

[ADRN Issue Briefing]

Malaysia's emergency ordinance and the clampdown on public discourse

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1. Introduction of state emergency postponing the general elections

On January 12, 2021, Malaysia's King announced a nationwide state of emergency that would last until August 1, 2021. During this period, the holding of any elections would be postponed and the sitting of parliament is to be delayed on public health grounds. Subsequently, on March 12, the Emergency (Essential Powers) (No. 2) Ordinance 2021 came into force through powers granted under the emergency.

The ordinance targets the spread of 'fake news' across written, video, and audio formats. The ordinance would make it a criminal offense to create, publish, or disseminate "fake news" related to COVID-19 or the proclamation of the emergency in Malaysia, or fail to take down such materials upon the government's request.¹ The ordinance overrides the Evidence Act of 1950, which ensures fair trials for people and provides the police the power to enforce, arrest, inspect, and investigate suspects without a warrant.

After the ordinance was gazetted, it has received significant criticism from civil society organizations as well as politicians for failing to establish standards that determine what constitutes 'fake news.' The ordinance raised fears that it could be used to clamp down on meaningful public discourse about COVID-19 in Malaysia as well as its state of emergency and how it came into being. The ordinance defines 'fake news' as 'any news, information, data and reports which is or are wholly or partly false relating to COVID-19 or the proclamation of emergency'.

The passage of the ordinance has only raised public suspicions that Malaysia's current Prime Minister Muhyiddin Yassin is ultimately exploiting the COVID-19 crisis to shore up his

¹ It imposes fines of up to MYR 100,000 (USD 24,000) or imprisonment of up to three years, or both. Further fines up to MYR 1,000 (US\$240) each can also be imposed for every day if the offence continues upon conviction. The court may order the convicted person to apologise to those affected by the offence.

position and silence political opposition. Muhyiddin's position is ultimately a precarious one, having come to power on March 1, 2020. This succeeded the collapse of the Pakatan Harapan (PH) coalition under the premiership of Mahathir Mohamed, which had won an historic victory in Malaysia's general elections in 2018, defeating the incumbent dominant Barisan Nasional (BN) coalition.

Since then, Muhyiddin's Perikatan Nasional coalition (which almost exclusively represents the interests of Malaysia's Malay-Muslim majority, in contrast to the more diverse Pakatan Harapan coalition) has held onto power through a razor thin majority, facing constant challenges from both the remnants of Pakatan Harapan as well as from its own component parties. Malaysia is widely expected to hold a general election once it contains its COVID-19 crisis.

As expected, the authorities have insisted that the ordinance would not be misused, but would only focus on targeting people who spread misinformation about COVID-19 or the state of emergency. On June 3, the Communications and Multimedia Minister Datuk Saifuddin Abdullah stated that the ordinance merely upholds the 'rule of law'. As of date, he noted that there have been 18 investigations under the ordinance, with two cases presented in court and two other cases warranting no further action. 14 other cases are still currently under investigation. The minister also revealed that a total of 456 'quick action response notices' have been issued by his ministry under the emergency.²

Concerning the two cases that went to court, one involved a teacher who was charged with posting fake news on Facebook, claiming that a traffic policeman died after receiving his second dose of the COVID-19 vaccine. The other case involved a housewife who was fined MYR 5,000 (USD 1,200) by the Sessions Court after pleading guilty to spreading fake news about COVID-19 through the mobile messaging service WhatsApp last April.³

2. Malaysia's mismanagement of its public health crisis

The enactment of the nationwide state of emergency, through which the ordinance emerged, came as Malaysia experienced a surge in cases from the start of the year. Malaysia has witnessed a five-fold increase in COVID-19 cases since the beginning of 2021. On May 28, Muhyiddin announced a 'total lockdown' nationwide starting from June 1, during which only essential services and sectors

² Ministry of Communications and Multimedia Malaysia, "Minister Says Anti-Fake News Emergency Ordinance To Uphold Rule Of Law," *Malay Mail*, June 3, 2021.

³ Bernama, "Housewife, tutor first to be charged under Emergency Ordinance for spreading fake news on Covid-19" *The Edge Markets*, June 2, 2021. [_](#)

would remain in operation.⁴

During this time, Malaysia has logged in record daily cases and deaths. Its healthcare system was brought to the brink; ICU beds reached capacity and medical workers complained of burnout. The outbreak in Malaysia is the worst among other Southeast Asian countries, relative to population size. Malaysia's new surge in cases has been attributed to both social gatherings held in violation of social distancing measures, movement restrictions during the Eid al-Fitr holiday held in mid-May, as well as the emergence of more highly contagious variants of COVID-19 in Malaysia, including variants from India, the UK, and South Africa.⁵

As Malaysians wearily undergo their fourth Movement Control Order (MCO) in two years, public anger with the Muhyiddin administration has only risen. The Malaysian public has often been left confused and frustrated with the ever changing MCO levels of caution and their corresponding Standard Operating Procedures (SOPs), which have been attributed, in part, to the lack of coordination between different ministries and government agencies.

Malaysia's vaccination rollout continues to be sluggish and oftentimes poorly handled. The government's online vaccination appointment system has encountered technical difficulties during the second opt-in on May 26. The poor vaccination rollout has been compounded by high levels of vaccine hesitancy among the general population.

Given the unwarranted situation in Malaysia, there are widespread beliefs that the ordinance actually serves to stifle public discourse regarding the state of the emergency, the COVID-19 situation, and the government's increasingly woeful handling of the public health crisis. There have been increasing calls from civil society groups and political leaders to reconvene the parliament to allow lawmakers to properly address the crisis. Indeed, given that all Members of Parliaments in Malaysia have already been vaccinated, critics have pointed out that there is little reason as to why the parliament cannot physically resume albeit with proper procedures in place.

3. Comparisons with the previous Anti-Fake News Act

Comparisons have been made between the ordinance and the Anti-Fake News Act 2018, the latter of which had been passed under the administration of former Prime Minister Najib Tun Razak. Similarly to the ordinance, the Anti-Fake News Act had been passed during a politically sensitive time for the government, as Najib faced mounting public criticism of his involvement in the 1MDB corruption scandal. Widely believed to have been used to silence public criticism, the Act was

⁴ Bowie, Nile. "Malaysia teeters on edge of Covid-19 catastrophe", *Asia Times*, May 31, 2021.

⁵ *Ibid.*

repealed in December 2019 by the subsequent Pakatan Harapan government.

While the ordinance follows the general structure of the Act, there are key differences which are worth bearing in mind. Unlike the Act, the ordinance is a temporary measure and will be automatically shelved once the state of emergency is scheduled to end on August 1 (unless the emergency is extended, which remains a strong possibility). The ordinance also specifically targets ‘fake news’ regarding COVID-19 and the state of emergency (the vagueness of what constitutes ‘fake news’ notwithstanding), while the Act was criticized for being overly broad and possibly including any sort of expression of which authorities could dispute the veracity. The Act also carried heavier penalties and longer terms of imprisonment than the new ordinance.

As argued by the co-chair of the Bar Council Constitutional Law Committee Andrew Khoo, this new ordinance constitutes a ‘much more technology-focused law’ compared to the Act, thereby making it more invasive of privacy. The ordinance grants authorities the right to access computerised data and website traffic data (including passwords, encryption codes, decryption codes, software or hardware), as well as the right to request the disclosure of stored traffic data. Khoo also notes that the ordinance comes under the purview of the ministry responsible for communications and multimedia, rather than that responsible for law.⁶

While the Act included a requirement that the act of creating or otherwise disseminating said ‘fake news’ must have been ‘malicious’ in intent, the new watered down the degree of intent to ‘intent to cause, or which is likely to cause fear or alarm to the public, or to any section of the public’. As Khoo observes, ‘this broadens the test of intention from being purely subjective – “with intent to cause” – to now include an element of objectivity – “likely to cause”.’⁷

It is also important to note another key distinction between the ordinance and the Act – the absence of democratic mandate with regards to the former. While it can at least be stated that the enforcement of the Act actually involved parliamentary approval, the ongoing suspension of parliament indicates that Malaysia’s legislative body had no ultimate say in the enforcement of the ordinance. In some sense, this makes the ordinance even more troubling than the repealed Act.

4. Lessons from Taiwan and Vietnam on Countering Fake News

While the government is right to battle the dissemination of misinformation about COVID-19 and ensure the public is gaining accurate information (particularly at a time when vaccine hesitancy is becoming a more acute problem), measures such as the ordinance are disproportionate and threaten

⁶ Khoo, Andrew. “The fake news ordinance is more draconian than we think,” *Malaysiakini*, March 17, 2021.

⁷ Ibid.

fundamental human rights and civil liberties granted by Malaysia's constitution. Instead of implementing top-down, restrictive policies which pay little attention to building public trust and engagement, the government would do good to draw inspiration from many of their fellow Asian neighbours, most notably Taiwan and Vietnam.

Taiwan won international acclaim for their relatively successful efforts in containing their COVID-19 cases. This has been attributed in part to the inclusive and collaborative nature of their pandemic response strategy. To combat misinformation, Taiwan's government did not seek to restrict public discourse but instead turned to push out accurate information. In one example, during the initial stages of the pandemic, authorities countered online rumours about an imminent toilet paper scarcity through light-hearted infographics that debunked them. Taiwanese authorities were also receptive to citizen feedback and suggestions and sought to be inclusive by making their digital services as accessible as possible (such as including voice assistance on their digital services to serve the visually impaired). As stated by Taiwan's Digital Minister Audrey Tang, 'we fought off the pandemic with no lockdown and the infodemic with no takedown'.⁸

In Vietnam, a proactive communication strategy was also vital to the country's successful pandemic control. The early and adequate dissemination of correct information about COVID-19 proved vital in mobilizing public understanding of the virus, thereby ensuring community compliance with public health measures. Vietnam's strategy saw the dissemination of credible and up-to-date information through multiple channels, including online news outlets, social media, community loudspeakers, and public awareness campaigns. While certain restrictive measures were implemented (such as administrative fines for posting misinformation), it is important to understand that Vietnam's overall strategy harboured open communication rather than clampdowns, thereby contributing to building public trust and widespread voluntary civic engagement.⁹

Ultimately, at the heart of Taiwan and Vietnam's respective pandemic responses were a focus on openness, effective and credible communication, and building public trust. Malaysia's public communication strategy, while undoubtedly efficient in certain ministries and agencies, has largely been characterized as confusing and inconsistent. Additionally, it has battled misinformation through vague restrictive measures that only threatened to shut down much needed conversations rather than through credible public information campaigns. With the country facing one of its worst public crises in decades, it is incumbent on the Malaysian government to revoke the ordinance and engage its public through openness and transparency. ■

⁸ Poon, Yun Xuan. "How Taiwan used memes to fight pandemic rumours," *GovInsider*, September 11, 2020.

⁹ Nguyen, Hong Kong and Ho, Tung Manh. "Vietnam's COVID-19 Strategy: Mobilizing Public Compliance Via Accurate and Credible Communications", *ISEAS Perspective*, Issue, No. 69, June 25, 2020.

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