

# EVALUATING MALAYSIA'S FAKE NEWS LAWS THROUGH THE LENS OF INTERNATIONAL HUMAN RIGHTS STANDARDS

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## I. INTRODUCTION

In recent years, the prevalence of fake news on the Internet has become a widespread concern, pushing many governments, particularly in Southeast Asia, to enact legislative and administrative measures to address the problem.<sup>2</sup> In 2018, Malaysia became the first country in Southeast Asia to pass a law explicitly targeting fake news—the Anti-Fake News Act (AFNA) 2018.<sup>3</sup> The Act, making it an offense to create, publish, or disseminate any fake news, has been widely condemned for stifling free speech and violating international human rights.<sup>4</sup> Due to a change in government, the AFNA was officially repealed in December 2019 by the Malaysian Parliament.<sup>5</sup> However, during the COVID-19 pandemic, the Malaysian government issued the Emergency (Essential Powers) (No. 2) Ordinance 2021<sup>6</sup> in March 2021, targeting pandemic-related fake news.<sup>7</sup> Some describe the Emergency Ordinance as the AFNA's rebirth because it is an aggravated version of the

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<sup>2</sup> See generally Robert B. Smith et al., "Fake News" in *ASEAN: Legislative Responses*, 9 J. OF ASEAN STUD. 117, 128 (2021) (showing that among the eleven Southeast Asian countries, almost every nation has legal regulations and punishments for addressing issue of fake news).

<sup>3</sup> SUSAN LEONG & TERENCE LEE, *GLOBAL INTERNET GOVERNANCE: INFLUENCES FROM MALAYSIA AND SINGAPORE* 51 (2021).

<sup>4</sup> Jessie Yeung, *Malaysia repeals controversial fake news law*, CNN (Aug. 17, 2018, 7:03 AM), <https://www.cnn.com/2018/08/17/asia/malaysia-fake-news-law-repeal-intl/index.html>.

<sup>5</sup> *Anti-fake news Act in Malaysia scrapped*, STRAITS TIMES (Dec. 20, 2019, 9:26 AM), <https://www.straitstimes.com/asia/se-asia/anti-fake-news-act-in-malaysia-scrapped>.

<sup>6</sup> *Emergency (Essential Powers) (No. 2) Ordinance 2021*, FED. GOV'T GAZETTE 1, 19-20 (2021), available at [https://web.archive.org/web/20210325061310/http://www.federalgazette.agc.gov.my/output/pua\\_20210311\\_PUA110\\_2021.pdf](https://web.archive.org/web/20210325061310/http://www.federalgazette.agc.gov.my/output/pua_20210311_PUA110_2021.pdf) [hereinafter *Emergency (Essential Powers) (No. 2) Ordinance 2021*].

<sup>7</sup> Joseph Sipalan, *Malaysia defends coronavirus fake news law amid outcry*, REUTERS (Mar. 12, 2021, 2:06 PM), <https://www.reuters.com/business/media-telecom/malaysia-defends-coronavirus-fake-news-law-amid-outcry-2021-03-12/>.

AFNA.<sup>8</sup> The Malaysian Parliament ultimately annulled all emergency ordinances in July 2021.<sup>9</sup>

As the first Southeast Asian country to enact laws against fake news, the Malaysian government's legal approach has sparked numerous debates regarding the balance between the principle of freedom of expression and the perceived need to regulate fake news.<sup>10</sup> For example, what is the appropriate definition of fake news? How ought fake news to be regulated? Are the Malaysian government's laws effectively achieving the regulatory aims (i.e., curbing the dissemination of fake news)? Do the speech restrictions adopted by the Malaysian government conform with international human rights standards? By discussing these questions, this Article aims to refine a deeper understanding of speech restriction in the context of fake news.

Part I of this Article introduces the research background. Part II chronicles significant events related to Malaysia's government passing the two fake news laws. Part III reviews and summarizes international standards for defining fake news and protecting freedom of expression. Part IV examines Malaysia's two fake news laws using the international human rights principles discussed in Part III. Part V concludes by summarizing the controversial aspects of Malaysia's fake news laws and providing recommendations for governments and policymakers.

## II. CHRONOLOGY OF MALAYSIA'S ANTI-FAKE NEWS LEGISLATIONS

The Malaysian government has passed two significant anti-fake news legislations recently: the Anti-Fake News Act (AFNA) in 2018<sup>11</sup> and the Emergency (Essential Powers) (No. 2) Ordinance (the "Emergency Ordinance") in 2021.<sup>12</sup> In fact, as early as 2017, the Malaysian authorities had already expressed concern about the phenomenon of online fake news.<sup>13</sup>

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<sup>8</sup> Lasse Schudt, *The rebirth of Malaysia's fake news law – and what the NetzDG has to do with it*, VERFASSUNGSBLOG (Apr. 13, 2021, 12:33 AM), <https://verfassungsblog.de/malaysia-fake-news/>.

<sup>9</sup> Eileen Ng, *Malaysia's Parliament opens after 7 months, emergency to end*, AP (July 26, 2021, 6:35 AM), <https://apnews.com/article/business-health-coronavirus-pandemic-malaysia-083e7446d51c90933cb1a0714bbc1aa7>.

<sup>10</sup> See Raphael Kok Chi Ren, *SUPPRESSING FAKE NEWS OR CHILLING FREE SPEECH: ARE THE REGULATORY REGIMES OF MALAYSIA AND SINGAPORE COMPATIBLE WITH INTERNATIONAL LAW?*, 47 J. OF MALAYSIAN & COMPAR. L. 25, 26 (2020).

<sup>11</sup> Anti-Fake News Act, Act 803, pt. II, §§ 4-6 (Apr. 9, 2018) (Malay) [hereinafter AFNA 2018].

<sup>12</sup> *Minister Says Anti-Fake News Emergency Ordinance To Uphold Rule of Law*, MINISTRY OF COMM. (June 3, 2021), <https://www.kkd.gov.my/en/public/news/19108-minister-says-anti-fake-news-emergency-ordinance-to-uphold-rule-of-law>; *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 19-20.

<sup>13</sup> *PM Najib and wife Rosmah say they were victims of fake news*, STRAITS TIMES (Oct. 22, 2017, 4:56 PM), <https://www.straitstimes.com/asia/se-asia/pm-najib-and-wife-rosmah-say-they-were-victims-of-fake-news>.

Facing accusations of a corruption scandal, former Malaysian Prime Minister Najib Razak asserted that he had become a victim of fake news on social media.<sup>14</sup> He claimed that fake news poses an urgent threat to the nation and needs to be addressed by law.<sup>15</sup> In April 2018, Najib Razak's political party—the Barisan Nasional (BN) coalition—rushed through the AFNA, officially criminalizing fake news.<sup>16</sup> Following the passing of the AFNA by the Parliament, Malaysia held a general election on May 9, 2018, and a new government came into power.<sup>17</sup> Due to the change of government, the AFNA was repealed in December 2019 by the new government.<sup>18</sup> However, the repeal of the legislation does not signify its demise.

In January 2021, due to the dissemination of COVID-19, Malaysia's king declared a state of emergency and suspended the Parliament until August 1, 2021.<sup>19</sup> On March 11, 2021, the Malaysian government enacted an emergency law—the Emergency (Essential Powers) (No. 2) Ordinance 2021—imposing hefty fines and prison sentences for the spread of COVID-19-related fake news.<sup>20</sup> The Emergency Ordinance is controversial for several reasons. First, the legislation is almost the same as the revoked AFNA 2018, except that the definition of fake news is COVID-19-specific.<sup>21</sup> Second, the Emergency Ordinance was issued without any public consultation.<sup>22</sup> Third, the legislative processes for the AFNA and the Emergency Ordinance differ.<sup>23</sup> Unlike the AFNA, passed by the Malaysian Parliament, the Emergency Ordinance was directly issued and implemented

<sup>14</sup> Mark Landler, *Trump Welcomes Najib Razak, the Malaysian Leader, as President, and Owner of a Fine Hotel*, N.Y. TIMES (Sept. 12, 2017), <https://www.nytimes.com/2017/09/12/world/asia/trump-najib-razak-malaysia-white-house.html>.

<sup>15</sup> See Ric Neo, *The Failed Construction of Fake News as a Security Threat in Malaysia*, 27 CONTEMP. POL. 316, 323 (2021).

<sup>16</sup> Dani Deahl, *First person convicted under Malaysia's fake news law gets month in jail*, VERGE (Apr. 30, 2018, 1:33 PM), <https://www.theverge.com/2018/4/30/17302954/malaysia-anti-fake-news-act-youtube>.

<sup>17</sup> Hannah Ellis-Petersen, *Malaysia election: Mahathir sworn in as prime minister after hours of uncertainty*, GUARDIAN (May 10, 2018, 10:19 AM), <https://www.theguardian.com/world/2018/may/10/malaysia-election-confusion-as-rival-questions-mahathirs-right-to-be-sworn-in>.

<sup>18</sup> See Chi Ren, *supra* note 10, at 26.

<sup>19</sup> Rozanna Latiff & Joseph Sipalan, *Malaysia declares emergency to curb virus, shoring up government*, REUTERS (Jan. 12, 2021, 5:26 AM), <https://www.reuters.com/article/us-health-coronavirus-malaysia-idUSKBN29H06G>.

<sup>20</sup> *Malaysia imposes emergency law to clamp down on COVID fake news*, REUTERS (Mar. 11, 2021, 6:46 AM), <https://www.reuters.com/article/malaysia-politics-idUSL4N2L92ZH>.

<sup>21</sup> Robert Smith & Mark Perry, *Fake News and the Pandemic in Southeast Asia*, 22 AUSTL. J. OF ASIAN L. 131, 140 (2022).

<sup>22</sup> *Malaysia: Emergency Fake News Ordinance has severe ramifications for freedom of expression*, ARTICLE 19 (June 23, 2021), <https://www.article19.org/resources/malaysia-fake-news-ordinance-severe-ramifications-freedom-expression/>.

<sup>23</sup> *Id.*

by the government under emergency powers.<sup>24</sup> Under Article 150(2) of the Malaysian Federal Constitution, during a state of emergency, the Yang di-Pertuan Agong (king of Malaysia) has the authority to promulgate emergency ordinances as circumstances require, and the ordinances have the same force and effect as laws passed by Parliament.<sup>25</sup> About two weeks before the end of the emergency state, Malaysian Prime Minister Takiyuddin Hassan officially announced the termination of the Emergency Ordinances, which took effect on July 21, 2021.<sup>26</sup> The legislative processes of the two laws and relevant events are presented in the table below.

**Table 1. The AFNA and the Emergency Ordinance: Enactment and Repeal**

Date	Event
Jan. 30, 2018	Former Prime Minister Najib Razak appointed a special committee to study new laws to act against fake news. <sup>27</sup>
Mar. 12, 2018	Malaysian authorities, including Minister Azalina Othman Said and the Malaysian Communication and Multimedia Commission (MCMC), met social media platform companies to discuss the anti-fake news bill. <sup>28</sup>
Apr. 4, 2018	The Malaysian Parliament passed the AFNA. <sup>29</sup>

<sup>24</sup> Zsombor Peter, *Malaysia Uses Emergency Powers to Impose 'Fake News' Law*, VOA (Mar. 13, 2021, 9:59 AM), [https://www.voanews.com/a/press-freedom\\_malaysia-uses-emergency-powers-impose-fake-news-law/6203266.html](https://www.voanews.com/a/press-freedom_malaysia-uses-emergency-powers-impose-fake-news-law/6203266.html).

<sup>25</sup> CONSTITUTION OF MALAYSIA 1957, art. 150(2).

<sup>26</sup> A. Ananthalakshmi, *Malaysia will not extend state of emergency, says law minister*, REUTERS (July 25, 2021, 11:58 PM), <https://www.reuters.com/world/asia-pacific/malaysia-will-not-extend-state-emergency-bernama-2021-07-26/>.

<sup>27</sup> *Malaysia Would Use "Fake News" Law To Crush Media Freedom*, RSF (May 3, 2018), <https://rsf.org/en/malaysia-would-use-fake-news-law-crush-media-freedom>.

<sup>28</sup> Adam Aziz, *Social media providers share input on fake news bill, says minister*, EDGE MALAY (Mar. 13, 2018, 7:55 PM), <https://www.theedgemarkets.com/article/social-media-providers-share-input-fake-news-bill-says-minister>.

<sup>29</sup> David Brunnstrom & Praveen Menon, *U.S. State Department concerned by Malaysia's 'fake news' bill*, REUTERS (Apr. 3, 2018, 1:35 PM), <https://www.reuters.com/article/us-malaysia-election-fakenews-usa-idUSKCN1HA27D>; Kelly Buchanan, *Malaysia: Anti-Fake News Act Comes into Force*, LIBR. OF CONG. (Apr. 19, 2018), <https://www.loc.gov/item/global-legal-monitor/2018-04-19/malaysia-anti-fake-news-act-comes-into-force/>.

Apr. 11, 2018	The AFNA came into force officially. <sup>30</sup>
Apr. 30, 2018	The first conviction under the AFNA (A Danish citizen charged with spreading false news accusing Malaysian police of late response to a shooting via YouTube). <sup>31</sup>
May 9, 2018	The 2018 Malaysian general elections were held. <sup>32</sup> The Pakatan Harapan (PH) coalition won the elections and became the new government. <sup>33</sup> The ruling Barisan Nasional (BN) party was removed from authority following more than six decades of authoritarian governance. <sup>34</sup>
Aug. 17, 2018	The lower house of Parliament, which the PH controlled, proposed the first bill to repeal the AFNA. <sup>35</sup>
Sep. 12, 2018	The upper house of Parliament, which the BN controlled, rejected the first bill to repeal the AFNA. <sup>36</sup>
Apr. 9, 2019	Former Prime Minister Mahathir Mohamad confirmed the government's intention to repeal the AFNA. <sup>37</sup>
Oct. 9, 2019	The lower house of Parliament passed the second

<sup>30</sup> Hidir Reduan & Luqman Arif Abdul Karim, *Anti-Fake News Bill is now law (NSTTV)*, NEW STRAITS TIMES (Apr. 11, 2018, 7:46 AM), <https://www.nst.com.my/news/nation/2018/04/356083/anti-fake-news-bill-now-law-nsttv>.

<sup>31</sup> Yantoultra Ngui, *Malaysia Wields Law Against 'Fake News' for First Time*, WALL ST. J. (Apr. 30, 2018, 7:27 AM), <https://www.wsj.com/articles/malaysia-wields-law-against-fake-news-for-first-time-1525087631>.

<sup>32</sup> Hannah Ellis-Petersen, *Malaysia Election: Mahathir sworn in as prime minister after hours of uncertainty*, GUARDIAN (May 10, 2018, 10:19 AM), <https://www.theguardian.com/world/2018/may/10/malaysia-election-confusion-as-rival-questions-mahathirs-right-to-be-sworn-in>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Sheith Khidhir, *Combating fake news: A balancing act*, ASEAN POST (Aug. 21, 2018), <https://theaseanpost.com/article/combating-fake-news-balancing-act>.

<sup>36</sup> Bernama, *Dewan Negara rejects Bill to repeal Anti-Fake News Act*, STAR (Sept. 12, 2018, 7:06 AM), <https://www.thestar.com.my/news/nation/2018/09/12/dewan-negara-rejects-bill-to-repeal-anti-fake-news-act>.

<sup>37</sup> Hashini Kavishtri Kannan & Ahmad, *PM: Malaysia will repeal Anti-Fake News Act*, NEW STRAITS TIMES (Apr. 9, 2019, 6:36 AM), <https://www.nst.com.my/news/nation/2019/04/477778/pm-malaysia-will-repeal-anti-fake-news-act>.

	bill to repeal the AFNA. <sup>38</sup>
Dec. 19, 2019	The upper house of Parliament passed the second bill to repeal the AFNA. The AFNA was repealed officially. <sup>39</sup>
Jan. 12, 2021	The king of Malaysia declared a state of emergency due to the COVID-19 pandemic. <sup>40</sup>
Mar. 11, 2021	The Emergency (Essential Powers) (No. 2) Ordinance was issued on March 11 and came into force on March 12 without public consultation. <sup>41</sup> The law targeted COVID-19-related fake news. <sup>42</sup>
July 21, 2021	All emergency ordinances were annulled. <sup>43</sup>
Aug. 1, 2021	The state of emergency ended. <sup>44</sup>

<sup>38</sup> Azril Annuar, *Anti-Fake News Act repealed by Dewan Rakyat again*, MALAY MAIL (Oct. 9, 2019, 6:11 PM), <https://www.malaymail.com/news/malaysia/2019/10/09/anti-fake-news-act-repealed-by-dewan-rakyat-again/1798721>.

<sup>39</sup> *Finally, Dewan Negara approves repeal of Anti-Fake News Act*, STAR (Dec. 19, 2019, 5:56 PM), <https://www.thestar.com.my/news/nation/2019/12/19/finally-dewan-negara-approves-repeal-of-anti-fake-news-act>.

<sup>40</sup> Rebecca Ratcliffe, *Malaysia declares Covid state of emergency amid political turmoil*, GUARDIAN (Jan. 12, 2021, 12:54 AM), <https://www.theguardian.com/world/2021/jan/12/malaysia-declares-covid-state-of-emergency-amid-political-turmoil>.

<sup>41</sup> *Malaysia imposes emergency law to clamp down on COVID fake news*, REUTERS (Mar. 11, 2021, 6:46 AM), <https://www.reuters.com/article/malaysia-politics-idUSL4N2L92ZH>.

<sup>42</sup> *Id.*

<sup>43</sup> Eileen Ng, *Malaysia's Parliament opens after 7 Months, emergency to end*, AP (July 26, 2021, 6:35 AM), <https://apnews.com/article/business-health-coronavirus-pandemic-malaysia-083e7446d51c90933cb1a0714bbc1aa7>.

<sup>44</sup> *Malaysia will not extend state of emergency, says law minister*, REUTERS (July 25, 2021, 11:58 PM), <https://www.reuters.com/world/asia-pacific/malaysia-will-not-extend-state-emergency-bernama-2021-07-26/>.

### III. INTERNATIONAL STANDARDS FOR FREEDOM OF EXPRESSION

#### A. Defining Fake News

Since the 2016 U.S. Presidential Election, the fake news phenomenon has received broad attention from governments globally.<sup>45</sup> Many Southeast Asian governments, including Malaysia, have attempted to define and regulate the fake news problem through legal approaches.<sup>46</sup> Although there is a rich literature on the definitional problems of fake news, there is still no universally agreed-upon definition of fake news.<sup>47</sup> Some scholars consider defining fake news to be quite challenging because the umbrella term includes various types of messages, such as hoaxes, satire, propaganda, trolling, and commentary.<sup>48</sup> Furthermore, verifying the accuracy or intent behind a piece of information is difficult.<sup>49</sup> Other scholars argue that the definition of fake news is less than useful because the term is being loosely bandied about.<sup>50</sup> In light of this, this Article aims to explore the use of appropriate standards for conceptualizing fake news properly rather than proposing a new definition.

The term “fake news” is controversial because politicians frequently use it to label news sources that do not support their positions as unreliable or fake news.<sup>51</sup> Given this, some scholars and fact-checking organizations suggest avoiding using the term “fake news” because its meaning is polarized and not objective.<sup>52</sup> A handbook for journalism education and training published by the United Nations Educational, Scientific and Cultural Organization (UNESCO) also contends that “fake news” is often misused to describe reporting with which the claimant disagrees.<sup>53</sup> Instead, UNESCO's handbook suggests using the terms “disinformation” and “misinformation” to clarify and better understand the concept of fake news.<sup>54</sup> According to the

<sup>45</sup> Ric Neo, *The International Discourses and Governance of Fake News*, 12 GLOB. POL'Y 214, 214 (2021).

<sup>46</sup> See Smith et al., *supra* note 2, at 128.

<sup>47</sup> Donato Vese, *Governing Fake News: The Regulation of Social Media and the Right to Freedom of Expression in the Era of Emergency*, 13 EUR. J. OF RISK REGUL. 477, 479 (2021).

<sup>48</sup> Mark Verstraete et al., *Identifying and Countering Fake News*, 73 HASTINGS L. J. 821, 826 (2022).

<sup>49</sup> *Id.* at 835.

<sup>50</sup> Ahran Park & Kyu Ho Youm, *Fake News from a Legal Perspective: The United States and South Korea Compared*, 25 SW. J. INT'L L. 100, 102 (2019).

<sup>51</sup> See Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCI. 1146, 1146 (2018).

<sup>52</sup> See, e.g., Étienne Brown, *"Fake News" and Conceptual Ethics*, 16 J. OF ETHICS & SOC. PHIL. 144, 145 (2019).

<sup>53</sup> CHERILYN IRETON & JULIE POSETTI, JOURNALISM, 'FAKE NEWS' AND DISINFORMATION: A HANDBOOK FOR JOURNALISM EDUCATION AND TRAINING 43 (2018).

<sup>54</sup> *Id.*

handbook, disinformation refers to dishonest information attempting to confuse or manipulate people, while misinformation generally refers to misleading information created or disseminated without malicious intent.<sup>55</sup> Therefore, intent provides a way to distinguish different types of fake news.<sup>56</sup>

In addition to UNESCO's definition, the European Commission has also put forth three crucial criteria for defining fake news: (1) the intent and the apparent objective pursued by fake news; (2) the sources of such news; and (3) the actual content of the news.<sup>57</sup> First, intent refers to whether fake news is deliberately created and distributed to mislead others and influence their thoughts and behavior.<sup>58</sup> Second, the sources of information are important.<sup>59</sup> News based on anonymous sources or a single, unverified source with limited context and an absence of alternative viewpoints may be considered fake and a violation of journalism standards.<sup>60</sup> Third, fake news refers to false content, such as manipulated facts or purposefully incorrect interpretations of events.<sup>61</sup> Therefore, it is essential to examine the actual content of the information.<sup>62</sup> In conclusion, both UNESCO and the European Union (EU) have offered clear guidelines for discerning fake news, including the intent, sources, and actual content of the information.<sup>63</sup> This Article argues that governments should consider these suggestions while utilizing legal approaches to address the fake news problem. Specifically, governments should avoid using the term "fake news" in legal descriptions and provide clear guidelines for identifying false information.

Regulating fake news is another challenging issue because it usually triggers public concerns about censorship and limits freedom of expression.<sup>64</sup> When evaluating speech restrictions executed by government authorities, it is crucial to consider whether the measures affect human rights because freedom of expression is one of the most salient human rights.<sup>65</sup> The following section introduces a cornerstone treaty within the United Nations (UN) human rights framework, namely the International Covenant on Civil and Political Rights (ICCPR).<sup>66</sup> This international treaty, broadly referenced

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<sup>55</sup> *Id.*

<sup>56</sup> *See id.*

<sup>57</sup> EUR. COMM'N, SYNOPSIS REPORT OF THE PUBLIC CONSULTATION ON FAKE NEWS AND ONLINE DISINFORMATION (2018), available at <https://ec.europa.eu/newsroom/dae/redirection/document/51810>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> IRETON & POSETTI, *supra* note 53, at 43; EUR. COMM'N, *supra* note 57.

<sup>63</sup> EUR. COMM'N, *supra* note 57.

<sup>64</sup> Vese, *supra* note 47, at 479.

<sup>65</sup> Evelyn M. Aswad, *In a World of "Fake News," What's a Social Media Platform to do?*, 4 UTAH L. REV. 1009, 1012-13 (2020).

<sup>66</sup> International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171.

in numerous studies, provides foundational and critical standards for protecting freedom of expression.<sup>67</sup>

## B. Article 19 of ICCPR

The International Covenant on Civil and Political Rights (ICCPR) is a critical international treaty adopted by the United Nations in 1966.<sup>68</sup> It safeguards fundamental human rights and provides international standards for protecting freedom of expression.<sup>69</sup> According to Article 19(1) of the ICCPR, “[e]veryone shall have the right to hold opinions without interference,”<sup>70</sup> which is an absolute human right.<sup>71</sup> Article 19(2) further describes that “[e]veryone 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.”<sup>72</sup> Articles 19(1) and (2) provide foundational and broad protection for free expression.<sup>73</sup> In specific situations, however, freedom of expression may be subject to certain restrictions.<sup>74</sup> Article 19(3) indicates that any speech restrictions must meet the three well-established conditions: (1) must be provided by law; (2) must be necessary; and (3) must be used to protect the rights or reputations of others, national security, public order, and public health or morals.<sup>75</sup> The above three requirements are known as (1) legality, (2) necessity,<sup>76</sup> and (3) legitimacy.<sup>77</sup>

<sup>67</sup> Aswad, *supra* note 65, at 1013-14.

<sup>68</sup> International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>69</sup> *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU (July 11, 2018), <https://www.aclu.org/documents/faq-covenant-civil-political-rights-iccpr#:~:text=The%20ICCPR%20obligates%20countries%20that%20treatment%2C%20and%20arbitrary%20detention%3B%20gender.>

<sup>70</sup> International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>71</sup> William Magnuson, *The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law*, 43 VAND. J. TRANSNAT'L L. 255, 279 (2010).

<sup>72</sup> International Covenant on Civil and Political Rights art. 19(2), Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>73</sup> *Id.*

<sup>74</sup> Kevin Francis, *Time, Place and Manner Restrictions*, FREE SPEECH CTR. (Feb. 18, 2024), <https://firstamendment.mtsu.edu/article/time-place-and-manner-restrictions/>.

<sup>75</sup> International Covenant on Civil and Political Rights art. 19(2), ¶ 3, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>76</sup> U.N. officials and scholars often use this term interchangeably with "proportionality." See Nadine Strossen, *United Nations Free Speech Standards as the Global Benchmark for Online Platforms' Hate Speech Policies*, 29 MICH. ST. INT'L REV. 307, 343-44 (2021).

<sup>77</sup> *Id.* at 342-43.

### 1. *Legality*

Legality refers to the premise that speech restrictions must be “provided by law,”<sup>78</sup> and the law must be adopted by “regular legal processes.”<sup>79</sup> The regular legal process means the court should comprehensively investigate individual claims within reasonable timeframes.<sup>80</sup> Also, the legislative processes should be transparent and accessible to the public;<sup>81</sup> secretly adopted speech restrictions will fail this fundamental requirement.<sup>82</sup> Additionally, the law should be written with sufficient precision,<sup>83</sup> meaning it should be written narrowly and tailored to avoid vagueness.<sup>84</sup> The “sufficient precision” requirement is critical because it enables individuals to distinguish lawful and unlawful expressions.<sup>85</sup> For instance, when enacting a fake news law, the government regulator must provide a clear, narrow definition of fake news to enable ordinary people to discern its scope.<sup>86</sup> In short, laws that infringe on the right to freedom of speech must be drafted precisely and narrowly.<sup>87</sup> Additionally, legality assurance should generally involve the oversight of independent judicial authorities.<sup>88</sup> In summary, legality rests on the above requirements that safeguard freedom of expression and restrict government arbitrariness.<sup>89</sup>

### 2. *Necessity*

Article 19(3) of the ICCPR requires that the adoption of speech restrictions must be “necessary” to achieve the public interest objective.<sup>90</sup>

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<sup>78</sup> *Id.* at 343.

<sup>79</sup> DAVID KAYE (SPECIAL RAPPORTEUR), REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION U.N. Doc. A/HRC/38/35, 4 (HUM. RTS. COUNCIL, THIRTY-EIGHTH SESSION 2018); Strossen, *supra* note 76, at 343.

<sup>80</sup> See Demet Çelik Ulusoy, *A Comparative Study of the Freedom of Expression in Turkey and EU*, 43 TURK. Y.B. OF INT’L REL. 51, 136-37 (2013); see also Luan Hasneziri, *The Adversarial Proceedings Principle in the Civil Process*, 4 EUR. J. MKTG. & ECON. 88, 93 (2021).

<sup>81</sup> Chi Ren, *supra* note 10, at 42.

<sup>82</sup> DAVID KAYE (SPECIAL RAPPORTEUR), REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION U.N. Doc. A/HRC/38/35, 4 (HUM. RTS. COUNCIL, THIRTY-EIGHTH SESSION 2018).

<sup>83</sup> *Id.* at art. 7.

<sup>84</sup> Strossen, *supra* note 76, at 344.

<sup>85</sup> See *id.*

<sup>86</sup> See Amy Shepherd, *Extremism, Free Speech and the Rule of Law: Evaluating the Compliance of Legislation Restricting Extremist Expressions with Article 19 ICCPR*, 33 UTRECHT J. INT’L & EUR. L. 62, 66-67 (2017).

<sup>87</sup> See *id.* (“[L]egislation restricting extremist speech needs to refer to a definition of extremism which targets with precision an identified harm.”).

<sup>88</sup> KAYE, *supra* note 82, at ¶ 7.

<sup>89</sup> See Strossen, *supra* note 76, at 343.

<sup>90</sup> International Covenant on Civil and Political Rights art. 19(3), Dec. 16, 1966, 999 U.N.T.S. 171.

More specifically, speech restrictions to the right of freedom of expression should be directly related to the need they claim to serve.<sup>91</sup> Before implementing speech restrictions, states should demonstrate the precise nature of the threat to legitimate interests.<sup>92</sup> In the context of fake news, states should clearly explain how fake news threatens public interests (e.g., public order).<sup>93</sup> While restricting speech, states must use the least intrusive means.<sup>94</sup> More importantly, states may not merely assert the necessity of speech restrictions but must demonstrate it.<sup>95</sup> To prove the necessity of speech restrictions, a legal scholar proposed that a “three-part inquiry” should be undertaken by governments.<sup>96</sup> The first step for a state is to assess whether it can attain its public interest goals without limiting freedom of speech.<sup>97</sup> The second step involves evaluating whether the state has adopted the least intrusive measure when good governance measures are deemed insufficient to achieve the objective.<sup>98</sup> Finally, a state must determine if the implemented speech restrictions actually contribute to achieving the public interest goals.<sup>99</sup> Ultimately, the three steps help states assess the necessity of the enforced speech restrictions.<sup>100</sup>

### 3. Legitimacy

Legitimacy refers to whether the objective of speech restrictions is legitimate or not.<sup>101</sup> According to Article 19(3) of the ICCPR, speech restrictions must meet the following requirements: (1) for respect of the rights or reputations of others and (2) for the protection of national security or of public order or public health or morals.<sup>102</sup> Other purposes, including protecting the ruling party's interests, are not legitimate reasons for speech restrictions.<sup>103</sup> While Article 19(3) of the ICCPR provides reasons for restricting free expression, it is essential to ascertain how the overarching reasons, such as national security and public order, are defined under international human rights laws.<sup>104</sup>

<sup>91</sup> Shepherd, *supra* note 86, at 76.

<sup>92</sup> Rebecca K. Helm & Hitoshi Nasu, *Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation*, 21 HUM. RTS. L. REV. 302, 311 (2021).

<sup>93</sup> *Id.*

<sup>94</sup> KAYE, *supra* note 82, at ¶ 7.

<sup>95</sup> *Id.*

<sup>96</sup> Aswad, *supra* note 65, at 1016.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1017.

<sup>100</sup> *Id.* at 1016-17.

<sup>101</sup> KAYE, *supra* note 82, at ¶ 7.

<sup>102</sup> International Covenant on Civil and Political Rights art. 19(3), Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>103</sup> Aswad, *supra* note 65, at 1017.

<sup>104</sup> Shepherd, *supra* note 86, at 71.

In fact, the term “national security” is not clearly defined in ICCPR and lacks international definition.<sup>105</sup> Some scholars suggest that the Johannesburg Principles provide a more specific description of national security.<sup>106</sup> According to the Johannesburg Principles, the punishment of expression as a threat to national security is contingent upon a government's ability to show that it is intended to incite imminent violence.<sup>107</sup> Also, a government must demonstrate a “direct and immediate connection” between the expression and the likelihood or occurrence of such violence.<sup>108</sup> In the context of fake news, a government should prove that the spread of fake news could directly lead to imminent violence, thus posing a threat to national security. “Public order” is ordinarily used to mean the absence of public disorder.<sup>109</sup> More specifically, public order can be understood as the rules that ensure society's functioning or the fundamental principles on which society is founded.<sup>110</sup> That is to say, if a government attempts to restrict information labeled as fake news or takes punitive measures against those who publish or spread such content, the government must explain how the information could disturb or harm public order.<sup>111</sup> In summary, governments must provide compelling reasons and evidence to justify the imposition of speech restrictions and the targeted legitimate objectives.<sup>112</sup>

#### IV. TEST THE FAKE NEWS LAWS BY ICCPR STANDARDS

As of February 2023, there are 173 parties to the ICCPR, with Malaysia being an exception, which means that the ICCPR is currently not applicable in Malaysia.<sup>113</sup> In fact, in 2013 and 2021, Malaysia's Deputy Foreign Minister expressed the federal government's intention not to sign the ICCPR: “Malaysia will sign ICCPR only if it is beneficial to the nation.”<sup>114</sup> Although

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<sup>105</sup> *Id.*

<sup>106</sup> *See id.* at 72.

<sup>107</sup> ARTICLE 6, THE JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION (1996), available at <https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf> [hereinafter Johannesburg Principles].

<sup>108</sup> *Id.*

<sup>109</sup> Elizabeth K. Cassidy, *Restricting Rights? The Public Order and Public Morality Limitations on Free Speech and Religious Liberty in Un Human Rights Institutions*, 13 REV. FAITH & INT'L AFFS. 5, 7 (2015).

<sup>110</sup> *Id.* at 8.

<sup>111</sup> *See generally id.* at 7-8.

<sup>112</sup> *See generally id.*

<sup>113</sup> *See UN Human Rights Committee to Review Egypt, Turkmenistan, Zambia, Peru, Sri Lanka and Panama*, U.N. HUM. RTS. OFF. HIGH COMM'R (Feb. 23, 2023), <https://www.ohchr.org/en/press-releases/2023/02/un-human-rights-committee-review-egypt-turkmenistan-zambia-peru-sri-lanka>.

<sup>114</sup> Martin Carvalho, *Deputy Minister: Malaysia will sign ICCPR only if beneficial to nation*, STAR (Dec. 3, 2013, 11:59 AM), <https://www.thestar.com.my/news/nation/2013/12/03/malaysia-iccpr-signatory/>; *see also* Kenneth Tee, *Saifuddin: Putrajaya not looking to ratify UN's International Covenant on Civil and Political Rights yet*, MALAY MAIL (Nov. 10, 2021, 8:10 PM),

Malaysia has neither signed nor ratified the international treaty, some scholars argue that the Malaysian government still has an obligation to uphold human rights, including freedom of expression, by following the ICCPR.<sup>115</sup> In the following sections, I will apply ICCPR's three necessary standards—legality, necessity, and legitimacy—to assess whether Malaysia's fake news laws comply with international human rights law.

#### A. The Legality Test

As previously summarized, the legality standard includes several requirements. First, any speech restrictions must be “provided by law.”<sup>116</sup> Second, the law must be adopted by “regular legal processes.”<sup>117</sup> Third, the law should be written with “sufficient precision.”<sup>118</sup> Fourth, legality assurance should generally involve the oversight of independent judicial authorities.<sup>119</sup> This section examines whether Malaysia's fake news laws fulfill the above requirements.

First, it is crucial to examine the legal definitions of fake news as stipulated in Malaysia's laws. Under Section 2 of the AFNA, “[F]ake news” includes any news, information, data, and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas.”<sup>120</sup> Meanwhile, Section 2 of the Emergency Ordinance defined fake news as follows: “[F]ake news” includes 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.”<sup>121</sup>

The only difference in the legal definition between the two laws is that, in the Emergency Ordinance, the definition of fake news is specific to COVID-19.<sup>122</sup> According to the definitions in the two laws, fake news refers to information that is “wholly or partly false.”<sup>123</sup> However, both laws fail to clearly explain what qualifies as false or the criteria that can be used to

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<https://www.malaymail.com/news/malaysia/2021/11/10/saifuddin-putrajaya-not-looking-to-ratify-uns-international-covenant-on-civ/2019931>.

<sup>115</sup> See, e.g., Chi Ren, *supra* note 10, at 41.

<sup>116</sup> *Id.* at 42; see also Strossen, *supra* note 76, at 344-45.

<sup>117</sup> Chi Ren, *supra* note 10, at 42.

<sup>118</sup> *Id.*

<sup>119</sup> See *id.*

<sup>120</sup> AFNA 2018, *supra* note 11, at pt. I, § 2.

<sup>121</sup> *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 19-20.

<sup>122</sup> See *id.* at 19.

<sup>123</sup> See *id.* at 19-20.

identify falsity.<sup>124</sup> Furthermore, it is concerning that people can be accused of violating the laws merely because their statements are partly false.<sup>125</sup> The loose and unclear definition of fake news triggered public concerns, and scholars worried that the law (AFNA) could reinforce Malaysia as an authoritarian state.<sup>126</sup> Lawyers also warned that a vague definition of fake news might lead to inconsistent enforcement because it allows authorities to abuse the law.<sup>127</sup> Obviously, the legal definitions of Malaysia's fake news laws did not meet the "sufficient precision" requirement.<sup>128</sup> This Article argues that the Malaysian government should have addressed the issue by adopting the guidelines for defining fake news as suggested by the UN and the EU. For instance, in legal terminology, the government should avoid using the term "fake news" and instead use "misinformation" or "disinformation." In addition, the Malaysian government should have added specific criteria for identifying fake news in the two legislations, such as the intent, sources, and actual content of the information.

It is also crucial to examine the legislative processes of the two legislations. As previously mentioned, the legislative processes of the AFNA and the Emergency Ordinance are different.<sup>129</sup> The Malaysian Parliament passed the AFNA bill on April 3, 2018, an official legislative process.<sup>130</sup> However, the Emergency Ordinance was not passed by Parliament because

<sup>124</sup> Chi Ren, *supra* note 10, at 43; *see also Malaysia: Revoke 'Fake News' Ordinance*, HUM. RTS. WATCH (Mar. 13, 2021, 2:50 PM), <https://www.hrw.org/news/2021/03/13/malaysia-revoke-fake-news-ordinance>.

<sup>125</sup> *See generally Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 19-20; AFNA 2018, *supra* note 11, at pt. I, § 2; *see also Malaysia: Revoke 'Fake News' Ordinance*, HUM. RTS. WATCH (Mar. 13, 2021, 2:50 PM), <https://www.hrw.org/news/2021/03/13/malaysia-revoke-fake-news-ordinance>.

<sup>126</sup> Moonyati Mohd Yatid, *Truth Tampering Through Social Media: Malaysia's Approach in Fighting Disinformation & Misinformation*, 2 *INDON. J. SE. ASIAN STUD.* 203, 220 (2019).

<sup>127</sup> Zakiah Koya, *Vague definition of fake news may lead to inconsistent enforcement, warns Lawyers for Liberty*, STAR (Mar. 12, 2021, 1:59 PM), <https://www.thestar.com.my/news/nation/2021/03/12/vague-definition-of-fake-news-may-lead-to-inconsistent-enforcement-warns-lawyers-for-liberty>; *see also Malaysia: Revoke 'Fake News' Ordinance*, HUM. RTS. WATCH (Mar. 13, 2021, 2:50 PM), <https://www.hrw.org/news/2021/03/13/malaysia-revoke-fake-news-ordinance>; *Lawyers slam hypocrisy in govt's defence of media control*, MALAY. NOW (Sept. 2, 2023, 11:09 PM), <https://www.malaysianow.com/news/2023/09/03/lawyers-slam-hypocrisy-in-govts-defence-of-media-control>.

<sup>128</sup> *See generally* Chi Ren, *supra* note 10, at 43; *see also Malaysia: Revoke 'Fake News' Ordinance*, HUM. RTS. WATCH (Mar. 13, 2021, 2:50 PM), <https://www.hrw.org/news/2021/03/13/malaysia-revoke-fake-news-ordinance>.

<sup>129</sup> *See Malaysia imposes emergency law to clamp down on COVID fake news*, REUTERS (Mar. 11, 2021, 6:46 AM), <https://www.reuters.com/article/idUSKBN2B31P6/>; *U.S. State Department concerned by Malaysia's 'fake news' bill*, REUTERS (Apr. 3, 2018, 1:35 PM), <https://www.reuters.com/article/us-malaysia-election-fakenews-usa-idUSKCN1HA27D/>.

<sup>130</sup> *U.S. State Department Concerned by Malaysia's 'Fake News' Bill*, REUTERS (Apr. 3, 2018, 1:35 PM), <https://www.reuters.com/article/us-malaysia-election-fakenews-usa-idUSKCN1HA27D/>.

Malaysia's king suspended it due to the COVID-19 pandemic.<sup>131</sup> Instead, the Emergency Ordinance was issued based on Article 150 (2B) of the Federal Constitution of Malaysia.<sup>132</sup> According to Article 150 (2B) of the Federal Constitution, if a proclamation of emergency is in operation, the king of Malaysia can promulgate ordinances in response to the emergency.<sup>133</sup> Given that the king of Malaysia declared a state of emergency on January 12, 2021,<sup>134</sup> the king's issuance of the Emergency Ordinances (No. 2) on March 11, 2021, was legal.<sup>135</sup>

While the legislative processes of the two laws appeared to comply with legal requirements, some people raised concerns about their problematic nature. Regarding the AFNA's legislative processes, some criticized the legislation as having been passed hastily and without proper public consultation.<sup>136</sup> Just over a month before the May 9, 2018, general elections, an international human rights organization, known as Article 19, claimed that the AFNA was rushed through Parliament without any serious public participation.<sup>137</sup> Why did the Malaysian government rush to pass the law? Some suggest that Parliament hurriedly passed and enacted the law before the 2018 general election because former Prime Minister Najib Razak wanted to use the law to tackle political dissenters.<sup>138</sup>

Prior to the enactment of the AFNA, Malaysian authorities, including the former Minister in the Prime Minister's Department, Azalina Othman Said, and the MCMC, extended invitations to digital platform companies.<sup>139</sup> Representatives from major platforms such as Google, Facebook, YouTube,

<sup>131</sup> Joseph Sipalan, *Malaysia defends coronavirus fake news law amid outcry*, REUTERS (Mar. 12, 2021, 2:06 PM), <https://www.reuters.com/business/media-telecom/malaysia-defends-coronavirus-fake-news-law-amid-outcry-2021-03-12/>.

<sup>132</sup> Harsh Mahaseth, *Malaysia, Covid-19, And The New Fake News Ordinance: Is There A Reason To Be Apprehensive?*, MOD. DIPL. (July 2, 2021), <https://moderndiplomacy.eu/2021/07/02/malaysia-covid-19-and-the-new-fake-news-ordinance-is-there-a-reason-to-be-apprehensive/>.

<sup>133</sup> CONSTITUTION OF MALAYSIA 1957, art. 150(2).

<sup>134</sup> Rebecca Ratcliffe, *Malaysia Declares Covid State of Emergency Amid Political Turmoil*, GUARDIAN (Jan. 12, 2021, 00:54), <https://www.theguardian.com/world/2021/jan/12/malaysia-declares-covid-state-of-emergency-amid-political-turmoil>.

<sup>135</sup> See CONSTITUTION OF MALAYSIA 1957, art. 150(2) ("A Proclamation of Emergency under Clause (1) may be issued before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof if the Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event.").

<sup>136</sup> See, e.g., Chi Ren, *supra* note 10, at 43.

<sup>137</sup> *Malaysia: Anti-Fake News Act Should Be Repealed in Its Entirety*, ARTICLE 19 (Apr. 24, 2018), <https://www.article19.org/resources/malaysia-anti-fake-news-act-repealed-entirety/>.

<sup>138</sup> Bhavan Jaipragas, *Why is Najib pushing fake news laws before Malaysia election?*, S. CHINA MORNING POST (Mar. 11, 2018, 7:00 AM), [https://www.scmp.com/week-asia/politics/article/2136601/why-najib-pushing-fake-news-laws-malaysia-election?module=perpetual\\_scroll\\_0&pgtype=article&campaign=2136601](https://www.scmp.com/week-asia/politics/article/2136601/why-najib-pushing-fake-news-laws-malaysia-election?module=perpetual_scroll_0&pgtype=article&campaign=2136601).

<sup>139</sup> See Adam Aziz, *Social media providers share input on fake news bill, says minister*, EDGE MALAY. (Mar. 13, 2018, 7:55 PM), <https://theedgemalaysia.com/article/social-media-providers-share-input-fake-news-bill-says-minister>.

and Twitter were included in these discussions.<sup>140</sup> The primary goal was to engage in dialogue about the forthcoming bill, specifically crafted to tackle the issue of fake news.<sup>141</sup> However, the responses from digital platform companies regarding the AFNA were not made public.<sup>142</sup> News articles only reported that Malaysian authorities received positive feedback from internet giants, and authorities believed that platforms and the government should work together to resolve the fake news problem.<sup>143</sup> It might be worrisome if platform companies attended the meeting but did not express their concerns about the law's impact. Even if internet giants did not express their concerns, the legal regulations of the AFNA were controversial.<sup>144</sup> They received much criticism, such as the vague definition of fake news and fear of media censorship.<sup>145</sup>

Similarly, the legislative processes of the Emergency Ordinance in 2021 were also controversial.<sup>146</sup> Authorized by the Federal Constitution, the declaration of a state of emergency gives the government extraordinary powers, such as introducing and suspending laws without Parliament's approval,<sup>147</sup> as illustrated by the Emergency Ordinance. Human rights organizations criticize the enactment of the Emergency Ordinance as being hasty and without any effective public consultation or legislative oversight.<sup>148</sup> Instead of rushing to pass and enact the legislation, this Article argues that the Malaysian government should have communicated openly with the public and suspended the legislation.

Lastly, assessing whether the laws were adopted through regular legal processes is crucial. Under Section 9 of the AFNA, “[c]ourt may order for removal of the publication containing fake news by police officer or authorized officer.”<sup>149</sup> This section gave the court sweeping powers to request authorities to remove publications containing information deemed fake news without transparency or clear processes.<sup>150</sup> Under Section 17 of

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Malaysia Meets Social Media Giants Facebook, Twitter and Google to Discuss Fake News Law*, STRAITS TIMES (Mar. 13, 2018, 2:26 PM), <https://www.straitstimes.com/asia/se-asia/malaysia-meets-social-media-giants-facebook-twitter-and-google-to-discuss-fake-news-law>.

<sup>144</sup> Marc Lourdes, *Malaysia's anti-fake news law raises media censorship fears*, CNN (Apr. 3, 2018, 11:54 PM), <https://www.cnn.com/2018/03/30/asia/malaysia-anti-fake-news-bill-intl/index.html>.

<sup>145</sup> *Id.*

<sup>146</sup> *Why A State of Emergency Raises Concerns In Malaysia*, REUTERS (Jan. 12, 2021, 6:21 AM), <https://www.reuters.com/article/us-healthcare-coronavirus-malaysia-emerg-idUSKBN29H1HE>.

<sup>147</sup> *Id.*

<sup>148</sup> See, e.g., *Malaysia: Emergency Fake News Ordinance has severe ramifications for freedom of expression*, ARTICLE 19 (June 23, 2021), <https://www.article19.org/resources/malaysia-fake-news-ordinance-severe-ramifications-freedom-expression/>.

<sup>149</sup> AFNA 2018, *supra* note 11, at pt. III § 9.

<sup>150</sup> *Malaysia: Anti-Fake News Act*, ARTICLE 19 (Apr. 24, 2018), <https://www.article19.org/resources/malaysia-anti-fake-news-act/>.

the Emergency Ordinance, “[a] police officer or an authorized officer may arrest any person whom he reasonably believes has committed or is attempting to commit an offense under this Ordinance.”<sup>151</sup> It granted police officers broad powers to arrest individuals under the law without a warrant.<sup>152</sup> Likewise, judicial independence is likely another issue. In Malaysia, executive control has historically compromised judicial independence, resulting in courts frequently issuing arbitrary or politically biased decisions.<sup>153</sup> Human rights organizations contend that the Malaysian government's content blocking and removal requests are generally nontransparent and lack judicial oversight.<sup>154</sup>

In conclusion, this Article argues that the AFNA and the Emergency Ordinance did not fulfill ICCPR's legality principles for the following reasons. First, these two laws did not clearly define fake news sufficiently, making it difficult for ordinary people to distinguish lawful and unlawful expression based on vague legal definitions.<sup>155</sup> Second, the legislative processes of the two laws were problematic, with human rights organizations criticizing their rushed nature and lack of accessibility to the public.<sup>156</sup> Third, the two laws were not implemented through regular legal processes.<sup>157</sup> As earlier discussed, the independence of Malaysia's judiciary is often subject to government interference.<sup>158</sup> Also, the Emergency Ordinance empowered authorities to arrest individuals deemed to be spreading false information without a court's warrant.<sup>159</sup> Considering the reasons mentioned above, this Article argues that Malaysia's legal approaches to fake news did not meet the legality standards set by the ICCPR. The next section will examine whether the two laws fulfill the necessity principles.

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<sup>151</sup> *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 25.

<sup>152</sup> *Malaysia: Emergency Fake News Ordinance has severe ramifications for freedom of expression*, ARTICLE 19 (June 23, 2021), <https://www.article19.org/resources/malaysia-fake-news-ordinance-severe-ramifications-freedom-expression/>.

<sup>153</sup> *Freedom in the World 2023-Malaysia*, FREEDOM HOUSE, <https://freedomhouse.org/country/malaysia/freedom-world/2023> (last visited Mar. 29, 2024).

<sup>154</sup> *Id.*

<sup>155</sup> Strossen, *supra* note 76, at 338.

<sup>156</sup> Chi Ren, *supra* note 10, at 42.

<sup>157</sup> Zsombor Peter, *Malaysia Uses Emergency Powers to Impose 'Fake News' Law*, VOA (Mar. 13, 2021, 9:59 AM), [https://www.voanews.com/a/press-freedom\\_malaysia-uses-emergency-powers-impose-fake-news-law/6203266.html](https://www.voanews.com/a/press-freedom_malaysia-uses-emergency-powers-impose-fake-news-law/6203266.html).

<sup>158</sup> *Freedom in the World 2023-Malaysia*, FREEDOM HOUSE, <https://freedomhouse.org/country/malaysia/freedom-world/2023> (last visited Mar. 29, 2024).

<sup>159</sup> *Malaysia: Emergency Fake News Ordinance has severe ramifications for freedom of expression*, ARTICLE 19 (June 23, 2021), <https://www.article19.org/resources/malaysia-fake-news-ordinance-severe-ramifications-freedom-expression/>.

## B. The Necessity Test

Necessity is another essential criterion that any speech restrictions should meet according to ICCPR's standards.<sup>160</sup> As previously discussed, the necessity principle includes several aspects.<sup>161</sup> First, governments must demonstrate the precise nature of the threat that particular speech poses to legitimate interests.<sup>162</sup> Second, speech restrictions must be "necessary" to promote legitimate purposes.<sup>163</sup> Third, speech restrictions must be the least intrusive alternative.<sup>164</sup> To assess whether Malaysia's legal approaches meet the above standards, this Article first examines whether the Malaysian government provided sufficient evidence to demonstrate that fake news threatens public interests. Then, this Article summarizes the speech restrictions and penalties included in the AFNA and the Emergency Ordinance and analyzes the necessity of these restrictions.

In Malaysia, the discourse of fake news as a threat to national security may be traced back to 2017.<sup>165</sup> In March 2017, Malaysia's former Prime Minister, Najib Razak, declared that fake news jeopardized Malaysia's economic growth and should be regulated by law.<sup>166</sup> Prime Minister Najib Razak was referring to reports regarding the 1Malaysia Development Berhad (1MDB) scandal.<sup>167</sup> 1MDB is a government-run company set up to develop new industries and make investments.<sup>168</sup> In 2015, reports on the 1MDB scandal revealed that more than \$700 million was deposited into Malaysian Prime Minister Najib Razak's bank account.<sup>169</sup> Since then, Prime Minister Najib Razak and the Malaysian government asserted that the relevant reports were fake news, initiating measures to suppress coverage of the issue.<sup>170</sup> Experts from academia, the legal field, and the media contend that the Malaysian government has not adequately demonstrated how fake news poses a specific threat to legitimate interests.<sup>171</sup> An empirical study found that

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<sup>160</sup> Aswad, *supra* note 65, at 1016-17.

<sup>161</sup> *Id.* at 1016.

<sup>162</sup> Helm & Nasu, *supra* note 92, at 311.

<sup>163</sup> Strossen, *supra* note 76, at 343.

<sup>164</sup> Aswad, *supra* note 65, at 1016.

<sup>165</sup> *Id.* at 1010-11.

<sup>166</sup> Neo, *supra* note 15, at 317.

<sup>167</sup> *See id.*

<sup>168</sup> *Id.* at 325.

<sup>169</sup> Tom Wright & Simon Clark, *Investigators Believe Money Flowed to Malaysian Leader Najib's Accounts Amid 1MDB Probe*, WALL ST. J. (July 2, 2015, 4:42 PM), <https://www.wsj.com/articles/malaysian-investigators-probe-points-to-deposits-into-prime-ministers-accounts-1435866107>.

<sup>170</sup> Neo, *supra* note 15, at 325-26.

<sup>171</sup> *See id.* at 316; *see also* Harsh Mahaseth & Gursimran, *Malaysia, Covid-19, And The New Fake News Ordinance: Is There A Reason To Be Apprehensive?*, MOD. DIPL. (July 2, 2021), <https://moderndiplomacy.eu/2021/07/02/malaysia-covid-19-and-the-new-fake-news-ordinance-is-there-a-reason-to-be-apprehensive/>.

most people do not believe the government will fairly implement the fake news law (AFNA).<sup>172</sup> Instead, they believe the AFNA had a more personal purpose, such as protecting Prime Minister Najib Razak's reputation and suppressing political dissent.<sup>173</sup> It appears that the government failed to convincingly illustrate the specific threat posed by fake news to legitimate interests.<sup>174</sup> As a result, the fake news laws did not garner support from civil society.<sup>175</sup> The following table further examines the restrictions and penalties of the two fake news laws.

**Table 2. Offenses and Penalties Under the AFNA and the Emergency Ordinance**

Offense	Maximum Sentence	
	AFNA 2018	The Emergency Ordinance 2021
Creating, offering, or publishing fake news <sup>176</sup>	<ul style="list-style-type: none"> <li>• Imprisonment for 6 years</li> <li>• Fine of RM500,000 (\$115,000); a further fine of RM3,000 (\$690) for every day that the offense continues</li> </ul>	<ul style="list-style-type: none"> <li>• Imprisonment for 3 years</li> <li>• Fine of RM100,000 (\$23,000); a further fine of RM1,000 (\$230) for every day that the offense continues</li> </ul>
Financial assistance for committing or facilitating the creation, offering, or publication of	<ul style="list-style-type: none"> <li>• Imprisonment for 6 years</li> <li>• Fine of RM500,000 (\$115,000)</li> </ul>	<ul style="list-style-type: none"> <li>• Imprisonment for 6 years</li> <li>• Fine of RM500,000 (\$115,000)</li> </ul>

<sup>172</sup> Neo, *supra* note 15, at 328.

<sup>173</sup> *Id.* at 327.

<sup>174</sup> See *id.* at 316; see also Harsh Mahaseth & Gursimran, *Malaysia, Covid-19, And The New Fake News Ordinance: Is There A Reason To Be Apprehensive?*, MOD. DIPL. (July 2, 2021), <https://moderndiplomacy.eu/2021/07/02/malaysia-covid-19-and-the-new-fake-news-ordinance-is-there-a-reason-to-be-apprehensive/>.

<sup>175</sup> Neo, *supra* note 15, at 328.

<sup>176</sup> AFNA 2018, *supra* note 11, at pt. II, § 4(1); *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 21.

fake news <sup>177</sup>		
Failure to remove fake news <sup>178</sup>	<ul style="list-style-type: none"> <li>• Fine of RM100,000 (\$23,000); a further fine of RM3,000 (\$690) for every day that the offense continues</li> </ul>	<ul style="list-style-type: none"> <li>• A person is liable for removing fake news within 24 hours of receiving notification</li> <li>• Fine of RM100,000 (\$23,000); a further fine of RM3,000 (\$690) for every day that the offense continues</li> </ul>
Non-compliance with a court order to remove fake news <sup>179</sup>	<ul style="list-style-type: none"> <li>• Fine of RM100,000 (\$23,000)</li> </ul>	

Table 2 summarizes the offenses, penalties, and restrictions included in the AFNA and the Emergency Ordinance.<sup>180</sup> These restrictions primarily targeted individuals, as the laws repeatedly use the term “any person” to specify the subject of the restrictions.<sup>181</sup> However, these restrictions could also be applied to internet service providers.<sup>182</sup> The international human rights organization, Article 19, contends that the Emergency Ordinance can also hold internet intermediaries accountable for the problem of fake news.<sup>183</sup> For instance, under Section 20(1) of the Emergency Ordinance, “the police

<sup>177</sup> AFNA 2018, *supra* note 11, at pt. II, § 5(1); *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 22.

<sup>178</sup> AFNA 2018, *supra* note 11, at pt. II, § 6; *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 22 (explaining that the Ordinance required individuals to remove fake news within 24 hours after receiving notifications from a police officer or authorized officer, while the AFNA did not have the timeframe requirement).

<sup>179</sup> AFNA 2018, *supra* note 11, at pt. III, § 7; *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 22-23.

<sup>180</sup> See *supra* Table 2.

<sup>181</sup> Anti-Fake News Act, Act 803 (Apr. 9, 2018) (Malay); *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 21-23.

<sup>182</sup> Samantha Holmes, *Legal Analysis - Malaysia: Emergency (Essential Powers) (No. 2) Ordinance 2021 (Fake News Ordinance)*, ARTICLE 19 (June 23, 2021), <https://www.article19.org/wp-content/uploads/2021/06/ARTICLE-19-Analysis-Malaysia-Emergency-Fake-News-Ordinance.pdf>.

<sup>183</sup> *Id.*

officer or authorized officer may, by a written notice, require a person who is in control of the communications system to disclose such traffic data in the manner specified in the written notice.”<sup>184</sup> Additionally, Section 20(3) of the Emergency Ordinance stipulates that any person, including those in control of the communication system, may be fined or imprisoned for violating the legal provisions.<sup>185</sup>

Overall, Malaysia's legal approaches to fake news can be grouped into two categories: content removal and criminal sanction.<sup>186</sup> Regarding content removal, the two fake news laws authorized the court to order anyone, including individual internet users, internet intermediaries, and authorities (e.g., police officers), to remove, take down, or block content deemed fake news.<sup>187</sup> Statistics suggest that the Malaysian government often utilizes legal power to ask internet intermediaries to restrict online content.<sup>188</sup> For example, in recent years, the Malaysian government has requested social media platform companies, such as Facebook and Twitter (renamed as X in 2023), to restrict online content deemed violating local laws.<sup>189</sup> The following table presents data statistics regarding Facebook and Twitter's cooperation with the Malaysian government's requests to restrict online content.<sup>190</sup>

<sup>184</sup> *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 26.

<sup>185</sup> *Id.* at 27.

<sup>186</sup> AFNA 2018, *supra* note 11, at pt. II, §§ 4-6, pt. III, §§ 7-9; *id.* at 21-24.

<sup>187</sup> AFNA 2018, *supra* note 11, at pt. III, §§ 7-9; *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 24.

<sup>188</sup> See, e.g., *Content Restrictions Based on Local Law – Malaysia*, META TRANSPARENCY CTR., <https://transparency.fb.com/reports/content-restrictions/country/MY/> (last visited Jan. 30, 2024); *Removal Requests – Malaysia*, X TRANSPARENCY, <https://transparency.twitter.com/en/reports/countries/my.html> (last visited Jan. 30, 2024).

<sup>189</sup> *Id.*

<sup>190</sup> *Content Restrictions Based on Local Law – Malaysia*, META TRANSPARENCY CTR., <https://transparency.fb.com/reports/content-restrictions/country/MY/> (last visited Jan. 30, 2024). The transparency report only provides information about the amount of content restricted in Malaysia by Facebook; it does not disclose the total number of legal demands from the Malaysian government for content removal that Facebook has received. According to the report, there are various reasons for the removal of the online content, including illegal hate speech, defamation, bullying, privacy violations, misinformation, etc. The transparency report does not provide further statistical data regarding the reasons for content removal. *Removal Requests – Malaysia*, X TRANSPARENCY, <https://transparency.twitter.com/en/reports/countries/my.html> (last visited Jan. 30, 2024). The transparency report only provides information about the total number of legal demands from the Malaysian government for content removal; it does not disclose the exact amount of content removed by Twitter. According to the report, removal encompasses two aspects: the removal of content and the removal of accounts. The transparency report is only updated with the latest data up to the year 2021. *Id.*

**Table 3. Content Restrictions by Twitter and Facebook**

Year	2018	2019	2020	2021
Amount of content restricted by Facebook from Malaysia <sup>191</sup>	26	255	386	245
Removal requests received by Twitter from Malaysia <sup>192</sup>	20	38	194	221

From 2018 to 2021, the Malaysian government requested Facebook and Twitter to restrict over one thousand pieces of illegal online content.<sup>193</sup> Freedom House, a US-based non-governmental organization that advocates for democracy, argues that content blocking and removal requests from the Malaysian government are generally nontransparent and lack judicial oversight or effective avenues for appeal.<sup>194</sup> For example, the MCMC, a regulatory authority in Malaysia responsible for overseeing the communications and media industries, periodically instructs individual users and internet intermediaries to remove content deemed illegal.<sup>195</sup> However, the criteria and processes for content removal are usually unclear, leading to concerns about arbitrary decisions.<sup>196</sup> It is also worth mentioning that apart from the AFNA and the Emergency Ordinance, the Malaysian government utilizes other existing laws for content moderation, such as the Penal Code, the Defamation Act, and the Communications and Multimedia Act.<sup>197</sup> Opponents from the legal fraternity argued against implementing fake news laws because the existing laws already have sufficient provisions enabling the Malaysian government to address fake news.<sup>198</sup>

<sup>191</sup> *Id.*

<sup>192</sup> *Removal Requests – Malaysia*, X TRANSPARENCY, <https://transparency.twitter.com/en/reports/countries/my.html> (last visited Jan. 30, 2024). The transparency report only provides information about the total number of legal demands from the Malaysian government for content removal; it does not disclose the exact amount of content removed by Twitter. According to the report, removal encompasses two aspects: the removal of content and the removal of accounts. The transparency report is only updated with the latest data up to the year 2021. *Id.*

<sup>193</sup> *Content Restrictions Based on Local Law – Malaysia*, META TRANSPARENCY CTR., <https://transparency.fb.com/reports/content-restrictions/country/MY/> (last visited Jan. 30, 2024); *id.*

<sup>194</sup> *Freedom on the Net 2022 - Malaysia*, FREEDOM HOUSE, <https://freedomhouse.org/country/malaysia/freedom-net/2022> (last visited Jan. 30, 2024).

<sup>195</sup> *Id.*

<sup>196</sup> *See Malaysia: Civil society calls on new government to reform laws restricting freedom of expression and access to information*, ARTICLE 19 (May 22, 2018), <https://www.article19.org/resources/malaysia-civil-society-calls-on-new-government-to-reform-laws-restricting-freedom-of-expression-and-access-to-information/>.

<sup>197</sup> Smith & Perry, *supra* note 21, at 138.

<sup>198</sup> *See Neo, supra* note 15, at 328.

Generally, there are three common nation-level regulatory responses to information disorder: information correction, content removal, and criminal sanction.<sup>199</sup> The least intrusive form of speech restriction is information correction.<sup>200</sup> Social media platforms such as Facebook and Twitter use the label correction method to inform users when they identify a post that may contain false information.<sup>201</sup> Some governments, such as Singapore, also employ the information correction approach to address the issue of fake news online.<sup>202</sup> Content removal is more intrusive than information correction because it directly interferes with misleading or false information.<sup>203</sup> Criminal sanction is, undoubtedly, the most intrusive approach to speech restrictions.<sup>204</sup> Laws that contemplate criminal punishments rarely constitute the least intrusive means to achieve public interest objectives.<sup>205</sup> In general, criminal penalties should only be utilized when all other options have been exhausted and only in the most severe instances.<sup>206</sup> Scholars also argue fines and imprisonment are only used for more serious violations.<sup>207</sup>

After examining the legal provisions of the AFNA and the Emergency Ordinance, this Article argues that Malaysia's fake news laws do not adhere to the necessity principle, as they have not adopted the least intrusive approaches. Specifically, both laws rely on content removal approaches and criminal sanctions to tackle the fake news problem.<sup>208</sup> The laws did not employ information correction or other less intrusive alternative approaches, such as media literacy education and fact-checking.<sup>209</sup> If the Malaysian government explores alternative, less intrusive methods that may not effectively address fake news, it should present evidence demonstrating why these less intrusive approaches are ineffective. Furthermore, the government must justify why content removal and criminal penalties are necessary and adequate.<sup>210</sup> Scholars argue that no specific empirical study demonstrates that the threat of criminal sanctions can eliminate the creation or dissemination of fake news.<sup>211</sup> However, under Malaysia's fake news laws, offenders can face fines of up to RM 500,000 (\$115,000) and imprisonment for up to six

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<sup>199</sup> Helm & Nasu, *supra* note 92, at 315.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> Aswad, *supra* note 65, at 1027.

<sup>203</sup> Helm & Nasu, *supra* note 92, at 315.

<sup>204</sup> *See generally id.* at 322.

<sup>205</sup> Aswad, *supra* note 65, at 1021.

<sup>206</sup> Helm & Nasu, *supra* note 92, at 322.

<sup>207</sup> *Id.*

<sup>208</sup> *See* ANFA 2018, *supra* note 11; *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 22.

<sup>209</sup> *See id.*

<sup>210</sup> *See generally* Cassidy, *supra* note 109, at 7-8.

<sup>211</sup> Helm & Nasu, *supra* note 92, at 322-23.

years.<sup>212</sup> The government has not provided adequate justification for imposing such hefty fines and imprisonment, not to mention the inappropriateness of these restrictions.

In conclusion, this Article argues that Malaysia's legal approaches did not meet ICCPR's necessity requirement for three reasons. First, the Malaysian government did not demonstrate the precise nature of the threat posed by fake news.<sup>213</sup> Second, the two fake news laws do not employ the least intrusive means to address the fake news issue.<sup>214</sup> Third, the government has not provided convincing reasons to justify the necessity of the implemented restrictions, namely, content removal and criminal punishments.<sup>215</sup> The following section will examine whether the two fake news laws meet ICCPR's legitimacy requirements.

### C. The Legitimacy Test

Legitimacy means any speech restrictions must protect only the interests enumerated in Article 19(3) of the ICCPR: the rights or reputations of others, national security or public order, or public health or morals.<sup>216</sup> Governments must provide compelling reasons to justify that the adopted speech restrictions are designed to promote one or more of the above legitimate objectives.<sup>217</sup> In the context of regulating fake news, potential legitimate interests include protecting the rights of others (e.g., the right to receive information) and maintaining public order (e.g., in cases where fake news threatens social stability).<sup>218</sup> One legal scholar suggests that legitimacy can be assessed from two aspects: the legislation itself and the actual measures taken under the legislation.<sup>219</sup> This Article applies the above standards to assess the legitimacy of Malaysia's fake news laws.

According to Section 8(3) of the AFNA and Section 8(3) of the Emergency Ordinance, the laws frame fake news as a threat to "national security" and "public order," justifying crackdowns.<sup>220</sup> The objectives seem

<sup>212</sup> *Id.* at 323.

<sup>213</sup> Chi Ren, *supra* note 10, at 43; *see also* Zakiah Koya, *Vague definition of fake news may lead to inconsistent enforcement, warns Lawyers for Liberty*, STAR (Mar. 12, 2021, 11:59 PM), <https://www.thestar.com.my/news/nation/2021/03/12/vague-definition-of-fake-news-may-lead-to-inconsistent-enforcement-warns-lawyers-for-liberty>; *see also* Malaysia: Revoke 'Fake News' Ordinance, HUM. RTS. WATCH (Mar. 13, 2021, 2:50 PM), <https://www.hrw.org/news/2021/03/13/malaysia-revoke-fake-news-ordinance>.

<sup>214</sup> *See* AFNA 2018, *supra* note 11; *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 22.

<sup>215</sup> *See generally* Cassidy, *supra* note 109, at 7-8.

<sup>216</sup> International Covenant on Civil and Political Rights art. 19(3), Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>217</sup> *See* Strossen, *supra* note 76, at 343.

<sup>218</sup> Aswad, *supra* note 65, at 1017.

<sup>219</sup> Chi Ren, *supra* note 10, at 49.

<sup>220</sup> AFNA 2018, *supra* note 11, at pt. II, § 4(1).

to align with ICCPR's legitimacy standards.<sup>221</sup> However, examining how the government defines "national security" and "public order" in the context of fake news is vital. States should not employ national security and public order as pretexts for imposing unclear and arbitrary restrictions on freedom of speech.<sup>222</sup>

The legislative purposes of the AFNA and the Emergency Ordinance are somewhat different. As previously mentioned, the enactment of the AFNA was primarily pushed by Prime Minister Najib Razak's aim to use the law to counteract relevant reports and public discussions surrounding the 1MDB scandal.<sup>223</sup> Malaysian government officials contend that some 1MDB-related reports are fake news, threatening the country's political stability and economic growth (i.e., national security).<sup>224</sup> However, there is a widespread belief that the AFNA was crafted to suppress political dissent, as Najib Razak faced public criticism regarding his involvement in the scandal.<sup>225</sup> Clearly, stifling public criticism does not constitute a legitimate objective for speech restrictions.<sup>226</sup> Conversely, the Emergency Ordinance was enacted during the COVID-19 pandemic, aiming to curb fake news related to COVID-19.<sup>227</sup> According to a Malaysian government official, "the ordinance is imperative to ensure that the people get authentic information from the right sources while maintaining national security and public order."<sup>228</sup> The government official did not further illustrate what constitutes national security and public order in the context of the pandemic.<sup>229</sup>

While the ICCPR does not precisely define "national security" and "public order," other international human rights standards, such as the Johannesburg Principles, emphasize the need for governments to demonstrate a "direct and immediate connection" between the expression and the likelihood or occurrence of violence.<sup>230</sup> However, under Section 4(1) of the Emergency Ordinance, any person "who is likely to cause fear or alarm

<sup>221</sup> See International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S 171; AFNA 2018, *supra* note 11, at pt. II, § 4(1).

<sup>222</sup> See Shepherd, *supra* note 86, at 72.

<sup>223</sup> Neo, *supra* note 15, at 6.

<sup>224</sup> *Id.* at 12-13.

<sup>225</sup> Imran Shamsunahar, *Malaysia's emergency ordinance and the clampdown on public discourse*, IDEAS (June 11, 2021), <https://www.ideas.org.my/malaysias-emergency-ordinance-and-the-clampdown-on-public-discourse/>.

<sup>226</sup> International Covenant on Civil and Political Rights art. 19(3), Dec. 16, 1966, 999 U.N.T.S 171; see Strossen, *supra* note 76, at 343; Aswad, *supra* note 65, at 1017.

<sup>227</sup> Imran Shamsunahar, *Malaysia's emergency ordinance and the clampdown on public discourse*, IDEAS (June 11, 2021), <https://www.ideas.org.my/malaysias-emergency-ordinance-and-the-clampdown-on-public-discourse/>.

<sup>228</sup> *Emergency Ordinance only focuses on tackling fake news on Covid-19*, Emergency Proclamation, THE SUN (Dec. 3, 2021, 9:42 PM), [https://thesun.my/local\\_news/emergency-ordinance-only-focuses-on-tackling-fake-news-on-covid-19-emergency-proclamation-updated-EY7203363](https://thesun.my/local_news/emergency-ordinance-only-focuses-on-tackling-fake-news-on-covid-19-emergency-proclamation-updated-EY7203363).

<sup>229</sup> *Id.*

<sup>230</sup> Johannesburg Principles, *supra* note 107.

to the public" by creating, publishing, or disseminating fake news or information containing fake news can be considered in violation of the law.<sup>231</sup> Specifically, the Emergency Ordinance does not require any intent for a particular harm (e.g., incitement to imminent violence) caused by expression.<sup>232</sup> Human rights organizations criticize the loose and vague descriptions for failing to meet legitimacy standards.<sup>233</sup> Overall, enforcing the Emergency Ordinance has raised public concerns, with critics arguing that it is actually intended to suppress public discourse about the government's mismanagement of the public health crisis.<sup>234</sup>

Next, this Article will examine how the fake news laws were implemented. On April 30, 2018, a Danish citizen, the first person to be prosecuted under the AFNA, was accused by a Malaysian court of maliciously publishing a fake news video on YouTube.<sup>235</sup> In the video, the Danish citizen claimed that he encountered a gunfight and made countless calls to the Malaysian police, who arrived at the scene fifty minutes later.<sup>236</sup> However, police refuted these allegations, stating they reached the scene in less than ten minutes.<sup>237</sup> The Danish citizen was accused of publishing fake news, sentenced to a week in jail, and fined RM10,000.<sup>238</sup> Deputy Public Prosecutor Noor Jazilah Mohd Yushaa urged the court to set a strong sentence on the Danish citizen accused of disseminating fake news.<sup>239</sup> The prosecutor stated, "The accused's action did not only injure the image of the Police and our country but also hurt the feelings of the victim's family members."<sup>240</sup>

<sup>231</sup> AFNA 2018, *supra* note 11, at pt. II, § 4(1); *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 21.

<sup>232</sup> *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6, at 21.

<sup>233</sup> See, e.g., Samantha Holmes, *Legal Analysis - Malaysia: Emergency (Essential Powers) (No. 2) Ordinance 2021 (Fake News Ordinance)*, ARTICLE 19 (June 23, 2021), <https://www.article19.org/wp-content/uploads/2021/06/ARTICLE-19-Analysis-Malaysia-Emergency-Fake-News-Ordinance.pdf>.

<sup>234</sup> Imran Shamsunahar, *Malaysia's emergency ordinance and the clampdown on public discourse*, IDEAS (June 11, 2021), <https://www.ideas.org.my/malaysias-emergency-ordinance-and-the-clampdown-on-public-discourse/>.

<sup>235</sup> Camila Domonoske, *Danish Man Is First Person Sentenced Under Malaysia's Anti-Fake-News Law*, NPR (Apr. 30, 2018, 1:55 PM), <https://www.npr.org/sections/thetwo-way/2018/04/30/607068241/danish-man-is-first-person-convicted-under-malaysias-anti-fake-news-law>.

<sup>236</sup> *Id.*

<sup>237</sup> Jessica Lin, *Danish national to be first person charged under Malaysia's Anti-Fake News Act*, S. CHINA MORNING POST (Apr. 30, 2018, 12:31 PM), <https://www.scmp.com/news/asia/southeast-asia/article/2143985/danish-national-be-first-person-charged-under-malaysias>.

<sup>238</sup> *Danish citizen is first person convicted under Malaysian anti-fake news law, jailed 1 week, fined RM10,000*, STRAITS TIMES (Apr. 30, 2018, 5:40 PM), <https://www.straitstimes.com/asia/se-asia/foreigner-to-be-first-person-charged-under-malaysias-new-anti-fake-news-law>.

<sup>239</sup> Khairah N. Karim, *Danish Man First Person to be Charged, Convicted Under Anti-Fake News Act*, NEW STRAITS TIMES (Apr. 30, 2018, 4:18 AM), [https://www.nst.com.my/news/crime-courts/2018/04/363835/danish-man-first-person-be-charged-convicted-under-anti-fake-news#google\\_vignette](https://www.nst.com.my/news/crime-courts/2018/04/363835/danish-man-first-person-be-charged-convicted-under-anti-fake-news#google_vignette).

<sup>240</sup> *Id.*

In this case, the Danish citizen faced charges of damaging the reputation of Malaysia's police and the nation through the spread of fake news.<sup>241</sup> Nevertheless, to what extent has the reputation of the police and the nation's image truly sustained damage? How might criminal punishments contribute to restoring the police's reputation and the nation's image? The Malaysian authorities did not offer specific explanations.<sup>242</sup> The Malaysian court's judgment raises questions about what exactly the AFNA aims to protect in terms of public interests.<sup>243</sup> The Emergency Ordinance also presents similar issues.<sup>244</sup> The MCMC claimed that the Ordinance protects individuals and organizations from falling victim to fake news.<sup>245</sup> Nevertheless, human rights organizations and scholars argue that the Malaysian government used the Emergency Ordinance to stifle free speech and suppress public discussions about its handling of the COVID-19 pandemic.<sup>246</sup> These cases illustrate that Malaysia's fake news laws do not fully meet the legitimacy standards of the ICCPR.<sup>247</sup>

## V. CONCLUSION

As the first Southeast Asian country to pass the “fake news” law in 2018, Malaysia's legal approaches to fake news have garnered significant attention and criticism.<sup>248</sup> The dilemma between speech restrictions and freedom of speech has sparked numerous debates and scholarly interest.<sup>249</sup>

<sup>241</sup> *Id.*

<sup>242</sup> Camila Domonoske, *Danish Man Is First Person Sentenced Under Malaysia's Anti-Fake-News Law*, NPR (Apr. 30, 2018, 1:55 PM), <https://www.npr.org/sections/thetwo-way/2018/04/30/607068241/danish-man-is-first-person-convicted-under-malaysias-anti-fake-news-law>.

<sup>243</sup> *Id.*

<sup>244</sup> AFNA 2018, *supra* note 11, at pt. III, § 6; *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6.

<sup>245</sup> MCMC: *Emergency Ordinance not to restrict freedom of speech, but to protect individuals and organizations from 'fake news,'* MALAY MAIL (Mar. 20, 2021, 8:05 AM), <https://www.malaymail.com/news/malaysia/2021/03/20/mcmc-emergency-ordinance-not-to-restrict-freedom-of-speech-but-to-protect-i/1959368>.

<sup>246</sup> Samantha Holmes, *Legal Analysis – Malaysia.: Emergency (Essential Powers) (No. 2) Ordinance 2021 (Fake News Ordinance)*, ARTICLE 19 (June 23, 2021), <https://www.article19.org/wp-content/uploads/2021/06/ARTICLE-19-Analysis-Malaysia-Emergency-Fake-News-Ordinance.pdf>; *see also* Smith & Perry, *supra* note 21, at 147.

<sup>247</sup> Camila Domonoske, *Danish Man Is First Person Sentenced Under Malaysia's Anti-Fake-News Law*, NPR (Apr. 30, 2018, 1:55 PM), <https://www.npr.org/sections/thetwo-way/2018/04/30/607068241/danish-man-is-first-person-convicted-under-malaysias-anti-fake-news-law>.

<sup>248</sup> *See* Khairah N. Karim, *Danish Man First Person to be Charged, Convicted Under Anti-Fake News Act*, NEW STRAITS TIMES (Apr. 30, 2018, 4:18 AM), [https://www.nst.com.my/news/crime-courts/2018/04/363835/danish-man-first-person-be-charged-convicted-under-anti-fake-news#google\\_vignette](https://www.nst.com.my/news/crime-courts/2018/04/363835/danish-man-first-person-be-charged-convicted-under-anti-fake-news#google_vignette); *see also* MCMC: *Emergency Ordinance not to restrict freedom of speech, but to protect individuals and organizations from 'fake news,'* MALAY MAIL (Mar. 20, 2021, 8:05 AM), <https://www.malaymail.com/news/malaysia/2021/03/20/mcmc-emergency-ordinance-not-to-restrict-freedom-of-speech-but-to-protect-i/1959368>.

<sup>249</sup> *Id.*

This Article primarily utilizes ICCPR's three principles—legality, necessity, and legitimacy—to assess whether Malaysia's fake news laws align with international human rights standards on freedom of expression.<sup>250</sup> The main objectives of this Article are to evaluate Malaysia's speech restrictions and provide recommendations for governments and policymakers.

This Article first examines the legal definitions of fake news in two Malaysian laws—the AFNA 2018 and the Emergency Ordinance 2021 and analyzes the legality of the implemented speech restrictions.<sup>251</sup> This Article contends that the legal definitions of fake news are problematic for several reasons, and the restrictions do not meet the legality requirements. First, the legal definitions of fake news are too broad and vague, which cannot help ordinary people distinguish lawful and unlawful speech.<sup>252</sup> Thus, the Malaysian government should consider UNESCO and the EU's criteria for identifying and defining fake news.<sup>253</sup> Second, the legislative processes for the AFNA and the Emergency Ordinance lack transparency and accessibility to the public.<sup>254</sup> Third, the two fake news laws were not enacted through regular legal procedures.<sup>255</sup> These are significant reasons why Malaysia's fake news laws did not comply with the principles of legality.<sup>256</sup>

Next, for three major reasons, Malaysia's speech restrictions do not fulfill the necessity principles.<sup>257</sup> First, the Malaysian government did not demonstrate the precise nature of the threat posed to public interests by fake news.<sup>258</sup> Second, the adopted regulations were not the least intrusive means.<sup>259</sup> Malaysia's laws primarily used fines and imprisonment to regulate

<sup>250</sup> International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>251</sup> AFNA 2018, *supra* note 11, at pt. III, § 6; *Emergency (Essential Powers) (No. 2) Ordinance 2021*, *supra* note 6; Strossen, *supra* note 76, at 343.

<sup>252</sup> Marc Lourdes, *Malaysia's anti-fake news law raises media censorship fears*, CNN (Apr. 3, 2018, 11:54 PM), <https://www.cnn.com/2018/03/30/asia/malaysia-anti-fake-news-bill-intl/index.html>.

<sup>253</sup> EUR. COMM'N, *supra* note 57.

<sup>254</sup> *Freedom on the Net 2019-Malaysia*, FREEDOM HOUSE, <https://freedomhouse.org/country/malaysia/freedom-net/2019> (last visited Feb. 17, 2024).

<sup>255</sup> Zsombor Peter, *Malaysia Uses Emergency Powers to Impose 'Fake News' Law*, VOA (Mar. 13, 2021, 9:59 AM), <https://www.voanews.com/a/press-freedom-malaysia-uses-emergency-powers-impose-fake-news-law/6203266.html>.

<sup>256</sup> EUR. COMM'N, *supra* note 57; *Freedom on the Net 2019-Malaysia*, FREEDOM HOUSE, <https://freedomhouse.org/country/malaysia/freedom-net/2019> (last visited Feb. 17, 2024); Zsombor Peter, *Malaysia Uses Emergency Powers to Impose 'Fake News' Law*, VOA (Mar. 13, 2021, 9:59 AM), <https://www.voanews.com/a/press-freedom-malaysia-uses-emergency-powers-impose-fake-news-law/6203266.html>.

<sup>257</sup> See Neo, *supra* note 15, at 316; see also Harsh Mahaseth & Gursimran, *Malaysia, Covid-19, And The New Fake News Ordinance: Is There A Reason To Be Apprehensive?*, MOD. DIPL. (July 2, 2021), <https://moderndiplomacy.eu/2021/07/02/malaysia-covid-19-and-the-new-fake-news-ordinance-is-there-a-reason-to-be-apprehensive/>.

<sup>258</sup> See *id.*

<sup>259</sup> Aswad, *supra* note 65, at 1021 (arguing that because both AFNA and the Ordinance rely on content removal approaches and criminal sanctions to talk fake news they have not adopted the least intrusive means to combat the issue).

individuals and internet intermediaries in order to reduce the dissemination of fake news.<sup>260</sup> Besides criminal sanction, the government frequently requested individuals and internet intermediaries to restrict content deemed false, which directly interferes with freedom of expression.<sup>261</sup> Third, the government has not provided convincing reasons to justify the necessity of the implemented restrictions.<sup>262</sup> Specifically, the authorities did not justify how content removal and criminal punishments can effectively address fake news.<sup>263</sup>

Lastly, the fake news laws did not fully meet the legitimacy principles because the government did not clarify the legitimate objectives.<sup>264</sup> Although the Malaysian government claimed that fake news threatens public order and national security, it failed to prove how public order and national security are actually impacted by fake news.<sup>265</sup> Instead, experts from different fields, such as lawyers and scholars, have raised concerns that the Malaysian government used public order and national security as pretexts to restrict freedom of speech.<sup>266</sup> This Article contends that the Malaysian government must clearly articulate the essence of public order and national security when regulating speech to address the issue of fake news. For instance, the government may consider adopting the Johannesburg Principles, which suggest that only expression capable of inciting immediate and imminent violence can be regulated or punished.<sup>267</sup> The government is also responsible for demonstrating that a particular expression poses a clear and direct threat to public interests.<sup>268</sup>

In conclusion, this Article contends that Malaysia's controversial fake news laws can offer valuable insights for many democratic governments. As an increasing number of governments contemplate adopting legal measures

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<sup>260</sup> AFNA 2018, *supra* note 11.

<sup>261</sup> *Id.*

<sup>262</sup> See Neo, *supra* note 15, at 316; see also Harsh Mahaseth & Gursimran, *Malaysia, Covid-19, And The New Fake News Ordinance: Is There A Reason To Be Apprehensive?*, MOD. DIPL. (July 2, 2021), <https://moderndiplomacy.eu/2021/07/02/malaysia-covid-19-and-the-new-fake-news-ordinance-is-there-a-reason-to-be-apprehensive/>.

<sup>263</sup> See generally Cassidy, *supra* note 109, at 7-8.

<sup>264</sup> See, e.g., Samantha Holmes, *Legal Analysis - Malaysia: Emergency (Essential Powers) (No. 2) Ordinance 2021 (Fake News Ordinance)*, ARTICLE 19 (June 23, 2021), <https://www.article19.org/wp-content/uploads/2021/06/ARTICLE-19-Analysis-Malaysia-Emergency-Fake-News-Ordinance.pdf>.

<sup>265</sup> *MCMC: Emergency Ordinance not to restrict freedom of speech, but to protect individuals and organizations from 'fake news,'* MALAY MAIL (Mar. 20, 2021, 8:05 AM), <https://www.malaymail.com/news/malaysia/2021/03/20/mcmc-emergency-ordinance-not-to-restrict-freedom-of-speech-but-to-protect-i/1959368>.

<sup>266</sup> *Id.*

<sup>267</sup> Johannesburg Principles, *supra* note 107.

<sup>268</sup> *Id.*

to tackle the issue of fake news in recent years,<sup>269</sup> the conflict and balance between speech restrictions and freedom of expression have garnered more attention.<sup>270</sup> By utilizing the ICCPR's legality, necessity, and legitimacy standards,<sup>271</sup> this Article has found that Malaysia's fake news laws exhibit numerous issues and do not adhere to international human rights standards. These issues may serve as valuable lessons for governments considering adopting legislation to tackle the problem of fake news.

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<sup>269</sup> See Rostam J. Neuwirth, *The Global Regulation of "Fake News" in the Time of Oxymora: Facts and Fictions about the Covid-19 Pandemic as Coincidences or Predictive Programming?*, 35 INT'L J. SEMIOT L. 831, 834 (2022).

<sup>270</sup> See *id.* at 832.

<sup>271</sup> International Covenant on Civil and Political Rights art. 19, Dec. 16, 1966, 999 U.N.T.S. 171.