



# INTERNET AND SOCIAL MEDIA IN ASIA

BATTLEGROUND FOR FREEDOM OF EXPRESSION



Copyright © 2012  
Asian Forum for Human Rights and Development  
(FORUM-ASIA)

ISBN: 978-616-7733-00-5

This book is written for the benefit of human rights defenders and may be quoted from or copied so long as the source and authors are acknowledged. This material may not be sold or used commercially. Reproduction for other purposes requires the permission of the Asian Forum for Human Rights and Development (FORUM-ASIA) through its regional office at:

66/2 Pan Road  
Silom, Bangrak  
Bangkok 10500  
Thailand  
Tel: +66 2 6379126  
Fax: +66 2 6379128  
Email: [info@forum-asia.org](mailto:info@forum-asia.org)  
Web: [www.forum-asia.org](http://www.forum-asia.org)

Editorial Team:           John Liu  
                                  Yap Swee Seng  
                                  Saartje Baes

Authors:                   John Liu  
                                  Sejin Kim

Cover Design & Layout: Bright Lights at Midnight



## Table of Contents

<b>Foreword</b>	6
<b>Executive Summary</b>	8
<b>Chapter 1</b> Introduction	14
<b>Chapter 2</b> Internet Censorship and Government Controls	18
<b>Chapter 3</b> Criminalisation of Speech on the Internet and Social Media	40
<b>Chapter 4</b> Power of Regulator and Role of Intermediaries	52
<b>Chapter 5</b> Violations by Non-State Actors	61
<b>Chapter 6</b> Conclusions	68
<b>Annex</b> Summary of Proceedings: Regional Symposium on Social Media, Freedom of Expression and Incitement to Hatred in Asia, 14-15 January 2012, Singapore	72

## Foreword

The past decade has witnessed a dramatic increase in Internet space due to the rapid technological advancements. This transformation has brought about a momentous opportunity for increased democratisation around world, as was witnessed at the “Arab spring” of 2011. Indeed today, the Internet has become one of the main platforms for peoples’ struggles for human rights and democratisation. Consequently, some governments have responded by taking up increasingly restrictive measures to limit this new space where people freely express their ideas, opinions and demands.

In this regard, Asian Forum for Human Rights and Development (FORUM-ASIA) seeks to contribute to the ongoing discourse on freedom of expression on the Internet. This publication, which highlights the phenomena of the Internet and social media, and its impacts to freedom of expression in Asia, is part of our efforts to that end. This publication is one of the outcomes of two regional meetings on freedom of expression which were held in the past two years (2011-2012).

This publication aims to inform readers of the recent developments and analyses related to freedom of expression on the Internet particularly social networking service, as well as to assess current legislations, cases, and emerging trends relating to freedom of expression on the Internet in Asian countries. We hope that this publication will serve as a guide for future efforts to improve the right to freedom of expression on the Internet in the region.

To this end, FORUM-ASIA expresses our deepest gratitude to all those with whom we have had the pleasure and honour to work. We would like to sincerely thank all participants that actively engaged in the two regional symposiums on freedom of expression, for their enormous contribution through the sharing of their invaluable expertise and participation in the debates. In particular, we would like to extend our sincere appreciation to Frank La Rue, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, who attended and participated in both the regional symposiums. We would also like to thank our donors, Open Society Institute (OSI) and the Swedish International Development Cooperation Agency (SIDA), whose generous support made this publication and the two previous workshops possible, as well as to the co-organisers of the two workshops, Southeast Asian Press Alliance (SEAPA), Media Defence-South East Asia, the Alliance for Independent Journalists, Indonesia (AJI), Paramadina Graduate School of Diplomacy (PGSD), the Asian Media Information and Communication Centre (AMIC), and the Centro-American Institute of Social Democracy Studies (DEMOS). Our appreciation also goes out to Shahzad Ahmad of Bytes for All, Pakistan, who reviewed parts of the draft of this publication. Various other individuals and organisations have also assisted in one way or another in producing this publication. To them, whose names are too many to mention here, we record our sincerest gratitude.

Finally, we hope that the discussions, findings and recommendations in this publication will contribute to the work of freedom of expression advocates in their respective countries and spheres of influence.

Yap Swee Seng  
Executive Director  
FORUM-ASIA

## Executive Summary

Recent developments and advancements on the Internet in Asia, including the tremendous growth in Internet accessibility and the use of social media, have created an unprecedented platform and space for free speech and opinions particularly in less open societies in the region. As a result, many governments in Asia have heightened efforts to restrict and control the Internet and the use of social media. Based on the cases compiled in this publication, the following key emerging trends and concerns relating to freedom of expression on the Internet and social media in the region have been identified:

- 1. Heightened censorship measures during specific key political events, as well as the employment of mechanisms to censor, block, or filter out online contents. More often than not, these measures are implemented in a non-transparent manner.**
- 2. The increasing use of existing harsh criminal laws (including laws relating to national security and incitement to hatred), as well as the introduction of new laws and policies, which are often vaguely worded and overly broad, to criminalise free speech online.**
- 3. Increasing liability of intermediaries over online contents, and the growing pressure on intermediaries to play the role of regulating the Internet.**

4. Violations of freedom of expression, including cyber attacks and physical threats and harassment, by non-state actors, who in some cases are allegedly employed by governments.

## Recommendations

Based on these trends and concerns, this report proposes the following specific recommendations:

1. To address the issue of heightened censorship measures during specific key political events, as well as the employment of increasingly elaborate mechanisms to censor, block, or filter out online contents:

In line with the recommendations by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, every government must ensure that any restrictive measure it takes passes a **three-part, cumulative test**.<sup>1</sup> Any restrictive measures must:

- a. be **provided by law**, which is clear and accessible to everyone;
- b. pursue one of the **purposes set out in article 19, paragraph 3, of the International Covenant on Civil and Political Rights (ICCPR)**, namely (i) to protect the rights or reputations of others; (ii) to protect national security or public order, or public health or morals of others; and
- c. be **proven necessary and the least restrictive means** required to achieve the purported aim

Furthermore, decisions to block or censor any online content must be undertaken by an **independent judicial body** or other **independent multi-stakeholder mechanisms**, instead of the discretionary powers of the government, administrative or quasi-government bodies.

<sup>1</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, A/HRC/17/27 (p. 8, para 24).

Governments must also **ensure transparency** in any measures to limit freedom of expression on the Internet. Websites that are blocked or censored must be informed and provided an explanation on the affected websites as to why they have been blocked. Such information should also be **publicly available**.

Websites that are blocked or censored should also be accorded the **right to appeal** through an independent mechanism.

2. **To address the use of existing criminal laws and laws on national security, as well as the introduction of new laws and policies, which are often vaguely worded and overly broad, to restrict free speech online:**

This report also fully supports the UN Special Rapporteur's call on all governments to **decriminalise defamation** and that **freedom of expression cannot be restricted on the grounds of protecting national security or countering terrorism**. Only in exceptions where certain expressions are: (a) intended to incite imminent violence; (b) likely to incite such violence; and (c) directly and immediately connected to the likelihood or occurrence of such violence; can restrictions on such grounds be made.<sup>2</sup> In this regard, governments should also comply with the "Johannesburg Principles on national security, freedom of expression and access to information".<sup>3</sup>

3. **To address the increasing roles of intermediaries as regulators of the Internet:**

Intermediaries should **refrain from regulating the Internet**.

Any restrictions by intermediaries should only be made if it has been **authorised by an independent judicial body or other independent mechanisms**.

<sup>2</sup> Ibid (p. 20, para 73).

<sup>3</sup> Johannesburg Principles on national security, freedom of expression and access to information (1996), <http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>

Intermediaries should also be **transparent** to the user, account owner or website affected by any restrictive measures taken. Users whose contents are blocked, censored, or removed, must be informed and provided an explanation as to why such actions are taken. Such information should also be **publicly available**.

Users whose contents are blocked, censored, or removed should also be accorded the **right to appeal**.

Echoing the recommendation of the UN Special Rapporteur, **corporations** should “establish clear and unambiguous **terms of service in line with international human rights norms and principles**, and should continuously review their impact of their services and technologies on the right to freedom of expression of their users, as well as on the potential pitfalls involved when they are misused”.<sup>4</sup>

#### 4. To address the violations by non-state actors, including cyber attacks:

Governments must ensure that all **perpetrators** of violations relating freedom of expression on the Internet and social media are **held accountable** through **effective and impartial investigation and prosecution**.

**National human rights institutions** and other independent mechanisms relating to human rights and the use of Internet and social media must also **closely monitor and intervene in these violations by non-state actors**, including their possible links with governments; while **judicial bodies** must ensure **fair and impartial trial**.

In addition, this report further proposes the following general recommendations:

4 Report of the Special Rapporteur, op. cit. (p. 21, para 77).

### 1. To Governments:

States that are not already a party to the ICCPR should immediately take steps to **ratify the convention** and further **ensure its implementation**.

States must fulfil its **primary obligation to promote and protect human rights**.

### 2. To Judicial Bodies:

The judiciary in all countries should be **guided by principles of freedom of expression under international human rights law** in deciding on cases relating to the Internet and social media.

### 3. To National Human Rights Institutions (NHRIs):

NHRIs should **urge governments to ratify key international human rights treaties** relating to freedom of expression on the Internet and social media, especially the ICCPR.

NHRIs should undertake **comprehensive reviews of existing legislations** relating to the Internet and social media, with the view of **recommending legislative changes** to their respective governments so that they will be in line with international human rights laws and standards.

NHRIs should **closely monitor their respective governments, corporations/intermediaries, as well as non-state actors**, in particular their respective roles and actions in relation to freedom of expression on the Internet and social media.

They should **intervene in a timely, proactive and effective manner** in cases of violations of freedom of expression on the Internet and social media, including through effective investigative measures.

They should also **provide trainings to law enforcement and judicial bodies** on the international standards on freedom of expression, and raise public awareness on the importance of protecting freedom of expression on the Internet and social media.

#### 4. To Regional Human Rights Mechanisms (the ASEAN Intergovernmental Commission on Human Rights, AICHR):<sup>5</sup>

AICHR should undertake **comprehensive reviews of existing legislations in ASEAN countries** relating to the Internet and social media, with the view of **recommending legislative changes** to their respective governments so that they will be in line with international human rights laws and standards.

AICHR should **urge all governments in ASEAN to ratify key international human rights treaties** relating to freedom of expression on the Internet and social media, especially the ICCPR.

AICHR should develop a **mechanism in which complaints relating to violations of freedom of expression on the Internet and social media can be lodged**. This is particularly critical for countries without NHRIs.

AICHR should **closely monitor all governments, corporations/intermediaries, as well as non-state actors in ASEAN**, in particular their respective roles and actions in relation to freedom of expression on the Internet and social media.

Finally, AICHR should ensure that the **ASEAN Human Rights Declaration protects the right to freedom of expression and freedom of information** in accordance with international human rights laws and standards.

<sup>5</sup> The ASEAN Intergovernmental Human Rights Commission (AICHR) is the only (sub)regional human rights mechanism that currently exists in Asia.

## Chapter 1 Introduction

As demonstrated by the recent “Arab Spring” of 2011, the Internet, particularly through social media, has played an increasingly important role in facilitating the flow of information and discussion of issues confronted by the society. Defined by Andreas Kaplan and Michael Haenlein (2010), for instance, as “a group of Internet-based applications [...] that allow the creation and exchange of user-generated content”,<sup>6</sup> social media includes social networking sites such as *Facebook*, *Twitter* and blogs, and have introduced and promoted online platforms and citizen journalism to help the flow of independent news and commentary. According to the International Telecommunications Union, over 2 billion Internet users exist worldwide.<sup>7</sup> A high proportion of this number also comprises users of social networking sites and applications. *Facebook*, for example, has more than 800 million users worldwide, as of June 2012.<sup>8</sup>

In response to the explosion of growth in the use of the Internet and social media, the United Nations Office of the High Commissioner for Human Rights, Navanethem Pillay, has identified “Social Media and Human Rights” as the theme of Human Rights Day 2011, emphasising the significant role of social media in today’s world. In addition, Frank La Rue, the United Nations Special Rapporteur on the promotion and protection of right to freedom of opinion and expression stated that:

6 Kaplan, Andreas & Michael Haenlein (2010) “Users of the world, unite! The challenges and opportunities of Social Media”, *Business Horizons* 53(1): pp. 59-68

7 International Telecommunication Union (2010) “ITU estimates two billion people by end 2010”, Press Release, 19 October, [http://www.itu.int/net/pressoffice/press\\_releases/2010/39.aspx](http://www.itu.int/net/pressoffice/press_releases/2010/39.aspx)

8 Figures according to <http://www.checkfacebook.com/>

“...the Internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies.”<sup>9</sup>

Indeed, there is no doubt that the Internet and social media have opened up a whole new horizon not only for information sharing, but also for the advancement of the right to freedom of expression and opinion. More and more human rights activists, dissidents, as well as marginalised and vulnerable groups are utilising the Internet to get their voices heard, especially in countries where traditional media are not free.

However, many governments have responded to this development by cracking down on dissent on the Internet in the same manner as they did on traditional media, including by suppressing free speech on the grounds of national security, public order, public morality and defamation, especially in relation to religion. Allegations of incitement of violence and hatred are also commonly used to criminalise dissidents and government critics on the Internet.

The right to freedom of expression and opinion on the Internet and social media is also increasingly violated by non-state actors such as religious extremist groups, particularly against views contrary to dominant cultural and religious norms. Furthermore, other non-state actors, such as corporations and Internet service providers (ISPs), are also increasingly pressured by governments to play an increased regulating role as intermediaries. This has been done in several countries in Asia by holding intermediaries liable for online contents, which forces them to block or remove certain contents that are deemed “undesirable”.

To address these emerging trends and concerns, the Asian Forum for Human Rights and Development (FORUM-ASIA),

<sup>9</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, A/HRC/17/27 (p. 4, para 2).

together with several other human rights and freedom of expression advocacy organisations, have organised two regional symposiums on freedom of expression. The first regional symposium on the Criminalisation of Free Speech, Expression and Opinion in Asia was held on 15-16 July 2011, Jakarta, Indonesia. The symposium was co-organised by FORUM-ASIA, Southeast Asian Press Alliance (SEAPA), Media Defence-South East Asia, the Alliance for Independent Journalists, Indonesia (AJI) and Paramadina Graduate School of Diplomacy (PGSD). The second regional symposium took place on 15-16 January 2012, Singapore. Organised by FORUM-ASIA together with Asian Media Information and Communication Centre (AMIC) and Centro-American Institute of Social Democracy Studies (DEMOS), the regional symposium brought about 35 participants from Asia comprising of government officials, law makers, IT experts, social media activists, national human rights institutions, IT corporations, public institutions related to media, and civil society organisations to analyse issues relating to social media, freedom of expression and incitement to hatred in the context of the rapid development of Internet users in the region.

These two regional symposiums resulted in a collection of a wealth of information and cases of violations of freedom of expression on the Internet in Asia, which have been collated and presented in the form of this publication. Some other cases presented in the following chapters were also gathered through FORUM-ASIA's media monitoring in the past two years.

These cases and discussions surrounding them will be organised in this publication as follows: The next chapter will examine the practice of censorship on the Internet and the use of social media in several Asian countries. In relation to this, several restrictive legislations relating to freedom of expression on the Internet and social media in selected countries will also be discussed. This will be followed by Chapter 3, which examines

the issue of criminalisation of speech on the Internet, and the harsh penalties imposed by governments on those violating prohibitions of free speech on the Internet, by looking at a number of cases that have been documented in recent years. Chapters 4 and 5, meanwhile, discuss the roles of regulating bodies and intermediaries, and non-state actors respectively – all of whom are increasingly playing more visible and central roles in relation to freedom of expression online. Finally, the concluding chapter sums up our findings and presents a list of general trends and concerns relating to freedom of expression on the Internet and social media in Asia.

The summary of proceedings from the Regional Symposium on Social Media, Freedom of Expression and Incitement to Hatred in Asia, organised by FORUM-ASIA, AMIC, and DEMOS in January 2012, is also annexed to this publication.

## Chapter 2 Internet Censorship and Government Controls

Recent developments on the Internet have seen the use of increasingly sophisticated measures to regulate web contents. In China for example, the government has adopted an extensive system – dubbed “the Great Firewall”, which combines URL filtering with the censoring of contents on the Internet that contain keywords such as “human rights” and “democracy”. China’s elaborate and sophisticated efforts to censor the Internet have already set precedence for other Asian countries: For example, in India – commonly referred to as the “world’s largest democracy” – the Delhi High Court in India has recently warned Internet service providers that it could order measures of censorship similar to that of China if they failed to protect religious sensitivities in the country.<sup>10</sup> Other countries in Asia have also taken similar prohibitive measures – in varying degrees – to filter, censor, or control information on the Internet, often on the purported grounds of protecting national security and dominant cultural norms and sensitivities. In many of these countries, harsh penalties are imposed on those who violate these prohibitions.

Another emerging concern, as noted by the UN Special Rapporteur on the right to freedom of opinion and expression in his 2011 report to the UN Human Rights Council (A/HRC/17/27), is the practice of censorship that is timed to prevent the access or dissemination of information during key political events, such

<sup>10</sup> For a more detailed discussion of this, see Chapter 4 of this publication, particularly on the role of intermediaries in India.

as elections and social unrest.<sup>11</sup> This was most notably practiced by governments in the Middle East during the “Arab Spring” in 2011. Governments in Asia have also resorted to such measures in recent years. For instance, in Sri Lanka, websites such as independent news portal *LankaeNews* (LeN) were blocked on the eve of the presidential election in 2010.<sup>12</sup> Meanwhile in Malaysia, severe disruptions of cellular communications were reported during the BERSIH 3.0 rally, a mass-scale street protest demanding for free and fair elections, on 28 April 2012 in Kuala Lumpur. However, the government of Malaysia has denied blocking communications, and instead attributed the disruptions to the huge number of people trying to access the network at the same time within the same vicinity.<sup>13</sup> Notwithstanding this, with the rise of popular social movements that are critical of governments and their policies in many countries across Asia, coupled with several scheduled elections in the next couple of years, there are indeed real and serious concerns that this practice will be increasingly prevalent in the region.

## 2.1 Limitations to Freedom of Expression under International Human Rights Law

While international human rights law unequivocally provides for guarantees of freedom of expression and opinion, it also allows for limitation of freedom of expression on narrow grounds such as national security, public order, public health and the rights of others. It further prohibits the incitement of violence and incitement to hatred. Article 19(3) of the ICCPR spells out certain exceptional types of expression which may be legitimately restricted under international human rights law:

*The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

11 Report of the Special Rapporteur, op. cit. (pp. 9-10, para 30).

12 Centre for Policy Alternatives (2011) Freedom of Expression on the Internet in Sri Lanka. Colombo: Centre for Policy Alternatives (p. 17).

13 “Gov’t denies jamming cellphones during Bersih 3.0”, Malaysiakini, 14 June 2012, <http://www.malaysiakini.com/news/200848>

- a) *For the respect of the rights or reputations of others;*
- b) *For the protection of national security or of public order (ordre public), or of public health or morals.*

Furthermore, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has noted that any limitation to the right to freedom of expression must pass the following three-part, cumulative test:

- a) It must be provided by the law, which is clear and accessible to everyone (principles of predictability and transparency); and
- b) It must pursue one of the purposes set out in article 19, paragraph 3, of the ICCPR, namely (i) to protect the rights or reputation of others, or (ii) to protect national security or of public order, or of public health or morals (principles of legitimacy); and
- c) It must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality).

## **2.2 Censorship in Practice: Selected Recent Cases**

A clear and emerging trend in governments' response to the rapid growth in the use of the Internet and social media is the adoption of censorship measures and filtering mechanisms. While limitations to freedom of expression, including censorship, are provided by international human rights laws on narrow grounds, as detailed in the previous section of this chapter, most of the cases where contents and sites are blocked and censored do not meet the minimum criteria required by international human rights law. This is largely because Internet censorship measures taken in most Asian countries are done in a non-transparent manner, making it extremely difficult to determine whether measures taken are indeed legitimate and necessary.

In **China**, the government has repeatedly censored and blocked various Internet sites, contents and services, including *Facebook*, *Flickr*, *YouTube*, *Blogger* and *Twitter*.<sup>14</sup> Similarly, **Vietnam** also maintains a tight control over the Internet, including by blocking and censoring websites and contents deemed “harmful”, conceivably to curb online activism. In 2009, *Facebook* together with seven other websites were blocked in Vietnam. However, unlike China who blocks websites at the level of ISPs, Vietnam’s apparent blocking of these websites were done only on a DNS (domain name system) level; hence a change in the DNS settings could circumvent Vietnam’s firewall. In other words, the ISPs in Vietnam are only ordered to redirect their servers away from the sites, rather than actually blocking their access.<sup>15</sup> Nevertheless, Vietnam has an array of laws that impose strict controls and severe restrictions on online contents and sites. These will be discussed in the next section of this chapter.<sup>16</sup>

In **Burma**, prior to the 2011-2012 democratic reforms, numerous websites, including exiled Burmese media, international media websites, social networking sites were blocked by the government, especially since the 2007 crackdown on anti-government demonstrations. Also blocked were proxies and other censorship circumvention tools used by Internet users in Burma attempting to access blocked websites. However, when the Burmese government undertook democratic reforms in 2011 and 2012, previous bans on some of the websites were lifted. In September 2011, previously blocked sites, including exiled Burmese media, such as the Norway-based *Democratic Voice of Burma (DVB)* and the Thailand-based *Irrawaddy*; international media websites, such as *BBC*, *CNN*, *The Guardian*, and *Reuters*; as well as social networking sites, such as *Blogger* and *YouTube*, were made accessible to Internet users in Burma.<sup>17</sup> However, activists and observers view this development with caution and vigilance, especially with legislations such as the Electronic

14 See, for example, Reporters Without Borders (2009) “Blocking of Twitter, YouTube, Flickr and Blogger deprives Chinese of Web 2.0”, Press release, 2 June, <http://en.rsf.org/china-blocking-of-twitter-youtube-flickr-02-06-2009,33208.html>

15 “Facebook in Vietnam: Why the block doesn’t work”, *Global Post*, 4 October 2010, <http://www.globalpost.com/dispatch/vietnam/100928/facebook-internet-china-press-freedom>

16 See Section 2.3 “Restrictive Legislations in Selected Asian Countries” in this chapter.

17 “Banned websites in Burma accessible again”, *Mizzima*, 16 September 2011, <http://www.mizzima.com/news/inside-burma/5948-banned-websites-in-burma-accessible-again.html>

Transactions Act still in place, and the government's continued control over ISPs in the country.<sup>18</sup>

Meanwhile in **Indonesia**, the Ministry of Information and Communication of Indonesia announced in October 2011 that it has blocked 300 websites, claiming that these are "radical" and "extremist", after sectarian clashes in Solo, Central Java, and Ambon, eastern Indonesia. However, the ministry did not disclose the sites that were blocked, as well as the criteria used to determine its decision to block the sites.<sup>19</sup>

In **Thailand**, the Thai Ministry of Information and Communication Technology has the power to block websites deemed offensive, in particular those in relation to violations against the lese majeste law. However, during the political violence of 2010 and in the context of the state of emergency, the army and the police were also involved in Internet censorship and blocking (as permitted under the State of Emergency Act). iLaw notes that 74,686 URLs were blocked by the courts in the period between July 2007 and July 2010.<sup>20</sup> Of these, 57,330 were related to violations against the lese majeste law.<sup>21</sup> It must further be noted that iLaw's records do not take into account the websites that were blocked by the Thai police and army without court order during the period of the state of emergency.<sup>22</sup> Hence, the total number of URLs blocked during the period is conceivably much higher. Internet freedom watchdogs have reported that the situation has not changed significantly even after the lifting of the state of emergency, with Reporters Without Borders, for example, claiming that an estimated 80,000 to 400,000 URLs were blocked in Thailand in January 2011.<sup>23</sup>

In **Malaysia**, the government exercises tight control over the Internet despite its guarantees that it "[will] ensure no Internet

18 Reporters Without Borders (2012) "Internet Enemies 2012", Internet Enemies: Burma, <http://en.rsf.org/burma-burma-12-03-2012,42076.html>

19 "To fight extremism, Indonesia blocks radical web sites", Voice of America, 4 October 2011, <http://www.voanews.com/content/indonesia-ban-on-extremist-sites-131132003/146187.html>

20 iLaw (2010) "Situational report on control and censorship of online media through the use of laws and the imposition of Thai state policies", <http://ilaw.or.th/node/632>

21 Ibid.

22 Reporters Without Borders (2011) "Internet Enemies 2011", Countries Under Surveillance: Thailand, <http://en.rsf.org/surveillance-thailand,39775.html>

23 Ibid.

ensorship” in its 1996 Bill of Guarantees, as well as in other pledges made to guarantee freedom in cyberspace. In April 2011, Prime Minister Najib Razak repeated the government’s pledge that it will not censor the Internet.<sup>24</sup> However, in June 2011, the Malaysian Communications and Multimedia Commission (MCMC) ordered all Malaysian ISPs to block several file-hosting websites, apparently for breaching provisions that deal with pirated contents under Section 41 of the Copyright Act 1987.<sup>25</sup> This was not the first time that ISPs in Malaysia were ordered to block certain websites. In 2008, all Malaysian ISPs were reportedly ordered by the MCMC to block *Malaysia Today*,<sup>26</sup> a website that had caused much controversy in Malaysian politics at that time because of its critical stance towards the government and its numerous exposés involving top politicians.

Meanwhile in **Pakistan**, the country’s Internet regulating body continues to block *Facebook*, *YouTube*, *Twitter*, and certain pages of *Wikipedia* over the years. In 2010, *Facebook* was banned following a court order by the Lahore High Court for disseminating “blasphemous” content following a campaign on the social networking site, which invited people to draw images of the Prophet Muhammad. The government of Pakistan has been censoring the Internet since 2003. Recent attempts by the Pakistan Telecommunication Authority (PTA) to ban the use of certain words in SMSes,<sup>27</sup> set up an Internet Filtering System along the lines of the “Great Firewall of China”, and employing a kill switch on digital communication in Balochistan<sup>28</sup> and Gilgit-Baltistan are some examples of the curbs on online freedom of expression and communication.

Finally in **Sri Lanka**, at least six news websites were blocked by the Internet regulating body Telecommunication Regulatory Commission (TRC) in November 2011 for allegedly “maligning”

24 “Najib repeats promise of no Internet censorship”, *The Malaysian Insider*, 24 April 2011, <http://www.themalaysianinsider.com/malaysia/article/najib-repeats-promise-of-no-internet-censorship/>

25 “No more free downloads as MCMC blocks 10 file sharing sites”, *The Star*, 11 June 2011, <http://thestar.com.my/news/story.asp?file=/2011/6/11/nation/8879884&sec=nation>

26 “ISPs ordered to cut access to Malaysia Today website”, *The Star*, 28 August 2008, <http://thestar.com.my/news/story.asp?file=/2008/8/28/nation/22187596&sec=nation>

27 “Filtering SMS: PTA may ban over 1,500 English, Urdu words”, *The Express Tribune*, 16 November 2011, <http://tribune.com.pk/story/292774/filtering-sms-pta-may-ban-over-1500-english-urdu-words/>

28 Bytes for All (2012) “Communication siege in Balochistan to mark Pakistan Day 2012”, Press release, 25 March, <http://content.bytesforall.pk/node/45>

the president, ministers, and top government officials.<sup>29</sup> In 2010, several websites, *Lankaenews.com*, *Lankanewsweb.com*, *Infolanka.com* and *Srilankaguardian.org*, were blocked on the eve of the announcement of the country's presidential election results.<sup>30</sup> Meanwhile in June 2010, *Groundviews*, an independent citizen journalism initiative, was inaccessible for eight hours over Sri Lanka Telecom ADSL connections.<sup>31</sup> In addition, pro-Tamil Tigers website *TamilNet* has been repeatedly blocked on numerous occasions since 2007.<sup>32</sup>

### 2.3 Restrictive Internet-Related Legislations in Selected Asian Countries

Exacerbating the governments' censorship policies and practices are various tough Internet-related laws across Asia, which place harsh restrictions and penalties on Internet users, as well as ISPs. Some of the Internet-related legislations in the region are as follows:

In **Thailand**, the Computer Crime Act (CCA) provides tough restrictions to freedom of speech, covering a broad scope of computer-related activities, and imposes harsh penalties on individuals who violate these restrictions. Articles 14 and 15 of the Act, for example, provides for penalties of up to five years of imprisonment for computer offences in relation to national security and lese majeste. However, instead of being narrowly defined, these provisions are open to overly broad interpretations. As such, Thai authorities have the discretionary powers, for example, to charge persons writing or posting materials deemed to be defamatory towards the Thai monarchy. Additionally, Article 15 extends the liability over online content to include ISPs and other intermediaries. These create chilling effects on the right to freedom of expression on the Internet, bringing rise to a climate of fear and self-censorship on the web in Thailand (See Box 2.1).

29 "Sri Lanka blocks websites for 'maligning' president", BBC News Asia, 7 November 2011, <http://www.bbc.co.uk/news/world-asia-15621160>

30 Centre for Policy Alternatives (2011) op. cit. (p. 17).

31 Ibid.

32 See also Section 5.1 in Chapter 5 of this publication for further discussion on DDoS attacks on *TamilNet*.

**Box 2.1: Computer Crime Act, Thailand**

*Section 14. If any person commits any offence of the following acts shall be subject to imprisonment for not more than five years or a fine of not more than one hundred thousand baht or both:*

- (1). that involves import to a computer system of forged computer data, either in whole or in part, or false computer data, in a manner that is likely to cause damage to that third party or the public;*
- (2). that involves import to a computer system of false computer data in a manner that is likely to damage the country's security or cause a public panic;*
- (3). that involves import to a computer system of any computer data related with an offence against the Kingdom's security under the Criminal Code;*
- (4). that involves import to a computer system of any computer data of a pornographic nature that is publicly accessible;*
- (5). that involves the dissemination or forwarding of computer data already known to be computer data under (1) (2) (3) or (4);*

*Section 15. Any service provider intentionally supporting or consenting to an offence under Section 14 within a computer system under their control shall be subject to the same penalty as that imposed upon a person committing an offence under Section 14 .*

In **Burma**, many journalists, photographers and bloggers have been given heavy prison sentences for breaching the Electronic Transactions Act (ETA). This law identifies the legal validity of electronic records, messages and signatures. The ETA also provides a compulsory system of licensing of Certification Authorities, which “prescribes detailed rules for them to follow, and assigns the Control Board to oversee their activities”. This law also includes a list of computer crimes, which carries a prison sentence of up to 15 years for using technology like the Internet to distribute information “detrimental to the interest of or that lowers the dignity of any organisation or any person” (See Box 2.2).

### **Box 2.2: Electronic Transactions Act, Burma**

#### *Chapter XII*

#### *Offences and Penalties*

33. *Whoever commits any of the following acts by using electronic transactions technology shall, on conviction be punished with imprisonment for a term which may extend from a minimum of 7 years to a maximum of 15 years and may also be liable to a fine:*
- (a) doing any act detrimental to the security of the State or prevalence of law and order or community peace and tranquillity or national solidarity or national economy or national culture.*
  - (b) receiving or sending and distributing any information relating to secrets of the security of the State or prevalence of law and order or community peace and tranquillity or national solidarity or national economy or national culture.*
34. *Whoever commits any of the following acts shall, on conviction be punished with imprisonment for a term which may extend*

- to 5 years or with fine or with both:*
- (a) sending, hacking, modifying, altering, destroying, stealing, or causing loss and damage to the electronic record, electronic data message, or the whole or part of the computer programme dishonestly;*
  - (b) intercepting of any communication within the computer network, using or giving access to any person of any fact in any communication without permission of the originator and the addressee;*
  - (c) communicating to any other person directly or indirectly with a security number, password or electronic signature of any person without permission or consent of such person;*
  - (d) creating, modifying or altering of information or distributing of information created, modified or altered by electronic technology to be detrimental to the interest of or to lower the dignity of any organization or any person.*
35. *Any certification authority or any of his officer or employee who violates any of the prohibitions contained in the order issued by the Control Board shall, on conviction be punished with imprisonment for a term which may extend to 3 years or with fine or with both.*
36. *Whoever violates any of the prohibitions contained in the rules, notifications and orders issued under this Law shall, on conviction be punished with imprisonment for a term which may extend to 1 year or with fine or with both.*
37. *Whoever commits any of the following acts shall, on conviction be punished with imprisonment for a term which may extend to 1 year or with fine or with both:-*
- (a) knowingly misrepresents to the certification authority his identity or authorisation in applying for a certificate or in submitting for suspension or cancellation of a certificate;*

*(b) obstructing or impeding or assaulting the Central Body and body or person assigned duty by it or the Control Board and body or person assigned duty by it which performs the functions and duties in accordance with this Law or failing to comply with the demand to perform in accordance with this Law.*

*38. Whoever attempts to commit any offence of this Law or conspires amounting to an offence or abets the commission of an offence shall be punished with the punishment provided for such offence in this Law.*

The government of Burma has also charged many individuals for violating the Television and Video Act of 1996, which carries a three-year prison sentence for “copying, distributing, hiring or exhibiting videotape that has no video censor certificate”.<sup>33</sup>

In **Vietnam**, the government in 2012 proposed the Decree on Management, Provision and Use of Internet Services and Information Content Online, which is aimed at regulating and further tightening its grip on online activities. Under the proposed new decree, all Internet users are required to use their real names and personal details, which is likely to worsen the climate of self-censorship in the country. The decree also requires all Internet companies to locate servers and offices inside the country, putting them liable to Vietnamese laws. Furthermore, the proposed decree holds website administrators liable for all contents on their websites, including for comments posted by others. The new decree is expected to be promulgated in June 2012.<sup>34</sup> This new policy will replace Decree 97/2008/ND-CP of 2008, and will further add to an existing body of highly restrictive legislations that stifles free speech on the Internet, including the draconian and vaguely-worded Penal Code, under which many bloggers have been arrested and charged.<sup>35</sup>

33 Television and Video Act 1996, Section 32b. The legislation is accessible here: [http://www.blc-burma.org/html/myanmar%20law/lr\\_e\\_ml96\\_o8.html](http://www.blc-burma.org/html/myanmar%20law/lr_e_ml96_o8.html)

34 Article 19 (2012a) “Vietnam: Internet decree or Internet-phobia?”, Press release, 21 June, <http://www.article19.org/resources.php/resource/3341/en/vietnam:-internet-decree-or-internet-phobia> ; <http://www.viettan.org/Vietnamese-authorities-mandate.html>

35 See Chapter 3 of this publication for further discussions on the use of the Vietnamese Penal Code against bloggers.

In **Malaysia**, the Communication and Multimedia Act (CMA) 1998 provides for charges against individuals who improperly use network facilities or network service by making, creating, soliciting and initiates transmission of any content that is “obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person” (See Box 2.3).

### **Box 2.3: Communication and Multimedia Act, Malaysia**

#### *Section 211*

#### *Prohibition on provision of offensive content*

1. *No content applications service provider or other person using a content applications service, shall provide content which is indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person.*
2. *A person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term or to both and shall also be liable to a further fine of one thousand ringgit for every day or part of a day during which the offence is continued after conviction.*

#### *Section 233*

#### *Improper use of network facilities or network service, etc.*

#### *1. A person who –*

- (a) by means of any network facilities or network service or applications service knowingly –*
  - i. makes, creates or solicits; and*
  - ii. initiates the transmission of,**any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in*

*character with intent to annoy, abuse, threaten or harass another person; or*

- (b) initiates a communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensure, with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address, commits an offence.*
2. *A person who knowingly –*
    - (a) by means of a network service or applications service provides any obscene communication for commercial purposes to any person; or*
    - (b) permits a network service or applications service under the person's control to be used for an activity described in paragraph (a), commits an offence.*
  3. *A person who commits an offence under this section shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both and shall also be liable to a further fine of one thousand ringgit for every day during which the offence is continued after conviction.*

Furthermore, in 2011, the Malaysian government announced its plan to amend the Printing Presses and Publications Act (PPPA) to widen the definition of “publications” to include also blogs and *Facebook* accounts. However, after protests from online news media, civil society, including the National Union of Journalists, and the opposition, the government backtracked on its proposal. The same year also saw the government proposing a certification mechanism for IT professionals. This proposal was also met with strong opposition, and was criticised as an attempt to monitor and censure activities of IT professionals. The proposal was subsequently shelved.<sup>36</sup>

<sup>36</sup> Southeast Asian Press Alliance (2012) “Malaysia: State aims to control cyberspace”, <http://www.seapabkk.org/seapa-reports/press-freedom-on-southeast-asian-countries/100589-malaysia-state-aims-to-control-cyberspace.html>

In June 2012, the Malaysian government tabled amendments to the Evidence Act, which was passed hastily in both the Lower and Upper Houses of Parliament. The amendments introduce a new provision, Section 114(A), which holds Internet account holders and intermediaries liable for content published through its accounts/services. Under the new provision, if an anonymous person posts content deemed offensive or illegal using another person's Internet account, it will be account holders that will be held liable – unless proven otherwise. In other words, the burden of proof is placed on Internet account holders rather than the prosecutor/investigator (See Box 2.4).

**Box 2.4 Article 114a, Evidence (Amendment) (No 2) Act, Malaysia**

- 114a. (1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.*
- (2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.*
- (3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.*

Meanwhile, government officials in **Indonesia** reportedly blamed the “Internet frenzy”, specifically referring to those who use online media to expose cases of corruption in the country, for eroding the country’s traditional values. In addition, Minister of Communication and Information Technology, Tifatul Sembiring claimed that social media platforms such as *Twitter* and *Facebook* “must be put under strict control because they can be used to destabilise the government”. He also asserted that individuals who misuse the Internet for pornography, gambling, threat, fraud and blasphemy may be subjected to prosecution under Law No. 11 of 2008 Regarding Information and Electronic Transaction (ITE).<sup>37</sup> The legislation provides for penalties of up to six years’ imprisonment and a fine of up to Rp1 billion (approx. USD106,000).

Furthermore, as the Indonesian Code of Criminal Procedure provides for a pre-trial detention period of 50 days for crimes that carry a penalty of at least five years’ imprisonment, suspects under the ITE Law may in effect be imprisoned without trial if there are concerns by the police that the suspect “will get away, damage or destroy evidence materials and/or repeat the criminal act”.<sup>28</sup> Under the ITE Law, law-enforcement officials are allowed to conduct electronic surveillance, including wiretapping and monitoring of email and other Internet communications.<sup>39</sup>

### **Box 2.5 Law No. 11 of 2008 Regarding Information and Electronic Transaction, Indonesia**

#### *CHAPTER VII PROHIBITED ACTS*

37 “Twitter offenders can end up in jail, says Tifatul”, Jakarta Post, 7 February 2012, <http://www.thejakartapost.com/news/2012/02/07/twitter-offenders-can-end-jail-says-tifatul.html>

38 Article 21(1) of the Indonesian Code of Criminal Procedure outlines the bases for pre-trial detentions, while Articles 24-25 authorises an initial pre-trial detention of 20 days on an order issued by an investigator, and an additional 30 days detention upon permission of a district court.

39 Law No. 11 of 2008 Regarding Information and Electronic Transaction, Article 31(4).

*Article 27*

- (1) Any Person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents against propriety.*
- (2) Any Person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of gambling.*
- (3) Any Person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of affronts and/or defamation.*
- (4) Any Person who knowingly and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of extortion and/or threats.*

*Article 28*

- (1) Any Person who knowingly and without authority disseminates false and misleading information resulting in consumer loss in Electronic Transactions.*
- (2) Any Person who knowingly and without authority disseminates information aimed at inflicting hatred or dissension on individuals and/or certain groups of community based on ethnic groups, religions, races, and intergroups.*

**Singapore's** Telecommunications Act requires Internet service providers and Internet service resellers to obtain a license before offering services to the public in Singapore (See Box 2.6).

### **Box 2.6 Telecommunications Act, Singapore**

*Power to license telecommunication systems and services*

5.-(1) *A licence may, with the consent of, or in accordance with the terms of a general authority given by the Minister, be granted by the Authority either unconditionally or subject to such conditions as the Authority may impose and specify in the licence and either irrevocably or subject to revocation as therein specified for the running of such telecommunication systems and services falling within section 3 as are specified in the licence.*

(2) *A licence granted under subsection (1) may be granted either to any person, class of persons or a particular person, and may include (without prejudice to the power to impose conditions conferred by that subsection) conditions requiring —*

- (a) *the licensee to enter into agreements or arrangements with any person, class of persons or another telecommunications licensee for —*
  - (i) *the interconnection of, and access to, telecommunication systems;*
  - (ii) *the sharing of installation or plant used for telecommunications belonging to any telecommunication licensee; and*
  - (iii) *such other purpose as may be specified in the licence, and on such terms and conditions as may be agreed to by the licensee and such other persons or licensees or, in default of agreement, as may be determined by the Authority;*

...

- (d) *the licensee to comply with codes of practice and standards of performance that are applicable to the licensee; and*

...

(4) *No person shall question whether the grant of a licence under subsection (1) was, or was not, effected with the consent of or in accordance with the terms of a general authority given by the Minister, and the validity of a licence granted under that subsection shall not be impugned on the ground that it was granted neither with the consent of nor in accordance with the terms of a general authority given by the Minister.*

(5) *The grant of licences under this section shall be at the discretion of the Authority.*

(6) *Nothing in this section shall prevent the Minister from directing the Authority to grant a licence in any specific case.*

...

*Suspension or cancellation of licence, etc.*

8.-(1)*If the Authority is satisfied that a person who is granted a licence under section 5 or any regulations made under this Act is contravening, or has contravened, whether by act or omission —*

*(a) any of the conditions of the licence or part thereof;*

*(b) any provision of any code of practice or standard of performance;*

*(c) any direction of the Authority given under section 27, 32D or 32F (2); or*

*(d) section 32B, the Authority may, by notice in writing, do either or both of the following:*

*(i) issue such written order to the person as it considers requisite for the purpose of securing compliance thereof;*

*(ii) require the payment, within a specified period, of a financial penalty of such amount not exceeding \$1 million as it thinks fit.*

...

- (5) Any person who fails to comply with any order under subsection (1) (i) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 3 years or to both.
- (6) In any proceedings brought against any person for an offence under subsection (5), it shall be a defence for him to prove that he took all reasonable steps and exercised all due diligence to avoid contravening the order.
- (7) Any financial penalty payable by any person under subsection (1) (ii) shall be recoverable by the Authority as a debt due to the Authority from that person; and the person's liability to pay shall not be affected by his licence ceasing (for any reason) to be in force .

ISPs are also forced to comply with the Media Development Authority's Internet Code of Practice, which summarises what the community regards as offensive or harmful to Singapore's racial and religious harmony (See Box 2.7).

### **Box 2.7: Internet Code of Practice, Singapore**

#### *Prohibited Material*

- 4.-(1) Prohibited material is material that is objectionable on the grounds of public interest, public morality, public order, public security, national harmony, or is otherwise prohibited by applicable Singapore laws.
- (2) In considering what prohibited material is, the following factors should be taken into account:-
- (a) whether the material depicts nudity or genitalia in a manner calculated to titillate;

- (b) whether the material promotes sexual violence or sexual activity involving coercion or non-consent of any kind;*
  - (c) whether the material depicts a person or persons clearly engaged in explicit sexual activity;*
  - (d) whether the material depicts a person who is, or appears to be, under 16 years of age in sexual activity, in a sexually provocative manner or in any other offensive manner;*
  - (e) whether the material advocates homosexuality or lesbianism, or depicts or promotes incest, paedophilia, bestiality and necrophilia;*
  - (f) whether the material depicts detailed or relished acts of extreme violence or cruelty;*
  - (g) whether the material glorifies, incites or endorses ethnic, racial or religious hatred, strife or intolerance.*
- (3) A further consideration is whether the material has intrinsic medical, scientific, artistic or educational value.*
- (4) A licensee who is in doubt as to whether any content would be considered prohibited may refer such content to the Authority for its decision.*

According to the law, ISPs must block contents that are classified as prohibited materials. Although the Internet Code of Practice does not offer any penalties on users, violation of other laws can subject Internet user to criminal penalties.

Finally in **Pakistan**, the Telecommunications (Reorganisation) Act 1996 gives the government broad powers to issue decrees to limit free speech and the privacy of communication on “requirements of national security”.<sup>40</sup> The legislation further provides broad powers of surveillance to the government, allowing interception of communications on the basis of “national

security”,<sup>41</sup> with little or no regulation or oversight.<sup>42</sup> The Act also criminalises vague and broadly-worded offences, including the dissemination of “false” or fabricated” information and “indecent or obscene” materials,<sup>43</sup> as well as causing “mischief”<sup>44</sup> [See Box 2.8]. All these create an environment which inhibits freedom of expression and severely hampers telecommunications users’ ability to seek and receive information freely.<sup>45</sup>

### **Box 2.8 Pakistan Telecommunications (Reorganisation) Act 1996**

- 31. Offences and penalties. — (1) Whoever—*
- (a) establishes, maintains or operates a telecommunication system or telecommunication service or possesses any wireless telegraphy apparatus or carries on any other activity in contravention of this Act or the rules or regulations made thereunder, the Wireless Telegraphy Act, 1933 (XV of 1933) or the conditions of a licence;*
  - (b) knowingly or having reason to believe that any telecommunication system or telecommunication service has been established or is maintained or is being operated in contravention of this Act, transmits or receives any intelligence by means thereof, or performs any service incidental thereto;*
  - (c) dishonestly obtains any telecommunication service, with the intent to avoid payment of a charge applicable to the provision of that service;*
  - (d) unauthorisedly transmits through a telecommunication system or telecommunication service any intelligence which he knows or has reason to believe to be false, fabricated, indecent or obscene;*
  - (e) engaged in the operation of a public switched network otherwise than in the course of his duty intentionally modifies*

41 Ibid, Article 54(1).

42 Article 19 (2012b) *Pakistan Telecommunications (Reorganisation) Act 1996: Legal analysis*. London: Article 19, <http://www.article19.org/data/files/medialibrary/2949/12-02-02-pakistan.pdf> (p. 15).

43 Pakistan Telecommunications (Reorganisation) Act 1996, Article 31(1)(d).

44 Ibid, Article 31(1)(h).

45 Article 19 (2012b) op. cit. (p. 2).

- or interferes with the contents of a message sent by means of that network;*
- (f) prevents or obstructs the transmission or delivery of any intelligence through a telecommunication system or telecommunication service;*
  - (g) intercepts, acquaints himself with the contents of any intelligence or unauthorisedly discloses to any person the contents of such intelligence;*
  - (h) commits mischief;*
  - (i) damages, removes, interferes or tampers with any telecommunication equipment;*
  - (j) unauthorisedly deciphers the contents of any message transmitted over a public switched network;*

## 2.4 Summary

Although limitations to freedom of expression, including censorship, are provided by international human rights laws on narrow grounds, Internet censorship measures are taken in a non-transparent manner in most Asian countries. This lack of transparency makes it extremely difficult to determine whether measures taken are indeed legitimate and necessary. Further, there are differing definitions of Internet censorship, as well as varying levels commitments to universally accepted human rights laws and standards across countries in the region, as noted in some of the legislations from selected Asian countries that was presented in the first part of this publication.

## Chapter 3

### Criminalisation of Speech on the Internet and Social Media

More and more governments across Asia have either adopted specific laws to criminalise or restrict free speech on the Internet, or resorted to existing criminal laws for the same purpose. In most of these countries, harsh, severe and disproportionate penalties are imposed for Internet-related offences. This is in stark contrast with the UN Special Rapporteur on the right to freedom of opinion and expression's recommendation that any restrictive measures must not only be proven necessary, but be "the least restrictive means required to achieve the purported aim".<sup>46</sup> In other words, any action taken to restrict free speech on the Internet must adhere to the principle of proportionality.

The following cases presented in this chapter provide an overview of how free speech on the Internet has been clamped down and criminalised in several different Asian countries using various legal means, often with disproportionate penalties. In most of these cases, criminal charges brought against individuals are overly broad and vague. Issues of "national security" and "incitement to hatred" have often been convenient justifications for governments to criminalise free speech on the Internet. While these may indeed be legitimate grounds for limitations permitted under international human rights law, legislations governing these offences in most Asian countries are often interpreted and applied arbitrarily in practice, making it highly problematic and inconsistent with international human rights laws and standards.

46 Report of the Special Rapporteur, op. cit. (p. 19, para 69).

### 3.1 Criminalising Speech in Practice: Selected Recent Cases

China, according to media freedom watchdog Reporters Without Borders, is the “**world’s biggest prison for netizens**”, with **78 individuals still imprisoned for Internet-related activities** as of March 2012.<sup>47</sup> Among them is Nobel Peace Prize laureate **Liu Xiaobo**, who has been imprisoned since 8 December 2008, and sentenced in December 2009 to 11 years’ jail term for “**inciting subversion to state power**” under **Article 105** of the country’s **Penal Code**.<sup>48</sup> Many other cyber dissidents, whose writings online call for political reforms in China, have also been persecuted and put behind bars with similar charges under the same legislation. These include **Liu Xianbin**, who in March 2011 received a 10-year jail sentence, and **Li Tie**, who in January 2012 was also sentenced to 10 years in prison,<sup>49</sup> Under Article 105 of the Penal Code:

“Whoever organises, plots, or acts to subvert the political power of the state and overthrow the socialist system, the ringleaders or those whose crimes are grave are to be sentenced to life imprisonment, or not less than 10 years of fixed-term imprisonment; active participants are to be sentenced from not less than three years to not more than 10 years of fixed-term imprisonment; other participants are to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights.

Whoever instigates the subversion of the political power of the state and overthrow the socialist system through spreading rumours, slandering, or other ways are to be sentenced to not more than five years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights; the ringleaders and those whose crimes are grave are to be sentenced to not less than five years of fixed-term imprisonment.”<sup>50</sup>

47 Reporters Without Borders (2012) Internet Enemies: China, <http://en.rsf.org/china-china-12-03-2012,42077.html>

48 Reporters Without Borders (2011) “Liu Xiaobo, last year’s Nobel Prize laureate, still in prison”, Press release, 7 October, <http://en.rsf.org/chine-liu-xiaobo-last-year-s-nobel-peace-07-10-2011,41150.html>

49 “China: Human Rights Activist Li Tie sentenced for subversion”, Library of Congress, 9 February 2012, [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205402982\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402982_text)

50 *Ibid.*

There are also serious concerns regarding the manner in which cyber dissidents are prosecuted in China. The trial of Liu Xianbin, for example, only lasted a few hours – with his lawyer only informed of his trial a mere four days prior, resulting in the lack of time to prepare for the case. Furthermore, since arrested in 2010, Liu was only given access to his lawyer on one single occasion.<sup>51</sup>

After China, **Vietnam** currently holds the dubious record of being home to the **second largest number of imprisoned netizens in the world, with 18 individuals remaining in prison for their online activities** as of April 2012.<sup>62</sup> In Vietnam, the **Penal Code** sets out harsh penalties for offences related to national security, which are **vaguely-worded and overly broad in scope**. Offences under this legislation include “subversion of the people’s administration” (Article 79 of the Penal Code, which carries a maximum penalty of death sentence); “undermining the unity policy” (Article 87, maximum penalty of 15 years in prison); “conducting propaganda against the state” (Article 88, maximum penalty of 20 years in prison); “disrupting security” (Article 89, maximum penalty of 15 years in prison); and “abusing democratic freedoms” to “infringe upon the interests of the State” (article 258, maximum penalty of seven years in prison).

Against the backdrop of the Arab Spring and the various protest movements throughout the world in 2011, the Vietnamese government has increased repression and control over the Internet, including by arresting, detaining, and persecuting a large number of bloggers and cyber dissidents. Among the recent cases of conviction of bloggers under Article 88 of the Vietnamese Penal Code are:<sup>53</sup> **Lu Van Bay**, whose writings criticising the Vietnamese government appeared in several websites outside the country, was sentenced to four years in prison and three years of house arrest on 22 August 2011 under Article 88 of the Penal Code;<sup>54</sup> French-Vietnamese blogger

52 Reporters Without Borders (2011) “Cyber-dissident gets heavy jail term after unfair trial”, Press release, 25 March, [http://en.rsf.org/china-cyber-dissident-gets-heavy-jail-25-03-2011\\_39885.html](http://en.rsf.org/china-cyber-dissident-gets-heavy-jail-25-03-2011_39885.html)

53 See, for example, Southeast Asian Press Alliance (2012) “Vietnam: No ‘Arab Spring’ here, please”, <http://www.seapabkk.org/seapa-reports/press-freedom-on-southeast-asian-countries/100584-vietnam-no-arab-spring-here-please.html>. See also Reporters Without Borders (2012) “Internet Enemies 2012”, Internet Enemies: Vietnam, op. cit.

54 At his trial, which lasted only a few hours, Lu Van Bay was denied access to lawyers.

**Pham Minh Hoang**, whose writings in his blog was deemed to be “aimed at overthrowing the government”, and was sentenced to three years imprisonment and three years of house arrest;<sup>55</sup> **Cu Huy Ha Vu**, who was sentenced in April 2011 to a seven-year jail sentence; and Hellman/Hammett award winner **Vi Duc Hoi**, who was originally sentenced to eight years imprisonment and five years of house arrest – a sentence which was later reduced to five years imprisonment and three years of house arrest following an appeal – for “disseminating propaganda against the government” through writings on his blog.

In July and August 2011, a group of individuals belonging to the Congregation of the Most Holy Redeemer – bloggers **Paulus Le Van Son** and **Nguyen Van Duyet**, university student **Nong Hung Anh**, and journalists **Dang Xuan Dieu** and **Ho Duc Hoa** – were arrested and held incommunicado on suspicion of “carrying out activities aimed at overthrowing the people’s administration” under Article 79 of the Penal Code. All five individuals are active contributors to citizen journalist sites, including Vietnam Redemptorist News.<sup>56</sup> In April 2012, the Vietnamese government charged bloggers **Nguyen Van Hai**, **Phan Than Hai** and **Ta Phong Tan** under Article 88 of the Penal Code, for allegedly posting 421 articles on the Internet, which “distorted and opposed the State”.<sup>57</sup> The three are awaiting trial at the time of writing, and could face up to 20 years of imprisonment if convicted.

Furthermore, the Vietnamese government’s **treatment of detainees and respect for the basic welfare of detainees** has also come into question. In July 2011, **Nguyen Van Ly**, a Catholic priest and editor, who was initially sentenced to an eight-year imprisonment in 2007 but was later granted a suspension of his jail term following multiple strokes and being diagnosed with brain tumour, was sent back to prison to resume his prison sentence. In another case, prominent blogger **Nguyen Van Hai** (popularly known as **Dieu Cay**), who has been detained since

56 Article 19, et al. (2012) “Request for the immediate release of Dang Xuan Dieu, Ho Duc Hoa, Nguyen Van Duyet, Nong Hung Anh and Paulus Le Van Son, and the dismissal of all charges”, Joint letter to the government of Vietnam, 12 March, <http://www.article19.org/data/files/medialibrary/3000/Joint-letter-to-Government-of-Vietnam.pdf>

57 “Internet controls continue in Vietnam”, *Voice of America*, 28 April 2012, <http://www.voanews.com/policy/editorials/asia/Internet-Controls-Continue-In-Vietnam-149536925.html>

2008 after being found guilty by the Ho Chi Minh City court on tax fraud charges, is still being **held incommunicado** although his two-year prison sentence was supposed to have ended in 2010. Critics have noted that the 2008 criminal charge against Dieu Cay was merely an attempt to silence the dissident blogger. Dieu Cay currently faces new charges of “propaganda against the Socialist Republic of Vietnam” under Article 88 of the Vietnamese Penal Code. While the whereabouts and wellbeing of Dieu Cay remain speculative, his case indeed warrants urgent concern as his family has been denied visiting rights.<sup>58</sup>

Besides China and Vietnam, a number of other Asian countries have either adopted specific laws to criminalise or restrict free speech on the Internet, or used existing criminal laws to govern contents and behaviours online.

In recent years, **Thailand** has been put under the international spotlight for its use of the Computer Crime Act<sup>59</sup> against persons who violate the lese majeste law (Article 112 of the Criminal Code). The UN Special Rapporteur on the right to freedom of opinion and expression has strongly questioned the use of the Computer Crime Act in Thailand, in his May 2011 report to the UN Human Rights Council. In addition, in December 2011, the UN High Commissioner for Human Rights expressed concern over “the ongoing trials and harsh sentencing of people convicted of lèse majesté in Thailand and the chilling effect that this is having on freedom of expression in the country”.<sup>60</sup>

In November 2011, for example, **Ampon Tangnoppakul**, who allegedly sent four messages via short message service (SMS) to the phone of the private secretary of Prime Minister of Thailand Abhisit Vejjajiva, was found guilty for violating Section 112 of the Criminal Code and Section 14(2) and 14(3) of the Computer Crime Act. He was sentenced to **20 years imprisonment for his four text messages** – a sentence which effectively equates

58 Reporters Without Borders (2012) “Internet Enemies 2012”, Internet Enemies: Vietnam, op. cit.

59 See Box 2.1 in Chapter 2 of this publication for details of the Computer Crime Act of Thailand.

60 UN High Commissioner for Human Rights (2011) “Press briefing note on Bahrain and Thailand”, 9 December, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11704&LangID=E>

to a **five-year jail term for every single text message** that was sent out.

Tangnoppakul was denied bail throughout his trial despite existing health conditions, and subsequently passed away in prison on 8 May 2012, after he was sentenced. Arrested on 3 August 2010, he was initially detained in Bangkok Remand Prison for 63 days. The Appeals Court at first granted his release on bail on 4 October 2010, but he was detained again at the Bangkok Remand Prison when he was officially charged on 18 January 2011. He remained in Bangkok Remand Prison throughout his trial up to his sentencing. Despite already suffering from oral cancer, his bail applications were repeatedly rejected by the court on the grounds that his case had severe effects on public sentiments and national security. His latest request for bail was rejected by the Appeals Court on 22 February 2012 on the basis that “the illness [...] does not appear to be life-threatening”.<sup>61</sup> According to the autopsy, the cause of Tangnoppakul’s death was a late-stage liver cancer that had spread all over his body. The autopsy also revealed that the cancer had developed for 3 to 6 months; in other words, in the period after his conviction.<sup>62</sup>

The Thai courts have also routinely **denied many other bail applications of defendants who are charged under lese majeste laws**.<sup>63</sup>

Meanwhile, on 30 May 2012, **Chiranuch Premchaiporn** (popularly known as Jiew) the web director of Thai online news portal, *Prachatai*, was sentenced to an eight-month suspended sentence, which was reduced from one-year jail sentence, and imposed a fine of THB20,000 under Thailand’s Computer Crime Act for failing to remove in time one message on the *Prachatai* discussion board deemed insulting towards the monarchy which another user had posted on the website.<sup>64</sup>

61 “Amphon dies in prison hospital”, *Prachatai*, 8 May 2012, <http://prachatai.com/english/node/3200>

62 “Uncle SMS’s Autopsy found Final Stage Liver Cancer”, *Prachatai*, 9 May 2012, <http://prachatai.com/journal/2012/05/40423>

63 See, for example, Human Rights Watch (2012) “Thailand: Courts denying bail in lese majeste cases”, 24 February, [www.hrw.org/news/2012/.../thailand-courts-denying-bail-lese-majeste-cases](http://www.hrw.org/news/2012/.../thailand-courts-denying-bail-lese-majeste-cases)

64 See Chapter 4 of this publication for further discussions on the case of Chiranuch Premchaiporn and the role of Internet intermediaries.

Other recent lese majeste cases related to the use of Internet and social media include: **Surapak Puchaieseng**, the owner of a *Facebook* page deemed defamatory towards the monarchy, who was arrested on 2 September 2011, and was subsequently charged under Article 14(3) of the Computer Crime Act;<sup>65</sup> and blogger **Joe Gordon** who, on 8 December 2011, was sentenced to two and one-half years in prison on lese majeste charges for translating on his blog excerpts of King Bhumibol Adulyadej's banned and unauthorised biography by Paul Handley, entitled "*The King never smiles*".

Meanwhile in **Burma**, numerous activists and bloggers have in recent years been detained and prosecuted under laws like the Electronic Transactions Act for the use of the Internet and social media in their activism. However, in January 2012, the Burmese government released hundreds of political prisoners and prisoners of conscience, among which were journalists and bloggers. These include the *Democratic Voice of Burma (DVB)* journalists who were previously detained, **Hla Hla Win**, **Ngwe Soe Lin**, **Win Maw**, **Sithu Zeya** and his father **U Zeya**, freelance journalists **Thant Zin Aung** and **Zaw Thet Htwe**, and blogger **Nay Phone Latt**. Nevertheless, blogger **Kaung Myat Hlaing** (also known by the blogging name of Nat Soe) remain imprisoned since 2010. Kaung Myat Hlaing, who was already serving a two-year sentence in the Insein prison, was tried secretly inside the prison and was sentenced to a further 10 years in jail under the Electronic Transactions Act in February 2011 for allegedly participating in an online poster campaign calling for the release of opposition leader Aung San Suu Kyi and other political prisoners in Burma. Others, including *DVB* journalist **Sithu Zeya**, have been imposed conditions for their release.<sup>66</sup>

Finally in **Malaysia**, six persons were charged under the Communications and Multimedia Act in March 2009 for insulting the Sultan of Perak on blogs or other Internet postings. One of

65 He is currently awaiting trial, which is scheduled to assume in September 2012, and is held in police custody on remand.

66 See, for example, Reporters Without Borders (2012) "Internet Enemies 2012", Internet Enemies: Burma, <http://en.rsf.org/burma-burma-12-03-2012,42076.html>

them pleaded guilty and was fined MYR10,000 (approx. USD3,000) in default of five months' jail, while the rest claimed trial.<sup>67</sup> On 1 June 2012, one of those charged, Chan Hon Keong, was given the maximum sentence of a year's jail and a fine of MYR50,000 (approx. USD15,000).<sup>68</sup>

### 3.2 Incitement to Hatred and Violence

In seeking to silence dissent online, a common and convenient justification of criminalising free speech on the Internet is the allegation of incitement of violence and hatred through the use of the Internet and social media. While it is undeniable that such allegations may be easily misused by governments to justify limitations of the right to freedom of speech and opinion, some Asian countries are indeed facing challenges in dealing with incitement to hatred based on religious beliefs.

In **Indonesia**, for example, the Ahmadiyya community has been a target of incitement to hatred, which has resulted in numerous attacks on the community, including an incident in February 2011 where around 20 Ahmadiyya followers in Cikeusik village were attacked by a thousand-strong mob. Three persons were killed, while six others were severely injured in the incident. Amidst this rising climate of intolerance towards religious minorities, the recent case of Alexander Aan raises further questions about freedom of expression on the Internet in relation to incitement to hatred. **Alexander Aan** is a civil servant in Indonesia who was attacked by a mob after he declared himself an atheist and wrote "God doesn't exist" on *Facebook*. Extremist groups have also called for Aan to be beheaded.<sup>69</sup> On 20 January 2012, he was charged under the Electronic Information and Transaction (ITE) Law for "disseminating information aimed at inciting religious hatred or hostility";<sup>70</sup> and under the Indonesian Criminal Code for religious blasphemy<sup>71</sup> and for calling others to embrace

67 "Lab helper fined for insulting Sultan", *The Star*, 14 March 2009, <http://thestar.com.my/news/story.asp?file=/2009/3/14/nation/3481417&sec=nation>

68 "Engineer sentenced to jail, fined RM50,000 for insulting Perak ruler", *The Star*, 1 June 2012, <http://thestar.com.my/news/story.asp?file=/2012/6/1/nation/20120601193336&sec=nation>

69 "Calls to behead Indonesian atheist Alexander Aan", *Jakarta Globe*, 2 February 2012, <http://www.thejakartaglobe.com/home/calls-to-behead-indonesian-atheist-alexander-aan/495308>

70 Electronic Information and Transaction (ITE) Law, Article 28(2)

71 Indonesian Criminal Code, Article 156(a)

atheism.<sup>72</sup> He was subsequently found guilty on the charge under the ITE Law, and was sentenced to a jail term of two and a half years, and a fine of Rp100 million (approx. USD10,600), while the two other counts of charges under the Indonesian Criminal Code were dropped.<sup>73</sup>

Meanwhile in **Bangladesh**, a Bangladeshi court on 21 March 2012 ordered authorities to shut down five *Facebook* pages and a website for blaspheming the Prophet Mohammed, the Koran and other religious subjects. Judges at the High Court in Dhaka ordered the telecommunications regulator, home ministry officials and police to block the offending pages. According to Nawashad Zamir, a lawyer of the petitioner, these pages contain “disparaging remarks and cartoons about Prophet Mohammed, the Muslim holy book of Koran, Jesus, Lord Buddha and Hindu gods”.<sup>74</sup> It is worthwhile to note that this was the first time a Bangladeshi court had ordered the shutting down *Facebook* pages on allegations of hurting religious sentiments.

Similarly in **Pakistan**, in May 2012, the Lahore High Court ordered a ban on *Facebook* and other websites disseminating “blasphemous” content, in response to a campaign on *Facebook* inviting people to draw images of the Prophet Muhammad, an act that is forbidden in Islam. As a result of the court order, the government instructed Pakistan’s main Internet regulating body, the Pakistan Telecommunication Authority (PTA) to block *Facebook* for users in Pakistan. Other websites blocked were *YouTube*, *Flickr*, and certain pages of *Wikipedia*.<sup>75</sup>

In September 2009, in **Malaysia**, online news portal *Malaysiakini* was ordered by the MCMC to remove two video clips in relation to an incident in which demonstrators carried cow heads to protest against the relocation of a Hindu temple to a predominantly Malay-Muslim neighbourhood. In the letter ordering the removal of the video clips, the MCMC said that the videos “contain

72 Ibid, Article 156a(b)

73 “Indonesian jailed for Prophet Mohammad cartoons”, *AFP*, 14 June 2012, [http://www.google.com/hostednews/afp/article/ALeqMshdFGRHpkE47IVXr\\_IWCA4e-CQ?docId=CNG.18e43f8e61579560971f8e0c11806c69.81](http://www.google.com/hostednews/afp/article/ALeqMshdFGRHpkE47IVXr_IWCA4e-CQ?docId=CNG.18e43f8e61579560971f8e0c11806c69.81)

74 “Bangladesh to shut Facebook pages for blasphemy”, *AFP*, 21 March 2012, [http://www.google.com/hostednews/afp/article/ALeqM5huozxQ6pX6NzGN1BLZ4v77F\\_WdsA?docId=CNG.69b619386661df32b641f3b9750e525c.211](http://www.google.com/hostednews/afp/article/ALeqM5huozxQ6pX6NzGN1BLZ4v77F_WdsA?docId=CNG.69b619386661df32b641f3b9750e525c.211)

75 See Chapter 2 of this publication for further discussions on this case.

offensive contents with the intent to annoy any person, especially [ethnic] Indian [Malaysians]” and that publishing the clips was an offence under Sections 211 and 233 of the Communication and Multimedia Act 1998. As a result of its refusal to remove the videos, *Malaysiakini* was subjected to harassment by the MCMC on several occasions, including having statements of its staff recorded by MCMC officers, and data from its hard disk copied.<sup>76</sup>

**Sexual minorities**, such as gay, lesbian, bisexual and transgender (LGBT) communities, have also been frequent targets of incitement to hatred and violence. The incident of the forced cancellation of the regional conference of the International Lesbian, Gay, Bisexual, Transgender and Intersex Association in Surabaya in March 2010 due to attacks and threats of violence by extremist groups is a case in point. On 1 February 2012, the website of the International Gay and Lesbians Human Rights Commission (IGLHRC), a “leading international organisation dedicated to human rights advocacy on behalf of people who experience discrimination or abuse on the basis of their actual or perceived sexual orientation, gender identity or expression”,<sup>77</sup> was blocked by mobile phone operators, Telkomsel and IM2, in **Indonesia**, following an order from the Minister of Communication and Information due to contents that were deemed to “contain pornography”. IGLHRC’s executive director criticised the ban:

“This is not the first time that attempts to organize and educate lesbian, gay, bisexual and transgender (LGBT) people and their allies have been met with state censorship. All too often governments use the charge of pornography as a smokescreen to attack freedom of expression. Oppressive governments [cannot] stop the tide of LGBT voices—whether they are on the Internet, in the media or on the streets. IGLHRC stands with human rights defenders in Indonesia in their struggle to keep the web free for dialog on basic human rights issues.”<sup>78</sup>

76 “Cow-head videos: MCMC comes a-calling again”, *Malaysiakini*, 10 September 2009, <http://www.malaysiakini.com/news/112564>

77 IGLHRC official website: <http://www.iglhrc.org/cgi-bin/iowa/content/about/index.html>

78 “IGLHRC website banned in Indonesia”, *The Seattle Lesbian*, 8 February 2012, <http://theseattlelesbian.com/iglhrc-website-banned-in-indonesia/>

The intolerance towards religious and sexual minority groups provide a context to discussions on the limitations to the right to freedom of expression and opinion in relation to incitement to hatred and violence. Nevertheless, the current practice of many Asian governments in relation to this remains highly problematic.

Firstly, as noted in the previous section, while international human rights laws provide limitations of freedom of expression, including censorship, on narrow grounds such as national security, public order, public health and the rights of others, there is a general lack of transparency in many of the Asian governments' measures to limit the right to freedom of expression and opinion on the Internet, which makes it extremely difficult to determine whether measures taken are indeed legitimate and necessary.

Secondly, the cases presented above demonstrate highly problematic decisions by the authorities as to what and who is deemed to be inciting hatred. For example, in Indonesia, Alexander Aan was given a two and a half years' imprisonment for allegedly "disseminating information aimed at inciting religious hatred or hostility" by declaring himself an atheist, but those who publicly issued threats against Aan, including by calling for his beheading, were not charged. Meanwhile, in the case of Malaysia, a news portal *Malaysiakini* was subjected to harassment merely for publishing, as part of its news reporting, a video clip of a group of Muslims who had insulted the Hindu community in Malaysia by carrying a severed head of a cow – a holy animal in Hinduism – to protest the relocation of a Hindu temple to a Muslim majority neighbourhood.

### 3.3 Summary

The selected cases above demonstrate the use of criminal measures to violate the right to freedom of expression in a manner that disregards international human rights standards. Most of the criminal actions taken by governments against bloggers, intermediaries, and other Internet users do not meet the principle of necessity (namely for the protection of the rights of others) in restricting freedom of expression under international human rights law; and the penalties imposed in many of these cases are also disproportionate with the alleged offences committed. For example, the case of Chiranuch Premchaiporn reveals the chilling reality that an intermediary could possibly face a jail term of up to 20 years merely for failing to promptly remove comments made by others, while the late Ampon Tangnoppakul was sentenced to 20 years in prison merely for sending out four text messages that are deemed to be defamatory to the monarchy. In some of these cases, defendants are denied bail, including in the case of Ampon Tangnoppakul in Thailand, where his bail application was denied despite an existing dire health condition. In most cases, criminal charges brought against individuals are overly broad and vague, for example on the grounds of “national security”, which can be interpreted loosely and arbitrarily by governments. In addition, incitement of hatred has been used as a convenient justification for governments to restrict and censor the Internet; but the arbitrary and inconsistent persecutions against individuals whose actions are deemed as inciting hatred remain highly problematic.

## Chapter 4

### Power of Regulator and Role of Intermediaries

Many governments in Asia regulate the Internet through its administrative bodies or quasi-government, quasi-private entities. Such practices have been criticised by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, who recommended that governments or administrative bodies should not have the power to restrict contents on the Internet, and that any restrictions – on the basis of protection of the rights of others – should be done by court rulings.<sup>79</sup>

Furthermore, intermediaries, which include Internet service providers (ISPs), search engines, online community platforms, etc. are increasingly expected and pressured by governments to play a role in regulating Internet contents. Although the question of whether or not intermediaries should regulate content – and thus whether they are liable, and to what extent, to third-party content – remains an ongoing debate, some recent cases of intermediary liability (e.g. the conviction of Chiranuch Premchaiporn for third-party comments that are allegedly defamatory towards the monarchy) have clearly set bad precedence that will leave negative implications on the timely regulatory role that intermediaries are expected to play in the future.

79 Report of the Special Rapporteur, *op. cit.* (p. 20, paras 70 & 75)

#### 4.1 Wide Regulatory and Enforcement Powers of Government or Quasi-Government Bodies

In **Korea**, the role of regulating the Internet is undertaken by the Korean Communications Standards Commission (KCSC), a body which is described by the UN Special Rapporteur on the right to freedom of opinion and expression as a “quasi-State and quasi-private entity tasked to regulate online content”.<sup>80</sup> Korea has long asserted controls on online communications. The KCSC consist of nine members, all of whom are directly appointed by the President. While it describes itself as playing the role of “protecting Internet users’ rights and prevent circulation of illegal and detrimental information in the cyberworld”, its control – and powers to order removal of contents – covers an overly wide scope of online contents, including ones that are deemed defamatory.<sup>81</sup> In addition, there is a lack of transparency in the procedures by which the KCSC regulate online contents in Korea.

Since the conservative Lee Myung Bak administration assumed power in 2009, the number of content removal requests issued by the Korean Communications Standards Commission (KCSC) has increased. Reporters Without Borders, citing the *NorthKoreaTech* blog, noted an increase from about 1,500 per year before 2009 to 80,449 in 2010, while investigations by the Commission increased from 58 before 2009 to 91 in 2010. It also noted that 122 pro-North Korean websites were investigated in the period between August 2010 and September 2011, with an estimate of 78 of them being shut down.<sup>82</sup> South Korea has also enacted considerable surveillance measures, as well as a restriction on online anonymity that is being challenged in the Constitutional Court.<sup>83</sup>

Meanwhile in **Malaysia**, the power of regulating the Internet is delegated to the Malaysian Communications and Multimedia

80 Ibid. (p. 13, para 43). See also A/HRC/17/27/Add.2.

81 Electronic Frontier Foundation (2011) “In South Korea, the only thing worse than online censorship is secret online censorship”, Press release, 6 September, <https://www.eff.org/deeplinks/2011/08/south-korea-only-thing-worse-online-censorship>. See also Electronic Frontier Foundation (2011) “Censorship by Korea Communications Standards Commission”, Letter to the Korea Communications Standards Commission, 6 September, <https://www.eff.org/files/letter-south-korea-kcsc.pdf>

82 Reporters Without Borders (2012) Korea, 12 March, <http://en.rsf.org/south-korea-south-korea-12-03-2012,42067.html>

83 Electronic Frontier Foundation (2011) “In South Korea, the only thing worse than online censorship is secret online censorship”, op. cit.

Commission (MCMC), a body overseen by the Minister of Information, Communications and Culture. The Minister directly appoints members of the Commission, which comprises: (a) a Chairman; (b) three members representing the Government; and (c) not less than two but not more than five other members.<sup>84</sup> MCMC's functions are set out in the Malaysian Communications and Multimedia Commission Act of 1998:<sup>85</sup>

- i. *to advise the Minister on all matters concerning the national policy objectives for communications and multimedia activities;*
- ii. *to implement and enforce the provisions of the communications and multimedia laws;*
- iii. *to regulate all matters relating to communications and multimedia activities not provided for in the communications and multimedia laws;*
- iv. *to consider and recommend reforms to the communications and multimedia laws;*
- v. *to supervise and monitor communications and multimedia activities;*
- vi. *to encourage and promote the development of the communications and multimedia industry including in the area of research and training;*
- vii. *to encourage and promote self-regulation in the communications and multimedia industry;*
- viii. *to promote and maintain the integrity of all persons licensed or otherwise authorised under the communications and multimedia laws;*
- ix. *to render assistance in any form to, and to promote cooperation and coordination amongst, persons engaged in communications and multimedia activities; and*
- x. *to carry out any function under any written law as may be prescribed by the Minister by notification published in the Gazette.*

<sup>84</sup> Malaysian Communications and Multimedia Commission Act 1998, Section 6.

<sup>85</sup> *Ibid.*, Section 16.

Further powers and functions of the MCMC are stated in the Communications and Multimedia Act 1998, which also provides a wide range of powers to the Minister of Information, Communications and Culture. The Act gives the Minister wide powers, including to grant and revoke licences, as well as to direct the MCMC to undertake investigations into any civil or criminal offence under the legislation<sup>86</sup> or hold public inquiries.<sup>87</sup> Besides directions from the Minister, the MCMC is also provided powers to undertake investigations and hold public inquiries either in response to written requests or on its own initiative.

In addition, under Section 73 of the Communications and Multimedia Act, the MCMC is given further investigative and information-gathering powers, including to direct any person to provide information or copies of documents (either in physical or electronic form) to the Commission within a certain period, and to compel any person to appear before the Commission to give evidence, either orally or in writing, and to produce documents requested by the Commission. Failure to comply with the directives of the MCMC is considered an offence punishable with a fine of up to MYR20,000 (approx. USD6,265) or imprisonment of up to six months, or both.<sup>88</sup>

The MCMC have demonstrated inconsistency and arbitrariness in the exercise of its wide powers in some recent examples. In October 2011, the MCMC questioned online news portal *Malaysiakini* for reporting a comment by law professor and constitutional expert Abdul Aziz Bari, who allegedly questioned the role of the Sultan of Selangor in relation to a raid of a Methodist Church by Islamic religious authorities.<sup>89</sup> In this particular case, the MCMC appeared to be proactive in persecuting individuals for allegedly breaching various national laws.

However, in contrast, the MCMC have been slow to react in other cases that appear to be legitimate cases of incitement to

86 Communications and Multimedia Act 1998, Section 6.

87 Ibid, Section 58.

88 Ibid, Section 74.

89 "MCMC questions Aziz Bari and Malaysiakini", *Malaysiakini*, 17 October 2011, <http://www.malaysiakini.com/news/178847>

hatred on the Internet. One example is a case in 2011 where an individual, Arlene Tan, was mistakenly identified and attacked online by hackers for allegedly posting contents that purportedly insulted Islam. The hackers distributed personal identification card number and photographs of Arlene Tan on the Internet, prompting other Internet users to send threats to the latter, which later turned out to be a mistaken identity. Despite these threats and obvious violation of the rights of Tan by the hackers, the MCMC, to whom Tan lodged a report with, refused to act further other than to obtain an apology from the hackers.<sup>90</sup>

These two cases, contrasted with each other, are examples of the MCMC's arbitrary powers, which have been exercised with double standards.

In **Thailand**, the Computer Crime Act provides wide powers to the authorities for the purpose of investigating alleged computer-related offences. Section 18, for example, grants officials powers:

- i. to notify or to summon any person related to offence prescribed by the Computer Crime Act to give statements or to send explanation in writing or to furnish document, information, or other evidence in understandable form;*
- ii. to summon traffic data concerning the communication transferred computer system from the service provider or other person concerned;*
- iii. to order the service provider to submit, to the competent official, related information of his user which has been kept under section 26 or being in his possession or control;*
- iv. to copy, in case where computer system is reasonably believed of committing the offence under this Act;*
- v. to order the possessor or controller of computer data or equipment for storing computer data to deliver to him such computer data or equipment;*

<sup>90</sup> Information on the case of Arlene Tan was provided by H.R. Dipendra during the Regional Symposium on Social Media, Freedom of Expression and Incitement to Hatred in Asia, held on 14-15 January 2012 in Singapore.

- vi. *to verify or to access the computer system, computer data, traffic data or equipment for storing computer data of any person which is evidence or may be used as evidence in connection with the commission of the offence, or investigate to ascertain an offender, and instruct such person to deliver to him computer data, traffic data as necessity persists;*
- vii. *to decrypt computer data of any person or require person concerning with encryption of computer data to decrypt or to afford him every reasonable facility to decrypt such computer data;*
- viii. *to seize or to attach as necessary computer system for the purpose of ascertaining the particulars of an offence and the offender under this Act.*

The law however does not stipulate how these wide powers are to be exercised by officials. This has created a situation where officials have the discretion to choose the procedures in which they exercise their powers. This opens up the possibility of abuses of power by officials. In an analysis of the Computer Crime Act, Sinfah Tunsarawuth and Toby Mandel (2010) provide an example in which officials can choose to seize an entire computer system or data storage device, rather than simply copying the data they want and returning the computer.<sup>91</sup> Officials do not need to obtain a court warrant in their exercise of some of these powers, namely in obtaining oral and written statements from individuals, and documents and traffic data from ISPs. For powers other than these, a court warrant is needed. Nevertheless, researchers have noted that Thai courts are very often cooperative in granting warrants in cases involving allegations of lese majeste.<sup>92</sup>

## 4.2 Role of Intermediaries

Increasingly, intermediaries are facing pressure from governments to regulate the Internet, and are thus being

91 Sinfah Tunsarawuth & Toby Mendel (2010) "Analysis of Computer Crime Act of Thailand", [http://www.law-democracy.org/wp-content/uploads/2010/07/10.05.Thai\\_Computer-Act-Analysis.pdf](http://www.law-democracy.org/wp-content/uploads/2010/07/10.05.Thai_Computer-Act-Analysis.pdf)

92 Ibid.

held liable for third party contents. Several cases in Asia have seen intermediaries being held liable by the government – and are thus facing, or have faced, punishments or threats of punishments under the law – for third-party contents. While there is legal protection for intermediaries from liability for third-party content in many countries, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has noted that intermediaries’ protection from liability has been eroding in many countries in recent years.<sup>93</sup>

**Thailand** in particular has been under scrutiny from the international community for its use of the Computer Crime Act to hold intermediaries liable for contents that allegedly violate the country’s lese majeste law (Article 112 of the Criminal Code). On 15 March 2011, **Thanthawut Thaweewarodomkul**, a web designer of Nor Por Chor USA was sentenced to 10 years’ imprisonment for posting messages deemed offensive under Section 112 of the Criminal Code and another 3 years for allowing a lese majeste comment to remain on his website without removing it. Thanthawut was arrested and has been detained without bail since 1 April 2010. He was charged by the Technological Crimes Suppression Division (TCSD) for posting offensive messages and being the administrator of the Nor Por Chor USA website.

Another case in Thailand is that of **Chiranuch Premchaiporn**, the director of a Thai online news website, Prachatai, who was charged under sections 14 and 15 of the Computer Crime Act, for being too slow to remove ten message items on the news website that are allegedly defamatory to the monarchy. On 30 May 2012, Chiranuch Premchaiporn was sentenced to an eight-month suspended sentence, which was reduced from one-year jail sentence. She was also imposed a fine of THB20,000. The presiding judge, Judge Kampol Rungrat said that the guilty verdict was based on one particular post that was left on the

93 Report of the Special Rapporteur, *op. cit.* (p. 11, para 38).

site for 20 days, noting that she “**did not perform her duty in a timely manner**”, and “**allowed the inappropriate posting to be on the website for too long**”. This was despite the fact that all offensive comments were eventually removed by Chiranuch, who had to vet through approximately 1,000 postings each day. While the eventual sentence by the Thai court, which effectively let Chiranuch escape jail, demonstrated some level of leniency relative to the maximum sentence punishable under the law, the possibility of a 20-year jail sentence nevertheless is an example of the disproportionate penalty that an intermediary could face for comments made by other users. The guilty verdict in the case of Chiranuch further sends the message that intermediaries are responsible to censor contents on the Internet.

According to the 2012 *Google* Transparency Report, *Google* received a total of 417 content removal requests from Thailand’s Ministry of Information and Communication Technology in 2011. These contents, which include *YouTube* videos, were reportedly “mocking or criticizing the King in violation of Thai lese-majeste laws”. Of these, 307 content items were fully removed by *Google*, while the other 110 cases were “partially” removed.<sup>94</sup> In other words, all of the Thai governments content removal requests to *Google* in 2011 were accommodated by the corporation to some degree.<sup>95</sup>

In **India**, the “IT Rules 2011”, supplementing the 2000 Information Technology Act, was passed in 2011. The new rule requires ISPs to remove Internet contents that are deemed “objectionable” within 36 hours a complaint is filed or after notification from authorities. ISPs that fail to comply with this rule will be held liable. This legislation allows individuals to initiate civil and criminal actions against web companies. In January 2012, 21 web companies, including *Google Inc.*, *Yahoo!*, *Facebook* and *Microsoft*, were brought to court in a criminal case following a complaint by a journalist that these web companies had allegedly

94 *Google* Transparency Report, Removal Requests, <http://www.google.com/transparencyreport/removals/government/>

95 “*Google* releases Transparency Report: Thailand an unknown quantity”, *Asian Correspondent*, 19 June 2012, <http://asiancorrespondent.com/84508/thailands-unknown-quantity-google-releases-transparency-report-assists-authorities-in-blocking-online-content/>

hosted content deemed offensive towards various religious statements on their sites. On 12 January 2012, in the course of the court proceedings, the New Delhi High Court judge warned that he could block the sites the way China does, if they fail to protect religious sensitivities in India. This warning apparently prompted *Google* and *Facebook* to remove contents from some Indian websites.<sup>96</sup> In addition, a separate civil case was also filed against the same web companies on similar charges. *Yahoo!* and *Microsoft* were subsequently dropped from both criminal and civil cases, but *Google Inc.*<sup>97</sup> and *Facebook* still face both civil and criminal charges at the time of writing.

According to the *Google* Transparency Report, a report that indicates the number of Internet content removal requests that *Google* receives from governments, Indian officials have requested for *Google* to remove 358 items between January and June 2011, to which 68 (or 51% of the requests) were complied by *Google*.<sup>98</sup>

### 4.3 Summary

In many Asian countries, the Internet is regulated through administrative bodies or quasi-government entities in a non-transparent manner. These regulatory powers are often exercised arbitrarily and sometimes selectively, as some of the cases above have shown. There are also increasing attempts by several Asian governments to exert pressure over intermediaries to control contents in the Internet, as well as to hold them liable for failing to prevent contents deemed illegal from being published on the Internet. Recent developments, particularly the conviction of Chiranuch Premchaiporn in Thailand and the passing of a new law in India, further validate the prevalence of this disturbing trend that is set to leave profoundly negative implications on the role of intermediaries in the context of freedom of expression and opinion on the Internet.

96 "Google and Facebook block content in India after court warns of crackdown", The Guardian, 6 February 2012, <http://www.guardian.co.uk/world/2012/feb/06/google-facebook-india>

97 *Google* India was dropped from both cases, but charges against its US parent company *Google Inc.* remain in both civil and criminal cases at the time of writing.

98 *Google* Transparency Report, Removal Requests, <http://www.google.com/transparencyreport/governmentrequests/IN/>

## Chapter 5

### Violations by Non-State Actors

Another major setback to freedom of expression on the Internet and social media are violations by non-state actors. Increasingly, non-state actors are using the Internet and social media to impose certain cultural norms, and even attack those who do not conform to these, including through physical violence, harassment and intimidation. In some cases, governments employ non-state actors to vilify and discredit critics and dissidents, such as the case of the usually pro-government “cyber troopers” in Malaysia. Other forms of cyber attacks include hacking into websites and online accounts of critics and dissidents, as well as distributed denial of service (DDoS) attacks. In addition, legal actions taken by non-state actors, in particular business entities, against human rights defenders, bloggers and activists who expose human rights abuses also impact negatively on the right to free speech on the Internet and social media, particularly in the context of exposing human rights violations using online platforms.

#### 5.1 Cyber Attacks by Non-State Actors

In **Malaysia**, “cyber troopers” refer to bloggers who are employed by the government, or the ruling political party, to use online means and the social media to attack and discredit critics of the government. One instance of the link between “cyber troopers” and the ruling political party is the establishment of a “Cyber

trooper” unit by the youth wing of the ruling-United National Malays Organisation (UMNO) in 2008. Then-leader of the youth movement, who at the time was also the Minister of Education and currently the Minister of Home Affairs, Hishammuddin Hussein said that the “cyber trooper” unit is set up to unite all bloggers engaged in the “cyber war” against allegations towards the government in various websites, online forums and chatrooms.<sup>99</sup>

An example of the role of the pro-government “cyber troopers” is in the attacks against BERSIH 2.0, a civil society coalition campaigning for electoral reforms in Malaysia, which held massive street rallies in 2011 and 2012. In the run-up to the rallies in both 2011 and 2012, leaders of the coalition became targets of numerous threats and accusations to discredit the BERSIH 2.0 movement. Among others, the “cyber troopers” made accusations that the leader of the coalition, Ambiga Sreenevasan, was a foreign agent who was trying to destabilise and overthrow the Malaysian government through street protests.<sup>100</sup> Another example is the case of Sisters in Islam (SIS), a Malaysian NGO that works on protecting and promoting the rights of women in Islam. Because of the nature of its work, SIS has often been the target of “cyber troopers”, including through blogs that call them deviant and accuse them of misleading the Muslims in the country. These attacks also occur on *Twitter* accounts, *Facebook* pages and other forms of social media and online platforms.<sup>101</sup>

The role of “cyber troopers” and its links to the ruling political party in Malaysia is somewhat similar to the role of students who were reportedly hired by Nanjing University officials in 2005 to “[counter] undesirable information [...] with comments friendly to the Communist Party”.<sup>102</sup>

99 Official website of the Youth Wing of the United Malays National Organisation, “Cyber Troopers’ Pemuda : Unit Tempur Pembongkaran Pembangkang Di Alam Siber” [Youth ‘Cyber Troopers’: Unit to battle opposition’s lies in cyber space], <http://www.pemudaumno.org.my/modules.php?name=News&file=article&sid=2305>

100 See, for example, Tan, N. (2011) “Bersih Part 1: A government gripped by paranoia?” *Malaysian Insider*, 22 June, <http://www.themalaysianinsider.com/opinion/article/bersih-part-1-a-government-gripped-by-paranoia/>

101 See discussions on this in the summary of proceedings of the Regional Symposium on Social Media, Freedom of Expression and Incitement to Hatred in Asia, 14-15 January 2012, Singapore, particularly in Session 3. The summary is available in the Annex of this publication.

102 “Malaysia’s anti-opposition blogs”, *Asia Sentinel*, 7 February 2012, [http://www.asiasentinel.com/index.php?option=com\\_content&task=view&id=4209&Itemid=164](http://www.asiasentinel.com/index.php?option=com_content&task=view&id=4209&Itemid=164)

Another type of cyber attack comes in the form of **DDoS (distributed denial-of-service) attacks**. In **Malaysia**, for example, the online news website *Malaysiakini*, has been a victim of such attacks on numerous occasions, particularly during key political events, such as elections and mass demonstrations. In 2011, *Malaysiakini* was attacked several times – most notably during the state-level election in the East Malaysian state of Sarawak in April and the BERSIH 2.0 rally, a mass-scale street protest calling for free and fair elections in the country, in July 2011. Meanwhile in 2012, *Malaysiakini* once again came under DDoS attack thus becoming inaccessible during the BERSIH 3.0 rally, a follow-up protest to the previous year's, on 28 April 2012. In the run up to the BERSIH 3.0 rally, the website of the rally's organiser also came under DDoS attack.

In **Vietnam**, DDoS attacks are a commonplace, affecting mainly anti-government websites. These include the DCV Online, *bauxitevietnam.info*, *Doi Thoai*, *danluan.org*, *danchimviet.info*, and *danfambao.com*. Because of the anti-government nature of most website targeted, critics believe that the Vietnamese government is responsible for orchestrating these attacks.<sup>103</sup>

In **Burma**, DDoS attacks on the country's Internet network during the 2010 elections resulted in a severe slowdown in Internet connections, which made it difficult for news reporting and transmission of information from the country. In addition, exiled Burmese media organisations, such as the *Democratic Voice of Burma (DVB)* and *Irrawaddy*, were also targets of such cyber attacks. The government apparently blamed hackers for launching the attacks thus resulting in the Internet slowdown, but Reporters Without Borders has alleged that most attacks were orchestrated by the government to justify the cutting off of Internet connections in the country.<sup>104</sup>

103 Reporters Without Borders (2011) "Internet Enemies 2011", Internet Enemies: Vietnam, <http://en.rsf.org/vietnam-vietnam-11-03-2011,39763.html>

104 Ibid. Internet Enemies: Burma: <http://en.rsf.org/burma-burma-11-03-2011,39754.html>

In Sri Lanka, Tamil news website *TamilNet* was reportedly disrupted by a DDoS attack, which coincided with the 19th Session of the UN Human Rights Council that was to debate on a resolution on Sri Lanka regarding the reconciliation and accountability for the atrocities committed during the final stages of the conflict in the country. *TamilNet* had also apparently been previously targeted for similar attacks.<sup>105</sup> In 2007, then-Sri Lankan Media Minister and military spokesman Keheliya Rambukwella had previously reportedly said that the then-government was “looking for hackers to disable the *TamilNet* but could not find anyone yet.”<sup>106</sup>

However, it must also be noted that DDoS attacks occur not only on websites critical of governments. In August 2011 the Sri Lankan branch of Anonymous “hactivist” group claimed to have hacked into the DNS servers of *Symantec*, *Facebook*, *Apple*, *Microsoft* and various other international organisations.<sup>107</sup> Nevertheless, as the UN Special Rapporteur on the right to freedom of opinion and expression has noted, it is difficult to ascertain the origin of such attacks, as well as the identity of the perpetrator.<sup>108</sup> Notwithstanding the origin of the attacks, activists and observers have condemned such actions as posing a threat to freedom of expression online. This was clearly articulated by the Centre for Policy Alternatives:

“[T]he activities of such groups present a clear threat to the freedom expression, particularly if they target social media websites and communication tools such as Skype that have assisted in strengthening the freedom of expression, and opposition to authoritarian politics in the country. It also presents the government with an added reason to build-up more sophisticated surveillance systems in order to monitor web activity and strengthen security systems, which might have an adverse impact if manipulated in order to suppress dissent in the country.”<sup>109</sup>

105 “DDoS attack disrupts TamilNet web traffic”, *TamilNet*, 27 February 2012, <http://www.tamilnet.com/art.html?catid=13&artid=34927>

106 “Tamilnet blocked in Sri Lanka”, *BBC Sinhala*, 20 June 2007, [http://www.bbc.co.uk/sinhala/news/story/2007/06/070620\\_tamilnet.shtml](http://www.bbc.co.uk/sinhala/news/story/2007/06/070620_tamilnet.shtml)

107 Centre for Policy Alternatives (2011) op. cit. (p. 42).

108 Report of the Special Rapporteur, op. cit. (p. 21, para 81).

109 Centre for Policy Alternatives (2011) op. cit. (p. 42).

## 5.2 Harassment and Physical Assault on Individuals by Non-State Actors

In **Thailand**, non-state actors harassed and physically assaulted **Abhinya Sawatvarakorn**, formerly known as Natthakan Sakundarachart, a student at the Faculty of Social Administration of Thammasat University, who in January 2010, created a private *Facebook* account under her full name in order to post socio-political news of Thailand. She was soon accused of posting messages that allegedly insult the monarchy on her *Facebook* page, and was subsequently vilified by the *Manager* newspaper in Thailand, which published her full name, photographs and other personal information to the public. As an apparent result, she repeatedly failed to obtain a place in several universities despite passing their entrance examinations. At Kasetsart University, one of the universities she applied to, dozens of protestors demonstrated against her on the day she was to be interviewed, resulting in her decision not to attend the interview despite having passed the entrance examinations there. Abhinya finally gained admission to the Faculty of Social Administration at Thammasat University. However, she has been verbally and physically abused numerous times at the university, including having a shoe thrown at her. The attacks and harassment forced Abhinya to change her name in June 2010.

Meanwhile in **Indonesia**, **Alexander Aan**, a civil servant who had declared himself an atheist on *Facebook* was attacked by the religious mob because he declared himself an atheist on *Facebook*. There were also calls by extremist groups for Aan to be beheaded.<sup>110</sup>

110 See Chapter 3 of this publication for a more detailed discussion on the case of Aan in Indonesia.

### 5.3 Defamation Suits against Human Rights Defenders and Online Whistleblowers

Cases of defamation filed against human rights defenders who expose violations and abuses of rights by non-state actors, such as corporations, also pose serious threats to freedom of expression online, especially in cases where the Internet and social media provide otherwise unavailable means of revealing violations and abuses to the public.

In February 2011, the Malaysian subsidiary of Japanese machine components maker **Asahi Kosei (M) Sdn. Bhd.** in February 2011 filed a defamation suit against Malaysian human rights defender **Charles Hector**, who had alleged on his blog that 31 Burmese workers at the company's factory had experienced unlawful salary deductions and were threatened with deportation. On 25 August 2011, a settlement was reached between Charles Hector and Asahi Kosei, on the condition that Hector publishes a half-page apology to Asahi Kosei national dailies *The Star* and *Nanyang Daily*. This suit has been condemned by various human rights defenders and organisations, who view the legal action against Hector as a threat to free speech in Malaysia, which could further inhibit human rights defenders, organisations and whistle blowers from reporting and exposing such violations and abuses committed by business entities.<sup>111</sup>

### 5.4 Summary

Non-state actors have also played negative roles in undermining the right to freedom of expression and opinion on the Internet. These violations range from cyber attacks to physical violence, harassment and intimidation. While in some cases, the involvement of governments in violations committed by non-state actors are discernible (for example, the employment of "cyber troopers" to discredit government critics in Malaysia), in

<sup>111</sup> For example, FORUM-ASIA (2011) "Stop legal action against Malaysian human rights defender for highlighting rights of migrant workers", Press release, 24 May, <http://www.forum-asia.org/?p=6944>

other cases (such as DDoS attacks), it is technically difficult to determine the origin of attacks and the identity of the perpetrator. Notwithstanding this, as stressed by the UN Special Rapporteur on the right to freedom of opinion and expression, governments have the obligation to protect individuals against interference and violations by third parties that undermines the right to freedom of opinion and expression.<sup>112</sup>

<sup>112</sup> Report of the Special Rapporteur, *op. cit.* (p. 21, para 81).

## Chapter 6 Conclusions

While the dramatic increase in Internet accessibility and the use of social media have created an unprecedented space for free speech and opinions, many governments in Asia have responded to this by heightening efforts to restrict the Internet and the use of social media. As noted by the UN Special Rapporteur on the right to freedom of opinion and expression in his March 2011 report to the UN Human Rights Council (A/HRC/17/27), an emerging trend in relation to governments' responses to the growth of Internet and social media is the practice of censorship that is timed to prevent the access or dissemination of information during key political events, such as elections and social unrest.<sup>113</sup> This is indeed apparent in Asia. For instance, in Sri Lanka, several websites were blocked on the eve of the presidential election in 2010; while in Malaysia, severe disruptions of cellular communications were reported during a mass-scale rally demanding for free and fair elections in April 2012, although the Malaysian government of Malaysia has denied responsibility.

Furthermore, many Asian countries are increasingly employing sophisticated measures to restrict free speech and opinions, including through mechanisms to filter out contents that are related to subjects deemed "sensitive" to regime stability. Largely due to the increasingly apparent evidence of the effectiveness of the Internet and social media in mobilising

<sup>113</sup> Report of the Special Rapporteur, *op. cit.* (pp. 9-10, para 30).

dissent and popular movements critical of governments, many Asian countries have used various means to varying degrees in their efforts to contain the effects and possibilities of the use of social media and the Internet for anti-government mobilisation or discussions that are critical of the government.

While international human rights laws provide for certain restrictions, including censorship, to be made on narrow grounds such as to safeguard national security, to ensure public order, and to protect the rights of others (ICCPR, Article 19(3)), any measure of restriction has to comply with the principles of necessity and proportionality. However, because most Asian governments' restrictions on the Internet are done in a non-transparency manner, it is extremely difficult to determine whether restrictive measures are indeed to serve certain legitimate aims allowed under international human rights laws. This concern may partly be addressed by ensuring that all decisions on restrictions of speech are made only by an independent judicial body. Currently, the regulation of the Internet in many Asian countries is largely either left to the discretionary powers of governments (sometimes through specialised regulating agencies operating directly under certain government ministries), or quasi-government entities that are made up of officials directly appointed by governments.

In addition to measures of censoring, blocking and filtering out online contents, many governments have also resorted to criminalising free speech on the Internet and social media with the use of existing domestic criminal laws. Many of these laws, invoked on the basis of "national security" and defamation of others' reputation – common justifications for many governments – are largely objectionable, especially in countries where these offences are vaguely defined. The case of Vietnam is an instance of this, where the Vietnamese Penal Code contains numerous provisions that provide for harsh penalties for offences relating

to “national security”, which have regularly been used against bloggers who are critical of the Vietnamese regime. Besides the Vietnamese Penal Code, national legislations in other Asian countries, such as Thailand’s Computer Crime Act and Article 112 of the Thai Criminal Code provide striking examples of this. Most of these legislations also impose disproportionately harsh penalties in contravention of international human rights laws, which stipulate that measures to limit freedom of speech must be the least restrictive option.

Another worrying development is the increasing pressure by governments towards intermediaries to regulate contents on websites. Individuals, such as webmasters, are being held liable for contents produced by other Internet users, as was clearly demonstrated in the case of the Thai webmaster Chiranuch Premchaiporn, who faced a possible jail term of 20 years for failing to promptly remove comments that were deemed to be defamatory towards the Thai monarchy – despite the fact that she did not write any of them herself. Other intermediaries, such as big corporations, are not spared either. In India, for example, a criminal case was filed against ISPs, including corporate giants such as *Google* and *Facebook*, for allegedly failing to protect sensitivities of India, prompting several websites to remove certain contents.

Finally, the right to freedom of speech and opinion on the Internet in many Asian countries have also been frequently violated by other non-state actors. These include the role of “cyber troopers” in discrediting critics of the government, physical threats and intimidation, especially against those who do not conform to dominant cultural norms, as well as other forms of cyber attacks, such as DDoS, which undermines the right to impart and access information freely.

**To address these concerns, various measures need to be taken by a range of relevant stakeholders. A list of specific and general recommendations is presented in the executive summary of this publication (pages 8-13).**

**Annex -  
Summary of Proceedings:  
Regional Symposium on Social Media, Freedom of Expression and  
Incitement to Hatred in Asia - 14-15 January 2012 Singapore**

**Session 1  
Keynote Speech**

**International Principles and Jurisprudence: Balancing the  
Protection of Freedom of Expression and Prevention Incitement  
to Hatred in Social Media**

*Mr. Frank La Rue, UN Special Rapporteur on the Promotion and  
Protection of the Right to Freedom of Opinion and Expression*

Mr. Frank La Rue began his speech by stressing the importance of freedom of expression. While all human rights are equal, some rights facilitate others. This does not make them more or less important, but rather gives them practical value and makes them different from other rights. Freedom of expression is one of those, and therefore holds a special place in building democracy and in defending human rights as a whole.

La Rue shared his own experience in his native Guatemala, where he was a labour lawyer and had to go into exile to the US because of his work with the labour movement and the Catholic Church and the grassroots communities. It was only after ten years that he was finally able to return to Guatemala. All this gave him a unique perspective on societies ruled by authoritarian governments. He notes that he plans to make use of and build on this perspective in his current mandate as a UN

Special Rapporteur. He also plans to do this by travelling around the world to look at the realities of different regions, countries, and societies around the world, and ensure that the debates in Geneva reflect these realities on the ground. "Let's break the four walls of the Palais de Nations of the United Nations and go out and listen," said La Rue. This, according to him, was the purpose of the consultations that he has undertaken, including this current symposium.

La Rue stressed his firm belief in universal human rights standards, and does not believe in cultural relativism. He made this point by sharing with the participants a debate he previously had with senators in Thailand, where he was criticised by the Thai officials for purportedly being ignorant of the traditions and values of Thailand when speaking about human rights in Thailand. In response, La Rue pointed out the Thai officials' misconception of human rights, and explained that human rights are a result of an international consensus of all nations in the world to establish minimum standards for the respect for human dignity and for the rights of every single individual around the globe. It has to be stressed that it is a minimum, rather than a maximum, standard – and is therefore not an imposition. Every culture should have respect for human dignity, and every single person has exactly the same dignity and should enjoy the same rights.

La Rue said that his report to the 20th Session of the UN Human Rights Council will focus on the Internet, and it had already been decided even before the recent political developments in the Middle East, and even before *Wikileaks* became widely known. The Internet has become the most important venue of communication of the 21st century, including for the purpose of defending freedom of expression, citizen participation, democracy and respect for all the other rights. This approach to the Internet was well received in the Internet Governance

Forum. It is in this context that he decided to hold a series of regional consultations.

He stressed that while the reality of the Internet, from a technical perspective, may be the same around the world, the way it is being used and the problems that people face in using the Internet, are different. Freedom of expression and human rights are the same around the world, but the struggles of people for these rights are different and it is important that a Special Rapporteur reflects that.

La Rue also referred to the statement by the UN High Commissioner for Human Rights, Ms. Navanethem Pillay, on the international day of human rights in 2011, which highlighted social media as the topic of focus for this year's (2012) human rights day.

La Rue proposed that this regional symposium's discussion should move from the more technical aspects of the Internet and how it enhances the freedom of expression to how it is being used socially to develop new forms of communications. He suggested that discussions on social media should not only be limited to the Internet (*Facebook* or *Twitter* or all the other uses of web pages) and the telephone messaging, but should also include community communications and community media (community radios, community television, community broadcasting, and community journalism generally). He noted that social media are alternative forms of communication that derive from the community itself and from those who are interested (in contrast with traditional and professional media).

La Rue also stressed that new technologies need to be looked at in terms of how they can be used socially. Taking the recent developments in the Arab world, La Rue is of the opinion that there was no "Internet revolution", as many would believe.

According to him, the Internet does not provide a revolution to any people. It was instead the people of Egypt, Tunisia, and Syria respectively who made the revolution happen. They, however, did use the Internet as the main mechanism of communication to exercise the right to association and freedom of assembly. This is where, according to La Rue, the Internet becomes an appropriate medium to exercise rights. Notwithstanding this, La Rue stressed that the Internet should not be expected to solve all problems. The fact that there is the Internet does not mean that authoritarian governments will fall. The struggle for rights has to come from the people.

The other issue stressed by La Rue is the un-renounceable nature of human rights: No one can say, "I don't want human rights; I don't want to be respected". Human rights relate to the human dignity and not to an individual will. However, human rights are also respected to the extent that the population organises and defends them. Human rights are part of international law, and thus states should comply with it because they voluntarily took the obligation by signing and ratifying conventions. However, this only happens when the population demands for their compliance. This is where, according to him, social media plays a crucial role.

La Rue also opined that comparing human rights between countries is a very bad exercise. Instead, every country has to be compared to itself: have human rights in a particular country improved or deteriorated? Nevertheless, he stressed that it is very useful to share and discuss good and bad practices around the world.

Several major problems and challenges to freedom of expression in relation to the Internet and social media were identified by La Rue. Most of these problems derive from the fear that the Internet is provoking governments, politicians, political parties and parliaments.

The first is the criminalisation of expression or defamation. Defamation has been in the criminal law for a long time. According to La Rue, there is a rise in the use of defamation because politicians feel threatened by the criticisms. Before the advent of the Internet, if criticisms were made in the newspapers, the effects of the criticisms will be known based on the newspaper's circulation. However, when criticisms are made on the Internet, it can never be known for sure as to how far that opinion circulates and the effects it will have. This was the case in Tunisia, when a brave young man took his life as a sign of protest, and this subsequently created a revolution in his country. So effectively, politicians are scared of the Internet. Prior to this, the exercise of power was done very much under the veil of secrecy: governments could choose the information they wish to reveal. Many governments still insist that the national budget is a national secret or a national security issue. La Rue pointed out that the Internet, however, is forcing transparency. It allows people to speak up, and provides people with access to information. Because of this, according to La Rue, many governments react by criminalising these expressions through defamation laws.

The second problem is the fear of the press, because all press now uses new technologies. All the major newspapers can be seen online today – for example, *Washington Post*, *BBC* and *Bangkok Post* all have their online versions. La Rue also shared that he speaks regularly in a weekly radio program in Guatemala, which is also aired online as well as on the radio stations. Thus, this fear has been transported into the persecution of journalists. La Rue observes a rise in violence against journalists, which is another concern highlighted in his report this year.

Social media is creating a new form of journalism, but at the same time it creates new threats for journalists, whether they are traditional journalists or citizen journalists. Citizens do

indeed play a role in journalism in key moments. For instance, information on the earthquakes in Haiti and in Japan was disseminated quickly because there were bloggers who took photographs of these events. That is the role of journalists, and it is important to protect these individuals. Bloggers were also instrumental in denouncing the electoral fraud in Iran. Thus, the protection of journalists is an important aspect in any discussions on social media.

The third problem is the growth of monopolies and conglomerates. While commercial radios, television, newspapers have historically played a role in the struggle for human rights and democratisation, the concentration of control and ownership over media organisations is a challenge to freedom of expression.

Finally, the mechanism of censorship of the Internet varies from country to country. In some countries, access is limited, while in other countries contents for viewing are limited even if there is Internet access. For instance, China has the biggest number of Internet users in the world, with 450 million people and growing. However in India, a technological superpower, only 7-10 percent of the population are connected to the Internet. This, according to La Rue is a serious problem that needs attention.

La Rue believes that the Internet, as many other things, is often misused even in the developed world. There should certainly be limitations and a rationalisation of the use. However, the determination of limitations should not fall under the state except under the more extreme circumstances, for example hate speech.

According to La Rue, every government has the responsibility to protect their people from terrorism.<sup>1</sup> While combating terrorism is legitimate, La Rue stressed that it has to be done within the boundaries of human rights laws and standards. In this regard, any expression that incites terrorism has to be blocked and can

<sup>1</sup> La Rue follows the definition of terrorism accepted in international human rights laws, as acts of violence that provoke the suffering and the harm to innocent unknown civilians.

be prosecuted, whether in the written press, on the radio or on the Internet. He cited the example of the Mille Collines radio in Rwanda, whose incitement of racial hatred was not stopped or prevented, and subsequently led to the occurrence of genocide.

La Rue pointed out several examples of prohibitions in existing international human rights instruments. Child pornography is prohibited in the Optional Protocol of the Rights of the Child, while the Convention on the Prevention of Genocide prohibits any incitement of genocide and racial hatred. And while the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) does not explicitly place prohibitions because CEDAW only makes recommendations, it does deal with language that provokes discrimination against women. Article 4 of the Convention on the Prevention of Racial Discrimination (CERD) prohibits any race to be declared superior to others and any form of discrimination on the basis of race. Hence, international human rights law indeed place various prohibitions.

However, La Rue stressed that governments cannot be allowed to decide on what people can say because that will result in censorship and be used politically. Hence, prohibitions are only limited to extreme cases, especially those related to article 20 of the International Covenant on Civil and Political Rights (ICCPR), namely hate speech, incitement of hatred, hostility and violence on the basis of race, nationality or religion.

## Session 2

### Case Studies: Emerging Trends of Social Media in Asia and the Exercising of the Right to Freedom of Expression

#### The Case of Thailand

*(Name withheld upon request), IT advocate*

The speaker noted the digital divide in Thailand: in Bangkok, free wi-fi and high-speed Internet access are available, with many Internet service providers; but in rural areas, Internet access is very limited. The speaker also noted that Thailand is currently facing a very challenging time in relation to the use of new media, including its use to obtain news, especially after the violent crackdown on anti-government protests in Bangkok in 2009.

The speaker also noted that live streaming is generally difficult to access in Thailand at the moment, except through big providers and for those who can afford to pay for the access. However, community radio, local cable TV, and satellite TV are important forms of media in rural areas, where high-speed Internet access is generally still unaffordable.

The speaker also pointed out that access to the Internet through mobile devices has generally increased because it is relatively cheap, and because the poor land line makes it impossible to get good high speed Internet in rural areas. However, only 23 percent of the population in Thailand gets access to the Internet, which is poor in comparison to neighbouring countries like Malaysia, for example.

Statistics show a high number of *Facebook* and *Twitter* users in Thailand. This may be because these media can quite easily be accessed through mobile devices. The speaker pointed that that *Twitter* was actually relatively unpopular in Thailand until **Thaksin**

**Shinawatra** (Prime Minister of Thailand 2001-2006) started using it, and many people started following him. Meanwhile, users of *Facebook* are generally aged below 40.

The speaker also spoke about the issue of censorship and crackdown on freedom of expression in social media, with particular reference to the Computer Crime Act (CCA). According to the speaker, it was only after five years of being in force that the CCA was clearly abused. The speaker noted that each government department now uses the CCA for its own purpose. In the first year of the CCA's existence (2007), there were only nine cases. Now, in 2012, it has jumped up to 76. The speaker noted that there are a number of URLs that are "legally" blocked using court orders. But there are also URLs that are shut down "illegally", through orders from some officials for an Internet Service Provider (ISP) to shut down certain websites without a court order.

Finally the speaker noted that the number cases of restrictions to the Internet have increased after the crackdown on the (anti-government) red shirt rallies in 2009. The government closed down all forms of information sources, especially those that provide information on where and when there is a rally.

## **The Case of China**

### ***Mr. Michael Anti, Journalist and political blogger***

Mr. Michael Anti noted that almost all social media portal and websites, including *Twitter*, *Facebook* and *YouTube*, are totally blocked inside China. *Twitter* is blocked inside China while *Google* and *Gmail* are partially blocked. In 2010, *Google* pulled out from China. Anti noted that it is very dangerous to use social media, citing an example of someone who was detained for one year in a labour camp merely for tweeting a joke. In another case, someone who merely re-tweeted the call for "Jasmine

Revolution” was detained during the crackdown in 2011. More than 200 people were detained during and after the Arab Spring because the authorities were scared that a similar revolution will happen inside China.

Anti noted the important role that *Twitter* has played in the civil society movement inside China. Because *Twitter* has a word limitation of 140 characters, one English-language tweet, for example, is usually only about one sentence in length. However, in comparison, 140 characters in the Chinese language may be as long as a paragraph. This is one of the reasons social media including *Twitter* immediately became a tool for citizen journalism as soon as it appeared in China.

Finally he stressed that the international influence of China is like cancer of the Internet. China, being one of the five permanent members of the United Nations Security Council, has the veto power at the Council. As such, if Internet governance is based on the UN system, it will not work as China and Russia would probably veto everything in relation to freedom of expression on the Internet.

### **The Case of Sri Lanka**

#### ***Mr. Nigel Nugawela, Centre for Policy Alternatives (CPA)***

Mr. Nigel Nugawela discussed the problems faced by journalists during the conflict in Sri Lanka. The Committee to Protect Journalists (CPJ) found that 19 journalists have been killed since 1992. According to Nugawela, that figure is much higher if the amount of abductions and missing persons reported within the mainstream media are also taken into account.

Nugawela stressed that social media must be used as a multi-faceted tool that obtains strengths and benefits from mainstream media. There has to be an eventual merger between the two, which is slowly happening, but not to an extent that is desirable,

according to Nugawela. Social media also has to facilitate political organisations. Currently, the left movement in Sri Lanka is quite enamoured with what happened in the Middle East, particularly with Egypt. The problem, Nugawela noted, is that these ideas are not properly communicated to the wider population in Sri Lanka.

Nugawela also noted that the obstacles to the growing use of social media in Sri Lanka include the issue of access: quality of service, the cost of access and the low level of broadband penetration. Thus, mobile telephone is a very important medium of communication in Sri Lanka, reaching about 85 percent of the population. The challenge thus is about increasing the access to social media on mobile phone devices.

Some information is nevertheless exchanged on platforms such as *Twitter*, *Facebook*, and blogs: articles on political socio-economic issues are discussed and hundreds of *Facebook* pages have been set up for specific political causes. While these are not very comprehensive or substantive in terms of achieving long-term goals, there still is value because they strengthen awareness.

Nugawela provided an example of the use of mobile phones as an important medium of information: This was from his experience working on trying to obtain information on the situation inside Menik Farm, an internment camp for internally-displaced persons (IDPs) that was set up as soon as the war ended in May 2009. In September 2009, during the monsoon season, 300,000 civilians were interned inside flooded camps in Menik Farm, living in tents and neck-deep in water. The story was not getting out even though updates on the situation were provided by humanitarian workers who were working in these camps. One individual managed to enter the camp with his mobile phone and took several pictures, which Nugawela's

group promptly published on its site. Nugawela noted that this was the only instance where his group was able to get contents out of Menik Farm out, while the mainstream media did not cover this story.

He also spoke about efforts in providing information on the floods that happened in Sri Lanka in January and February 2010. Nugawela shared that they had managed to set up a *Google map* pinpointing the main areas of floods in Sri Lanka, and detailed where the rescue operations were happening, where there were landslides, where people were stranded – all based on information that they had received from citizens in the area.

Nugawela further stressed the importance of engaging the periphery, something that they have been able to achieve with the citizen's media initiative. Noting that Sri Lanka has a rural population of 84 percent, the citizen's media initiative involved people from the provinces by getting them to write. He also highlighted the increased engagement of human rights activists and public policy institutions and journalists from the mainstream media with social media in 2011.

He noted that decision making in Sri Lanka is excessively centralised, and most of the restrictions on online contents are completely arbitrary. Throughout 2010 and 2011 there have been blocking of numerous websites, and in November 2011, the Media Ministry issued a statement to the media department, requesting all new sites in Sri Lanka to register with them, failing which they will be blocked. This, noted Nugawela, was not based on legislation.

Finally, Nugawella expressed concern over the politicisation of the judiciary in Sri Lanka, which has prevented civil society and Internet freedom advocates from putting forward a case to the courts on the basis of fundamental rights for fear of setting a regressive precedent.

### Session 3

## **Challenges of racial and religious fundamentalism in Asia: Balancing the Protection of Freedom of Expression and the Prevention of Incitement to Hatred**

*Mr. Shahzad Ahmad, Bytes for All, Pakistan*

Mr. Shahzad Ahmad expressed optimism about the growth of social media in Pakistan, which has provided a forum where Pakistanis can express their opinion in a non-violent manner. Social web-forums have also been compelling forms of communication in disaster relief management, for example, in the previous year's floods. Of course, civil society and human rights groups also benefit from these forums in their lobbying and advocacy.

However, Shahzad stressed that there continues to be widespread censorship in Pakistan. Firstly, by law, it is illegal to make remarks that are an insult to the "glory of Islam", or that could compromise the "security and defence" of Pakistan (see Article 295(a)-(c) of Pakistan's Criminal Code). Secondly, the Telecommunications Authority (PTA) has been increasingly blocking websites with political and blasphemous content, and recently started to also target pornographic websites. Shahzad is of opinion that such widespread censorship can strongly compromise the entire Internet sphere. On a more positive note, Shahzad explained that Pakistan censorship policies have not trampled LGBTs. On the contrary, they are being encouraged – through court verdicts – to be more active in the social media sphere.

The Internet can also have far-reaching negative effects when it concerns hate speech. Shahzad cited the example of Pastor Terry Jones in the US, who publicly burnt the Koran in the midst of a controversy over plans to develop an Islamic centre near

the site of the September 2001 terrorist attacks in Manhattan in March 2011. The word spread quickly, and shortly after, demonstrations by Muslim communities across the world ensued. Protests took a particularly heightened turn in Pakistan and Afghanistan, which in turn caused cross-firing between world leaders at the United Nations.

There has also been a rise in hate speech, making religious minorities in Pakistan especially vulnerable. Unfortunately, the Internet and social media have been used as a tool for hate speech. Such was the case of TV anchor Amir Liaqat, following which his spread of propaganda against the Ahmadi people resulted with major riots and some fatalities. Zaid Hameed, a right-wing supporter who has been very outspoken about conquering Bangalore, has also spoken ill-words on Pakistani minorities. All this would not have had the same affect without the Internet. Firstly, information, whether bad or good, is disseminated through the Internet at a pace like never before. Secondly, it is a difficult to police speeches on the Internet, and even if some eventually get reprimanded, it usually comes too late.

However, he expressed the idea that Internet bans are not ideal as they prevent people from becoming responsible for their own speeches and actions. Shahzad noted that his organisation, Bytes for All, believes that the impact of hate speech can be only gradually minimised through intensive carefully designed education and awareness programmes.

***Ms. Marina Mahathir, Board of Directors, Sisters in Islam, Malaysia***

Ms. Marina Mahathir set the scene by introducing Sisters in Islam (SIS). Established in 1990, SIS has been working to expand the space for public discourse not only on Islamic issues but also in the wider context of democracy and nation building in

Malaysia. She went on to explain that Malaysia, as a federation, is governed by the Federal Constitution which declares Islam as the official religion, but gives freedoms to other religions to practice. The Constitution also declares the country to be majority Malay – and “a Malay” as being someone who (a) speaks Malay, (b) follows Malay customs, and (c) adheres to Islam. In recent years, the politicisation of race and religion has been on the rise, particularly since 2008 when the *Barisan Nasional*, BN (the ruling coalition) lost its two-thirds parliamentary majority in the last elections. Many leaders have responded to this loss by claiming that the ethnic Malays are now under threat because the largest party in the ruling coalition, the United Malays National Organisation, is also a race-based Malay party. In this same context, there has been an increase in so-called “Malay supremacy NGOs”, promoting the rights of the ethnic Malays.

She then explained that Malaysia has several laws that restrict freedom of speech, including: the Sedition Act; the Internal Security Act (which has recently been repealed); the Printing Presses and Publications Act, which restricts freedom of the press; and the Universities and University and Colleges Act, which prevents university student from taking part in politics.

She then talked about the many attempts to intimidate her organisation, SIS, over the years, and this was highlighted in three main cases:

1. The banning of their publication entitled, “*Muslim Women and the Challenges of Islam Extremism*” in July 2008. After having had the book on bookshelves for two years, SIS was told that it was prohibited on the basis that it was allegedly threatening public order. SIS was not informed with an official letter from the government, but instead learnt about the ban two weeks after a notification was sent to the media by the Ministry of Home Affairs alleging that the content of

the book tarnished the purity of Islam, could affect one's Aqidah (faith), and was contrary to the Ahlisunnah wal Jamaah (doctrine) and Fatwa (opinion). Her organisation appealed to the Religious Text Control Division under the Ministry of Home Affairs, but it was rejected. Among the reasons given was that the book would act to incline Muslim women to interpret statements of Islam according to the opinion of the authors.

2. Following this, SIS presented 1,000 postcards to the Home Ministry opposing the book banning, and in December 2008 they applied for judicial review in the High Court, which was granted in August 2009. All this time, the book could not be sold anywhere. The judge viewed that they had an arguable case and the issues raised were considered very important as they related to the equality of freedom of speech and freedom of religion, the state jurisdiction and international obligations of Malaysia. A senior member of the Federal counsel argued that the book needed to be banned because it was prejudicial to public order. At first the Court hesitated to overrule that opinion, but eventually quashed the ban in January 2011. The Court judged the book not a threat to public order as (i) it had already been publicly available for two years had had not caused any palpable disorder, and (ii) it was academic in nature.
3. A young woman named Kartika was found drinking alcohol in public space and was sentenced to six cane lashes and a fine of MYR5,000. After issuing a statement, filing an application to the Court for revision of the judgement and holding a press conference – on the basis that under the Federal Constitutional Law that no woman should not be subjected to corporal punishment – 50 Islamist NGOs filed a police report against SIS, accusing them of insulting the Sharia court system, the king and the constitution. This was

followed by 60 more police reports demanding an apology and withdrawal of the court application. An opposition Member of Parliament even called on the National Fatwa Council to investigate the organisation and other NGOs that had criticised the caning sentence. What alarmed the organisation the most was the attention received from the Hizbul Tahrir group, which is banned in many countries due to their tendency to use violent means to advocate for an Islamic state, but remains legal in Malaysia. Hizbul Tahrir made banners and accused SIS of being western agents. The police even called SIS in for questioning. In March 2011, another NGO which calls itself the Malaysian Association of Mosque Youth, filed a suit in the high court to stop them from using the name "Sisters in Islam" on the basis that what they do is not Islamic. While the court ruled in favour of SIS in this particular case, the organisation still receives many forms of threats and harassment.

All this oppression proves that the popular conservative opinion objects to the idea of women talking about religion. The staff at Sisters in Islam has been accused of not being qualified to talk about religion and have been denigrated for not wearing head-scarves. She also pointed out that many people tend to not tolerate deviation from the mainstream interpretation of the Koran, and this is also reflected in similar intimidation that the small Shi'a communities suffer from the majority Sunni interpretation of Islam.

***Mr. Bonar Tigor Naipospos, Vice-Chairperson, Setara Institute, Indonesia***

Mr. Bonar Tigore Naipospos, began his speech by explaining the recent increasing concerns of using the Internet as a medium of expression by radicals to gather more support. The younger

generation are especially easy to influence and thus most at threat. One of the surveys carried out by the Islamic State University in Jakarta showed more than 40 per cent of the high school students supporting the violence used by the radical group. Another tactic used by radicals for maximum exposure has been to build their own schools. In mid-2011, as a response to complaints from several parties, the Indonesian Ministry of Communication and Information claimed that they had already banned 300 radical sites out of the 900 they are monitoring. This is difficult to verify, and Bonar has already noted that *www.annah.com* – calling for overthrowing the Indonesian Government because it is un-Islamic – remains accessible despite its founder having been sent to jail for acts of terrorism.

It is also difficult to judge whether a website is radical because of difficulties in accessing the content in the first place: most websites now require an access code and use the Arabic language. The content varies from words of intolerance, to hate speech, to more practical instruction of terrorism, such as how to make a bomb using household materials.

Bonar locates the problem in Indonesia as being similar to the problem Frank La Rue also alluded to (“how to define hate speech?”): how to define radicalism? Bonar noted that there is a general consensus on defining terrorism, but radicalism has to be defined more carefully.

In 2008, Indonesia enacted the Information and Electronic Transactions Law. The law covers many aspects of communications, including online contents. Under this law, several people have been arrested and sentenced for information they have shared through the Internet.

In mid-2010, a high school student received a one-and-a-half year sentence for blasphemy against Prophet Muhammad and

Islam through messages written on his blog. The youth was arrested after a radical group from Bekasi, West Java Province, complained to the police. Another instance where the law was applied unfairly was in the case of a famous Indonesian artist sentenced to three years in jail for a sex-tape of him with another celebrity being circulated on the Internet.

Bonar believes Indonesia should set clear limits and boundaries in terms of incitement to hatred, especially when related to radicalism. The international community also needs to be at an agreement on the definition of "radicalism" itself. Failing which, governments will be left to decide on the definition on a subjective basis.

### **Summary of Open Discussion**

During the open discussion, the role of non-state actors, especially in relation to incitement to hatred was discussed. All three panellists noted the significance of the role of government-aligned non-state actors, and the problematic role they play, in the issue of incitement to hatred. An example of how non-state actors actually perpetuate hatred online is the role of "cyber troopers", who are bloggers employed to protect the government (and attack critics) in Malaysia.

The discussion also touched on the issue of education, in which a participant suggested that education should not only be about how people should behave online, but should extend to the culture of freedom of expression. In this context, Marina Mahathir pointed out that offensive speeches can be addressed through self-regulating mechanism that exists in any public space: other people will come in and say "you can't talk like that". In any public space, one cannot simply get say something without being challenged. She also opined that blog owners set the tone for discussions, and this largely determines the

nature of comments that one will receive. Marina shared that her own postings put up on other people's blog sometimes generate very different comments and responses from the one she receives on her own blog. She noted that people on her blog are often quite polite, while comments on her writings that appear on other blogs may not be so. To her, that has to do with the atmosphere that a blog owner generates, whether it encourages harsh language or otherwise. In this regard, she concurred with the point of the need to produce a culture of freedom of expression.

**Session 4:**  
**Intermediary Liability: Promoting Freedom of Expression and Prevention of Hate Speech**

*Mr. Lokman Tsui, Policy Advisor for Google in Asia*

Mr. Lokman Tsui, spoke about the technological advances that have changed the way we live and go about interacting with people. The World Wide Web, in particular, has become core to defining "modernity" as we understand it today. However, because of its digital nature, the Internet is difficult to police, which makes it prone to being used as an instrument of hate speech. The problem lies in finding the right balance between limiting abuse, but still allowing enough freedom to foster innovation and creativity.

In Tsui's opinion, freedom of expression can be defined as two-fold: it is both a right and a responsibility, and the service providers are to a certain extent responsible for any content shared with the rest of the world by means of their platforms. He stressed the difficulty in deciding whether or not to censor. He admitted to having to agree to take down content or even share users' personal data on occasions, but explained that was only done as a last resort. Although in most instances, they will look for caveats in the law to try avoid removing data.

In cases where there is a great breach of the “spirit of the law” and where there is no leeway for debate, *Google* will comply with the removal request. He believes web providers take a moral approach to intermediary responsibility; only grave cases of hate speech should trigger a tertiary responsibility. However, Tsui argues that censorship solely on the basis of the “letter of the law” in itself should not be the cause for tertiary liability. Tsui explained that he logs all the requests received by governments and makes a note of the percentage *Google* complies with, divided into categories.

Lastly, Tsui opined that too much emphasis is placed on regulatory laws these days. More needs to be done to teach web users about the kind of language that could incite someone to hurt another human being. By addressing this imbedded “ignorance”, companies and governments can make a positive difference because they have all the available tools.

***Mr. Jon Ungpakorn, Advisor to Commissioner Supinya of the National Broadcasting and Telecommunications Commission, Thailand***

Mr. Jon Ungpakorn, started his discussion by speaking about the current views of intermediary liability in Thailand. According to Ungpakorn, Thailand’s legal environment is very strict when it comes to information being propagated through Internet service providers. One example of such laws is the 2007 Computer Crimes Act (CCA).

Ungpakorn explained that websites and URLs sometimes have to be blocked under the State of Emergency Act, but most of the time these requests are not backed by official court orders. Such environment is not conducive to websites dedicated to discussions on politics. As a result, webhosts try to play it safe, leading to self-censorship and restrictions on

freedom of expression. The majority of censorship aims to block pornographic sites, although they are unable to block all of them. The other main target groups are sites with content considered disloyal to the monarchy; sometimes critical and sometimes even insulting.

A key case of intermediary liability is the case of *Prachatai's* webmaster, Chiranuch Premchaiporn, who is presently on trial under section 15 of the CCA and facing imprisonment for being too slow to remove comments posted by a blogger deemed to be offensive to the monarchy. In fact, all of the comments were taken down, but because the web board had more than 1,000 postings each day, there was a delay in removing some of them.

Ungpakorn noted that the issue of incitement to hatred in Thai social media is not really confined to ethnic or religious hatred. Traditionally in Thailand, according to Ungpakorn, there has been very little ethnic or religious conflict. However, since the escalation of the violence in the predominantly Muslim southern provinces, there has been incitement to hatred in Thai social media directed against Muslim communities in the southern border provinces. This occurred around 2004 onwards.

More recently, a different type of incitement to hatred has emerged, not based on ethnic or religious grounds, but against people with opposing political beliefs, particularly those in relation to the "red-yellow shirts" conflict, and against people perceived to be disloyal to the monarchy or advocating reform of lèse-majesté law. Ungpakorn noted that he has been accused of being disloyal to the king, and thus has been a target of hate campaigns.

He further noted the hate campaigns against the spoilt rich or the misbehaving rich. This reflects the feeling against the privileged people in Thai society. Ungpakorn shared the case

of the Praewa, a teenage girl from a rich family, who drove a luxurious car without a driver's license and allegedly caused a horrendous accident, claiming the lives of nine people. There is *Facebook* hatred campaign against her, which has over 313,000 members. Ungpakorn opined that it is indeed not a healthy sign in Thai society that there are more than 313,000 people declaring hatred against a young teenage girl, regardless whether her father is rich or not. This, according to Ungpakorn, is a different form of hatred which emerges from social media.

In Thailand's case, Ungpakorn believes that only ethnic and religious hatred could be legislated against, as the constitution bans ethnic and religious discrimination. Other forms of hatred should be countered through public education on media awareness and social sanctions, and self-regulation among Internet service providers.

Finally, Ungapakorn discussed the role of the National Broadcasting and Telecommunication Commission (NBTC) in promoting freedom of expression and combating incitement to hatred. He explained that the NBTC has practically no control over Internet content; it is only responsible for providing licenses to radio and television broadcast. It, however, can set ethical standards as conditions to those licenses, and thus has the power to revoke them in cases of hate speech in the telecommunications industry.

### **Excerpts from Open Discussion**

A question was posed as to whether *Google* analyses the content of the sites before deciding to block them on the basis of a request by the Thai government. In response, Mr. Lokman Tsui affirmed that *Google* does indeed review the requests. *Google*, according to Tsui, takes each request very seriously and uses professional translators to help determine the nature of the content. The main difficulty comes down to threshold: at

what point is something considered hate speech? Thailand is particularly difficult because its legal definitions of hate speech target specific groups. To help guide users, *Google* has drawn clear guidelines on its regulating procedures and standards applied. There is also a procedure in place for discontent web users may appeal *Google*'s decision to censor them. Tsui further explained that *Google* does not only take into consideration its compliance with local laws when deciding whether to censor someone's website, blog, etc., but also considers the general legal and political framework of the country.

Frank La Rue revisited the issue of threshold of hate speech, which differs from one country to another. He cited the US, for example, as having the broadest threshold of expression under the First Amendment. A controversial example of this, according to La Rue, is the US-based racist organisation called Ku Klux Klan, which is considered legal as long as it does not advocate violence. Americans, he noted, define hate speech in its most narrow form: only speech which promotes violence can be considered "hate speech". However, this goes beyond what La Rue considers acceptable: he opines that slurs based on race, religion or nationality, sexual preference or gender, or all of these, cannot be accepted. In La Rue's opinion, the State needs to prohibit those elements reflecting extremist views against other racial groups, such as the Ku Klux Klan. Still, he stressed that one has to remain cautious about not giving the State too much power in defining hate speech. After all, he noted, it is already defined in international human rights instruments. Giving the State leeway to decide would only provide them a bigger platform to protect those in power.

The moderator summed up the discussion by highlighting two themes that have emerged in the discussion in this session: Firstly, the question of how social media should be regulated and to what extent: whether it should be done by law; or by

virtue – education and culture. Secondly, questions relating to standards of freedom of speech, threshold of limitations, and the respective roles of intermediaries and social media users. He pointed out that while international human rights laws and standards such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) serves as our major compass in our discussions, debates around the behaviours of intermediaries and social media users remains as a “battlefield” in relation to freedom of expression and its limits on the Internet. Finally, he stressed the point made by several participants during the discussion – that civil society needs to play a bigger role to ensure the values it promotes.

## **Session 5**

### **Legislations and Governmental Measures in Asia Regulating Freedom of Expression: From Traditional Media to Social Media**

#### **The Experience of South Korea**

*Prof. Kyung-shin Park, Commissioner of the Korean Communication Standards Commission and Professor of School of Law, University of Korea*

Prof. Kyung-Shin Park began his speech by encouraging all participants to push for Frank La Rue’s official country visits to their respective countries. Sharing the experience of Korea, Prof. Park noted that La Rue’s visit to Korea in 2009 has resulted in some important changes in the country.

Prof. Park then proceeded to argue that administrative censorship is indeed a human rights violation. Blocking and filtering by an administrative body, instead of a judicial body, constitutes a restriction on free speech that is not consistent with international standards. He noted that judges around the world

have thus far focused only on prior censorship, which is blocking and filtering before contents are made public. According to Prof. Park, this misled focus is due to the use of term “prior censorship”. However, he also pointed out that in the case of *Bantam Books v. Sullivan*, the US Supreme Court ruled that administrative censorship, even when it is done after contents become available, was unconstitutional.

Prof. Park argued that it is a suppression of free speech as soon as an administrative body is given the power to determine whether an expression is legal or illegal. He urged other countries not to follow the example of Korea, where expressions on the Internet are regulated by the Korean Communication Standards Commission (KCSC), an administrative body that decides whether certain expression is legal, and filters and blocks online contents according to its determination. KCSC has nine commissioners. Three of the commissioners, including Prof. Park himself, are appointed by the opposition party, while the rest are nominated by the government.

One of the major problems with regard to regulation of Internet contents in Korea is that many of them are blocked and taken down without notice to the person who posted it. Nor is the person responsible given the opportunity to defend the contents posted. Furthermore, many of the contents that are freely available in books, films and other media are taken down and blocked on the Internet. This is perhaps because information travels faster and more widely on the Internet. Prof. Park thus argues that there is a systematic discrimination against the Internet as a media, which must be stopped.

Prof. Park further argued that the KCSC violates the rule of “minimum restriction”, especially in regulating social media like *Facebook* and *Twitter*. He argued that social media exists mainly to connect people, rather than on its contents. Thus

it is impossible to pinpoint every illegal content to be taken down. This has resulted in the Commission taking down more contents down than is necessary. More than a hundred thousand websites have been blocked and deleted without notice to the posters. Furthermore, anybody can order any message to be taken down permanently if he/she finds a particular message offensive, and the poster does not have the right to retrieve or recover that content. Thus, the Internet has become what Prof. Park calls “a wonderland of Alice”, a space where only contents that are pleasing to people are allowed.

Prof. Park also claimed that Korea is the only country in the world that requires real name verification for all election related postings. Anybody who wants to make any comment on election candidates, for example, needs to identify him/herself. Furthermore, in Korea, all mobile phones must be registered with the government under the users’ real names. Korean regulators usually use the term “Korean net”, instead of the “Internet” because the latter implies the absence of boundaries.

## **The Experience of Malaysia**

### ***Mr. H.R. Dipendra, Southeast Asia Media Legal Defense Network***

Mr. H.R. Dipendra noted that Malaysia was one of the first a few countries have laws and regulation dealing with the Internet in the mid- to late-1990s. There was no censorship to multi-media stakeholders for guarantee. Subsequently, there is a piece of legislation called the Communication Multimedia Act 1997.

The Internet penetration rate in Malaysia is around 62 percent, which means that every 62 persons out of 100 are using the Internet. 12 million people have a *Facebook* account.

Dipendra noted that Malaysia's situation can be summed up with "3Rs": Race, Religion and Royalty. These are three main topics that cannot be freely discussed even by the government.

The main existing laws that deal with traditional media and have been subsequently applied to social media include the Penal Code. The Penal Code covers almost all criminal offences, including criminal defamation. In the past year, one or two individuals have been charged with criminal defamation. The Printing Presses and Publication Act, which is designed to ensure that no publications are printed without license from the government, does not apply to online publication. Sedition Act, on the other hand, states liability of offence, which means that there is no need to prove that one has acted seditiously to be charged under the law. Instead, just by saying something deemed "seditious", a person can be charged under the Sedition Act. This law can indeed be used against social media users.

In the transition from traditional media to social media, the Malaysian government has used the Communication and Multimedia Act. At the heart of this legislation is the Malaysian Communications and Multimedia Commission (MCMC), which is set up to regulate multimedia communications, including the communications on the Internet. Dipendra also illustrated the inconsistency of the MCMC in undertaking its mandate with two contrasting cases: one, where the MCMC was proactive and charged an individual who had allegedly insulted a royalty in Malaysia; while in contrast, in another case that appear to be a legitimate case of incitement to hatred online, the MCMC was hesitant to take action. The latter was the case of Arlene Tan, who was mistakenly identified and attacked online by hackers for allegedly posting contents that purportedly insulted Islam. The hackers distributed personal identification card number and photographs of Arlene Tan on the Internet, prompting other Internet users to send threats to the latter, which later

turned out to be a mistaken identity. Despite these threats and obvious violation of the rights of Tan by the hackers, the MCMC, to whom Tan lodged a report with, refused to act further other than to obtain an apology from the hackers.

Dipendra also cited the case of the online news portal, *Malaysiakini*, which has been consistently refused a printing license for years. This is despite the promises made by the current Prime Minister, Najib Razak, to reform the Printing Presses and Publications Act (PPPA) – although no details has been provided as to how the reform is going to be and when the reform will be. In short, Dipendra asserts that Malaysia has not really dealt with transition between traditional media to social media.

Another issue highlighted by Dipendra is that of the “cyber troopers”, which according to him, is a very Malaysian concept: these are bloggers and Internet users employed by the government to attack civil society groups and critics of the government and its policies. Dipendra provided the example of such attacks against electoral reforms group BERSIH 2.0, which held a massive rally demanding for electoral reforms in 2011. Dipendra shared that BERSIH 2.0’s chairperson, Ambiga Sreenevasan, has been accused by the cyber troopers as being, among others, a foreign agent who aims to destabilise the Malaysian government. All these accusations and attacks are aimed to discredit critics of the government.

The government has also tried to equalise levels of playing field between social media and traditional media. For example, the Malaysian government launched 1Malaysia television, designed to allow speedy and accurate dissemination of information from the government. Dipendra stressed that this is done by the Malaysian government in realisation that social media cannot be regulated, and that there is no point to come up with a restrictive legislation, which will give negative publicity

to the government. Perhaps the government's initiative of the 1Malaysia television demonstrates that it is aware of the popularity of social media as it has always been used by civil society groups to disseminate information. Another example provided by Dipendra is the Malaysian police's use of *Twitter*.

In short, Dipendra observed that the Malaysian government has largely played a reactive role in response to social media. Nothing much has been done since there are no well-defined policies to regulate social media. The government is thus trying to react to social media using its own media outlets, according to Dipendra.

## **The Experience of India**

*Mr. Pranesh Prakash, Center for Internet and Society*

Mr. Pranesh Prakash highlighted the numerous regulations governing traditional media and speech. The Indian Penal Code of 1886 covers all offences – from sedition to treason to defamation. There is also a provision in the Penal Code that criminalises words and gestures that would cause displeasure to others. Apart from that, the Press Registration Act requires newspapers to be registered with the government in order to be able to be published, while the Indecent Representation of Women (Prohibition) Act prohibits indecent representation of women through advertisements, publications, writings, paintings, figures or in any other manner. Prakash also pointed out that there exist other laws that restrict speech that incites caste violence.

There are also examples of both self-regulatory mechanisms within the state framework. For instance, there is the Press Council of India, which is largely self-regulatory. The chairman is appointed by the government but it mostly consists of journalists.

Prakash noted that hate speech regulations in India are mostly related to religion and caste. However, he also opined that independence of the judiciary still exists in India. He came to this conclusion based on the last six books that were banned in India. The courts overturned the bans except for one that actually promoted hate speech. Prakash, however, conceded that there were several bad cases in the past.

Prakash also provided an overview of the situation of freedom of speech online in India. He noted that the laws are very confusing in that what is allowed in one place is prohibited in another. He noted that all legislations relating to speech are applicable to online media. Recently, a law was passed to require all cyber cafes to install filters to block pornography. However, it is unclear how this would be technically applied as there is no law in India that explicitly bans the viewing of obscene materials. Apart from that, there is also the Information and Technology Act that provides for blocking of websites, mainly on the grounds of national security but does not include pornography.

Prakash also discussed about the intermediary guidelines rule in India. There is a section in the Information Technology Act, which states that intermediaries are not responsible for third party contents. The law, among others, states that if an intermediary is due diligent, he/she should not be responsible for any third party contents. However, "due diligence" is set out by another additional set of rules published by the government, which subjects everyone to a set of terms of service. There are glaring contradictions between this set of rules and other existing laws. For example, the rules, among others, state that anything related to or promoting gambling is prohibited online although such advertisements are legal elsewhere offline, including in newspapers, where various state governments published such advertisements.

Notwithstanding this, Prakash stressed that the biggest problem is that all intermediaries are required to act within 36 hours to disable access to information prohibited under the law. The intermediary is not required to inform the third party in removing the contents. Once a complaint is received, the contents must be removed. This, according to Prakash, is a huge flaw: Prakash noted that his organisation tested out the law by submitting frivolous complaints that should have been rejected. However, six out of seven complaints sent by his organisation were actually acted on by the intermediaries, some of which more contents were removed than requested, including unrelated comments.

Finally, Prakash noted that censorship is happening in India in a “completely invisible” manner. There is a lack of transparency in government censorship, and this problem is now extending to the private sector.

### **Excerpts from Open Discussion**

La Rue raised the question of whether the KSCC is an official or a private commission. He said that the commissioners claimed that it is private commission and advisory body to the government and ISP, which Mr La Rue disagreed, noting that the KSCC is clearly a censorship commission. He stressed that the judiciary can play such role of determining censorship of contents such as child pornography.

Prof. Park responded by noting that the government claims that it is not really forcing to take down websites, but rather just advising the intermediaries to do so. He stressed that a lot of censorship happens informally. Prof. Park added that the commission has repeatedly claimed to be only of advisory capacity and a private entity. Prof. Park nevertheless reiterated the positive changes in Korea after La Rue’s visit to the country. He highlighted a case where the court said KCSC’s advice to an intermediary to take down this blog content that criticised the

company of cement made in Korea was not just an advice but a government action, which can be reviewed by the judiciary for its constitutionality.

## **Session 6**

### **Experiences and best practices from other countries/region in balancing freedom of expression and incitement to hatred**

*Mr. Rohan A. Jayasekera, Index on Censorship*

Mr. Rohan A. Jayasekera stressed that there is no “good practice” in restricting speech, even in the context of restricting hostile, racist, insulting or offensive speech. Most restrictions are bad practices, or at best, practices that are not bad. He asserted that the issue of importance is not the practice of restriction of rights but rather the practice of balancing those different rights where they conflict.

The Universal Declaration of Human Rights succeeded in doing this, according to Jayasekera, but has not yet supplanted an older, libertarian tradition, in which rights, including freedom of expression, are understood to be absolute. Thus, there is a persistent argument that rights are non-negotiable, and any attempt to balance one right with another would weaken one and strengthen another, to no one’s advantage.

According to Jayasekera, this libertarian, absolutist tradition persists mainly because, in many places, the relationship between the overwhelming power of the state and the limited freedoms of the citizen is so obviously and unfairly imbalanced. However, in the West (Europe and the United States), where democracies are supposed to be more stable and established, the absolutist tradition persists because, when challenged to do so, those responsible for finding the balance have failed.

Jayasekara quoted the Council of Europe, from its own attempt in 2003 to address racist expression on the web, where the central requirement is “the need to ensure a proper balance between freedom of expression and an effective fight against acts of a racist and xenophobic nature”.

He spoke about the UK as an example where there is confusion at every level – from arresting officers to the Supreme Court. He cited a case in 2006, when an Oxford student, Sam Brown, was arrested, charged and fined for calling a police horse “gay”. The arresting officer judged his comments to be homophobic and likely to cause “harassment, alarm or distress”. While this might make some sense if placed in the context offensive and hateful speech, it was nevertheless still an act that made a mockery of the law, of the right to peaceful free expression, and above all, of the honest and legitimate desire to limit homophobia in the UK. Jayasekara further demonstrated this confusion by noting that in UK case law, there is legal authority that defacing the US flag in protest as a form of free expression is not insulting, but burning a war memorial poppy is.

Jayasekara noted that the existing system requires people on the first rungs of the legal ladder – policemen and local magistrates – to judge potentially insulting and abusive forms of free expression without proper guidance on how that judgment should be made, or even proper definition of the terms “insulting” and “abusive”. Even worse, there is no apparent expectation that they take Article 19 (in Europe Article 10) into account when doing so. The overall effect of all this is a system that is not fit for purpose – either as a means of confronting discrimination, or of preserving public order.

While the answer to this confusion could be found by referring to good or better practice (that is if it could be defined, assigned

and implemented by the system), Jayasekara opines that we should stop attempting to classify insult or abusive words for the purpose of criminalising or just censoring some words and not others. He stressed that there is already enough statutes to tackle overt racist threats and intimidation, defamation, and incitement to violence. He stressed that society has to consider the civility of public discourse when addressing key issues of culture such as immigration and race: "There may be better ways to change culture than by force of law."

***Ms. Anja Kovacs, Internet Democracy Project***

Like the previous speaker, Ms. Anja Kovacs did not have any best practices to share on this area. She further added that contrary to most discussions on Internet governance, which seem to revolve around the supposedly free West against the authoritarian countries that are mostly in the developing world, the Internet is increasingly posing tremendous challenges in all democratic countries, including in the West. However, she noted that assessments of the Internet's impact on democracy and freedom of expression has not yet been done in a very systematic manner.

Kovacs, nevertheless, spoke of two "best practices". Her first example was *Google*, which she admitted might be quite a controversial one. While she admitted that *Google* is problematic in many ways, including the way it aggregates data and uses them, Kovacs pointed out that *Google* is one of the few companies that consistently show up in forums such as this.

In India, there is an ongoing case in court against 21 intermediaries, including *Google* and *Facebook*. Kovacs shared that the judge in this case, in the course of the proceedings, said in a rather irritated way to the *Google* counsel, "we can ban you like they did in China", because *Google* was supposedly

not making enough efforts to censor. She noted that the Indian government had asked all intermediaries, including *Google* and *Skype*, to set up services within the country, which effectively means that there is a likelihood that these companies may be pushed into a position where they are forced to localise or leave the country. Setting up services inside the country would make it much easier for the government to take down content. She empathised with the difficult situation *Google* is in, noting that it must be acknowledged that *Google* is after all a business entity.

She also pointed out that civil society has put itself on a slippery slope in its arguments and positions. In India, as well as in other countries, civil society has argued that censorship should go through the courts, instead of the executive, which is a current trend in many countries. However, the threat by the Indian court to ban *Google* “just like in China”, shows that the court is not necessarily more competent than the government. She noted that the judge was just trying to implement the laws that already exist in the country. The case in court against *Google*, *Facebook* and 19 other intermediaries concerns contents that are supposedly obscene, especially obscene depictions of the Prophet Mohammed and of Hindu gods and goddesses. The judges merely implement the existing national laws, which are there to balance the sensitivities of the diverse cultural and religious communities in the country. While Kovacs was unsure how to resolve this tension, she nevertheless stressed that there have not been enough discussions on how to deal with the fact that the Internet is a global structure and that many strategies, even those used by civil society, are within the national framework.

She noted that the current case against *Google*, *Facebook* and 19 other intermediaries has been brought to the court by a journalist. Because of the way the landscape is shaped in India, sadly there are very few possibilities to make connections with

the media on freedom of expression online, although they should be a natural ally. Kovacs thus stressed the importance of making connections with broader communities, for example with community radios, which in India are not allowed to broadcast news and thus have a stake in the calls for freedom of expression. Kovacs stressed that this is something that should be pushed more, especially in countries with low penetration rates where it is easy to say that online freedom of expression is an issue only for elites.

Kovacs also pointed out the importance of challenging restrictions, including cultural ones, through good practice. She gave the example of how a website called *Minivan* in the Maldives has played an important role in providing independent news and allowing people to comment on their website. Almost any kind of comment is accepted with very little restrictions. *Minivan*'s approach is to battle hate speech with more speech: they do not often have to do it themselves because their readers will comment to counter hate speech. Kovacs noted that through allowing such a space, *Minivan* has contributed to shaping a culture of freedom of expression that had long been absent in the country.

Lastly, Kovacs stressed the importance of more capacity building and networking surrounding these issues. She noted that one way to overcome the contradiction between the desire to allow some space for cultural sensitivities when dealing with issues like hate speech, and at the same time acknowledging the global nature of the Internet, is for civil society be more involved and present at global spaces to discuss the different ways in which governments are abusing the global nature of the Internet. In Kovacs' view, that this has not been done enough thus far.

***Ms. Gayathry Venkiteswaran, Southeast Asian Press Alliance (SEAPA)***

Ms. Gayathry Venkiteswaran asserted that the media is partly guilty of perpetuating incitement. This, according to Gayathry, is not only the case of social media, but other forms of media either online or print and broadcasting. Part of the problem, said Gayathry, is in the kind of language that is used by the media in putting one group against another. This problem is related to three issues within the region.

First, is the problem of ethics. Compliance with ethical standards, according to Gayathry, has perpetuated discrimination in the media. Second, many news reports across many countries are unnecessarily framed in a racial or religious perspective. Third, there is a lack of level-playing field due to monopolies of ownership and control of media by political parties, resulting in the lack of diversity in the media sector. As such, there is an absence of multiple levels of discussions on issues. Gayathry provided examples of how incitement to hatred is dealt with in different countries.

The first example provided by Gayathry was the case of South Africa in 2008, where a story that was entitled “SA insiders versus invading barbarians” in the influential *Mainland Guardian* generated heated discussions in the midst of a rise of anti-foreigner sentiments in South Africa. During this time of anger and frustrations against foreigners in South Africa, 62 people were killed. Although the *Mainland Guardian* has its own policy for the website and complies with the ISP code of ethics, the Constitution and with the Equality Act, the comments posted in response to the story included some clearly racist ones that created hostility. Notwithstanding this, the editors of the *Mainland Guardian* website allowed these comments, apparently in order to get the commentators to challenge even the media

for posting this article. Furthermore, the offending comments formed only a fraction of about 700 comments received. It was concluded that the offending speech did not lead to the violence that actually happened: no reader reported abuse and it was unlikely to have influenced actual perpetrators, especially those who were not online. This, according to Gayathry, is an example of how it is possible for media organisations to have its own policies, and to explore how users can also utilise the space available. For a lot of countries, however, there is a need to get used to what actual civilised debates are all about.

Gayathry's second example was the conflict between the Christian and the Muslim in Moluccas, Indonesia, between 1999 and 2002, and the role of journalists in that conflict. During the conflict, a journalist who supposedly carried the Christian view could not interview the leader of the Muslim population, and vice versa. To bridge this gap, the Alliance of Independent Journalists (AJI) brought together journalists from across the divide, and moderated discussions to encourage them to look at and report the conflict from a journalist's point of view. An outcome from these discussions is a centre called the Maluku Media Centre, set up to promote peace journalism. Gayathry noted that while this initiative is very much limited to the media, the idea can also be extended to involve social media users, bloggers and online participants.

Thirdly, Gayathry cited the example of Malaysia in discussing the failure to look beyond the context of racial and religious identity. In Malaysia, the issues surrounding Hindu temple demolitions and complaints over the call for prayer in mosques being too loud for local residents have been taken as a religious issue – or even perceived as “anti-Islam” – rather than being discussed, for instance, in terms of local government's policies, non-transparent decision making processes, and the issue land acquisition. This, however, according to Gayathry presents

an opportunity: In Malaysia, there were a series of talks and discussions among journalists and civil society groups in an attempt to unpack religious issues. She stressed the importance of dialogue and understanding in dealing with these issues.

Finally, Gayathry shared a proposal by the freedom of expression advocacy group, Article 19, to have a threshold test on incitement under Article 20 of the ICCPR. The test considers restrictions to limit incitement on the basis of the severity of the incitement, the intent and actual content of the message, the likelihood that the message could incite violence, and the context within which it is broadcasted. Although this has not yet been adopted, Gayathry suggested that it might be useful to try and frame this threshold test in the context of social media and incitement to hatred.

### **Excerpts from Open Discussion**

In addition to the panellists' presentation, a participant suggested that hate speech laws could be structured as anti-discrimination laws. He noted that there is a law in Korea against discrimination of disabled people. One of the provisions puts liability on verbal abuse against the disabled. This law only applies when the following requirements are met: the speaker is not disabled, the speech should be against the disabled and the content of the message should be words that perpetuate and deepen discrimination against the disabled community.

The issue of respectful and responsible journalism in the context of countering hate speech was also discussed by the participants. One of the points shared during the discussion was that the nature of news reporting is to a large extent governed by the market: In Latin America, especially in Mexico and Central America, in the context of increasing violence, newspapers compete with one another in terms of the number of photographs of bullet-ridden bodies published on their pages. However,

in the case of El Salvador, newspapers came to a voluntary agreement among themselves, that none of them would carry a photograph of violence on the front page, although the news and photographs can still be featured on the inside pages. This, according to La Rue, could be seen as a good practice of responsible and respectful journalism – in this case to address the perpetuation of the culture of violence – that is initiated by journalists themselves.





**“The Internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies.”**

**Frank La Rue, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression**

---

The dramatic growth of the Internet and the use of social media have created an unprecedented space for the advancement of human rights and democracy all around the world. More and more human rights defenders, dissidents, as well as marginalised and vulnerable groups are now utilising the Internet and social media to get their voices heard, in a manner that has never before been as accessible, effective and wide-reaching.

Asia, as a region, in particular has experienced the fastest Internet growth in the world. However, many governments in Asia have also responded to this development by tightening controls over the Internet and the use of social media. Voices of dissent emerging from these new spaces created by advancements on the Internet have often been met with harsh crackdown by governments. Those who express views that are contrary to dominant cultural and religious norms are particularly targeted – not only by governments but by non-state actors as well. The Internet and social media have thus become battlegrounds between those claiming and utilising the new space for free speech and expressions, and those who seek to close this space.

*Internet and Social Media in Asia: Battleground for Freedom of Expression* charts these contestations, and analyses the impacts of the Internet and social media on freedom of expression in countries across the Asian region. Based on two regional symposiums on freedom of expression held in 2011 and 2012, this publication compiles numerous cases that illustrate the trends and challenges relating to freedom of expression on the Internet and social media in Asia.