

GISWatch 2017
SPECIAL EDITION

UNSHACKLING EXPRESSION:

A STUDY ON LAWS CRIMINALISING EXPRESSION ONLINE IN ASIA



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)

GISWatch 2017
SPECIAL EDITION

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

Coordinating committee

Gayatri Khandhadai (APC)
Pavitra Ramanujam (APC)
Geetha Hariharan

Project coordinator

Gayatri Khandhadai (APC)

Edition coordinator

Geetha Hariharan

Assistant editor, publication production

Lori Nordstrom (APC)

Graphic design

Monocromo
info@monocromo.com.uy
Phone: +598 2400 1685

Cover illustration

Ivana Kurniawati

Supported by the European Union under the Instrument for Democracy and Human Rights (EIDHR) and the Internet Policy Observatory (IPO)



Published by APC
2017

Printed in India

Creative Commons Attribution 4.0 International (CC BY 4.0)
<https://creativecommons.org/licenses/by/4.0/>
Some rights reserved.

Global Information Society Watch 2017 | Special edition
Unshackling Expression: A study on laws criminalising expression online in Asia

ISBN 978-92-95102-86-6
APC Serial Number: APC-201711-CIPP-R-EN-DIGITAL-276



Disclaimer: The views expressed in GISWatch are not necessarily the views of APC or of its members

Regional trends in criminalisation of expression online: An overview

Geetha Hariharan

Some speech is criminal, says the law. *Unshackling Expression* is about this speech, which, legitimately or otherwise, is criminalised in the six states across Asia that are addressed in this report. It studies the criminalisation, and more broadly, some of the restrictions that are placed on the right to freedom of opinion and expression on the internet in Cambodia, India, Malaysia, Myanmar, Pakistan and Thailand. These states were chosen as representative of South and Southeast Asia, and therefore show us a representative picture of the state of freedom of expression on the internet in the region.

The constitutions of these six states guarantee the right to freedom of opinion and expression to their citizens. In none of these states is this right absolute, and the states lay down justifications for the curtailment of the right in their constitutions or other legal documents. Some of the prominent justifications that states provide are national security, friendly relations between states, sedition, defamation, hate speech, blasphemy, public order, obscenity, pornography and related expressions, and gender and sexual expression, among others. These justifications, applied variously in the six states, have a direct and detrimental impact on the right to freedom of opinion and expression, including political expression.

While each of these states is unique in the restrictions it places on online freedom of expression, and the manner in which it applies them, certain common threads run across the region. This chapter studies the commonalities and differences among these states in their criminalisation and restriction of freedom of expression. The first part provides an overview of the six states that are part of *Unshackling Expression*. The second part of this chapter considers commonalities, pointing to trends that run across the six states. Finally, it enumerates some of the divergent trends that distinguish the six states from each other.

Introduction to the six states

This section introduces each of the six states that are part of *Unshackling Expression*, with a focus on the laws affecting online freedom of expression.

Cambodia

The Cambodian constitution guarantees the right to freedom of speech and expression in Article 41, which states: “Khmer citizens shall have freedom to express their ideas.” Not only this, but the constitution protects a series of connected rights, such as the rights to political participation and privacy. International human rights law is directly applicable in Cambodia, by way of Article 31 of the constitution.

Cambodia has a growing number of internet users. As of November 2016, its internet penetration stood at 46.4% of the population. The internet has revolutionised news and information consumption in Cambodia. Prior to the advent of the internet, Cambodian media were all state-run or state-affiliated, directly or indirectly, and therefore, all news and information was mediated by the state. However, with the internet, this trend has changed, with individuals and alternative media being able to play a more active, independent role in news and content creation and consumption.

But the state continues to expand its role as gatekeeper, by placing strict and increasing controls on the internet. For instance, while there exist several laws, such as the constitution, the Law on the Press, the Law on Education, etc., which guarantee the right to freedom of opinion and expression to citizens, the government has simultaneously placed strong restrictions through other means. Informal orders of the government and orders from the telecom regulator are used to curb expression online. Offline laws are used to target online speech as well. Political opposition is strongly discouraged through the use of criminalisation. Not only are there laws that target associations and NGOs, political parties and electoral speech, but a cybercrime bill has been proposed which also enables the government to dissolve legal entities (including civil society organisations) on the

grounds that individuals associated with those entities have been accused of cybercrimes. Cambodia primarily uses the justifications of state security, morality and political neutrality, among others, in order to criminalise speech.

India

India's constitution guarantees the right to freedom of expression to all its citizens.¹ Legitimising reasonable restrictions, the constitution provides "interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence" as justifications.² While the constitution makes no reference to the internet or communications, the right has been held as applicable to online speech.³

India has a long history of criminalising speech. The colonially drafted Indian Penal Code criminalises various kinds of expression, and includes offences relating to obscenity, hurting religious sentiments and uttering words to hurt religious feelings (broadly understood as hate speech), defamation and sedition, among others. While the Penal Code also makes no reference to the internet, its sections have been applied to online speech as well. From arrests of WhatsApp group administrators and Facebook users to charges of sedition and defamation, online speech is widely criminalised in India, as the India country report notes.

In addition to the Indian Penal Code, the Information Technology Act, 2000 (as amended in 2008) (IT Act) also includes provisions criminalising online speech. The IT Act targets cyberspace specifically, and includes provisions against obscenity, violation of privacy, etc. Prior to 2015, the IT Act also contained a provision criminalising the sending of messages that are "offensive" or are known to be false but are sent to cause "annoyance, inconvenience, danger, obstruction, insult, injury [...],"⁴ but it was struck down as unconstitutional.⁵

Malaysia

Malaysia has a long history of suppressing freedom of opinion and expression. Article 10 of the Malaysian constitution guarantees to citizens the

right to freedom of speech and expression,⁶ with the exceptions being "the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence."⁷ In addition to this, Article 149(1) of Malaysia's constitution states that if the country passes a law fearing organised violence or any action disturbing public order, such a law is valid notwithstanding its divergence from Article 10.

Despite the guarantee of freedom of expression, Malaysia criminalises a wide variety of expression, including online speech and expression. The Sedition Act, 1948, for instance, renders certain kinds of speech criminal and seditious, and may result in imprisonment of the speaker. Moreover, the Security Offences (Special Measures) Act, 2012 (SOSMA) criminalises the committing of (and attempt of) activity "detrimental to parliamentary democracy," and the publication and possession of publications detrimental to parliamentary democracy. The procedural sections of the law stipulate that a law enforcement officer can detain an individual for 24 hours under suspicion of offences, and for a further 28 days for the purposes of investigation.

Particularly when it comes to internet speech, Malaysia utilises the provisions of the Communications and Multimedia Act, 1998 (CMA). The CMA has a broad range. For instance, Section 233 criminalises "any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person."⁸ The Malaysia report notes that in the year 2016 alone, over 180 instances of "social media abuse" have been recorded under Section 233.

Myanmar

Myanmar's constitutional history is long and chequered. Its 2008 constitution, in Article 354, guarantees to citizens the right to "express and publish freely their convictions and opinions."⁹

1 Constitution of India, 1950. Article 19(1). <http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm>

2 Constitution of India, 1950. Article 19(2). <http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm>

3 Shreya Singhal v. Union of India. AIR 2015 SC 1524.

4 Information Technology Act, 2000. Section 66A. <http://meity.gov.in/content/information-technology-act-2000>

5 Shreya Singhal v. Union of India. AIR 2015 SC 1524.

6 Federal Constitution of Malaysia. Article 10(1)(a). [www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20\(B1%20text\).pdf](http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(B1%20text).pdf)

7 Federal Constitution of Malaysia. Article 10(2)(a). [www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20\(B1%20text\).pdf](http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(B1%20text).pdf)

8 Communications and Multimedia Act, 1998. Section 233. www.unodc.org/res/cld/document/mys/communications_and_multimedia_act_html/Malaysia_Communications_and_Multimedia_Act_1998.pdf

9 Constitution of the Republic of the Union of Myanmar, 2008. Article 354. http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf

Despite the guarantee of this right, the government reserves the right to restrict freedom of expression on grounds of “Union security, prevalence of law and order, community peace and tranquility or public order and morality.”¹⁰ These restrictions (including the creation of criminal offences) have been exercised through the use of laws, such as the Myanmar Penal Code, the Computer Science Development Law, Electronic Transactions Law, Telecommunications Law, etc.

The Myanmar Penal Code, like that of India, is a colonial legislation. Enacted in 1860, it includes offences relating to obscenity, outraging religious feelings, and defamation, among others. While the Penal Code makes no mention of the internet, there is nothing to suggest that the Penal Code cannot be used to target online speech. However, it is the Electronic Transactions Law and the Telecommunications Law that have been most commonly used against online speech in Myanmar. Section 66(d) of the Telecommunications Law criminalises “[e]xtorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening to any person by using any Telecommunications Network.”¹¹ The Electronic Transactions Law, for its part, criminalises any act that is “detrimental to the security of the State or prevalence of law and order or community peace and tranquillity or national solidarity or national economy or national culture,” for which the punishment is a jail term of five to seven years.¹² Myanmar does, in fact, utilise these provisions to criminalise online speech; as the Myanmar report notes, there have been over 73 cases in the span of one year alone.

Pakistan

In Pakistan, the distrust of electronic media and the internet is glaringly obvious. As the Pakistan report shows, the state authorities have made it clear that social media has a detrimental influence on the cultural and religious values of the country, and that they intend to crack down on such influences. Towards this end, Pakistan employs a structured network of laws to criminalise and, more broadly, restrict freedom of speech and expression.

Pakistan guarantees freedom of speech and expression through Article 19 of its constitution.¹³ The

article also lays down the grounds on which the right can be restricted: “the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, [commission of] or incitement to an offence.” As the Pakistan report notes, these justifications have been enabled through laws in the country.

The Pakistan Penal Code is one such law, which criminalises speech and expression, among other offences. Blasphemy is a major provision by way of which speech, including and particularly online speech, is criminalised in Pakistan. As the Pakistan report notes, there is a “well-developed body of case law focused on the online space” relating to blasphemy. On the ground of blasphemy, YouTube has been banned, bloggers have disappeared, and vigilante murders have occurred. The Prevention of Electronic Crimes Act, 2016, is another legislation that is used to criminalise online expression in Pakistan. Several sections, detailing offences and in some cases, heavier penalties than for offline offences, address online speech and expression. These provisions include hate speech, blasphemy, defamation, etc. In addition to blasphemy, national security, contempt of court and sedition, among others, have been frequently used in Pakistan against online speech. A crucial divergence in Pakistan is the mob justice that is meted out against “offensive” religious speech, though we see similarities to this in India as well.

Thailand

Thailand’s constitution of 2017 guarantees the right to freedom of opinion and expression under Section 34. Section 34 reads: “A person shall enjoy the liberty to express opinions, make speeches, write, print, publicise and express by other means,” and expressly protects academic freedom. However, the right is not absolute, and may be curtailed on grounds of “maintaining the security of the State, protecting the rights or liberties of other persons, maintaining public order or good morals, or protecting the health of the people.”¹⁴

Following the military coup of 22 May 2014, Thailand has been ruled by the National Council for Peace and Order (NCPO). The NCPO controls expression in Thailand through a series of laws, including the Penal Code and the Head of NCPO Announcements. *Lèse majesté* is a crucial wing of the NCPO’s control

10 Ibid.

11 Telecommunications Law. Section 66(d). www.burmalibrary.org/docs23/2013-10-08-Telecommunications_Law-en.pdf.

12 The Electronic Transactions Law. Section 33(a). www.burmalibrary.org/docs15/2004-SPDC_Law2004-05-Electronic_Transactions_Law-en.pdf

13 Constitution of the Islamic Republic of Pakistan. Article 19. <https://pakistanconstitutionlaw.com/article-19-freedom-of-speech-etc>

14. Constitution of the Kingdom of Thailand. Section 34. www.constitutionnet.org/sites/default/files/2017-05/CONSTITUTION%20OF%20THE%20KINGDOM%20OF%20THAILAND%20B.E.%202560%2B%282017%29%29.pdf

over online expression in Thailand.¹⁵ Even peaceful or humorous expression of opinion concerning the royalty is charged with *lèse majesté*, under Section 112 of the Penal Code. As the Thailand report notes, over a three-year period, over 90 people have been arrested on grounds of *lèse majesté*.

In addition to *lèse majesté*, Thailand uses Section 116 of the Thai Penal Code to criminalise seditious express. Section 116 criminalises acts or expressions that seek to use force or violence to “bring about a change in the Laws of the Country or the Government,” or to raise unrest and disaffection among people to cause disturbance.¹⁶ Sedition charges have been filed against multiple people even without the presence of force or violence. While both these sections of the Thai Penal Code make no mention of the internet, they have been used to punish online expression. The Computer Crimes Act, 2007 specifically targets online activities. The Thai control over the internet and online activities is strong, and the many arrests and convictions stand witness to this.

Following this introduction of the six states, the next section considers the common trends among the states where the criminalisation of online freedom of opinion and expression is concerned.

Common trends among states in *Unshackling Expression*

Among the six states that are part of *Unshackling Expression*, there are some commonalities. All these states either have laws that target cyberspace specifically (along with legal provisions that affect online speech), or they are moving towards such a law. All of these states also utilise offline laws to criminalise and punish online speech. Most of them also utilise multiple legal provisions to target and criminalise a single instance of online speech. They also prescribe harsher punishments for online “offences” than for offline speech.

Towards cyber-specific laws

It is a trend that can be seen across Asia that states are adopting laws that target cyberspace specifically. These laws not only describe the way in which the internet and electronic transactions are to be conducted, but they also create online offences and prescribe punishments. Many of these offences target online freedom of opinion and expression, and are relevant to our discussion.

Cambodia, for instance, has a cybercrime bill which has not yet been signed into law. Malware attacks in Cambodia have lent a sense of urgency to the need for a cybercrime law, with the private sector in the country pushing for the same.¹⁷ While the law has not yet been passed, several provisions of the bill have proved troubling for freedom of opinion and expression. For instance, as noted in the Cambodia report, the first draft of the law contained an article that outlawed content that could be “deemed damaging to the moral and cultural values of the society,” including “manipulation, defamation, and slanders.” In addition to the cybercrime bill, the Law on Telecommunications governs online and networked spaces in Cambodia. The law, while outlawing any use of telecommunications networks which may result in “national insecurity”, also prescribes heavier penalties for Criminal Code offences.

India has had a cyber legislation since the year 2000. The Information Technology Act, 2000 (as amended in 2008) (IT Act) specifically targets cyberspace. In addition to setting up a Computer Emergency Response Team, a Cyber Appellate Tribunal, a National Critical Infrastructure Protection Authority, etc., and setting out encryption standards, digital and electronic signatures, etc., the IT Act also sets out a series of offences and prescribes punishments. Several of these sections affect online speech, including provisions on the violation of privacy, pornographic material (characterised as obscenity), etc.

In Malaysia, the Communications and Multimedia Act, 1998 (CMA) targets the internet. As the Malaysia report shows, the CMA sets out offences that affect online speech – the most notable being Section 233. Section 233 criminalises any online expression that is “obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person.”

The Telecommunications Law and Electronic Transactions Law affect the internet in Myanmar. Article 66(d) of the Telecommunications Law, and Articles 33 and 34 of the Electronic Transactions Law, directly impact online speech.

In Pakistan, the Prevention of Electronic Crimes Act, 2016 (PECA) targets online speech. Section 34 of the PECA grants the Pakistan Telecommunication Authority the power to block or remove “unlawful online content”, while several other provisions in Chapter II of the law outline offences and punishments. Hate speech, the glorification of an offence, false information that harms the privacy or reputation of an individual, etc. are all criminalised.

¹⁵ Thai Penal Code. Section 112. <https://www.thailandlawonline.com/laws-in-thailand/thailand-criminal-law-text-translation#chapter-2>

¹⁶ Thai Penal Code. Section 116. <https://www.thailandlawonline.com/laws-in-thailand/thailand-criminal-law-text-translation#chapter-2>

¹⁷ Vannak, C. (2017, 3 July). Cybercrime law on the way. *Khmer Times*. www.khmertimeskh.com/news/39866/cybercrime-law-on-the-way

The Computer Crimes Act, 2007 (CCA) is the law targeting the online space in Thailand. The Thailand report notes that, along with the Penal Code, the CCA is used to suppress and criminalise online expression. Section 14, which involves forged or false computer data, has been most used to criminalise online speech, including in cases involving defamation.

Offline laws used to criminalise online speech

Across Asia, states use offline laws to target and criminalise online speech and expression. The Penal Codes are most commonly used towards this end. The Indian Penal Code, the Malaysian Penal Code, the Myanmar Penal Code and the Pakistan Penal Code, remnants of the colonial era, are similar in content and structure. They codify offences against the state (for instance, sedition), hate speech (outraging religious feelings or blasphemy in Pakistan), obscenity and defamation. These are applied online as and when considered convenient, and individuals are arrested on the grounds of the above offences. While some states, such as Myanmar, have provisions against defamation codified in an internet-specific law,¹⁸ the offline laws are also used to target online speech in most states.

Section 305 of the Cambodian Criminal Code targets defamation both offline and online, while also criminalising incitement to commit a crime (Article 495) and incitement to commit discrimination (Article 496). In Cambodia, it is not only the right to freedom of speech that suffers at the hands of these provisions, but also the right to political participation. In India, Section 124A of the Indian Penal Code (IPC), the provision for sedition, is utilised to target online speech as well, as is Section 500, IPC, the provision on defamation. Sections 153A and 295A, IPC, the provisions concerning promoting enmity between groups on grounds of religion, etc., and outraging religious feelings, are also used against online speech and expression.

Malaysia routinely uses provisions of the Sedition Act, 1948, and Sections 499 and 500 of the Malaysian Penal Code, in conjunction with Section 233 of the Communications and Multimedia Act, to criminalise online expression. Malaysia also applies Section 298 (“Uttering words, etc., with deliberate intent to wound the religious feelings of any person”) of the Malaysian Penal Code to online speech. The same is true for Myanmar, where Section 295A (outraging religious feelings) is applied both offline and online, as is Section 124A (sedition). In addition to Section 10A of the Prevention of Electronic Crimes

Act, 2016 (hate speech), Pakistan also applies the blasphemy provisions in the Penal Code to online speech and expression. Similarly, Thailand applies Penal Code Sections 112 (lèse majesté) and 116 (an offence against internal security) to both offline and online speech.

Multiple legal provisions to target a single “offence”

Case studies show that all the six states utilise multiple legal provisions to charge a single instance of online speech. In India, for example, Section 295A of the IPC (which criminalises acts or expression that outrages religious feelings) is often clubbed with Section 153A, IPC (promoting enmity between groups on grounds of religion, etc.), and when Section 66A of the IT Act was on the books, it was clubbed with that provision as well. In Malaysia, in instances involving sedition, the Malaysia report notes that individuals are often simultaneously booked under the Sedition Act, 1948 as well as the Communications and Multimedia Act, 1998.

In Myanmar, Section 34(d) of the Electronic Transactions Law (“creating, modifying or altering of information or distributing of information [...] to be detrimental to the interest of or to lower the dignity of any organization or any person”) is clubbed with Section 66(d) of the Telecommunications Law (“Extorting, coercing, restraining wrongfully, defaming,” etc., using a telecommunications network), as well as Section 500 of the Myanmar Penal Code (defamation). In Pakistan as well, charges under the PECA are often clubbed with charges under the Pakistan Penal Code. In Thailand, while the Computer Crimes Act, 2007 makes no direct reference to defamation, the Thailand report notes that defamation under the Thai Penal Code has often been clubbed with Section 14(1) of the CCA.

The effect of this clubbing is two-fold. *First*, an individual may be found guilty on one count, while acquitted on another. So this raises the chances of the individual's conviction for an instance of speech and expression. *Second*, as the case studies from Thailand make clear, the clubbing of provisions also means that a higher punishment, combined on the basis of multiple charges, may be ordered on the individual.

Harsher punishments for online offences

The states that form part of this study have been found to grant harsher punishments for online offences than for their offline counterparts in some cases. Table 1 gives a bird's eye view of some offences in which the online penalties are higher.

¹⁸ Telecommunications Law. Article 66(d).

TABLE 1. PENALTIES FOR OFFLINE AND ONLINE OFFENCES

Country	Offline legal provision	Offline penalty	Online legal provision	Online penalty
India	Section 292, Indian Penal Code: Sale, etc. of obscene books	On first conviction with imprisonment of either description for a term which may extend to <i>two years</i> , and with fine which may extend to <i>two thousand rupees</i> , and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to <i>five thousand rupees</i> .	Section 67, Information Technology Act, 2000: Punishment for publishing or transmitting obscene material in electronic form	On first conviction with imprisonment of either description for a term which may extend to <i>three years</i> , and with fine which may extend to <i>five lakh*</i> rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to <i>ten lakh rupees</i> .
Myanmar	Section 500, Myanmar Penal Code: Defamation	Simple imprisonment for a term which may extend to <i>two years</i> , or with fine, or with both	Section 66(d), Telecommunications Law: Whoever commits any of the following acts shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine or to both. ... (d) Extorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening to any person by using any Telecommunications Network.	Imprisonment for a term not exceeding <i>three years</i> or to a fine or to both
Pakistan	Section 298, Pakistan Penal Code: Uttering words, etc., with deliberate intent to wound religious feelings	Imprisonment of either description for a term which may extend to <i>one year</i> or with fine, or with both.	Section 10A, Prevention of Electronic Crimes Act, 2016: Hate speech	Imprisonment of either description for a term which may extend to <i>seven years</i> or with fine, or with both.
	Section 298A, Pakistan Penal Code: Use of derogatory remarks, etc., in respect of holy personages	Imprisonment of either description for a term which may extend to <i>three years</i> , or with fine, or with both.	Section 10A, Prevention of Electronic Crimes Act, 2016: Hate speech	Imprisonment of either description for a term which may extend to <i>seven years</i> or with fine, or with both.
Thailand	Section 305, Thai Penal Code: Defamation	Imprisonment not exceeding <i>one year</i> or fined not exceeding <i>twenty thousand Baht</i> , or both.	Section 14(1), Computer Crimes Act, 2007: Whoever commits the following acts shall be liable to imprisonment for a term not exceeding five years or to a fine not exceeding one hundred thousand Baht or both: (1) input into a computer system wholly or partially fake or false computer data that is likely to cause damage to another person or the public...	Imprisonment for not more than <i>five years</i> or a fine of not more than <i>one hundred thousand baht</i> or both

* 1 lakh = 100,000

Divergences among the six states

As we saw in the previous section, there exist several common trends among the six states across Asia. However, there are several divergent trends among the six states as well. First, each state uses a unique combination of legal provisions to target online speech; that is, each state has a certain set of provisions that it uses most commonly to criminalise online speech, but these provisions differ across the states. Second, the definitions of different provisions, while similar, differ across the states; the example of defamation will be used to show such differences. Third, the punishments given to offences differ across the states; the example of hate speech and blasphemy, as well as defamation, will be used to illustrate this.

Unique combinations of legal provisions

While similar provisions exist across the countries, each state is unique in its choice of go-to provisions to target online speech. No two states use the exact same provisions to commonly and widely target online speech. While they have in common the provisions themselves, in practice, they each have different go-to legal provisions to best control online expression in each of their territories.

Prior to 2015, India made extensive use of Section 66A, Information Technology Act, 2000 (as amended in 2008).¹⁹ Section 66A criminalised the sending of “offensive messages” through the internet, and stated that the sending of false messages that cause “annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will” would be penalised with a jail term extending to three years and with a fine. However, Section 66A was struck down by the Supreme Court of India as unconstitutional, as it violated unreasonably the freedom of expression of citizens.²⁰ Following this, there has been an increase in the use of Section 295A, Indian Penal Code (the hate speech provision).²¹ One of the most notable cases of the use of this provision involved the arrests of Shaheen Dada, who posted a Facebook post critical of a state *bandh* or shutdown (it was instituted due to the death of a prominent politician), and Renu

Srinivasan, who liked the said post. In addition to these provisions, India also liberally uses other provisions to target online speech, such as defamation and provisions from both the Indian Penal Code and the IT Act. India is, in that sense, an outlier.

Cambodia is also an outlier. While Cambodia has multiple provisions criminalising speech, the country utilises them to exemplify the consequences of breaking the law. For instance, in the case concerning the assassination of Kem Ley, several individuals were arrested on charges of defamation under the Cambodian Criminal Code for insinuating government ties to the assassination, as will be seen in the Cambodia report. Similarly, Articles 495 and 496 of the Cambodian Criminal Code (incitement to commit a crime and incitement to commit discrimination) have often been used to criminalise Facebook comments.

Malaysia focuses on the use of Section 233 of the Communications and Multimedia Act, 1998, to criminalise online speech. As the Malaysia report notes, over 180 cases have been registered in 2016 alone, and “[o]ffences that have surfaced under this law include lèse majesté, alleged fake news, satire, graphics that are perceived as insulting the prime minister, and a wide variety of other ‘affronts’.”

In Myanmar, the largest number of cases have been reported under Section 66(d) of the Telecommunications Law. Section 66(d) criminalises the “[e]xtorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening to any person by using any Telecommunications Network,” with a jail term of two years, or with a fine, or with both. As the Myanmar report notes, over 90 cases have been registered under Section 66(d) alone, concerning online speech.

Pakistan, on the other hand, relies on its blasphemy laws to target online speech and expression. It has acted in a variety of ways, from criminalising blasphemous speech with imprisonment for life, to blocking content considered to be blasphemous under the Prevention of Electronic Crimes Act, 2016.²² For instance, as the Pakistan report notes, a death sentence was once awarded to a man who sent a poem considered blasphemous over WhatsApp.

In Thailand, lèse majesté is the provision of choice when targeting online speech. The provision, Section 112 of the Thai Penal Code, criminalises anyone who “defames, insults, or threatens the King, the Queen, the Heir-apparent, or the Regent,” with a punishment of three to 15 years of imprisonment. Most cases in recent years concerned posts and messages on Facebook.

¹⁹ Information Technology Act, 2000. Section 66A. <http://meity.gov.in/content/information-technology-act-2000>.

²⁰ Shreya Singhal v. Union of India, AIR 2015 SC 1524

²¹ Indian Penal Code, 1860. Section 295A: “Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs.—Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of [citizens of India], [by words, either spoken or written, or by signs or by visible representations or otherwise], insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to [three years], or with fine, or with both.” www.lawmin.nic.in/ld/P-ACT/1860/186045.pdf

²² Prevention of Electronic Crimes Act, 2016. Section 34. http://www.na.gov.pk/uploads/documents/1470910659_707.pdf

TABLE 2. DEFINITIONS OF DEFAMATION IN THE SIX STATES

Country	Definition
Cambodia	<p>Article 305, Cambodian Criminal Code: Any allegation or charge made in bad faith which tends to injure the honour or reputation of a person or an institution.</p>
India	<p>Section 499, Indian Penal Code: Defamation.– Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person. Explanation 1.– It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives. Explanation 2.– It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such. Explanation 3.– An imputation in the form of an alternative or expressed ironically, may amount to defamation. Explanation 4.– No imputation is said to harm a person’s reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.</p>
Malaysia	<p>Section 499, Malaysia Penal Code: Whoever, by words either spoken or intended to be read or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation and shall also be liable to fine of such person, is said, except in the cases hereinafter excepted, to defame that person. Explanation 1 – It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives. Explanation 2 – It may amount to defamation to make an imputation concerning a company, or an association or collection of persons as such. Explanation 3 – An imputation in the form of an alternative, or expressed ironically, may amount to defamation. Explanation 4 – No imputation is said to harm a person’s reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.</p>
Myanmar	<p>Article 499, Myanmar Penal Code: Defamation.– Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person. Explanation 1.– It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives. Explanation 2.– It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such. Explanation 3.– An imputation in the form of an alternative or expressed ironically, may amount to defamation. Explanation 4.– No imputation is said to harm a person’s reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.</p>

TABLE 2. DEFINITIONS OF DEFAMATION IN THE SIX STATES

Country	Definition
Pakistan	<p>Section 499, Pakistan Penal Code: Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person. Explanation 1.— It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives. Explanation 2.— It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such. Explanation 3.— An imputation in the form of an alternative or expressed ironically, may amount to defamation. Explanation 4.— No imputation is said to harm a person’s reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.</p> <p>Section 3, Defamation Act, 2004: (1) Any wrongful act or publication or circulation of a false statement or representation made orally or in written or visual form which injures the reputation of a person, tends to lower him in the estimation of others or tends to reduce him to ridicule, unjust criticism, dislike, contempt or hatred shall be actionable as defamation. (2) Defamation is of two forms, namely:— (i) Slander; and (ii) Libel. (3) Any false oral statement or representation that amounts to defamation shall be actionable as slander. (4) Any false written, documentary or visual statement or representation made either by ordinary form or expression or by electronic or other modern means of devices that amounts to defamation shall be actionable as libel.</p>
Thailand	<p>Section 326, Thai Penal Code: Whoever, imputes anything to the other person before a third person in a manner likely to impair the reputation of such other person or to expose such other person to be hated or scorned, is said to commit defamation, and shall be punished with imprisonment not exceeding one year or fined not exceeding twenty thousand Baht, or both.</p> <p>Section 329, Thai Penal Code: Whoever, in good faith, expresses any opinion or statement: By way of self justification or defense, or for the protection of a legitimate interest; In the status of being an official in the exercise of his functions; By way of fair comment on any person or thing subjected to public criticism; or By way of fair report of the open proceeding of any Court or meeting, shall not be guilty of defamation.</p>

Definitions of offences differ across states

While the six states share commonalities in their criminalisation of speech and expression, the way in which the offences are understood in these states differs. For instance, the ways in which defamation is understood in the six states is illustrated in Table 2.

At a glance, it is clear that the definitions of defamation in India, Malaysia, Myanmar and Pakistan are the same. Their common colonial past throws light on this. In these countries, defamation is defined on the basis of four factors: (1) there must be a publication or speech of an

imputation; (2) there must be intent, knowledge or reason to believe that such imputation will harm the reputation of the subject of the imputation; (3) the imputation must lower “the moral or intellectual character of that person”; and (4) such a lowering of character must occur in the estimation of others. It should be noted that there is no requirement of bad faith in making the imputation. There are also general defences, of truth, opinion in good faith under certain circumstances, or the public good.

However, the definitions of defamation in Cambodia and Thailand are markedly different. In

TABLE 3. PENALTIES FOR HATE SPEECH AND BLASPHEMY		
Country	Offline penalties	Online penalties
Cambodia	Article 516, Criminal Code: Insult of Buddhist monks, nuns and laymen: Imprisonment from one day to six days and a fine from one thousand to one hundred thousand Riels.	No online counterpart.
India	Section 295A, Indian Penal Code: Imprisonment of three years, or with fine, or with both. Section 298, Indian Penal Code: Imprisonment of one year, or with fine, or with both.	No online counterpart. Offline law used to charge online offences.
Malaysia	Section 298, Malaysia Penal Code: Imprisonment of one year, or with fine, or with both. Section 298A, Malaysia Penal Code: Imprisonment for a term of not less than two years and not more than five years.	No online counterpart. Offline law used to charge online offences.
Myanmar	Section 295A, Myanmar Penal Code: Imprisonment of either description for a term which may extend to two years, or with fine, or with both. Section 298, Myanmar Penal Code: Imprisonment of either description for a term which may be extend to one year, or with fine, or with both.	No online counterpart.
Pakistan	Section 295A, Pakistan Penal Code: Imprisonment of 10 years, or with fine, or with both. Section 295C, Pakistan Penal Code: Death, or imprisonment for life, and with fine. Section 298, Pakistan Penal Code: Imprisonment of either description for a term which may extend to one year, or with fine, or with both. Section 298A, Pakistan Penal Code: Imprisonment of three years, or with fine, or with both.	Section 10A, Prevention of Electronic Crimes Act, 2016: Imprisonment for a term which may extend to seven years, or with fine, or with both.
Thailand	Article 44, Sangha Act 1962: Fine of not more than five thousand Baht or an imprisonment of not more than one year or both. Section 206, Criminal Code: Imprisoned as from two years to seven years or fined as from two thousand Baht to fourteen thousand Baht, or both. Section 207, Criminal Code: Imprisonment not exceeding one year or fined not exceeding two thousand Baht, or both.	No online counterpart.

Cambodia, the requirements are far less: (1) there must be an allegation or charge, (2) the allegation or charge must be made in bad faith, and (3) the allegation or charge must tend to injure the honour or reputation of the natural or juristic person. There are no exceptions as to truth, holding an opinion, or public good. In Thailand, (1) there must be an imputation made to a subject, (2) the imputation must be made before a third party, and (3) the imputation must be likely to damage the reputation of the subject of the imputation. Thailand is different from Cambodia in that there is no need for bad faith in making the imputation, and moreover, Thailand also creates the exception of good faith imputations to the crime of defamation.

Punishments for offences differ across states

While the six states share similar laws and provisions, they differ, if but slightly, in the way they punish these offences. For instance, in the case of hate speech, each state offers different punishments (imprisonment as well as fine). As can be expected, Pakistan offers the greatest punishment, from 10 years to life imprisonment. Cambodia offers the least punishment, with imprisonment of only days, but with a large fine. In the case of defamation, however, while Cambodia prescribes a maximum of ten million Riels as punishment, in Thailand, an individual may be imprisoned for five years. The penalties for these offences in the six states are compared in Tables 3 and 4.

TABLE 4. PENALTIES FOR DEFAMATION

Country	Offline penalties	Online penalties
Cambodia	Article 305, Cambodian Criminal Code: Defamation shall be punishable by a fine from <i>one hundred thousand to ten million Riels</i> if it is committed by any of the following means: (1) any words whatsoever uttered in a public place or in a public meeting; (2) written documents or pictures of any type released or displayed to the public; (3) any audio-visual communication intended for the public.	Same as for offline offence
India	Section 500, Indian Penal Code: Simple imprisonment for a term which may extend to two years, or with fine, or with both.	Same as for offline offence.
Malaysia	Section 500, Malaysian Penal Code: Imprisonment for a term which may extend to <i>two years</i> or with fine or with both.	Section 233, Communications and Multimedia Act, 1998: Shall be liable to a fine not exceeding <i>fifty thousand ringgit</i> or to imprisonment for a term not exceeding <i>one year</i> or to both and shall also be liable to a further fine of one thousand ringgit for every day during which the offence is continued after conviction.
Myanmar	Section 500, Myanmar Penal Code: Simple imprisonment for a term which may extend to <i>two years</i> , or with fine, or with both.	Section 66(d), Telecommunications Law: Imprisonment for a term not exceeding <i>three years</i> or to a fine or to both
Pakistan	Section 500, Pakistan Penal Code: Imprisonment for a term which may extend to <i>two years</i> , or with fine, or with both.	Section 18, Prevention of Electronic Crimes Act, 2016: Imprisonment for a term which may extend to <i>three years</i> or with fine which may extend to <i>one million rupees</i> or with both.
Thailand	Article 326, Thai Penal Code: Imprisonment not exceeding <i>one year</i> or fined not exceeding <i>twenty thousand Baht</i> , or both.	Section 14(1), Computer-related Crimes Act, 2007: Imprisonment for not more than <i>five years</i> or a fine of not more than <i>one hundred thousand baht</i> or both.

* Prevention of Electronic Crimes Act, 2016. Section 18. "Offences against the dignity of a natural person. (1) Whoever intentionally and publicly exhibits or displays or transmits any information through any information system, which he knows to be false, and intimidates or harms the reputation or privacy of a natural person [...]" www.na.gov.pk/uploads/documents/1470910659_707.pdf

Conclusion

As APC’s joint written statement to the Human Rights Council at its 35th session²³ notes, states in Asia are moving towards repressive regimes where online freedoms are concerned. Although freedom of expression is guaranteed in the constitutions of Asian states, including the six that are part of this report, states liberally use legal justifications to curtail and also to criminalise online speech. Some states, such as Cambodia, also use informal means

to repress freedoms, and create high-profile cases to serve as deterrents against political expression and opposition. Not only political expression, but artistic expression also suffers in the first instance. In states like India, laws on obscenity affect educational and artistic expression in practice. Although the law may say otherwise, the very fact of arrest and charging for the offence itself constitutes harassment and punishment. Furthermore, expressions of wit and humour that touch upon religion are affected in states like Pakistan and Malaysia, where laws on blasphemy and outraging religious feelings severely restrict the scope of expression. The following reports show the state of online freedom of expression in their respective countries.

23 Association for Progressive Communications. (2017). Joint written statement submitted by Association for Progressive Communications (APC), non-governmental organizations in general consultative status. https://www.apc.org/sites/default/files/2570_A_HRC_35_NGO_Sub_En.pdf

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.

GISWatch 2017
SPECIAL EDITION
<https://www.GISWatch.org>



SUPPORTED BY

