CENTRE FOR LAW AND DEMOCRACY

Malaysia

January
2025

Media Law Reform Blueprint

Centre for Law and Democracy
info@law-democracy.org
+1 902 431-3686
www.law-democracy.org
fb.com/CentreForLawAndDemocracy
@Law_Democracy

Centre for Law and Democracy
Halifax, Nova Scotia, Canada

The Centre for Law and Democracy (CLD) is an international human rights organisation based in Canada and providing expert legal services globally. We work to promote, protect and develop those human rights which serve as the foundation for or underpin democracy, including the rights to freedom of expression, to vote and participate in governance, to access information and to freedom of assembly and association.

Email: info@law-democracy.org
Phone: +1 902 431-3686
Website: www.law-democracy.org
Facebook: fb.com/CentreForLawAndDemocracy
X: @Law_Democracy

This work is licensed under the Creative Commons Attribution-Non Commercial-ShareAlike 3.0 Unported Licence. You are free to copy, distribute and display this work and to make derivative works, provided you give credit to Centre for Law and Democracy, do not use this work for commercial purposes and distribute any works derived from this publication under a licence identical to this one. To view a copy of this licence, visit: http://creativecommons.org/licenses/by-nc-sa/3.0/.

Acknowledgements

This report was authored by Toby Mendel, Executive Director, CLD, with research support from Hanying Zhang, Nicole Lorimer and Gabrielle Gonsalves, Legal Interns, CLD. This report has been by CLD in collaboration with the International Federation of Journalists as part of its project "Strengthening Malaysia's Media for Change" (2020-2025), funded and supported by the European Commission (EC). The contents of this publication are the sole responsibility of the Centre for Law and Democracy and do not necessarily reflect the views of the European Union.

Table of Contents

Executive Summary

Malaysia has historically performed poorly in the area of freedom of expression and media freedom. However, hopes for change in this area started with the election of the Pakatan Harapan government in 2018. Following a challenging period, Pakatan Harapan put forward a strong platform for media law reform in its 2022 election manifesto, Kita Boleh, raising high hopes of progress in this area, which continued when the Unity Government was formed following those elections. Unfortunately, progress has not been as steady or rapid as some had hoped. One indication of this was the refusal of Malaysia to support almost any of the many recommendations relating to freedom of expression arising from its recent Universal Periodic Review. At the same time, the government has moved forward with a relatively progressive Media Council Bill and consultations on its promised adoption of a right to information law.

This report provides an overview of international standards on freedom of expression and media law and then provides a broad assessment of Malaysia's legal framework in this area against those standards. While it does not delve deeply into every issue, which would require a series of such reports, it does canvas broadly the different areas addressed by international standards in this area. It is in that sense that it can be styled as a "media law reform blueprint", as the title of the report suggests.

International law has, over the years, developed strong standards in the area of freedom of expression and media freedom. These comprise strong standards relating to the core nature of the right, including that it covers not only the right to express oneself but also to seek and receive information and ideas, and that it not only requires States not to interfere unduly with this right (the so-called negative aspect of the right) but also to put in place positive measures in a number of areas to protect the right and to maximise the free flow of information and ideas in society.

Freedom of expression is not, unlike some rights, absolute. International law sets out a very precise regime for restrictions on freedom of expression. These are founded on the three-part test for restrictions, namely that they be provided by law, serve a legitimate interest listed in international law and be necessary to protect that interest.

One positive obligation of States as part of the right to freedom of expression is to adopt progressive laws giving individuals a right to access information held by public authorities, or right to information laws. Some of the key features of these laws are that they should apply broadly to all information, everyone and all public authorities, they should put in place user-

friendly procedures to make and respond to requests for information, they should provide for a clear and narrow regime of exceptions, and they should provide for robust and independent administrative systems of oversight and promotion of the law.

Two international standards for media regulation are of particular importance, namely the need for regulatory bodies to be independent of government (or, to put it differently, to be protected against political interference), and the need for a key aim of regulation to be to promote media diversity. The latter should cover diversity regarding the types of media outlets (outlet diversity), guard against undue concentration of media ownership (source diversity) and, ultimately, ensure that citizens can access a wide range of content (content diversity). States also have a positive obligation to protect those who are at risk of attack due to having expressed themselves.

Digital means of communication have become ever more dominant globally, including in Malaysia, and clear standards for the regulation of digital communications have emerged in many areas and are starting to emerge in others. These include, among other things, strict limits on the imposition of blocking or filtering systems, a prohibition on requiring intermediaries to monitor their systems for illegal content, different approaches to when intermediaries become responsible for illegal content, including notice and take down systems (intermediaries need to take down illegal content when notified about it) and notice and action systems (intermediaries need to respond in good faith to allegations about illegal content). International law also protects the rights of users to take advantage of encryption and anonymisation tools, and places a positive obligation on States to promote universal access to the Internet.

The Constitution of Malaysia guarantees the right to freedom of expression in fairly broad terms, but it fails to include elements of international guarantees, such as the protection not only of the right to speak but also the rights to seek and receive information and ideas. More problematically, the restrictions allowed under the Constitution go well beyond what is permitted under international law, including by protecting a number of legal regimes rather than interests, and dispensing with any notion of necessity for those restrictions.

Malaysia does poorly when it comes to independent regulation of the media, with regulatory actors under all of the key historic pieces of legislation either being government ministries or bodies which are not independent. This may change with the new Media Council Bill, which envisages a far more independent Council. In terms of diversity, Radio Television Malaysia fails to meet the standards of a true public service broadcaster. Malaysia does, however, have a system for licensing commercial broadcasters under the Communications and Multimedia

Act 1998, although it could be improved by adding criteria for issuing licences, along with clearer procedures for the licence application process, into the legislation. There is also a system for licensing community radios, although it is not clear how many such radios have in fact been authorised. The rules on concentration of ownership apply only in the context of broadcasting and no dedicated set of ownership rules for the media has been developed.

Malaysia has, recently and problematically, moved to license major social media platforms, contrary to international standards in this area. It has also very recently adopted legislation in the form of the Online Safety Bill to address harmful content online. While this follows similar developments in a number of other jurisdictions, the Bill does not provide a good definition of harmful content and fails to take a systematic approach to regulating such content, instead relying only on a piecemeal take down approach.

The whole approach to regulating the print media, as set out in the Printing Presses and Publications Act 1984, is very outdated and fails to conform in numerous ways to international standards. On the other hand, the new Media Council Bill, which is still before Parliament, offers a more modern approach to the issue of promoting professionalism in the media. While it could still be improved in many respects, it does hopefully signal a new national outlook in the area of media regulation.

Like many countries, Malaysia has numerous problematical restrictions on what content may be disseminated publicly in different pieces of legislation. These range from the Sedition Act 1948 and Printing Presses and Publications Act 1984, both of which should simply be repealed, to the Penal Code, Communications and Multimedia Act 1998 and other laws. Monitoring by independent civil society actors in Malaysia demonstrates that some of the more problematical restrictions remain in heavy use today. There is a need to undertake a comprehensive review of these restrictions and to amend them, as necessary, to bring them into line with international standards.

Finally, we very much welcome Malaysia's commitment to adopt a right to information law, while also urging this to be done sooner rather than later and in a way that creates a strong regime of access. Broad restrictions on sharing information in the Penal Code should be amended to bring them into line with the promised right to information law. For its part, the Official Secrets Act 1972, like the Sedition Act 1948, represents a very old-fashioned approach, in that case to protecting secrets. It should either be repealed in its entirety or fundamentally amended to bring it into line with international standards.

Introduction

The wider environment in Malaysia for freedom of expression generally and media freedom in particular has fluctuated quite dramatically in recent years, largely reflecting the rapidly changing political situation. Prior to 2018, Malaysia did very poorly on Reporters Sans Frontiers' (RSF) World Press Freedom Index, for example earning ratings of between 144th and 146th out of 180 countries globally between 2016 and 2018 (the Index comes out in April or May of each year). It then jumped 22 places to 123rd out of 180 countries in 2019, and 22 places again to 101st in 2020, before falling back to 119th in 2021.

These changes can to some extent be mapped to political developments in the country. Barisan Nasional (BN) and its predecessor, the Alliance, dominated politics in Malaysia from the time of independence in 1957, holding government for over 60 years until 2018. Over that period, BN pursued a generally repressive approach towards freedom of expression, described by the International Federation of Journalists (IFJ) as "BN's tight leash on the media",[1] resulting in Malaysia's poor rankings during their reign. In the May 2018 general elections, the Pakatan Harapan coalition won a very narrow majority, leading to the defeat of BN for the first time in post-independence history. In what some viewed as an interesting twist, Mahathir Mohamad, who had formerly led BN, was sworn in as the Pakatan Harapan coalition prime minister. The environment for media freedom improved significantly following the Pakatan Harapan victory, as reflected in Malaysia's standing in the RSF Index in 2019 and 2020.

The Pakatan Harapan government only lasted for 22 months, due to a political crisis in Malaysia from early 2020 to late 2022. A number of members of parliament – who are elected on a first-past-the-post (or constituency) basis – crossed the floor (i.e. changing their parties). A new coalition, Perikatan Nasional, was created in early 2020 and, at the end of February 2020, Muhyiddin Yassin, representing Perikatan Nasional, was appointed as prime minister. But he only ran the country until August 2021, following which there was a return to BN leadership under Ismail Sabri Yaakob of the United Malays National Organisation (UMNO) until the general elections in November 2022. Malaysia again fell on the RSF Index during this period (i.e. in the 2021 and 2022 Indexes).

[1] *Voices Under Watch: The State of Malaysia's Media 2024*, December 2024, Foreword, https://www.ifj.org/media-centre/reports/detail/voices-under-watch-the-state-of-malaysias-media-2024/category/publications.

Pakatan Harapan again won the most seats in the 2022 election, although it fell well short of getting an overall majority of seats. After obtaining support from BN and a number of other parties and coalitions, in what is known as the Unity Government, Pakatan Harapan Chairman Anwar Ibrahim was sworn in as Prime Minister on 24 November 2022, while Perikatan Nasional become the official opposition. Many observers hope that the alignment of Pakatan Harapan and BN will bring greater political stability to Malaysia. The standing of Malaysia on the RSF Index has fluctuated wildly since the election, with the country rising to its highest ever position of 73rd in 2023 but falling again dramatically to 107th position in 2024.

Pakatan Harapan's Election Manifesto, Kita Boleh

In its election manifesto, Kita Boleh, published in October 2022, just before the election,[2] Pakatan Harapan made a number of bold promises to improve respect for freedom of expression in Malaysia, including through legal reform. In section 14, on Combatting Corruption,[3] Pakatan Harapan made a commitment to adopt an access to information law, limit the application of the Official Secrets Act 1971(OSA),[4] except for "matters that can potentially threaten the security of the nation", amend the Whistleblower Protection Act 2010[5] "to allow whistleblowers to directly expose misappropriations to the media", establish a Media Council and amend the Printing Presses and Publications Act 1984.[6] The Media Council would govern the media industry so as "to standardise regulations that cover print media, broadcasting, and online media – while at the same time guaranteeing media freedom as enshrined in Article 10 of the Constitution".

Several of these commitments are repeated in section 17, on Protecting Media Freedom and Promoting Free Speech, including to establish of a media council, amend the Whistleblower Protection Act 2010, adopt an access to information law and limit the application of the OSA.

---

[2] Available at https://kitaboleh.my/en/home-english/.
[3] On Transparency International's Corruption Perceptions Index, which is published for the previous year around February of each year, Malaysia has recently hovered between 47th and 62nd place, with a score of between 47 and 51 (higher scores are better), from 2020 to 2023. See https://www.transparency.org/en/cpi/2023.
[4] Act No. 88 of 1972, available at https://tcclaw.com.my/wp-content/uploads/2020/12/Official-Secrets-Act-1972.pdf.
[5] Act No. 711 of 2010, available at https://www.sprm.gov.my/admin/files/sprm/assets/pdf/pendidikan/akta-711-bi.pdf.
[6] Act No. 301 0f 1984, available at https://www.moha.gov.my/images/maklumat_bahagian/PQ/Act301.pdf.

Section 17 also calls generally for "[r]eviewing and repealing draconian provisions of acts that can be abused to restrict free speech", mentioning specifically the Sedition Act 1948,[7] Communications and Multimedia Act 1998[8] and Printing Presses and Publications Act 1984. Section 19, Broadening Internet Access, also makes a commitment to "broaden high speed internet penetration to the entirety of Malaysia so that internet poverty can be eradicated".

So far, little of this has been achieved. In the Malaysia section of its World Report 2024, Human Rights Watch notes: "In his first year as prime minister, Anwar Ibrahim, a former political prisoner, largely failed to uphold his pledges to address repression and corruption."[9] According to a report published by the Centre for Independent Journalism in December 2023, incidents under the Sedition Act 1948, Printing Presses and Publications Act 1984 and certain provisions of the Communications and Multimedia Act 1998 were actually higher in the first 11 months of 2023 than in 2022, with the report noting that the Sedition Act 1948 continued to be used to "stifle opposition political voices and quell dissent".[10] And, as the IFJ noted as recently as December 2024:

> To date, the much hyped and promised media reforms to free the media of its shackles by current Prime Minister Anwar Ibrahim and his unity Madani government are yet to be delivered.[11]

However, it should be noted that the government has moved forward to adopt a Media Council Act, with a Media Council Bill being tabled in Parliament for the first reading on 12 December.[12] And concrete preparatory work has been done in terms of adopting a Right to Information (RTI) Act, with a major two-day consultation conference having been organised by the Government of Malaysia from 29-30 August.[13] At that conference, the government

---

[7] Act No. 15 of 1948, available at http://www.commonlii.org/my/legis/consol_act/sa19481969183/.
[8] Act No. 588 of 1998, available at https://www.mcmc.gov.my/en/legal/acts.
[9] Available at https://www.hrw.org/world-report/2024/country-chapters/malaysia.
[10] *A Report on the State of Freedom of Expression (FOE) in Malaysia, 2023*, Table 2, p. 7 and p. 8, https://cijmalaysia.net/wp-content/uploads/2023/12/CIJ_FoE_Report.pdf.
[11] Note 1, Foreword.
[12] See, for example, Ragananthini Vethasalam, Allison Lai and Benjamin Lee, "Malaysian Media Council Bill tabled for first reading in Parliament", The Star, 12 Dec 2024, https://www.thestar.com.my/news/nation/2024/12/12/malaysian-media-council-bill-tabled-for-first-reading-in-parliament. The Bill is available at https://www.christopherleeong.com/wp-content/uploads/2024/12/Malaysian-Media-Council-Bill-DR63-BI.pdf.
[13] The conference – titled Engagement Session on the Freedom of Information Legislation with Government Agencies, Non-Governmental Organisations (NGOs), Civil Society Organisations (CSOs) and Legal Bodies in the Central Zone of Malaysia – was organised by the Government of Malaysia from 29-30 August and held at the Putrajaya International Convention Centre (PICC). It discussed best practices on the right to information and collected feedback from local stakeholders on the issue. The

announced that the RTI Bill, originally scheduled to be released in the latter part of 2024, would only be released in 2025.

Universal Periodic Review

It may be noted that Malaysia has just gone through its Fourth Cycle Universal Periodic Review (UPR) before the UN Human Rights Council. The review of Malaysia was held on 25 January 2024, the Report of the Working Group on the Universal Periodic Review: Malaysia, with 348 recommendations, was adopted on 11 March 2024, and Malaysia's "views" on those recommendations (essentially its acceptance, in whole or in part, or its mere "noting" or rejection of the recommendations), set out as an Addendum to the Report, were published on 11 June 2024.[14]

Just 17 of the 348 recommendations (55.98 to 55.114) included a focus on freedom of expression or media freedom. Some were quite general (such as Recommendation 55.99: "Review, amend or abolish, within a clear time frame, legal provisions that violate or limit the right to freedom of expression and opinion, and bring them into line with international standards"). But others were more specific. These included often repeated calls to repeal or amend the Sedition Act 1948, the Communications and Multimedia Act 1998 (with some specific references to section 233), the Printing Presses and Publications Act 1984, and Penal Code provisions on offending religious sensitivities.

Malaysia only accepted one freedom of expression recommendation in full, namely 55.105: "Take the steps necessary to ensure citizens' right to freedom of expression and information in line with article 10 of the Federal Constitution within the next three years". It may be noted that this is a soft recommendation which it is easy for Malaysia to accept for two main reasons. First, it is very general in nature, apart from having a clear timeframe attached to it, such that Malaysia can claim that practically any reforms it implements represent compliance with this recommendation. Secondly, it is conditioned on compliance only with Article 10 of Malaysia's Constitution, rather than international standards (unlike the other general

author of this report attended that consultation. See, for example, media reports at https://thesun.my/malaysia-news/freedom-of-information-act-right-of-the-public-to-seek-receive-give-information-FJ12931675#google_vignette and https://international.astroawani.com/malaysia-news/freedom-information-act-right-public-seek-receive-give-information-485671.

[14] These and other documents relating to the UPR process are available at https://www.ohchr.org/en/hr-bodies/upr/my-index.

recommendation cited above), and thus not only represents a lower bar (see below) but also reflects what is already formally legally binding on Malaysia via its own legal system.

Malaysia accepted a second recommendation in part, without specifying what part, namely 55.106: "Study the possibility of strengthening the regulatory framework relevant to the promotion and protection of freedom of expression and opinion in accordance with international standards". It is not clear why Malaysia only accepted this in part, given that it only calls on the country to "study the possibility of strengthening" the legal framework and not actually to do anything concrete.

In any case, it is quite significant that, just one and one-half years into its mandate, the Government of Malaysia had already refused to accept a number of recommendations from the international community to reform the very laws which Pakatan Harapan had specifically committed to reform in its election manifesto, Kita Boleh.

Overview of Report

This report provides an overview of the legal framework for freedom of expression and of the media in Malaysia, assessed against international human rights standards, with a focus on freedom of expression. International guarantees of the right to freedom of expression are, in particular, drawn from Article 19 of the *Universal Declaration of Human Rights* (UDHR).[15] The UDHR was adopted unanimously by the United Nations General Assembly in 1948 and is generally viewed as the flagship international statement of human rights. Frequent references are also made to Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),[16] a legally binding human rights treaty ratified by 174 States.[17] Although Malaysia has neither signed nor ratified the ICCPR, it is widely viewed as an authoritative elaboration of the guarantee for freedom of expression set out in the UDHR.

This report focuses on the legal framework *per se*, rather than, for the most part, how it is applied. A number of other reports and documents delve in more detail into the way the framework has been applied, many of which are referenced in this report. The report does not claim to be comprehensive in its assessment of the legal framework for freedom of expression in Malaysia, something which would require a series of reports of this length. But

[15] United Nations General Assembly Resolution 217A (III), 10 December 1948.
[16] UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976.
[17] As January 2025. See https://indicators.ohchr.org.

it does aim to cover the key areas where reforms need to be made to Malaysian law to bring it more fully into line with international standards.

The report is divided into four main chapters, in addition to the introduction. The first, Guarantees for Freedom of Expression, focuses mainly on the key international guarantees for freedom of expression. It, in turn, is subdivided into sections looking at general international protection for this right, restrictions, the right to information, three key standards regarding media freedom – specifically the need for bodies which exercise regulatory powers over the media to be independent of government, the need for regulation of the media to include the promotion of media diversity as a key aim, and the obligation on States to prevent attacks on freedom of expression – and then a fairly detailed section on regulation of digital communications. The final section here assesses Malaysian constitutional guarantees for freedom of expression and the extent to which they conform to international standards.

The second chapter, Regulation of the Media and Digital Communications, focuses on the way these issues are addressed in the Malaysian legal environment. It is broken down into six sections focusing, respectively, on the need for independent regulation of the media, the need for such regulation to promote diversity, standards governing the regulation of the print media, broadcasting and digital communications, and the issue of professional regulation, with a focus on the New Media Council Bill.

The third chapter, Content Restrictions, analyses some of the key restrictions in Malaysian law on the type of content which may be disseminated publicly. Like the rest of the report, it focuses on the key restrictions in Malaysian law, drawing its inspiration in this regard from reports produced by other actors, but providing a clear analysis of the ways in which the restrictions it covers fail to conform to international standards. It is organised along the lines of the key laws which restrict freedom of expression, with sections on the Sedition Act 1948, Penal Code, Printing Presses and Publications Act 1984, and the Communications and Multimedia Act 1998. The final substantive chapter focuses on Transparency, with a focus on the new promised Right to Information Act and also some key secrecy provisions.

This report is based primarily on a desk review of relevant documents, as well as interactions with key stakeholders during missions to the country and via email. The documents reviewed included a range of authoritative sources of international law, the text of relevant Malaysian laws, reports by official and credible civil society actors, official press releases from the Malaysian government, academic articles and monographs, and news articles from credible media outlets.

1. Guarantees for Freedom of Expression

Freedom of expression is universally recognised as a fundamental human right and it is guaranteed under international law as well as virtually every national constitution around the world. The right to express oneself freely, along with the right to seek and receive information and ideas from others, is a fundamental underpinning of human dignity, democracy and good governance, sustainable development and the achievement of personal goals. It is key to ensuring free public debate and the scrutiny and hence accountability of officials and other powerful social actors. It is also a core means for maintaining respect for all other human rights. Indeed, the introduction of excessive constraints on freedom of expression has been recognised as the "canary in the coal mine" for declining respect for democracy and other human rights.

Authoritative international human rights actors have continuously reaffirmed the importance of freedom of expression. The UN General Assembly made a clear statement to this effect in Resolution 59(I), adopted at its very first session in 1946:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.[18]

The UN Human Rights Committee, the independent body of experts established to monitor and oversee implementation of the ICCPR, has held:

> The right to freedom of expression is of paramount importance in any democratic society.[19]

Similarly, the Inter-American Court of Human Rights (IACtHR), which oversees the *American Convention on Human Rights*,[20] has stated: "Freedom of expression is a cornerstone upon which the very existence of a democratic society rests."[21] And the European Court of Human Rights (ECtHR), which applies the *European Convention on Human Rights* (ECHR),[22] has noted: "Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man."[23]

---

[18] Adopted 14 December 1946.
[19] *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.
[20] Adopted 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.
[21] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.
[22] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.
[23] *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

1.1. International Guarantees

The right to freedom of expression is protected by leading international and regional human rights instruments. This includes the UDHR, Article 19 of which states:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

As a UN General Assembly resolution, the UDHR is not formally binding on States, but it is widely accepted that parts of it, including its guarantee of freedom of expression, has acquired legal force as customary international law.[24]

Article 19 of the ICCPR also guarantees the rights to freedom of opinion and expression, stating, in relevant part:

> (1) Everyone shall have the right to freedom of opinion.
>
> (2) 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.

Malaysia is one of only a small number of countries which has neither signed nor ratified the ICCPR.[25]

Regional human rights treaties guarantee freedom of expression in broadly similar terms to the UDHR and ICCPR. For example, Article 13 of the *American Convention on Human Rights* (ACHR)[26] states that freedom of expression "includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers…". Article 10 of the ECHR states that freedom of expression "shall include freedom to hold opinions and to receive and impart information and ideas." Article 9 of the *African Charter on Human and People's Rights*

---

[24] See, for example, D'Amato, A., "Human Rights as Part of Customary International Law: A Plea for Change of Paradigms" (2010, Faculty Working Papers, 88), https://scholarlycommons.law.northwestern.edu/facultyworkingpapers/88; and Meron, T., *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989).

[25] As of 6 January 2025, there were 174 States Parties to the ICCPR and another 6 signatories, leaving just about 15 UN Member States which have neither signed nor ratified it, of which many are very small island States. See https://treaties.un.org/pages/viewdetails.aspx?chapter=4&clang=_en&mtdsg_no=iv-4&src=ind.

[26] 22 November 1969, entered in force 18 July 1978, http://www.oas.org/juridico/English/treaties/b-32.html.

(ACHPR)[27] is a bit different, with Article 9(2) stating: "Every individual shall have the right to express and disseminate his opinions within the law." Article 9(1) protects the right to receive information, stating: "Every individual shall have the right to receive information".

The guarantees of freedom of expression in these treaties makes it clear that the right does not only protect the ability to impart information and ideas (to speak), but also the rights to seek and receive them. These are also key components of the right which function as independent protections, which are generally deemed to be just as important as the right to express oneself. The UN Special Rapporteur on Freedom of Expression, for example, has noted that the right to receive information "is not simply a converse of the right to impart information but it is a freedom in its own right. The right to seek or have access to information is one of the most essential elements of freedom of speech and expression."[28]

According to the UDHR, in relation to the rights it protects, States are required "to secure their universal and effective recognition and observance".[29] It is clear that, at least in relation to freedom of expression, this requires States to go beyond simply abstaining from undue restrictions on expressive activity. It also requires them to take positive steps to facilitate the full enjoyment of this right in certain contexts. This aspect of the obligations associated with the right to freedom of expression has been confirmed by international and regional human rights courts. For example, in *Claude-Reyes et al. v. Chile*, the IACtHR found that Chile had breached the right to freedom of expression by failing to take positive steps to guarantee the right of its citizens to access official information:

> Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it....[30]

In an analogous fashion, in *Özgür Gündem v. Turkey*, the ECtHR held Turkey to be in breach of its freedom of expression obligations for failing to put in place positive measures to provide physical protection to a newspaper which had repeatedly been attacked. In that case, the Court stated: "Genuine, effective exercise of [freedom of expression] does not depend

---

[27] Adopted 27 June 1981, entered into force 21 October 1986.
[28] *Report of the Special Rapporteur, pursuant to Commission on Human Rights resolution 1993/45*, 14 December 1994, E/CN.4/1995/32, para 35, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/750/76/PDF/G9475076.pdf?OpenElement.
[29] UDHR, note 15, preamble.
[30] 16 September 2006, Series C No. 151, para 77, https://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf.

merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals."[31]

Another key feature of the right to freedom of expression is that it protects not only speech which others find acceptable or palatable but also speech which many people find "offensive".[32] It applies across State borders, as both the UDHR and ICCPR make explicit (in the phrase "regardless of frontiers"). Both the UDHR and the ICCPR also make it clear that the exercise of the right is protected regardless of the means of communication used ("through any media"), which includes the Internet and other digital means of communication.

The UDHR and ICCPR also protect the right to hold opinions. Importantly, according to Article 19(1) of the latter, while States may restrict freedom of expression, the right to hold opinions is absolute and States may never legitimately limit this right.

1.2. Restrictions on Freedom of Expression

Freedom of expression is a fundamental human right but, at the same time, it is not an absolute right. With limited exceptions, international law does not itself prescribe restrictions on freedom of expression. Instead, it allows each State to set its own restrictions, while placing clear limits on those restrictions. Article 19(3) of the ICCPR sets out the conditions which any restriction must meet to be considered legitimate:

> (3) The exercise of the rights provided for in paragraph 2 of this article [guaranteeing freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights and reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

This imposes a strict three-part test for assessing the legitimacy of any restriction on freedom of expression. This test was summarised by the UN Human Rights Committee in its (most recent) 2011 General Comment on Freedom of Expression, No. 34, as follows:

---

[31] 16 March 2000, Application No. 23144/93, para 43, http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-46141&filename=ERS%C3%96Z%20AND%20OTHERS%20v.%20TURKEY.pdf&logEvent=False.

[32] *Handyside v. United Kingdom*, note 23, para. 49.

> [Article 19(3) of the ICCPR] lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.[33]

The first part of the test, which is drawn directly from the text of Article 19(3), is that restrictions must be "provided by law". A key rationale for this is that only the legislature, acting collectively pursuant to its formal law-making powers, should have the ability to decide when and how, in conformity with international law, to override freedom of expression. This rules out *ad hoc* or arbitrary action by elected officials or civil servants, no matter how senior, although it does not mean that parliament cannot delegate secondary law-making power to other actors (such as via regulations under a law).

It is not enough, to pass this part of the test, for the restriction just to be set out in a law; that law must meet certain quality control standards. It must, fairly obviously, be accessible, normally meaning that it should have been published in the official gazette (i.e. the official publication which serves to notify the general public about laws).

The law must also not be unduly vague. When a restriction on freedom of expression is vague, it may be subject to a range of different interpretations, which may or may not reflect the original intent of parliament in adopting the law. Put differently, vague rules effectively grant discretion to the authorities responsible for applying them – whether this be a regulatory body, the police, an administrator or someone else – to decide what they mean. This undermines the very idea that it is parliament which should decide on restrictions. The same is true where a law is clear, but allocates unduly broad discretion to different authorities in terms of how it is to be applied. An example of this might be a law which allowed a minster to extend the scope of a restriction in the public interest, which effectively grants the minister the power to decide on the extent of the restriction (i.e. rather than parliament).

Vague provisions may also be applied in an inconsistent or subjective manner. This fails to give individuals proper notice of what is and is not allowed, another key objective of the "provided by law" part of the test. In this case, especially where sanctions for breach are significant, individuals are likely to steer well clear of the potential zone of application of the rule to avoid any possibility of being censured, leading to what has been called a chilling effect on freedom of expression. In General Comment No. 34, the Human Rights Committee

[33] General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 22. General Comments are authoritative interpretations of rights which are issued periodically by the UN Human Rights Committee. For an earlier elaboration of the three-part test see *Mukong v. Cameroon*, 21 July 1994, Communication No.458/1991, para.9.7 (UN Human Rights Committee).

referred to the problems of vagueness and granting too much discretion in the application of a law:

> For the purposes of [Article 19(3) of the ICCPR], a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.[34]

This part of the test does not necessarily rule out subordinate legislation (such as rules or regulations under a statute) or other delegated powers to make laws (such as rules adopted by a regulator or even judge-made law in Common Law countries), as long as these powers are derived clearly from a primary legal rule (i.e. a law or constitution). The European Court of Human Rights summed up its jurisprudence on this issue in *Sanoma Uitgevers B.V. v. the Netherlands*:

> [A]s regards the words "in accordance with the law" and "prescribed by law" which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both "written law", encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. "Law" must be understood to include both statutory law and judge-made "law". In sum, the "law" is the provision in force as the competent courts have interpreted it.[35]

The second part of the test is that restrictions must aim to protect one of the interests listed in Article 19(3). That article makes it quite clear that this list is exclusive (i.e. may not be added to) and the UN Human Rights Committee has reiterated that point:

> Restrictions are not allowed on grounds not specified in [Article 19(3) of the ICCPR], even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[36]

Thus, restrictions which do not serve one of the listed interests are not legitimate. At the same time, it may be noted that the list of interests – namely "respect of the rights and reputations of others" or "the protection of national security or of public order (ordre public), or of public health or morals" – is quite broad. In addition, courts have tended to interpret it widely. For

[34] *Ibid.*, para. 25.
[35] 14 September 2010, Application No. 38224/03, para. 83.
[36] Note 33, para. 22.

example, the European Court of Human Rights has interpreted the scope of "public order" quite broadly:

> The concept of 'order' refers not only to public order or 'ordre public' … [I]t also covers the order that must prevail within the confines of a specific special group. This is so, for example, when, as in the case of armed forces, disorder in that group can have repercussions on order in society as a whole.[37]

Furthermore, restrictions must be primarily directed at one of the legitimate interests and serve it in both purpose and effect, as captured by the requirement that they be "directly related to" that interest in the quote from the UN Human Rights Committee above. For example, a restriction which does serve one of the legitimate interests listed but which achieves this merely incidentally to another primary aim is not legitimate. In practice, however, international courts rarely decide freedom of expression cases on the basis that the underlying rules did not serve a legitimate interest.

The third part of the test is that restrictions must be "necessary" to secure the interest. A large majority of all international cases on freedom of expression are ultimately decided on the basis of this part of the test, which is quite complex and cannot be reduced to a simple formula or set of sub-tests. But the following key features can be drawn from various authoritative statements interpreting this element of the test:

- Restrictions must not be overbroad in the sense that they do not limit speech beyond that which poses a risk to the relevant interest.
- Restrictions must be rationally connected to the interest they wish to protect in the sense of having been carefully designed to protect the interest and representing the option for protecting the interest which intrudes least on freedom of expression.
- Restrictions must be proportionate in the sense that the benefits in terms of protecting the interest outweigh the harm to freedom of expression.

International courts have also made it clear that it is up to the State which is defending a restriction to show, in a clear and specific manner, how the restriction protects the interest and otherwise meets these conditions. It is not enough for the State simply to put forward a claim that a restriction is necessary to protect, for example, national security or public order.

[37] *Engel and others v. the Netherlands*, 8 June 1976, Application Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, para. 98.

The UN Human Rights Committee summarised these conditions succinctly in General Comment No. 34 as follows:

> Restrictions must not be overbroad. The committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law". The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.
>
> When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[38]

Another good summary of this part of the test has been elaborated by the Inter-American Court of Human Rights:

> Lastly, the restrictions imposed must be necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest. If there are various options to achieve this objective, that which least restricts the right protected must be selected. In other words, the restriction must be proportionate to the interest that justifies it and must be appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right.[39]

1.3. Right to Information

As noted above, the right to freedom of expression protects the rights to "seek" and "receive", as well as to "impart" information and ideas. The right should therefore be understood as protecting not only the right to speak but, more generally, the wider idea of protecting or maximising the free flow of information and ideas in society. As part of this, and especially over the last 20 years, it has been recognised that the right also embraces a right to access information held by public authorities (often referred to as the right to information or RTI, and sometimes also as freedom of information or access to information). The key underlying rationale for this is that public authorities do not own the information they hold or hold it merely for themselves but, rather, they hold it as custodians on behalf of the public. As a

[38] Note 33, paras. 34-5.

[39] *Claude Reyes and Others v. Chile,* 19 September 2006, Series C, No. 151, para. 91.

result, and subject only to limited exceptions, the public has a right to access this information. Looked at from the point of view of a free flow of information in society, public authorities hold a tremendous amount of information of high public interest value. If this information is accessible only to officials, this will seriously undermine the free flow of information and ideas in society.

To give effect to this right, States need to adopt comprehensive right to information legislation based on the core principle of maximum disclosure of information. Both the main rationale for this right and the need for legislation were stated clearly in Principle IV of the 2002 *Declaration of Principles on Freedom of Expression in Africa* (original African Declaration):

> 1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
>
> 2. The right to information shall be guaranteed by law.[40]

There are two main means of providing the public with access to information in practice. First, public authorities should proactively publish information of key public importance, so that everyone can access it reasonably easily, something that is significantly facilitated by digital communications technologies. Second, the legislation should put in place a system for making and responding to requests for information. These two approaches were recognised in paragraph 19 of the UN Human Rights Committee's General Comment No. 34:

> To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.[41]

Currently, 140 countries globally have adopted RTI laws, meaning that this is very widespread among democracies.[42] The push for adoption of RTI laws has been significantly advanced by the adoption of Sustainable Development Goal (SDG) indicator 16.10.2,[43] which focuses on: "Number of countries that adopt and implement constitutional, statutory and/or

[40] Adopted by the African Commission on Human and People's Rights at its 32nd Session, 17-23 October 2002.
[41] Note 33.
[42] See the RTI Rating, https://www.rti-rating.org/country-data/.
[43] Available at: https://unstats.un.org/sdgs/indicators/indicators-list/.

policy guarantees for public access to information". This hardwires RTI into the development agenda and provides a strong motivation for countries to move forward on this issue.

The Centre for Law and Democracy (CLD) recently did an analysis of the 56 UN Members States which have not yet adopted RTI laws.[44] It found that 30 of them were countries which are very weak democracies, as reflected in their score of .20 or less on the V-Dem Liberal Democracy Index.[45] Another 17 were countries with a population of 1,000,000 or less,[46] leaving just 9 other countries, including Malaysia (alongside two other Asian countries, namely Papua New Guinea and Singapore).

What makes an RTI law strong is somewhat complicated. The RTI Rating (www.RTI-Rating.org) is the leading global methodology for assessing the strength of RTI laws, and the 61 indicators used in the methodology essentially reference the different features that a good law should have (such as a broad scope in terms of public authorities covered, clear and user-friendly procedures for making and processing requests, limited exceptions to the right of access, and an accessible and independent system for appealing against refusals to provide access).

The RTI Rating groups the key features of a good law into seven main categories:

1. Right of Access (guarantees of the right in the constitution and law)
2. Scope (scope of coverage of the law in terms of public authorities, applicants and information)
3. Requesting Procedures (the rules for making and processing requests)
4. Exceptions (one of the more complicated parts of the law; see below)
5. Appeals (including the right to lodge an appeal with an independent administrative body)
6. Sanctions and Protections (sanctions for wilful obstruction of access and protection for good faith disclosures of information)
7. Promotional Measures (measures to make the law work in practice, such as having a central body with responsibility for promoting the right)

The right to information, like the right to freedom of expression from which it is derived, is not absolute. Governments may legitimately withhold certain information in limited

[44] Available at: https://www.law-democracy.org/live/wp-content/uploads/2025/01/Countries.Deficit.Jul24.CLD_.rev2_.xlsx.
[45] Available at: https://www.v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf.
[46] According to https://www.worldometers.info/world-population/population-by-country/.

circumstances. There is a three-part test for this, derived from the wider three-part test for restrictions on freedom of expression. First, the exception must relate to a legitimate interest which is defined clearly in law. There is no formally adopted, universal list of legitimate interests, but these are generally understood as being limited to: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice; legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities.

Second, information should be withheld only if its disclosure would pose a risk of harm to the protected interest. It is not legitimate to withhold information simply because it relates to an interest. Instead, the public authority should demonstrate that disclosure of the information will cause specific harm to one of the interests. Third, there should be a public interest override whereby even if disclosure of information would cause harm, it should still be disclosed unless that harm outweighs the overall public interest in accessing the information. For example, if information exposes corruption or human rights abuses, there is generally a very high (overriding) public interest in its disclosure.

1.4. Independent Regulation of The Media

Most States, including Malaysia, have in place significant legal regimes governing the regulation of the media. One of the key overarching standards for such regulation in international law is that bodies which exercise regulatory powers over the media need to be independent of the government and protected against both political and commercial interference. This principle is also well-rooted in the comparative practice of democratic States. The rationale for this is fairly evident: if regulators are controlled by the government, they are likely to make regulatory decisions which favour the government of the day, rather than the wider public interest. This will, among other things, undermine the ability of the media to report critically, especially on political events, and thereby diminish respect for freedom of expression.

It is equally important for regulators to be independent of the sectors they regulate. While this has not so far been a major issue in many countries, in part because the far greater threat is of government control, it is currently a major or emerging problem in many democracies, where it is referred to as "regulatory capture". The negative implications of this are equally evident and essentially the same as for government control: if industry controls the regulator,

it will operate with a bias towards industry, again rather than making decisions in the wider public interest.

It is worth noting that the principle of independence applies at the level of implementing regulatory powers and not to (higher-level) policy making or the setting of the rules, which remains the preserve of government. For example, many governments are currently discussing how to regulate digital platforms, while some, such as the European Union, have already put in place rules on this (in that case, the Digital Services Act or DSA).[47] However, democracies have been careful to assign responsibility for implementation of the rules to independent regulatory authorities (the DSA is an example of this).[48]

Numerous international statements by authoritative actors support the need for bodies with the power to regulate the media to be independent. For the most part, these statements have been directed at broadcast or telecommunications regulators, largely because most democracies do not have official bodies which regulate the print media or journalists although, as noted above, this principle is also being applied to bodies which are responsible for digital regulation. A relatively broad statement of the need for regulators to be independent is from the 2003 Joint Declaration adopted by the (then) three special international mandates on freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Expression, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the Organization for Security and Co-operation in Europe (OSCE) Special Representative on Freedom of the Media:[49]

> All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[50]

More recently, in its 2011 General Comment No. 34, the UN Human Rights Committee made a similar statement albeit limited to broadcast regulators:

---

[47] Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, 15 December 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0825&from=en.

[48] See, for example, Article 39 of the DSA.

[49] They were joined at the end of 2004 by a fourth mandate, the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.

[50] Adopted 18 December 2003. Available at: http://www.osce.org/fom/66176. Since 1999, the special mandates have adopted a Joint Declaration each year on a different freedom of expression theme. The Centre for Law and Democracy has supported the development of these Joint Declarations since it was first founded in 2010.

> It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses. [references omitted][51]

All three regional bodies for the protection of human rights – in Africa, the Americas and Europe – have also referred to this idea. Thus, the 2019 *Declaration of Principles on Freedom of Expression and Access to Information in Africa* (updated African Declaration) states very clearly, at Principle 17(1):

> A public regulatory authority that exercises powers in the areas of broadcast, telecommunications or internet infrastructure shall be independent and adequately protected against interference of a political, commercial or other nature.[52]

The *Inter-American Declaration of Principles on Freedom of Expression* (Inter-American Declaration), adopted by the Inter-American Commission on Human Rights in 2000, does not explicitly state that broadcast regulators must be independent. But it does refer to the underlying reason for this:

> [T]he concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law.[53]

The Council of Europe – the key human rights body for the wider community of European countries, which currently has 46 Member States – has an entire recommendation devoted to this issue, namely Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector (COE Recommendation).[54] The very first substantive clause of this Recommendation states:

> Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

This view has been upheld by international and national courts. The reasons for this were set out rather elegantly in a decision of the Supreme Court of Sri Lanka holding that a

[51] Note 33, para. 39.
[52] Adopted by the African Commission on Human and People's Rights at its 65th Session, 21 October to 10 November 2019.
[53] Adopted at the 108th Regular Session, 19 October 2000, Principle 13.
[54] Adopted by the Committee of Ministers of the Council of Europe on 20 December 2000. See also the Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, adopted 26 March 2008.

broadcasting bill which gave a government minister substantial power over appointments to the broadcast regulator was incompatible with the constitutional guarantee of freedom of expression. The Court noted: "[T]he authority lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought."[55]

Recognising the principle of independent regulation is one thing but guaranteeing it in practice is quite another, and experience in countries around the world shows that promoting independence is both institutionally complex and difficult to achieve in practice. The COE Recommendation provides some guidance as to how independence may be protected in practice, with sections on Appointment, Composition and Functioning (of the governing boards of these bodies), Financial Independence, Powers and Competence, and Accountability.

The way in which members are appointed to the governing boards of regulatory bodies is central to their independence. Principle 17(2) of the updated African Declaration states that the appointments process should be "open, transparent and involve the participation of relevant stakeholders." The COE Recommendation devotes some attention to this matter, calling for: members to be "appointed in a democratic and transparent manner"; rules of 'incompatibility' to prevent individuals with strong political connections or commercial conflicts of interest from sitting on these bodies; prohibitions on members receiving instructions or a mandate from anyone other than pursuant to law; and protection against dismissal except for "non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions".[56]

The COE Recommendation also notes the importance to the protection of independence of having suitable funding arrangements in place. It calls on public authorities not to use any financial decision-making power to interfere with regulatory bodies, and calls for funding arrangements to "be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently".[57] The Recommendation also calls for regulatory bodies to have the power to set their own internal rules.[58]

---

[55] *Athokorale and Ors. v. Attorney-General*, 5 May 1997, Supreme Court, S.D. No. 1/97-15/97.
[56] Note 54, Clauses 3-8.
[57] *Ibid.*, Clause 9.
[58] *Ibid.*, Clause 12.

Both the COE Recommendation and the African Declaration recognise that broadcast regulators need to be accountable to the public but that such accountability should be achieved in a manner that does not compromise independence. The African Declaration, for example, states:

> Any public authority that exercises powers in broadcast, telecommunications or internet infrastructure shall be accountable to the public.[59]

The COE Recommendation emphasises this point and notes that regulators "should be supervised only in respect of the lawfulness of their activities, and the correctness and transparency of their financial activities".[60]

1.5. Media Diversity

A second key principle governing media regulation under international law is that of promoting diversity. While the principle of independence is primarily about the manner in which media regulation should take place, the principle of diversity speaks to a key objective of such regulation, particularly in the context of broadcasting. Jurisprudentially, the principle of media diversity derives from the multi-faceted nature of the right which, as noted above, protects not only the right of the speaker (to "impart" information and ideas) but also the right of the listener (to "seek" and "receive" information and ideas).[61] In one dimension, this aspect of the right prevents States from interfering with the right of listeners to seek and receive information from others. In another dimension, however, it places a positive obligation on States to implement measures to promote an environment in which a diversity of information and ideas are available to the public. At least in the broadcasting sector, externalities and rigidities like scarce frequencies and the high cost of entry into the sector have traditionally, in the absence of countervailing regulation, prevented the emergence of a truly diverse media. As such, it is not enough for States simply to take a *laissez faire* approach to broadcast regulation; rather, they must put in place positive measures to promote diversity.

[59] Note 52, Principle 17(3).
[60] Note 54, Clause 26.
[61] See, for example, the Inter-American Court of Human Rights' judgment in *Baruch Ivcher Bronstein v. Peru*, 6 February 2001, Series C, No. 74, para. 146.

Pluralism has received broad endorsement as a key aspect of the right to freedom of expression. For example, in its General Comment No. 34, the UN Human Rights Committee stated:

> As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.[62]

Similarly, the original African Declaration states:

> Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.[63]

The Inter-American Court of Human Rights has recognised that the right to seek and receive information and ideas requires the existence of a free and pluralistic media:

> It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.[64]

Within the European context, the issue of media diversity as an aspect of the right to freedom of expression has attracted considerable attention. In a 2012 case, *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, a Grand Chamber of the European Court of Human Rights[65] set out in some detail the key principles governing this idea:

> 129. The Court considers it appropriate at the outset to recapitulate the general principles established in its case-law concerning pluralism in the audiovisual media. As it has often noted, there can be no democracy without pluralism. Democracy thrives on freedom of expression. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.
>
> 130. In this connection, the Court observes that to ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. It is necessary in addition to allow effective access to the market so as to guarantee

[62] Note 33, para. 14.
[63] Note 40, Principle III.
[64] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 34.
[65] A Grand Chamber involves a larger number of judges, normally 17, and its decisions carry far more weight than an ordinary decision.

> diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed.
> …
>
> 134. The Court observes that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism (see paragraph 130 above). This is especially desirable when, as in the present case, the national audiovisual system is characterised by a duopoly.
>
> With this in mind, it should be noted that in Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content (see paragraph 72 above) the Committee of Ministers reaffirmed that "in order to protect and actively promote the pluralistic expressions of ideas and opinions as well as cultural diversity, member states should adapt the existing regulatory frameworks, particularly with regard to media ownership, and adopt any regulatory and financial measures called for in order to guarantee media transparency and structural pluralism as well as diversity of the content distributed". [references omitted][66]

The Court referred to the Council of Europe's Recommendation 2007(2) on Media Pluralism and Diversity of Media Content,[67] which is entirely devoted to the question of media diversity and measures to promote it. The Recommendation provides: "Member states should seek to ensure that a sufficient variety of media outlets provided by a range of different owners, both private and public, is available to the public."[68] It also speaks to the need for positive measures to promote diversity:

> Pluralism of information and diversity of media content will not be automatically guaranteed by the multiplication of the means of communication offered to the public. Therefore, member states should define and implement an active policy in this field.[69]

The 2007 Joint Declaration on Diversity in Broadcasting of the four special international mandates on freedom of expression focused entirely on media diversity, stressing its importance as an aspect of freedom of expression and as an underpinning of democracy.[70] The Joint Declaration identified three distinct aspects of media pluralism or diversity, namely

---

[66] 7 June 2012, Application No. 38433/09. See also See, for example, *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 38.
[67] Recommendation No. R (2007)2, adopted by the Committee of Ministers on 31 January 2007. This updates Recommendation No. R(1999)1 in Measures to Promote Media Pluralism, adopted by the Committee of Ministers on 19 January 1999.
[68] *Ibid.*, para. I(1.1).
[69] *Ibid.*, para. II(1).
[70] Adopted 12 December 2007, http://www.osce.org/fom/66176.

diversity of content, outlet and source.[71] **Diversity of content**, in the sense of the provision of a wide range of content that serves the needs and interests of different groups in society, is the most obvious and ultimately the most important form of diversity. Diversity of content, one aspect of which is giving voice to all groups in society, depends, among other things, on the existence of a plurality of types of media, or **outlet diversity**. Specifically, democracy demands that the State create an environment in which different types of broadcasters – including public service, commercial and community broadcasters – which reflect different points of view and provide different types of programming, can flourish. The absence of **source diversity**, reflected in the growing phenomenon in many countries of concentration of media ownership, can impact in important ways on media content, as well as independence and quality.[72]

A number of authoritative statements support the idea that the right to freedom of expression places States under an obligation to promote all three types of diversity, namely of source, of outlet and of content. It has, however, always been recognised that there is a need to distinguish between how the print and broadcast sectors are regulated. In many States, only diversity of source is regulated in the print media sector, which does not suffer from the same externalities and rigidities as the broadcasting sector. At the same time, some States do provide for subsidies for the print media as a means of promoting diversity of content in that sector.

1.6. Safety

States have an obligation to protect everyone against physical attacks, as part of the rights to life and security of the person. However, where attacks are a response to what someone has said, known as "attacks on freedom of expression", then this obligation also derives from the right to freedom of expression, specifically to prevent what has been termed "censorship by killing".[73]

---

[71] See also Thomas Gibbons, "Concentrations of Ownership and Control in a Converging Media Industry", in Chris Marsden & Stefaan Verhulst, eds., *Convergence in European Digital TV Regulation* (London: Blackstone Press Ltd., 1999), p. 157.

[72] See Toby Mendel, *et al.*, *Concentration of Media Ownership and Freedom of Expression: Global Standards and Implications for the Americas*, (Paris: UNESCO, 2017), page 14, https://unesdoc.unesco.org/ark:/48223/pf0000248091.

[73] See the 30 November 2000 Joint Declaration of the special international mandates on freedom of expression, http://www.osce.org/fom/66176.

The essence of these crimes is that they are designed to stop the flow of information and ideas, often about a matter of high public importance such as corruption, organised crime, nepotism or other serious wrongdoing. As the special international mandates on freedom of expression noted in their 2012 Joint Declaration on Crimes Against Freedom of Expression:

> [V]iolence and other crimes against those exercising their right to freedom of expression, including journalists, other media actors and human rights defenders, have a chilling effect on the free flow of information and ideas in society ('censorship by killing'), and thus represent attacks not only on the victims but on freedom of expression itself, and on the right of everyone to seek and receive information and ideas.[74]

States have a special obligation to protect those who are at demonstrable risk of being attacked for what they have said (for example as illustrated by threats they have received). One of the most serious problems in these cases is the very high prevailing rate of impunity, which observers note is above 85 percent globally.[75] This gives rise to a second State obligation, namely to conduct effective investigations, wherever possible leading to prosecutions, where such attacks do occur. The special international mandates on freedom of expression described the obligations of States in the area of safety in their 2012 Joint Declaration:

> The above implies, in particular, that States should:
>
> i. put in place special measures of protection for individuals who are likely to be targeted for what they say where this is a recurring problem;
> ii. ensure that crimes against freedom of expression are subject to independent, speedy and effective investigations and prosecutions; and
> iii. ensure that victims of crimes against freedom of expression have access to appropriate remedies.[76]

While many of the statements about safety focus on journalists, the scope of protection, as both the title and the substance of the 2012 Joint Declaration make clear, extends to anyone who is attacked for making statements about matters of public interest. This may, for example, include parliamentarians and individuals working for civil society, where they are at risk of being attacked for their political views or public interest statements.

---

[74] 25 June 2012, Preamble, http://www.law-democracy.org/live/wp-content/uploads/2012/08/mandates.decl_.2012.pdf.
[75] See, for example, UNESCO, *Journalists at the frontlines of crises and emergencies: highlights of the UNESCO Director-General's Report on the Safety of Journalists and the Danger of Impunity published on the occasion of the International Day to End Impunity for Crimes Against Journalists 2024*, p. 1, https://unesdoc.unesco.org/ark:/48223/pf0000391763.
[76] Note 74, para. 1(c).

Where there is an ongoing and serious risk of crimes against freedom of expression, one of the best ways to provide protection to those at risk is to establish a specialised safety mechanism, something UNESCO has been supporting both generally and in various countries around the world.[77]

In addition to establishing specialised safety mechanisms, where warranted, States should also recognise crimes against freedom of expression through specific legal provisions. This can be done, for example, by providing for heavier penalties for these crimes, as many States do for crimes which are motivated by racism, and by removing statutes of limitation (the period after which a prosecution for a crime can no longer be brought) for these crimes.[78]

1.7. Regulation of the Digital Space

The right to freedom of expression applies to the Internet just as it does to any other form of communication. This was already somehow envisaged in the language of Article 19 of the ICCPR, which protects expression through "any other media of his choice", and reaffirmed by authoritative international actors. The Internet has brought about a major shift in how we communicate due to the speed, breadth and accessibility of information sharing it enables. Legacy media such as newspapers and television gave powerful platforms to a small number of individuals but the rise of the Internet and particularly social media means that anyone can now communicate easily and instantaneously with a virtually unlimited number of people while also being able to access a vast range of information globally. Due to its unique properties, new approaches to regulation of digital communications have developed.

General Regulatory Standards

It is not appropriate simply to apply regulatory systems designed for legacy media – i.e. newspapers and broadcasters – to digital communications, due to the profound differences between each of them. This is highlighted specifically in paragraph 39 of General Comment No. 34, where the UN Human Rights Committee noted: "Regulatory systems should take into account the differences between the print and broadcast sectors and the internet".[79]

---

[77] See, for example, Toby Mendel, *Supporting Freedom of Expression: A Practical Guide to Developing Specialised Safety Mechanisms* (Paris: UNESCO, 2016), https://www.law-democracy.org/live/wp-content/uploads/2016/04/Safety-Report.16.04.20_final.pdf.
[78] See, for example, the special international mandates on freedom of expression 2012 Joint Declaration on Crimes Against Freedom of Expression, note 74, para. 2(b).
[79] Note 33.

Similarly, in their 2011 Joint Declaration on Freedom of Expression and the Internet, the special international mandates on freedom of expression stated:

> Approaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet but, rather, need to be specifically designed for it.[80]

In terms of licensing/registration, international law does not consider it to be legitimate to impose special licensing systems on Internet service providers or Internet-based communications services above and beyond those which apply generally to businesses (e.g. corporations) and, as relevant, telecommunications service providers. Thus, in paragraph 43 of General Comment No. 34, the Human Rights Committee indicated:

> Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with [Article 19(3) of the ICCPR].

In their 2005 Joint Declaration, the special international mandates on freedom of expression went even further, noting:

> No one should be required to register with or obtain permission from any public body to operate an Internet service provider, website, blog or other online information dissemination system, including Internet broadcasting. This does not apply to registration with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation.[81]

The same position was taken in the Council of Europe's leading statement on digital communications, the Declaration on Freedom of Communication on the Internet, which states:

> The provision of services via the Internet should not be made subject to specific authorisation schemes on the sole grounds of the means of transmission used.[82]

Regulating Content

It is not legitimate for States to impose general blocking or filtering measures, or shutdowns of the Internet, although these remain unfortunately common around the world. Thus, in

[80] Adopted 1 June 2011, para. 1(c), https://www.osce.org/representative-on-freedom-of-media/78309.
[81] Adopted 21 December 2005, https://www.osce.org/fom/27455.
[82] Adopted by the Committee of Ministers on 28 May 2003, Principle 5, https://rm.coe.int/16805dfbd5.

their 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations, the special international mandates on freedom of expression stated:

> Filtering of content on the Internet, using communications 'kill switches' (i.e. shutting down entire parts of communications systems) and the physical takeover of broadcasting stations are measures which can never be justified under human rights law.[83]

A similar idea is expressed in Principle 3 of the Council of Europe's Declaration on Freedom of Communication on the Internet:

> Public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers. This does not prevent the installation of filters for the protection of minors, in particular in places accessible to them, such as schools or libraries.

Otherwise, there is some consensus but also some areas of debate currently about how to address harmful online speech. It is accepted that (otherwise legitimate) content restrictions, such as hate speech, national security and defamation laws, should also apply to online content. A challenge is who should be held responsible for this content. It is clear that intermediaries cannot generally be responsible for the often vast volume of communications which flow through their services, which it would be impossible for them to monitor, a form of strict liability. It is accepted that intermediaries should not be required to monitor their services for illegal content. This is reflected in Principle 6 of the Council of Europe's Declaration on Freedom of Communication on the Internet:

> Member States should not impose on service providers a general obligation to monitor content on the Internet to which they give access, that they transmit or store, nor that of actively seeking facts or circumstances indicating illegal activity.

It is also broadly accepted that actors who merely facilitate access to the Internet (sometimes referred to as Internet service providers or ISPs), should not be liable for the content which flows through their services, sometimes referred to as the 'mere conduit principle'. This is again reflected in Principle 6 of the Council of Europe's Declaration on Freedom of Communication on the Internet:

---

[83] Adopted 4 May 2015, para. 4(c), https://www.law-democracy.org/live/wp-content/uploads/2015/05/JD-2015.final_.Eng_.pdf. See also the 2005 Joint Declaration, https://www.osce.org/files/f/documents/5/d/27455.pdf; the 2011 Joint Declaration, paras. 3 and 6(b), https://www.osce.org/representative-on-freedom-of-media/78309; and the 2017 Joint Declaration, paras. 1(f) and (g), https://www.osce.org/fom/302796.

> Member States should ensure that service providers are not held liable for content on the Internet when their function is limited, as defined by national law, to transmitting information or providing access to the Internet.[84]

However, beyond that, there is less agreement. In particular, different approaches to intermediary liability which falls below the standard of strict liability have been adopted in different jurisdictions. A more onerous liability model is called a 'notice and takedown' approach. Under this approach, once an intermediary has been notified of allegedly illegal content, it must either remove or block access to that content, or bear liability for it should it ultimately be determined to be illegal.[85] This approach is foreseen in Principle 6 of the Council of Europe's Declaration on Freedom of Communication on the Internet and is the approach taken in the European Union's Digital Services Act (DSA).[86] A criticism of this approach is that it fails to provide sufficient protection for freedom of expression because it effectively incentivises intermediaries to take down content as soon as someone claims it is illegal, even if in fact it is not illegal. Intermediaries cannot, as a matter of practice, assess these legal claims and they will therefore normally be motivated to take action to avoid any risk of liability.

In paragraph 2(b) of their 2011 Joint Declaration on Freedom of Expression, the special international mandates on freedom of expression indicated that notice and take down systems fail to respect international guarantees of freedom of expression:

> Consideration should be given to insulating fully other intermediaries, including those mentioned in the preamble, from liability for content generated by others under the same conditions as in paragraph 2(a) [which describes the 'mere conduit principle']. At a minimum, intermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression (which is the case with many of the 'notice and takedown' rules currently being applied).

Another approach, which provides greater protection for freedom of expression, is a 'notice and action' system, which requires intermediaries to make a good faith determination of legality when notified of allegedly illegal content and then to take relevant action (or inaction). This may be distinguished from a notice and takedown approach inasmuch as intermediaries are not required to make a correct determination, just a good faith determination; i.e. they are protected whether or not their determination is ultimately deemed to be correct.

---

[84] See also Joint Declaration on Freedom of Expression and the Internet, 1 June 2011, note 80, para. 2(a).
[85] Rebecca MacKinnon, *et al.*, *Fostering Freedom Online: The Role of Internet Intermediaries* (2014, Paris, UNESCO), pp. 40- 42, http://unesdoc.unesco.org/images/0023/002311/231162e.pdf.
[86] Note 47

Yet another, again more freedom of expression-friendly, approach is a 'notice and notice' approach. This requires intermediaries to notify authors when they are notified about content which is alleged to be illegal. The authors then have the option either of defending their content (which might require them to emerge from behind a veil of anonymity) or not. In the latter case, the matter is essentially transformed into a notice and takedown approach.

Different issues arise in relation to breaches of intermediaries' terms of service. It may be noted that intermediaries have available to them a much wider range of potential responses (sanctions) than States. These include doing nothing, providing a warning message, demonetising or otherwise demoting content, providing links to accurate information or allowing users to do so, removing content, or temporarily suspending or banning the user. The large range of options available to intermediaries is positive from the perspective of respect for freedom of expression, since it enables less intrusive options to be imposed for less harmful speech or behaviour.

Beyond the issue of intermediary liability, the global nature of the Internet also raises challenges for determining the appropriate jurisdiction for legal cases relating to online content. By definition, online content is available in virtually every country, but it is clearly not appropriate for authors to be liable everywhere, which would mean that everyone would be held to the standards of the most restrictive country. The special international mandates on freedom of expression addressed this in paragraph 4(a) of their 2011 Joint Declaration:

> Jurisdiction in legal cases relating to Internet content should be restricted to States to which those cases have a real and substantial connection, normally because the author is established there, the content is uploaded there and/or the content is specifically directed at that State. Private parties should only be able to bring a case in a given jurisdiction where they can establish that they have suffered substantial harm in that jurisdiction (rule against 'libel tourism').

It is also becoming increasingly clear that it is not legitimate for States to impose parallel restrictions on digital content (i.e. with duplicate rules governing the same content disseminated offline), often with harsher punishments, an unfortunate tendency in many States. Instead, States should just to tweak the offline rules, as necessary, so that they also cover digital content. The special international mandates on freedom of expression addressed this in their 2018 Joint Declaration on Media Independence and Diversity in the Digital Age:

> Restrictions which are designed specifically for digital communications should be limited in scope to activities which are either new or fundamentally different in their digital forms (such as spamming) ….[87]

Encryption and Anonymity

The possibility of using encryption and anonymity tools is an important facilitator of free speech online. International law generally protects the use of these tools, recognising that any limits should be in accordance with the three-part test for restrictions on freedom of expression. Thus, the 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations of the special international mandates on freedom of expression states:

> Encryption and anonymity online enable the free exercise of the rights to freedom of opinion and expression and, as such, may not be prohibited or obstructed and may only be subject to restriction in strict compliance with the three-part test under human rights law.[88]

Targeted police actions against criminal suspects represent an exception to this. This is reflected in Principle 7 of the Council of Europe's Declaration on Freedom of Communication on the Internet:

> In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity. This does not prevent member states from taking measures and co-operating in order to trace those responsible for criminal acts, in accordance with national law, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements in the fields of justice and the police.

The notice and notice system, referred to above, is one way to address the issue of harmful, anonymous content (i.e. anonymous posters either have to stand up for their content or accept that whichever company is hosting it may take it down).

Promoting Access to the Internet

The Internet plays a hugely significant role not only in facilitating speech but also in giving access to information, including where it is needed to ensure respect for other rights. As such, it is accepted that States have an obligation to promote universal access to the Internet. Thus, in General Comment No. 34, the UN Human Rights Committee stated:

---

[87] Adopted 2 May 2018, para. 3(c), https://www.law-democracy.org/live/wp-content/uploads/2018/12/mandates.decl_.2018.media-ind.pdf.
[88] Note 83, para. 8(e).

> States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.[89]

Similarly, in paragraph 6(a) of their 2011 Joint Declaration, the special international mandates indicated:

> Giving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet. Access to the Internet is also necessary to promote respect for other rights, such as the rights to education, health care and work, the right to assembly and association, and the right to free elections.

States are not required to provide universal access immediately, which would be impossible for many States. Instead, they need to devote appropriate attention and resources to achieving this. Paragraph 6(e) of the 2011 Joint Declaration lists a number of ways in which this could be achieved, including through regulatory measures (such as universal service obligations for access providers), direct support, promoting awareness and giving special attention to access for persons with disabilities.

1.8. Relevant Malaysian Constitutional Guarantees

The Federal Constitution of Malaysia was first adopted in 1957 and then reintroduced on Malaysia Day, 16 September 1963.[90] The right to freedom of expression is guaranteed in Article 10, under Part II: Fundamental Liberties, as follows:

> Everyone has the right to freedom of thought and the freedom to communicate opinions and expression in a manner that is not contrary to any tenet of Islam.
>
> (1) Subject to Clauses (2), (3) and (4)—
>
> (a) every citizen has the right to freedom of speech and expression; …
>
> (2) Parliament may by law impose—
>
> (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;
>
> …

[89] Note 33, para 15.
[90] Available at: https://www.jac.gov.my/spk/images/stories/10_akta/perlembagaan_persekutuan/federal_constitution.pdf

> (4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under paragraph (a) of Clause (2), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

The positive aspect of this right, as set out in Article 10(1), lacks several of the attributes found under international law. It only refers to the expressive aspect of freedom of expression and not the important companion elements of the right to seek and receive information and ideas. It does not explicitly apply regardless of frontiers, although this may have been read in by courts. And it also does not explicitly apply regardless of the means of communication used although, again, this may have been read in by courts.

Far more important are the differences when it comes to restrictions on the right, as provided for in Article 10(2)(a). As under international law, restrictions must be set out in law. The biggest differences are in relation to the interests which are protected. One additional interest has been added, namely "friendly relations with other countries". For the protected interests – which also include security, public order and morality – the standard of necessity has been substituted by the notion of being deemed by parliament to be "necessary or expedient". In common parlance, expediency presents a much lower bar than necessity. However, much depends here on the manner in which these terms are interpreted as opposed to the specific language used.

However, Article 10(2)(a) also refers to a number of legal regimes – which are very different from interests – which do not require necessity or even expediency but merely that the restriction is "designed to protect … or to provide against". The legal regimes include "the privileges of Parliament or of any Legislative Assembly … contempt of court, defamation, or incitement to any offence". It may be noted that certain aspects of the rules relating to the privileges of legislative bodies, contempt of court and incitement to an offence will fall within the scope of public order (ordre public) as it is understood under international law, while defamation law generally exists to protect reputation, specifically recognised as an interest under international law. However, this does not extend to all aspects of those legal regimes.

More importantly, by referring to legal regimes rather than interests, and dispensing with any notion of necessity for such protection, Article 10(2)(a) would effectively appear to parry any constitutional challenge to those legal regimes, thus safeguarding them almost regardless of the impact they may have on freedom of expression. It may be noted that an important proportion of all freedom of expression cases before international courts is based on challenges to defamation laws, which would appear to be largely ruled out here.

It may also be noted that in certain respects the scope of restrictions under Article 10(2)(a) is too narrow, inasmuch as it only refers to defamation from among all of the rights of others. As such, issues such as privacy and commercial confidentiality would appear to be excluded from the scope of legitimate restrictions under this regime.

Article 10(4) is not only quite unique as a restriction on freedom of expression but it also grants Parliament extremely broad discretion effectively to prohibit entirely any debate about the constitutional provisions it refers to. These are, briefly, the establishment of Malay as the national language of Malaysia (Article 152), the reservation of certain privileges for Malays and natives from the States of Sabah and Sarawak (Article 153) and the preservation of the traditional powers and prerogatives of the traditional rulers of States (Article 181). While everyone is expected to respect the regime established by the constitution in practice, it is quite another thing to prohibit debate about the provisions and rules in the constitution. This is not legitimate according to international standards on freedom of expression, subject to rules on incitement to violence and other crimes, which are already covered by Article 10(2)(a) of the Constitution.

Recommendations

- In due course, consideration should be given to amending the guarantee of freedom of expression found in Article 10 of the Constitution of Malaysia so at to bring in more fully into line with international guarantees.
- For the positive aspect of this guarantee, that should include expanding the right to cover seeking and receiving information and ideas, and potentially to apply regardless of frontiers and of the means of communication used.
- For restrictions on freedom of expression, that should include subjecting all restrictions to a strict test of necessity and extending only to protect interests which are recognised under international law.

2. Regulation of the Media and Digital Communications

This part of the report looks at the system for regulation of the media in Malaysia. Key legal documents here are the Printing Presses and Publications Act 1984, described by IFJ as "a cornerstone of media regulation in Malaysia",[91] and the Communications and Multimedia

[91] Note 1, p. 8.

Act 1998. The latter has to be seen in conjunction with the Malaysian Communications and Multimedia Commission Act 1998,[92] which immediately followed it, as well as the amendments to it adopted just in December 2024 in the form of the Communications and Multimedia (Amendment) Act 2024.[93] The new Malaysian Media Council Bill,[94] once it is passed into law, will also be an important part of the regulatory environment for the media in Malaysia. The Online Safety Bill, just adopted in December,[95] is also a very important development in the area of relating digital communications.

The first section in this chapter of the report looks at the extent to which the various bodies which are, in Malaysia, responsible for regulating the media, including the public media are independent. The second looks at the systems which are in place in Malaysia to promote media diversity, with a focus on diversity in broadcasting, given that this is where most States concentrate their efforts in this regard. The next section looks at regulation of the print media, with a focus on the Printing Presses and Publications Act 1984. The following section does the same for broadcasting, although the first two sections in this chapter already cover many of the key regulatory issues for broadcasting. This is followed by a section on regulating digital communications. Given the breadth of this topic, the focus here is on the licensing of online intermediaries, and the recent changes in that area, as well as the new Online Safety Bill. The final section focuses on the new Media Council Bill, given that it is still being considered by Parliament, assessing it as a system for professional regulation of the media and making recommendations to improve the Bill.

2.1. Independent Regulation

As noted above, international law is very clear on the requirement that regulation of the media needs to be undertaken by independent bodies, even if it is appropriate for government to set law and policy in this area.

There is no attempt whatsoever under the Printing Presses and Publications Act 1984 to have regulation done by an independent body. Instead, all of the mostly very broad regulatory powers under the Act are exercised directly by the responsible minister. This includes issuing

[92] Act No. 598 of 1998, available at https://www.mcmc.gov.my/en/legal/acts.
[93] Available at https://d356mar4ez6tcl.cloudfront.net/skrine/media/assets/cma-amdmt-bill-2024.pdf.
[94] A version of the Bill is available at https://www.christopherleeong.com/wp-content/uploads/2024/12/Malaysian-Media-Council-Bill-DR63-BI.pdf.
[95] Available at: https://www.parlimen.gov.my/bills-dewan-rakyat.html?uweb=dr&lang=en#.

a licence to operate a printing press under section 3, which the minister may grant, refuse, revoke or suspend essentially at will (i.e. without any conditions, see section 3(3)).

Similarly, a permit from the minister is needed to, among other things, "print, import, publish, sell, circulate or distribute" any newspaper (section 5(1)). A newspaper is defined extremely broadly (see below). The minister has apparently unfettered discretion to grant a permit, revoke or suspend a permit or impose conditions on the grant of a permit (sections 6(1), (2) and (3)).

Licences and permits shall be of such duration as the minister may decide (section 12) and the minister's decision to grant, revoke or suspend a licence or permit shall be final (section 13A). The minister may also require those who have been granted a licence or permit to deposit a certain sum with the government before their licence or permit is issued (section 10).

It goes without saying that all of this is in breach of the international law standard that requires regulation of the media to be done by an independent body. And these are, of course, very fundamental regulatory functions given that a licence or permit is required before anyone may operate a printing press or newspaper.

The Malaysian Communications and Multimedia Commission Act 1998, as the name implies, establishes the Communications and Multimedia Commission (Commission). However, contrary to international standards, the Commission is not remotely independent of government. Indeed, the minister exercises a remarkable degree of control over the Commission. The minister appoints all members of the Commission, including the Chair, three members "representing the Government" and between two and five other members (section 6).[96] The tenure of members is a very short two years, but they may be reappointed for up to five terms (section 10). This is almost the opposite of a more stable, democratic arrangement (i.e. which might envisage two terms of five years), and almost seems designed to ensure that members do not displease the appointing authority (i.e. the minister). The Minister also sets the level of remuneration for members (section 11), has unfettered powers to remove members (section 13(h)), must approve regulations regarding the conditions of

[96] Note that section 3 of the Malaysian Communications and Multimedia Commission (Amendment) Act 2024, which has been introduced at first reading in Parliament, would extend this to between two and seven other members. Available at https://www.parlimen.gov.my/bills-dewan-rakyat.html?uweb=dr&lang=en#.

service of employees (section 23)[97] and effectively sets the budget for the Commission (section 41). The Act also sets the first function of the Commission as being "to advise the Minister" (section 16(1)(a)), and provides that the Commission "shall be responsible to the Minister" (section 18(1)) and that the minister may give the Commission directions which are not inconsistent with the Act, to which the Commission must give effect (section 18(2)).

Despite these extensive levers of control, the Commission does not even undertake the main licensing functions under the Communications and Multimedia Act 1998. It just makes recommendations to the minister regarding individual licences, although the minister must have "due regard" to any such recommendation before making a decision (see sections 29 and 30). The minister issues class licences directly (see section 44). As with the Printing Presses and Publications Act 1984, having a minister exercise direct regulatory functions is the opposite of what the standard of independence requires.

The matter is quite different in relation to the Malaysian Media Council (Council) which is proposed to be established by the Malaysian Media Council Bill, where relatively strong guarantees for independence are in place. The Council will have the power, among other things, to adopt a code of conduct governing the behaviour of its members, to promote the highest standards of journalism and "regulate" the professional conduct of media practitioners, to promote media independence and the rights of media practitioners, to coordinate media training, to propose reforms of laws, and to put in place a mechanism to deal with complaints and impose disciplinary measures (sections 5(1), 15, 16 and 22(3)).

There are to be three categories of members: media companies, media associations and "non-media members" (section 7(1)). The definition of the latter in section 2 is not entirely clear but it appears to comprise individual academics, media trainers, members of the public who are not media practitioners and NGOs (it is not clear whether this is individual representatives of NGOs or NGOs as such).

The governing board of the Council includes two members representing the government, nominated by the minister, four members from each of the three membership categories, nominated and elected by the members of that category, and six other members, appointed from among the members of the Council by the 12 Board members from the three membership categories (section 8(1)), with the election taking place during a general meeting (section 8(4)). Members are elected for two years and may be reappointed once (section 10(1)),

[97] This power of the minister would be removed by section 11 of the Malaysian Communications and Multimedia Commission (Amendment) Act 2024.

and then again after two years have lapsed since they were on the board (section 10(6)). The Council sets the remuneration for the chair and other members (section 11). The board elects its own chair from among its members and there are prohibitions on those with strong political connections from being appointed as chair (section 9).

Despite these generally positive rules, it is not clear why it should be necessary for the government to have two representatives on the board. Even though this represents just 10% of the entire board, they could have significantly more influence than that. And the notion of independence under international law runs counter to the idea of having government representatives on a body like this. It would also make sense to apply the rules on political connections in section 9(2) to all members of the board and not just the chair.

The minister is also tasked with appointing the first or founding board (section 8(5) and clause 1 of First Schedule). That first board is to have 12 members, four each from each of the membership categories, all appointed by the minister, and shall appoint their own chair from among themselves. The main task of the founding board is to organise the first general meeting (which shall take place within six months of the appointment of the founding board, clause 1 of Second Schedule, and shall elect a new, full board). While there may be some concerns about the minister appointing the founding board, it may also be the most practical way to kick off the organisation. To further protect against the possibility of control, it may be useful to require the non-media members to be nominated by media companies or media associations, and to apply the prohibitions on political connections in section 9(2) to members of the founding board.

Funding for the work of the Council is to be paid out of a Malaysian Media Council Fund (Fund), itself to be supported by an allocation from parliament, fees earned by the Council, and grants and donations (sections 17(2) and 18). Foreign funding is not permitted, except as approved by the minister and for awareness work (sections 17(4) and (5)). It is not clear why the minister needs to pre-approve foreign funding as opposed to this being enforced via the courts should the Council accept foreign funding in a manner which is in breach of the law. Pursuant to section 18(2), the minister must also approve contributions by the Council to bodies outside Malaysia undertaking "journalism activities". There would not appear to be any justification for this. It might also be useful to put in place a process whereby the Council would prepare a budget for presentation to parliament as part of the process of allocating its budget.

The Second Schedule sets out key rules relating to the appointment of the founding board and first general meeting, the annual general meeting and special meetings. Pursuant to

section 19(2), the minister may, upon the recommendation of the board, amend this schedule. It would be helpful to rule out any possibility of amending clause 1 of the Second Schedule, relating to the appointment of the founding board and first general meeting.

It is also well-established under international law that public broadcasters should be independent of government. Thus, paragraph 16 of the UN Human Rights Committee's General Comment No. 34 states:

> States parties should ensure that public broadcasting services operate in an independent manner. In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.

This rationale for this is fairly obvious and a rather eloquent description of this rationale was provided over 30 years ago by the Supreme Court of Ghana:

> [T]he state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham.[98]

Radio Television Malaysia or Radio Televisyen Malaysia (RTM)[99] is the main public broadcaster in Malaysia. In stark contrast to the standards outlined above, it operates as a government department operated by the Ministry of Communications and Multimedia.[100] The Government of Malaysia's Official Gateway describes RTM as "the public broadcasting station owned by the government of Malaysia".[101]

Recommendations

- If the Printing Presses and Publications Act 1984 is not repealed entirely, as many commentators have recommended, at a minimum the regulatory powers it provides for should be undertaken by an independent regulatory body and not the minister.
- The Malaysian Communications and Multimedia Commission Act 1998 should be substantially amended to create an independent Commission and the Communications and Multimedia Act 1998

[98] *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.
[99] See https://www.rtm.gov.my.
[100] See, for example, https://philippinetelevision.fandom.com/wiki/Radio_Televisyen_Malaysia#cite_note-5 and https://statemediamonitor.com/2024/09/radio-television-malaysia-rtm/. See also the BBC's Malaysia media guide, which refers to RTM as "State-owned", https://www.bbc.com/news/world-asia-pacific-15384221.
[101] See https://www.malaysia.gov.my/portal/content/30054.

should also be amended to place key regulatory powers, including over licensing, in the hands of the (independent) Commission.

- Consideration should be given to amending the Malaysian Media Council Bill in line with the assessment above so as to strengthen the protection for the independence of the Council.
- RTM should be transformed into an independent public service broadcaster, operating under separate legislation and under the governance of an independent board of governors.

2.2. Promotion of Diversity

As noted above, the promotion of diversity is a key international law obligation of States as part of their positive duties to promote the right to freedom of expression. There are a wide range of ways to promote diversity but, as highlighted above, a focus on the three types of diversity – of source, outlet and content – through the regulatory system for the broadcast media is a dominant approach in most countries.

In terms of source diversity, it is generally agreed that in fact there is high concentration of ownership among the Malaysian media. For example, a 2021 report by the Centre for Independent Journalism, *Malaysian Media Landscape: A Snapshot of 2021*, notes: "[T]here exists a high concentration of media ownership in Malaysia within and across different media sectors".[102] The report goes on to detail significant concentration of ownership in different Malaysian media markets.[103] The 2024 IFJ report noted:

> Malaysia's media ownership can at best be described as "highly concentrated" and at worst complicated and murky, with major media outlets controlled by a small group of powerful entities, many with direct ties to political parties or politically influential figures but with a trail that is not clear or transparent.[104]

Chapter 2 General Competition Practices of Part IV Economic Regulation of the Communications and Multimedia Act 1998 broadly addressed the issue of concentration for the services which are licensed under the Act. Section 133 generally prohibits licensees from engaging in conduct "which has the purpose of substantially lessening competition in a communications market", while section 134 authorises the Communications and Multimedia

[102] 2022, p. 8, https://cijmalaysia.net/wp-content/uploads/2022/05/CIJ-Malaysian-Media-Landscape-Brief-2021.pdf.
[103] *Ibid.*, pp. 8-9.
[104] Note 1, p. 5. See also the BBC's Malaysia media guide, https://www.bbc.com/news/world-asia-pacific-15384221.

Commission to publish guidelines on this, listing factors to which the guidelines may refer. Then, section 137 authorises the Commission to determine that a "licensee is in a dominant position in a communications market" and section 138 grants the Commission the power to adopt guidelines on this, again listing factors to which the guidelines may refer, such as global trends, market share, the power of the licensee to make rate setting decisions and the degree of product differentiation in the market. Where a licensee is in a dominant position, the Commission may direct it to "cease a conduct in that communications market which has, or may have, the effect of substantially lessening competition" in that market (section 139).

The Commission adopted a Guideline on Dominant Position, pursuant to section 138, in 2014.[105] The Guideline provides guidance on a number of key competition issues, grouped under the headings "Market Definition" and "Dominant Position", signalling a two-step process to assessing whether a licensee is in a dominant position in a market. It is unclear, however, whether the Commission has ever applied these rules to a licensed broadcaster (as opposed to telecommunications provider).[106] In any case, it may be noted that these rules are generic in nature, covering both broadcasters and telecommunications service providers, whereas, under international law, these are recognised to be entirely different sectors, with much more stringent anti-competition rules being appropriate for the media sector.[107] In addition, the rules under the Communications and Multimedia Act 1998 appear to apply only within a communications market. For the media, cross-media ownership rules (for example between the print, broadcast and online media sectors) are also important.

In terms of outlet diversity, international law calls on States to put in place a regulatory environment to promote three types of broadcasters, namely public service, commercial and community. We have already noted, above, that the public broadcaster is not independent of government, which is a core requirement for public service broadcasters under international law. As far as we are aware, RTM also does not operate pursuant to a statute but simply as

[105] Adopted 24 September 2014, https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Commission-Guideline-on-Dominance-in-a-Communications-Market-Final.pdf.

[106] Shanthi Kandiah, 12 April 2024, "Malaysia: Lack of cross-sector merger control sparks updates to current regime and new emphasis on digital economy", https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2024/article/malaysia-lack-of-cross-sector-merger-control-sparks-updates-current-regime-and-new-emphasis-digital-economy, reviews one case where the Commission applied the rules to a telecommunications company.

[107] See Toby Mendel, *et al.*, *Concentration of Media Ownership and Freedom of Expression: Global Standards and Implications for the Americas*, note 72, pp. 19-23.

part of a government department. As such, it is unlikely to have a clear, mandatory public service mandate, another key requirement for such broadcasters.

The Communications and Multimedia Act 1998 authorises the licensing of private broadcasters and a number of private terrestrial and pay TV options exist, as well as a number of private radios, alongside the State broadcasting channels and both local and international online options.[108] There are also a number of FM radio stations, although rather a modest number compared to the size and population of Malaysia,[109] operating alongside a number of online radio stations.[110]

Malaysia has also formally recognised community broadcasters, specifically via section 209 of the Communications and Multimedia Act 1998, which recognises a limited content applications service (as distinguished from a content applications service). The former is defined as being "limited" based on one of four main characteristics: it targets a special interest group; it is available only in a restricted geographical area; it is available only for a short time (temporary licence); or it is based on content of limited appeal, in addition to cases where the minister makes a determination of limited content appeal pursuant to section 10.

In August 2010, the Malaysian Communications and Multimedia Commission adopted a Guideline on the Provision of Community Radio Service which elaborates on the standards for community radio.[111] The minister had earlier adopted Ministerial Determination No. 4 of 2003 on the Guidelines on Limited Content Application Services.[112] The latter elaborates on the four characteristics of a limited content applications service as set out in section 6 of the Communications and Multimedia Act 1998.

The MCMC Guideline focuses on radio services which target a particular geographic community. It imposes the following conditions on community radios: they operate on a not-for-profit basis; they transmit their signals using low power; and their content is available for free (para. 3). Pursuant to para. 4, such radio services are required to register under a class licence, with different requirements for applicants which broadcast their own content and

[108] See BBC Malaysia media guide, https://www.bbc.com/news/world-asia-pacific-15384221 and https://philippinetelevision.fandom.com/wiki/List_of_television_stations_in_Malaysia.
[109] See https://www.onestopmalaysia.com/travel/fm-radio/fm-frequency-by-radio-station.html.
[110] See https://mytuner-radio.com/radio/country/malaysia-stations#google_vignette.
[111] SKMM/G/01/10, 10 August, 2010, https://www.mcmc.gov.my/skmmgovmy/files/attachments/Guidelines_Community_Radio_09August2010.pdf.
[112] 17 July 2003. Included an Annexure 4 to the Guideline on the Provision of Community Radio Service, *ibid.*

those which do not. A fee of just MYR 2,500 (approximately USD 550) is charged for such registration (this does not include the licences for undertaking broadcasting).

Para. 9.1 of the Guideline sets out a number of content requirements for community radios including:

- Offering "diverse programming that reflects the needs and interest of the community".
- Not providing content which may "upset the sensitivity and sensibility of the community".
- Limiting commercial advertisements to "such time limits as may be ascertained by the community members who are involved in the operations of the service".
- If required, broadcasting "public service announcements as determined by the Minister".

Para. 10.1 also requires community radios to encourage community members to participate in their operations, and the selection and provision of programmes. Some other relevant conditions include a prohibition on licences being provided to "political bodies" (para. 5.1), limitation of distribution of content to the relevant geographic area (para. 6.6) and the retention of recordings of aired programmes for two weeks (para. 8.2).

It is positive that Malaysia has put in place a structured regime for licensing community radios. It is, however, not entirely clear how many community radios have so far been authorised to operate in Malaysia.

These rules comply with quite a lot of the international requirements for community broadcasters but there are also some concerns. Some of the conditions set out in para. 9.1 are problematical. The second item mentioned above, about upsetting the "sensitivity and sensibility of the community" is extremely vague and is also unacceptably limiting. It is also not appropriate to require any broadcasters, including community broadcasters, to carry messages on the demand of the government (the last condition set out above for para. 9.1).

Some additions should also be considered, such as extending the rules to cover community television. The idea of providing funding support for community broadcasters should also be considered, in addition to the lower fees at least for registering community radios (although they appear to be subject to the same fees for the licences required should they wish to broadcast their own content).

Recommendations

- The Communications and Multimedia Commission should consider adopting specific guidelines on undue concentration of media ownership and then applying these appropriately. If needed, the Communications and Multimedia Act 1998 should be amended to authorise the Commission to adopt and apply guidelines on cross-media ownership.
- As noted above, RTM should be transformed into a true, independent public service broadcaster, with a clear mandate to operate in the public interest, along with adequate funding, provided in a manner which does not undermine its independence, to allow it to discharge that mandate.
- Consideration should be given to tweaking the community broadcasting rules as suggested above and, to the extent that this has not yet happened or only happened on a limited basis, to actually issue community broadcasting licences.

2.3. Regulation of the Print Media

Under the Printing Presses and Publications Act 1984, a licence from the minister is required to operate a printing press (section 3(1)). A "printing press" is anything which can reproduce any "document" (defined very broadly in section 2) at a rate of "1,000 impressions per hour or more" (Schedule I), unless this has been amended by the minister (section 3(7)), although it does not cover documents printed in the normal course of business other than by a printing business (section 3(8)). Even with these exclusions, any business which served to print business cards, postcards or almost any other form of printed document, using even a fairly modest commercial printer, would require such a licence.

A newspaper is defined extremely broadly to include any publication (itself defined to cover anything which is "capable of suggesting words or ideas") which contains news, intelligence or reports of occurrences or any remarks on any matter of public interest, for sale or free, distributed at regular or irregular intervals. As noted above, a permit from the minister is needed, among other things, to "print, import, publish, sell, circulate or distribute" any newspaper (section 5(1)).

Operating a printing press without a licence or a newspaper without a permit are offences which may be punished by up to three years' imprisonment or a fine of up to MYR 20,000 or both (sections 3(4) and 5(2)). Under international law, it is not legitimate to subject print media activities to a licensing requirement (of which the permit under the Printing Presses

and Publications Act 1984 also qualifies as a licensing system). A technical system of registration for newspapers, which requires only limited information to be provided and does not envisage any discretion to refuse or revoke registration, except perhaps on the very technical ground that another newspaper using the same or a similar name already exists, may be legitimate according to international standards but even this is not necessary (it is sufficient for newspapers to be registered in the normal way as companies). As the (then) three special international mandates on freedom of expression stated in their 2003 Joint Declaration:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.[113]

The system of licences (for printing presses) and permits (for newspapers) under the Printing Presses and Publications Act 1984 clearly do not qualify as a technical registration system. This is particularly true given that the Act allows the minister to impose any conditions on the operation of a licence or permit that he or she may wish to. The Act also empowers the minister to require the deposit of funds with the government before a licence or permit is issued (section 10), another fetter on free speech which also cannot be justified under international law.

The penalties under the Printing Presses and Publications Act 1984 are also excessive (undue penalties represent a separate breach of the right to freedom of expression under international law). For example, pursuant to section 8B, where any person has been found guilty of any offence via a publication, the public prosecutor may apply to the court to order the suspension of the publication for six months. Given that defamation is a criminal offence in Malaysia (pursuant to section 499 of the Penal Code; see below), this means that a conviction of a journalist for defamation could potentially also lead to the extreme measure of the closure of the newspaper which published the statement for up to six months. Indeed, pursuant to section 8C of the Printing Presses and Publications Act 1984, a newspaper can even be suspended pending the determination of criminal charges against a "printer, publisher, editor or writer". This is clearly excessive (indeed, as noted below, even the possibility of a sanction of imprisonment for defamation is excessive).

[113] Adopted 18 December 2003. All of the Joint Declarations are available at https://www.osce.org/fom/66176.

Recommendations

- Given that it does not appear to serve any useful or valid purpose, consideration should be given to repealing in its entirety the Printing Presses and Publications Act 1984.
- At a minimum, the requirements for printing presses to obtain a licence and for newspapers to obtain a permit, and the related powers of the minister to impose conditions on licences and permits and to require the making of a deposit, should be repealed. In addition, the powers of suspension provided for in sections 8B and 8C of the Act should be repealed.

2.4. Regulation of Broadcasting

Most of the issues regarding the regulation of broadcasting are addressed above under Independent Regulation and Promotion of Diversity. However, a few additional issues are canvased here. A first is that the Communications and Multimedia Act 1998, section 126 of which provides for the licensing of broadcasters, which are deemed to be content applications services, fails to set out any criteria for the awarding of either individual or class licences.[114] This means that, where there are competing licence applications, decisions about how to award them are entirely at the discretion of the Communications and Multimedia Commission and minister. It also means that any public interest considerations regarding the promotion of certain types of licences, are left entirely to the Commission and minister rather than being set by the legislature. This is never appropriate but it is particularly problematical where the regulatory process is not overseen by independent bodies, as is the case in Malaysia. This problem is exacerbated by the fact that the minister may, on the recommendation of the Commission, suspend or cancel any licence "in the public interest",[115] which is again highly discretionary.

The Act also provides for very little detail on the procedures for applying for and granting licences. In most countries, these issues receive detailed treatment in the primary legislation and are not left to the discretion of the regulator. This helps ensure fairness in the process and provides clarity and consistency for applicants. For example, section 27(2) leaves it

[114] See section 29, which grants the Commission the unfettered power to recommend the granting or not of a licence and then the same for the minister when deciding whether or not to grant a licence under section 30.

[115] Section 37(e) of the Communications and Multimedia Act 1998.

entirely up to the discretion of the minister to decide, by regulation, who may and who may not apply for a licence. The Act fails to set out any details about what documents should be provided in a licence application, while section 28 gives the Commission unfettered power to require additional information to be provided. There is no provision for an applicant to be heard where the Commission is considering not to recommend the granting of a licence under section 29 or where the minister refuses to grant a licence under section 30. There are also no procedures for determining any special conditions in a licence (section 32(b)) or for engaging in the process for varying or revoking those conditions (section 33).

Recommendations

- Clear criteria should be set out in the primary legislation, i.e. the Communications and Multimedia Act 1998, regarding the criteria to be used when deciding whether or not to recommend and then grant a licence, at the very least for broadcasting services.
- The primary legislation should set out much clearer and more detailed rules on the procedures for applying for and granting a licence.

2.5. Regulation of Digital Communications

The subject of regulating digital communications is very broad indeed. Here, we focus mainly on two recent issues, namely the requirement for intermediaries to obtain licences, which started on 1 January 2025, and the new Online Safety Bill, passed by Parliament in December 2024.[116]

The Communications and Multimedia Act 1998 defines an "applications service" in section 6 as "a service provided by means of but not solely by means of, one or more network services". Interestingly, a "network service" is not defined. Pursuant to section 126, subject to any exemptions, no one may provide a network service except in accordance with a licence (either individual or class). Section 6 also defines a "content applications service" as "an applications service which provides content". Finally, pursuant to section 4, the Act applies to persons which provide "relevant facilities or services under this Act in a place within Malaysia". In August 2024, the Communications and Multimedia (Licensing) (Amendment) (No. 2) Regulations 2024 and Communications and Multimedia (Licensing) (Exemption)

[116] Note 95.

(Amendment) Order 2024 were adopted, making it clear that any service provider with eight million or more users in Malaysia would need to obtain a licence by 1 January 2025.[117]

Despite the lack of definition of the important term "network service", it seems clear that the cumulative impact of these terms is that most online intermediaries providing services in Malaysia are supposed to obtain a licence under the Act. As noted above, it is legitimate to license these actors only where they operate a business which otherwise requires a licence. Thus, those providing Internet access infrastructure, such as via cabling or satellite, might be required to obtain a telecommunications licence but this should not be extended to actors which simply provide services using the Internet, such as social media platforms. This does not mean that the latter cannot be regulated and, indeed, countries around the world are moving to regulate them.[118] The Online Safety Bill also represents such an effort. But that is not the same thing as requiring them to hold a licence. As always, the fact that the Act is implemented by bodies which are not independent of government, namely the Communications and Multimedia Commission and the minister, exacerbates this problem.

Of further concern in this regard is section 263 of the Communications and Multimedia Act 1998, which requires each licensee to "use his best endeavour" to prevent its service from "being used in, or in relation to, the commission of any offence under any law of Malaysia". Licensees must also, when requested by the Commission or any other authority, assist that requester "as far as reasonably necessary in preventing the commission or attempted commission of an offence under any written law of Malaysia or otherwise in enforcing the laws of Malaysia".

Much depends here on how the terms "use his best endeavour" and "as far as reasonably necessary" are interpreted. As noted above, it is not legitimate to impose a requirement on intermediaries to monitor the content that flows through their services. Otherwise, what is required under both heads of section 263 needs both to be reasonable and also not to intrude on human rights such as freedom of expression and privacy.

Concerns with section 263 are exacerbated by section 252, which empowers the Public Prosecutor, if he or she merely "considers … that any communications [sic] is likely to contain

[117] We were unable to obtain a copy of these regulatory instruments, including on the website of the Communications and Multimedia Commission. But see, for example, Baker McKenzie, "Malaysia: Licensing of Social Media and Internet Messaging Service Providers - From 1 January 2025 Onwards", 5 August 2024, https://insightplus.bakermckenzie.com/bm/technology-media-telecommunications_1/malaysia-licensing-of-social-media-and-internet-messaging-service-providers-from-1-january-2025-onwards.

[118] See, for example, the European Union's DSA, note 47.

any information which is relevant for the purpose of any investigation into an offence" under the Act, to authorise a police officer or "authorised officer" to "intercept or to listen to" those communications. There are two serious problems with this. First, given that the Public Prosecutor is part of the system of enforcement of the law, and thus has a bias towards such enforcement, authorisations for surveillance are normally reserved for the judicial system. Second, given the privacy and freedom of expression implications of surveillance, the standard for authorising this form of surveillance, namely merely that a communication is likely to be relevant to an investigation, is too low. Instead, there should be a clear and direct link between the surveillance action and the enforcement of a law, and proof that surveillance is necessary to obtain relevant evidence and not just a convenient way of doing so.[119]

There are a number of structural problems with the Online Safety Bill. A first is that it does not distinguish between content which is illegal and content which is merely harmful without rising to the level of illegality. Both types of content are found in the First Schedule to the Bill, which sets out the categories of "harmful content". A second is that the definition of "harmful content" is both too broad and too vague. A third is that it only envisages one response to harmful content by the services which it covers, namely making content inaccessible, whereas many such services will have a wide range of possible options at their disposal which the Bill simply fails to take advantage of. A fourth is that it fails to take into account the systemic impact, in terms of the spread of harmful content, of the operations of intermediaries, including social media platforms, in the modern world. Each of these issues is addressed below in turn.

Most of the new laws which address harmful online content either focus only on illegal content or treat illegal and "merely" harmful content differently.[120] There are good reasons for this. It is legitimate to call on intermediaries to take down or render inaccessible illegal content whereas a more tailored approach is needed for content which is harmful but not illegal. Thus, it is not appropriate to take down all false content but intermediaries may apply other measures to it, such as not boosting it, labelling it as false, directing users to accurate information about the same theme and so on.

---

[119] For more information on these standards, including the approach taken by different countries and courts around the world, see Necessary & Proportionate: On the Application of Human Rights to Communications Surveillance, https://necessaryandproportionate.org.

[120] For more information on this, see the background paper on international standards and comparative national practice prepared for UNESCO's Internet for Trust initiative, Toby Mendel, *Background Paper: Legal Regulation of Platforms to Promote Information as a Public Good*, Centre for Law and Democracy, January 2023, https://www.unesco.org/en/internet-trust/guidelines-consultation-process?hub=71542.

The First Schedule covers both illegal content – such as child sexual abuse material, incitement to violence or terrorism and fraudulent content – and content which, when circulated in volume over social media platforms, may be harmful – such as content which may cause harassment or alarm, or content which may induce a child to harm him- or herself. The Bill does distinguish between "priority harmful content" and "harmful content", although we note that, unhelpfully, the Second Schedule, addressing priority harmful content, simply refers back to items in the list in the First Schedule, rather than establishing a separate list of items.[121] But the Bill treats all "harmful content", whether illegal or merely harmful, in the same way, which is not appropriate.

A second general problem is that the First Schedule to the Bill defines "harmful content" too broadly and too vaguely. There is a huge amount of problematical content circulating online today. It is proving very challenging to mitigate the harm this causes, even when the focus is clearly on only the most harmful content. It is simply unrealistic to try to address all of the problematical content. Furthermore, a very careful balancing is needed when addressing so-called "harmful" content to ensure that this does not unduly restrict freedom of expression. Here, as always, the focus should be on actual harm rather than the notion of offence or content which some people may not like.

The First Schedule is both over- and underinclusive in this regard. It is simply not appropriate to require intermediaries to take action in relation to some of the categories it lists, which fall clearly into the "offensive" as opposed to "harmful" category. This includes, for example, content which "may give rise to a feeling of disgust due to lewd portrayal which may offend a person's manner on decency and modesty" and "content which is profane in nature, improper and against generally accepted behavior or culture".

On the other hand, the First Schedule fails to address certain forms of harm. The DSA, for example, requires very large online platforms to respond to content which may create "negative effects for the exercise of the fundamental rights to respect for private and family life, freedom of expression and information, the prohibition of discrimination and the rights of the child" or a "negative effect on the protection of public health, minors, civic discourse, or actual or foreseeable effects related to electoral processes and public security", as well as illegal content.[122] The First Schedule does refer to promoting "promote feelings of ill-will or

[121] It is obviously problematical to have the same categories of content falling into both Schedules and thereby being subjected to different procedures under the Bill.
[122] Note 47, Article 26(1).

hostility", which touches on discrimination, and certain types of harm to children, but otherwise it does not cover these wider risks from online content.

A third problem is that the one response to harmful content envisaged in the Online Safety Bill is to make it inaccessible.[123] This is not inappropriate for illegal content, as noted above, but it is not appropriate for merely harmful content as it fails to strike an appropriate balance with freedom of expression. It also fails to take into account the way harm actually arises online. In most cases, it is not individual expressions which create harm but the boosting and multiplication of them online. To give a very practical example, it does not much matter if someone expresses a factually incorrect view on vaccines (such as that they do not help prevent serious symptoms of COVID 19 or that they are harmful for your health). But when such expressions are massively multiplied and boosted via social media, such that important segments of the population are actually confused about the truth in this context, that poses a very real risk to public health measures. The appropriate response here is, therefore, not to try to take down each and every incorrect statement about vaccines but for social media platforms to put in place structural measures to prevent their systems from multiplying and boosting this content (and perhaps other measures, such as labelling and redirecting users to correct content). Furthermore, most of these other measures are far less harmful to freedom of expression than taking content down.

This brings us to the fourth problem noted above, namely the failure of the Online Safety Bill to take into account the systemic nature of most online harms and to craft a systemic response to them, i.e. a broader response on the part of online intermediaries, whose systems are, in the end, a primary cause of the problems. The approach of the European Union's DSA is instructive here, but it may be noted that UNESCO's Guidelines for the Governance of Digital Platforms: Safeguarding freedom of expression and access to information through a multistakeholder approach,[124] part of their wider Internet for Trust initiative, promote a very similar approach.

The DSA calls on very large online platforms (those with 45 million users or more in the European Union) to "identify, analyse and assess", annually, "any significant systemic risks stemming from the functioning and use made of their services in the Union". The DSA also

[123] See, for example, sections 22 and 23.
[124] 2023, https://www.unesco.org/en/internet-trust/guidelines.

lists the specific risks mentioned above as risks which must be included in the assessment.[125] It also goes on to note:

> When conducting risk assessments, very large online platforms shall take into account, in particular, how their content moderation systems, recommender systems and systems for selecting and displaying advertisement influence any of the systemic risks referred to in paragraph 1, including the potentially rapid and wide dissemination of illegal content and of information that is incompatible with their terms and conditions.[126]

These platforms are then required to put in place "reasonable, proportionate and effective mitigation measures, tailored to the specific systemic risks identified".[127] A number of possible measures are listed, including: adapting content moderation or recommender systems, decision-making processes, the features or functioning of their services or their terms and conditions; measures aimed at limiting the display of advertisements; reinforcing their internal processes or supervision; or improving their cooperation with other online platforms.[128]

There are a number of benefits to this approach, which takes place under the supervision of an independent regulator. It is tailored to the way platforms actually function, including the automated systems they use to disseminate content. As such, it has a much higher chance both of being implemented effectively by them and of being successful in reducing the incidence of harmful content. It responds directly to the core problem, namely the systemic promotion of harmful content by platforms, rather than the piecemeal dissemination of that content by individual users. And it employs all of the tools available to the platforms, without undermining their commercial operations or breaching their intellectual property rights, rather than simply the rather crude tool of taking down individual pieces of content.

A few cautions are, however, relevant here. First, it is not yet clear how effective this approach will be, since it is just starting to be implemented in the European Union. Second, the impact of this approach on human rights, and especially freedom of expression, is not yet clear. There will no doubt be a lot of litigation around this within the European Union and likely before the European Court of Human Rights, and no doubt certain adjustments will need to be made to the system to ensure proper respect for human rights in its operation.

---

[125] Note 47, Article 26(1).
[126] *Ibid.*, Article 26(2).
[127] *Ibid.*, Article 27(2).
[128] *Ibid.*

Third, and importantly for Malaysia, the idea of oversight by a robustly independent regulator is essential to the proper operation of this system. These are sensitive content issues and it would be highly problematical from the perspective of freedom of expression if they were to be overseen by a non-independent body. At the same time, oversight is essential to the proper operation of such a system. As noted above, the Communications and Multimedia Commission, which is the key regulator in the Online Safety Bill, is not independent. Neither is the Online Safety Committee which is established by section 5 of the Bill and which, pursuant to section 10, provides advice to the Commission.

Finally, it is one thing for the European Union, with a population of 450 million, to impose these obligations on platforms and quite another for Malaysia, with about 35 million inhabitants, to do so.

Recommendations

- Online intermediaries should not be required to obtain a licence simply because they provide online or network services. This requirement should instead be limited to those providing specific types of services which, by their nature, it is appropriate to license.
- Section 263 of the Communications and Multimedia Act 1998 should either be amended or subjected to clear interpretation to ensure that it is both not unduly onerous for service providers and does not unduly restrict human rights, including freedom of expression and privacy.
- Section 252 of the Communications and Multimedia Act 1998 should be amended to require judicial authorisation for communications surveillance and to set appropriately high standards for such authorisation.
- The Online Safety Bill should distinguish between illegal and merely harmful content and provide for different approaches to the two. The lists in the First and Second Schedules to the Bill should be separate (i.e. the Second should not just refer back to the First).
- The definition of harmful content should be limited to content which actually is harmful, as opposed to content which may merely upset or annoy certain people. On the other hand, it should cover a wider range of harmful content, such as content which threatens freedom of expression or privacy, which promotes discrimination, which is harmful to children, or which poses risks to health or elections.
- Malaysia should consider putting in place some sort of broader human rights due diligence system for online platforms which have eight million or more users in Malaysia. However, the legitimacy of this would depend on Malaysia setting up an independent regulator to oversee the system, a standard with the Communications and Multimedia Commission does not meet.

2.6. Professional Regulation – The New Media Council Bill

The Malaysian Media Council Bill focuses primarily on the idea of establishing a system of professional regulation for the media (i.e. a professional system of complaints), even though section 5(1) also sets out a relatively broad mandate for the Council, which is positive. It represents a fairly classical co-regulatory approach to professional regulation, i.e. one which is backstopped by legislation but which allows for a significant role to be played by media actors (for example as opposed to a self-regulatory approach which is set up by media actors without being backstopped by legislation. Key to the whole system is provision for complaints based on an established code of conduct.

Overall, the idea of establishing a professional regulatory system for the media is very positive and such systems have proven to be an important means of supporting media freedom in different countries around the world, including very positively in Indonesia. There are also a lot of other positive features associated with the Council, such as advocating for media law reform. The key attributes of a strong co-regulatory system, in line with international standards on freedom of expression and better comparative practice by other States, include the following:

1. The creation of an independent and fair system for deciding upon complaints.
2. The establishment of clear standards against which complaints will be assessed (normally a code of conduct).
3. The setting out of a limited range of sanctions for breach of the rules which are aimed at promoting professionalism rather than punishing offenders.

We address each of these features in turn.

1. Complaints System

Section 5(1)(h) of the Bill tasks the Council with setting up a grievance mechanism and deciding on professional complaints against a "member of the Council". Section 6(2)(a) then refers to a code of conduct for "media practitioner and independent media practitioner", while section 6(1)(d) refers to investigating complaints again against media practitioners. For its part, section 15 refers to the idea of a "grievance mechanism" functioning as an "intermediary between the Council, members of the Council and the public", while section 16(1) indicates that the Council shall have "disciplinary powers over its members" and "may exercise disciplinary powers against members" who have contravened the Act or the code of conduct. Section 16(2) provides for the establishment of disciplinary offences, the imposition

of disciplinary penalties and the determination of procedures for disciplinary proceedings to be adopted by a simple majority vote at a general meeting.

The rules need to be quite clear on who is a member and also against whom complaints and then disciplinary proceedings and penalties may be made/imposed. The provisions above are not consistent or clear, at least vis-à-vis complaints and discipline (including as to who is covered by this).

The category under section 7(1)(c), covering non-media members, refers explicitly (via the section 2 definitions) to individual academics, media trainers and (non-media) members of the public. We question the whole purpose of the section 7(1)(c) category of members. We see value in having esteemed members of the public, including academics and media trainers, playing a role on the complaints body (on which, see below), but little point in having them as core members of the Council. The role of the Council is to serve (and govern) the media, and it is the media who should be members.

There is also something anomalous about the section 7(1)(c) category. Although media companies are represented by publishers or senior management and media associations are represented by their members (sections 7(1)(a) and (b)), there does not appear to be any place for individual media practitioners (journalists) to join as members. In contrast, section 7(1)(c) provides for individual members of the public (and academics and so on) to join the Council. This cannot be appropriate.

Better practice is for media codes of conduct to apply to media outlets, as such, and not to individual journalists. There are two main reasons for this. First, it is the collective decision by a media outlet to disseminate content that is mainly responsible for any harm done. Of course an individual journalist can invade privacy or intrude on grief, for example, but the harm flowing from this is vastly greater if that action becomes public via media dissemination of the content. Second, the primary remedies under professional systems – namely corrections, rights of reply and requirements to disseminate (publish) decisions of the complaints body – can only be provided by media outlets, since individual journalists cannot require such dissemination unless, perhaps, they are editors.

This does not mean that only media outlets should be accepted as members, although this is indeed the case in many professional systems. But it does suggest that there should be special form of membership for media outlets or at least that the system of complaints and discipline should apply only to those members. Otherwise, if other categories of members are retained, consideration should be given to opening this up to individual media practitioners.

Regardless of membership, the Act should set out clearly and consistently who may be the subject of a complaint. And, whether or not this covers media practitioners, as well as media outlets, complaints should only be allowed against members of the Council.

Section 7, on membership, is not explicit about this but we assume that membership is voluntary. That is fine but it would also be important to establish inducements ("carrots") relating to membership. One very important such inducement to consider, which applies in a number of countries, including Indonesia, is the idea of this being a *lex specialis* (special law) for the media. As such, complaints against the media should be required to be routed first through the complaints system under this law, where this is relevant (i.e. where the complaint relates to an issue which is covered by the code of conduct), before a legal case may be lodged before a court. There are important virtues of this approach. In Indonesia, as a practical example of this, it has led to rapid, appropriate resolution of the vast majority of complaints against the media, including for ordinary people, with only a very small number of cases continuing to the courts (demonstrating the appropriateness of the resolutions provided via the complaints system).

According to section 16(2), it is the general meeting of the Council, i.e. the full membership of the Council, which not only establishes disciplinary offences and determines the procedures for disciplinary proceedings (both appropriate) but also imposes disciplinary penalties. The latter is neither appropriate nor practical. The imposition of disciplinary penalties, and the procedures which precede it, should not be decided upon through what essentially amounts to a majority voting system but via an independent, quasi-judicial approach. In addition, the general meeting will take place only once a year, which may both lead to serious delays in deciding cases (and imposing punishments) and overwhelm the meeting, as there could be a very large number of cases to be decided upon over the course of a year. This does not conform to the idea of an "efficient and swift dispute resolution system" (section 15(1)(b)).

It is likely also not appropriate to have the board of the Council deciding upon cases, given that it will be responsible for managing all of the affairs of the Council. It would also be difficult to incorporate public representatives into this process (taking into account the point made above about how it does not really make sense for "ordinary" members of the public to be members of the Council). Instead, we recommend that the board, or perhaps general meeting, appoint a complaints body to decide upon complaints. An alternative would be to have a roster of experts, which should include both leading media workers (editors and senior journalists) and respected members of the public, from which the board could appoint

panels to decide on complaints. These panels (or the complaints body) could either impose disciplinary measures directly or recommend them to the board, which would then impose them. This would allow for the integration of leading public representatives into the complaints process, thereby bolstering the credibility of the complaints process (so it does not look like an inside media business), without distorting the membership of the Council.

Section 15 provides for a "grievance mechanism" to be adopted by the general meeting. This is fine but it might be useful to set out at least some broad conditions on this in the law, such as that it must allow all parties a proper opportunity to be heard and to respond (at least once) to claims made by the other party. Clause 4 of the First Schedule addresses conflicts of interest on the board and the same rules should also apply to the members of whichever body is responsible for deciding upon complaints.

2. Code of Conduct

Various provisions in the Bill refer to the idea of a code of conduct being adopted by the Council, at a general meeting (including sections 5(1)(a), 6(2)(a), 16(1) and 22). Section 22 says the Council "may establish" a code, whereas this should be mandatory for the Council. Different provisions use different language in relation to the code and breaches of it (such as "committed a misconduct" in section 16(1) and "breach of the code" in section 22(3)); this should be standardised and the term used should be based on the idea of a "breach". Beyond this, it might be useful to stipulate a bit more clearly in the law what exactly the code is supposed to cover. Section 5(1)(a) does refer to the idea of "standards of ethical and responsible journalism", and this is repeated in section 6(2)(a), but it would be useful also to include this language in section 22, which is the main operative provision governing the code. Consideration should also be given to listing, in a general manner, the key issues which should be covered by the code.

3. Sanctions or Disciplinary Measures

A number of provisions in the Bill refer to the idea of disciplinary powers and penalties, including section 16, 21(2) and 22(3). Only section 22(3) clearly links disciplinary measures to breaches of the code, while section 16(1) refers to disciplinary powers for breaches of the Act or code and section 21(2) refers rather generally to discipline in the context of a failure "to comply with the guideline, directive, circular, standard and notice". Any power of the Council to impose disciplinary measures should be carefully and clearly circumscribed and limited to procedural matters (such as a failure to cooperate with the Council) and substantive breaches of the code.

More generally, it is of the essence of professional systems that sanctions be limited in nature, normally to actions like warnings, or requirements to carry a correction, reply or statement or decision of the complaints body. Some systems also allow for minor fines to be imposed for breach of a code but that is not recommended in this case, where membership of the Council appears to be voluntary (since a member could simply elect to leave the Council if a fine were imposed). It is also of the greatest importance for a co-regulatory system that the available disciplinary measures be set out clearly in the governing legislation, and not left to the discretion of the Council itself.

We also have some other brief comments on the Bill, as follows:

- Section 8(1) provides for one person on the board from among those from each of the three categories of members – but not from the members representing government or the additional members – to be a woman. This could result in only three women being on the board from among 21 members. At a minimum, one woman should be required to be appointed from among each of the five types of board members listed in section 8(1).
- Section 8(1)(a) provides for a chair of the board and then section 9(1) provides that the members of the board shall appoint the chair. Normally, the type of arrangement provided for in section 9(1) refers to appointments from among the members who are already on the board. As it is, it is not very clear whether the chair as provided for in section 8(1)(a) is another person from those listed in sections 8(1)(b)-(f) (likely this is the intention, since section 8(1)(a) is a separate provision and, otherwise, there would be an even number of board members). If so, at least some parameters for how the chair is to be appointed should be provided for in section 8(1)(a).
- According to section 6(2)(c), the Council may impose a fee for membership, while clause 1(4)(c) of the Second Schedule provides for the fee to be set at the first general meeting. Given that there are likely to be a wide range of types of members, including very different sizes of media outlets and potentially both media outlets and individual media practitioners, some reference to the idea of a varied schedule of fees, which could take these differences into account, might be made.

Recommendations

- The idea of individual members of the Council who come from outside of the media, as provided for in section 7(1)(c), should be reconsidered.

- The idea of having two government representatives on the board should be reconsidered.
- Consideration should be given to allowing for individual media practitioners to be members of the Council but, regardless of this, complaints should only be allowed against media outlets which are members of the Council.
- Consideration should be given to setting the Media Council Act up as a *lex specialis* for the media, and to requiring those bringing complaints against the media to go first to the Council where their complaint relates to a matter which is covered by the code of conduct, before they may go to court.
- Neither complaints nor the imposition of disciplinary measures should be decided upon by the general meeting of the Council. While these actions might be undertaken by the board of the Council, it is recommended instead that a complaints body, or roster of complaints experts, be established to process complaints and either decide on or recommend disciplinary measures (in the latter case, subject to the final decision of the board).
- Consideration should be given to setting out at least some main procedural fairness rules for the processing of complaints in the law.
- The rules on conflicts of interest in Clause 4 of the First Schedule should be extended to cover the members of whichever body decides on complaints.
- The law should require the Council to adopt a code of conduct rather than merely allow it to.
- The idea of "breaches" of the code should be used consistently throughout the law.
- The phrase "standards of ethical and responsible journalism" should be included in section 22.
- Consideration should be given to setting out the key issues to be included in the code in the law.
- It should be clear that the Council may only impose disciplinary measures for procedural matters and for substantive breaches of the code.
- The range of possible disciplinary measures should be set out in the law and should include only warnings, or requirements to carry a correction, reply or statement or decision of the complaints body.
- Consideration should be given to requiring at least one woman to be included among each of the types of board members listed in sections 8(1)(b) to (f).
- The law should set out how the chair, provided for in section 8(1)(a), is to be appointed.
- Consideration should be given to providing for a varied schedule of fees for different types of members of the Council.

3. Content Restrictions

This chapter of the report focuses on a number of key content restrictions which are found in different pieces of Malaysian legislation. In any country, there are numerous such restrictions, many of which may raise concerns from the perspective of freedom of expression. The sample of restrictions highlighted below represents only some of the

problematical restrictions in Malaysian Law. It is drawn from among those which are referred to by other commentators as being most problematical, as well as some others which we deemed to be particularly divergent from established international standards. They are organised under the headings of the different laws in which they are found, namely the Sedition Act 1948, Penal Code, Printing Presses and Publications Act 1984, and Communications and Multimedia Act 1998.

We are aware that a number of other laws – including the Film Censorship Act 2002,[129] the Prevention of Terrorism Act 2015,[130] the Universities and Universities Colleges Act 1971,[131] the Evidence Act 1950[132] and the Defamation Act 1957.[133] Two laws have also been adopted since 2018 which impose general bans of so-called fake news, namely the Anti-Fake News Act 2018,[134] which was repealed in 2019, and the Emergency (Essential Powers) (No 2) Ordinance (Fake News Ordinance), adopted in March 2021 using powers conferred by a January 2021 Emergency Proclamation, but repealed in August 2021.[135] It is, however, beyond the scope of this report to cover all of these content restrictions.

3.1. Sedition Act 1948

The offence of sedition, or seditious libel as it was originally styled, is generally considered to have its origins in the case *De Libellis Famosis*,[136] penned in 1606 by the Chief Justice of the now infamous Court of the Star Chamber, Lord Coke.[137] According to *De Libellis Famosis*,

[129] Act 620, https://tcclaw.com.my/wp-content/uploads/2020/12/Film-Censorship-Act-2002.pdf.
[130] Act 769, https://natlex.ilo.org/dyn/natlex2/natlex2/files/download/103086/MYS103086.pdf.
[131] Act 30, https://tcclaw.com.my/wp-content/uploads/2020/12/Universities-and-University-Colleges-Act-1971.pdf.
[132] Act 56, https://www.sprm.gov.my/admin/files/sprm/assets/pdf/penguatkuasaan/akta-keterangan-1950-akta-56-bi.pdf.
[133] Act 286, http://www.commonlii.org/my/legis/consol_act/da19571983174/.
[134] Available at https://web.archive.org/web/20180417192622/https://www.cljlaw.com/files/bills/pdf/2018/MY_FS_BIL_2018_06.pdf.
[135] Available in Bahasa Melayu or the Malay language at https://drive.google.com/file/d/1ZOWsLPsqNL-fuIcS3w7LRsmYnqeRWk__/view. See also Lasse Schuldt, "The rebirth of Malaysia's fake news law – and what the NetzDG has to do with it", 13 April 2021, https://verfassungsblog.de/malaysia-fake-news/. The problems with such rules are outlined below.
[136] 77 Eng. Rep. 250.
[137] The Court of Star Chamber was created by Henry VII in 1487 to combat the feudal anarchy which was being visited upon England by warring barons. The Star Chamber is known for its liberal wielding of the power of censorship, which had became a particular concern with the advent and then spread of the printing press (first invented around 1440).

intention was irrelevant, as was the presence or not of actual harm. Truth, according to Lord Coke, was not a defence; indeed, truth could be more injurious than fiction. When the Court of Star Chamber was abolished in 1641, seditious libel continued as an offence under the common law.

Sedition acts were adopted by the British colonial rulers in many of the colonies, including Malaysia. Some of these have now been repealed,[138] while others have fallen into disuse. The Common Law offence of sedition was finally abolished in the United Kingdom in 2009 by the Coroners and Justice Act 2009,[139] although it had not been applied for many years.

The last prosecution for sedition in Canada was *Boucher v. The King* in 1951. Boucher, a member of the Jehovah's Witnesses religion, was prosecuted for urging people to protest against the Quebec government's "mob rule and Gestapo tactics" by showing obedience to God. The Supreme Court of Canada set aside Mr. Boucher's conviction and rejected the idea of criminally proscribing behaviour based on the mere creation of "disaffection", "discontent", "ill-will, or "hostility", as sedition traditionally did, stating:

> There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence, of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality.[140]

The Court also rejected any definition of "seditious intention" which did not incorporate an intent to incite to violent lawlessness against constitutional authority. The current definition of sedition in section 59 of the Canadian Criminal Code requires advocacy of "the use,

---

[138] For example, Kenya's Sedition Act was repealed in November l997 by the Statute Law (Repeals and Miscellaneous Amendments) Act, 1997, https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=http://kenyalaw.org:8181/exist/rest//db/kenyalex/Kenya/Legislation/English/Amendment%2520Acts/No.%252010%2520of%25201997.pdf&ved=2ahUKEwj1tZKNxfyKAxVVfvUHHRMKE4IQFnoECBkQAQ&usg=AOvVaw08TqrL9sqjHlA_TLtAK7uh.

[139] Section 73, https://www.legislation.gov.uk/ukpga/2009/25/enacted/data.pdf.

[140] *Boucher* v. *The King*, [1951] S.C.R. 265, p. 288.

without the authority of law, of force as a means of accomplishing a governmental change within Canada".[141]

The famous British judge, Lord Denning, put the matter in very clear terms:

> The offence of seditious libel is now obsolescent. It used to be defined as words intended to stir up violence, that is, disorder, by promoting feelings, of ill-will or hostility between different classes of His Majesty's subjects. But this definition was found to be too wide. It would restrict too much the full and free discussion of public affairs .... So it has fallen into disuse for nearly 150 years. The only case in this century was *R. v. Caunt* ... when a local paper published an article stirring up hatred against Jews. The jury found the editor Not Guilty.[142]

Unfortunately, in Malaysia, the Sedition Act 1948 not only remains on the books but continues to be used actively in prosecutions. As noted above, the Centre for Independent Journalism has observed that the Sedition Act 1948 was actually used more frequently in 2023 than in 2022.[143] In its 2023 report, *Malaysia Human Rights Report 2023: Civil and Political Rights*,[144] SUARAM reports a spike of nearly 60% in cases under the Sedition Act 1948 from 2022 to 2023. SUARAM also reported a total of 960 investigations between 2010 and 2023, of which only 2% resulted in actual court cases. SUARAM suggests that this wide discrepancy "demonstrates arbitrary application of the law to stifle speech". It also notes that all three of the cases under the Sedition Act 1948 which went to court in 2023 involved "politicians from the Opposition".[145] Annex II of its report provides an overview of the cases under the Sedition Act 1948.

Despite the commitment by Pakatan Harapan in section 17 of the Kita Boleh to review and repeal "draconian provisions of acts that can be abused to restrict free speech", and specifically the Sedition Act 1948 in this context, in March 2023 the government appeared to resile from that commitment.[146]

Looking specifically at the provisions of the Sedition Act 1948, section 3(1) defines a "seditious tendency" to include, among other things, a tendency to "excite disaffection

---

[141] R.S.C., 1985, c. C-46.
[142] Lord Denning, *Landmarks in the Law* (London: Butterworths, l984), p. 295.
[143] *A Report on the State of Freedom of Expression (FOE) in Malaysia, 2023*, note 10, Table 2, p. 7 and p. 8.
[144] 2024, https://www.suaram.net/_files/ugd/359d16_ab54282901d049e1bd30ce834f143354.pdf.
[145] *Ibid.*, p. 41.
[146] See, for example, Jason Thomas, "No plans to abolish Sedition Act just yet, says Ramkarpal", 21 March 2023, Free Malaysia Today, https://www.freemalaysiatoday.com/category/nation/2023/03/21/no-plans-to-abolish-sedition-act-just-yet-says-ramkarpal/.

against any Ruler or against any Government", "excite disaffection against the administration of justice in Malaysia or in any State", "raise discontent or disaffection amongst the subjects", or "promote feelings of ill will and hostility between different races or classes of the population". Section 3(3) provides specifically that the intention of the person is irrelevant if the act in fact had a seditious tendency. Section 4 makes it an offence, punishable by a fine of up to MYR 5,000 (approximately USD 1,100) and up to three years' imprisonment to perform any act which has a seditious tendency, to utter any seditious words, or to print, sell or import any seditious publication.

It is immediately apparent not only that the definition of what constitutes sedition is vastly overbroad – for example covering the mere raising of discontent – but also that it falls squarely within the scope of what the Supreme Court of Canada and Lord Denning rejected as permissible limitations on freedom of expression. Section 3(2) does include a number of exceptions, such as pointing out that a ruler has been misled or mistaken, but these do not suffice to mitigate the vast overbreadth of these provisions.

The seriously problematical nature of these provisions is exacerbated by a number of other provisions in the Act. For example, section 7, requiring persons to deliver seditious publications to the authorities as soon as they become aware of their seditious content, effectively reverses the onus of proof, providing that knowledge of the seditious nature of a publication shall be presumed until the contrary is proven. Section 9 provides for the extreme prior restraint sanction of banning a newspaper for up to a year and prohibiting its publisher, proprietor and editor for working for any newspaper for the same period if the newspaper is found to have published seditious material.[147]

Recommendation

- The Sedition Act 1948 should be repealed in its entirety forthwith.

[147] The problems with prior restraints are elaborated on below.

3.2. Penal Code

There are numerous restrictions on freedom of expression in the Malaysian Penal Code,[148] as there are in these laws around the world. We focus here on only some of the restrictions which we deem to be less compliant with international law and which have been mentioned as being problematical in other assessments of freedom of expression in Malaysia.

A first area is defamation, which is a criminal offence pursuant to section 499 of the Penal Code, punishable by a fine or up to two years' imprisonment or both, pursuant to section 500. Sections 501 and 502 effectively extend this to printings and engravings. It is now well established that criminal defamation provisions are inherently problematical from the perspective of freedom of expression and that imprisonment is not a legitimate punishment for defamation. As the UN Human Rights Committee noted in General Comment No. 34: "States parties should consider the decriminalization of defamation … and imprisonment is never an appropriate penalty."[149] Thus, as a first point, Malaysia should decriminalise defamation and, instead, defamation claims should be dealt with exclusively under the civil law.[150]

Positively, the criminal offence of defamation in Malaysia requires either an intention to harm or knowledge or reason to believe that the statement will harm the reputation of the person concerned. International standards also call for the proof of all elements of the offence, on the criminal standard of beyond all reasonable doubt, to lie on the party claiming to be defamed. This should include proof of the falsity of the statement (i.e. this should be classed as an element of the offence), as well as that the defendant knew it was false (or acted recklessly as to this matter).[151]

Section 499 of the Penal Code sets out ten exceptions to the main rule, of which the more important protections are:

- That the statement is true and in the public good.

[148] Act 574, https://www.rcrc-resilience-southeastasia.org/wp-content/uploads/2017/12/Penal-Code-Act-574.pdf.
[149] Note 33, para. 47.
[150] The Defamation Act, No. 286, 1957, addresses civil defamation law.
[151] See the Article 19 principles on this issue, Toby Mendel, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, 1999, Principle 4(b), https://www.article19.org/wp-content/uploads/2018/02/defining-defamation.pdf.

- That the statement is a good faith opinion respecting the conduct of a civil servant in the discharge of his or her functions or respecting the conduct of any person touching on any public question.
- That the statement is a substantially true report on the proceedings of a court or legislative assembly.
- That the statement is a good faith opinion respecting the merits of, or conduct of any party to any civil or criminal case which has been decided by a court.
- That the statement is a good faith comment on the conduct of a person over whom the author of the statement had any authority, whether based on law or a contract, or a good faith accusation made to someone who has lawful authority over the person concerned.
- That the statement is a good faith caution against a person which aims to protect either the interests of the author or of a third party to whom the statement is made.

These are positive exceptions but they do not go as far as is required by international law. First, any true statement, regardless of whether it is deemed to be in the public good, should not attract liability in defamation (and, as noted, for criminal defamation the onus should be on the party bringing the case to prove falsity). Second, public authorities, as such, should be prohibited from bringing defamation cases to protect their own "reputations". Third, there should either be absolute or very strong protection for opinions (i.e. statements which cannot reasonably be proven to be true or false). The exceptions to section 499 do include some protection for opinions but do not go far enough. Fourth, there should also be a defence of "reasonable publication" which applies even to incorrect statements where it was "reasonable in all the circumstances for a person in the position of the defendant to have disseminated the material in the manner and form he or she did".[152] Some of the exceptions to section 499 fall into this category but, even taken together, they do not provide this level of protection. Fifth, the exception relating to courts and legislative assemblies should be expanded to cover statements made directly before those bodies, a wider range of official actors (such as official commissions and so on), and fair and accurate reports on formal reports adopted by judicial and legislative bodies and other official bodies. An exception should also apply to all statements made in good faith (or in the absence of malice) and which were made in the performance of a legal, moral or social duty or interest, such as providing a reference. Some of the exceptions touch on this but they do not go this far.

[152] Article 19 principles, *ibid.*, Principle 9.

Section 509 is analogous to defamation but even broader, applying to any expression made with the intention of insulting the modesty of any person. This is simply unnecessary; it is enough to provide for (civil law) protection for reputation.

Section 124D prohibits the circulation or reproduction of any document which is "detrimental to parliamentary democracy", punishable by a very heavy sentence of up to fifteen years' imprisonment. Section 124E extends this to the mere possession of a document which is "detrimental to parliamentary democracy", punishable in this case again by a very heavy sentence of up to ten years' imprisonment. Section 124F covers the importation of such documents, in this case punishable by up to five years' imprisonment. The idea of being "detrimental to parliamentary democracy" is not defined in the Penal Code and is susceptible of a very wide range of meanings, and hence fails to satisfy the "provided by law" part of the test for restrictions on freedom of expression.[153] It also does not refer to any legitimate protected interest (i.e. national security, public order and so on).

Section 124I penalises the making or spreading of "false reports" or "false statements likely to cause public alarm", punishable by up to five years' imprisonment. It may be noted that this would cover, among many other things, an erroneous report about a serious weather incident (which would be likely to cause public alarm). It is very well established under international law that it is not legitimate to prohibit, in a general manner, even the intentional making of false statements (otherwise known as "lying"), something which almost every human being has, at one point or another in their lives, done. The 2017 Joint Declaration of the special international mandates on freedom of expression, titled Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, focused directly on this issue. The Joint Declaration includes a very clear statement ruling out general bans on false statements:

> 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, as set out in paragraph 1(a), and should be abolished.[154]

While the making of false statements linked to a specific harm which falls within the scope of the legitimate aims listed in Article 19(3) of the ICCPR, such as defamatory statements, perjury or fraud, may legitimately be proscribed, linking false statements to a vague notion

[153] It would be possible for the courts to have provided a clear interpretation of this term which would bring it within the scope of "provided by law". We are not aware of whether or not this has been done.
[154] Adopted 3 March 2017, para. 2(a), http://www.osce.org/fom/66176.

such as "public alarm", which does not fall within the scope of the legitimate aims listed in Article 19(3), is not legitimate.

Sections 292, 293 and 294 all deal with the issue of obscenity. Section 292 prohibits the sale and importation of, and other actions relating to "obscene" materials (books, objects, etc.). An exception applies to religious objects. Section 293 prohibits the sale of obscene objects to persons under the age of 20 years. And section 294 prohibits the doing, in any public place, of an obscene act or the utterance in a public place of obscene songs, "to the annoyance of others".

Most countries around the world do ban certain forms of obscene content and especially the sale of such material to young persons (as reflected in section 293). However, this concept is very subjective in nature. It is also possible to distinguish the issue of bans which are based on morals and those which seek to prevent harm (such as bans on child pornography). In General Comment No. 34, the UN Human Rights Committee provided some clarity as to the legitimate scope of moral restrictions on freedom of expression, stating 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" and that "[a]ny such limitations must be understood in the light of universality of human rights and the principle of non-discrimination".[155]

Much depends here on the manner in which police and prosecutors apply these provisions and then how courts interpret them. It would be preferable, however, to include a narrow definition in the Penal Code of what constitutes "obscene" content so as to promote consistency in the way these provisions are applied. In addition, section 294 is concerning inasmuch as it is articulated around the notion of merely annoying others, rather than focusing more closely on the concept of obscenity or causing harm. It is also hard to imagine, in the modern world, how mere words in a song could rise to the level of obscenity (indeed, this appears to reflect a very old-fashioned conception of this notion).

Section 298 is a form of blasphemy provision, prohibiting the making of any statement to another person with the deliberate intent of wounding the religious feelings of that person. It may be noted that, under international law, blasphemy rules are not deemed to be legitimate. As the UN Human Rights Committee indicated in General Comment No. 34: "Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances

[155] Note 33, para. 32.

envisaged in article 20, paragraph 2, of the Covenant." Article 20(2) of the ICCPR deals with hate speech (see below).

It is positive that section 298 is limited to instances where statements are made with the deliberate intent to cause the harm envisaged. However, the standard of that harm, namely merely wounding the religious feelings of another person, sets a very low bar for what may be prohibited. As noted above, under International Guarantees, freedom of expression protects speech which others merely find offensive (while allowing for restrictions to protect others against harmful speech). The Penal Code already addresses speech which may incite others to commit crimes, as well as incitement to hatred on the basis of religion (see below). Section 298 is not, therefore, necessary to protect against harm. At a minimum, the level of harm envisaged in section 298 should be elevated from merely offending someone's feelings to something which reflects a form of harm.

Section 298A is a religious hate speech provision, prohibiting statements or acts which cause, attempt to cause or are likely to cause "disharmony, disunity, or feelings of enmity, hatred or ill will" or prejudice or attempt to prejudice "the maintenance of harmony or unity" on grounds of religion, punishable by between two and five years' imprisonment. Sections 298A(3)-(5) set out circumstances which create a presumption of breach of section 298A(1), while section 298A(6) establishes an exception for acts done or authorised by religious authorities. Section 298A(7) provides that it is not a defence to assert that the accused acted under an honest belief in the tenets or teachings of a religion, while section 298A(8) requires courts interpreting any religious matter to accept the interpretation given by religious authorities.

Article 20(2) of the ICCPR provides:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

This is widely accepted as representing the legitimate scope of criminal hate speech provisions such that rules which go beyond this are unlikely to be deemed to be legitimate.[156] It is apparent that section 298A is both broader and narrower than Article 20(2). Section 298A does not explicitly incorporate a special intent requirement (i.e. the intent to cause the listed results as opposed to merely the intent to make the statements or undertake the acts involved), unlike Article 20(2) which signals this special intent through the word

[156] See, for example, paras. 50-52 of the UN Human Rights Committee's General Comment No. 34, note 33.

"advocacy".[157] Section 298A covers a much broader range of results, namely causing mere "disharmony, disunity, or feelings of enmity, hatred or ill will" or prejudicing the "maintenance of harmony or unity", as opposed to "discrimination, hostility or violence", as required by Article 20(2). And section 298A merely requires an attempt to cause or the likelihood of causing (or prejudicing), whereas Article 20(2) requires incitement. These problems are exacerbate by the presumptions in sections 298A(3)-(5), the ruling out of honest beliefs in the tenets of a religion as a defence in section 298A(7) and the requirement for courts to accept the interpretation of any legally established religious authority in section 298A(8).

On the other hand, section 298A only covers religion, whereas Article 20(2) refers to race, nationality or religion.

Sections 504 and 505 both refer to statements which may provoke others to do something wrong. Section 504 essentially refers to provoking a person while intending him or her to break the public peace or commit any other offence. Section 505 refers to making a statement which is likely to cause an armed forces officer to mutiny or fail in his or her duty, to cause fear or alarm in the public such that someone may "be induced" to commit an offence against the State or public tranquility, or to incite an offence against a group of persons. Both sections provide for punishment by a fine or up to two years' imprisonment or both. It is well established under international law that culpability in such cases should be limited to instances where the person acted with intent and incited others to commit crimes. The broader language used in most of the provisions in sections 504 and 505 (with the exception of the last paragraph of section 505) represents an excessive limitation on freedom of expression, in particular because criminalising mere likelihood in these contexts will create too much of a chilling effect on free speech (i.e. speakers will refrain from making even perfectly legitimate statements to avoid any risk of going to prison). Sections 124G and 124H suffer from the same problem covering, respectively, distributing documents or making statements which either incite to violence (legitimate) or merely counsel violent breach of the law or any lawful order (not legitimate).

The risks to freedom of expression arising from these provisions is not merely theoretical. According to the Centre for Independent Journalism, many of these provisions are being used actively today in Malaysia.[158]

[157] As backed up by authoritative interpretation. See, for example, *Faurisson v. France*, 8 November 1996, Communication No. 550/1993, para. 9 (UN Human Rights Committee).
[158] *A Report on the State of Freedom of Expression (FOE) in Malaysia, 2023*, note 10, Table 2, p. 7 and p. 8.

Recommendations

- Defamation should be removed from the Penal Code altogether and dealt with exclusively as a civil law matter. If defamation is retained in the Penal Code, it should be amended so as to reflect the recommendations above.
- Section 509, which is sort of analogous to a defamation provision, should be repealed entirely.
- Section 124I should be repealed entirely.
- The term "obscene" should be defined clearly and narrowly in the Penal Code and consideration should be given to repealing section 294 entirely.
- Section 298 should either be repealed entirely or significantly amended so that it is conditioned on a form of harm rather than just offence to someone's feelings.
- Section 298A should be amended to narrow it down to the scope of Article 20(2) of the ICCPR, while consideration should be given to expanding the range of groups which are protected by section 298A.
- All of sections 124G, 124H, 504 and 505 should be limited to cases where a person intentionally incited others to commit the offences in question.

3.3. Printing Presses and Publications Act 1984

A number of provisions in the Printing Presses and Publications Act 1984 establish special content restrictions for the media outlets, and other entities and matters which are regulated by that law. As a general point, we note that special content restrictions for media outlets or related entities, such as media practitioners and printers, are not legitimate beyond the scope of a system of professional regulation, as discussed above under Professional Regulation – The New Media Council Bill. Media outlets are already bound by laws of general application, such as the Sedition Act 1948, Penal Code and civil rules on defamation. They should not be subject to additional restrictions, whether of a civil, criminal or even administrative law nature.

Beyond that general comment, many of the specific rules found in the Printing Presses and Publications Act 1984 do not conform to the three-part test for restrictions on freedom of expression set out under international law. Section 4 makes it an offence to print any publication or document which is "obscene or otherwise against public decency", incites to violence, "counsels disobedience to the law or to any lawful order", or "is likely to lead to a breach of the peace or to promote feelings of ill-will, hostility, enmity, hatred, disharmony or disunity". All of these, apart from the one on incitement to violence, fail to pass muster under

the three-part test. As noted above, obscenity needs to be defined to be clear enough to qualify as "provided by law" and the notion of something being "against public decency" is far vaguer still, and also fails to identify sufficiently clearly any legitimate interest which it aims to protect. Mere counselling of disobedience to the law fails to pass the necessity test; international law sets a clear standard in such cases of incitement (i.e. to breach of the law). Otherwise, innocuous discussions about possible violations of the law might be captured. The same applies to a likelihood of leading to a breach of the peace or promoting feelings of ill-will and so on (i.e. the appropriate standard is again incitement). The latter also fails to meet clear international standards in the area of hate speech, in the same way as was discussed for section 298A of the Penal Code.

Section 7 is even more problematical as it gives the minister very wide ("absolute") discretion to ban any material which he or she deems to be prejudicial to "public order, morality, security", likely to "alarm public opinion" or contrary to any law, or prejudicial to "public interest or national interest". The reference to "absolute discretion" in this section suggests that courts have limited power to assess whether the decision is correct or even reasonable. Many of the items listed here are not only impossibly vague – including the idea of alarming public opinion or being prejudicial to the public or the national interest – but also fail to refer clearly to the protection of any legitimate interest which is recognised under international law as a ground for restricting freedom of expression. These prohibitions also fail the necessity part of the test inasmuch as they represent disproportionate limitations on freedom of expression. Section 9 gives the minister the power to block the importation of publications into Malaysia on the same bases as are listed in section 7, and section 9A gives senior officers the power to seize publications pending a decision of the minister under section 9.

Section 13 empowers the minister to revoke the licence of any printing press which has printed a publication which is "prejudicial to public order or national security" or the permit of a newspaper which has disseminated similar content. It may be noted that these measures represent a form of prior restraint, since they silence the printing press or newspaper going forward, following the imposition of the measure. As such, they are an extreme form of sanction which is viewed with great suspicion under international law. Indeed, Article 13 of the ACHR rules out such restrictions altogether, except as needed to protect children.[159] Granting the minister this power is highly problematical; it should be applied, if at all, only by the courts. And the standard set out in these restrictions – namely merely being prejudicial to order or security – is far too low in any case for a restriction on freedom of expression.

[159] Note 26.

Section 8A provides for up to three years' imprisonment and fine of up to MYR 20,000 (approximately USD 4,440) for maliciously disseminating "false news" through a publication. The problems with such general prohibitions on false news have already been noted. At the same time, it may be noted that virtually every professional code of conduct for the media sets standards for the obligation of the media to strive for accuracy in their reporting, such that the approach under the proposed Media Council will likely address this issue.

Recommendations

- All of the content restrictions in the Printing Presses and Publications Act 1984 should be repealed.
- In the alternative, sections 4, 7, 8A, 9, 9A and 13 should be substantially amended to bring them into line with international standards for restrictions on freedom of expression.

3.4. Communications and Multimedia Act 1998

A number of provisions in the Communications and Multimedia Act 1998 impose restrictions on the content of what may be disseminated but the attention of commentators is mostly focused on two provisions, namely those found in sections 211 and 233. In its 2017 review of the Act, Article 19 describes the former as "[t]he most problematic content-related offence" in the Act,[160] while reports by CIJ[161] and SUARAM[162] focus more on section 233.

According to the CIJ report, 876 investigations were initiated under section 233 between January 2018 and November 2023, and yet only 65 cases resulted in charges being laid, which led the organisation to conclude that the section was "being used arbitrarily to stifle speech and online content".[163] CIJ also indicated that there were 114 cases under section 233 in 2022 and 103 in 2023.[164] A table on pages 46-47 of the SUARAM report indicates that, according to their monitoring, there were 49 investigations under section 233 in 2022 and 51 in 2023, 19 and 25 arrests or remands into custody, respectively, in those years, 16 and 15 charges laid,

[160] *Malaysia: The Communications and Multimedia Act 1998: Legal Analysis*, February 2017, p. 11, https://www.article19.org/wp-content/uploads/2018/02/Malaysia-analysis-Final-December-2.pdf.
[161] *A Report on the State of Freedom of Expression (FOE) in Malaysia, 2023*, note 10.
[162] *Malaysia Human Rights Report 2023: Civil and Political Rights*, note 144.
[163] P. 9.
[164] See Table 2, p. 7.

and 17 and 6 sentences imposed. More details about the specific cases from 2023 are set out a table running from pages 48 to 57 of the report. Interestingly, according to SUARAM, out of 24 cases under the Sedition Act 1948 which remained at the investigation stage, all except two also involved charges under section 233 of the Communications and Multimedia Act 1998.[165]

Pakatan Harapan specifically mentioned the Communications and Multimedia Act 1998 in section 17 of the Kita Boleh, in its reference to "draconian provisions of acts that can be abused to restrict free speech" which it would review and repeal. However, the amendments to the Act which were adopted in December 2024 in the form of the Communications and Multimedia (Amendment) Act 2024[166] mostly expand the scope of section 233 and drastically increase the penalties for breach.

In terms of substance, both section 211 and section 233 were amended by the Communications and Multimedia (Amendment) Act 2024. The old section 211 prohibited both content applications service providers and anyone using a content applications service from disseminating content which is "indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person", subject to a fine of up to MYR 50,000 (approximately USD 11,100) or one year' imprisonment or both. The title of this section has now been changed from "offensive content" to "indecent content", its scope has been limited to content applications service providers (and not their users), and the term "offensive" has been replaced by the term "grossly offensive". The maximum penalties have also been increased very substantially to MYR 1,000,000 (approximately USD 222,000) and ten years' imprisonment.

The problems with terms such as "indecent" and "obscene", if left undefined, have already been described above, as has the illegitimacy of banning generally the dissemination of false statements. The fact that freedom of expression protects offensive statements has also already been outlined. While the amendment of this to "grossly offensive" does narrow its scope, it is still not clear that it now refers to a specific harm which is being protected against. The fact that these acts are conditioned on an intent to "annoy, abuse, threaten or harass" someone, which represent very low barriers (especially "annoy"), does nothing to save this provision. The massive increase in the sanctions for this offence, in particular the now extremely severe maximum term of imprisonment, is very concerning.

[165] See p. 41. A list of these cases is provided at pp. 42-44.
[166] Adopted on 9 and 16 December 20204, https://www.parlimen.gov.my/bills-dewan-rakyat.html?uweb=dr&lang=en#.

It is positive that the scope of this offence has been limited to service providers, to the exclusion of users, although this is effectively negated by section 233 (see below). In addition, the definitions of relevant terms suggests that it would cover both broadcasters and online actors, including social media platforms, which served as a means to disseminate content.[167] As such, and especially with the massive increase in penalties, this provision appears to be aimed at prompting social media platforms and other service providers to engage in robust censorship of any content potentially falling within the broad scope of section 211.

The original section 233 provided for two offences, both subject to a fine of up to MYR 50,000 (approximately USD 11,100) or up to one year' imprisonment or both. The first, in section 233(1), applies to anyone who, using any network or applications service (i.e. not just a content service as under section 211), makes any comment which is "which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person" or initiates an anonymous communication with "intent to annoy, abuse, threaten or harass any person". The reference to "offensive" has been replaced by "grossly offensive" and committing an offence of fraud or dishonesty has been added to the list of intended results. The penalty for breach of this provision has also been increased to up to MYR 500,000 (approximately USD 111,000) or two years' imprisonment or both, which is further increased to five years' imprisonment where the offence is committed against a child under 18 years of age. The first part of this offence is very similar to section 211 and suffers from the same problems. The second part is perhaps less problematical although it is not appropriate to criminalise merely annoying others.

The second offence in the original section 233(2) applies to the use of a network or applications service to provide obscene communications for commercial purposes. This has been retained, now as section 233(4), with an increased penalty of a fine of up to MYR 1,000,000 (approximately USD 222,000) and five years' imprisonment or both. This is less problematical than the first offence although the lack of any definition of an "obscene communication" is still problematical.

Recommendations

- Section 211 should be repealed in its entirety.

[167] An "applications service" means a service provided via a network services and a "content applications service" covers any applications service which provides content.

- Section 233(1) should be repealed in its entirety, while consideration should be given to repealing section 233(2) (now section 233(4)) or at least adding a clear and narrow definition of an "obscene communication".

4. Transparency

As noted above, the Government of Malaysia has not only promised to adopt a right to information law but it has held a number of consultations to receive inputs from citizens, civil society, media actors, officials and others as to what should be included in the law. A draft of the law was originally promised to be published in the last few months of 2024 but, at the large August 2024 consultation,[168] it was announced that the law would instead be published in early 2025.

We applaud the commitment of the government to adopt a right to information law. Such laws are a key part of the enabling environment for freedom of expression and they are also key underpinnings of democracy, sustainable development and the protection of all rights and freedoms. There is nothing wrong with the government taking a bit longer to collect inputs and to think carefully about how to frame this law, but we urge it not to delay too long in this regard, noting that Malaysia is already very late in terms of adopting this sort of legislation (with 140 other countries around the world already having done so).[169]

We also note that the devil is very much in the details when it comes to right to information laws. While even a weaker law is probably better than no law, the same cannot be said of a very weak law and of course there are many advantages, not only for information applicants but also for civil servants, of strong laws. The key features of a strong law are outlined above and the Centre for Law and Democracy's RTI Rating, and in particular its 61 indicators,[170] provide further direction as to what is needed to make a right to information law strong.

We would like to highlight here a few of the more crucial areas which, in practice, really distinguish between effective and less effective laws. The first is the need to have an

[168] See note 13.
[169] See the list on the Centre for Law and Democracy's RTI Rating at https://www.rti-rating.org/country-data/.
[170] The indicators are available at https://www.rti-rating.org/wp-content/uploads/2021/01/Indicators.final_.pdf.

independent administrative body which is responsible both for reviewing refusals to provide information (and other claimed breaches of the law) and for providing support for strong implementation of the law to both applicants and public authorities. It is no exaggeration to say that the presence of such a body is a key defining characteristic of strong right to information systems. It is also very important to craft an appropriately tight regime of exceptions since, otherwise, the law will fail to deliver on its central premise, namely government openness. At the centre of this is the need for exceptions to focus on protecting legitimate interests against harm rather than incorporating class exceptions (which exempt entire categories of information). And, of course, having user-friendly procedures for making and processing requests is also very important.

In addition to adopting a strong right to information law, it is important for Malaysia to review problematical secrecy provisions in other laws. The main piece of legislation here is undoubtedly the Official Secrets Act 1972 (OSA),[171] but there are also problematical provisions in the Penal Code, in particular section 203A. The first paragraph of that section creates an absolute prohibition on disclosing "any information" obtained in the performance of one's duties, punishable by a fine of up to MYR 1,000,000 (approximately USD 222,000) or one year' imprisonment or both. The second paragraph extends the prohibition to anyone who has received information which was disclosed in breach of the first paragraph (i.e. to prevent them from further disclosing the information), and is subject to the same punishments.

The first paragraph obviously needs to be amended, or overridden by the right to information law, since otherwise it would run directly counter to the latter (as it does not even recognise legal authority as a ground for disclosing information, although perhaps that has been read in). The second paragraph runs counter to established international standards in this area. As the special international mandates on freedom of expression stated in their 2004 Joint Declaration:

> Public authorities and their staff bear sole responsibility for protecting the confidentiality of legitimately secret information under their control. Other individuals, including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information. Criminal law provisions that don't restrict liability for the dissemination of

[171] See note 4.

> State secrets to those who are officially entitled to handle those secrets should be repealed or amended.[172]

The rationale behind this is fairly obvious: it is up to government to protect its secrets. The operation of this may be seen, for example, in the fact that while Edward Snowden has been charged with violating the Espionage Act, no charges have been laid against United States newspapers, like The Washington Post and The New York Times, which published the information he leaked to them.

Although the OSA in Malaysia was only adopted in 1972, it is another example of an historic British law which was put in place in many British colonies. The language of many of these acts is very similar, and the Malaysian version is again similar in much of its language to other OSAs.

An important preoccupation of the OSA is with preventing secrets from being provided to foreign countries. But it also casts a thick cloak of secrecy over all "official secrets", defined very broadly to include anything which is classified at any level (even the lowest level of "restricted", which likely covers a vast array of information held by public authorities since any authorised official can classify information and there are no conditions on doing this). It also comprises the three categories of information listed in the Schedule, namely cabinet documents (even if they are final decisions), documents of the State Executive Council, and any document concerning national security, defence or international relations. In stark contrast to the approach of right to information laws, the scope of this is not limited to documents the disclosure of which would harm a protected interest, such as national security or international relations. It is enough if the information relates to the matters which are listed there.

Many of the other key operative terms used in the OSA are also defined incredibly broadly. Thus, a prohibited place includes any factory, dockyard or mine, any place where fuel, supplies or documents relating thereto are made, repaired or stored, and any other place so designated by the government. Many of the offences in the OSA revolve around the notion of harm to the "safety or interests of Malaysia", which could be deemed to cover a very wide range of issues.

This leads to extremely broad and largely undefined offences. For example, section 3, on spying, makes it an offence, for any purpose which is prejudicial to the safety or interests of Malaysia, simply to approach or even be in the neighbourhood of a prohibited place, or to

[172] Adopted 6 December 2004, http://www.osce.org/fom/66176.

make any document which might, directly or indirectly, be useful to a foreign country. These offences are punishable by imprisonment for life. The OSA also incorporates a number of reverse onus provisions. Thus, pursuant to section 4(1), the making of any document on or within a prohibited place is presumed to be an offence, punishable by up to 14 years' imprisonment, unless the person concerned proves that it is "not prejudicial to the safety or interests of Malaysia and is not intended to be directly or indirectly useful to a foreign country" (there are some exceptions to this in sections 4(2) and (3)).

In terms of secrecy, pursuant to section 7, if any person is approached by another person to obtain an official secret which has been entrusted to him by any public officer, the first person must immediately report this to a police officer. It may be noted that filing a request for information with a public authority where some of the information covered by the request is classified (a common occurrence in many countries given that significant over classification takes place) would be an offence pursuant to this section. In a similar fashion, pursuant to section 8(1), any person who has in his or her possession an official secret which has been entrusted to him by any public officer and retains that information without having a right to do so commits an offence. This would again cover many ordinary right to information requests. Section 8(2) is even more concerning from the perspective of the right to information, since it makes it a crime, punishable by between one and seven years' imprisonment, to receive an official secret unless you can prove that that was contrary to your wishes. Again, this would cover a not unimportant proportion of all requests for information (where the provision of information is clearly not contrary to the wishes of the applicant).

All of these problems with the OSA are exacerbated by some of the procedural and evidentiary rules the Act establishes. Thus, section 16(2) establishes a remarkably low bar for conviction, namely that, even if no illegal act is proven, a person may be convicted if, from the circumstances, or his or her conduct or character, it merely "appears that his purpose was a purpose prejudicial to the safety or interests of Malaysia". Section 16(3) establishes another reverse onus, namely that if a person makes, obtains or communicates any document relating to a prohibited place, it shall be presumed that this was done for a "purpose prejudicial to the safety or interests of Malaysia". According to section 16A, a certificate by any public officer to the effect that a document is an official secret shall be "conclusive evidence" of that fact, which "shall not be questioned in any court on any ground whatsoever". Sections 21 and 22 throw out the normal rules of evidence for OSA cases, replacing them with rules which are more "convenient" for obtaining prosecutions.

Recommendations

- The government should move forward reasonably promptly to adopt a strong right to information law.
- Section 203A(1) of the Penal Code should either be repealed or amended so as to accommodate the planned right to information act, while section 203A(2) should be repealed.
- Consideration should be given to repealing, in its entirety, the OSA and, to the extent that this is needed, replacing it with a modern, human rights aligned law. At the very minimum, the Act should be substantially overhauled so as to bring it into line with international human rights standards and to render it compatible with a right to information law.