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# UNSHACKLING EXPRESSION:

A STUDY ON LAWS CRIMINALISING EXPRESSION ONLINE IN ASIA



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)

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# **Unshackling expression: A study on laws criminalising expression online in Asia**

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# Understanding international standards for online freedom of expression

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In this report, *Unshackling Expression*, APC and its partner organisations study the state of freedom of expression on the internet in six Asian countries: Cambodia, India, Malaysia, Myanmar, Pakistan and Thailand. While the national reports provide an in-depth study of the state of freedom of expression online in the six countries, a study of internet rights in Asia is incomplete without a preliminary study of the international standards for freedom of expression. International standards form the yardstick, the baseline, for national standards on freedom of expression – and are the standards to which national laws must adhere. The six countries that form part of this study also have protections for freedom of expression in their constitutions, and most of these states are parties to international human rights treaties, imbuing them with an obligation to protect and respect international standards for the protection of human rights.

*Unshackling Expression* is a study of the criminalisation of and curbs placed on freedom of expression using laws and policies at the domestic level. A harsh measure, criminalisation affects the freedom of expression of people both directly and indirectly. Directly, it forms a clear, physical restraint on speakers who make their views known online. Indirectly, it causes a chilling effect on citizens, often resulting in self-censorship, leading to a less diverse and more conformative cyberspace. Further, restrictions on freedom of opinion and expression adversely affect the right to “to seek, receive and impart information and ideas of all kinds.” In a 2011 report to the UN Human Rights Council, former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, states:

[L]egitimate online expression is being criminalized in contravention of States’ international human rights obligations, whether it is through the application of existing criminal laws to

online expression, or through the creation of new laws specifically designed to criminalize expression on the internet. Such laws are often justified on the basis of protecting an individual’s reputation, national security or countering terrorism, but in practice are used to censor content that the Government and other powerful entities do not like or agree with.<sup>1</sup>

Freedom of expression is particularly crucial when it comes to the internet. Offline, one may have multiple ways of expressing oneself, but online, publication and participation are the first acts. All exercise of freedom of expression online begins with the act of publication – whether it be a publication of views through writing, posts, comments, messages or tweets, or through the use of visual, video or audio content. As such, any restriction on online content becomes a harsh restraint on freedom of expression, and none more so than the criminalisation of content or other forms of expression. Not only this, but in Asia in particular, there are several trends that are problematic to the free use of the internet.

In this chapter, we consider the international standards that define freedom of expression, and in particular, freedom of expression online, and also take a look at the regional standards established by the Association of Southeast Asian Nations (ASEAN).

## International standards on freedom of speech and expression online

The history of the right of freedom of speech and expression precedes the internet. It finds its beginnings in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). As a binding treaty, the ICCPR has more value in international law. The UDHR and ICCPR guarantee certain inalienable rights to

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1 La Rue, F. (2011). Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. A/HRC/17/27. [https://www.un.org/ga/search/view\\_doc.asp?symbol=A/HRC/17/27](https://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/17/27)

human beings. Recognising the inherent dignity of all beings, the ICCPR and UDHR guarantee, *inter alia*, the right to freedom of expression,<sup>2</sup> the right to privacy,<sup>3</sup> the right against advocacy of national, religious or racial hatred (it has been understood as the right against “hate speech”)<sup>4</sup> and the right to freedom of religion.<sup>5</sup> Moreover, the ICCPR prohibits discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>6</sup> These rights, among all the others guaranteed under the ICCPR, are available to all human beings, regardless of their countries of origin and residence.

The right to freedom of opinion and expression is a crucial right in the ICCPR. It is the “foundation stone of every free and democratic society.”<sup>7</sup> Without freedom of expression, the full development of the individual is impossible. Moreover, the “marketplace of ideas” aids the pursuit of truth. Without freedom of expression, the autonomy of an individual may be considered curtailed and restrained.

The importance of the right led the Human Rights Committee to hold that a general reservation to paragraph 2 of Article 19 of the ICCPR was unacceptable.<sup>8</sup> Article 19 of the ICCPR as well as the UDHR guarantees the right to hold opinions without interference and guarantees everyone the right to freedom of expression and the right to receive and impart information, regardless of frontiers. Any limitations placed on this right must meet the standards required and justified by provisions in

Article 19(3) of the ICCPR. Article 19 of the ICCPR reads:

(1) Everyone shall have the right to hold opinions without interference;

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice...

As the text of the right makes clear, the right to freedom of opinion, speech and expression is available regardless of borders or frontiers. More importantly, it is available *through any media* of one’s choice. It is this terminology that is crucial when considering freedom of speech online.

In addition to the international treaties, several regional charters also guarantee the right to freedom of opinion and expression. In Asia, it is the ASEAN Charter<sup>9</sup> and the ASEAN Human Rights Declaration<sup>10</sup> that enshrine this right. Vowing to respect and protect “human rights and fundamental freedoms,” the ASEAN Charter incorporates as one of its principles the “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice.” Article 14 of the Charter states that “ASEAN shall establish an ASEAN human rights body” in accordance with the purposes and principles of the ASEAN Charter.

Taking off from this, the ASEAN Intergovernmental Commission on Human Rights was established in 2009, and the ASEAN Human Rights Declaration was unanimously adopted in November 2012. Under Article 23 of the ASEAN Human Rights Declaration:

Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person’s choice.

In its General comment No. 34, the Human Rights Committee confirmed the applicability of Article 19 online, equally as it applies offline.<sup>11</sup> The General Comment contains the authoritative interpretation of Article 19, including the scope and extent of the right.

2 Article 19, ICCPR: (1) Everyone shall have the right to hold opinions without interference; (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice...

3 Article 17, ICCPR: (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; (2) Everyone has the right to the protection of the law against such interference or attacks.

4 Article 20, ICCPR: (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

5 Article 18, ICCPR: (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching; (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice...

6 Article 26, ICCPR.

7 Human Rights Committee. (2011). General comment No. 34, Article 19: Freedoms of opinion and expression. CCRP/C/GC/34. www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

8 “[A] general reservation to the rights set out in paragraph 2 would be incompatible with the object and purpose of the Covenant.” *Ibid.*, at para. 6.

9 www.hrlibrary.umn.edu/research/Philippines/ASEAN%20Charter.pdf

10 www.mfa.go.th/asean/contents/files/other-20121217-165728-100439.pdf

11 “They include all forms of audio-visual as well as electronic and internet-based modes of expression.” Human Rights Committee. (2011). Op cit., at para. 12.

The Human Rights Committee holds that there shall be no exceptions to the right to hold opinions, whether they are of a “political, scientific, historic, moral or religious nature.”<sup>12</sup> In particular, the Committee makes clear that it is unacceptable to criminalise the holding of an opinion:

The harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1.<sup>13</sup>

As we shall see in the following national reports, the Asian states that form part of this study stand in potential violation of this understanding of Article 19, paragraphs 1 and 2. Moreover, the right to freedom of expression encompasses a wide variety of activities, including offensive speech (not falling within the ambit of Article 20, ICCPR),<sup>14</sup> and applies to “all forms of audio-visual as well as electronic and internet-based modes of expression.”<sup>15</sup>

In addition to Article 19, Article 20 of the ICCPR also impacts speech. Article 20 prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Speech that falls within the ambit of Article 20 (as hate speech) cannot merely be offensive, but must have an intent to cause harm, and be likely to cause harm. That is, for speech to fall within the definition of hate speech, it must have the quality of inciting imminent violence.<sup>16</sup> It cannot merely be a statement, but rather a call to violence on any of the above grounds, in order to qualify as hate speech. While restrictions are permissible on the above given grounds, they must also be necessary and proportionate to the aim sought to be achieved, and imposed by law.

Where the internet is concerned, the above-mentioned report of former Special Rapporteur Frank La Rue gathers importance. La Rue highlights the “unique and transformative nature of the Internet not only to enable individuals to exercise their right to freedom of opinion and expression, but also a range of other human rights.”<sup>17</sup> The internet enables individuals not merely to be passive

receivers of information, but to be active publishers of knowledge and information, for the internet, as an interactive medium, enables individuals to take active part in the creation and dissemination of information.

Moreover, the Human Rights Council has affirmed that offline human rights must be equally protected and guaranteed online. In its 20th session (29 June 2012), the Human Rights Council adopted a resolution which unanimously declared:

[T]he same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.<sup>18</sup> (Emphasis supplied.)

However, it is important to remember that the right to freedom of speech and expression is not absolute. The ICCPR states that the right may be curtailed, if necessary and if provided by law, for the following reasons:

For respect of the rights or reputations of others;  
For the protection of national security or of public order (*ordre public*), or of public health or morals.<sup>19</sup>

The ASEAN Human Rights Declaration goes one step further. Its clause on restrictions, Article 8, states:

The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.

As the text makes clear, the ASEAN Human Rights Declaration expands the scope of justifications on the basis of which the right to freedom of opinion and expression may be restricted. In addition to the justifications provided in the ICCPR, the ASEAN

12 Human Rights Committee. (2011). Op. cit., at para. 9.

13 Ibid.

14 Human Rights Committee. (2000, 18 October). Communication No. 736/97, Ross v. Canada.

15 Human Rights Committee. (2011). Op. cit., at para. 12.

16 Khandhadai, G. (2016). *Desecrating Expression: An Account of Freedom of Expression and Religion in Asia*. Bytes for All, Pakistan and FORUM-ASIA. [https://www.forum-asia.org/uploads/wp/2016/12/Final\\_FoER\\_Report.pdf](https://www.forum-asia.org/uploads/wp/2016/12/Final_FoER_Report.pdf)

17 La Rue, F. (2011). Op. cit.

18 Human Rights Council. (2012). The promotion, protection and enjoyment of human rights on the Internet. A/HRC/20/L.13. <https://daccess-ods.un.org/TMP/3578843.1763649.html>

19 Article 19(3), ICCPR.

Human Rights Declaration also adds public safety and the vague and open-ended “general welfare of peoples in a democratic society” as legitimate aims for the restriction of freedom of speech.

While restrictions are indeed permissible, they must meet tests of permissibility: they must be outlined by law, necessary and proportionate to protect a legitimate aim. These are the conditions laid down in the UDHR and the ICCPR. The test of legality requires that the restriction set by any government on the right to freedom of expression be expressly laid out in a law. This legislation, order or bylaw must be publicly available and understandable by the public, and no restriction is valid unless it has the backing of the law.<sup>20</sup> The law must be both *accessible* and *foreseeable*.<sup>21</sup>

Not only must the restriction be based in law, it must also be *legitimate*. The test of legitimacy requires that the restriction on freedom of expression be based on one of the justifications laid out in Article 19(3).<sup>22</sup> What are these justifications? Article 19(3) states that “protection of national security or of public order (*ordre public*), or of public health or morals” and “respect of the rights or reputations of others” constitute legitimate reasons for the restriction of freedom of expression. Any restriction

– and indeed, criminalisation – of expression that does not fall in with these justifications is liable to be contested as falling foul of Article 19, ICCPR.

Finally, the test of necessity and proportionality requires that the restriction be based on a “pressing social need” which makes the restriction “necessary in a democratic society.”<sup>23</sup> It must be placed so as to fulfil the aims set forth in Article 19, paragraph 3, ICCPR. Of course, the state has a margin of appreciation in testing the necessity of the restriction, but the margin is narrow where freedom of expression is considered.<sup>24</sup> In determining pressing social need, the test of pluralism, broadmindedness and tolerance is to be applied,<sup>25</sup> which accommodates divergent views and opinions.

Not only this, but the restriction placed by the state on freedom of expression must be *proportional* – i.e., the *least onerous* restriction must be applied to *appropriately meet* the need.<sup>26</sup> A broad restriction is unacceptable, and the restriction must be narrowly tailored. For instance, the incidence of internet shut-downs across the world, where access to the internet is completely cut off in response to any situation (primarily, states use the excuse of security) is *disproportional* to the aims of the restriction,<sup>27</sup> and so would be contested under Article 19, paragraph 3.

20 *Hinczewski v. Poland*, No. 34907/05, § 34, ECHR 2010 (ECHR).

21 Keun-Tae Kim v. Republic of Korea, Communication no. 574/1994 CCPR/C/64/D/574/1994 (4 January 1999) (HRC); *Sunday Times v. United Kingdom* (no. 2), Judgment of 26 November 1991, no. 13166/87, Series A no. 216 (ECHR); Article 19 v. Eritrea, (2007) AHRLR 73 (ACHPR 2007).

22 *Vladimir Petrovich Laptsevich v. Belarus*, Communication no. 780/1997, § 8.5, UN Doc. CCPR/C/68/D/780/1997 (2000) (HRC); *Vladimir Velichkin v. Belarus*, Communication no. 1022/2001, § 7.3, UN Doc. CCPR/C/85/D/1022/2001 (2005) (HRC).

23 Jacobs, F. C., & White, R. C. A. (1996). *The European Convention on Human Rights*. Oxford: Clarendon Press; *Handyside v. United Kingdom*, Judgment of 7 December 1976, Series A no. 24 (ECHR); *Vogt v. Germany* (no. 1), Judgment of 26 September 1995, Series A no. 323 (ECHR); *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, (1984) (Inter-Am. Ct.); *Prince v. South Africa*, 2004 AHRLR 105 (ACHPR 2004).

24 *Lehideux & Isorni v. France*, no. 22662/94, ECHR 1998-VII (ECHR); *Schwabe v. Austria*, Judgment of 28 August 1992, Series A no. 242-B (ECHR).

25 *Handyside v. United Kingdom*, Judgment of 7 December 1976, Series A no. 24 (ECHR); *Sunday Times v. United Kingdom* (no. 1), Judgment of 26 April 1979, Series A no. 30 (ECHR); *Dudgeon v. United Kingdom* Judgment of 23 September 1981, Series A no. 45 (ECHR).

26 *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of Health, ex parte Fedesa and others*, [1990] ECR I-4023 (ECJ); *Klass v. Germany*, Judgment of 6 September 1978, Series A no. 28 (ECHR); *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, §§ 33-5, 54, Advisory Opinion 5/85 (1985) (Inter-Am. Ct.); *Nebraska Press Association v. Stuart*; *Reno v. ACLU* 521 U.S. 844 (1997) (US Sup. Ct.); Human Rights Committee. (2011). Op. cit., at para. 34: “[...] must be the least intrusive instrument amongst those which might achieve their protective function.”

27 Kaye, D. (2017). Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. A/HRC/35/22. <https://undocs.org/A/HRC/35/22>.

# UNSHACKLING EXPRESSION: A study on laws criminalising expression online in Asia

Freedom of expression and opinion online is increasingly criminalised with the aid of penal and internet-specific legislation. With this report, we hope to bring to light the problematic trends in the use of laws against freedom of expression in online spaces in Asia.

In this special edition of GISWatch, APC brings together analysis on the criminalisation of online expression from six Asian states: Cambodia, India, Malaysia, Myanmar, Pakistan and Thailand.

The report also includes an overview of the methodology adapted for the purposes of the country research, as well as an identification of the international standards on online freedom of expression and the regional trends to be found across the six states that are part of the study. This is followed by the country reports, which expound on the state of online freedom of expression in their respective states.

With this report, we hope to expand this research to other states in Asia and to make available a resource that civil society, internet policy experts and lawyers can use to understand the legal framework domestically and to reference other jurisdictions.

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