

GREATER FREEDOM IN THE CYBERSPACE? AN ANALYSIS OF THE REGULATORY REGIME OF THE INTERNET IN MALAYSIA*

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ABSTRACT

Malaysia's move into the Information Age of the 21st century began as early as 1996 with the formulation of the National IT Agenda (NITA) and the subsequent development of the Multimedia Super Corridor (MSC) Malaysia, the country's version of Silicon Valley. In order to attract investment and support from the world's most renowned ICT and multimedia companies in developing the gigantic project and to address the scepticism of investors and competition from Singapore and other countries in the Southeast Asia, the government has issued a set of Bill of Guarantees in 1997 which among others indicates the government's commitment towards no censorship of the Internet. This assertion is then incorporated into section 3(3) of the Communication and Multimedia Act 1998 (CMA) which explicitly provides that 'Nothing in this Act shall be construed as permitting the censorship of the Internet'. In line with this declaration, certain quarters in the country believe that the Internet users are entitled to a greater freedom in the cyberspace as the Internet seems to be not subjected to any shackles of rules and regulations. Nonetheless, the blocking of several websites by the Malaysian Communications and Multimedia Commission (MCMC) and the prosecution of a number of online offenders has shown that such belief is unfounded and baseless. In relation to this, the study seeks to examine the interplay between the no censorship policy and the regulatory regime that has been adopted to regulate the Internet industry in Malaysia. In so doing, the study will conduct critical analysis of the primary sources of law which are to be found in statutes and cases, as well as the secondary sources including text books, scholarly articles from refereed journals and seminar papers presented at relevant conferences.

Key words: Internet governance, no censorship guarantee, Malaysia, cyber law

Introduction

The Malaysian community first experienced the Internet when the Malaysian Institute of Microelectronic Systems (MIMOS) launched the country's first Internet service provider (ISP)¹, the Joint Advance Research Integrated Networking System (JARING), in 1992.² Later, the government had formulated a range of policies, most notably the National IT Agenda (NITA), which was framed by the National IT Council in December 1996, to lay out the basic framework for the utilisation of information and communications technology (ICT) in the country.³ In parallel to this, the Multimedia Super Corridor (MSC) Malaysia, the Malaysia's version of Silicon Valley,⁴ was developed to exploit the economic potential of the Internet and to bolster its take-up by the public.⁵ Since then, the usage of the Internet among the Malaysians has soared tremendously with the latest report as at first quarter of 2014 issued by the Malaysian Communications and Multimedia Commission (MCMC) indicates that the broadband subscriptions and penetration rate usage has reached 67.3% out of the total population compared to merely 28 subscribers when JARING was commercialised in 1992.⁶

The Internet is so deep-rooted in almost all aspects of our daily lives, particularly in the communication and dissemination of news and information. A vast array of web based communications such as blogs, social media networks, online news portals and

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¹ Internet Service Provider (ISP) is an organisation that provides services for accessing, using or participating in the Internet.

² Further details on JARING, see <www.jarang.my/corporateinfo/index.cfm?tag=history> [accessed 28 August 2014].

³ For details on the National IT Agenda, see <<http://nitc.kkmm.gov.my/index.php/national-ict-policies/national-it-agenda-nita>> [accessed 28 August 2014].

⁴ The term 'Silicon Valley' was coined by journalist Don C. Hoefler in 1971. It is a nickname for the southern part of the San Francisco Bay Area in northern California, USA where high concentration of semiconductor chips made of silicon and computer related industries are the principal product of the area. It is contained by the San Francisco Bay on the east, the Santa Cruz Mountains on the west and the Coast Range to the southeast.

⁵ The MSC Malaysia is equipped with a world-class physical and information infrastructure and its boundary extends from the Petronas Twin Towers at the Kuala Lumpur City Centre in the north to the Kuala Lumpur International Airport (KLIA) in the south. In order to manoeuvre the development and growth of the MSC Malaysia, seven MSC Flagship Applications were launched. They are the Electronic Government, Multipurpose Card, Smart Schools, Telehealth, R&D Cluster, E-Business and Technopreneur Development. For details on the MSC Malaysia, see <www.msomalaysia.my> [accessed 28 August 2014].

⁶ For the latest statistics on the percentage of Internet users in Malaysia, see <http://www.skmm.gov.my/skmmgovmy/media/General/pdf/Q1_2014C-MPocket.pdf> [accessed 28 August 2014].

many others have been resorted as viable alternative sources of information and news to the mainstream media since they appear to be 'considerably more hospitable to contentious journalism' (George, 2005). This is perhaps due to the guarantee of the no censorship on the Internet that has led to a common perception that the cyberworld is not susceptible to the government's command and control. Unfortunately, the Internet has been misused to channel hatred and spread lies, particularly against the government and the cabinet ministers. Thereafter, a series of legal actions have been initiated to tackle the alleged 'misuse' of the Internet. As such, it seems to suggest that the public's initial belief of the Internet as an 'unregulated' new medium is baseless and unfounded. In relation thereof, the study aims to scrutinise the existing regulatory regime governing the Internet in the country and the interplay with the no censorship policy and to solve the impeding issue of whether there is greater freedom in the cyberspace.

Overview of the Internet Governance in Malaysia

The Internet industry in the country was initially unregulated in the early nineties. The ISP was not required to possess any licences apparently because MIMOS which operated the only ISP at that time, JARING, was a unit under the Prime Minister's Department. This setup had enabled the government to exert direct control over the Internet without the necessity of having any specific rules and regulations. Such scenario has later changed when the second ISP, TM Net, was established by a private corporation and started to offer its services to the public in 1995.⁷ This development had then prompted the Parliament to pass the Communications and Multimedia Act 1998 (CMA), a specific statute which was enacted to cater for the convergence of different industries in the Information Age.⁸ With the passage of the CMA, three distinct industries of broadcasting, telecommunications and information technology in the country were grouped together as a new 'communications and multimedia' industry and will now be subjected to a single regulatory framework under the CMA. In overseeing the operation of the converging industry, the government has contemporaneously established a new body corporate, the Malaysian Communications and Multimedia Commission (MCMC), as a single state regulator pursuant to the Malaysian Communications and Multimedia Commission Act 1998 (MCMCA). Thus, the study intends to scrutinise whether the current regulatory regime for the Internet industry does accord greater freedom for online users in Malaysia.

The Licensing of the Internet Industry

The new regulatory system established by the CMA for the converged communications and multimedia industry has indirectly introduced a new licensing system for the Internet industry. Section 126(1) of the CMA provides that:

Subject to such exemptions as may be determined by the Minister⁹ by order published in the Gazette, no person shall –

- (a) own or provide any network facilities;
- (b) provide any network services; or
- (c) provide any applications services,

except under and in accordance with the terms and conditions of –

- (aa) a valid individual licence granted under this Act; or
- (bb) a class licence granted under this Act, expressly authorising the ownership or provision of the facilities or services.

The aforesaid provision has clearly mandated owners or providers of network facilities, network services and application services to possess valid licences to own or operate such facilities and services. Although licensing for the Internet is not specifically mentioned, regulation 30 of the Communications and Multimedia (Licensing) Regulations 2000¹⁰ explicitly stipulates that providers of Internet access services¹¹ are to be registered as applications service provider class licensees.¹² Thus, the ISPs which provide access to the Internet are no longer left unregulated as they are now required to possess applications service provider¹³ class license, ¹⁴ a light-handed form of regulation which only requires registration and is renewable annually, under the CMA.

⁷ For details on TM Net, see <<http://www.tnnet.com.my/about.asp>> [accessed 28 August 2014].

⁸ The impetus of the Information Age is the widespread utilisation of the Internet.

⁹ At present, the CMA is under the purview of the Ministry of Communications and Multimedia.

¹⁰ The Communications and Multimedia (Licensing) Regulations 2000 are made by the Minister pursuant to section 16 of the CMA.

¹¹ 'Internet access service' is interpreted in regulation 2 of the Communications and Multimedia (Licensing) Regulations 2000 as 'an application service whereby a person is able to access Internet services and applications in conjunction with either a dial-up connection or a direct connection'.

¹² Regulation 2 of the Communications and Multimedia (Licensing) Regulations 2000 defines 'applications service provider class licensee' as 'a person who is registered with the Commission to provide an applications service in accordance with the Act and these Regulations'.

¹³ Section 6 of the CMA defines 'application service provider' as 'a person who provides an applications service'. Whilst the phrase 'applications service' is interpreted as 'a service provided provided by means of, but not solely by means of, one or more network services'.

¹⁴ Section 6 of the CMA provides that 'class licence' means 'a licence for any or all persons to conduct a specified activity and may include conditions to which the conduct of that activity shall be subject'.

No Censorship of the Internet Policy

Apart from the licensing requirement for the ISPs, regulations for the Internet appears to be minimal compared to the traditional print and broadcast media (Abbott, 2001). This is due to the promise of the no censorship on the Internet which was first announced in 1997 by the former Prime Minister, Tun Dr Mahathir Mohamad, when he promoted the MSC Malaysia overseas (Steele, 2007). The pledge was later incorporated into the Bill of Guarantees¹⁵ as well as the CMA. Section 3(3) of the CMA expressly stipulates that 'Nothing in this Act shall be construed as permitting the censorship of the Internet'.

The no censorship policy was in the beginning part of the country's marketing effort to attract foreign investors to the MSC Malaysia and to address the scepticism of investors and competition for investment from Singapore and other countries in the Southeast Asia (George, 2006). Over the years, the government has maintained its commitment to uphold the no censorship guarantee despite reported incidents involving cyber threats in the country have recently been on the steep rise (Hamidah Atan, 2009). Thus, it is submitted that the Internet's perceived economic value has led the government to stick up for the no censorship policy and disregard its strict regulatory controls that have for long been continuously applied to the traditional media.

Unfortunately, the existence of the no censorship policy has on the other hand resulted in a speculative assertion that the Internet is a lawless territory and that any activities performed in the cyber world would be free from any shackles of rules and regulations. The precipitous assumption is evidently unsubstantiated because the interpretation accompanying the Bill of Guarantees explicitly provides that the no censorship policy does not render Internet users to freely disseminate illegal content with impunity and without regard to the law. In other words, the government has never intended the no censorship policy to create any distinction between the cyber world and the brick-and-mortar world as whatever is illegal offline will be illegal online. In addition, section 3(3) of the CMA itself does not prevent the imposition of any laws including defamation, sedition and even the statutory provisions of the CMA on online content post-publications. Therefore, it is obviously wrong to regard the Internet as a legal vacuum merely with the existence of the no censorship guarantee because the government is statutorily empowered to take appropriate actions against any unlawful use of the Internet in the country.

This would be best illustrated with a long list of criminal charges that have been initiated by the government commencing with the arrest of four persons in 1998 for spreading rumours on the Internet about knife-wielding Indonesians rioting in Kuala Lumpur. Over the years, several other Internet users were charged mostly under defamation and sedition (Azmi, 2010). It was however alleged that even though traditional laws may be used to govern the Internet, it would be preferable to charge those culprits under the provisions of the Malaysian cyber laws, namely the Computer Crimes Act 1997, the Digital Signature Act 1997 and the Telemedicine Act 1997, as well as the CMA because these statutes were specifically enacted to handle issues emerging in the cyberspace (Ishak, 2007).

Regulation of the Online Content

Content published in the cyber world is bound by the provisions of the CMA. Section 6 defines the word 'content' as 'any sound, text, still picture, moving picture or other audio-visual representation, tactile representation or any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated electronically'. This definition is all-inclusive so as to embrace any materials published electronically either via the Internet or the broadcast media.

Section 211(1) provides that it is a criminal offence to provide online content which is 'indecent, obscene, false, menacing or offensive content with intent to annoy, abuse, threaten or harass any person'. Such offence carries a maximum fine of RM50,000 or one year imprisonment or both. Improper use of network facilities, network services or applications service to transmit illegal content is also not permitted. Section 233(1) states that the use of any facilities or services to transmit content which is 'obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another' would amount to a criminal offence which carries a fine of not exceeding RM50,000 or one year imprisonment or both. It is submitted that the aforesaid provisions which prohibits provision of illegal content and improper use of the Internet are not contrary to the guarantee of no censorship on the Internet.

There is however uncertainty pertaining to blocking of access to the Internet as the adoption of such approach may lead to violation of the no censorship policy. The most infamous censorship of political blog first occurred in August 2008 when all local ISPs were instructed by the MCMC to block access to Malaysia Today (Hamdan & Peng, 2008). It was alleged that the controversial political blog had been censored because its editors continuously ignored the government's warnings of not publishing libellous or slanderous statement. The incident has raised fierce criticisms from the blogging community, politicians, civil rights groups and many others.

Nonetheless, the Home Minister claimed that the MCMC was statutorily permitted to issue the censorship order as the alleged blog contained prohibited content. This is pursuant to section 263(1) of the CMA which provides that 'A licensee shall use his best endeavour to prevent the network facilities that he owns or provides or the network service, applications service or content

¹⁵ The MSC Malaysia Bill of Guarantees is a set of incentives, rights and privileges in a form of grant conferred by the Malaysian Government on any companies that are awarded with MSC Malaysia status. Further details, see <<http://www.msomalaysia.my/bogs>> [accessed 29 August 2014].

applications service that he provides from being used in, or in relation to, the commission of any offence under any laws in Malaysia'. Therefore, all ISPs that offer Internet access service to their customers are mandated to ensure that their facilities are not being used in the commission of any offence. It is further stipulated in subsection 2 of the same section that upon written request from the Commission or other authority, the ISPs shall provide assistance in deterring the occurrence or future commission of such offence.

Based on the aforesaid argument, it is argued that instead of cutting of access to the alleged blogs, it would be more effective if those blog owners to be charged either under section 211 or section 233 of the CMA in order to avoid potential breach of the no censorship policy. Apart from that, the efficacy of filtering by the ISPs is also in doubt as mirror sites or other technical measures can be easily established to circumvent the ban. In relation thereof, it is submitted that though the blocking of access has been adopted several times by the MCMC, such action should only be resorted to handle evidently undisputed and appropriate cases such as copyright infringement and child pornography.

Apart from the aforesaid statutory measures, the CMA has also advocated the industry players to adopt a self-regulatory approach in governing the online content with the application of the Malaysian Communications & Multimedia Content Code (the Content Code).¹⁶ The Content Code was formulated by the Communications & Multimedia Content Forum of Malaysia (the Content Forum), an industry body designated to be a content forum by the Commission and to self-regulate online content and its related issues.¹⁷ Compliance with the Content Code is voluntary but it shall be a defence against any legal actions under the CMA.¹⁸

In general, the Content Code sets out guidelines and procedures for the dissemination of materials which are regarded as 'indecent content, obscene content, violence, menacing content, bad language, false content, children's content, family values and persons with special needs'.¹⁹ The Content Code also contains specific guidelines for providers and access providers to online content including Internet access service providers, Internet content hosts, online content developers, online content aggregators and link providers.²⁰ It was alleged that the scope of the Content Code is quite narrow since it does not cover other areas such as defamation and sedition (Azmi, 2004). Interestingly, the proclaimed 'self-regulatory' style of the online content is also supported by fall-back provisions administered by the Commission (Zalina Abdul Halim & Mohammad Rizal Salim, 2005). For this reason, it is argued that the regulatory regime should be properly termed as co-regulation instead of self-regulation.

Conclusion

The CMA and the Communications and Multimedia (Licensing) Regulations 2000 have introduced the licensing system for the Internet industry as it mandated providers of applications service including the Internet access services providers or the ISPs to possess class licences under the CMA. Nonetheless, Internet based publications do not fall within the meaning of applications service and accordingly they will not be obliged to possess such licences. Apart from that, even though section 6 of the CMA renders such online publications to be included within the scope of content applications service, but they do not have to apply for any licences because providers of Internet content applications services are expressly excluded by the Communications and Multimedia (Licensing) (Exemption) Order 2000. Further, the government has expressly provided that it has no intention to issue licence for blogs and other online publications or to set up a special body to supervise them. Thus, other web-based communications are basically free to publish content without the need to procure any types of licences and arguably this appears to be in parallel with the no censorship of the Internet policy enshrined in the CMA and the Bill of Guarantees.

Nonetheless, the absence of licensing requirements does not absolve online publications from any legal liabilities. Though such publications are exempted from having content applications service licences, they are still subjected to the provisions on content regulations under the CMA. Section 211(1) prohibits online publications from publishing any indecent, obscene, false, menacing or offensive content with intent to annoy, abuse, threaten or harass any person. Further, any online publications which are accessible through the ISPs are also not permitted to use the ISPs to transmit illegal content. Section 233(1) prevents the ISPs from being used to transmit content which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass any person. The efficacy of section 211 has yet to be tested in courts but section 233 has been invoked for the first time in 2009 against six bloggers for posting offensive comments towards the Sultan (King) of Perak in relation to the political crisis in the state. Later, a number of criminal charges for improper use of the Internet have been brought under section 233 of the CMA but unfortunately, there is yet any single reported judgment on this provision.

To sum up, comprehensive examination of the regulatory systems that are currently being applied to regulate the Internet in Malaysia clearly indicates that online publications are already bound by specific statutory controls that are currently being applied to the Internet. In addition, there also exists a long list of general laws such as defamation and sedition that could equally be applied to govern the cyber world. Nonetheless, it is argued that although there is no absolute freedom in the cyberworld, online publications do provide greater freedom to the Internet users in the country since they are not subjected to prior constraint in the form of licence or permit that is currently applicable to the traditional media.

¹⁶ The Content Code was made pursuant to section 213 of the CMA and it was registered on 1st September 2004.

¹⁷ Further details on the Content Forum, see <<http://www.cmf.my>> [accessed 29 August 2014]

¹⁸ Item 6.0 of Part 1 of the Content Code.

¹⁹ Part 2 of the Content Code.

²⁰ Part 5 of the Content Code.

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