Module 2

INTRODUCTION TO DIGITAL RIGHTS

Modules on Litigating Freedom of Expression and Digital Rights in South and South East Asia
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# Module 2: Introduction to digital rights

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MODULE 2

INTRODUCTION TO DIGITAL RIGHTS

- Digital rights — which include the right to freedom of expression, privacy and access to information — are the same fundamental human rights as those enjoyed offline but adapted to a new age of technology.

- In understanding digital rights, it is important to understand the role of internet intermediaries, a range of actors who enable access to and use of the internet and whose actions play a critical role in protecting or undermining freedom of speech and associated digital rights online.

- Freedom of expression online is uniquely powerful because of its borderless nature, but it has created new legal challenges and consequences, such as the growth in dis- and misinformation.

- It is crucial that human rights defenders engage with the new challenges posed online and act to protect and promote digital rights in the rapidly evolving online world.

INTRODUCTION

Digital rights are human rights in the digital realm. The term ‘digital rights’ speaks to questions around how the same rights that have always been fundamental to all humans — such as freedom of expression, privacy and access to information — are exercised and protected in the era of the internet, social media and technology.

There is a tension between human rights and freedoms, and the rise in restrictions on access to and use of online spaces, which is continuing with increased political polarisation and the growing powers of non-state actors. Protecting and developing online spaces where human rights can be respected and promoted requires effective responses to oppressive regulations, and innovative solutions.

Additionally, understanding digital rights is crucial to being able to protect fundamental human rights online, as very little of our lives today is immune from the forces of technology and the internet that have reshaped how humans communicate, participate and behave. Digital rights are the rights that apply in these spaces, including the particular nuances which come with the application of human rights online.

This module seeks to provide an overview of digital rights and trends affecting freedom of expression online in South and Southeast Asia.
Module 2: Introduction to digital rights

WHAT ARE DIGITAL RIGHTS?

It is now firmly established that the same rights that people have offline should also be protected online, in particular the right to freedom of expression. As stipulated in article 19(2) of the International Covenant on Civil and Political Rights (ICCPR), the right to freedom of expression applies regardless of frontiers and through any media of one’s choice.

However, how established principles of freedom of expression should be applied to online content and communications is in many ways still being determined. For example, do bloggers and citizen journalists count as journalists and should they be afforded the same protections with regards to freedom of expression? How should states regulate the re-tweeting or resharing of hate speech as compared to the author of it? What about regulations for defamatory statements from anonymous accounts? These challenges are actively being grappled with by policymakers and courts around the world.

Examples of digital rights issues

To give an idea of the range and complexity of the issues included in the umbrella term ‘digital rights,’ here are some examples:

- **Access to the internet.** The right to access the internet is not explicitly recognised in human rights treaties, the main ones of which were elaborated prior to the internet’s becoming widespread in usage. However, there has been a growing recognition in recent years that states are required to take progressive steps to promote universal access to the internet.¹

- **Interferences with access to the internet.** In addition to positive obligations to progressively realise improve access to the internet, states are required to refrain from unjustified restrictions on accessing the internet through internet shutdowns, the disruption of online networks and social media sites, and the blocking and filtering of content.² All of these are considered forms of prior restraint on freedom of expression for restricting internet users from expressing themselves through these services and websites before the expression actually occurs. International law allows very limited space for such extreme restrictions on freedom of expression.

- **The freedom to choose among information sources.** The 2017 Report of the UN Special Rapporteur on freedom of expression notes that in the digital age the freedom to choose

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¹ Juan Carlos Lara, ‘Internet access and economic, social and cultural rights’, Association for Progressive Communications (September 2015) at p 10-11 (accessible at: https://www.apc.org/sites/default/files/APC_ESCR_Access_Juan%20Carlos%20Lara_September2015%20%28%29.pdf). The 2019 Report of the UN Secretary-General’s High level panel on Digital Cooperation noted that “universal human rights apply equally online as offline – freedom of expression and assembly, for example, are no less important in cyberspace than in cyberspace than in the town square” at p 16 (accessible at: https://www.un.org/en/pdfs/DigitalCooperation-report-for%20web.pdf). In Delfi v Estonia, Application no. 64669/09 (2015) the Grand Chamber of the European Court of Human Rights held that the internet provided an unprecedented platform for the exercise of the right to freedom of expression (accessible at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2264669/09%22]#%22documentcollectionid%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]#%22itemid%22:[%222001-155105%22]}).

² See Module 3 of this course for more details.
among information sources is meaningful only when internet content and applications of all kinds are transmitted without undue discrimination or interference by non-state actors, including providers.³ This concept is known as network neutrality, the principle that all internet data should be treated equally without undue interference.⁴ In Asia, there has been significant debate about access to zero-rated content, which is applications or websites the usage of which a mobile operator does not count towards a user's monthly data allotment, rendering it ‘free’. This is a practice commonly used by social media companies. Although some of these companies have touted zero-rating schemes as a means of providing access to the internet for people who might not otherwise have been able to afford it, in practice they can lead to unfair competition and can distort users' perceptions by only allowing access to particular sites. India is among the jurisdictions to have taken effective action against zero-rating, effectively banning the practice.⁵

- **The right to privacy.** Exercising privacy online is increasingly difficult in a world in which we leave a digital footprint with every action we take online. While data protection laws are on the rise across the world, including Asia, they are of widely varying degrees of comprehensiveness and effectiveness, and often offer insufficient protection against state surveillance activities.⁶ Government-driven mass surveillance is on the rise as a result of the development of technology that enables the interception of communications in a variety of new ways, such as biometric data collection and facial recognition technology.⁷

### WHAT IS AN INTERNET INTERMEDIARY?

An internet intermediary is an entity which provides services that enable people to use the internet, falling into two categories: (i) conduits, which are technical providers of internet access or transmission services; and (ii) service providers, such as hosts, providers of content services, such as online platforms (e.g. social media websites), caching providers and storage services.⁸

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⁴ For more on net neutrality, see Module 3 of this course and pp 2-9 of Module 5 of Media Defence’s Advanced Modules on Digital Rights and Freedom of Expression Online (accessible at: https://www.medialdefence.org/reader/publications/advanced-modules-on-digital-rights-and-freedom-of-expression-online/module-5-trends-in-censorship-by-private-actors/).


Examples of internet intermediaries are:

- Network operators, such as Airtel, Globe and Axiata.
- Network infrastructure providers, such as Cisco, Huawei, Ericsson and ZTE.
- Internet access providers, such as MyKRIS, WorldTel and PTCL.
- Communications service providers, such as Telenor, Metfone and SLT-Telecom.
- Social networks, such as Facebook, Twitter and LinkedIn.

One of the most challenging questions relating to internet intermediaries is whether they constitute publishers in the traditional sense of the word. Is an Internet Service Provider (ISP) or even social media platform liable for the content it hosts on behalf of others? Courts have generally found that an ISP does not ‘publish’ any more than the supplier of newsprint or the manufacturer of broadcasting equipment. As pointed out by the UN Special Rapporteur on Freedom of Expression in 2011:

> “Holding intermediaries liable for the content disseminated or created by their users severely undermines the enjoyment of the right to freedom of opinion and expression, because it leads to self-protective and over-broad private censorship, often without transparency and the due process of the law.”

Some countries in South and Southeast Asia, such as the Philippines, have laws providing for the limitation of intermediary liability, to help protect themselves from liability even in cases where such legislation does not exist, intermediaries often develop terms and conditions that specify their responsibilities and those of their customers. Other countries in South and Southeast Asia have laws that explicitly make intermediaries liable for their actions regarding content posted using their services.

Additionally, internet intermediaries are increasingly being used by states to police the internet through direct requests to take down content or interfere with internet access, decisions which are often made outside of formal legal and regulatory frameworks and lack transparency and public scrutiny. Even where such actions are authorised under domestic law, often the legislation used is worded in an overly broad manner, giving authorities significant discretion to order content removed on vaguely defined or impermissible grounds. For example, under section 37 of The Prevention of Electronic Crimes Act 2016, the Pakistan Telecommunication Authority is granted “the power to remove or block or issue directions for removal or blocking of access to an information through any information system if it considers it necessary in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, public order, decency or morality, or in relation to contempt of court or commission of or incitement to an offence under this Act.”

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11 See, for example, Joint Letter of Access Now and 24 other organisations, ‘Indonesia: repeal law that imposes harsh intermediary liabilities, risks curtailing expression’ (2021) (accessible at: https://www.accesnow.org/indonesia-intermediary-liabilities/).

THE BORDERLESS ENJOYMENT OF FREEDOM OF EXPRESSION

One particular strength of freedom of expression online presents is that the right is able to be enjoyed regardless of physical borders. People are able to speak, share ideas, coordinate and mobilise across the globe on a significant and unprecedented scale.

**The internet as a tool for change: the case of Myanmar and the Milk Tea Alliance**

Following the 2021 *coup d'état* that led to a military regime taking control of Myanmar’s government, activists in Taipei, Bangkok, Melbourne and Hong Kong heeded a call by pro-democracy campaigners in Myanmar and took to the street carrying #MilkTeaAlliance signs.¹³ The Milk Tea Alliance online movement for democracy and human rights first emerged in Hong Kong, Taiwan and Thailand, and is an allusion to a shared love for variations of milk tea in those countries, and the hashtag was used to protest online attacks from Chinese nationalists.¹⁴

Before the internet, this would have been next to impossible. The borderless nature of the internet can lead to international pressure being put on states for rights violations, global campaigns being developed and supported, and a rigorous exchange of ideas being fostered.

However, the internet also gives rise to particular challenges. Through the internet, the ability to publish immediately and reach an expansive audience can create difficulties from a legal perspective, such as establishing the true identity of an online speaker, establishing founding jurisdiction for a legal claim, or achieving accountability for wrongdoing that has spread rapidly online, such as the non-consensual dissemination of intimate images.

Moreover, once content has been published online it can often be very difficult to remove it. In the 2021 case of *T.V. Today Network Limited vs The Cognate & Ors*,¹⁵ the New Delhi High Court ordered the deletion of an infographic that had been shared on Twitter, Facebook and Instagram and that was determined to be defamatory. This particular order was worded broadly, and the defendants were also ordered to block related posts on “other social media or any other website on the internet, in print or electronically or other media”.¹⁶ However, the viral nature of social media raises questions about the effectiveness of such remedies, particularly where they are broadly worded. The deletion of a tweet on Twitter does not necessarily remove it from all platforms, as there are other ways in which the content may have been distributed that are not addressed by the deletion (such as retweets in which persons added a comment of their own),¹⁷ and third parties responsible for such posts may not be party to the litigation and thus not bound to remove content they have disseminated. This is a particular challenge to finding effective remedies to claims of defamation, hate speech, or the right to be forgotten.

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¹⁴ ld.

¹⁵ Delhi High Court, CS(OS) 246/2021 (2021) (accessible at: [https://indiankanoon.org/doc/72053412/](https://indiankanoon.org/doc/72053412/))

¹⁶ ld. at para. 27.

THE RIGHT TO FREEDOM OF EXPRESSION ONLINE

International law is clear that the right to freedom of expression applies online just as it does offline, though there are challenges in implementing this principle in practice. For example, article 19(2) of the [ICCPR](https://www2.ohchr.org/english/bodies/hrc/docs/qc34.pdf) is explicit that the right to freedom of expression applies "regardless of frontiers," and the United Nations Human Rights Committee ([UNHRC][teo]) General Comment No. 34 further clarifies that this includes internet-based modes of communication.18

Challenges to freedom of expression online

Some examples of the new challenges to exercising freedom of expression online include:

- The blocking, filtering, and removal of content, often executed by internet intermediaries on behalf of government outside of regulatory or legislative provisions or pursuant to expansive and vague legislation, and with little transparency or accountability.
- Online content regulation through overly broad and vague cybercrimes legislation which, although ostensibly intending to counter genuinely criminal activity online, such as child pornography, is often misused by governments to stifle criticism and free speech.19
- The rapid growth in misinformation and disinformation on online platforms leading to a backlash from states, which react with ‘fake news’ regulations that often unjustifiably restrict freedom of expression.20
- Defining and protecting journalists and the media in an environment now saturated with bloggers and social media writers, and defending them from online harassment, particularly women who are disproportionately subject to online attacks.
- Enabling free, full and socially relevant access to the internet, including overcoming the challenges of unaffordability while preventing the distortion that can be created by zero-rating.21
- Tackling the spread of hate speech on online platforms without placing undue responsibility on private actors to proactively limit content on their platforms.
- Protecting the public from invasive uses of private data and protecting anonymous communications, while simultaneously enabling accountability for illegal behaviour online.

CONCLUSION

Digital rights is a relatively new and dynamic field. Protecting digital rights involves a host of new actors that did not exist previously, such as internet intermediaries. The internet is an incredibly powerful tool for social progress and the fuller realisation of human rights, but it also gives rise to particular challenges. Nevertheless, international law is clear that the same rights that apply offline

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18 UN Human Rights Council, General Comment no. 34 at para. 12 (2011) (accessible at [https://www2.ohchr.org/english/bodies/hrc/docs/qc34.pdf](https://www2.ohchr.org/english/bodies/hrc/docs/qc34.pdf)).
19 For more see Module 7 in this series from Media Defence on ‘Cybercrimes.’
20 For more see Module 8 in this series from Media Defence on ‘False news, misinformation and propaganda.’
21 For more see Module 3 in this series from Media Defence on ‘Access to the internet.’
apply online, and while those challenges might be immense, the benefits of getting it right — a free and fair internet which is accessible to all — are too important not to take digital rights seriously.