most of the offences articulated under the Ordinance have no discernible nexus to protecting public health.

At present, Malaysia is facing an unprecedented spike in COVID-19 cases and deaths.² ARTICLE 19 is concerned that restricting the free flow of information will not improve public health, but will likely cause more harm as individuals, the media, and civil society—including human rights groups—will be discouraged and under threat of criminal penalty from sharing information related to the pandemic.

Recent arrests³ of dissidents under laws like the Sedition Act—which ARTICLE 19 continues to urge the government to repeal—highlight the threat posed by overbroad provisions such as those within the Ordinance. As of June, the Ordinance has already been used to initiate at least a 21 investigation papers under the Section 4(1) of the Ordinance⁴ and at least two have been charged so far for spreading 'fake news' related to COVID-19 and vaccinations.⁵ On 8 May 2021, deputy minister Datuk Seri Ti Lian Ker was forced to delete a tweet commenting on a COVID-19 conspiracy theory.⁶ One investigation has concerned claims made in a Facebook post that were said 'could cause public anxiety and unease on the measures taken by the government to curb the spread of Covid-19.'⁷

As national elections are due to be held in late 2021 or early 2022 and the COVID-19 pandemic continues to surge, the reconsideration of the Ordinance is of the utmost urgency.

² Nadirah H. Rodzi, Malaysia orders shorter hours for malls, restaurants to curb Covid-19 spike, *The Straits Times*, 23 May 2021, available at: <https://www.straitstimes.com/asia/se-asia/malaysia-orders-shorter-hours-for-malls-restaurants-in-battle-against-covid-19-cases>.

³ In April 2021, police officers arrested graphic artist Fahmi Reza for creating a Spotify playlist in a satirical response to a controversial tweet by Malaysia's queen. Authorities also arrested activist Mukmin Nantang and six others for protesting strict movement control orders.

⁴ FMT Reporters, 10 nabbed under fake news ordinance, *Free Malaysia Today*, 1 June 2021, available at:

<https://www.freemalaysiatoday.com/category/nation/2021/06/10/keep-calm-and-carry-on-dissenting-fahmi-tells-artists/>.

⁵ Housewife, tutor first to be charged under Emergency Ordinance for spreading fake news on Covid-19, *The Edge Markets*, 2 June 2021, available at: <https://www.theedgemarkets.com/article/housewife-tutor-first-be-charged-under-emergency-ordinance-spreading-fake-news-covid19>.

⁶ Zurairi Ar, Deputy minister Ti deletes tweet after accused of spreading Covid-19 conspiracy theory, says only questioning article, *Malay Mail*, 9 May 2021, available at: <https://www.malaymail.com/news/malaysia/2021/05/09/deputy-minister-ti-spouts-covid-19-conspiracy-theory-on-twitter-then-says-o/1972764>.

⁷ Bukit Aman says 12 investigation papers opened on Covid-19 fake news, *Malay Mail*, 5 May 2021, available at:

<https://www.malaymail.com/news/malaysia/2021/05/05/bukit-aman-says-12-investigation-papers-opened-on-covid-19-fake-news/1971972>.

International human rights standards

The protection of freedom of expression under international law

The right to freedom of expression is protected by a number of international human rights instruments, in particular Article 19 of the **Universal Declaration of Human Rights (UDHR)**⁸ and Article 19 of the **International Covenant on Civil and Political Rights (ICCPR)**.⁹

We note that Malaysia has not signed or ratified the ICCPR, despite accepting several recommendations to do so during its last Universal Periodic Review in 2018.¹⁰ Nevertheless, the obligations set out in the ICCPR largely reflect customary international law. The ICCPR should therefore guide the interpretation of guarantees for freedom of expression in Article 10(a) of the Malaysian Federal Constitution, as should other international human rights instruments to which Malaysia is a State party.¹¹

Additionally, **General Comment No. 34**,¹² adopted by the UN Human Rights Committee in September 2011, explicitly recognises that Article 19 of the ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and internet-based modes of expression.¹³ In other words, the protection of freedom of expression applies online in the same way as it applies offline. State parties to the ICCPR are also required to consider the extent to which developments in information technology, such as internet and mobile-based electronic information dissemination systems, have dramatically changed communication practices around the world.¹⁴ The legal framework regulating mass media should take into account the differences between the print and broadcast media and the internet, while also noting the ways in which media converge.¹⁵

Similarly, in their 2011 **Joint Declaration on Freedom of Expression and the Internet** four special mandate holders on the right to freedom of expression¹⁶ noted that regulatory approaches in the telecommunications and broadcasting sectors cannot simply be transferred to the internet.¹⁷ In particular, they recommend the development of tailored approaches for responding to illegal content online, while pointing out that specific restrictions for material disseminated over the internet are unnecessary. They also promote the use of self-regulation as an effective tool in redressing harmful speech. In a 2019 **Joint Declaration on challenges to Freedom of Expression in the next decade**, the four mandate holders reiterated that ‘the exercise of freedom of expression requires a digital infrastructure that is robust, universal and regulated in a way that maintains it as a free, accessible and open space for all stakeholders.’¹⁸

⁸ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

⁹ UN General Assembly Resolution 2200A (XXI), adopted 16 December 1966, entry into force 23 March 1976.

¹⁰ Human Rights Council, Report of the Working Group on the Universal Periodic Review: Malaysia, A/HRC/40/11, 7 January 2019.

¹¹ See for example, Convention on the Rights of the Child, Article 13; and Convention on the Rights of Persons with Disabilities, Article 21.

¹² Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, adopted on 12 September 2011, available at: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

¹³ *Ibid.*, para. 12.

¹⁴ *Ibid.*, para. 17.

¹⁵ *Ibid.*, para. 39.

¹⁶ The four mandate holders parties to the joint declaration are the UN Special Rapporteur on Freedom of Opinion and 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.

¹⁷ UN Special Rapporteur on Freedom of Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and the Internet, June 2011, available at: <https://www.osce.org/fom/78309>.

¹⁸ UN Special Rapporteur on Freedom of Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on challenges to Freedom of Expression in the Next Decade, 10 July 2019, available at: https://www.ohchr.org/Documents/Issues/Opinion/JointDeclaration10July2019_English.pdf.

Limitations on the right to freedom of expression

While the right to freedom of expression is a fundamental right, it is not absolute. Under international human rights standards, States may restrict the right to freedom of expression provided such limitations strictly conform to a three-part test. Restrictions must be:

- **Provided for by law:** A norm must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.¹⁹ Ambiguous, vague, or overly broad restrictions on freedom of expression are therefore impermissible.
- **In pursuit of a legitimate aim:** Legitimate aims are enumerated in Article 19(3)(a) and (b) of the ICCPR as being limited to respect of the rights or reputations of others and protection of national security, public order, public health or morals. As such, it would be impermissible to prohibit expression or information solely on the basis that they cast a critical view of the government or the political social system espoused by the government.
- **Necessary and proportionate:** The party invoking the restriction must show a direct and immediate connection between the expression and the protected interest. Proportionality requires that a restriction on expression is not over-broad and that it is appropriate to achieve its protective function. It must be shown that the restriction is specific and individual to attaining that protective outcome and is the least intrusive means capable of achieving the same limited result.²⁰

Article 20(2) of the ICCPR also provides that ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’²¹

The same principles apply to electronic forms of communication or expression disseminated over the internet.²²

Limits on disinformation and ‘fake news’

‘Fake news’, ‘disinformation’, and ‘misinformation’ are not defined under international human rights law. Protecting persons from false information is not, as such, a legitimate aim for justifying restrictions on the right to freedom of expression under Article 19(3) of the ICCPR.

In her report to the Human Rights Council, the UN Special Rapporteur on freedom of expression, Irene Khan, noted that many laws or regulations restricting ‘fake news’ fail to meet the three-part test of legitimacy, legality, and necessity and proportionality. ‘They often do not define with sufficient precision what constitutes false information or what harm they seek to prevent, nor do they require the establishment of a concrete and strong nexus between the act committed and the harm caused.’²³

As four mandate holders on the freedom of expression cautioned in their 2017 Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda, 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 vulnerability of such persons to threats of violence and undermining

¹⁹ UN Human Rights Committee, *L.J.M de Groot v. The Netherlands*, No. 578/1994, UN Doc. CCPR/C/54/D/578/1994 (1995).

²⁰ UN Human Rights Committee, *Velichkin v. Belarus*, No. 1022/2001, UN Doc. CCPR/C/85/D/1022/2001 (2005).

²¹ ICCPR, Article 20(2).

²² General Comment No. 34, para. 43.

²³ Human Rights Council, Disinformation and freedom of opinion and expression: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, A/HRC/47/25, 13 April 2021, para. 54, available at: <https://undocs.org/A/HRC/47/25>.

public trust in the media.²⁴ They specifically 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.’²⁵

An important 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.’²⁶ 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.’²⁷

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, generally maintaining that intermediary immunity from liability is critical to protecting freedom of expression online.

The UN Human Rights Council affirmed in 2018 that the ‘same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice.’²⁸ The UN Human Rights 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.²⁹

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 and to address the adverse rights impacts related to their business operations.³⁰ 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 expression has long held that censorship measures should never be delegated to private entities.³¹ At a minimum, in their 2011 Joint Declaration on Freedom of Expression and the Internet, the four freedom of expression mandate holders stated, ‘intermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression.’³²

In his June 2016 report to the Human Rights Council,³³ the then UN 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,

²⁴ UN Special Rapporteur on Freedom of Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda, 3 March 2017, available at: <https://www.article19.org/resources/joint-declaration-on-freedom-of-expression-and-fake-news-disinformation-and-propaganda/>.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ Human Rights Council, The promotion, protection and enjoyment of human rights on the Internet, A/HRC/38/L.10/Rev.1, July 2018, available at: <https://undocs.org/A/HRC/38/L.10/Rev.1>.

²⁹ General Comment No. 34, paras. 12, 39, and 43.

³⁰ 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 Resolution 17/4, A/HRC/RES/17/14, 16 June 2011.

³¹ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27, 16 May 2011, paras. 75–76, available at: <https://undocs.org/en/A/HRC/17/27>.

³² 2011 Joint Declaration on Freedom of Expression and the Internet.

³³ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/32/38, 11 May 2016, paras. 40–44, available at: <https://undocs.org/A/HRC/32/38>.

policies, or extra-legal means. He further recognised that 'private intermediaries are typically ill-equipped to make determinations of content illegality,'³⁴ 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.'³⁵

The UN 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.³⁶

In their 2017 Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda, four international freedom of expression mandate holders 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.'³⁷ They emphasised 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.

These international norms are referenced in the Manila Principles on Intermediary Liability, which introduces a framework to assess laws, policies, and practices that govern liability of intermediaries for third-party content, which states:

Intermediaries should be shielded from liability for third-party content. Content must not be required to be restricted without an order by a judicial authority. Requests for restrictions of content must be clear, be unambiguous, and follow due process. Laws and content restriction orders and practices must comply with the tests of necessity and proportionality. Laws and content restriction policies and practices must respect due process. Transparency and accountability must be built into laws and content restriction policies and practices.³⁸

Anonymity and encryption

The protection of anonymity is vital to the enjoyment of the right to freedom of expression, the right privacy, and other human rights. A fundamental feature enabling anonymity online is encryption.³⁹ Without the authentication techniques derived from encryption, secure online transactions and communication would be impossible.

The right to online anonymity has so far received limited recognition under international law. Traditionally, the protection of anonymity online has been linked to the protection of the right to privacy and personal data, under Article 17 of the ICCPR. In May 2015, the UN Special Rapporteur on freedom of expression,

³⁴ *Ibid.*

³⁵ *Ibid.*, para. 43.

³⁶ *Ibid.*

³⁷ 2017 Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda.

³⁸ Manila Principles on Intermediary Liability, available at: <https://www.manilaprinciples.org/>.

³⁹ Encryption is a mathematical 'process of converting messages, information, or data into a form unreadable by anyone except the intended recipient' that protects the confidentiality of content against third-party access or manipulation; see for example, SANS Institute, History of encryption, 8 August 2001, available at: <https://www.sans.org/reading-room/whitepapers/vpns/history-encryption-730>.

published his report on encryption and anonymity in the digital age.⁴⁰ The report highlighted the following issues:

- Encryption and anonymity must be strongly protected and promoted because they provide the privacy and security necessary for the meaningful exercise of the right to freedom of expression and opinion in the digital age;⁴¹
- Anonymous speech is necessary for human rights defenders, journalists, and protestors. He noted that any attempt to ban or intercept anonymous communications during protests was an unjustified restriction to the right to freedom of peaceful assembly under the UDHR and the ICCPR.⁴² Legislation and regulations protecting human rights defenders and journalists should include provisions that enable access to and provide support for using technologies that would secure their communications;
- Restrictions on encryption and anonymity must meet the three-part test of limitations to the right to freedom of expression under international law.⁴³ Laws and policies providing for restrictions to encryption or anonymity should be subject to public comment and only be adopted following a regular—rather than fast-track—legislative process. Strong procedural and judicial safeguards should be applied to guarantee the right to due process of any individual whose use of encryption or anonymity is subject to restriction.⁴⁴

The Special Rapporteur's report also addressed mandatory 'key disclosure' and 'decryption orders' whereby law enforcement may justify requests for access to communications by either requiring targeted decryption of a particular communication or the disclosure of the key necessary for decryption. The Special Rapporteur noted that targeted decryption orders 'may be seen as more limited and less likely to raise proportionality concerns,' whereas key disclosure would expose an individual's 'private data well beyond what is required by the exigencies of a situation.' This is because the decryption key would grant authorities access to the individual's entire set of encrypted communication.⁴⁵

The report stipulated that, in both cases, such orders should be:

- based on publicly accessible law;
- clearly limited in scope focused on a specific target;
- implemented under independent and impartial judicial authority, in particular to preserve the due process rights of targets; and
- only adopted when necessary and when less intrusive means of investigation are not available.⁴⁶

In his 2018 Encryption and Anonymity follow-up research paper, the Special Rapporteur reiterated that, 'court-ordered decryption should only be permitted on a case-by-case basis applied to individuals pursuant to 'transparent and publicly accessible' legal criteria that meet the requirements of Article 19(3) and are subject to prior judicial authorization and associated due process safeguards.'⁴⁷

⁴⁰ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, A/HRC/29/32, 22 May 2015, available at: <https://undocs.org/A/HRC/29/32>.

⁴¹ *Ibid.*, paras. 12, 16 and 56.

⁴² *Ibid.*, para. 53.

⁴³ *Ibid.*, para. 56.

⁴⁴ *Ibid.*, paras. 31–35.

⁴⁵ *Ibid.*, para. 45.

⁴⁶ *Ibid.*

⁴⁷ Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Research Paper, Encryption and Anonymity follow-up report, June 2018, para. 8, available at: <https://www.ohchr.org/Documents/Issues/Opinion/EncryptionAnonymityFollowUpReport.pdf>.

Protection of sources

The protection of journalists' sources is an essential element of freedom of expression. The media routinely depend on contacts for the supply of information on issues of public interest. Individuals sometimes come forward with secret or sensitive information, relying upon the reporter to convey it to a wide audience in order to stimulate public debate. In many instances, anonymity is the precondition upon which the information is conveyed from the source to the journalist; this may be motivated by fear of repercussions which might adversely affect the source's physical safety or job security.

The topic of source protection formed the basis of the 2015 report of the UN Special Rapporteur on freedom of expression to the General Assembly, which stressed the integral nature of sources to the enjoyment of the right to freedom of expression. As part of that report, the Special Rapporteur reiterated that reporters frequently rely on confidential sources, and that 'without protection, many voices would remain silent and the public uninformed.' The Special Rapporteur hence urged that when searches of the abodes, offices, or digital devices are contemplated as part of investigations, 'a higher burden should be imposed in the context of journalists and others gathering and disseminating information,' citing laws and regulations around the world that afford greater scrutiny to infringements on the privacy and security of journalists.⁴⁸

The UN, the Organization for Security and Co-operation in Europe (OSCE), and the Organization of American States (OAS) rapporteurs on freedom of expression asserted in February 2000 that: 'Journalists should never be required to reveal their sources unless this is necessary for a criminal investigation or the defence of a person accused of a criminal offence and they are ordered to do so by a court, after a full opportunity to present their case.'⁴⁹

As such, journalists should never be compelled to disclose sources, or have their files or records taken, absent exceptional circumstances where vital interests are at stake, and where there is ample transparency and opportunity for defence.

Enjoyment of scientific progress

The right to freely participate in scientific advancement is set forth in Article 27 of the **UDHR**, and is expanded to the right to enjoy the benefits of scientific progress and its applications as protected under Article 15 of the **International Covenant on Economic, Social, and Cultural Rights**.

The right to enjoy the benefits of scientific progress, which includes health related advancements such as vaccines and other medical related progress, is all the more important during public health emergencies, when the protection of the freedom of research and expression is paramount. This includes 'the protection of researchers from undue influence on their independent judgment...the freedom of researchers to freely and openly question the ethical value of certain projects...the freedom of researchers to cooperate with other researchers, both nationally and internationally; and the sharing of scientific data and analysis with policymakers, and with the public wherever possible.'⁵⁰

The Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment No. 25, elaborates that Article 15 protections extend to 'protection and promotion of academic and scientific freedom, including freedom of expression and freedom to seek, receive and impart scientific information,

⁴⁸ UN General Assembly, Promotion and protection of the right to freedom of opinion and expression, A/70/361, 8 September 2015, paras. 14 and 24, available at: <https://undocs.org/A/70/361>.

⁴⁹ ARTICLE 19, agreed by Santiago Canton, OAS Special Rapporteur on Freedom of Expression, Freimut Duve, OSCE Representative on Freedom of the Media, and Abid Hussain, UN Special Rapporteur on Freedom of Expression, Statement regarding key issues and challenges to freedom of expression, February 2000, available at: <https://ifex.org/report-on-key-issues-and-challenges-facing-freedom-of-expression/>.

⁵⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/25, 30 April 2020, para. 13.

freedom of association and freedom of movement.⁵¹ As a crucial medium for such exchange, arbitrary restrictions on online freedom of expression weakens scientific progress and can have a negative impact on society. As noted by the CESCR, respect for Article 15 rights includes 'eliminating censorship or arbitrary limitations on access to the Internet, which undermines access to and dissemination of scientific knowledge.'⁵²

⁵¹ *Ibid.*, para. 46.

⁵² *Ibid.*, para. 42.

Analysis of the Emergency Fake News Ordinance

Definitions

The Fake News Ordinance begins in Section 2 by lifting the definition of 'fake news' nearly verbatim from the repealed 2018 Anti-Fake News Act (the '2018 Act'). Section 2 of the 2018 Act defined '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.

For comparison, Section 2 of the 2021 Fake News Ordinance provides that 'fake news' includes:

[A]ny 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 form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas.

The clause requiring that targeted content be connected to COVID-19 or the proclamation of emergency narrows the scope of the ordinance compared to the 2018 Act. However, the somewhat ambiguous term 'relating to', as well as wide ranging powers granted to the government during the state of emergency, open the door to application of the Ordinance against a broad swath of expression.

As ARTICLE 19 has previously observed in relation to the 2018 Act, this provision fails the test of 'legality' under the tripartite test for permissible restrictions of freedom of expression, which requires that any regulation be formulated with sufficient precision to enable individuals to regulate their conduct accordingly. The scope of what it means for information to be 'wholly or partly false' is an entirely subjective one. It was precisely this type of subjectivity and its propensity for abuse that the freedom of expression mandates focused upon in their 2017 Joint Declaration when warning against the adoption of 'fake news' or disinformation laws.⁵³

In her March 2021 Communication to the government of Malaysia concerning the Fake News Ordinance, the UN Special Rapporteur on freedom of expression noted her concern 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.' She warned that 'the new ordinance fails to define strictly the offense of 'fake news' and the level of intentionality required to trigger a punishment.'⁵⁴

This problem is exacerbated by the fact that Section 2 of the Ordinance, again drawn from the 2018 Act, defines 'publication' broadly, making it apply to any form of writing, including digital writings, and also 'copies', 'reproductions' or 'replications'. This widens the scope of the Ordinance not only to initial publishers of information, but to anyone who redistributes that content. Therefore, simply clicking the 'share' button on a social media platform may subject individuals to criminal sanction under the Ordinance.

⁵³ 2017 Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda.

⁵⁴ Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Communication to the government of Malaysia, OL MYS 5/2021, 25 March 2021, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?qlId=26287>.

'Fake news' offences

Creating, offering, or publishing 'fake news'

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

Any person who, by any means, with 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 or publication containing fake news [...]

Penalties include fines up to RM 100,000 (approximately USD 25,000), imprisonment up to a period of three years, and in the case of a 'continuing offence' additional fines of RM 1,000 (approximately USD 250) 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. This offence is copied nearly verbatim from the 2018 Act but is broader. The Ordinance removes the intent requirement from the 2018 Act, which required that the conduct be done 'maliciously'. The prosecution now does not need to prove any intention if it can be proved that the law is 'likely to cause fear or alarm.'

When considered against the definitions contained in Section 2 of the Ordinance, Section 4(1) plainly fails the tripartite test for restrictions of freedom of expression under international law:

- **The proscribed conduct is not clearly provided for by law:** Weighed against the broad scope of the Section 2 definition of 'fake news', the precise conduct punished by the law is not clearly defined and is overly ambiguous. There is no guidance as to what is considered 'wholly or partly false'. Further, Section 4(1) punishes conduct 'likely to cause fear or alarm' to 'any section' of the public, which conceivably means anyone. The notion of 'likely to cause fear or alarm' is highly subjective and potentially limitless. In practice, this will have a chilling effect on the free exercise of expression, as individuals and others will tend to err on the side of self-censorship to avoid criminal sanctions, or even close platforms for communication in order to avoid liability.
- **Section 4(1) is not necessary:** The Ordinance does not require any 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. The only requirement is a likelihood of 'fear or alarm' to 'any section of the public'—in practice this could mean the government itself, which would penalise criticism of the government. Indeed, the Ordinance specifically does this, prohibiting statements regarding the 'proclamation of emergency.' In its General Comment No. 34, the Human Rights Committee stated that 'the penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.'⁵⁵ This extends to prohibiting 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.'⁵⁶

Section 4(1) is not only unnecessary, it will undermine the stated objective of the Ordinance, which is to aid efforts to combat the COVID-19 pandemic. The punishment of individuals for unwittingly spreading false information casts a severe chilling effect on communication, impeding the type of information sharing that is needed to quickly identify and respond to a viral outbreak. Heavy-handed approaches to misinformation stifle the type of public reporting that can lead to early detection and effective mitigation efforts.

⁵⁵ General Comment No. 34, para. 42.

⁵⁶ General Comment No. 34, para. 43.

- **Section 4(1) is not proportionate:** Finally, the staggering penalties (up to three years' imprisonment, reduced from six years' in the 2018 Act) are grossly disproportionate, especially as there is no requirement to even prove a particularised harm to a specific, legitimate government interest. Such criminal punishments for expression or failure to remove content is also in excess of the 'least intrusive means' limitation established under international law. The addition of heightened fines for a 'continuing offence' raises questions as to the limits of what it means to be 'continuing'—i.e., if a post goes viral on social media, is the original creator liable in perpetuity as long as that post is shared, even if the sharing is outside the creator's control? As written, there is no potential limit to fines.

Section 4(1) also conflicts with values important for the realisation of a democratic society. There are many forms of so-called 'fake' information that are in the public interest. Artists may engage in satire and parody in order to convey important ideas. There are instances where false statements may need to be shared or repeated in order to provide commentary on them. The vague definition of what may constitute 'fake' information under the Ordinance also opens it up to abuse by the State to remove critical public commentary by simply labelling it as 'likely to cause fear or alarm.' The lack of limitations under Section 4(1) undermines many important forms of social commentary during the COVID-19 pandemic, including newsgathering, discussion of scientific information, and other commentary in the public interest. This provision will have a chilling effect on expression.

Providing financial assistance to facilitate a 'fake news' offence

Section 5 goes well beyond punishing those who publish or disseminate content and also punishes:

Any person who directly or indirectly, provides or makes available financial assistance intending that the financial assistance be used, or knowing or having reasonable grounds to believe that the financial assistance will be used, in whole or in part, for the purpose of committing or facilitating the commission of an offence under section 4 [...]

The penalty for a violation is RM 500,000 (approximately USD 125,000) or six years' imprisonment. This provision, too, is lifted from the 2018 Act.

The drafting of Section 5 sets an extraordinarily low—almost non-existent—bar to establishing liability for nearly anyone for the dissemination of so-called 'fake news'. The intent requirement that is described is purely illusory, as it is followed by the language that one have 'reasonable grounds to believe' which is an entirely subjective standard that carries no requirement of bad faith or intent to do harm. Knowledge that an individual may create or post something is likely enough to trigger 'reasonable grounds to believe' a violation may occur, especially with how broadly the Section 4(1) violations are defined.

The scope of 'financial assistance' is potentially limitless. Financial assistance may entail a donation to an artist, publisher, or news provider. It may entail a grant of funds to a not-for-profit news medium for investigative journalism. Or it may entail charitable funding for civil society groups engaged in human rights advocacy or criticism of the government.

Section 5 fails the tripartite test for the same reasons that Section 4(1) does. Punishing anyone who provides financial support to a party that might publish something 'partly false' widens the net of the Ordinance to virtually everyone in society. It also threatens to have a significant chilling effect on donors or grantors to independent media outlets critical of the Malaysian government's COVID-19 response, or human rights groups advocating for legal reforms.

Finally, it is worth emphasising that the financial assistance provisions implicate not only the right to freedom of expression, but the rights to freedom of peaceful assembly and association. As the UN Special Rapporteur on the latter 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).⁵⁷

Intermediary liability

Both Section 4 and Section 6 provide for liability claims against internet intermediaries.

Section 4(1) extends criminal liability to any person who ‘publishes’, ‘distributes’, ‘circulates’, or ‘disseminates’ ‘fake news’, even if they did not create the original content in question. ‘Publication’ is defined to include ‘any digitally, electronically, magnetically or mechanically produced publication, and a replication or substantial replication of such publication.’ This language could be interpreted to amount to criminal liability for social media platforms and websites that permit user comments.

This recent conviction of media outlet *Malaysiakini* for its users’ comments shows a high risk that courts will support an interpretation of the law that holds at least some intermediaries directly responsible for the same offence for which users are liable when users generate content hosted by intermediaries. In February 2021, the Federal Court of Malaysia convicted *Malaysiakini* of contempt of court on the basis of five user-generated comments. The court relied in part on a 2012 amendment of the Evidence Act that establishes a presumption that anyone who ‘facilitates to publish or re-publish’ content is deemed to have published the relevant content.⁵⁸ A similar argument could be used to hold internet intermediaries—such as news sites that allow comments and social media platforms—criminally liable for user-generated content, though it is unclear whether this reasoning could extend so far as to also implicate internet access providers or other intermediaries. International standards on intermediary liability make clear that ‘intermediaries must never be made strictly liable for hosting unlawful third-party content.’⁵⁹

Section 6(1) provides criminal liability for failure to take down content deemed ‘fake news’ after a police officer or authorised officer issues a directive to do so. Section 6(1) is drawn from the previous Section 6 of the 2018 Act, and provides, in substance, for criminal liability for intermediaries that fail to take down content deemed ‘fake news’. It requires:

[A]ny person having in his possession, custody or control...any publications containing fake news to remove such publication within twenty four hours from the time a direction is given by a police officer or an authorized officer.

The punishment for failure to comply is a RM 100,000 (approximately USD 25,000) fine on conviction, with an additional RM 3,000 (approximately USD 750) per day that the offence continues. There is a limited right to ‘apply to the High Court’ to review the direction, although this does not prevent a violation from occurring or stop the clock on the commission of an offence.

Under this provision, social media platforms, search engines, and other internet intermediaries may be considered to be in ‘possession, custody or control’ of information posted on their services, even though they do not necessarily control, modify, or interfere with the content. There is no requirement of the platform even providing notice or any explanation to the end user or subscriber.

Section 6(1) appears to provide wide discretion to police officers and authorised officers to order directives to remove content without requiring a court order, resulting in sweeping censorship powers that are wholly incompatible with freedom of expression protections under international law. Additionally, twenty-four hours is an excessively short timeframe. The Manila Principles make clear that intermediaries ‘must not be

⁵⁷ Human Rights Council, Report of the Special Rapporteur on freedom of peaceful assembly and of association, A/HRC/23/39, 24 April 2013, paras. 19 and 20, available at: <https://undocs.org/A/HRC/23/39>.

⁵⁸ ARTICLE 19, Malaysia: Conviction of Malaysiakini a blow to press freedom, 19 February 2021, available at: <https://www.article19.org/resources/malaysia-conviction-of-malaysiakini-a-blow-to-press-freedom/>.

⁵⁹ Manila Principles on Intermediary Liability, Principle 1, available at: <https://www.manilaprinciples.org/>.

required to restrict content unless an order has been issued by an independent and impartial judicial authority that has determined that the material at issue is unlawful.⁶⁰ The lack of due process, combined with the extremely vague definition of 'fake news' runs a serious risk of abuse by authorities.

Further, Section 6(1) places the burden on providers to defend themselves (and the appropriateness of the content in question), rather than on officers to seek judicial approval or other independent oversight over the lawfulness of their actions. This is untenable from a freedom of expression standpoint. Where the burden is on platforms to actively appeal an order that presumptively will lead to liability, the majority of platforms and intermediaries are more likely to simply take down content rather than bear the risk of continued criminal sanction. Forced takedowns are extreme measures and should only be used sparingly pursuant to independent judicial hearings and courts orders with fully protected rights of appeal. As drafted, Section 6(1) provides blanket takedown authority to every police officer with a minimal degree of oversight that is unlikely to be invoked or meaningful.

Content removal orders

Section 7 provides a broad ability for any person to invoke censorship by court order with no meaningful requirement for notice or right of appeal. Section 7 provides that any person 'affected by a publication containing fake news' may make an *ex parte* application to the Court for that content's removal. This means the application can be made without the consent or notification of other parties concerned. The Court may make a removal order without the other side having an opportunity to be heard. Neither does it require any notice to parties connected to the content, such as its creator, or publisher, or those with rights to it.

Minimal information is needed to make an application to the Court. Form A, which is attached to the Ordinance as a Schedule, only requires an affirmation from the applicant. Given that there is not a requirement of participation by or notice to parties who may have an opposing interest, there is thus no opportunity for cross-examination of the applicant's representations. All that is required to be attached are a police report and a copy of the original publication or content in question.

Form B is similarly sparse, essentially providing a 'template document' for the Court to notify an individual that they must remove content without any need to articulate reasons why or provide a right of representation or appeal. But potentially more dangerous is that Form B refers to removal of a 'publication' containing 'fake news', rather than the 'fake news' itself. Given that 'publication' is defined so broadly in Section 2, this *ex parte* application process could conceivably be used to takedown entire platforms. And, if individuals do not voluntarily comply with a takedown order, a police officer may be empowered under Section 9(1) to 'take necessary measures to remove such publication' without definition as to what those measures are.

There are no meaningful restrictions on the Court's discretion to order removal of content. Indeed, that discretion appears to be limitless, as Section 7(3) allows for removal 'if it appears to the Court that the publication containing fake news should be removed.' Needless to say, this *per se* fails the tripartite test of restrictions on freedom of expression, because it imposes no limitation or standard for the removal of content. The Court is neither required nor encouraged to apply interests of necessity or proportionality. Literally speaking there is no space on Form B for it.

The penalties under Section 7 are disproportionately severe, especially given that an individual may be punished with a fine of up to RM 100,000 (approximately USD 25,000) without even being fairly notified. Specifically, Section 7(4) provides that a takedown order may be deemed served if it is simply delivered to the 'last known address' of the person or 'served by electronic means'; an explanation is provided that the latter includes 'sending the order to his e-mail address or social media account.' These notification methods

⁶⁰ Manila Principles on Intermediary Liability, Principle 2, available at: <https://www.manilaprinciples.org/>.

may not result in actual notification, as individuals may not necessarily remain at the same address or have access to their e-mail account or social media account.

There is no meaningful right to appeal. While Section 8(1) appears to provide for a limited right of appeal. The appeal must be made 'within fourteen days' from service. Given that Section 7(4) will not necessarily result in meaningful notice, it is more likely than not that this right of appeal may be waived by the time affected parties even learn of the removal. Further, the appeal does not actually stay the order, nor does Section 8 provide for any standard of review. Given that no reasoning is articulated by the Court in the first place, nor any opportunity for challenging an applicant's claims, it is unclear 'what' is actually being appealed.

Nevertheless, appeals against takedown orders from the government—the ones that should be subject to the *most* scrutiny—are likely to be fruitless in substance due to Section 8(3). This provision excludes any right to appeal entirely where the complainant is the Malaysian government and the 'fake news' is allegedly 'prejudicial or likely to be prejudicial to public order or national security.' It amounts to an 'ouster clause' that removes the right of any person to have access to the courts and amounts to a human rights violation. The preamble of the Ordinance itself is presented 'by reason of the existence of a grave emergency threatening the...public order.' Since 'fake news' is defined under the ambit of the Ordinance, this provision becomes circular and in effect defeats any and every appeal of a takedown order from the Malaysian government.

Derivative, corporate, and vicarious liability

Section 22 of the Ordinance provides liability for 'abetment' of offences under Section 4(1), with the same penalties available upon conviction. 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.

Section 25 of the Ordinance 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 Ordinance is committed by a body corporate. Section 26 provides for vicarious liability for employers for the acts of their employees or agents. ARTICLE 19 notes that similar mechanisms of corporate criminal liability under Section 244(1) of the Communications and Multimedia Act have previously been used to target senior executives in media organisations.⁶¹ Under the provisions, employers could be held liable and charged for the actions of their employees; thus, the editors of a news outlet would face legal exposure for the reporting of their publication, thereby having a chilling effect and encouraging publications to self-censor.

Finally, Section 25(b) provides that officers of a corporation are presumed to be guilty of an offence that the body corporate is convicted of unless the officer can prove the offence was committed without his knowledge or that it was committed without his consent and the officer had taken all reasonable steps to prevent the offence. Here, the corporate officer is presumed to be guilty. The usual criminal burden of proof is thus reversed and the accused company is obliged to prove its innocence. This legal position is unacceptable in a criminal law context.⁶²

⁶¹ ARTICLE 19, Malaysia: Drop charges against independent news portal Malaysiakini, 18 May 2017, available at: <https://www.article19.org/resources/malaysia-drop-charges-against-independent-news-portal-malaysiakini/>.

⁶² Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, adopted on 23 August 2007, para. 30, available at: <https://undocs.org/CCPR/C/GC/32>.

Procedural and due process concerns

Rights of the accused

Section 24 of the Ordinance requires (i) defence statements and (ii) all evidence to be used by the defence at trial to be submitted to the prosecutor before trial. There is no parallel requirement on the part of the prosecution, violating the principle of equality of arms, which ensures equal treatment of parties in all legal proceedings, including criminal proceedings. This provision violates the right to a fair trial under international law.⁶³

Extraterritorial scope

ARTICLE 19 is concerned that Section 3 of the Ordinance provides for its extraterritorial application, in that 'if any offence under this Ordinance is committed by any person, whatever his nationality or citizenship, in any place outside Malaysia' and the offence 'concern[s] 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, groups, or media organisations based abroad and 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, as well as non-nationals, from travelling to Malaysia. As noted above, the powers of Courts to order content 'removal' is not restricted territorially. 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 right to freedom of expression and information 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 Ordinance beyond Malaysia's borders may interfere with the human rights obligations of other States.

As outlined above, the right to freedom of expression applies 'regardless of frontiers.' Any limitations on such trans-boundary communications must meet the requirements of Article 19(3) of the ICCPR. For the reasons outlined above, the offences under the Ordinance do not meet those requirements.

Overriding the Evidence Act of 1950

Sections 10 through 15 (Part IV) enumerate several evidentiary rules, a problematic feature of the Ordinance, given that it was passed without parliamentary approval. Section 10 states that the evidentiary provisions of the Ordinance 'shall have effect notwithstanding anything inconsistent with the Evidence Act 1950.' The Evidence Act 1950 is the core source of the rules of evidence in Malaysia to balance the interests of parties to litigation and uphold the rights of the accused. The impact of the Ordinance is not only to impose broad criminal penalties but to rewrite the rules of evidence against accused persons in court. These procedural rules have nothing to do with COVID-19 and have no place in a purported emergency public health ordinance.

Section 11, for instance, allows for the admission of any 'statement made whether orally or in writing' by a person who is dead or cannot be found, for the purpose of 'an investigation or inquiry into an offence under this Ordinance.' This contradicts Section 32(1)(i) of the Evidence Act, which requires that any statements used by such persons be made 'under or by virtue of any written law.'

⁶³ See for example, *Ibid*.

Section 12 allows for 'any statement by an accused whether orally or in writing to any person at any time' to be admissible as evidence against them. But this contradicts various provisions of the Evidence Act which concern the admissibility of evidence, including forced or induced confessions.

Section 13 allows for the admissibility of 'all documents or things seized or howsoever obtained,' Section 14 allows for admissibility of document lists, and Section 15 allows for admissibility of any document obtained by a police officer. These three provisions contradict Chapter V of the Evidence Act which outlines the restrictions on and distinctions between the two types of documentary evidence: primary and secondary. As a general framework, primary documents are original copies and secondary documents are copies; Section 64 of the Evidence Act provides that documents 'must be proved by primary evidence' except in specific cases. Section 66 requires that admission of secondary evidence must comply with rules of notice. Sections 13-15 of the Ordinance circumvent this by allowing admission of anything, not subject to these distinctions.

Police power concerns

No warrant required for arrests

As the offences of the Ordinance are considered 'seizable' offences under Section 16—this typically means offences punishable with death or imprisonment of three or more years—Section 17 accordingly allows a police officer or authorised officer to arrest 'any person whom he reasonably believes has committed or is attempting to commit an offence' under the Ordinance. This means that officers do not need to acquire a warrant to arrest an individual under the Ordinance. The Ordinance allows for the punishment of someone who creates a piece of information that is considered partly false and could cause 'fear or alarm', empowering police with excessive discretion to arrest individuals based on subjective notions of falsity. The possibility of arbitrary detention without access to a remedy is particularly worrying.

Forced decryption and access to data

ARTICLE 19 expresses particular concern at the forced decryption provisions under Section 19. Section 19(1) provides that an officer conducting a search 'shall be given access to computerized data.' Section 19(2) elaborates that this requires officers be 'provided with the necessary password, encryption code, decryption code, software or hardware.' Note that there is no limitation to searches conducted pursuant to investigations under the Ordinance. Failing to comply with such a demand subjects someone to one year imprisonment and a fine of RM 100,000 (approximately USD 25,000).

Encryption facilitates the exercise of free expression and privacy, and the UN Special Rapporteur on freedom of expression has held that compelled decryption orders are restrictions on expression and hence are subject to the three-part test under international law and must only be permitted by court order on a case-by-case basis. The Ordinance does not provide an articulated basis or standard for compelled orders, empowering any officer to conduct one at any time. This may have grave implications for areas like user privacy, journalistic source protection, the work of human rights defenders, and attorney-client confidentiality.

It is also often the case that service providers do not possess the technical capacity to decrypt end-to-end communications that pass through their systems. Such providers should not face criminal penalty or contempt if they are asked to perform a task that is technically impossible. However, mandating access to computerised data has significant freedom of expression implications, particularly if that data implicates journalistic sources, attorney-client communications, or user privacy.

Forced preservation and disclosure of user data

Sections 20 and 21 of the Ordinance allows officers to order the preservation and forced disclosure of user data so long as the officer is 'satisfied' that the data is 'reasonably required for the purposes of an investigation' and believes there is a risk of the data becoming inaccessible. These provisions do not require independent judicial notice or review, nor do they grant any right of appeal. On the contrary, Sections 20(2) and 21(2) explicitly *prohibit* persons issued with such a written preservation or disclosure notice from communicating the existence and content of the notice.

This means that those who receive such a preservation notice cannot disclose anything about it or even seek judicial oversight or remedy. It is unclear if communicating the notice to one's legal counsel would be a violation—on the face of the provision it would be—and hence this violates the fair trial rights of individuals. Failing to comply with either provision can be punished by a year imprisonment or a fine of RM 100,000 (approximately USD 25,000).

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, 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 ARTICLE 19's 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 and Policy Team, you can contact them by e-mail at legal@article19.org. For more information about ARTICLE 19's work in Malaysia, contact Nalini Elumalai at nalini@article19.org.