

# *Contracting space for opposing speech in South East Asia and restrictions on the online freedom of expression*

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## ***Contracting Space for Opposing Speech in South East Asia and Restrictions on the Online Freedom of Expression***

Alexander Gilder\*

### **Abstract**

The right to freedom of expression has been subjected to limitations in South East Asia with restrictions continuing in Thailand, Vietnam, Indonesia, Singapore, and Malaysia, to name a few countries. Speech that is critical of governments has been prevented with many instances of journalists, bloggers, activists, and opposition groups being detained and convicted, resulting in contracting space for the press and civil society. Going further, Malaysia, Thailand, and Cambodia have sought to restrict online activities through various means. This State practice report outlines examples of laws enacted in Malaysia and Cambodia and practices in Thailand that impact the online freedom of expression and examines the literature on content moderation and human rights frameworks. The report expounds the risks posed by States who seek to restrict the use of the internet for the freedom of expression and highlights the need for future research to examine the legal frameworks being used by states to limit the online freedom of expression.

**Keywords:** Freedom of expression – South East Asian States – Internet content moderation – Intermediaries – Article 19 ICCPR

### **Introduction**

This State practice report comes at period of transition. States have grappled with the COVID-19 pandemic and responses, including the declaration of States of emergency, have led to changes in the law and, in some circumstances, the creation of new restrictions on human rights. States must ensure international human rights law is adhered to as States of emergency are abated and attention turns to new (and old) questions of human rights.<sup>1</sup> First, this report discusses controversial restrictions on the freedom of expression in Malaysia, Thailand, and Cambodia focusing on the online freedom of expression and measures imposed to restrict access to content, remove content, and prosecute individuals for offences related to their online

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<sup>1</sup> For example, the UN High Commissioner for Human Rights and many of the Special Rapporteurs urged States to adhere to human rights standards when implementing measures to combat COVID-19 and that “emergency powers should not be used to quash dissent.”. United Nations Office of the High Commissioner on Human Rights, ‘Coronavirus: Human rights need to be front and centre in response, says Bachelet’ 6 March 2020 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25668&LangID=E> accessed 14 October 2021; United Nations Office of the High Commissioner on Human Rights, ‘COVID-19: States should not abuse emergency measures to suppress human rights – UN experts’, 16 March 2020 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25722> accessed 14 October 2021.

activities. Second, the literature on content moderation is discussed to demonstrate how the freedom of expression can be limited on online platforms. However, the literature mainly focuses on the actions of the private companies who operate online platforms (intermediaries) and does not account for State regulation and restrictions imposed on intermediaries. Importantly, the report expounds the risks posed by States who seek to restrict the use of the internet for the freedom of expression and highlights the need for future research to examine the legal frameworks being used to limit online expression.

### **Contracting Space for Opposing Speech in South East Asia**

Since the beginning of the COVID-19 pandemic several South East Asian States have taken advantage of the situation to impose further restrictions on the freedom of expression.<sup>2</sup> Civic space and the freedom of expression in some South East Asian States has contracted during 2020 and 2021.<sup>3</sup> In 2020, Freedom House reported that political rights declined overall in the Asia-Pacific region due to States bringing criminal prosecutions against members of opposition groups and journalists, and the persecution of religious and ethnic minorities.<sup>4</sup> South East Asia has a majority of governments described as ‘soft dictatorships to electoral authoritarian regimes and illiberal democracies’.<sup>5</sup> Examples of legislation that imposes restrictions on the freedom of expression are rife in South East Asia with regimes passing state of emergency laws during COVID, such as in Thailand and Cambodia, and other laws such as Singapore’s Protection from Online Falsehoods and Manipulation Act 2019 which allows the Singaporean government to issue take down orders for the removal of content and a correction notices for content the government has deemed to be false or so-called ‘fake news’.<sup>6</sup> In Malaysia, the Communications and Multimedia Act 1988 has been used in an expansive manner to ‘supress freedom of expression’ online.<sup>7</sup>

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<sup>2</sup> Stewart Manely, ‘Critical Speech in Southeast Asian Grey Literature During the COVID-19 Pandemic’, (2021) 21 *Human Rights Law Review* 233-251, 238.

<sup>3</sup> *Ibid.* 239.

<sup>4</sup> Freedom House, ‘Freedom in the World 2020: A Leaderless Struggle for Democracy’ (2020) <[https://freedomhouse.org/sites/default/files/2020-02/FIW\\_2020\\_REPORT\\_BOOKLET\\_Final.pdf](https://freedomhouse.org/sites/default/files/2020-02/FIW_2020_REPORT_BOOKLET_Final.pdf)> accessed 30 September 2021, p.22.

<sup>5</sup> Sorpong Peou, ‘The Limits and Potential of Liberal Democratisation in Southeast Asia’ (2014) 33 *Journal of Current Southeast Asian Affairs* 19-47, p.19

<sup>6</sup> David Hutt, ‘Southeast Asia’s Coronavirus-Driven Censorship’, *The Diplomat*, 17 April 2020 <<https://thediplomat.com/2020/04/southeast-asias-coronavirus-driven-censorship/>> accessed 30 September 2021; Saheli Roy Choudhury, ‘Singapore’s law minister says that to counter fake news, more information must be given’, *CNBC*, 8 April 2020 <<https://www.cnbc.com/2020/04/08/singapore-law-minister-on-tackling-fake-news-during-coronavirus-pandemic.html>> accessed 30 September 2021; See also, Bill Hayton, ‘Freedom of expression under threat in Southeast Asia’, *Chatham House*, 3 June 2021 <<https://www.chathamhouse.org/2021/06/freedom-expression-under-threat-southeast-asia>> accessed 30 September 2021.

<sup>7</sup> Article 19, ‘Malaysia The Communications and Multimedia Act 1998: Legal Analysis’, February 2017 <<https://www.article19.org/wp-content/uploads/2018/02/Malaysia-analysis-Final-December-2.pdf>> accessed 30 September 2021.

Examining the situation particularly in Malaysia, Thailand, and Cambodia this section outlines recent examples of restrictions on the freedom of expression reported since the start of the pandemic. Both Malaysia and Thailand have made use of states of emergency with Malaysia declaring a state of emergency on 12 January 2021 which was lifted on 1 August 2021 due to security, economic life and public order being threatened by the COVID-19 pandemic.<sup>8</sup> Thailand also declared a state of emergency on 25 March 2020 which lasted until 31 July 2020.<sup>9</sup> Subsequently, Thailand responded to protests in Bangkok in late 2020 by declaring a state of emergency on 15 October 2020.<sup>10</sup>

Cambodia refrained from initiating a state of emergency early in the pandemic in 2020 but did use confirmed cases to justify the “urgent” need to clarify the powers of the government, under Article 22 of the Cambodian constitution, during a state of emergency.<sup>11</sup> The resulting legislation, unofficially translated as the Law on the Management of the Nation in Emergencies, became law on 29 April 2020.<sup>12</sup> Under Article 5, the law enables the government to impose restrictions or ban travel, meetings and gatherings, and people leaving their homes, amongst other restrictions.<sup>13</sup> Furthermore, the government may adopt “surveillance measures by any means for digital information in response to the State of Emergency.”<sup>14</sup> The UN Special Rapporteur on the situation of human rights in Cambodia, Rhona Smith, stated “[t]he broadly worded language on the protection of national security and public order, ostensibly aimed at addressing COVID-19, can potentially be used to infringe on the right to privacy and unnecessarily restrict freedoms of expression, association and peaceful assembly.”<sup>15</sup> The law remains in effect but has been criticised as providing “one more legal mechanism through

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<sup>8</sup> Emergency (Essential Powers) Ordinance 2021. See, Kok Chee Kheong, *The Emergency (Essential Powers) Ordinance 2021* (19 January 2021), Skrine <<https://www.skrine.com/insights/alerts/january-2021/the-emergency-essential-powers-ordinance-2021>> accessed 14 October 2021.

<sup>9</sup> Regulation Issued under Section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) (No. 1) (25 March 2020). For an unofficial translation see, [https://covidlawlab.org/wp-content/uploads/2021/02/Thailand\\_2020.03.27\\_Regulation\\_Regulation-Issued-under-Section-9-of-the-Emergency-Decree-on-Public-Administration-in-Emergency-Situations-B.E.-2548-2005-No.-1\\_EN.pdf](https://covidlawlab.org/wp-content/uploads/2021/02/Thailand_2020.03.27_Regulation_Regulation-Issued-under-Section-9-of-the-Emergency-Decree-on-Public-Administration-in-Emergency-Situations-B.E.-2548-2005-No.-1_EN.pdf).

<sup>10</sup> Regulation Issued under Section 9 and Section 11 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005) (15 October 2020). For an unofficial translation see, [https://covidlawlab.org/wp-content/uploads/2021/02/Thailand\\_2020.10.15\\_Order\\_Regulation-Issued-under-Section-9-and-Section-11-of-the-Emergency-Decree-on-Public-Administration-in-Emergency-Situations-B.E.-2548-2005\\_EN.pdf](https://covidlawlab.org/wp-content/uploads/2021/02/Thailand_2020.10.15_Order_Regulation-Issued-under-Section-9-and-Section-11-of-the-Emergency-Decree-on-Public-Administration-in-Emergency-Situations-B.E.-2548-2005_EN.pdf).

<sup>11</sup> Randle DeFalco, ‘Opportunism, COVID-19, and Cambodia’s State of Emergency Law’, JustSecurity, 3 August 2020 <<https://www.justsecurity.org/71194/opportunism-covid-19-and-cambodias-state-of-emergency-law/>> accessed 30 September 2021.

<sup>12</sup> Agence Kampuchea Presse, ‘Full Text of Approved State of Emergency Draft Law’, 10 April 2020 <<https://akp.gov.kh/post/detail/29564>> accessed 30 September 2021; DeFalco (n. 11).

<sup>13</sup> Agence Kampuchea Presse (n. 12).

<sup>14</sup> Ibid.

<sup>15</sup> United Nations Office of the High Commissioner on Human Rights, ‘Cambodia’s state of emergency law endangers human rights, warns UN expert’, 17 April 2020 <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25801&LangID=E>> accessed 30 September 2021.

which the government can, when needed, confer extraordinary and largely arbitrary powers on itself, all while maintaining a façade of legality.”<sup>16</sup>

In Malaysia, the Perikatan Nasional coalition took power in March 2020 with Muhyiddin Yassin serving as Prime Minister until his resignation on 16 August 2021 when the coalition government lost the support of the United Malays National Organisation (UMNO). Since 21 August 2021, UMNO Vice-President, Ismail Sabri Yaakob has been Prime Minister of Malaysia. The Perikatan Nasional coalition was criticised for carrying out an “assault on freedom of speech” by launching criminal investigations, arresting protesters, and banning books.<sup>17</sup> Amnesty has alleged that blanket bans on protests and the dispersal of peaceful assemblies after the state of emergency was lifted fails to respect the right to peaceful assembly and expression.<sup>18</sup> Article 19 has also documented instances where the Malaysian authorities prevented protesters from accessing public squares, surveilled protesters allegedly to intimidate protesters, and carried out arrests.<sup>19</sup> Some have suggested the Malaysian authorities utilised the state of emergency, due to COVID-19, as a method of silencing dissent.<sup>20</sup> The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, has criticised legislation in Malaysia that criminalises ‘fake news’ as the executive is given unfettered discretion without judicial oversight and opens “the possibility for abuse and arbitrary decision-making.”<sup>21</sup>

In July 2021, the ‘#Lawan’ protests were organised in response to government restrictions and suspension of parliament in the face of rising COVID-19 cases. The aforementioned Communications and Multimedia Act 1988 has been used to detain individuals for social media posts that “calls for the public to participate in the #Lawan rally.”<sup>22</sup> Arrests of opposition politicians have also taken place in Malaysia for their participation in events that protest the suspension of parliament by the government.<sup>23</sup> Amnesty have documented the Malaysian government’s response to the #Lawan protests which reportedly includes the intimidation of

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<sup>16</sup> DeFalco (n. 11).

<sup>17</sup> Linda Lakhdir, ‘Troubling Cases of the Malaysian Government Criminalizing Speech’, 29 April 2021 <<https://www.hrw.org/news/2021/04/29/troubling-cases-malaysian-government-criminalizing-speech>> accessed 30 September 2021.

<sup>18</sup> Amnesty International, ‘Malaysia: PM’s resignation must restore respect for freedom of expression and assembly’, 17 August 2021 <<https://www.amnesty.org/en/latest/news/2021/08/malaysia-pm-resignation-restore-respect-freedom-expression/>> accessed 30 September 2021.

<sup>19</sup> Article 19, ‘Malaysia: Government must stop harassment and intimidation of peaceful protesters’, 31 July 2021 <<https://www.article19.org/resources/malaysia-government-must-stop-harassment-intimidation-peaceful-protesters/>> accessed 30 September 2021.

<sup>20</sup> Ibid.

<sup>21</sup> UN Human Rights Council, ‘Disinformation and freedom of opinion and expression’ (13 April 2021) A/HRC/47/25, p.11.

<sup>22</sup> Article 19 (n. 19).

<sup>23</sup> Human Rights Watch, ‘Malaysia: Free Speech Under Increasing Threat’, 19 May 2021 <<https://www.hrw.org/news/2021/05/19/malaysia-free-speech-under-increasing-threat>> accessed 30 September 2021; Amnesty International (n. 18).

activists, journalists, and opposition politicians leading to investigations and questioning of members of parliament and media workers.<sup>24</sup>

The freedom of expression has also seen restrictions in Thailand amidst protests in 2020-21 that “demand a new constitution, a new government, and an end to the harassment and intimidation of government critics. Activists have also called for reform of the monarchy, an institution protected by laws carrying severe criminal penalties.”<sup>25</sup> Two main areas of Thai law have been used to impose restrictions on the freedom of expression since the start of the pandemic. First, the Public Assembly Act and emergency regulations under the state of emergency have been used throughout the pandemic to ban public assemblies and prosecute individuals who have sought to exercise the right to protest.<sup>26</sup> However, during Thailand’s second Universal Periodic Review (UPR) in May 2016 Thailand noted for examination a recommendation that the Public Assembly Act should be repealed.<sup>27</sup> However, the Act remains in force and Thailand’s third UPR is due to take place on 10 November 2021. Second, laws on *lèse-majesté* criminalise “defamation or insult of the king”.<sup>28</sup> Section 112 of the Criminal Code has been used since November 2020 to investigate and charge persons for *lèse-majesté* offences.<sup>29</sup> In 2017, the UN Special Rapporteur on the promotion of freedom of expression, David Kaye, stated “[t]he *lèse-majesté* provision of the Thai Criminal Code is incompatible with international human rights law”.<sup>30</sup> Despite eight recommendations for reform of Section 112 during Thailand’s second UPR, the provision remains and has been used broadly to investigate and arrest protesters.<sup>31</sup>

Challenges to the freedom of expression in Malaysia and Thailand have also taken place in online spaces. In a recent case, *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Another* [2021], the Malaysian Federal Court held that Malaysiakini, an online news provider, was responsible for comments posted by third-parties under section 114A(1) of the Evidence

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<sup>24</sup> Amnesty International (n. 18).

<sup>25</sup> Article 19, ‘Submission to the Universal Periodic Review of Thailand by ARTICLE 19’, 25 March 2021 <[https://www.article19.org/wp-content/uploads/2021/03/ARTICLE-19\\_Thailand-UPR\\_25.03.2021.pdf](https://www.article19.org/wp-content/uploads/2021/03/ARTICLE-19_Thailand-UPR_25.03.2021.pdf)> accessed 30 September 2021, para 4.

<sup>26</sup> *Ibid.* paras 6-9.

<sup>27</sup> UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review Thailand’ (A/HRC/33/16) 15 July 2016, Recommendation 159.53 at p.27.

<sup>28</sup> Hayton (n. 6).

<sup>29</sup> Human Rights Watch, ‘Thailand: Prominent Activists Held in Pre-Trial Detention’, 9 February 2021 <<https://www.hrw.org/news/2021/02/09/thailand-prominent-activists-held-pre-trial-detention>> accessed 30 September 2021.

<sup>30</sup> United Nations Office of the High Commissioner on Human Rights, ‘Thailand: UN rights expert concerned by the continued use of *lèse-majesté* prosecutions’, 7 February 2017 <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21149>> accessed 30 September 2021.

<sup>31</sup> See UN Human Rights Council (n. 27) Recommendations 159.52, 159.53, 159.55, 159.62, 159.59, 159.18, 159.54, 159.57; Article 19, (n. 19) para 19.

(Amendment) (No.2) Act 2012.<sup>32</sup> The decision has been criticised with a collection of NGOs publishing a joint statement declaring that “[p]unishing a news portal over comments left by their readers, which they removed upon being notified that the comments were problematic, is grossly disproportionate to any legitimate aim of protecting public order, and seriously undermines freedom of expression.”<sup>33</sup>

In October 2020, the Thai government were reported to have request the cooperation of internet providers to ban the Telegram messaging app. A leaked document stated, “[t]he Ministry of Digital Economy and Society is seeking your co-operation to inform the Internet Service Providers and all mobile network operators to suspend the use of Telegram app”.<sup>34</sup> Going further the Thai government “ordered a ban on news and online information that could affect national security” and “also banned political gatherings of more than five people.”<sup>35</sup> More recently on 29 July 2021 the government promulgated Regulation No.29 which,

prohibit[s] the release, distribution or dissemination of texts that may “instigate fear” or are “intended to distort information to mislead understanding of the emergency situation to the extent of affecting the security of state or public order or good morals of the people.”<sup>36</sup>

Human Rights Watch assert that Regulation No.29 is an ‘arbitrary and intrusive’ measure and the use of criminal sanctions, fines, and the suspension of IP addresses does not comply with Article 19 International Covenant on Civil and Political Rights (ICCPR).<sup>37</sup>

Since 2020 Cambodia has sought to extend its control of the online environment through several mechanisms including a sub-decree and the development of new draft laws. A Sub-Decree on the Establishment of a National Internet Gateway (NIG Sub-Decree) was adopted in February 2021 to create an internet gateway “through which all Internet communications

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<sup>32</sup> *Peguam Negara Malaysia v. Mkini Dotcom Sdn Bhd & Another* [2021] 1 LNS 89 (Case No. 08(L)-4-06/2020) (Malaysia Federal Court). Judgement available here <<http://foongchingleong.com/wordpress/wp-content/uploads/2021/05/goj-malaysiakini-majoriti.pdf>> accessed 30 September 2021.

<sup>33</sup> ‘Malaysian Federal Court Decision Against Online News Portal Malaysiakini a Setback to Media Freedom and Freedom of Expression’, 23 February 2021, Joint press release from the Centre for Independent Journalism, Gerakan Media Merdeka and the National Union of Journalists Peninsula Malaysia, and global partners International Federation of Journalists, ARTICLE 19 and the Centre for Law and Democracy [https://www.ifj.org/fileadmin/user\\_upload/210224\\_Malaysia.pdf](https://www.ifj.org/fileadmin/user_upload/210224_Malaysia.pdf) accessed 30 September 2021.

<sup>34</sup> ‘Thailand protests: Authorities move to ban Telegram messaging app’, BBC, 19 October 2020 <<https://www.bbc.co.uk/news/world-asia-54598956>> accessed 30 September 2021.

<sup>35</sup> Patpicha Tanakasempipat, Panarat Thepgumpanat, ‘Thai police probe media, as thousands again defy protest ban’, Reuters, 19 October 2020 <<https://www.reuters.com/article/thailand-protests-idUSKBN2740JF>> accessed 30 September 2021.

<sup>36</sup> Human Rights Watch, ‘Thailand: Immediately Repeal Emergency Regulation that Threatens Online Freedoms’, 3 August 2021 <<https://www.hrw.org/news/2021/08/03/thailand-immediately-repeal-emergency-regulation-threatens-online-freedoms>> accessed 30 September 2021.

<sup>37</sup> *Ibid.*



and Internet data traffic circulating within and coming into Cambodia must pass.”<sup>38</sup> Under the Sub-Decree, content can be blocked where it is deemed to “affect safety, national revenue, social order, dignity, culture, traditions and customs”.<sup>39</sup> It could be argued that the government-appointed operators will, in effect, be carrying out content moderation to censor communications that fall foul of the Sub-Decree. Three UN Special Rapporteurs expressed concern that the Sub-Decree could contravene Articles 19 and 17 of the ICCPR.<sup>40</sup> A draft of a Law on Cybercrime, dated 4 August 2020, was reportedly leaked on 4 August 2020.<sup>41</sup> The draft has not become law but includes proposed provisions for service providers, who are not fully defined, to provide user data to government authorities when requested and to retain data for a minimum of 180 days, and criminalises the online spread of ‘disinformation’.<sup>42</sup> Given the fact that Malaysia, Thailand, and Cambodia have sought to restrict online activities through various means, the next section will discuss the literature on content moderation and human rights frameworks. The section highlights the issues left unresolved in the literature, including the growing role of states in the imposition of online restrictions and the freedom of expression.

### **The Online Restriction of the Freedom of Expression and Content Moderation**

Social media platforms, and online methods of communication more generally, have been used to spread hatred and promote violence. For example, social media has been used to incite violence against the Rohingya in Myanmar.<sup>43</sup> Ronan Lee has argued State denigration of the Rohingya has led to the acceptability of anti-Rohingya speech from non-State actors on social media.<sup>44</sup> Consequently, the State is able to impact the generation of types of speech and content shared on social media platforms that in turn can impact a State’s duty to ensure an enabling environment for freedom of expression under IHRL. Another example is the use of WhatsApp by individuals in India to spread misinformation, which has led to a number of deaths and violent attacks since 2015, but notably hitting a peak in 2018.<sup>45</sup> In an effort to limit hate speech

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<sup>38</sup> Article 19, ‘Cambodia: Human Rights Council must urge action to uphold the right to freedom of expression’, 5 August 2021 <<https://www.article19.org/wp-content/uploads/2021/08/Cambodia-Advocacy-Briefing-for-HRC48.pdf>> accessed 30 September 2021, p.5.

<sup>39</sup> ‘Mandates of the Special Rapporteur on the situation of human rights in Cambodia; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the right to privacy’, 7 April 2021, Ref AL KHM 3/2021 <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26263>> accessed 30 September 2021, p.1.

<sup>40</sup> Ibid p. 2.

<sup>41</sup> Article 19 (n 38) p.6.

<sup>42</sup> Ibid. p.6.

<sup>43</sup> Barrie Sander, ‘Democratic Disruption in the Age of Social Media: Between Marketized and Structural Conceptions of Human Rights Law’ (2021) 32 *European Journal of International Law* 159-193, at 166.

<sup>44</sup> Ronan Lee, ‘Extreme Speech in Myanmar: The Role of State Media in the Rohingya Forced Migration Crisis’ (2019) 13 *International Journal of Communication* 3203–3224; See generally, Naved Bakali, ‘Islamophobia in Myanmar: the Rohingya genocide and the ‘war on terror’’ (2021) 62 *Race & Class* 53-71.

<sup>45</sup> Shakuntala Banaji and Ram Bhat, ‘WhatsApp Vigilantes: An exploration of citizen reception and circulation of WhatsApp misinformation linked to mob violence in India’ (LSE Department of Media and Communications, 2019) <http://www.lse.ac.uk/media-and-communications/assets/documents/research/projects/WhatsAppMisinformation-Report.pdf> accessed 30 September 2021.

and misinformation from both the state and non-state actors, companies that operate online platforms have growing roles in content moderation. However, at the same time the online platforms “play an increasingly important civic role as platforms for discourse. They collectively create space for members of the public to gather, discuss, debate, and share information”.<sup>46</sup> Consequently, there is an important balance for States and companies to strike in online content moderation between the freedom of expression of users and the imposition of legitimate restrictions on speech.

There is a distinction between companies which host or republish content (such as a social media platform where users are able to post their own content) and companies that have editorial responsibility for content on their platform (such as a news outlet that is responsible for the content posted by its reporters and other contributors). The former are so-called ‘intermediaries’ because they facilitate the means by which users communicate and share content. Many States do not hold intermediaries liable for content published by third parties.<sup>47</sup> For example, in the United States such intermediaries are shielded from third party content liability under section 230 of the Communications Decency Act 1996.<sup>48</sup> This means that the company cannot be held responsible for the speech of a user in the United States. However, the liability of intermediaries is still under debate in other jurisdictions.

In April 2020 Baker McKenzie carried out a study of Asian-Pacific States to determine which States have adopted laws that attach liability to a platform where users have disseminated fake news.<sup>49</sup> For example, in Malaysia intermediaries can be liable under the aforementioned Communications and Multimedia Act 1988 where users of the platform are found to have spread fake news and under the Content Code where the intermediary does not comply with a direction from the Malaysian Communications and Multimedia Commission to remove the content deemed false.<sup>50</sup> In addition, under the Malaysian Penal Code, the intermediary “ may be presumed to be the publisher of the content made available on their platform, and can be liable for a criminal offense” to spread false statements.<sup>51</sup>

Much of the discussion in the literature has focused on the methodologies and approaches adopted by intermediaries to moderate content posted by users of their platform. For example, literature has discussed the need to harmonise the standards applied because “content which is

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<sup>46</sup> Sarah Myers West, ‘Censored, suspended, shadowbanned: User interpretations of content moderation on social media platforms’ 20 *New Media & Society* 4366-4383, p.4366.

<sup>47</sup> UN Human Rights Council, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’ A/HRC/38/35 (6 April 2018), para 14.

<sup>48</sup> Thiago Dias Oliva, ‘Content Moderation Technologies: Applying Human Rights Standards to Protect Freedom of Expression’ (2020) 20 *Human Rights Law Review* 607-640, 608.

<sup>49</sup> ‘Asia Pacific Survey on Fake News and Intermediary Liability’, April 2020, Baker McKenzie <<https://www.bakermckenzie.com/-/media/files/insight/guides/2020/ap-survey-on-fake-news-and-intermediary-liability.pdf>> accessed 15 October 2021.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

not fit for Facebook might still find a home on Twitter or Reddit”<sup>52</sup> Intermediaries may also use algorithms or artificial intelligence to identify and remove content that violates the platform’s terms of service. Authors have argued that the methods used by intermediaries, and consequently the terms of service, should follow recognised international human rights standards, such as the United Nations Human Rights Committee’s criteria for assessing compliance with ICCPR.<sup>53</sup>

For example, Oliva discusses how “overblocking”, where the intermediary over-enforces their terms of service and removes a large amount of content, both presents a risk to the freedom of expression of individuals but also “deprive[s] the public as a whole of consuming wrongfully limited speech, thus damaging access to information.”<sup>54</sup> Intermediaries have been found to adopt strict approaches to the moderation of content because of governmental pressure.<sup>55</sup> In addition, content that is not unlawful or may be in the public interest has been restricted by intermediaries particularly where the context of the speech has not be considered.<sup>56</sup>

Recently, we have seen the removal and fact-checking of speech from political leaders on Twitter while Facebook allows speech that may be considered hateful where it is “newsworthy and has public-interest value”.<sup>57</sup> This creates an interesting situation where intermediary companies adopt different approaches to content moderation while balancing the rights of individuals with governmental pressures where a State wishes speech from certain groups to be limited. Wilson and Land express serious concern that senior politicians can be exempted from content moderation policies on the grounds of newsworthiness due to their historic role in inciting mass violence.<sup>58</sup> This heightens the concern that where opposing online speech is limited by governments the prevailing voices present may therefore be politicians and other government figures. As Oliva says, such an online environment would damage access to information. The decision of the Malaysian Federal Court in *Pegum Negara Malaysia v Mkini Dotcom Sdn Bhd & Another* could be wielded to require intermediaries to prevent users from posting comments that challenge governmental narratives thus diminishing the space available to debate and share information.

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<sup>52</sup> Michael Karanicolas, ‘Squaring the Circle Between Freedom of Expression and Platform Law’ (2019-2020) *Journal of Technology Law & Policy* 177-211, p.200

<sup>53</sup> *Ibid.* Oliva (n.48) 639.

<sup>54</sup> *Ibid.* p.638

<sup>55</sup> Christina Angelopoulos, Annabel Brody, Wouter Hins, Bernt Hugenholtz, Patrick Leerssen, Thomas Margoni, Tarlach McGonagle, Ot van Daalen and Joris van Hoboken, ‘Study of fundamental rights limitations for online enforcement through self-regulation’ (2015) Institute for Information Law, University of Amsterdam <[https://www.ivir.nl/publicaties/download/study\\_fundamental\\_rights\\_limitations.pdf](https://www.ivir.nl/publicaties/download/study_fundamental_rights_limitations.pdf)> accessed 30 September 2021.

<sup>56</sup> Richard Ashby Wilson and Molly K. Land, ‘Hate Speech on Social Media: Content Moderation in Context’ (2021) 52 *Connecticut Law Review* 1029-1076, 1061.

<sup>57</sup> *Ibid.* 1072

<sup>58</sup> *Ibid.* 1072.

That being said, States remain the duty bearers of their international human rights law obligations, and consequently, must ensure respect for the freedom of expression in keeping with their duties under conventions acceded to by the State. States must ensure an enabling environment for the freedom of expression and protect the ability of persons to exercise the right.<sup>59</sup> Similarly, under Principle 3 of the Guiding Principles on Business and Human Rights the State has a duty to ensure an environment that enables businesses to respect human rights.<sup>60</sup> The literature on content moderation by intermediaries focuses on Article 19 ICCPR which states:

- (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) 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:
  - (a) For 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.

Authors have suggested that content moderation by intermediaries should follow international human rights law frameworks.<sup>61</sup> For example Oliva suggests intermediaries adopt the three-step test put forward by the UN Human Rights Committee where speech can be restricted if provided by law, grounded in legitimate aims, and necessary:

- (i) a “legality” assessment, in which the intermediary should analyse whether its interference with user speech was “provided by law”, that is, in an analogy with “platform law”, the intermediary’s ToS and community standards, with “sufficient precision to enable an individual to regulate his or her conduct accordingly”;
- (ii) a “legitimacy” assessment, in which the intermediary should analyse whether its interference with user speech was grounded in one of the “legitimate aims” listed by ICCPR Article 19 (respect of the rights or reputations of others, protection of national security, public order, public health or morals); and

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<sup>59</sup> UN Human Rights Council (n21) para 6.

<sup>60</sup> United Nations Office of the High Commissioner on Human Rights, ‘Guiding Principles on Business and Human Rights’ <[https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> accessed 30 September 2021, Principle 3.

<sup>61</sup> See e.g. Oliva (n.48); Edward Lee, ‘Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance’ (2021) 70 *American University Law Review* 913-1060; Karanicolas (n 52); Barrie Sander, ‘Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human Rights-Based Approach to Content Moderation’ (2020) 43 *Fordham International Law Journal* 939-1006.

(iii) a “necessity” assessment, in which the intermediary should analyse whether its interference with user speech employed “the least intrusive instrument amongst those which might achieve their protective function”.<sup>62</sup>

In addition, where a State enacts regulations on the freedom of expression, they “must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.”<sup>63</sup> In relation to online content it must be clear to both the user and the intermediary what type of speech is prohibited for both the individual to modify their behaviour and the intermediary to tailor their content moderation policies to avoid legal penalties. But where do intermediaries stand when the host State has not acceded to major international human rights treaties? Thailand and Cambodia have acceded to the ICCPR, but Malaysia has not. This leaves a critical gap in the literature where discussions around content moderation that focuses on obligations under the ICCPR does not apply to Malaysia’s, or other non-party State’s, actions. On 17 September 2021, ARTICLE 19 and CIVICUS recommended that Malaysia immediately ratify the core human rights conventions including the ICCPR.<sup>64</sup> This comes after Malaysia’s third UPR in 2018 where the State received 11 specific recommendations to ratify the ICCPR and 5 more to ratify the remaining core international human rights treaties.<sup>65</sup> In response Malaysia committed itself to ratifying the core international human rights treaties but has yet to do so.<sup>66</sup> Despite the inaction, on 14 October 2021 Malaysia was elected to the UN Human Rights Council for a term from 2022-2024.<sup>67</sup>

The literature also focuses on democracies in the global North and omit a key actor who can maliciously prohibit speech, the State. For example, Langvardt states “[t]he broad dilemma is this: the Internet makes it easy for bad actors, ranging from trolls to spammers to malicious hackers, to deter or frustrate speech within online channels.”<sup>68</sup> Langvardt later suggests as one possible solution to content moderation concerns, that the State oversee intermediaries in the private sphere to ensure legal standards are adhered to.<sup>69</sup> However, this would rely heavily on the State to enforce its obligations under international human rights law as a benevolent actor

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<sup>62</sup> Oliva (n. 48); See UN Human Rights Committee, ‘General comment No. 34: Article 19: Freedom of opinion and expression’ CCPR/C/GC/34 (12 September 2011), paras 24-33.

<sup>63</sup> General comment No. 34 (n 62) para 22.

<sup>64</sup> Article 19, ‘Malaysia: Government must respect human rights as it seeks UN Human Rights Council membership’, 17 September 2021 <<https://www.article19.org/resources/malaysia-government-should-respect-human-rights-as-it-seeks-un-human-rights-council-membership/>> accessed 30 September 2021.

<sup>65</sup> UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review: Malaysia’ (7 January 2019) A/HRC/40/11.

<sup>66</sup> UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review: Malaysia Addendum’ (18 February 2019) A/HRC/40/11/Add.1 para 9.

<sup>67</sup> United Nations, ‘Election of the Human Rights Council’, 14 October 2021 <<https://www.un.org/en/ga/76/meetings/elections/hrc.shtml>> accessed 15 October 2021; See also, UN General Assembly, ‘Note verbale dated 4 June 2021 from the Permanent Mission of Malaysia to the United Nations addressed to the President of the General Assembly’ (9 June 2021) A/76/83.

<sup>68</sup> Kyle Langvardt, ‘Regulating Online Content Moderation’ (2018) 106 *The Georgetown Law Journal* 1353-1388, 1358.

<sup>69</sup> *Ibid.* 1363.

in an environment where political discourse and movements that challenge State authority increasingly takes place online.

In 2018, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, expressed the view that States

rely on censorship and criminalization to shape the online regulatory environment. Broadly worded restrictive laws on “extremism”, blasphemy, defamation, “offensive” speech, “false news” and “propaganda” often serve as pretexts for demanding that companies suppress legitimate discourse.<sup>70</sup>

Kaye further explains that States have legitimate concerns related to privacy and national security, but that restrictions on the online environment do involve risks to the freedom of expression where intermediaries must remove content to avoid legal consequences.<sup>71</sup>

The examples given above of States which have adopted or are considering further restrictions on the online environment are only some of the recent instances where South East Asian States have sought to limit the freedom of expression. Intermediaries themselves have also introduced new policies in light of COVID-19 to combat “misinformation”. This has been described as similar to a declaration of an emergency by the intermediaries where they judged the costs of increased moderation of speech were less than not moderating at all.<sup>72</sup> Intermediaries justified the added restrictions on their platforms by deferring to “authoritative” sources of information on COVID-19, such as the World Health Organization (WHO).<sup>73</sup> However, the designation of authoritative sources can become problematic where the intermediary must decide between differing scientific advice from a State government where their online platform is used and other international authorities, such as the WHO. Where a State takes a different view from the international community, laws that seek to restrict online freedom of expression could be used to compel intermediaries to censor speech. For example, Cambodia’s NIG Sub-Decree could be used to remove content, or access to content, which affects safety due to the government’s position on a health epidemic differing from widespread scientific evidence. Sander explains the ban of an online platform, such as Telegram in Thailand, would be difficult to justify as necessary under Article 19(3) ICCPR.<sup>74</sup> However, Cambodia’s NIG Sub-Decree could result in access being blocked to certain online platforms, particularly those which are used by opposition groups.

Consequently, more attention must be paid to the State’s influence on the online freedom of expression and the methods employed to subvert human rights standards by using a variety of

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<sup>70</sup> UN Human Rights Council (n.47) para 13.

<sup>71</sup> *Ibid.* para 15.

<sup>72</sup> Evelyn Douek, ‘Governing Online Speech: From “Posts-as-trumps” to Proportionality and Probability’ (2021) 121 *Columbia Law Review* 759-833, 802, 766.

<sup>73</sup> *Ibid.* 762.

<sup>74</sup> Sander (n. 43) 168.

restrictive laws to limit the space available for citizens to challenge the State in the online environment. One response to online restrictions is self-censorship. Ong explains that where there is less protection for the freedom of expression people are induced into engaging in self-censorship.<sup>75</sup> Singapore and Malaysia have a high proportion of social media users who are politically engaged online, between 40% and 60%.<sup>76</sup> However, people in the Philippines, Thailand, Indonesia, and Vietnam are less politically engaged online at only 15-22%.<sup>77</sup> A possible result of increased online regulation of the freedom of expression by South East Asian States is self-censorship and less political activity from citizens.

## **Conclusion**

This State practice report has discussed the potential impact of increased restrictions on the freedom of expression and, in particular, the issues surrounding State involvement in online restrictions on the freedom of expression. The consequences of content moderation by the State and private intermediaries is multifaceted. The examples above have demonstrated the multiple avenues by which Malaysia, Thailand and Cambodia have sought to use the law to regulate the online behaviour of both individuals and private intermediaries to regulate online speech and access to information. In 2012, the UN Human Rights Council asked all States to “to promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries.”<sup>78</sup> However, despite the concerns raised by the UN Special Rapporteur on the promotion of freedom of expression in 2018, the latest developments in South East Asia fail to promote access to and use of the internet, and its many platforms for communication, by citizens to exercise their freedom of expression.<sup>79</sup> If the trend of imposing restrictions on online speech is set to continue, future research on content moderation and the relationship between the State, intermediaries, and users of online platforms will need to account for the use of law to restrict the freedom of expression, prevent the mobilisation of opposition groups, and more.

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<sup>75</sup> Elvin Ong, ‘Online Repression and Self-Censorship: Evidence from Southeast Asia’ (2021) 56 *Government and Opposition* 141-162, 143.

<sup>76</sup> *Ibid.* 153.

<sup>77</sup> *Ibid.* 153.

<sup>78</sup> UN Human Rights Council, ‘20/8. The promotion, protection and enjoyment of human rights on the Internet’ A/HRC/RES/20/8 (16 July 2012), para 3.

<sup>79</sup> See UN Human Rights Council (n.47).