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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Joint written statement* submitted by Association for Progressive Communications (APC), non-governmental organizations in general consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[15 May 2017]

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* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Criminalisation of online expression in Asia

The Association for Progressive Communications (APC) and organisations supporting this joint statement welcome the report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. David Kaye,¹ to be presented at the 35th session of the Human Rights Council (HRC). We also welcome the Special Rapporteur's timely attention paid to network shutdowns in conflict-stricken Kashmir² and the brutal murder of prominent blogger and human rights defender Yameen Rasheed in the Maldives,³ which are indicative of the worsening environment for online rights in the Asian region.

Throughout Asia and the world, people have taken to social media and online platforms to express themselves in ways that were not possible through traditional offline mediums. States have realised the empowering impact of free expression online and have, in some cases, tried to impose greater regulation. Offline regulations, typically in penal legislation, are being applied to online spaces, to bolster internet-specific legislation. Legitimate expression on the internet is, as a result, increasingly being redefined as cybercrime.

In many states, including Thailand, Bangladesh and Pakistan, more severe punishments and penalties are imposed for expression online than for expression offline. In countries like Malaysia and Cambodia, new legislation or amendments are currently being formulated, which are likely to further restrict the environment for free expression.

The institutionalisation of such illegitimate restrictions, in contravention of international law,⁴ guarantees and obligations, has made it very difficult for human rights defenders and civil society to advocate for reforms and to defend free expression.

The range of expression online currently being criminalised includes expressions on religion, sexual expression, gender identity, political opinion, dissent, and factual statements; which are often prosecuted as blasphemy, obscenity, sexual deviance, sedition, and criminal defamation. States often rely on public order, national security and religion-based exemptions to crack down on legitimate forms of expression and dissent. Non-state actors, some of whom benefit from the tacit support of the state, have attacked (and sometimes killed) individuals for expressing themselves online.

Based on the observations of APC and its partners, laws criminalising expression in the following jurisdictions are highlighted:

Bangladesh

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A/HRC/35/22, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22

2 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21604&LangID=E>

3 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21597&LangID=E>

4 General Comment No. 34, Article 19, Freedom of opinion and expression, available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

2

The Information, Communication and Technology Act, 2006 was amended in 2013 amidst widespread opposition by civil society groups.⁵ Section 57 of the Act, which is overbroad and vague, is one of the most problematic aspects of the legislation. Under this section, anyone can be prosecuted for publishing material on a website or in digital form that is “fake and obscene,” “creates the possibility for the deterioration of law and order,” “prejudices the image of the State or a person” or “may cause hurt to religious belief.” Conviction can lead to between seven and 14 years imprisonment.⁶ Critics, human rights defenders, journalists, bloggers and writers have been the most targeted by the state under this Act. Under the amendment, original prescriptions for imprisonment and penalties have been considerably raised,⁷ and are higher than what is prescribed for similar expression offline. Civil society groups have opined that the amendments are a serious deviation from international law, as they make many offences under the Act non-bailable; they allow the police to make arrests without a warrant; they impose a severe minimum prison sentence of seven years for offences under the Act; and they increase the maximum penalty for offences under the law from ten to 14 years imprisonment.⁸

Cambodia

The Royal Government of Cambodia has been attempting to pass a law titled Anti-Cyber Crime Law, which bears a striking resemblance to many repressive cyberlaws in the region.⁹ Currently, the state relies on orders issued by the telecom regulators and Ministry of Interior and informal ways of pressuring internet service providers to block access, censor or take down content.¹⁰ In addition, penal legislation has been used to punish those expressing dissent online. With this new bill in progress, the state seeks to formalise its control over expression online.

India

In addition to specific cyber and technology laws like the Information and Technology (IT) Act, provisions in traditional penal laws such as those related to hate speech, criminal defamation and sedition in the Indian Penal Code are used by authorities disproportionately and arbitrarily to shut down dissent and criminalise expression.¹¹ However, on a positive note, the Supreme Court of India took a progressive position in relation to the vague and repressive language of section 66A of the IT Act, striking it down in 2015 as being violative of fundamental rights in the Constitution of India. In doing so, the Supreme Court made specific observations on the importance of upholding the right to freedom of expression and dissent on the internet.¹²

5 <https://www.forum-asia.org/?p=21477>

6 <http://america.aljazeera.com/articles/2015/4/17/bangladesh-press-freedom.html>

7 <https://www.article19.org/resources.php/resource/38365/en/bangladesh:-information-communication-technology-act>

8 <https://www.icj.org/bangladesh-information-and-communication-technology-act-draconian-assault-on-free-expression/>

9 http://cchrcambodia.org/index_old.php?url=media/media.php&p=analysis_detail.php&anid=34&id=5

10 <http://www.licadho-cambodia.org/media/index.php?id=26&c=1>

11 Coalition Submission to the Universal Periodic Review of India: Internet Rights, Freedom of Expression (FOE) Online and Freedom of Association and Assembly (FOAA) Online in India, by Digital Empowerment Foundation, Internet Democracy Project, Point of View, Nazdeek and Association for Progressive Communications (APC). Available at <http://defindia.org/universal-periodic-review-india-human-rights-council-2/>

12 Supreme Court of India, Shreya Singhal Vs Union of India, Writ Petition (Criminal) No. 167 of 2016. Available at

Malaysia

Proposed amendments to the Communication and Multimedia Act (CMA) in Malaysia contain provisions that authorise censorship without judicial oversight, require registration of political blogs and websites, and increase penalties for offences related to “undesirable” content.¹³ These changes in legislation are currently being discussed by the legislative bodies without any consultation with civil society and have been severely criticised by numerous sectors of society.¹⁴

In addition to the CMA, there are other laws that are used to curtail freedom of expression online. Malaysia’s Security Offences (Special Measures) Act 2012, which is popularly known as SOSMA, is increasingly regarded by human rights activists and civil society actors as a draconian law, as it has been used to detain political critics and human rights defenders. SOSMA bypasses judicial oversight, as a warrant of arrest is not needed, and the police have refused to allow legal representation upon arrest. Anyone arrested under SOSMA can be detained up to 28 days without being charged.

The Sedition Act 1948, a law that prohibits discourse and under which one can be charged for inciting unrest or for raising sensitive issues that insult a particular ethnicity, is frequently used by politically affiliated members of the

Malaysian government against others. Recent amendments to the Sedition Act¹⁵ have brought religion within the purview of sedition and, thus, comments or acts seen as critical of religion online may attract sedition charges.

Finally, in growing attempts to control freedom of expression online, there have been amendments to existing acts, such as the new section of 114a to the Evidence Act 1950, which essentially presumes guilt in the event of publication. These laws are also used to target online expression in addition to the CMA.

Pakistan

In April 2016, the government of Pakistan passed the controversial Prevention of Electronic Crimes Act (PECA),¹⁶ which contains several vague provisions vesting the state with blanket authority to block, restrict and criminalise expression online.¹⁷ Civil society has expressed grave concerns relating to repressive provisions of this legislation.¹⁸ The Act, chalks out comprehensive guidelines for the state to criminalise political and religious dissent. Section 10 focuses on cyberterrorism, Section 20 pertains to offences against the dignity of a natural person, and Section 37 addresses “unlawful” online content. These provisions grant unnecessary powers to administrative authorities to take down online content and initiate legal action against any person.¹⁹

http://supremecourtindia.nic.in/FileServer/2015-03-24_1427183283.pdf

13 www.apc.org/en/pubs/malaysian-parliament-should-heed-civil-society-cal

14 Written submission to the Human Rights Councils’ 32nd session: State of internet rights in India, Malaysia and Pakistan. Available at <https://www.apc.org/en/pubs/written-submission-human-rights-councils-32nd-sess>

15 <http://www.agc.gov.my/Akta/Vol.%201/Act%2015.pdf>

16 http://www.na.gov.pk/uploads/documents/1472635250_246.pdf

17 Written submission to the 32nd session of the Human Rights Council: State of internet rights in India, Malaysia and Pakistan. Available at <https://www.apc.org/en/pubs/written-submission-human-rights-councils-32nd-sess>

18 <https://www.apc.org/en/node/21608> and <https://www.apc.org/en/pubs/suggestions-internet-related-human-rights-question>

19 Bytes for All, Pakistan and APC submission to the Universal Periodic Review of Pakistan. Available at

Section 9 of PECA states that anyone who “prepares or disseminates information, through any information system or device” with the intent to “glorify an offence or the person accused or convicted of a crime and support terrorism or activities of proscribed organizations” and “advance religious, ethnic or sectarian hatred” shall be punished. This particular provision also declares unlawful any online content that threatens the “glory of Islam”, the integrity, security or defence of Pakistan or any part thereof, public order, decency or morality. These provisions under PECA also prescribe heightened punishments and penalties as compared to the provisions of the Penal Code.

The government also uses the Anti-Terrorism Act, 1997²⁰ to criminalise online speech. There are documented cases where the state tried the accused under Section 11-W of the Anti-Terrorism Act for sharing “objectionable” material on Facebook.

Thailand

Thailand’s Cyber Related Crimes Act, 2016 gives broad powers to the government to restrict free speech, enforce surveillance and censorship, and penalise human rights defenders and those expressing dissent, particularly political dissent.²¹ Previously, the state was using the Computer Crimes Act, 2007, which has now been replaced by the Cyber Related Crimes Act to penalise and deter free speech. The new 2016 Act permits the prevention, deletion and permanent removal of data. It also prescribes more severe punishments for offences in comparison to the 2007 version.²² Civil society is extremely concerned about this legislation being used to shut down dissent, particularly on issues touching upon politics and the monarchy.

Conclusion

As affirmed by the UNHRC repeatedly, the same rights people enjoy offline apply online.²³ Therefore, the standards and guarantees applicable to laws governing expression offline are equally applicable to laws governing expression online. As many Asian states are in the norm-setting phase of internet and communication technology policies, it is important for the Human Rights Council, and more particularly the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, to monitor and ensure that some basic non-negotiable baselines are adhered to and that problematic trends are addressed before these norms are normalised as accepted practices.

Bytes for All, Pakistan, Digital Asia Hub (DAH), Digital Empowerment Foundation (DEF), Internet Democracy Project (IDP), Persatuan Kesedaran Komuniti Selangor (EMPOWER) and Southeast Asian Press Alliance (SEAPA) NGO(s) without consultative status, also share the views expressed in this statement.

<https://www.apc.org/en/pubs/joint-submission-internet-related-human-rights-iss-1>

20 www.ppra.org.pk/doc/anti-t-act.pdf

21 <https://www.hrw.org/news/2016/12/21/thailand-cyber-crime-act-tightens-internet-control>

22 <https://www.amnesty.org/en/documents/asa39/4944/2016/en/>

23 UNHRC resolution on the promotion, protection and enjoyment of human rights on the internet

A/HRC/RES/26/13, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/13; APC welcomes Human Rights Council resolution on human rights and the internet, <https://www.apc.org/en/pubs/apc-welcomes-human-rights-council-resolution-human>; UN Human Rights Council Resolution A/HRC/20/L.13, http://ap.ohchr.org/documents/alldocs.aspx?doc_id=20280; Freedom of expression and ICTs: Overview of international standards, <https://www.article19.org/resources.php/resource/37380/en/freedom-of-expression-and-icts:-overview-of-international-standards>