SPECIAL EDITION

GLOBAL INFORMATION SOCIETY WATCH 2011 UPDATE I

INTERNET RIGHTS AND DEMOCRATISATION

Focus on freedom of expression and association online

Association for Progressive Communications (APC)
and Humanist Institute for Cooperation with Developing Countries (Hivos)

Global Information Society Watch

2011 UPDATE I

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Introduction

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In the past decade, all over the world, individuals have embraced the internet as a platform for discourse, commerce, and of course, political and social activism. Since 2000, internet access worldwide has increased by more than 500% to reach a total of 2.3 billion internet users, leading to a rather rapid change in how we approach daily life, as well as a greater divide between those with access and those without.

Still, nearly 70% of the world's population lives without internet access. Of those that are able to connect, the OpenNet Initiative estimates[1] that nearly half of them access a "filtered" or censored internet of some kind, ranging from the filtering of illegal content (such as child pornography) to restrictions on political speech protected by the principles of the Universal Declaration of Human Rights.[2]

The country-level case studies contained within this report feature countries – South Africa, Argentina, Pakistan, Indonesia, Saudi Arabia and Azerbaijan – where internet usage is fast-growing and regulation, as a result, sometimes a poor fit to the realities on the ground. The regulations and restrictions enacted within these countries vary wildly, from Saudi Arabia and Pakistan's extensive controls on speech to the relatively open and progressive online environments experienced in Argentina and South Africa.

Nevertheless, each of these countries faces distinct limitations on, and threats to, freedom of expression. And while the challenges facing each are on the surface quite different, they can be distilled into three overarching themes: commercial interests, national security, and "cultural preservation", the latter of which includes issues of morality and blasphemy.

It is within the framework of these themes that the following analysis lies.

Commercial interests

Business interests have always played a part in determining media regulation, and the internet is no different. Amongst the six countries in this report, this is no more apparent than in Argentina where despite constitutional status for freedom of expression and access to information, censorship has at times been enabled by actions from the private sector; as the authors (Danilo Lujambio, Florencia Roveri and Flavia Fascendini) of this case study write, "[t]his is most clearly seen in the tensions between intellectual property and freedom of expression".

Framing their analysis partly through the lines of Article 13 of the American Convention on Human Rights (to which Argentina is party), which states that "the right of expression may not be restricted by indirect methods or means, such as through the abuse of government or private controls", the authors demonstrate how certain content regulations, such as the December 2011 Antiterrorist Act, have been pushed by economic interests. In this example, the Act – which criminalises certain forms of protest – was adopted "at the request of the Financial Action Task Force (FATF), an intergovernmental forum that promotes norms that enable the prosecution of money laundering and the financing of terrorism".

Even stronger are examples provided by the authors relating to intellectual property. The report presents analyses of three cases that "clearly exemplify the tension that exists between intellectual property rights and freedom of expression", demonstrating not only the chilling effects such regulations have on free expression but also their negative impact on internet intermediaries.

The most recent of the three examples describes the plight of Cuevana, a website created in 2009 by students with the goal of streamlining the video-streaming process. Rather than host content, the site facilitates access to third-party content through a searchable, linked database. Following initial civil proceedings against the site by content companies, Cuevana was later attacked from several directions. This included a blocking order demanding that all ISPs restrict access to the links provided by the

1. OpenNet Initiative, "Global Internet filtering in 2012 at a glance", opennet.net/blog/2012/04/global-internet-filtering-2012-glance
2. Ibid

site's database and the arrest of one of the site's administrators in Chile.

In their analysis, the authors point to the extraordinary power given to judges to block the distribution of content in instances where there could be "suffering or imminent or irreparable harm". The idea that imminent, irreparable harm could be done to multi-billion dollar companies is a clear distortion of the law's intent.

Ultimately, the case served to illustrate the overbroad regulations on intellectual property that allow for the punishment of not only the content "thief", but also potentially the person who uploaded the content, the person who hosted it, or the person who provided the means of locating it. As the authors write, "it is possible for some overlap in responsibility to occur".

As UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Frank La Rue has stated, and the authors have cited, "while States are the duty-bearers for human rights, private actors and business enterprises also have a responsibility to respect human rights".

This responsibility is also apparent in Indonesia, where content providers play a significant role in the moderation of the local online environment, threatening editorial independence and freedom of speech. One such example cited by case study author Ferdiansyah Thajib occurred in 2008, when the Okezone online news site had to change its coverage on a corruption scandal after the site's ultimate owner (a large media corporation) stepped in.

In Indonesia, however, the limitations on freedom of expression crosscut the categories set forth in the introduction; in Argentina, the primary threat to speech does appear to come from private actors in collusion with government, and under the umbrella of intellectual property concerns.

National security

Attempting to distill a list of 35 detailed, specific categories (from "free email" to "minority rights and ethnic content") facing online censorship into three umbrella categories, researchers at the OpenNet Initiative settled on "political filtering", "social filtering", and "security/conflict filtering". In the research institution's first book, *Access Denied: The Practice and Policy of Global Internet Filtering*, chapter authors Robert Faris and Nart Villeneuve write:[3] "These different types of filtering activities are often correlated with each other, and can be used as a pretense for expanding government control of cyberspace".

Indeed, as Faris and Villeneuve note, a government may claim the necessity of censorship under the pretense of blocking pornography or illegal content, but once the tools and mechanisms are in place to do so, may instead (or in addition) block political or other speech. Nowhere is this more apparent than in countries that censor online speech under the guise of national security.

Of the six countries covered in this volume, each one enacts some sort of speech restrictions on the basis of national security. Some examples are severe; nationalistic Azerbaijan leaves access relatively unfettered, allowing the government to more easily monitor and punish "rebellious activities" and furthermore presents social media as a "dangerous place", which chapter author Vugar Gojayev cites as a contributing factor to the low rate of internet adoption (14%) amongst women in the country.

In Pakistan, write Shahzad Ahmad and Faheem Zafar, the government has justified censorship of the internet by citing Section 99 of the Penal Code, which allows the government to restrict access to information that might be "prejudicial to the national interest". Targets of such censorship have included a large number of Baloch dissident websites and forums, as well as individual YouTube videos which showed President Asif Ali Zardari yelling "shut up" to an audience member during a speech.

Other examples are less oppressive but should be of no less concern: in South Africa, for example, the Regulation of the Interception of Communications and Provision of Communication-Related Information Act (ROICA) of 2002, which regulates the interception of certain communications, has been determined by watchdog group Privacy International to lack basic safeguards.

States have always placed restrictions on content for the purposes of national security, but never before has the determination of what constitutes a national security threat been left to minor agencies or private regulators, creating greater room for error and corruption. Furthermore, when "national security" becomes a catch-all to justify the censorship of anti-nationalist activities or social movements, the resulting effect is often overly restrictive.

"Cultural preservation"

This third and final category blends separate but related issues: the censorship of "immoral" content such as pornography and the censorship of hateful and derogatory speech under the guise of cultural preservation. Of the dozens of countries around

3. Robert Faris and Nart Villeneuve, "Measuring Global Internet Filtering" in *Access Denied: The Practice and Policy of Global Internet Filtering*, eds. Ronald Deibert, John Palfrey, Rafal Rohozinski and Jonathan Zittrain (Cambridge, MA: MIT Press, 2008), access.opennet.net/wp-content/uploads/2011/12/accessdenied-chapter-1.pdf

the world that censor online content, the vast majority have regulations dealing with both or either of these content categories.

Some of these content regulations are understandable under the shadow of history; South Africa, for example, bans the "advocacy of hatred based on identifiable group characteristic that constitutes incitement to imminent harm unless a documentary with scientific, literary, or artistic merit or a matter of public interest". While such restrictions may be legitimate when, as La Rue has argued, transparent, purposeful, and proportional to their aim, chapter author Jane Duncan argues that in South Africa, the scope for criminalisation of "unacceptable" content under the Film and Publications Act has become too broad, and that aspects of the country's self-regulatory system for online content are often too restrictive as well.

In other cases, cultural preservation is used as a cover to place undue restrictions on speech. In Saudi Arabia, writes chapter author Rafid A Y Fatani, some forms of censorship have wide support from the country's conservative population, and the country's religious establishment has led a mass call to "purify" society of destabilising elements, including a push for further censorship and encouragement of citizens to report content they deem "offensive" or "vulgar". Given that the online censorship system in the country relies on individual reports, such encouragement from religious figures validates individual determinations, resulting in increased censorship.

In Indonesia, where Thajib writes that media has become a central indicator of freedom and openness post-Soeharto, the online sphere is often reflective of the country's great diversity, harbouring a "broad spectrum of political differences, ideologies and behaviours". But, as Thajib notes, it is "not uncommon" for online exchanges to result in hate speech, which is in turn arbitrated by the Ministry of Communication and Informatics (MCI). In some cases, "given enough political weight", the ministry interferes by blocking or removing content. The MCI has taken greater steps to censor content as well, banning YouTube, MySpace and other sites in 2008 in an effort to block the Dutch film *Fitna* and, more recently, blocking 300 websites allegedly publishing "radical content" in an effort to "clean out" the web of immorality.

As Frank La Rue reiterated in his oft-cited 2011 report,[4] Article 19, paragraph 3 of the International Covenant on Civil and Political Rights (ICCPR) allows for exceptional limitations on certain types of speech, provided such limitations meet a three-part, cumulative test: the limitations must be provided by law, made clear and accessible to all; they must legitimately meet one of three purposes – to protect the rights or reputations of others, to protect national security or public order, or to protect public health or morals; and they must be proven as necessary and as the least restrictive means required to achieve the purported aim.

Included amongst those types of speech for which such limitations would be allowed are hate speech (to protect the rights of affected communities) and the advocacy of national, racial, or religious hatred that constitutes incitement (to protect the rights of others, such as the right to life). But while these types of speech may be legitimately restricted under the parameters laid forth by the ICCPR, the chapter authors are in agreement that, in each of their respective countries of focus, the three-part cumulative test has not, in some or in all cases, been met.

Each of the following chapters seek to inform, from a human rights-focused perspective, on the challenges facing freedom of expression – and its advocates – in these six countries. Each country of the six is different, with varied forms of government, cultural backgrounds, and national aspirations, but the similarities in the challenges faced by their citizens in preserving the principles of free expression on the frontiers of the internet are all too similar. ■

4. Frank La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27* (Geneva: United Nations General Assembly, Human Rights Council, 2011), www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf