The rebirth of Malaysia's fake news law - and what the NetzDG has to do with it

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On 11 March 2021, the Government of Malaysia issued the Emergency (Essential Powers) (No. 2) Ordinance 2021. The Ordinance criminalizes the dissemination of fake news related to COVID-19 and contains accompanying provisions that set aside regular legal guarantees. It is an aggravated reincarnation of the country's Anti-Fake News Act of 2018 that had been repealed in late 2019. More importantly, from a German perspective, it continues the trend of anti-fake news legislation that is mistakenly associated with the German Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG) of 2017. Though the NetzDG did not create new crimes, it has become the involuntary godmother of several such laws around the world, lending legitimacy to the global war on fake news.

You only live twice: The Anti-Fake News Act is back

In April 2018, about one month before the general elections of 9 May, the Malaysian parliament enacted the Anti-Fake News Act 2018 (AFNA). The government led by then Prime Minister Najib Razak was embattled by the 1MDB corruption scandal, which made the swift legislative move appear as an attempt to quell unwelcome reports. Najib's United Malays National Organisation (UMNO) lost the election, and the Pakatan Harapan coalition was formed under the leadership of former Prime Minister Mahathir Mohamad. One of Mahathir's campaign promises was to repeal AFNA. The Act was finally scrapped in December 2019.

Pakatan Harapan collapsed in February 2020, and Muhyiddin Yassin was appointed Prime Minister. When COVID-19 started spreading in Asia in the month before, Muhyiddin, then Minister of Home Affairs, stated that there were enough laws to curb fake news without AFNA. However, he changed his mind a year later. In January 2021, the Malaysian King issued a Proclamation of Emergency on request of the government that aimed to better contain the ongoing COVID-19 spread. Parliament was suspended. On 11 March 2021, the Emergency (Essential Powers) (No. 2) Ordinance 2021 was promulgated on the basis of Article 150 (2B) of the Federal Constitution which allows the promulgation of ordinances in circumstances that require immediate action.

The Ordinance is an aggravated version of AFNA. While large parts have just been pasted from the previous Act, some distinguishing elements shall be highlighted here. The Ordinance defines the term "fake news" as including "any news, information, data and reports, which is or are wholly or partly false relating to COVID-19 or the proclamation of emergency, whether in the forms of features, visuals or audio recordings or in any other form capable of suggesting words or ideas." In comparison to AFNA, this definition is narrower because it is limited to information related to the pandemic.

The key provision is Section 4 of the Ordinance which criminalizes the creation, offering, publishing, printing, distribution, circulation and dissemination of any fake news or publication containing fake news if committed "with intent to cause, or which is likely to cause fear or alarm to the public, or to any section of the public." While AFNA criminalized only malicious behavior, the Ordinance satisfies itself with intent or the mere likelihood of fear or alarm. The applicable punishment is a fine not exceeding 100,000 ringgit (about 20,000 Euro) and/or imprisonment for a term not exceeding three years. AFNA had stipulated 500,000 ringgit and/or six years.

Section 5 of the Ordinance criminalizes financial assistance for the purpose of committing or facilitating the commission of an offence under Section 4. The

provision is an almost exact copy from AFNA, including the original level of punishment (500,000 ringgit and/or six years), resulting in the doctrinally questionable situation that assistance is subject to a significantly higher punishment than the principal commission of the crime.

Aggravating elements that had not been part of AFNA can be found particularly in Parts IV (Evidence) and V (Enforcement) of the Ordinance. Section 10 declares the Evidence Act 1950 irrelevant in case of any inconsistencies with the Ordinance. All statements of an accused, thus also including self-incriminating ones, are declared admissible (Section 12). Police officers can arrest suspects (Section 17), access computer data (Section 19) and preserve and access traffic data (Sections 20, 21). Court orders are not necessary in any of these cases. Finally, Section 27 absolves the government and any officer from all liability "in respect of any act, neglect or default done or omitted by it or him in good faith, in carrying out the provision of this Ordinance."

What a comeback. AFNA is alive and well again, and it even gained additional teeth, at least temporarily. Southeast Asia thus remains one of the world's foremost laboratories of anti-fake news legislation.

But what does the German NetzDG have to do with it?

The involuntary godmother of more and more children

The promulgation of the Malaysian Ordinance was followed by critical statements from the Malaysian Bar Council, the Human Rights Commission of Malaysia (SUHAKAM), the Centre for Independent Journalism (CIJ), Human Rights Watch and Article 19.

"The Centre", an UMNO-aligned think tank, issued a more nuanced statement calling in particular for a distinction between "serious" and not-so-serious fake news. It also stated that "to date, Malaysia is among the 17 countries around the world which have introduced legislation to criminalise fake news. Germany, Singapore, and Russia, for example, introduced such laws within the past three years which, like Malaysia, have attracted sharp criticism regarding potential restriction on free speech." Ironically, this is fake news.

Of course, neither has Germany introduced nor enacted such a criminal law. The NetzDG – apparently referred to by the Centre – enhanced the duties of social media platform operators in terms of reporting, handling of complaints and the appointment of domestic representatives. Criminal liability for the dissemination of "fake news" is precisely not part of its content. Rather, the NetzDG merely refers to existing criminal law. Not to mention the above-outlined far-reaching provisions of the Malaysian Ordinance which do not have any counterpart in the NetzDG, either.

Despite these grave differences, the NetzDG has often been referred to as a source of inspiration and, more importantly, legitimacy when governments sought the criminalization of online falsehoods. When AFNA was enacted in 2018, the Minister in the Prime Minister's Department, Azalina Othman Said, rejected allegations that it aimed at restricting free speech. Rather, "some countries such as Germany, Singapore, France, the Czech Republic and the European Union have also taken and are taking the same measures to curb the dissemination of fake news." The Liberal Democratic Party (LDP) president and Minister in the state of Sabah, Teo Chee Kang, said that Malaysia should follow the lead of some Western countries that had allegedly implemented laws similar to AFNA: "Germany and the Czech Republic have done it, and the French government intends to do it."

The same occurred in Singapore. A ministerial Green Paper that prepared the ground for the later deliberation and enactment of the Protection from Online Falsehoods and Manipulation Act (POFMA) stated that "countries around the world and technology companies have begun taking steps to address online falsehoods. In Germany, the Network Enforcement Act was enacted last year." The report from the Parliamentary Select Committee made several references to the NetzDG as well. Prime Minister Lee Hsien Loong said, "Singapore is not the only one which has taken legislation on this issue. The French have done so, the Germans have done so. […] So Singapore had to do this." POFMA, of course, created new criminal

provisions addressing the spreading of false statements of fact on the Internet. It also offered the government powers to issue various forms of directions.

In the Philippines, a couple of Anti-Fake News Acts were introduced in 2017 that aimed to create criminal liability for the dissemination of fake news. The Senate Bill introduced by Senator Joel Villanueva refers to only one international example, the NetzDG. The explanatory note of the House Bill introduced by Representative Luis Villafuerte states, "countries like Germany, Italy and the United States of America have started their respective legislative proposals to avert the creation of fake news."

These examples show how the NetzDG was (ab)used as a discursive tool. References to Germany, a democratic Western country, were apparently intended to nip in the bud any criticism against the creation of fake news crimes.

In reality, the NetzDG created a form of intermediary liability. In this respect, it was indeed a role model for many countries. But it did certainly not create new criminal liability. Nonetheless, have German legislators perhaps themselves misled the public?

NetzDG and fake news

The draft NetzDG introduced by the federal government in 2017 posited that the law would focus on hate crimes and fake news. Eventually, however, the fake news component was limited.

According to the draft's explanatory section, "the fight against criminal false news ('fake news') in social networks has received high priority" in Germany. "False news ('fake news') are also covered [by the Act] as far as they would fulfill the objective elements of the offense." In the specific part of the draft's explanation, the government describes the NetzDG's aim as "to fight against hate crimes, other criminal content according to Section 1(3) of the draft and criminal false news on social network platforms." Fake news are described ostensibly as a separate category in addition to the criminal provisions listed in Section 1(3). That list, however, is conclusive.

Some of the crimes listed in Section 1(3) can indeed be classified as dealing with "criminal false news." In Sections 110a, 130(3), 186 and 187 of the Criminal Code, the falsity of a statement is an element of the offense. But these are only four of the overall 22 criminal provisions referenced here. In the drafting stages, the Federal Council even demanded the inclusion of additional provisions that it considered "more significant" to fight fake news (these were Sec. 109d, 145d, 164 and 241a(4) of the Criminal Code). None of these have subsequently been included.

The NetzDG drafters thus apparently promised more than the draft held. The proclaimed fight against fake news has not actually been prioritized in the law even though the public debate surrounding the enactment focused quite intensely on the issue. As Linda Monsees has analyzed, "the NetzDG became, at least for a short amount of time, the core issue of the fake news controversy." Consequently, the NetzDG as an assumed tool to fight fake news found its way into academia. International articles on regulatory responses to fake news discuss the NetzDG's approach prominently (see, for instance, the contributions by Alberto Alemanno or Irini Katsirea). Most publications address the law's mechanism for intermediary liability that, of course, can also be used to address fake news.

The distorted political reception in Southeast Asia and elsewhere, however, focused on the assumed criminalization of online falsehoods instead.

Who regulates the regulators?

It is fair to say that the NetzDG drafters' imprecise use of language deserves part of the blame. More importantly, however, the intentional misrepresentation of foreign legislation in different parts of the world is nothing else than fake news. Governments that regulate free speech by creating anti-fake news legislation should rather lead by example and assume elevated duties to communicate truthfully. The unequal enforcement of the truth and the exclusion of the government from fake news laws' applicability does certainly not restore the trust in institutions.

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