

CREATING A
CONDUCTIVE
LEGAL
ENVIRONMENT
FOR



FREEDOM OF EXPRESSION

A Review of Malaysian Laws Related to Freedom
of Expression, Press Freedom and Access to
Information



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With the support of UNESCO Office in Jakarta

Creating a Conducive Legal Environment for Freedom of Expression

*A Review of Malaysian Laws Related to Freedom of
Expression, Press Freedom, and Access to Information*

Creating a Conducive Legal Environment for Freedom of Expression: A Review of Malaysian Laws Related to Freedom of Expression, Press Freedom, and Access to Information

C4 Center Report

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1

Freedom of Expression under International Human Rights Law

Article 19 of the International Covenant on Civil and Political Rights

1. The right to freedom of expression is embodied in Article 19 of the International Covenant on Civil and Political Rights (ICCPR).
2. Article 19(1) and Article 19(2) of the ICCPR respectively provide for the right to hold opinions and the right to express oneself.
3. General Comment No. 34 on Article 19 of the ICCPR which was issued by the United Nations Human Rights Committee (UNHRC) affirmed, among others, that:

“Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions. Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.”¹

4. It is worth reiterating that the Malaysian government in its Aide-Memoire to the United Nations on 28 April 2006 which spelled out Malaysia’s commitments in support of its candidature for the United Nations Human Rights Council affirmed the important role played by this Council in promoting and protecting human rights.²

¹ General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 2 and 3

² Submission of the Malaysian Bar Council, available at http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=1735, [accessed 20 February 2019]

5. In reference to the role played by the media in promoting the right to freedom of expression, the government of Malaysia stated in the Aide-Memoire that:

Another manifestation of the importance that the Government attaches to the enjoyment of all human rights and fundamental freedoms is the promotion of a free media, including in cyberspace, as well as the encouragement of vibrant and active civil societies.”³

6. Furthermore, it pledged, among others, to:

“Continue to participate actively in the norm-setting work of the Human Rights Council.”⁴

7. It is important to note that the right to freedom of expression under Article 19(2) of the ICCPR also includes the right to information. Article 19(2) reads:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

5. In emphasising the importance of the right to information, which is fundamental to the exercise of the right to freedom of expression, the UNHRC articulates that public bodies have an obligation to provide information and such information must be accessible to members of the public.⁵
6. The UNHRC specifically requires States to proactively provide information which is of public interest in the public domain by putting in place procedures to enable members of the public to access government information.⁶

ASEAN and Commonwealth

1. The right to freedom of opinion and expression was also reiterated in the ASEAN Human Rights Declaration (AHRD). The AHRD was adopted by member states of ASEAN including Malaysia on 18 November 2012.⁷
2. Article 23 of the AHRD provides:

“Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person’s choice.”

³ Ibid.

⁴ Ibid

⁵ General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 18

⁶ Ibid, para. 19

⁷ ASEAN, 2012, ASEAN Human Rights Declaration, Jakarta: ASEAN Secretariat

3. In reaffirming the universality of the right to freedom of information, the Commonwealth Law Ministers and, subsequently, the Commonwealth Heads of Government (including Malaysia's) endorsed in a resolution in 1999 where they declared:

“Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.”⁸

Restrictions on Freedom of Expression under Article 19(3) of the ICCPR

1. It is noteworthy that freedom of expression provided for under Article 19(2) of the ICCPR is not absolute as it allows for the exercise of such right to be restricted on two (2) grounds:
 - i) Provided by law; and
 - ii) Necessary.
2. Article 19(3) of the ICCPR further states that restrictions on freedom of expression may be imposed to ensure:
 - i) Respect for of the rights or reputations of others;
 - ii) Protection of national security or of public order (*ordre public*), or of public health or morals.
3. In interpreting the restrictions stipulated in Article 19(3) of the ICCPR, the UNHRC proceeds to state that restrictions on freedom of expression must strictly and directly be related to all the specific grounds stipulated in the said Article.⁹
4. Article 19(3) of the ICCPR provides a three-part, cumulative test which ought to be complied with to determine whether restrictions on freedom of expression are permissible under international human rights law.¹⁰ According to the three-part, cumulative test:

⁸ Commonwealth Heads of Government Meeting 1999, para. 20

⁹ General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 22

¹⁰ See, e.g. United Nations Human Rights Council, A/HRC/17/27, “Report of UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue” May 16, 2011, para. 69:

(1) the restriction must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency);

- i) the restriction must be provided by law, which is clear and accessible to everyone (i.e., adheres to principles of predictability and transparency);
 - ii) the restriction must pursue one of the purposes set out in article 19(3) of the ICCPR, namely: (i) to protect the rights or reputations of others; (ii) to protect national security or public order, or public health or morals (principle of legitimacy); and
 - iii) the restriction must be proven as necessary and the least restrictive means required to achieve the purported aim.
- iv) The test that ought to be applied to determine that the restrictions imposed on the right to freedom of expression fulfil the requirements set out in Article 19(3) is the test of necessity and proportionality.¹¹

Conditions to Restrict Freedom of Expression under Article 19(3) of the ICCPR

Restrictions Must be Provided by Law

1. The UNHRC emphasises that laws enacted to restrict the right to freedom of expression must be in consonance with the provisions, aims, and objectives of the ICCPR.¹²
2. Article 19(3) makes it mandatory for restrictions on the right to freedom of expression to be prescribed by law.
3. Furthermore, for the laws restricting freedom of expression to be compatible with the spirit embodied in Article 19(2) of the ICCPR, it is imperative that these laws are enacted with sufficient precision. Precision is required to enable:
 - i) individuals to act accordingly;¹³

(2) the restriction must pursue one of the purposes set out in article 19(3) of the ICCPR, namely: (i) to protect the rights or reputations of others; (ii) to protect national security or public order, or public health or morals (principle of legitimacy); and
 (3) the restriction must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality).

¹¹ Communication No. 1022/2001, *Velichkin v. Belarus*, Views adopted on 20 October 2005

¹² General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 26

¹³ Communication No. 578/1994, *de Groot v. The Netherlands*, Views adopted on 14 July 1995

- ii) individuals charged under the law limiting freedom of expression to determine what kind of speech is permissible and what kind of speech is restricted.¹⁴
2. It is noteworthy that this requirement for precision to be embodied in laws restricting freedom of expression is adopted by the European Court of Human Rights in the case of *Sunday Times v. United Kingdom*. In this case, the Court held that:

*“... a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”*¹⁵
 3. Additionally, the laws put in place to restrict the right to freedom of speech should not confer absolute discretion for the imposition of such restrictions.¹⁶

Restrictions Must be Necessary

1. Restrictions on the right to freedom of expression must be necessary.
2. In determining that the restrictions are necessary, the UNHRC articulates that they must be imposed to achieve a legitimate purpose.¹⁷
3. In interpreting what constitutes necessity, the European Court of Human Rights held that:

*“The adjective “necessary”, within the meaning of Article 10 § 2, implies the existence of a “pressing social need”.”*¹⁸
4. In light of the above decision, the restrictions imposed on the right to freedom of expression can only be justified on the ground of necessity when there exists a pressing social need for a particular speech to be limited.
5. The European Court of Human Rights in this case further held that the State has an obligation to give “relevant and sufficient” reasons for restricting freedom of expression on the basis of necessity.¹⁹

Restrictions to Ensure Respect for of the Rights or Reputations of Others

¹⁴ General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 25

¹⁵ Judgment no. 6538/74, 26 April 1979, para. 49

¹⁶ General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 25; General Comment No. 27 on the ICCPR (November 1999, CCPR/C/21/Rev.1/Add.9), para. 13

¹⁷ General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 33

¹⁸ *Zana v Turkey*, judgment of the Grand Chamber of 25 November 1997, Application No 18954/91 para 51

¹⁹ *Zana v Turkey*, judgment of the Grand Chamber of 25 November 1997, Application No 18954/91 para 61

1. The term “rights” used in Article 19(3) of the ICCPR includes both human rights as specifically provided for in the ICCPR and generally in international human rights law.²⁰
2. The term “others” in Article 19(3) is defined as individuals or members of a particular community.²¹
3. As regards defamation laws which address the protection of one’s reputation, the UNHRC notes that they must be enacted with care to ensure compliance with all the requirements embodied in Article 19(3) of the ICCPR.²² Criminal laws to address defamation should only be applied in the most of serious cases.²³
4. In reference to penal defamation laws, defence of truth should be included as one of the defences and these laws should not apply to expression that is subject to verification.²⁴
5. The UNHRC emphasises that imprisonment is never acceptable as a punishment for defamation.²⁵
6. It is important to note that the UNHRC recommends that States consider decriminalising defamation.²⁶

Restrictions to Ensure Protection of National Security or of Public Order (Ordre Public), or of Public Health or Morals.

1. As regards the imposition of restrictions on freedom of speech to protect national security or public order (*ordre public*), the UNHRC cautions that States take extreme care and adhere to the strict requirements prescribed by Article 19(3) of the ICCPR.²⁷
2. It is important to note that laws that address treason, official secrets, or sedition must not be applied to hide information that is of public interest and silence individuals such as journalists, researchers, environmental activists, human rights defenders, or others for having revealed the information in question.²⁸

²⁰ General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 28

²¹ Communication No. 736/97, *Ross v. Canada*, Views adopted on 18 October 2000

²² Concluding Observations on the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6)

²³ General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 47

²⁴ General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 27

²⁵ *Ibid* para 47

²⁶ Concluding observations on Italy (CCPR/C/ITA/CO/5); concluding observations on the Former Yugoslav Republic of Macedonia (CCPR/C/MKD/CO/2)

²⁷ General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 30

²⁸ *Ibid*

3. In reference to restrictions on freedom of expression meant for the protection of public order (*ordre public*), the imposition of regulations on speech-making in certain circumstances in a particular public place is permissible.²⁹
4. The UNHRC, in the case of *Coleman v. Australia*, affirms that regulations on speech-making, however, must reasonably balance out the individual's freedom of speech and the need to maintain public order.³⁰
5. As regards restrictions on the right to freedom of speech to protect morals, the UNHRC in General Comment No. 22³¹ of the ICCPR articulates that:

"The concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition."
6. The UNHRC further observes that restrictions imposed on the basis of the protection of morals must conform to universality of human rights and the principle of non-discrimination.³²

The Test of Necessity and Proportionality

Necessity

1. The test of necessity must be applied to the imposition of restrictions on the right to freedom of expression so as to achieve a legitimate purpose.³³
2. In determining whether it was necessary for the State to impose the restriction on the author's freedom of expression in order to protect the rights or reputation of persons of the Jewish faith, the UNHRC, in the case of *Ross v. Canada*, concludes that:

*"...the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance."*³⁴
3. The UNHRC, in this case, opines that the restriction imposed on the author was necessary in order to uphold the principle of non-discrimination stipulated in Article 20(2) of the ICCPR.³⁵

²⁹ Communication No. 1157/2003, *Coleman v. Australia*, Views adopted on 10 August 2006

³⁰ *Ibid*

³¹ General Comment No. 22, Official Records of the General Assembly, Forty-eighth Session, Supplement No. 40 (A/48/40), annex VI

³² *Ibid*

³³ *Ibid* para. 33

³⁴ Communication No. 736/97, *Ross v. Canada*, Views adopted on 17 July 2006

³⁵ *Ibid* para. 11.6

Proportionality

1. The test of proportionality requires restrictions imposed on the right to freedom of expression not to be overly broad.³⁶
2. In the General Comment No. 27, the UNHRC emphasises that preventive measures formulated to restrict freedom of expression must conform to the proportionality test.
3. Furthermore, to ensure that the restrictions imposed are proportionate, the following conditions must be fulfilled:
 - i) the restrictions must be appropriate to achieve their protective function.
 - ii) the restrictions must be the least intrusive instrument amongst those which might achieve their protective function.
 - iii) The restrictions must be proportionate to the interest to be protected.
 - iv) The principle of proportionality must be embodied in the law restricting freedom of expression and observed by administrative and judicial bodies applying the law.
 - v) The principle of proportionality must consider the form in which the speech is made and how it is disseminated.
4. The UNHRC also affirms that States have an obligation to clearly demonstrate the direct and immediate connection between the expression and the threat it poses.³⁷

Expression in Public Debates Concerning Public and Political Figures

1. It is pertinent to note that the ICCPR places a huge value on unrestrained expression in public debates taking place in a democratic society concerning public and political figures.³⁸
2. The UNHRC observes that expressions deemed as insults which are directed towards public and political figures do not constitute sufficient justification to warrant the imposition of penalties.³⁹

³⁶ General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 34

³⁷ Communication No. 926/2000, Shin v. Republic of Korea, Views adopted on 16 March 2004

³⁸ Communication No. 1180/2003, Bodrozic v. Serbia and Montenegro, Views adopted on 31 October 2005

³⁹ Ibid

3. The UNHRC puts emphasis on the fact that all public figures, including those who hold the highest political authority, are not immune to criticism and political opposition.⁴⁰ Institutions such as the army or the administration are also subject to criticism.⁴¹
4. In the General Comment No. 34, the UNHRC notes with concern the use of laws to punish individuals for lese majesty⁴², *desacato*⁴³, disrespect for authority⁴⁴, flags or symbols representing the State, defamation of the head of state,⁴⁵ and the protection of the honour of public officials.⁴⁶
5. Furthermore, the identity of the person whom the expression is directed at should not be the sole reason for imposing heavier penalties on the maker of the expression.

Freedom of Expression and Religion

1. As regards issues surrounding freedom of expression and respect for religion, the UNHRC articulates that:

“Prohibitions of displays of lack of respect for a religion or other belief systems, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.”⁴⁷

2. The UNHRC emphasises that prohibitions in relation to respect for religion must strictly fulfil the requirements stipulated in Article 19(3) of the ICCPR.

Freedom of Expression and Media

1. The UNHRC emphasises that the media must be “free, uncensored, and unhindered” to ensure the enjoyment of freedom of expression and opinion and other rights which “constitutes one of the cornerstones of a democratic society”.⁴⁸
2. As it is essential for there to be “free communication of information and ideas about public and political issues between citizens, candidates, and elected representatives”, the press must not be censored or restrained from informing

⁴⁰ Communication No. 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005

⁴¹ Concluding Observations on Costa Rica (CCPR/C/CRI/CO/5), para. 11

⁴² Communications Nos. 422-424/1990, *Aduayom et al. v. Togo*, Views adopted on 30 June 1994

⁴³ Concluding observations on the Dominican Republic (CCPR/CO/71/DOM)

⁴⁴ Concluding observations on Honduras (CCPR/C/HND/CO/1)

⁴⁵ Concluding observations on Zambia (CCPR/ZMB/CO/3)

⁴⁶ Concluding observations on Costa Rica (CCPR/C/CRI/CO/5)

⁴⁷ General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 48

⁴⁸ *Ibid*, para. 13

the public about these matters, and the public, in turn, has a “corresponding right to receive media output”.⁴⁹

3. With the emergence of the internet and new technologies, States must “foster the independence” of new media as well as “ensure access of individuals” to this new media.⁵⁰
4. It is noteworthy that the UNESCO’s key indicators on media freedom also affirm that States should not place “unwarranted legal restrictions on the media”, explaining that there should be no legal provisions “dictating who may practice journalism or requiring the licensing or registration of journalists”, coupled with “fair and transparently implemented accreditation procedures for coverage of official functions and bodies”.⁵¹
5. In reference to the safety of journalists, in a series of resolutions culminating in 2015, the General Assembly of the United Nations has expressed concerns over continuing violations of the rights of journalists and threats to their safety.⁵²
6. In addressing the need to ensure the safety of journalists, the Human Rights Council calls on States to “create and maintain, in law and in practice, a safe and enabling environment for journalists to perform their work independently and without undue interference”.⁵³
7. In the Concluding Observations on Viet Nam⁵⁴ and Concluding Observations on Lesotho, the UNHRC affirms that States have an obligation to ensure that legislative and administrative frameworks regulating the media are in compliance with Article 19(3) of the ICCPR.⁵⁵
8. It is noteworthy that refusal to grant a permit to the publication of newspapers and other print media where the publication does not pose a threat to the grounds stipulated in Article 19(3) of the ICCPR is in breach of the right to freedom of expression guaranteed in the ICCPR.⁵⁶

⁴⁹ Ibid

⁵⁰ Ibid. para. 15

⁵¹ UNESCO, “Media Development Indicators: A framework for assessing media development” (2008), Available at <http://unesdoc.unesco.org/images/0016/001631/163102e.pdf> (Last accessed: 10.9.2018)

⁵² UN General Assembly Resolution on Safety of Journalists and the Issue of Impunity (A/RES/70/162), 2015. See also (A/RES/68/163) in 2013 and (A/RES/69/185) in 2014. Also relevant are Human Rights Council Resolutions on the Safety of Journalists: (A/HRC/RES/21/12) in 2012; (A/HRC/RES/27/5) in 2014; and (A/HRC/RES/33/2) in 2016

⁵³ Human Rights Council Resolution 27/5, dated 25 September 2014 (Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 53A and corrigenda (A/69/53/Add.1 and Corr.1 and 2), chap. IV, sect. A)

⁵⁴ Concluding Observations on Viet Nam (CCPR/CO/75/VNM) para. 18 and Concluding Observations on Lesotho (CCPR/CO/79/Add.106), para. 23

⁵⁵ General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 39

⁵⁶ Ibid

9. Imposing a ban on a publication is strictly prohibited unless specific content, tightly interwoven with the publication is tantamount to a threat specified under Article 19(3).⁵⁷
10. In the Concluding Observations on Gambia, the UNHRC observes that States have an obligation to refrain from imposing onerous licensing and fee conditions on media outlets.⁵⁸
11. In addition to ensuring compliance with the conditions set out in Article 19(3), States have an obligation to ensure that conditions related to licencing conditions and fees are:
 - i) reasonable and objective;⁵⁹
 - ii) clear;⁶⁰
 - iii) transparent;⁶¹ and
 - iv) non-discriminatory⁶².
8. The UNHRC also recommends that States form an independent and public broadcasting licensing authority which is tasked with examining broadcasting applications and granting licenses.⁶³

Access to Information

1. The right to information is an integral part of freedom of expression.
2. The right to information includes a right for an individual to know what bodies control or may control information regarding that individual, and a right to have information about that individual rectified.⁶⁴
3. Laws on freedom of information should have limited exceptions, proactive obligations to disclose information, clear and simple procedures for making requests, an independent and effective oversight system, and adequate promotional measures, and States should ensure that the wide legal environment is consistent with and supports the right to information.⁶⁵

⁵⁷ Ibid

⁵⁸ Concluding observations on Gambia (CCPR/CO/75/GMB)

⁵⁹ Concluding Observations on Lebanon (CCPR/CO/79/Add.78), para. 25

⁶⁰ Concluding Observations on Kuwait (CCPR/CO/69/KWT); Concluding Observations on Ukraine (CCPR/CO/73/UKR)

⁶¹ Concluding observations on Kyrgyzstan (CCPR/CO/69/KGZ)

⁶² Concluding Observations on Ukraine (CCPR/CO/73/UKR)

⁶³ Concluding observations on Lebanon (CCPR/CO/79/Add.78)

⁶⁴ General Comment No. 34 on the ICCPR (July 2011, CCPR/C/GC/34), para. 18 and 19

⁶⁵ "Brisbane Declaration on Freedom of Information: The Right to Know" (UNESCO) in conjunction with World Press Freedom Day 2010.

4. In considering restrictions on the right to information, the United Nations Special Rapporteur on Freedom of Expression and Opinion suggests three considerations that deserve emphasis in this area, in line with the requirements of Article 19(3) of the ICCPR⁶⁶:
 - i) The restriction must protect a specific legitimate interest from actual or threatened harm that would otherwise result, pointing out that it is not legitimate to resist disclosure to protect against embarrassment or exposure of wrongdoing, or to conceal the functioning of an institution.
 - ii) Disclosure should only be refused under the “well-accepted” proportionality element of the necessity test, where a specific risk of harm to a legitimate State interest must be shown to outweigh the public’s interest in the information to be disclosed. Furthermore, some matters should be considered “presumptively” to be in the public interest such as criminal offences and human rights or international humanitarian law violations, corruption, public safety, environmental harm, and abuse of public office.
 - iii) Restrictions must be drafted clearly and narrowly, designed to give guidance to authorities and subject to independent judicial oversight.

Incitement to Terrorism

1. It is noteworthy that incitement to terrorism is a legitimate restriction on freedom of expression. However, to satisfy the requirement of international human rights law, it must be demonstrated that:

“Incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.”⁶⁷

2. In elaborating on what constitutes incitement to terrorism, reference should be made to Article 5 of the Council of Europe Convention on the Prevention of Terrorism. Article 5 of this Convention requires State parties to criminalise the unlawful and intentional public provocation to commit a terrorist offence.

⁶⁶ David Kaye “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression” (specifically on the protection of sources to information and whistle-blowers) (2015, Un Doc A/70/361) (“Kaye”), at para. 9 - 11

⁶⁷ OHCHR, Fact Sheet No. 32 “Human Rights, Terrorism and Counter-terrorism” (July 2008), at page 43, quoting a joint declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on the Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression “International mechanisms for promoting freedom of expression” (21 December 2005)

3. Article 5 has been described as a best practice in combating incitement to terrorism while protecting the right to freedom of expression.⁶⁸
4. The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism affirms that:

“States are encouraged to use precise and defined terminology when quasi-legislative requirements are being advanced by Security Council resolutions: terms such as “incitement” and “material support” must be given precise legal meaning, consistent with the principles of legality and proportionality as the absence of such precision creates conditions under which counter-terrorism norms can be abused domestically, undermining human rights protections for individuals and groups.”⁶⁹

⁶⁸ Council of Europe, Protection of Human Rights and Fighting Terrorism, HDIM.IO/85/08 (1 October 2008)

⁶⁹ Special Rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/73/361 (3 September 2018)

2

Freedom of Expression under the Federal Constitution

1. In Malaysia, the right to freedom of expression is provided for under Article 10(1)(a) of the Federal Constitution (FC) – the supreme law of the land.
2. Freedom of expression enshrined in the FC is subject to a number of restrictions. These restrictions are spelled out in Article 10(2)(a) and 10(4) of the FC.

Restrictions on Freedom of Expression under the FC

Article	Provision
Article 10(2)(a)	<ul style="list-style-type: none">• Restrictions must be provided by law.• Restrictions must fulfil 8 conditions:<ol style="list-style-type: none">i) in the interest of the security of the country;ii) friendly relations with other countries;iii) public order;iv) morality;v) restrictions designed to protect the privileges of Parliament or of any Legislative Assembly;vi) to provide against contempt of court;vii) defamation;viii) incitement to any offence.
Article 10(4)	<ul style="list-style-type: none">• restrictions in relation to national security or public order under Article 10(2)(a) may be legislated to prohibit matters which are stipulated in:<ol style="list-style-type: none">i) Part III of the FC (citizenship);ii) Article 152 (national language);iii) Article 153 (special position of Malays);iv) Article 181 (sovereignty of Rulers).

3

Malaysian Laws Restricting Freedom of Expression

1. There are a number of laws enacted by the government of Malaysia to restrict freedom of expression.
2. These laws, among others, are:
 - i) The Sedition Act 1948;
 - ii) The Printing Presses and Publication Act 1984;
 - iii) The Official Secrets Act 1972;
 - iv) Penal Code (criminal defamation);
 - v) The Communications and Multimedia Act 1998;
 - vi) The Film Censorship Act 2002;
 - vii) The Prevention of Terrorism Act 2015;
 - viii) The Anti-Fake News Act 2018;
3. Other related laws and policies that are not in line with international standards are:
 - i) The Freedom of Information (State of Selangor) Enactment 2011;
 - ii) The Penang Freedom of Information Enactment 2010;
 - iii) The MSC Bill of Guarantees.

The Sedition Act 1948

1. The Sedition Act 1948 is a colonial-era law that was passed in 1948 to deal with the communist insurgency. It has been used since Malaysia gained independence in 1957 and is still in place to criminalise expressions deemed to have seditious tendency. The justification used by the Barisan Nasional

government to retain the Sedition Act 1948 was the need to address the threats against peace, public order, and the security of Malaysia.⁷⁰

2. It is noteworthy that the Sedition Act 1948 went through a number of amendments in April 2015.
3. The amendments to section 3(1) of the Act, among others, removed criticism against the government and the judiciary as acts deemed to be seditious. The amended section 3(1) reads:

“A “seditious tendency” is a tendency –

- (a) to bring into hatred or contempt or to excite disaffection against any Ruler;*
- (b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;*
- (c) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State;*
- (d) to promote feelings of ill will and hostility or hatred between different races or classes of the population of Malaysia; or*
- (e) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution.”*

4. Section 3 of the Sedition Act criminalises expression that contains “seditious tendency.” “Seditious tendency” under section 3 of the Act refers to a tendency to cause hatred, contempt, dissatisfaction discontent, feelings of ill will, hostility, hatred against a group of people namely the Ruler, subjects of the Ruler or the King, inhabitants in a particular territory, different races or classes of the Malaysian population.
5. Pursuant to the amendments made in 2015, a new provision was inserted into section 3 – section 3(ea) which criminalises tendency:

⁷⁰ ‘What you need to know about the amended Sedition Act’, The Malay Mail, 10 April 2015, available at <https://www.malaymail.com/s/875651/what-you-need-to-know-about-the-amended-sedition-act>, accessed 6 June 2018

“to promote feelings of ill will, hostility or hatred between persons or groups of persons on the ground of religion.”

6. Section 10(1) of the Act was also amended to give more powers to the Sessions Court to issue a prohibition order for publications which “would likely lead to bodily injury or damage to property; appears to be promoting feelings of ill will, hostility or hatred between different races or classes of the population of Malaysia; or appears to be promoting feelings of ill will, hostility or hatred between persons or groups of persons on the ground of religion”. The words “likely” and “appears” were used in this particular amendment. Section 10(1) reads:

“Where on the application of the Public Prosecutor it is shown to the satisfaction of a Sessions Court Judge that the making or circulation of a seditious publication –

(f) is or if commenced or continued would likely lead to bodily injury or damage to property;

(g) appears to be promoting feelings of ill will, hostility or hatred between different races or classes of the population of Malaysia; or

(h) appears to be promoting feelings of ill will, hostility or hatred between persons or groups of persons on the ground of religion,

the Sessions Court Judge shall make an order (“prohibition order”) prohibiting the making or circulation of that seditious publication (“prohibited publication”).”

7. The other amendments were the abolition of fines or imprisonment for a term not exceeding three years for a first offence and the introduction of a minimum of three years and a maximum of seven years imprisonment upon conviction under the Act.⁷¹
8. The Act was also amended to introduce a new offence (section 4A) – aggravated sedition which carries a minimum of three years and a maximum of twenty years imprisonment upon conviction.
9. In addition, one of the amendments also empowers the Court to issue an order to prohibit a person charged with sedition from leaving the country.⁷² Upon application filed by the public prosecutor, it is mandatory for the Court to grant

⁷¹ Section 4(1) of the Sedition Act 1948

⁷² Section 5A of the Sedition Act 1948

an order prohibiting the accused from leaving the country as the word “shall” is used in the amendment.

Compliance with International Human Rights Standards

1. The ambiguity and broadness surrounding the wording used in section 3 of the Sedition Act 1948 as to what constitutes “seditious tendency” are in breach of the requirement for precision to be incorporated into laws restricting freedom of expression.
2. The vague wording – “likely” and “appears” used in section 10 of the Act also offends the requirement for precision to be embodied in the legal provisions restricting the right to freedom of expression.
3. The absence of clearly demarcated harm under sections 3, 4, and 4A of the Act also offends the requirement for the restrictions to be proportionate to achieve their protective function and the interest meant to be protected.
4. Amendments to section 4(1) of the Act which abolished fines or imprisonment for a term not exceeding three years for a first offence and introduced a minimum of three years and a maximum of seven years imprisonment upon conviction are in breach of the principle of proportionality which should also be observed by judicial bodies applying the law in question. The introduction of imprisonment would compel judges to apply this heavy punishment upon conviction.
5. It is important to note that section 5A of the Act makes it mandatory for the Court to grant an order prohibiting individuals charged with sedition from leaving the country. This provision violates the principle of proportionality which should also be observed by judicial bodies applying the law in question as it strips the Court of its judicial discretion when deciding the proportionality of the restrictions.
6. The Sedition Act criminalises expression made against, among others, the Ruler. The Act defines “Ruler” as the Yang di-Pertuan Agong or Yang di-Pertua Negeri of any state in Malaysia. As a democratic country that practices the constitutional monarchy and parliamentary system, criminalisation of expression directed at public and political figures, which include the Rulers, clearly breaches the spirit of Article 19 of the ICCPR.
7. The United Nations High Commissioner for Human Rights, in responding to the amendments made to the Act in 2015, observed that:

“The new provisions would seriously undermine the freedom of expression and opinion in the country, in breach of Malaysia’s Federal Constitution and its international human rights obligations.”⁷³

Recommendation

The Sedition Act be repealed.

The Printing Presses and Publications Act 1984

1. The Printing Presses and Publications Act 1984 (PPPA) was enacted to regulate the use of printing presses and the printing, importation, production, reproduction, publishing, and distribution of publications and criminalise publications of materials deemed undesirable.

2. Section 3(1) of the PPPA imposes a strict condition where the ownership and possession of printing presses requires a licence. Section 3(1) reads:

“No person shall keep for use or use a printing press unless he has been granted a licence under subsection (3).”

3. Section 3(3) of the Act empowers the Minister to grant, refuse any application for such licence, revoke, or suspend such licence at any time indefinitely. Section 3(3) states:

“The Minister may grant to any person a licence to keep for use or use a printing press and he may refuse any application for such licence or may at any time revoke or suspend such licence for any period he considers desirable.”

4. Furthermore, section 5(1) of the PPPA mandates a permit be obtained for printing, import, publication, sale, circulation or distribution of any newspaper. Section 5(1) states:

“No person shall print, import, publish, sell, circulate or distribute, or offer to publish, sell, circulate or distribute, any newspaper printed in Malaysia or Singapore unless there has been granted by the Minister in respect of such newspaper a permit under paragraph 6(1)(a) or (b).”

⁷³ ‘Malaysia: Draft anti-terror and sedition laws seriously undermine freedom of expression and opinion – Zeid’, United Nations Human Rights Office of the High Commissioner, 9 April 2015, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15810&LangID=E>, accessed 8 November 2018

5. Under section 6(2) of the PPPA, the Minister is empowered to issue, revoke, or suspend the permit for any period he/she deems fit. Section 6(2) states:

“The Minister may at any time revoke or suspend a permit for any period he considers desirable.”

6. It is noteworthy that after amendments made to the Act in 2012, licences and permits are granted once and no longer need to be renewed annually.

7. Section 7(1) of the PPPA grants the Minister absolute power to ban any publication which he/she deems undesirable. Section 7(1) describes undesirable publications as:

“...any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest...”

8. As regards imported publications, section 9(1) of the Act empowers the Minister to refuse the importation of publication deemed undesirable of the grounds of public order, morality, security, public interest, or national interest. Section 9(1) reads:

“Without prejudice to anything in this Act, the Minister may refuse the importation into Malaysia or withhold delivery or return to the sender thereof outside Malaysia any publication which he is satisfied contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is likely to be contrary to any law or is otherwise prejudicial or is likely to be prejudicial to public interest or national interest.”

Compliance with International Human Rights Standards

1. The power given to the Minister to grant, refuse any application for a licence to possess or use a printing press, revoke, or suspend such licence at any time for an indefinite period of time violates the principle of proportionality which should also be observed by administrative bodies applying the law in question.
2. The power given to the Minister to ban any publication which he/she deems undesirable and the absence of judicial review to challenge his/her power clearly violate one of the conditions set out in Article 19(3) of the ICCPR – the

requirement which mandates that laws restricting freedom of expression not confer absolute discretion for the imposition of such restrictions.

3. The absence of a clear definition or explanation as to what constitutes undesirable publications offends the requirement for precision to be prescribed in laws restricting freedom of expression.
4. The failure of the provisions of sections 7(1) and 9(1) of the PPPA to clearly demonstrate the stipulated threats which the restriction intends to address also offends the requirement for laws restricting freedom of expression to be proportionate to achieve their protective function and the interest meant to be protected.
5. It is to be noted that at the Universal Periodic Review which took place on 24 October 2013, States participating in the review recommended that the PPPA be reviewed (repealed or amended) in order to ensure the full realisation of the right to freedom of expression.⁷⁴
6. In emphasising the role of the media in realising the right to freedom of expression, the House of Lords in the case of *McCartan Turkington Breen v Times Newspaper Ltd* held that:

*'The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring.'*⁷⁵

Recommendations

1. The PPPA be repealed. This recommendation is in consonance with the position taken by the Centre for Independent Journalism (CIJ). In an interview with Director of CIJ Sonia Randhawa, she observes that:

"The PPPA only covers print media. The reasons behind licensing and regulation of the airwaves are because they involve the use of a finite, public resource. Neither of those conditions apply to print media. We do not argue that there is no case for the restriction of printed materials, but these should be on grounds clearly defined in law, and be based on narrow exceptions, where harm is done to the exception. The exceptions should be consistent with the idea that freedom of expression is a right, and grounded in international standards. It should also be consonant with the idea that printed material requires effort to obtain and absorb - few people accidentally read a book. Thus, none of the legitimate restrictions for freedom of expression implies a licensing system for printed material."

⁷⁴ Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Malaysia, Universal Periodic Review, Twenty-fifth session', 4 December 2013, A/HRC/25/10

⁷⁵ *McCartan v Times Newspaper Ltd* [2001] ac 277, para 1

2. This position is also affirmed by civil society groups working on freedom of association and peaceful assembly, protection of human rights defenders, press freedom, freedom of expression, and ratification of international treaties/engagement with UN Special Procedures. In a joint statement submitted to the Institutional Reform Committee set up by the new Pakatan Harapan government on 4 June 2018, they articulated that:

*“A repeal of this former colonial law is long overdue. Media companies, publishers and printers are already **registered** as business under the Companies Commission of Malaysia and are already subject to a host of laws related to operations, defamation, advertising, employment and criminal offence under the Penal Code. In places like Indonesia and Thailand, publishers are only required to register their businesses, and in some cases, required to submit copies of their publications for archival/library use (could be placed under the Malaysian National Library Act 1972 or the National Archives Act 2003).”*

3. An independent media council consisting of media practitioners, civil society representatives, and members of the public be established to regulate media owners, publishers, editors, and journalists and set standards that should be complied with by all media practitioners. One example close to Malaysia is the Indonesian Press Council, established pursuant to the 1999 Press Law, that is made up of journalists, media owners, and members of the public (albeit selected by journalists and media owners) that serves both as a means to advocate for free speech as well as a swift dispute resolution mechanism.⁷⁶
4. Provisions dealing with imported publications can be enacted separately to mirror the provisions of the Control of Imported Publications Act 1958 (an Act that was in force prior to the enactment of the PPPA).

The Official Secrets Act 1972

1. The Official Secrets Act 1972 (OSA) was enacted in 1972 to deal with the protection of official secrets.⁷⁷ It covers two broad heads of offences:
 - i) disclosure of ‘official secrets’; and
 - ii) spying.

⁷⁶ See <https://accountablejournalism.org/press-councils/Indonesia> (Last accessed: 10.9.2018) that provides an overview of the Council, and an article on the Human Rights Watch website by Andreas Harsono, HRW’s Indonesia researcher who writes favourably of the role of the press council though cautioning that it must be accompanied by other more meaningful reforms, “Press councils: the Indonesian experience” (20.6.2012), at <https://www.hrw.org/news/2012/06/20/press-councils-indonesian-experience> (Last accessed: 10.9.2018)

⁷⁷ Preamble to the Official Secrets Act 1972

2. The OSA uses two descriptive terms for classified information – ‘official secret’ and ‘official document’ – but does not provide a substantive definition for either.
3. Apart from the Schedule to the Act, there is no description of, or prescribed method to identify, the information that falls under those two terms.
4. Section 2(1) of the OSA simply provides a procedural mechanism for marking official secrets and makes an ‘official secret’ of anything that is classified as such by a Minister or appointed public officer. Official secret under section 2 is described as:

“...means any document specified in the Schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as “Top Secret”, “Secret”, “Confidential” or “Restricted”, as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under section 2B;”
5. As regards declassification of official secrets, section 2C of the OSA states:

“A Minister or public officer charged with any responsibility in respect of any Ministry, department or any public service or the Menteri Besar or the Chief Minister of a State or the principal officer in charge of the administrative affairs of a State may, at any time, declassify any document specified in the Schedule or any official document, information or material as may have been classified and upon such declassification, the said document, information or material shall cease to be official secret.”
6. It is important to note that while section 2C of the OSA provides for the declassification of official secrets, it does not prescribe a substantive right, or lay out a procedural mechanism, for individuals to apply for such declassification.
7. The OSA essentially provides the following:
 - i) every piece of information in the public service is an official document;
 - ii) any official document is liable to be classified as an ‘official secret’; and
 - iii) the executive branch’s classification cannot be questioned by the courts where a certificate of conclusive evidence is issued.
8. The OSA therefore vests full possession and control of government information in the hands of the executive. It gives the executive the sole and unfettered discretion to decide which piece of information within the public service to turn into an official secret; but since every document in the public service is nevertheless an ‘official document’ under the OSA, even the documents that

the executive chooses not to expressly mark as an official secret is, by a strict reading of the Act, subject to the restrictions on possession and use imposed on official documents.

9. Section 8(1) of the OSA criminalises possession as well as disclosure of documents classified as official secret. Furthermore, the OSA criminalises both primary and secondary disclosures of classified information. Section 8 reads:

“If any person having in his possession or control any official secret or any secret official code word, countersign or password which – ...he shall be guilty of an offence punishable with imprisonment for a term not less than one year but not exceeding seven years.”

10. This means that the parties involved in the original disclosure as well as subsequent parties who receive, possess, and disclose the information are subject to criminal penalties under the OSA.
11. Conviction under the OSA carries an imprisonment for a term not less than one year but not exceeding seven years.

Compliance with International Human Rights Standards

1. The absence of a clear definition of what constitutes official secret and substantive right or a procedural mechanism for individuals to apply for declassification of official secret are in breach of the condition stipulated in Article 19(3) of the ICCPR which requires that laws restricting freedom of expression be precise.
2. The absence of clearly demarcated harm which the provisions of the OSA intend to target also offends the requirement for the restrictions to be proportionate to achieve their protective function and the interest meant to be protected.
3. The absolute power given to the Minister to declare government documents official secret also offends the requirement which states that laws which stipulate restrictions on freedom of expression must not confer absolute discretion for the imposition of such restrictions.
4. The heavy punishments imposed on individuals convicted under the OSA violates the principle of proportionality which should also be observed by judicial bodies applying the law in question. The existence of imprisonment under the Act would compel judges to apply this punishment upon conviction.
5. It is to be noted that States participating in the Universal Periodic Review held on 24 October 2013 recommended that the Malaysian government bring the

OSA in line with the international human rights standards in order to ensure the full realisation of the right to freedom of expression.⁷⁸

Recommendations

1. The OSA should be repealed and replaced with a comprehensive freedom of information law.
2. Alternatively, the OSA should be amended to include the following:
 - i) The overriding premise should be for citizens to have maximum access to information related to public administration, and that any exceptions should be clearly articulated. Therefore, 'official secrets' should be substantively defined within the Act itself and should be precise so that only information whose disclosure would pose a serious and demonstrable threat to a legitimate protected interest such as national security, defence, and foreign relations can be classified. Such classification should remain only as long as the information continues to pose a threat to that legitimate protected interest.
 - ii) Cabinet and State Executive Council papers should not remain classified as 'official secrets' once the decisions are adopted, or alternatively, there should be a fixed-term moratorium on the secrecy of the documents, after which they should be declassified.
 - iii) The classification of 'official document' should be removed, in that there should not be criminal sanctions attached to the disclosure and possession of information from the public services that have not been labelled as 'official secrets'.
 - iv) The Act should also be amended to include a public interest exception, so that information, even if otherwise classified as an 'official secret', should nevertheless be released if there exists an overriding public interest in disclosure.
 - v) Only Ministers and designated senior public officers should be given the power to classify information, and any wilful misclassification should be penalised.
 - vi) The government's power to issue certificates of conclusive evidence for OSA classified information should be revoked.

⁷⁸ Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Malaysia, Universal Periodic Review, Twenty-fifth session', 4 December 2013, A/HRC/25/10

- vii) The Act should include a right for members of the public to request the declassification of information, and a procedure set up for doing so.
- viii) The Act should be amended to impose a review period to ensure that information classified as ‘official secrets’ are periodically reviewed to ascertain if the classification remains valid and justifiable.
- ix) All official information that is not classified as ‘official secrets’ or that has been declassified should be published/made accessible to the public, and a procedure set up to allow the public to request the release of information.
- x) The Act should specifically allow judicial review of any decision to classify information, or any refusal to declassify or release information.
- xi) Any offences relating to the possession or disclosure of official secrets should include the element of intention of wrongdoing.
- xii) Powers of ancillary enforcement given to the authorities to carry out investigations under the Act must be subject to judicial scrutiny/review, either prior to the exercise of the power or subsequent to it (in exceptional circumstances where urgent action and the element of surprise are necessary).

Penal Code (criminal defamation)

1. Sections 499, 501, and 502 of the Penal Code (Chapter XXI) criminalises acts deemed defamatory.
2. Section 299 of the Penal Code reads:

“Whoever, by words either spoken or intended to be read or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation and shall also be liable to fine of such person, is said, except in the cases hereinafter excepted, to defame that person.”
3. Section 501 of the Penal Code provides:

“Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.”

4. Section 502 of the Penal Code states:

“Whoever sells or offers for sale any printed or engraved substance, containing defamatory matter, knowing that it contains such matter, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.”
5. The provisions of sections 499, 501, and 502 however do not specify what constitutes a serious case of defamation.
6. Section 499 of the Penal Code also criminalises defamation of a dead person (not permitted in the civil law of defamation), company, or association.
7. Under sections 499, 501, and 502 of the Penal Code, criminal defamation carries a prison sentence up to two years or a fine or both. As regards fines, the law does not specify the limit on the maximum amount of fine that can be imposed.

Compliance with International Human Rights Standards

1. The absence of a clear definition or explanation as to what constitutes a serious case of defamation does not comply with the requirement that restrictions to ensure respect for reputation of others must be only applied in the most serious of cases.
2. The absence of a clear definition or explanation as to what constitutes a serious case of defamation also offends the requirement for precision to be prescribed in laws restricting freedom of expression.
3. The existence of imprisonment as a punishment for criminal defamation is arbitrarily harsh and therefore constitutes a violation of the aims and objectives of Article 19 of the ICCPR.
4. It is noteworthy that in a dialogue organised by the Human Rights Council with the Special Rapporteur on the situation of human rights defenders, Armenia, as one of the concerned countries present, noted with concern the use of defamation laws to silence human rights defenders.⁷⁹

Recommendation

Chapter XXI of the Penal Code dealing with criminal defamation should be repealed. This position is in line with the UNHRC’s recommendation.

⁷⁹ ‘Human Rights Council holds interactive dialogue on human rights defenders and on torture’, United Nations Human Rights Office of the High Commissioner, 1 March 2018, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22740&LangID=E>, accessed 20 February 2019

Furthermore, Malaysia has a sufficient civil defamation law, namely the Defamation Act 1957 (Act 286) (Revised 1983), that can be applied to address issues surrounding the protection of reputation of others.

Communications and Multimedia Act 1998

1. The Communications and Multimedia Act 1998 (CMA) was enacted regulate matters pertaining to the converging communications and multimedia industries. It also provides for the criminalisation of expressions made online which are deemed offensive.

2. Section 3(3) of the CMA provides that there will be no censorship of the Internet. Section 3(3) reads:

“Nothing in this Act shall be construed as permitting the censorship of the Internet.”

2. It is important to note that despite the guarantee embodied in section 3(3) of the CMA, both sections 211(1) and 233 of the CMA are widely worded where they prohibit “indecent, obscene, false, menacing, or offensive” communications that are published or communicated with the “intent to annoy, abuse, threaten or harass any person”.

3. Section 211(1) of the CMA states:

“No content applications service provider, or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person.”

4. Section 233(1) of the CMA provides:

“A person who –

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

(i) makes, creates or solicits; and

(ii) initiates the transmission of, any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person; or
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(b) initiates a communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without

disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address,

commits an offence.”

5. What constitutes “indecent, obscene, false, menacing, or offensive” and “intent to annoy, abuse, threaten or harass any person” both under sections 211 and 233 of the CMA is not clearly defined. The harm these provisions intend to target is also not clearly demarcated.
6. Offences under sections 211 and 233 of the CMA carry heavy punishments – a fine not exceeding RM50,000.00 or imprisonment for a term not exceeding one year.
7. Additionally, a person convicted under section 233 shall also be liable to a further fine of RM1,000.00 for every day during which the offence is continued after conviction.

Compliance with International Human Rights Standards

1. The ambiguity and broadness surrounding the wording used in sections 211 and 233 of the CMA are in breach of the requirement for precision to be prescribed in laws restricting freedom of expression.
2. The absence of clearly demarcated harm which the provisions intend to target also offends the requirement for the restrictions to be proportionate to achieve their protective function and the interest meant to be protected.
3. The heavy punishments imposed on individuals convicted under sections 211 or 233 of the CMA also violate the principle of proportionality which should also be observed by judicial bodies applying the law in question. The existence of imprisonment and a hefty fine would compel judges to apply these harsh punishments upon conviction.
4. It is important to note the position expressed by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye:

“The States parties to the Covenant chose to adopt the general phrase “through any other media” as opposed to an enumeration of then-existing media. Partly on this basis, international mechanisms have repeatedly acknowledged that the protections of freedom of expression apply to activities on the Internet.”⁸⁰

⁸⁰ ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye’, Human Rights Council, 22 May 2015, A/HRC/29/32, para. 26

Recommendation

Sections 211 and 233 of the CMA be repealed.

Film Censorship Act 2002

1. The Film Censorship Act 2002 (FCA) was legislated to deal with matters related to censorship of films deemed obscene or against public decency.
2. Section 5(1) of the FCA criminalises possession, custody, control, ownership, circulation, exhibition, distribution, display, manufacturing, production, sale, or hire of any film or film-publicity material which is obscene or against public decency. Section 5(1) provides:

“No person shall –

(a) have or cause himself to have in his possession, custody, control or ownership; or

(b) circulate, exhibit, distribute, display, manufacture, produce, sell or hire,

any film or film-publicity material which is obscene or is otherwise against public decency.”

3. The FCA however does not define what constitutes “obscene” and “against public decency.”
4. Conviction under section 5(1) of the FCA carries a fine of not less than RM10,000.00 and not more than RM50,000.00 or to imprisonment for a term not exceeding five years or to both.
5. Section 6(1) of the FCA criminalises possession, custody, circulation, exhibition, distribution, display, manufacturing, production, sale, or hire any film or film-publicity material which has not been approved by the Board of Censors established under section 4 of the FCA. Section 6(1) reads:

“No person shall –

(a) have in his possession or in his custody or under his control; or

(b) circulate, exhibit, distribute, display, manufacture, produce, sell or hire,

any film or film-publicity material which has not been approved by the Board.”

6. In respect of possession, custody, circulation, exhibition, distribution, display, manufacturing, production, sale, or hire of film, a person convicted under section 6(1) of the FCA is liable to a fine of not less than RM5,000.00 and not

more than RM30,000.00 or to imprisonment for a term not exceeding three years or to both.

7. As regards possession, custody, circulation, exhibition, distribution, display, manufacturing, production, sale, or hire of film-publicity material, conviction under section 6 carries a fine of not less than RM1,000.00 and not more than RM10,000.00.

8. Section 21(1) of the FCA provides the right to appeal to the Appeal Committee against the decision made by the Board of Censors. Section 21(1) provides:

“The owner of any film or film-publicity material who is aggrieved by any decision of the Board may, within thirty days from the date on which he is notified of the decision and on payment of the prescribed fee, appeal to the Appeal Committee by lodging with the Secretary a written notice of appeal.”

9. However, pursuant to section 23(2) of the FCA, the decisions made by the Appeal Committee is final and not subject to judicial scrutiny. Section 23(2) provides:

“The decision of the Appeal Committee shall be final and shall not be questioned in any court of law.”

10. The powers of the Minister in charge of film censorship are provided for under Chapter V of the FCA (sections 25(1), 26, 27, and 28). The provisions under Chapter V confers absolute power to the Minister to direct, prohibit, regulate, and exempt matters related to film censorship.

11. Section 25(1) of the FCA states:

“The Minister may issue to the Board or the Appeal Committee directions of a general character consistent with the provisions of this Act as to the policy of the Government relating to public exhibition of films and film-publicity materials.”

12. Section 26 of the FCA provides:

“Notwithstanding any other provisions of this Act, if the Minister is of the opinion that the exhibition, display, distribution, possession, circulation or sale of any film or any film-publicity material would be contrary to public interest, he may, in his absolute discretion, by order published in the Gazette, prohibit the exhibition, display, distribution, possession, circulation or sale of that film or film publicity material.”

13. Section 27 of the FCA reads:

“The Minister may make such regulations as may be expedient or necessary for the carrying out of the provisions of this Act, including regulations prescribing –

- (a) the manner for submitting films and film-publicity materials to the Board for the purpose of censorship;*
- (b) fees for any matter under this Act;*
- (c) the classification of films;*
- (d) the procedure in relation to the disposal of unclaimed films;*
- (e) offences which may be compounded.”*

14. Section 28 of the FCA provides:

“The Minister may, subject to any condition that he may impose –

- (a) exempt any film or class of films, including those which are sponsored by the Federal Government pursuant to a treaty, agreement or arrangement to which the Federal Government is a party, from the application of any of the provisions of this Act or regulations made under this Act; and*
- (b) if he is satisfied that it would not be contrary to the public interest or to the interest of the country to do so, exempt any person or any film or film-publicity material from any provisions of this Act or regulations made under this Act.”*

15. Section 48 of the FCA provides that decisions made by the Minister are not subject to judicial oversight. Section 48 reads:

“No decision of the Minister, the Board or the Appeal Committee under this Act or any regulations made under this Act shall be subject to appeal or review by any court on any ground.”

Compliance with International Human Rights Standards

1. The ambiguity and broadness surrounding the wording used in sections 5(1) and 6(1) of the FCA are in breach of the requirement for precision to be prescribed in laws restricting freedom of expression.
2. The absence of clearly demarcated harm which the provisions intend to target also offends the requirement for the restrictions to be proportionate to achieve their protective function and the interest meant to be protected.

3. The absolute power given to both the Appeal Committee and Minister to decide matters related to film censorship offends the requirement of Article 19(3) which provides that laws which stipulate restrictions on freedom of expression must not confer absolute discretion for the imposition of such restrictions.
4. In addressing the issue of prior censorship, the Special Rapporteur in the field of cultural rights, Farida Shaheed, emphasised that:

“A system whereby content automatically requires official clearance before it can be released would be unacceptable, as its harm to freedom of artistic expression and creativity would by far outweigh the benefit of its goals. In countries where prior censorship bodies exist, the immediate abolition of these bodies should be envisaged, as regulating access for children and youth can best be implemented through rating and classification procedures.”⁸¹

Recommendation

1. The FCA be amended:
 - i) Sections 5(1) and 6(1) of the FCA be amended to include a clear definition of what constitutes “obscene” and “against public decency.”
 - ii) Directions, prohibition, regulations, and exemptions made by the Minister in respect of film censorship be clearly and precisely worded.
 - iv) The harm which the FCA intends to address in order to achieve its protective function be clearly spelled out.
 - v) A provision for decisions made by the Appeal Committee and Minister to be subject to judicial oversight be included.

Prevention of Terrorism Act 2015

1. The Prevention of Terrorism Act 2015 (POTA) was legislated to address matters related to the prevention of the commission or support of terrorist activities in a foreign country and the control of individuals involved in such activities.
2. It is important to note that section 4(3) of the POTA provides:

“No person shall be arrested and detained under this section solely for his political belief or political activity”.

⁸¹ ‘Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: The right to freedom of artistic expression and creativity’, Human Rights Council, 14 March 2013, A/HRC/23/34, para. 61

2. Furthermore, section 4(6) of the POTA defines “political belief or political activity” as:

“...engaging in a lawful activity through –

- (a) *the expression of an opinion or the pursuit of a course of action made according to the tenets of a political party that is at the relevant time registered under the Societies Act 1966 [Act 335] as evidenced by –*
 - (i) *membership of or contribution to that party; or*
 - (ii) *open and active participation in the affairs of that party;*
- (b) *the expression of an opinion directed towards any government in Malaysia; or*
- (c) *the pursuit of a course of action directed towards any government in Malaysia.”*

3. The requirement that the political activity must be “lawful” effectively renders the protection of the right to freedom of speech obsolete given the existence of numerous laws that permit the government to restrict activities, particularly public assemblies and associations, as being unlawful.

Compliance with International Human Rights Standards

1. The ambiguity surrounding the wording used in section 4(6) of the POTA breach the requirement for precision to be prescribed in laws restricting freedom of expression.
2. The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism affirms that:

“States are encouraged to use precise and defined terminology when quasi-legislative requirements are being advanced by Security Council resolutions: terms such as “incitement” and “material support” must be given precise legal meaning, consistent with the principles of legality and proportionality as the absence of such precision creates conditions under which counter-terrorism norms can be abused domestically, undermining human rights protections for individuals and groups.”⁸²

3. The ambiguous wording of section 4(6) of the Act which requires political activities to be “lawful” would also result in rendering the exercise of the right

⁸² Special Rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/73/361 (3 September 2018)

to freedom of expression illusory given the existence of numerous laws that deem certain expressions unlawful.

4. The absence of clearly demarcated harm which the provisions intend to target also offends the requirement for the restrictions to be proportionate to achieve their protective function and the interest meant to be protected.
5. The United Nations High Commissioner for Human Rights noted with concern the passage of the POTA which allows indefinite detention without trial:

“Silencing dissent does not nurture social stability, but an open democratic space does. Curtailing the legitimate exercise of human rights in the name of fighting terrorism has been shown, time and again, to backfire and to only lead to festering discontent and a strong sense of injustice.”⁸³

Recommendation

Section 4(6) of the POTA which defines “political belief or political activity” be amended by removing the existing definition. A new, clear, and precise definition which incorporates the rights to freedom of speech, assembly and association be included to replace the existing definition.

Anti-Fake News Act 2018

1. The Anti-Fake News Act 2018 (AFNA) was passed to criminalise the dissemination of various forms of information such news, data, or reports – information deemed to be fake news.
2. Section 2 of the AFNA defines “fake news” as:

“...includes any news, information, data and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or any other form capable of suggesting words or ideas;”
3. It is important to note that the AFNA’s Explanatory Statement provides that the Act intends to address issues surrounding fake news by putting in place measures to curb the dissemination of fake news. The Explanatory Statement further states the Act seeks to deal with the misuse of publication medium and protect the public from the proliferation of fake news.

⁸³ ‘Malaysia’s anti-terror and sedition laws ‘curtail’ human rights, warns UN rights chief’, UN News, 9 April 2015, available at <https://news.un.org/en/story/2015/04/495512-malysias-anti-terror-and-sedition-laws-curtail-human-rights-warns-un-rights>, accessed 20 February 2019

4. Section 4(1) of the AFNA provides:

“Any person who, by any means, maliciously creates, offers, publishes, prints, distributes, circulates or disseminates any fake news or publication containing fake news commits an offence...”

5. Furthermore, section 5(1) of the AFNA states:

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

6. Not only does the AFNA criminalise the act of creating, offering, publishing, printing, distributing, circulating, or disseminating fake news,⁸⁴ it also criminalises the act of providing financial assistance for the creation, offer, publication, printing, distribution, circulation, or dissemination of fake news.⁸⁵

7. Conviction for creating, offering, publishing, printing, distributing, circulating, or disseminating fake news carries a fine not exceeding RM500,000.00 or imprisonment for a term not exceeding six years or both. Conviction for these offences also carries a further fine not exceeding RM3,000.00 for every day the offence continues to be committed after conviction.

8. A fine not exceeding RM500,000.00 or imprisonment for a term not exceeding six years or both will be imposed on individuals convicted for providing financial assistance for the creation, offer, publication, printing, distribution, circulation, or dissemination of fake news.

9. Section 6 of the AFNA requires individuals who possess, control, or have in custody materials containing fake news to remove such materials failing which they will be liable to a fine not exceeding RM1,000.00 and a further fine not exceeding RM3,000.00 for every day the offence continues to be committed after conviction.

10. Section 6(1) reads:

“It shall be the duty of any person having in his possession, custody or control any publication containing fake news to immediately remove such publication after knowing or having reasonable grounds to believe that such publication contains fake news.”

⁸⁴ Section 4(1) of the AFNA

⁸⁵ Section 5(1) of the AFNA

11. Section 6(2) provides:

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."

12. Pursuant to section 3(1) of the AFNA which provides for extra-territorial application of the Act, the government is empowered to criminalise acts specified under the Act which are committed outside Malaysia. Section 3(2) of the Act provides that these acts concern Malaysia or a Malaysian citizen.

13. Section 3(1) states:

"If any offence under this Act is committed by any person, whatever his nationality or citizenship, in any place outside Malaysia, he may be dealt with in respect of such offence as if the offence was committed in any place within Malaysia."

14. Section 3(2) further states:

"For the purposes of subsection (1), this Act shall apply if, for the offence in question, the fake news concerns Malaysia or the person affected by the commission of the offence is a Malaysian citizen."

Compliance with International Human Rights Standards

1. The purposes of the AFNA which are stated in its Explanatory Statement – to address issues surrounding fake news by putting in place measures to curb the dissemination of fake news, seek to deal with the misuse of publication medium, and protect the public from the proliferation of fake news – do not comply with the requirement of Article 19(3) which aims at protecting (i) the rights or reputations of others; (ii) to protect national security or (iii) public order, or public health or morals.
2. The ambiguity and broadness surrounding the wording used in section 2 of the AFNA to define what constitutes fake news is in breach of the requirement for precision to be prescribed in laws restricting freedom of expression. As a result, individuals are prevented from determining what type of expression is permissible and vice versa.
3. The absence of clearly demarcated harm which sections 3, 4, 5, and 6 of the Act intend to target also offends the requirement for the restrictions to be proportionate to achieve their protective function and the interest meant to be protected.

4. The heavy and harsh punishments imposed on individuals convicted under the Act also violate the principle of proportionality which should also be observed by judicial bodies applying the law in question. The existence of imprisonment and a hefty fine would compel judges to apply these punishments upon conviction. The imposition of these heavy and harsh punishments will undoubtedly result in widespread self-censorship.
5. It is noteworthy that a joint declaration was adopted in March 2017 by the international special rapporteurs working on freedom of expression and/or the media where it cautioned 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...and should be abolished.”⁸⁶

Recommendation

The AFNA be repealed.

Freedom of Information (State of Selangor) Enactment 2011 and Penang Freedom of Information Enactment 2010

1. A few years after the general elections were held in 2008, both Selangor and Penang enacted the state-level freedom of information enactments. Selangor gazetted the Freedom of Information (State of Selangor) Enactment 2011 (Selangor FOI Enactment) in August 2011, while Penang gazetted the Penang Freedom of Information Enactment 2010 (Penang FOI Enactment) in February 2012. These enactments were legislated to provide for public disclosure of government information.
2. It is noteworthy that while the Selangor and Penang state-level Freedom of Information Enactments are quite similar, they differ in certain respects. (See table below.)
3. The Penang FOI Enactment notably has a tighter time limit for the state to respond to FOI requests compared to the Selangor FOI Enactment.

⁸⁶ The United Nations (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, *Joint Declaration on “Fake News”, Disinformation and Propaganda*, para. 2(a) (March 3, 2017).

	SELANGOR FOI ENACTMENT	PENANG FOI ENACTMENT
SIMILARITIES	<ol style="list-style-type: none"> 1. Appoints information officers and the State Information Board 2. Gives the right for people to make FOI requests 3. Rejections can be appealed within 21 days 4. State government has the right to declassify information 5. Partial disclosure is possible 	<ol style="list-style-type: none"> 1. Appoints information officers and the Appeals Board 2. Gives the right for people to make FOI requests 3. Rejections can be appealed within 21 days 4. State government has the right to declassify information 5. Partial disclosure is possible
MAIN DIFFERENCES	<ol style="list-style-type: none"> 1. 30 days to respond, 7 days if life or liberty threatened 2. Must state the reasons for the refusal of FOI request 3. Automatic declassification after 20 years 4. State information board must prepare annual report of usage 5. Destroying information is an offence 6. Appeal decisions can be contested again at a higher court. 7. Can fine people up to RM50,000 and/or 5 years' jail for making false application, destroying information, wilfully obstructing access 	<ol style="list-style-type: none"> 1. 14 days to respond, 48 hours if life or liberty threatened 2. Application can automatically be transferred if the information is elsewhere 3. Long list of specified confidential information categories. 4. Appeal decisions are incontestable. 5. No criminal offence embedded.

4. Even though the mandated time to respond to FOI requests is longer in the Selangor FOI Enactment, this law as drafted does feature more clauses that prioritise the public's right to know when compared to the Penang FOI Enactment. This is reflected in the provisions of section 6(1) and 7(3) of the Selangor FOI Enactment.
5. Section 6(1) of the Selangor FOI Enactment provides:

“Any person who applies to access information shall make an application to the department in a form as prescribed by the State Authority provided that where any such application does not fully adhere to the prescribed

form, the application may not be refused by the Information Officer for that reason."

6. Section 7(3) of the Selangor FOI Enactment reads:

"If a request for information in an application is unclear, the department shall use all reasonable efforts to obtain clarification from the applicant and this shall not extend the prescribed time stated in subsection (1) and (2) to provide the written confirmation to the applicant."

7. In terms of implementation, the Selangor FOI Enactment is also more accessible because of the lower fees imposed for citizens to make a freedom of information request.

8. The Selangor FOI Enactment criminalises the act of destroying government information under section 18(1). Section 22(1) of the Selangor FOI Enactment compels the government to prepare an FOI usage report for submission to the legislative assembly every year.

9. Section 18(1) of the Selangor FOI Enactment provides:

"It is an offence if a person –

- (a) uses any information obtained under this Enactment contrary to the reason and purpose of such application is made if the effect is detrimental;*
- (b) gives false information in the form under subsection 6(1);*
- (c) destroys, erases, alters, damages, conceals, blocks or falsify any information within the control of any department with the intention of preventing disclosure of any information or any part thereof or obstructing access to any information;*
- (d) knowingly gives incorrect or misleading information to an applicant; or*
- (e) wilfully obstructs or denies access to information that is not otherwise exempted."*

10. Section 22(1) of the Selangor FOI Enactment reads:

"The State Information Board shall prepare and submit a report annually to the Legislative Assembly containing such information prescribed by the Legislative Assembly, which shall include at the minimum in respect of the year to which the report relates:

- (a) *the total number of applications for information made to the departments;*
- (b) *the actions taken by each department in respect of every application received for the year;*
- (c) *the total number of applications which were refused by the department, the reasons for such refusals and the total number of times that each of the exemptions in Part IV or any other provisions of this Enactment were invoked as the basis for such refusals;*
- (d) *the total number of occurrences whereby the information requested could not be located and details of the steps taken to locate the same;*
- (e) *the number of appeals made during the year, the outcome of such appeals and the reasons for the appeals which did not result in a disclosure of the information requested;*
- (f) *the average number of days taken to process the applications for information of different types;*
- (g) *the applicable rates or range of fees imposed for requests or based on the various types of requests, whichever is applicable, the average amount of fees charged per request and the total amount of fees imposed;*
- (h) *the Information Officer and his department's activities pursuant to section 3(2); and*
- (i) *any recommendations to improve the process of providing access to information, and the Legislative Assembly shall be required to publish the consolidated reports received from all departments.*

11. The Penang FOI Enactment has a long list of exceptions as compared to the Selangor FOI enactment, spelling out what should be confidential information. Under section 11(1)(f), information related to State economy is classified as exempt information under the Penang FOI Enactment. Section 11(1)(f) states:

“information affecting the State economy information is exempt information if its disclosure, under this Enactment would, or would be likely to, prejudice:

- (i) *the economic interests of the State; or*
- (ii) *the financial interests of any administration in the State;”*

12. Section 14(c) of the Selangor FOI Enactment classifies “information where if disclosed would, or would be likely to cause serious prejudice to the effective formulation of policy or development of the State Government” as exempt

information. It is important to highlight that these exempt information under the Penang and Selangor FOI Enactments do not demonstrate the threat the information poses if disclosed.

13. It bears reminding that while the other states do not have FOI enactments, these state-level enactments are themselves limited as they do not cover federal agencies. The existing federal secrecy law, the OSA, also poses obstacles to the full application of these FOI enactments given the fact that federal laws supersede state laws.

Compliance with International Human Rights Standards

1. The Penang FOI Enactment's long list of exceptions breaches the principle which requires FOI laws incorporate limited exceptions. Imposing a long list of exceptions runs the risk of undermining the full exercise of the right to information.
2. The absence of clearly demarcated harm which the provisions of both FOI Enactments (list of exceptions) intend to target also offends the requirement for the restrictions to be proportionate to achieve their protective function and the interest meant to be protected.
3. Restricting access to information in relation to bodies tasked with governing both Penang and Selangor also breaches the requirement which states that exceptions must not be imposed to conceal the functioning of an institution.
4. The absolute power given to the Board of Appeal to review decisions to reject FOI applications where such decisions are not subject to judicial scrutiny⁸⁷ runs against the requirement of Article 19(3) which provides that laws which stipulate restrictions on freedom of expression which includes freedom of information must not confer absolute discretion for the imposition of such restrictions.
5. The time mandated to respond to FOI requests in the Selangor FOI Enactment (30 days for matters not related to the life or liberty of an individual and 7 days for matters related to the life or liberty of an individual) falls short of international standard⁸⁸ which requires 20 working days or less. Imposing long timelines to respond to FOI requests is not in line with the principle which requires States to widen the legal environment to ensure that the right to information is fully realised.
6. The provisions highlighted above are in violation of the requirements spelled out in the Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media

⁸⁷ Section 13(14) of the Penang FOI Enactment

⁸⁸ Access Info Europe and the Center for Law and Democracy's *Right to Information Legislation Rating* (RTI-rating.org)

and the OAS Special Rapporteur on Freedom of Expression which was made on 26 November 1999. The requirements, among others, are:

- *“The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions.*
- *Those requesting information should have the possibility to appeal any refusals to disclose to an independent body with full powers to investigate and resolve such complaints.”*

Recommendations

1. The Penang and Selangor FOI Enactments be amended to provide clear and precise exceptions in respect of information related to bodies tasked with governing the states by spelling out specific legitimate interests such exceptions seek to protect.
2. The Penang FOI Enactment be amended to include a provision for decisions made by the Board of Appeal to be subject to judicial review.
3. Section 13(14) of the Penang FOI Enactment which provides mandated time to respond to FOI requests of 30 days for matters not related to the life or liberty of an individual and 7 days for matters related to the life or liberty of an individual be amended to 14 days and 48 hours respectively (as stipulated in the Penang FOI Enactment).

Multimedia Super Corridor Bill of Guarantees

1. The Multimedia Super Corridor Bill of Guarantees (BOG)⁸⁹ is linked to the creation of the Multimedia Super Corridor (MSC) – a special economic zone built in 1996. The Bill of Guarantees were drafted to embody the government’s commitment to providing a conducive environment for the development of MSC status companies and digital economy.
2. BOG No. 7, among others, states that:

“While the Government will not censor the Internet, this does not mean that any person may disseminate illegal content with impunity and without regard to the law. To the extent that any act is illegal in the

⁸⁹ Malaysia National ICT Initiative, "MSC Malaysia 10-Point Bill of Guarantees

physical world, it will similarly be outlawed in the online environment. Hence, laws prohibiting dissemination of, for example, indecent/obscene or other illegal materials will continue to apply.”

3. BOG No. 7, however, is not absolute as its “no censorship” internet policy is subject to numerous existing laws which allow restrictions on freedom of expression.

Compliance with International Human Rights Standards

1. It is noteworthy that the BOG serves as an initiative to foster economic success by guaranteeing, among others, freedom from internet censorship. This freedom however is seriously undermined given the application of BOG No. 7 which allows for expression to be restricted by the existing laws which do not conform to the international human rights standards.
2. The application of BOG No. 7, which allows for expression to be restricted by the existing laws which violate the international human rights standards, is in breach of the resolution on the promotion, protection, and enjoyment of human rights on the Internet adopted by the Human Rights Council where it states that:

“Affirms 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, in accordance with article 19 of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights.”⁹⁰

Recommendation

BOG No. 7 be amended to remove the condition which stipulates that the “no censorship” internet policy be subject to the existing laws that are in breach of the international human rights standards.

⁹⁰ Resolution on the promotion, protection and enjoyment of human rights on the Internet, Human Rights Council, 4 July 2018, A/HRC/38/L.10/Rev.1, para. 1



The Center to Combat Corruption and Cronyism