

ASEAN BRIEFS

ASEAN Digital Democracy: Laws on
Freedom of Expression in the Internet Era



Vol. 4 / Issue 6 / September 2017



ASEAN Briefs is a regular publication about current developments on ASEAN regionalism, especially in the Political-Security, Economic as well as Socio - Cultural Pillars.

The Habibie Center -
ASEAN Studies Program
ASEAN Briefs

Project Supervisor:
Rahimah Abdulrahim
(Executive Director)
Hadi Kuntjara
(Deputy Director for Operations)

**Head of ASEAN Studies Program/
Editor:**
A. Ibrahim Almuttaqi

Researcher:
Fina Astriana
Muhamad Arif
Askabea Fadhillah
Hana Hanifah Bastaman
Vierna Tasya Wensatama

Finance and Administration:
Mila Oktaviani

Design and Publication:
Rahma Simamora
Tongki Ari Wibowo



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EXECUTIVE SUMMARY

This issue of ASEAN Briefs mainly explores the notion of freedom of expression as a human right and how the right is perceived by governments across ASEAN member states. The right to freedom of expression is one of the key characteristics of a democratic society, and numerous elements shall be considered when talking about its implementation in national systems, given the diverse circumstances in respective states. The rapid advancement of technology in this Internet era affects where and how people choose to voice out their opinions, and this situation inevitably pushes governments to keep up with the pace. It is then important to acknowledge how the protection of freedom of expression now expands to the digital world and how governments choose to adapt themselves in the present. While efforts by governments are seen across the region, the outcome might have not been as expected (yet) – by international standards and by their own people. This issue of ASEAN Briefs argues that to overcome the obstacles in protecting the right to freedom of expression, governments need to avoid vague regulations on the particular right and adopt a more humane approach in implementing them, in order to successfully strike a fair balance between protecting national security and their people's human rights.



INTRODUCTION

Freedom of expression, which is also known with its many other names, is one of the internationally recognised fundamental human rights, as embodied in the Universal Declaration of Human Rights and the International Covenant for Civil and Political Rights (ICCPR), that provides the groundwork for the fundamental human rights that the international community has agreed upon. The interchangeably used term to this right expresses the international community's intention to safeguard and ensure its exercise, including on the Internet, regardless of whatever form of words or terminology the authorities decide to use. It is, however, not a single-standing right. It is one that when exercised by a person, such exercise carries with it special duties and responsibilities as it may overlap the right(s) of another person, particularly within the territory of a government. It then poses a dilemma, particularly for the governing powers, as to what extent shall freedom of expression be limited – or whether it shall be limited at all, even.

Recognising the importance of this issue, the United Nations has provided explanatory points made upon this particular right in its General Comment No. 34 of 2011.¹ Limitations and/or restrictions on the exercise of such right must fulfil some firm conditions, provided for in ICCPR through Article 19(3) as a 'three-part test'. This test, which has been confirmed by the Human Rights Committee, requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest (including, as noted, protecting the reputations of others),

and (3) necessary to secure this interest. Given the general nature of said limitations, the main purposes inferred in the articles are prone to misinterpretation, if not misuse of power, by the authorities. Derogations and limitations, as well as interpretations, made upon ICCPR must then be done carefully, in the sense that they do not challenge or contrast with the purposes of the articles in concern. The UN Economic and Social Council adopted the Siracusa Principles in 1984, a non-binding international document serving as guidance as to what extent limitations and derogations to the ICCPR may be done.

It is unquestionable that civil society plays a pivotal part in steering a nation to the implementation of democracy. The involvement of people makes important progress for development, as the government is obliged to listen and adhere to the voice of the nation. Governments are then expected to create a system where democratic values are upheld and practiced, but most of the times this is not always the case. For example, it has come to the attention of the UN Special Rapporteur that governments (and "other powerful entities") are, in fact, justifying the enactment of defamation laws in their respective countries on the basis of protecting national interests or the reputation of the hurt individuals, while in fact such laws are used to "censor content that [they] do not like or agree with".² On the other hand, blasphemy – often worded as defamation of religion – is also a controversial derivation of freedom of expression. It is prone to abuses and misuses, and the United Nations has condemned the enactment and enforcement

of blasphemy laws, especially in states which are parties to the ICCPR, because such laws contradict the essence of freedom of religion – interconnected with freedom of expression – in the ICCPR itself.³

It is called upon states by the Human Rights Council to refrain from enacting provisions that contradict with the values of freedom of expression, such as:

“(i) Discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups;

(ii) The free flow of information and ideas, including practices such as the banning or closing of publications or other media and the abuse of administrative measures and censorship;

(iii) Access to or use of information and communication technologies, including radio, television and the Internet.”⁴

As the access to the Internet has been considered as a basic human right by the United Nations,⁵ the above far-reaching explanation of how governments shall not overextend its authority by imposing restrictions showcases even further the indubitable concern of the international community of how important the people’s voices are and how they shall be protected at all costs. ASEAN Parliamentarians for Human Rights has expressed its concerns at the increasing human rights violations in the region – among the mentioned is “increasing government restrictions on freedom of expression”.⁶ More specifically on Internet freedom, Freedom of the Net index⁷ reported that the Philippines has the highest score among other ASEAN member states and is labelled ‘Free’, but is then followed by Singapore, Indonesia, Malaysia, and Cambodia who are labelled ‘Partly Free’.

Meanwhile Myanmar, Thailand, and Vietnam have seemingly failed to rack up points, as the states are labelled ‘Not Free’.⁸ The methodology used in the index is based on, among others, scoring the formation and enforcement of laws in relation with freedom of expression, especially over the Internet.

HOW GOVERNMENTS PROTECT THE RIGHT TO FREEDOM OF EXPRESSION

The modern era makes it inevitable for people to make maximum use of a plethora of media choices to gain as well as spread information. While conventional modes such as newspapers and magazines are still in use at large, online media platforms are continuously seeing a steep incline in user numbers as technology develops at a rapid pace. At the moment, the Internet is a key player in helping the dissemination of information. Although at the time when ICCPR entered into force the Internet had not even existed,⁹ the convention has always opened itself up for changes and innovations, as evident through the phrase “any other media” in Article 19(2). Not wanting to leave any corners unlit, countries are generally fast in adjusting their laws with recent developments and drafting necessary regulations on their peoples’ forms of expression over the Internet. However, the implementation in recent times shows that the practice of ambiguous determination on the regulated scope are becoming more common in national laws, such as the circulation of information over the Internet in Lao PDR. Regulated in its Decree Number 327 on Information Management on the Internet, it is stated that the “[i]ndividuals, legal entity or organizations that violate *this decree* will be warned, educated, penalized, fined, and subjected to civil or criminal charges depending on the severity of the case.”¹⁰ The problem then rises from the vague referral of “this decree”, which does not explain further which type of act or violation would be charged with which punishment, and then to what extent the people are then allowed to exercise their rights on the Internet.

As judgments may be highly biased, the equivocal subsection to either civil or criminal charges should not have depended on severity, but on clear categorisations instead. This way, the article leaves too broad of an open space for the government to interpret how an act shall be considered as a violation to the decree and what punishment will be given to the violator, as evident in Myanmar, where the government has been relentlessly slapping bans, especially on media outlets. Its Constitution indeed mentions about citizens' freedom to exercise several rights, including "to express and publish freely their convictions and opinions",¹¹ yet critics would point to the Telecommunications Law, particularly its Article 66D that has been used – or abused – far too often to 'protect' the government from the people who have allegedly dishonoured officials or institutions.¹² Singapore also states its citizens' freedom of speech in Article 14(1)(a) of its Constitution, but again with extensive restrictions that immediately follows.¹³ Its national laws make the issue more specific: among the controversial statutes are the Newspaper and Printing Presses Act (NPPA) and the Broadcasting Act, through which the government confers upon itself the power to control the media, enforced by its dedicated Media Development Authority. As firm restrictions are imposed upon all local and foreign media, more people are forced to tone down their criticisms, especially through media, as the government does not hesitate from suing its critics and taking extreme measures to make sure that they can no longer publish such criticisms.¹⁴

Approaches by governments to pursue freedom of expression at times can take the form of revising 'controversial' laws that have existed. The recent amendment made upon the Information and Electronic Transactions Law (ITE Law) in Indonesia¹⁵ was yet another government move that triggered its people to speak against it in various tones of disagreement. The issue in the country, despite being regulated in the ITE Law, is that the decisions made upon whether a content is accessible or not still relies heavily in the hands of the Ministry of Communications and Information, which has made questionable announcements to block several websites with debatable reasons – such as Vimeo, Reddit,¹⁶ and Telegram just

recently¹⁷ as an example. Since its initial enactment in 2008, the number of defamation claims has been reportedly climbing up,¹⁸ as the ITE Law appears to have given too big of a leeway for individuals, especially those with governmental positions, as it imposes criminal sanction regarding contents of defamation or mockery, as well as contents that are of gambling activity, blackmail or threat, harmful to customer, violating 'decency', and/or inflicting racial/ethnic issues. A similar approach to limiting freedom of expression through the Internet was taken by the Philippines when the Cybercrime Prevention Act was introduced in 2012. The law, as said by Human Rights Watch, "drastically increases punishments for criminal libel and gives authorities excessive and unchecked powers to shut down websites and monitor online information".¹⁹ As a response, the Magna Carta for Philippines Internet Freedom was crowd-sourced and made its way to the Philippine Congress,²⁰ symbolising the rise of participative democracy in the nation.²¹ However, despite the efficacious efforts, it is reported that the bill was absorbed into another law, and many of its key provisions were not incorporated in the said law,²² making the government's intention to protect Internet freedom even more questionable. Malaysia, on the other hand, quite intriguingly amended their sedition law in 2015,²³ despite having strengthened its commitment in guaranteeing such right by making a pledge "to ensure no censorship of the Internet".²⁴ The Malaysian government has been receiving numerous criticisms for seemingly being on the fence, as the Prime Minister had previously vowed to repeal the act but years later decided to 'strengthen' it instead,²⁵ and more worryingly just recently made a move to block national access to a UK-based online platform, due to their reports on national economics controversies that the government claimed was harmful to the national security.²⁶ Both events took the country by storm, as the freedom of speech entitled to the citizens is mentioned in its Constitution,²⁷ yet the implementation is far from ideal. Freedom of the press should be inseparable with the basic human right to freedom of expression, especially in the digital era, where any information can be made available in a matter of seconds to everyone with access to the Internet.²⁸ It is commonly found that preventive measures against the media are taken

by governments to ensure national order, but as far as democracy goes, mass media shall be free from any forms of interference or threat, in order for them to be able to provide quality and fair information for the public.

On media closure, Thailand adopts a slightly different approach: to guarantee its people's freedom of expression, it is mentioned explicitly in its Constitution that no media will have to face shutdown except in a state of war.²⁹ However, the problem transcends as Thailand currently reaps controversies for its laws that are said to have affected its people's freedom of expression over the internet, as evident in its recent capture of an anti-corruption activist for mocking a government official on Facebook.³⁰ Thailand, also has one of the toughest *lèse-majesté* laws in the world, with Article 112 of its Criminal Code mentioning that “[w]hoever, defames, insults or threatens the King, the Queen, the Heir-apparent or the Regent, shall be punished with imprisonment of three to fifteen years.” The article has seen some allegations to it, as the forms of defamation, insult, or threat are not clearly defined, leaving again another vague gap in national law for broad interpretation – as have been shortly discussed above.

Aside from mass media, how civilians are perceived in the eyes of the government over the Internet, particularly in social media platforms, is also an upsetting issue. Since 2015, it was reported that Cambodia has been seeing an increase in criminalisation of civilians expressing their opinions of the government on Facebook, including detainments and threats from public officials,³¹ despite the fact that freedom of expression, press, publication, and assembly are ensured in its constitution.³² Even the opposition party is not safe from such criminalisation – as the Cambodia National Rescue Party had their lawmakers sentenced with imprisonment for various allegations of incitement.³³ Such cases, may possibly lead to further instabilities and insecurities, although improvements are expected with a cybercrime law forthcoming.³⁴ A similar situation can also be found in Vietnam. A lot of people have been sent into prison for allegedly violating Article 88 of Vietnam's Criminal Code – some detainments are even unlawful, such as

of Nguyễn Văn Đài, a Vietnamese human rights activist, which has been going on since November 2015 without any preceding or subsequent trial. At the end of June, Nguyen Ngoc Nhu Quynh, a prominent blogger and human rights activist, was found guilty of ‘conducting propaganda against the state’ and sentenced to ten years in prison,³⁵ and the latest case being at the end of July where activist Tran Thi Nga was sentenced to nine years in prison, followed by five years under house arrest, for having spread “anti-State propaganda.”³⁶ Article 25 of the Vietnamese Constitution enshrines the right to freedom of speech that the citizens are entitled to, but unfortunately the practice of detaining political prisoners in Vietnam is regrettably common, with an estimate of 110 political prisoners currently still waiting for their fates behind the bars.³⁷ Article 88 of Vietnam's Criminal Code regulates that conducting propaganda against the country would result in up to 20 years of imprisonment, yet in reality, such restricting rule is not followed by a due process of justice.

Seeing the unwanted rise in criminalising acts of expression by civilians over the Internet, an important thing to consider when responding to those acts– especially those that are directed at the government – is that it shall be done in a different fashion from conventional media, which approaches are more strict and unforgiving. The difference is, as emphasised by the UN, due to the opportunity for the ‘perpetrators’ to instantly clarify their allegedly defaming statements, as the nature of media platforms allows them to do so.³⁸ However, the Defamation Act of Brunei Darussalam may have viewed it differently – the law defines ‘telecommunication’ as electromagnetic systems, yet “[f]or the purpose of the law of libel and slander, the broadcasting of words by means of telecommunication shall be treated as publication in a permanent form.” Regulations over information and communications technology are admittedly limited, yet attempts to develop laws on information and communications technology have been done many times in Brunei, but unfortunately they lead to little to no avail.³⁹

From the situations illustrated above, it is understood that to look beyond the act (or alleged violation), and learn the *raison d'être* of why such

act is done, is of utmost importance, particularly in maintaining a just balance on the right to freedom of expression. Some people might be able to voice their concerns to the government with a tone that the officials deem inappropriate, but when the criteria of such appropriateness is vague and somehow a criticism does not pass, another failure to distinguish ‘anti-government’ agenda from constructive criticisms could occur and further lead to arbitrary or wrongful imprisonment – the exact opposite of the expected outcome from the freedom of expression.

POLICY RECOMMENDATION

Adhering to the aforementioned findings, it is fathomable that the recent cases in regards to exercising the right to freedom of expression taking place within the ASEAN region and its respective member states are disconcerting. As discussed earlier in this edition of ASEAN Briefs how each state decides to regulate and respond to acts of freedom of expression as well as how the situation turns out to differ, nevertheless, there are a few policy recommendations that can be made upon this issue.

First, the governments of all ASEAN member states need to reassess their commitment to the international community and its rules. To date, only some of ASEAN member states – namely Brunei Darussalam, Malaysia, Myanmar, and Singapore – have either ratified or acceded to ICCPR. As the affirmation to adhere to international law has been repeatedly reiterated by international organisations such as the UN and NGOs such as Human Rights Watch, it signifies the attention shed on Southeast Asia and how the region needs to make efforts to improve the condition in the respective states.

Second, bearing in mind the benefits from making use of the Internet as a media to express thoughts and opinions, governments are then encouraged to avoid draconian laws with overly vague provisions in their respective national laws, in order to increase the engagement of civil society for a more democratic country. Despite the guarantee of right

to freedom of expression commonly found in each state’s constitution, the interpretation process into national laws, and how such national laws are implemented, is where the right often gets lost in translation. The need to protect national interests and security is indeed unquestionable, hence the strict approaches; but shall the limitations be too specific on acts that are debatable as a violation, they will also discourage the civil society to be forthright with their thoughts and opinions, especially in the era where exchanges of thoughts can easily be done through the endless options of online platforms to choose. Therefore, tough as it may seem, governments are advised to find a just balance between their rights to enact regulations for public order and their obligations to ensure the protection of their peoples’ rights.

Finally, governments may need to comprehend that at times, even, it might not be the regulations that are at fault, but it is them that might have missed the mark in applying a more humane perception towards the regulatory framework in the country. Restrictions applied by the government should essentially be reasonable on the basis of national security and public order, but the concern is that in most national laws, such restrictions are heavily vague, which can potentially lead to arbitrary use or abuse of such power vested in the authorities. Due process of law, therefore, also needs to be upheld. Governments have to see the system thoroughly and put their feet in the people’s shoes and after all, the ASEAN Declaration on Human Rights did not guarantee freedom of speech for nothing. There might be no one-size-fits-all standard for the creation of such regulations, but it is the needs of a country that matters the most, and adhering to the people’s voices might be a good jumpstart to actually fulfil them.



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About The Habibie Center

The Habibie Center was founded by Bacharuddin Jusuf Habibie and family in 1999 as an independent, non-governmental, non-profit organisation. The vision of The Habibie Center is to create a structurally democratic society founded on the morality and integrity of cultural and religious values. The mission of The Habibie Center are first, to establish a structurally and culturally democratic society that recognizes, respects, and promotes human rights by undertaking study and advocacy of issues related to democratization and human rights, and second, to increase the effectiveness of the management of human resources and the spread of technology.

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The ASEAN Studies Program was established on February 24, 2010, to become a center of excellence on ASEAN related issues, which can assist in the development of the ASEAN Community by 2015. The Habibie Center through its ASEAN Studies Program, alongside other institutions working towards the same goal, hopes to contribute to the realization of a more people-oriented ASEAN that puts a high value on democracy and human rights. The objective of the ASEAN Studies Program is not merely only to conduct research and discussion within academic and government circles, but also to strengthen public awareness by forming a strong network of civil society in the region that will be able to help spread the ASEAN message. With the establishment of ASEAN Studies Program, The Habibie Center aims to play its part within our capabilities to the ASEAN regional development.

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Talking ASEAN is a monthly public dialogue held at The Habibie Center in Jakarta. Covering a wide array of issues related to ASEAN, Talking ASEAN addresses topics of: Economic Integration, Socio-cultural, & Democracy, human rights and regional peace, among others. Featuring local and visiting experts, Talking ASEAN is one of a series of twelve dialogues regularly held each month and open to a target audience consisting of ASEAN officials, foreign ambassadors & diplomats, academics, university students, businesses, and the media.

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ASEAN Studies Program - The Habibie Center

The Habibie Center Building - Jl. Kemang Selatan No.98, Jakarta 12560
Tel: 62 21 781 7211 | Fax: 62 21 781 7212 | Email: thc@habibiecenter.or.id

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