

Online News Portals in Malaysia: Should They Be Subjected to the Existing Traditional Media Laws?

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Abstract: The Internet provides a new platform for communication and dissemination of information. Various types of Internet based communications including online news portals have been resorted to publish news that are not covered by the traditional media. Unfortunately, online news portals are currently not subjected to any statutory controls. Further, the existence of the no censorship guarantee seems to suggest that online news portals will not be requested to comply with the licensing systems of the traditional media. This is definitely undesirable as online news portals may be exploited by unscrupulous individuals. Thus, this study will analyse the existing statutory provisions governing the traditional media and examine the probability of applying these provisions to online news portal in Malaysia. The study is largely based on doctrinal research as it is primarily concerned with the review of the existing laws in order address the uncertainties of online news portals. As for conclusion, it is submitted that online news portals in the country should not be left unregulated nor treated as a legal vacuum.

Key words: Online news portals • No censorship guarantee • Press freedom • Print media • Licensing regime • Content regulation

INTRODUCTION

The traditional media in Malaysia have been subjected to a strict regulatory regime since the British colonial rule and the position remained the same until today. Specific media legislation i.e. the Printing Presses and Publications Act (the PPA) was enacted to govern the print industry in the country. In addition, the press had also been informally restrained through ownership mechanism [1]. As a result, Azlan, A. Rahim, Hassan Basri, & Hasim (2012) argued that news and information disseminated by the traditional media are often perceived as biased and partial towards the ruling government [2].

The scenario has started to change with the convergence of communication, broadcasting and information technology. As a result, various forms of Internet based publications, most notably online news portals, have been developed to publish news and comments that are not covered by the traditional media. Consequently, the public seems to be less dependent on the traditional media. Further, this development has rendered the existing controls of the traditional media to

be ineffective as the PPA predated the development of the Internet. Such position is definitely undesirable as online news portals may be exploited to channel hatred and spread lies. As such, it is pertinent to analyse the statutory provisions that are currently being used to govern the print industry and finally to evaluate the possibility of applying the legal regimes to online news portals.

The Printing Presses And Publications Act 1984 (PPA):

The PPA is a specific legislation enacted to regulate the use of printing presses and the printing, importation, production, reproduction, publishing and distribution of publications and for matters connected therewith. It governs all domestic publications including books, pamphlets and newspapers and publications imported from abroad [3]. The crux of the PPA is the application of prior restraints in the form of licences and permits. Owners or operators of printing press, i.e. printing machine or equipment which can produce 1, 000 impressions or more in one hour, are required by section 3(1) of the PPA to apply for a licence from the Minister of Home Affairs to

keep for use or to use a printing press. On a similar note, newspaper publishers are also mandated by section 5(1) of the PPA to procure permits from the same ministry before they can engage in printing, publishing, selling, circulating and distributing any newspaper in the country.

The central issue of the licensing system relates with the provision of a very wide power on the Minister by the PPA. By virtue of sections 3(3), 6(1)(2) and 12(2) of the PPA, the Minister has been conferred with absolute discretion not only to grant or refuse application for printing press licence or publication permit, but also to revoke or suspend licence or permit that has been issued earlier. Further, section 12(1) provides that such licence or permit is only valid for twelve months or such other shorter periods as determined by the Minister. As a result, all proprietors and publishers have to make a fresh application every year because non-compliance with the rigid licensing system will expose them to criminal offences that are punishable with fines and imprisonment under sections 3(4) and 5(2) of the PPA.

The licensing system of the press is further worsened subsequent to the amendment to the PPA in 1998 that introduced an ouster clause, which seeks to exclude judicial review of the Minister's decision. Section 13A(1) provides that 'Any decision of the Minister to refuse to grant or to revoke or to suspend a licence or permit shall be final and shall not be called in question by any court on any ground whatsoever'. In addition, section 13B of the PPA states that 'No person shall be given an opportunity to be heard with regard to his application for a licence or permit or relating to the revocation or suspension of the licence or permit granted to him under this Act'. These provisions have rendered any decisions made by the Minister as final and will not be susceptible to judicial review. Further, the Minister is neither required to accommodate prior hearing nor furnish grounds of his decision to applicants in relation to any application, suspension or revocation of licence or permit under the PPA. This setup is obviously inconsistent with Article 10(1) of the Malaysian Constitution that explicitly guarantees freedom of speech and expression as well as freedom of the press to all of the people in the country unless on specified permitted grounds.

The constitutionality of the seemingly unlimited power of the Minister and the exclusion of judicial review by the PPA has been challenged in *Persatuan Aliran Kesedaran Negara v Minister of Home Affairs* [4]. In this case, the applicant had on a couple of times sought a

permit to publish its English monthly magazine in the Malay language. However, the applications were turned down on both occasions and no specific reasons were offered by the Minister. The applicant then applied to the High Court for a judicial review of the Minister's decision. In holding that the Minister had no good reasons to refuse the applications, it was highlighted by Harun J that 'It is common ground that although the discretion is absolute it is not unfettered. It follows that the exercise of the discretion is subject to judicial review'. Unfortunately, the decision was reversed on appeal and the Minister's decision to refuse the publication permit was upheld by the Supreme Court in *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* [5].

Nonetheless, a new direction was set in the later case of *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor* [6]. In this case, the Minister had claimed that the ouster clause in section 13A had prevented the applicant from challenging his absolute discretion. It was ruled by Lau Bee Lan J that the Minister's argument of the ouster clause is misconceived since there are many authorities that indicate judicial review is not ousted to correct errors of law by an administrative body or tribunal.

Notwithstanding the positive development on the reviewability of the Minister's discretion, the struggle towards press freedom has still a long journey to go. Anuar (2007) argued that this is partly due to the government's treatment of licence and permit as a privilege of the Minister and not a right of the people [7]. As a result, many local newspapers are directly owned and controlled by those who have good relations with the ruling party, whilst opposition parties and civil groups are prevented from publishing their newspapers on a daily basis. The situation is further undermined with the application of self-censorship by editors and their inclination to avoid controversial issues and to set aside journalist ethics in order to maintain good relations with the ruling government [8].

The licensing system of the press has been successfully resorted to instil public faith in the government and to alleviate political criticisms and dissent views from entering the public sphere [9]. It is very much expected that this system will remain in operation in the near future. Due to this situation, proponents of media freedom and media practitioners have frequently demanded the government to review the PPA in order to allow critical views to be published in the

print media or even to abolish it altogether [10]. Surprisingly, the Prime Minister has announced drastic plans to review or abolish a number of laws including the PPA as part of his political transformation programmes. The long awaited amendment, the PPA (Amendment) Act 2012, has finally been passed by the Parliament in June 2012.

The amendment to the PPA has removed the Minister's absolute discretion in granting or refusing a printing press licence and publication permit. It has also removed the twelve-month validity period for a licence and permit and has allowed such licence and permit to remain valid as long as the Minister does not revoke it. As a result, proprietors of printing press and publishers of newspapers are no longer required to renew their licence or permit annually. Apart from that, the ouster clause which prevented any application for judicial review on the decision of the Minister to grant, refuse to grant, revoke or suspend a licence or permit has been altogether removed from the PPA. In addition, the amendment has established a right to be heard for licence or permit holders before the Minister can exercise his power to revoke or suspend such licence or permit.

The efficacy of the amendment has been put to test in the unreported case of *Mkini Dotcom Sdn Bhd v Ketua Setiausaha Kementerian Dalam Negeri & Ors* [11]. By way of judicial review, the applicant sought to quash the decision of the second respondent who had refused to grant publishing permit on the ground of procedural unfairness as the latter did not furnish any reasons for refusing to grant the permit to the applicant. The respondents argued that the Minister is not bound by any statutory duty to give reasons in the exercise of his discretion under the PPA and that the issuance of a permit is a privilege of the Minister and not a right of the applicant. The High court ruled that the Minister was expected to give reasons for his refusal as the decision had an impact upon the applicant's right to freedom of the press. It was observed by Tuan Abang Iskandar J that 'This Court had found that the matter of printing permit is a right that emanates from Article 10 of the Federal Constitution and that it was not a mere privilege'. Accordingly, the court held that the decision of the second respondent was defective for want of procedural fairness as he had misconstrued the extent of the Minister's power as a privilege and for his failure to provide any grounds of rejection to the applicant.

The court then ordered the application for the publishing permit by the applicant to be remitted to the Minister so that it could be considered according to law and to make another lawful decision.

The aforesaid judgment, which was delivered after the amendment to the PPA that abolished the 'absolute discretion' of the Minister in exercising his power and the removal of the ouster clause that prevented judicial review of the Minister's decision, has judicially put a rest to the long-standing perception that the grant or refusal of a printing licence and publishing permit under the PPA is the privilege of the government and not part or parcel of the fundamental rights of the citizens to freedom of speech and expression. Thus, it is submitted that the case has arguably indicated the inclination and latest trend of the judiciary in according greater protection to freedom of the press and freedom of expression in Malaysia. Nonetheless, it is too early to predict the fate of the print media after the latest amendment to the PPA as proprietors of printing presses and publishers of newspapers are still statutorily required to acquire printing licence and publishing permit. Further, Mkini's application for a permit to publish daily newspaper has yet to be decided by the Minister.

Content Regulation: The print industry is also subjected to content regulation under the PPA. Section 4(1) prohibits the use of printing press from printing documents which are obscene or against public decency, or which incite to violence against persons or property, or which promote feelings of ill-will, hostility, enmity, hatred, disharmony or disunity. Further, section 7(1) permits the Minister to prohibit any publishers from publishing materials that are deemed 'undesirable'. This includes the publication of article, caricature, photograph, report, notes, writing, sound, music, statement or any other content which is prejudicial or likely to be prejudicial to public order, morality, security or likely to alarm public opinion or likely to be contrary to any law or likely to be prejudicial to public interest or national interest. It is argued that the restrictions in section 4(1) are reasonably necessary and expedient with the object of restricting the circulation of materials which are specifically mentioned in the provision. However, section 7(1) appears to have accorded too much power to the Minister to the extent that he may even restrain the dissemination of genuine content as the criteria for undesirable publications are ill-defined and ambiguous.

The print industry is further restrained with the inclusion of a new offence of malicious publication of false news. Section 8A of the PPA provides that such an offence will be established if there is a publication, the publication contains false news and the accused maliciously published the false news. The malice will be presumed if the false news is published and no reasonable measures to verify the truth have been established prior to the publication. Criminal prosecution will be initiated against the printer, publisher, editor as well as the writer and if convicted, they are liable to be punished with imprisonment for up to three years, or a fine of maximum RM 20, 000 or both.

Faruqi (1998) argued that though the provision was intended to counteract unsubstantiated allegations, the conferment of too wide power on the authorities is open to abuse since it can be manipulated to silence criticisms and adversarial political speech, particularly against members of opposition parties and human rights activists [12].

The offence has been invoked against politicians in *Lim Guan Eng v Public Prosecutor* [13]. The appellant was convicted by the High Court for maliciously publishing false news in a pamphlet. The pamphlet related to the non-prosecution of an alleged rape case involving the former Chief Minister with an under-aged girl. On appeal to the Court of Appeal, the guilty finding was upheld and the sentence was even increased to 18 months' imprisonment. The appellant then appealed to the Federal Court and it was held that since the words were found to be false and no evidence showed that the appellant took reasonable measures to verify the truth of the words, the appellant was actuated by actual malice and therefore his guilt and sentence were sustained.

A similar charge was also brought against Irene Fernandez, a social activist and director of *Tenaganita*, for publishing a memorandum entitled '*Abuse, Torture and Dehumanised Conditions of Migrant Workers in Detention Centres*'. The memorandum exposed the ill-treatment, sex abuse and denial of adequate medical care to migrant workers in detention camps. The criminal charge against her commenced in 1996 but she was only found guilty and sentenced to twelve months' imprisonment on 16 October 2003. She then appealed against her conviction to the High Court and on 24 October 2008, her earlier conviction was set aside and she was discharged and acquitted [14].

In relation to this, it was contended that the provisions on the content regulation of the PPA have created a serious derogation to press freedom, in particular where the PPA empowers the authorities to censor publications on dubious grounds of undesirable and malicious content [15]. Thus, it is submitted that so long as the government has not revised the statutory provisions on content regulation of the print media, there is still uncertainty on the future of press freedom even though the latest amendment to the PPA seems to have relaxed the rigid licensing system of the PPA.

Potential Application of the Existing Regulatory Regime of the Print Media to Online News Portals:

The preamble to the PPA has explicitly indicated that the PPA was enacted to regulate the printing presses and publications. In essence, the term 'printing press' is defined in section 3(2) and Schedule I of the PPA as any printing machine or equipment that can produce 1, 000 impressions or more in one hour. Whilst the term 'publication' has been given a very wide interpretation in section 2 of the PPA so as to include any written or printed materials, as well as audio recording. Thus, it is obvious that though online news portals would fall outside of the interpretation of the term 'printing press', they may be covered by the sweeping definition of the term 'publication' in the PPA. As such, online news portals may be subjected to the existing regulatory controls of the print media.

Despite the slight possibility of applying the licensing system of the press to online news portals, the provisions of the PPA have yet to be extended to the cyber world. Due to this, the government has proposed to prolong the remit of the PPA to online news portals and other web-based publications. It was suggested that the PPA should be amended so that it could be extended to the electronic environment. The proposal has however received strong objections from proponents of media freedom and Internet users [16]. Nonetheless, so long as the proposal is yet to be materialised, the existing regulatory regime of the press will not be implemented in the cyber world. Further, it is argued that any attempts to apply inappropriate prior restraints such as licence or permit to online news portals may lead to a violation of the no censorship guarantee of the Internet in section 3(3) of the Communications and Multimedia Act 1998 and the MSC Malaysia Bill of Guarantees.

CONCLUSION

In summary, detailed analysis of the provisions governing the print media indicates that online news portal in Malaysia is very much unlikely to be bound by such a regime. This is due to the fact that the provisions of the PPA were drafted long before the advancement of the Internet. Further, the existence of the no censorship guarantee on the Internet has made it difficult for the licensing regime under the PPA to be extended to online news portals as such prior restraint may amount to violation of the no censorship promise by the government. Nonetheless, it is submitted that leaving online news portals not subjected to any specific legal regime is highly undesirable because these new media are prone to be exploited to channel hatred and disseminate lies. Further, this is also unfair to the online news portals that are associated with the traditional print media as they are subjected to a strict regulatory regime under the PPA as well as the indirect control through ownership mechanism. As such, it is argued that, online news portal in Malaysia should not be treated differently from the traditional print media and should also be subjected to certain regulatory control.

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