

SPECIAL
EDITION

GLOBAL INFORMATION SOCIETY WATCH 2011 UPDATE I

INTERNET RIGHTS AND DEMOCRATISATION

Focus on freedom of expression and association online



Global Information Society Watch

2011 UPDATE I



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Introduction

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In the past decade, all over the world, individuals have embraced the internet as a platform for discourse, commerce, and of course, political and social activism. Since 2000, internet access worldwide has increased by more than 500% to reach a total of 2.3 billion internet users, leading to a rather rapid change in how we approach daily life, as well as a greater divide between those with access and those without.

Still, nearly 70% of the world's population lives without internet access. Of those that are able to connect, the OpenNet Initiative estimates¹ that nearly half of them access a "filtered" or censored internet of some kind, ranging from the filtering of illegal content (such as child pornography) to restrictions on political speech protected by the principles of the Universal Declaration of Human Rights.²

The country-level case studies contained within this report feature countries – South Africa, Argentina, Pakistan, Indonesia, Saudi Arabia and Azerbaijan – where internet usage is fast-growing and regulation, as a result, sometimes a poor fit to the realities on the ground. The regulations and restrictions enacted within these countries vary wildly, from Saudi Arabia and Pakistan's extensive controls on speech to the relatively open and progressive online environments experienced in Argentina and South Africa.

Nevertheless, each of these countries faces distinct limitations on, and threats to, freedom of expression. And while the challenges facing each are on the surface quite different, they can be distilled into three overarching themes: commercial interests, national security, and "cultural preservation", the latter of which includes issues of morality and blasphemy.

It is within the framework of these themes that the following analysis lies.

Commercial interests

Business interests have always played a part in determining media regulation, and the internet is no different. Amongst the six countries in this report, this is no more apparent than in Argentina where despite constitutional status for freedom of expression and access to information, censorship has at times been enabled by actions from the private sector; as the authors (Danilo Lujambio, Florencia Roveri and Flavia Fascendini) of this case study write, "[t]his is most clearly seen in the tensions between intellectual property and freedom of expression".

Framing their analysis partly through the lines of Article 13 of the American Convention on Human Rights (to which Argentina is party), which states that "the right of expression may not be restricted by indirect methods or means, such as through the abuse of government or private controls", the authors demonstrate how certain content regulations, such as the December 2011 Antiterrorist Act, have been pushed by economic interests. In this example, the Act – which criminalises certain forms of protest – was adopted "at the request of the Financial Action Task Force (FATF), an intergovernmental forum that promotes norms that enable the prosecution of money laundering and the financing of terrorism".

Even stronger are examples provided by the authors relating to intellectual property. The report presents analyses of three cases that "clearly exemplify the tension that exists between intellectual property rights and freedom of expression", demonstrating not only the chilling effects such regulations have on free expression but also their negative impact on internet intermediaries.

The most recent of the three examples describes the plight of Cuevana, a website created in 2009 by students with the goal of streamlining the video-streaming process. Rather than host content, the site facilitates access to third-party content through a searchable, linked database. Following initial civil proceedings against the site by content companies, Cuevana was later attacked from several directions. This included a blocking order demanding that all ISPs restrict access to the links provided by the

1. OpenNet Initiative, "Global Internet filtering in 2012 at a glance", opennet.net/blog/2012/04/global-internet-filtering-2012-glance

2. Ibid

site's database and the arrest of one of the site's administrators in Chile.

In their analysis, the authors point to the extraordinary power given to judges to block the distribution of content in instances where there could be "suffering or imminent or irreparable harm". The idea that imminent, irreparable harm could be done to multi-billion dollar companies is a clear distortion of the law's intent.

Ultimately, the case served to illustrate the overbroad regulations on intellectual property that allow for the punishment of not only the content "thief", but also potentially the person who uploaded the content, the person who hosted it, or the person who provided the means of locating it. As the authors write, "it is possible for some overlap in responsibility to occur".

As UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Frank La Rue has stated, and the authors have cited, "while States are the duty-bearers for human rights, private actors and business enterprises also have a responsibility to respect human rights".

This responsibility is also apparent in Indonesia, where content providers play a significant role in the moderation of the local online environment, threatening editorial independence and freedom of speech. One such example cited by case study author Ferdiansyah Thajib occurred in 2008, when the Okezone online news site had to change its coverage on a corruption scandal after the site's ultimate owner (a large media corporation) stepped in.

In Indonesia, however, the limitations on freedom of expression crosscut the categories set forth in the introduction; in Argentina, the primary threat to speech does appear to come from private actors in collusion with government, and under the umbrella of intellectual property concerns.

National security

Attempting to distill a list of 35 detailed, specific categories (from "free email" to "minority rights and ethnic content") facing online censorship into three umbrella categories, researchers at the OpenNet Initiative settled on "political filtering", "social filtering", and "security/conflict filtering". In the research institution's first book, *Access Denied: The Practice and Policy of Global Internet Filtering*, chapter authors Robert Faris and Nart Villeneuve write:³ "These

different types of filtering activities are often correlated with each other, and can be used as a pretense for expanding government control of cyberspace".

Indeed, as Faris and Villeneuve note, a government may claim the necessity of censorship under the pretense of blocking pornography or illegal content, but once the tools and mechanisms are in place to do so, may instead (or in addition) block political or other speech. Nowhere is this more apparent than in countries that censor online speech under the guise of national security.

Of the six countries covered in this volume, each one enacts some sort of speech restrictions on the basis of national security. Some examples are severe; nationalistic Azerbaijan leaves access relatively unfettered, allowing the government to more easily monitor and punish "rebellious activities" and furthermore presents social media as a "dangerous place", which chapter author Vugar Gojayev cites as a contributing factor to the low rate of internet adoption (14%) amongst women in the country.

In Pakistan, write Shahzad Ahmad and Faheem Zafar, the government has justified censorship of the internet by citing Section 99 of the Penal Code, which allows the government to restrict access to information that might be "prejudicial to the national interest". Targets of such censorship have included a large number of Baloch dissident websites and forums, as well as individual YouTube videos which showed President Asif Ali Zardari yelling "shut up" to an audience member during a speech.

Other examples are less oppressive but should be of no less concern: in South Africa, for example, the Regulation of the Interception of Communications and Provision of Communication-Related Information Act (ROICA) of 2002, which regulates the interception of certain communications, has been determined by watchdog group Privacy International to lack basic safeguards.

States have always placed restrictions on content for the purposes of national security, but never before has the determination of what constitutes a national security threat been left to minor agencies or private regulators, creating greater room for error and corruption. Furthermore, when "national security" becomes a catch-all to justify the censorship of anti-nationalist activities or social movements, the resulting effect is often overly restrictive.

"Cultural preservation"

This third and final category blends separate but related issues: the censorship of "immoral" content such as pornography and the censorship of hateful and derogatory speech under the guise of cultural preservation. Of the dozens of countries around

3. Robert Faris and Nart Villeneuve, "Measuring Global Internet Filtering" in *Access Denied: The Practice and Policy of Global Internet Filtering*, eds. Ronald Deibert, John Palfrey, Rafal Rohozinski and Jonathan Zittrain (Cambridge, MA: MIT Press, 2008), access.opennet.net/wp-content/uploads/2011/12/accessdenied-chapter-1.pdf

the world that censor online content, the vast majority have regulations dealing with both or either of these content categories.

Some of these content regulations are understandable under the shadow of history; South Africa, for example, bans the “advocacy of hatred based on identifiable group characteristic that constitutes incitement to imminent harm unless a documentary with scientific, literary, or artistic merit or a matter of public interest”. While such restrictions may be legitimate when, as La Rue has argued, transparent, purposeful, and proportional to their aim, chapter author Jane Duncan argues that in South Africa, the scope for criminalisation of “unacceptable” content under the Film and Publications Act has become too broad, and that aspects of the country’s self-regulatory system for online content are often too restrictive as well.

In other cases, cultural preservation is used as a cover to place undue restrictions on speech. In Saudi Arabia, writes chapter author Rafid A Y Fattani, some forms of censorship have wide support from the country’s conservative population, and the country’s religious establishment has led a mass call to “purify” society of destabilising elements, including a push for further censorship and encouragement of citizens to report content they deem “offensive” or “vulgar”. Given that the online censorship system in the country relies on individual reports, such encouragement from religious figures validates individual determinations, resulting in increased censorship.

In Indonesia, where Thajib writes that media has become a central indicator of freedom and openness post-Soeharto, the online sphere is often reflective of the country’s great diversity, harbouring a “broad spectrum of political differences, ideologies and behaviours”. But, as Thajib notes, it is “not uncommon” for online exchanges to result in hate speech, which is in turn arbitrated by the Ministry of Communication and Informatics (MCI). In some cases, “given enough political weight”, the ministry interferes by blocking or removing content. The MCI has taken greater steps to censor content as well, banning YouTube, MySpace and other sites in 2008 in an effort to block the Dutch film *Fitna* and, more recently, blocking 300 websites allegedly publishing “radical content” in an effort to “clean out” the web of immorality.

As Frank La Rue reiterated in his oft-cited 2011 report,⁴ Article 19, paragraph 3 of the International

Covenant on Civil and Political Rights (ICCPR) allows for exceptional limitations on certain types of speech, provided such limitations meet a three-part, cumulative test: the limitations must be provided by law, made clear and accessible to all; they must legitimately meet one of three purposes – to protect the rights or reputations of others, to protect national security or public order, or to protect public health or morals; and they must be proven as necessary and as the least restrictive means required to achieve the purported aim.

Included amongst those types of speech for which such limitations would be allowed are hate speech (to protect the rights of affected communities) and the advocacy of national, racial, or religious hatred that constitutes incitement (to protect the rights of others, such as the right to life). But while these types of speech may be legitimately restricted under the parameters laid forth by the ICCPR, the chapter authors are in agreement that, in each of their respective countries of focus, the three-part cumulative test has not, in some or in all cases, been met.

Each of the following chapters seek to inform, from a human rights-focused perspective, on the challenges facing freedom of expression – and its advocates – in these six countries. Each country of the six is different, with varied forms of government, cultural backgrounds, and national aspirations, but the similarities in the challenges faced by their citizens in preserving the principles of free expression on the frontiers of the internet are all too similar. ■

4. Frank La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/17/27 (Geneva: United Nations General Assembly, Human Rights Council, 2011), www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

COUNTRY REPORTS



OPPORTUNITIES AND THREATS FOR INTERNET RIGHTS IN ARGENTINA



Danilo Lujambio, Florencia Roveri
and Flavia Fascendini
Nodo TAU

Background

On 24 March 1976 a military coup overthrew the democratic government in Argentina, forever changing the national consciousness. Between 1976 and 1983, the new regime committed countless crimes against humanity, leaving at least 30,000 people missing (their bodies are still missing to this day), and wreaking political, economic, social, cultural and institutional devastation on the country.

During this period, many human rights organisations started to denounce violations against human rights. These included SERPAJ (Servicio Paz y Justicia), Madres de Plaza de Mayo, Abuelas de Plaza de Mayo, and, later, HIJOS.

Soon after the former president of Argentina Néstor Kirchner took office (May 2003-December 2007), human rights became the political flagship for the government, shaping a remarkable and until then unseen alliance with the human rights movement. The government promised to bring to justice those military and police officials who, during the dictatorship, had committed acts of torture and assassinations. Kirchner dismissed powerful officials, and overturned amnesty laws¹ for military officers accused of crimes. Judgments for crimes against humanity are still taking place in Argentina today.

According to statistics of the Centro de Estudios Legales y Sociales (CELS), a total of 1,861 individuals – among them civilians and security forces personnel – are or have been involved in cases related to state terrorism. Of these, 17% have been sentenced and 244 are in the process of being sentenced or acquitted.²

The human rights discourse in Argentina has been significantly marked by these events. It is in this context that the national government constantly appeals to human rights, through policies

related to “memory, truth and justice”, but in a way that at times overshadows other important human rights concerns.

Freedom of expression³

During the military dictatorship, censorship was an everyday practice – but even after the recovery of democracy in 1983, the exercise of freedom of expression remains a central issue in our country. In the 1990s, governments aligned with neo-liberal policies continued implementing measures that restricted freedom of expression by applying the Broadcasting Act 22.285 – originally created by the military dictatorship – and allowed censorship of radio and television, the strict control of media resources, and limited media ownership by commercial entities. However, the implementation of these rules has since diminished due to successive modifications of the law. For example, in 2003 after a judicial process that banned community radio, the Supreme Court declared Article 45 of the Act (which prohibited non-profit organisations from using broadcasting frequencies) as unconstitutional. The argument being that it threatened freedom of expression, which is guaranteed in Argentina as a signatory to the American Convention of Human Rights.⁴

In 2010, after a long and rich debate, a new law dealing with audiovisual communication services was passed by Congress. The bill, promoted by the government of Cristina Fernández de Kirchner, was developed with the input from the civil society organisation Coalition for a Democratic Broadcasting. The Coalition’s “Citizens’ Initiative for a Broadcasting Law for Democracy (21 Points)” defined the main aspects of the new law. It promoted, among other things, a more transparent and democratic assignment of radio frequencies, which would have an impact on media diversity and, in turn, on the exercise of freedom of speech. However, since the law was approved, several aspects of its

1. The 1986 *Ley de punto final* and the 1987 *Ley de obediencia debida*
2. www.cels.org.ar/comunicacion/?info=detalleDoc&ids=4&lang=es&ss=46&idc=1488

3. The titles of laws mentioned in this report, as well as quotes from published articles and interviews, have been translated by the authors to convey the literal meaning of the original Spanish. Alternative English versions of these may exist

4. www.insumisos.com/diplo/NODE/2744.HTM

implementation have been criticised by the Coalition, including the assignment of media licenses.⁵

A brief note on internet access is necessary: we consider that a lack of real access to infrastructure is the first concrete restriction for exercising the right to freedom of expression. In this sense, we celebrate the national government initiative that plans to build the National Fibre-optic Network (Red de Fibra Óptica Federal) since it will radically increase the penetration of internet in the interior of the country – places that internet companies regard as unprofitable.

Recent data from the National Institute of Statistics and Censuses (INDEC)⁶ points out that over the last year, the total number of residences enjoying access to internet increased by 59%, with an increase of 62.4% in broadband connections.⁷ The total number of organisations (including businesses and institutions) with internet access increased by 74.5% in the same period.

According a recent survey, Argentina has over 30-million internet users,⁸ meaning that three of every four people living in Argentina have some kind of access to the internet. The country also boasts the second highest number of Facebook users in South America.

In June 2005, Law 26.032⁹ was approved by Congress, which provides a legal framework for internet services. The law establishes that “the search, reception and broadcasting of information using internet services are subject to the Constitutional guarantee of freedom of expression”.

From 2000 onwards, censorship on the internet has mostly been the result of decisions made by the private sector – typically when there is a perceived threat to their businesses. This is most clearly seen in the tension between intellectual property and freedom of expression. We argue below that the tension between economic and social interests define and shape the exercise of human rights online in Argentina.

Legal status of human rights

Human rights in general, and especially freedom of expression and access to information and freedom of association in particular, have constitutional status in Argentina. The constitutional reform of 1994

widened this legal basis, with the inclusion of international treaties¹⁰ such as the American Convention on Human Rights, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child, among many others international mechanisms ratified by Argentina.¹¹

Article 14 of the Constitution includes, among the fundamental rights of all Argentine citizens, “the right to petition the authorities and to publish ideas through the press without prior censorship”. In the same sense, Article 13 of the American Convention on Human Rights states:

Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.¹²

In the same Article, the Convention stipulates: “The right of expression may not be restricted by indirect methods or means, such as through the abuse of government or private controls.”

Freedom of association

The tension between social protest, freedom of expression and civil rights is a current issue in most Latin American countries, including Argentina.¹³

One element of concern in relation to the exercise of freedom of association in Argentina is the criminalisation of social protest, which is, in some cases, the only way in which some groups can express their ideas and demands, especially marginalised groups such as indigenous communities,¹⁴ homeless people,¹⁵ and communities affected by mining.¹⁶ Typically the decisions to ban protest action comes from provincial rather than national government.

The Antiterrorist Act, approved on December 2011, raised concerns in this context. The law was created to punish crimes of terrorism, but human rights organisations and lawyers fear that it serves to criminalise social protest. One of the main questions posed by the law is based on the argument

5. www.farco.org.ar/index.php/es/noticias/1369-compromiso-y-participacion-por-la-total-aplicacion-de-la-ley.html

6. www.indec.gob.ar/

7. www.indec.gob.ar/nuevaweb/cuadros/14/internet_o6_12.pdf

8. www.argentina.ar/_es/ciencia-y-educacion/C10690-tres-de-cada-cuatro-argentinos-tienen-acceso-a-internet.php

9. infoleg.mecon.gov.ar/infolegInternet/anexos/105000-109999/107145/norma.htm

10. *National Constitution of Argentina*, Article 75, para. 22, www.argentina.gov.ar/argentina/portal/documentos/constitucion_nacional.pdf

11. www.derhuman.jus.gov.ar/normativa.html

12. www.hrcr.org/docs/American_Convention/oashr4.html

13. www.palermo.edu/cele/pdf/Protesta-social.pdf

14. tiempo.infonews.com/notas/repression-formosa-miembro-de-comunidad-qom-murio-y-otro-esta-coma

15. www.pagina12.com.ar/diario/elpais/1-158317-2010-12-08.html

16. www.pagina12.com.ar/diario/sociedad/3-186665-2012-02-01.html

that it was adopted at the request of the Financial Action Task Force (FATF),¹⁷ an intergovernmental forum that promotes norms that enable the prosecution of money laundering and the financing of terrorism. Argentina had to pass this bill in order to be considered as a “reliable country” by the FATF, and to be involved in the G20, which is very important for the national government.¹⁸

Several social organisations and political commentators¹⁹ argue that the FATF requirement is associated with corporate interests in preventing the realisation of labour, social and environmental rights, among others, and ensuring “a domesticated citizenship”, consequently posing a risk to the respect of human rights, including freedom of expression.

After the pressure and debate generated around the Act, government agreed to include a point establishing that the “aggravating circumstances do not apply if the actions in question [concern the realization of] human and/or social rights or any other constitutional right”.

Online freedom of expression vs. intellectual property

In recent years, a number of proposed internet-related laws, policies and practices that could impact negatively on the exercise of human rights in Argentina – such as the right to freedom of expression, access to information, freedom of association and privacy – have emerged.

Even though human rights issues do inform discussions – as we have outlined above – the debate around these issues does not extend to the general public, and is usually confined to small groups involved, in particular academics and journalists.

Some of the recently proposed legislation, policies and initiatives that in some way limit human rights on the internet in Argentina are:

- Telecommunications Law 25.873²⁰ which was sanctioned by the Senate on December 2003 in the last session of the year without parliamentary debate. This act stipulated that communication service providers had the responsibility of storing information and data for use by the authorities in criminal and other investigations. At that time the law was called the “Spy Law”, because it allowed the monitoring

of private communications. The law was established by decree 1653 in 2004 but withdrawn in 2005 after a public outcry.

- Two legislative projects aimed at ISPs: Senator Guillermo Jenefes’ bill²¹ that made ISPs liable for their users’ actions, and a second bill²² by Deputy Federico Pinedo that regulated ISPs.
- The aforementioned Antiterrorist Law (law 26.734), which amends the chapter on the Penal Code regarding the financing of terrorism.
- And the not so recent Law 11.723 of Intellectual Property, originally drafted in 1933.

We will focus this report on evaluating freedom of expression in Argentina based on the analysis of three cases that clearly exemplify the tension that exists between intellectual property rights and freedom of expression. In doing so, we will describe the impact of the legislative initiatives mentioned above regarding the role of intermediaries in the control of online content.

Cases in Argentina

Intellectual property in Argentina is regulated by Law 11.723, which dates back to 1933. This law penalises anyone who “edits, sells or reproduces by any means or instrument, an unpublished or published work without permission from the author or his/her heirs”. There have recently been a number of cases that called for its application online. These cases were brought to court and fuelled debates about the regulation and criminalisation of certain online activities, making it evident that the law is outdated and does not account for current social and technological contexts.

Horacio Potel, professor of philosophy

In 2008, a university professor of philosophy, Horacio Potel, published blogs dedicated to the work of philosophers Friedrich Nietzsche, Martin Heidegger and Jacques Derrida, in order to distribute their texts among his students. Many of these materials were already online, and Potel provided links to them; many of the texts were impossible to find in local bookshops. A lawsuit was initiated against Potel by the Argentina Book Chamber (CAL, Cámara Argentina del Libro), a guild that represents publishing houses, including those that hold copyrights of some of the works included in the blogs. Potel was notified by the police and told that his phone and

17. www.fatf-gafi.org

18. www.pagina12.com.ar/diario/elpais/1-183117-2011-12-11.html

19. www.resumenlatinoamericano.org/index.php?option=com_content&task=view&id=3065&Itemid=99999999&lang=es

20. www.infoleg.gov.ar/infolegInternet/anexos/90000-94999/92549/norma.htm

21. www.senado.gov.ar/web/proyectos/verExpe.php?origen=S&tipo=PL&numexp=209/09&nro_comision=&Consulta=3

22. www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=8793-D-2010

computer would be seized and his case brought to court.

After a long trial and a solidarity campaign Potel's case was dismissed. The campaign, launched by organisations and people interested in access to free culture, included criticism of CAL's position at conferences, lectures and in media and the inclusion of banners on web pages to show solidarity with Potel.²³ The blog "Derecho a leer"²⁴ (right to read) was also created (nowadays this blog serves as a reference in the analysis of the internet and ICTs). "The lesson we can learn from this situation is that virtual actions can lead to real effects", said Potel.²⁵ Immediately after the case's dismissal, the materials were back online, where they remain to this day.²⁶

In 2011 and 2012 legal actions for infringement of intellectual property rights were also initiated against two popular websites in the country: Taringa.net and Cuevana.tv. These cases and their impact on internet rights are analysed in the following section.

Taringa

Taringa.net is an online sharing platform for texts, images, files and links to content such as movies, music and books. By mid-2011, the people responsible for the website, brothers Hernán and Matías Botbol and Alberto Nakayama, were prosecuted for violating the Intellectual Property Law 11.723. They were accused of being "necessary participants" in the dissemination and reproduction of content protected by copyright and also of being clearly aware of the illegality of their actions, thereby "facilitating piracy".²⁷ This process was, as in the case of Potel, initiated by CAL.

In their defence, Taringa's legal representative argued that it was impossible for the site to determine if shared content violated copyright – given that 20,000 posts were published daily. They also noted that the lack of access to the National Registry of Intellectual Property represents a barrier to determining ownership.

On 7 October 2011 a criminal court upheld the prosecution of one of the owners of the site, which it said "gives anonymous users the possibility of

sharing and downloading free files whose contents are not authorised to be published by their authors, thereby facilitating the illegal reproduction of published material".²⁸

The case sets a precedent in the field of internet rights. A group of researchers analysing freedom of expression on the internet in Argentina indicated that "the idea that a web manager should know about the content that is uploaded to a site or linked from it...presents challenges of accountability...including for search engines that link to other sites or content in an automated way".²⁹

In January 2012 the Sixth Court of the Chamber of Criminal and Correctional Appeals upheld the prosecution and determined that Taringa should pay compensation of 50,000 pesos (approximately USD 11,500) to CAL. In April 2012, Taringa and the CAL reached an out of court agreement³⁰ that would exempt Taringa from paying the penalty if they provide a technological solution to identifying protected content, with CAL helping to define what could and what could not be included on the site.

Cuevana

In January 2012, while the world was talking about the Stop Online Piracy Act (SOPA³¹, a controversial US anti-piracy bill) Megaupload was being shutdown and its manager arrested,³² a controversy around the Cuevana website took centre stage in Argentina. This site was created in 2009 by three students who wanted to simplify the process of streaming videos from the web. The site offers a searchable database of films and TV series and soon had over 15 million users a month. Cuevana does not host content on its servers but facilitates access to them by linking to other sites. Instead, the content is hosted on third-party servers, including Megaupload, which provide the space for users to upload or download files of any type, including movies and television series.

In November 2011, a group of companies, among them Imagen Satelital, owner of licenses from Turner International, initiated a civil proceeding against the site, asking for an injunction to prevent "imminent or irreparable harm". Later, the Argentina Union of Video Editors also brought

23. partido-pirata.blogspot.com.ar/2009/04/comienzo-la-feria-del-libro-en-buenos.html

24. derechoaleer.org

25. www.pagina12.com.ar/diario/suplementos/espectaculos/2-16094-2009-11-23.html

26. www.nietzscheana.com.ar
www.jacquesderrida.com.ar/index.htm
www.heideggeriana.com.ar/bibliografia/bibliografia.htm

27. From the verdict in Taringa's case, www.cij.gov.ar/nota-6742-Confirman-el-procesamiento-de-propietarios-de-sitio-web-donde-usuarios-descargaban-musica.html

28. www.infobae.com/adjuntos/pdf/2011/10/474901.pdf

29. Claudio Ruiz Gallardo and Juan Carlos Lara Gálvez, "Responsabilidad de los proveedores de servicios de Internet (ISPs) en relación con el ejercicio del derecho a la libertad de expresión en Latinoamérica" in *Hacia una Internet libre de censura. Propuestas para América Latina*, compilador Eduardo Bertoni (Buenos Aires: Universidad de Palermo, 2012), 82-83

30. www.redusers.com/noticias/acuerdo-cal-taringa-no-fue-pero-puede-ser

31. en.wikipedia.org/wiki/Stop_Online_Piracy_Act

32. www.bbc.co.uk/news/technology-16642369

a case against the site. As a preliminary measure, the judge ordered ISPs to block access to a list of links included on Cuevana which provided access to audiovisual works. The National Commission of Communication, which operates within the Communications Secretariat in the Ministry of Federal Planning, Public Investment and Service, notified all ISPs in the country (through CNC 88)³³ that it should block the access to the links.

In mid-March 2012, one of the administrators of Cuevana was arrested in Chile.³⁴ The reason was a claim made by Home Box Office (HBO), a very important cable television network from the US. Meanwhile, the General Prosecutor of the National Chamber of Criminal Appeal in Argentina opened a case against Cuevana for violation of copyright law.

Eduardo Bertoni, director of the Centre for Studies on Freedom of Expression and Access to Information of the University of Palermo in Buenos Aires, explains that the companies' claim was protected by two precedents:³⁵ Article 232 of the Code of Civil and Commercial Procedure in Argentina allows an injunction where there is a justified fear that "there could be a suffering of imminent or irreparable harm", while Article 79 of the Intellectual Property Law 11.723 gives judges the power to order the suspension of theatre, cinematic and musical performances – or the confiscation of creative works – on the same basis.

As Bertoni underlined, "the judge's decision has three parts relevant to the analysis: i) it uses a precautionary measure to prohibit the dissemination of content; ii) it prevents access by internet users to complete pages of the site; and iii) does not issue the order to the author of the potential damage but to private agents (ISPs) who are not responsible for the content".

The three cases mentioned above were the source of much controversy. While legal analysts³⁶ argued that the internet should be regulated, they also pointed to the absence of legal tools with which to intervene. On the other hand, free culture activists, such as as Fundación Vía Libre, warned that "it is clear that any person who holds a digital device and reproduces a work is violating a law dating from 1933 that requires urgent modification".³⁷

These cases highlight several issues in Argentina. First, the balance between rights and responsibilities of the actors involved and the criteria to identify who is considered to be violating the law: the person who uploads copyrighted content, the one that hosts it on servers, or the person who provides the means for finding it online. The case of Taringa suggests that although the accused would eventually be those who upload or download copyrighted work, it is possible for some overlap in responsibility to occur.³⁸

In relation to the responsibility of private actors in the respect of human rights, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, indicates that "while States are the duty-bearers for human rights, private actors and business enterprises also have a responsibility to respect human rights".³⁹ In this regard, he highlights the framework of "Protect, Respect and Remedy" that rests on three pillars:

- (a) the duty of the State to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication;
- (b) the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing the rights of others and to address adverse impacts with which they are involved; and
- (c) the need for greater access by victims to effective remedy, both judicial and non-judicial.

Other issues to be considered in relation to these cases are:

1. Both cases raised debate concerning the jurisdiction in charge given the physical location of the servers. The Criminal and Correctional Court of Appeals says that "although the links from which you download illegally reproduced works are located outside of Argentina, the servers from which the service is offered are in our country".⁴⁰ The general prosecutors concluded: "without prejudice to the foregoing, the effects of crime would have occurred in the country. Under the principle of ubiquity provided by Article 1

33. www.scpl.coop/index.php?page=ver&nid=1262

34. "¿Llegó el fin de Cuevana?", *BBC Mundo*, 16 March 2012, www.bbc.co.uk/mundo/noticias/2012/03/120316_tecnologia_cuevana_cierre_dp.shtml

35. www.palermo.edu/cele/pdf/investigaciones/la-tension-entre-la-proteccion-de-la-propiedad-intelectual.pdf

36. www.infobae.com/notas/580877-Apoyan-fallo-penal-que-condena-a-Taringa-%20por-descargas-ilegales-de-musica.html

37. www.vialibre.org.ar/2011/05/15/el-delito-que-cometemos-todos

38. "Todos/as somos piratas", *enREDando.org.ar*, 16 May 2011, www.enredando.org.ar/noticias_desarrollo.shtml?x=65440

39. Frank La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/17/27 (Geneva: United Nations General Assembly, Human Rights Council, 2011), para. 45, www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

40. www.redusers.com/noticias/caso-taringa-no-importa-donde-est-en-los-servidores-sino-donde-existe-el-dano

of the Penal Code, the criminal law in Argentina applies”. Cuevana⁴¹ announced that they would close the site only if a precautionary measure is issued and that they would only shut it down in Argentina.

2. The role of profit-making has also been discussed, and whether the copyright holder's rights are affected by the fact that the sites include paid advertising. The person responsible for Cuevana alleged that they had no profit intention and that they use income from advertising to pay for the high costs of maintaining the site. Nevertheless the prosecutor determined that the law had been violated because of the inclusion of the content, regardless of any profit motive.
3. The fact that the Taringa case ended in a settlement between private parties highlights the failure of legislation to resolve the conflict with respect to the right to freedom of expression.⁴² The agreement establishes that Taringa should develop a system that allows CAL to decide if content is infringing copyright. But this private settlement also raises questions that might have significant implications. For example: who will be responsible for defining the system? What kind of information will the system provide CAL? Who will develop or build it? Will it be open source so that the backend data capture procedures are transparent? How can the system's compliance with human rights be monitored?
4. When intermediaries do not comply with due process, they not only infringe on the rights of users but also establish a worrying precedent. It demonstrates how a conflict between several parties can be settled by two of them, generally those more powerful, disregarding legal principles that society took centuries to build. In relation to the role of justice, the Anti-Counterfeiting Trade Agreement (ACTA)⁴³ follows this trend because it opens the window for ISPs and copyright holders to cooperate directly with one another, without requiring a prior decision by a judge.

A practical consequence of this is that when asked to take down content for supposedly infringing copyright, ISPs, administrators or

search engines will comply with the demands in order to avoid legal processes, without any concern about the value of published content and about the rights to freedom of expression of those who published them. This has been described as having a “chilling effect”: “deterred by fear of punishment, some people refrain from saying or publishing anything that they legally could, and indeed, they should [say]”,⁴⁴ according to Bertoni. “If the injunction becomes the rule, users will choose to avoid the cost of a trial and choose to restrict their freedom of expression”.

The following case illustrates this point: in Argentina, Google and YouTube recently complied with demands to take down certain content that allegedly violated intellectual property rights. One of the demands was presented by a news channel whose videos were uploaded by a group of bloggers. The intermediary that hosts the blogs decided to take the content down. Moreover, some of the blogs were closed down after repeatedly publishing the videos. Due process was not followed: the copyright holder made a request, the intermediary reacted and the blogger was censored.⁴⁵

Paradoxically, the Intellectual Property Law in Argentina includes an exception in the case of journalism in its Articles 27 and 28.⁴⁶ Article 27 says that proceedings from conferences as well as political speeches cannot be reproduced without the explicit authorisation of their author. Moreover, parliamentary proceedings cannot be used for profit. At the same time it establishes an exception that should be applied in the case of journalism. In the same sense, Article 28 regulates the reproduction of anonymous works that are published in newspapers, magazines or other periodical publications. The media that purchased or obtained them has the right over their reproduction. However, the article mentions that news of general interest can be used, transmitted or reproduced, but when it is published in its original version (e.g. in an interview format) journalists should inform their source.

As the conflict regarding the blogs mentioned

41. www.bbc.co.uk/mundo/noticias/2012/03/120316_tecnologia_cuevana_cierre_dp.shtml

42. www.derechoaleer.org/2012/05/taringa-y-el-delito-que-nos-afec.html

43. The agreement was signed by six countries in October 2011 and by the European Union in January 2012, but its ratification is still pending

44. Frederick Schauer, “Fear, Risk and the First Amendment: Unraveling the Chilling Effect”, *Faculty Publications, Paper 879* (1978): 693, scholarship.law.wm.edu/facpubs/879. Cited by Eduardo Bertoni

45. Presentation of Beatriz Busaniche at the roundtable “Desafíos para la libertad de expresión en internet en la Argentina”, organised by the Asociación por los Derechos Civiles and FOPEA in Buenos Aires, 3 May 2012, pure-words.blogspot.com.ar/2012/05/mesa-redondalibertad-de-expresion-en.html

46. www.infoleg.gov.ar/infolegInternet/anexos/40000-44999/42755/textact.htm

above was resolved between two private actors, the law could not be applied and the censored bloggers were not able to exercise their rights. The private agreement showed the vulnerability of third parties: in this case, the users of the site. They were neither asked nor taken into account in the agreement.

5. Bertoni outlines four issues related to the regulation of content that must be specifically taken into account in cases that affect freedom of expression. They are:
 - Regulation of content to protect honor and privacy
 - Regulation of content to protect authors' rights
 - Regulation of content to fight hate, racist or discriminatory speech
 - Regulation of content to fight child pornography.

The questions in relation to these issues should be: Who regulates them and using what criteria? Should intermediaries be made liable? What are the consequences of having regulation duties outside clearly established legal frameworks?

Inconvenient frameworks: Perspectives

The three cases mentioned show the lack of a regulatory framework that accounts for the enforcement of intellectual property in digital environments. The cases show how individuals or groups of people are criminalised for using the internet to share content.

In Potel's case we find that his right to express himself freely on the internet was restricted because of the profit interests of intermediaries. In the other two cases, the right to freedom of association was affected, since the measures against content sites did not consider that sharing, circulating and copying is essential to using digital technology resources to collaborate and organise online. In this sense sharing content on the internet could be equated with peaceful assembly or social association.

The issue that must be discussed is the legality or illegality of these practices. Nowadays uploading or downloading content such as books, pictures, songs, and films, and building platforms that facilitate these exchanges, is illegal. In this context, photocopying a book is also illegal in Argentina today.

It's important to consider who is affected by the illegal action and what is the harm they suffer. Are they earning less? Do they lose control over their work? And more precisely, the question should concern

the legitimacy of legal recourses. Any deliberation should take as a starting point that the internet is about sharing – that is its function. In this scenario, the economic consequences are not necessarily of primary consideration, and conventional frameworks for deliberation do not apply.

According to Bertoni, if exchanging content on the internet is a crime, then the burden of proof applies: "It is assumed that anyone who administrates a site has the duty to monitor and make sure that all content is not illegal. Does this relate to intermediaries? Are we allowing censorship by an individual who will be encouraged to censor content that should be shared publicly? Here we have a complex problem for freedom of expression for those who have their legitimate content arbitrarily censored".

In a sense, it is good that the cases discussed reached the courts because it allowed those affected to defend their rights with all the legal safeguards. This was possible because in Argentina there is still no specific regulation for the internet. "In most cases the regulation is privatised or handed out by administrative authorities or service providers themselves", explains Bertoni.

The declaration signed by Special Rapporteurs on Freedom of Expression of Africa, the Americas, Europe and the UN,⁴⁷ states that intermediaries should not be held responsible for the circulation of content and they should not control content generated by their users. Under the argument that this is not a document subscribed to by Argentina, judges rejected its consideration as a legal argument. Bertoni says that this is a mistake, because the document is an authoritative interpretation of freedom of expression that does not need to be officially subscribed to by any State.

Bertoni highlights three axes in the analysis of these cases, especially in the case of Cuevana: the use of intermediaries, censorship and the proportionality of the measures. First, the involvement of intermediaries in content take-downs appears to be a tendency in the region,⁴⁸ giving ISPs the role of policing content, which amounts to a form of censorship.

Second, the injunction in the Cuevana case is clearly a case of censorship, infringing Article 13 of the American Convention on Human Rights, which provides the limits for the regulation of content while respecting freedom of expression. The article states that the right to freedom of expression "shall not be subject to prior censorship but shall be

47. www.cidh.org/relatoria/showarticle.asp?artID=848&IID=2

48. www.palermo.edu/cele/pdf/investigaciones/la-tension-entre-la-proteccion-de-la-propiedad-intelectual.pdf

subject to subsequent imposition of liability, which shall be expressly established by law". The article restricts prior restraint "for the sole purpose of regulating access to them for the moral protection of childhood and adolescence", but without prejudice to the previous rule.

Third, as regards the proportionality of the measures, Bertoni considered that "in most cases the measures are disproportionate. That is, the end sought is inconsistent with the magnitude of the measure. A video of a baby singing the song of a known artist or a student posting a poem of his favorite writer on his blog may constitute uses forbidden by authors' rights, however they are not related to the objective of combating piracy, and they do not represent a risk from which society should care". In the cases of complete blocking of pages for infringement of author's rights, this also represents disproportionality because the measure also censors comments, analysis and opinions that are not infringing copyright.

"The protection of author's rights at the expense of citizens' basic rights, such as the respect of due process and freedom of expression, raises the question about what is really the priority of states in regulating the internet", he says.⁴⁹

Intellectual property and cultural rights⁵⁰

A proposal for reforming intellectual property law was presented in May 2012. It was introduced by Proyecto Sur, a progressive political party. The bill defines that it would not be illegal to download cultural content from internet for individual use, with the purpose of learning, educating, informing, or entertainment, nor should it be a punishable offense to facilitate access to this content when the offer is free.

The proposed bill includes two articles. Article 1 says:

Access to the authors' works covered by Law 11.723, or the use of the work on the internet, whether by an individual, at home, school, university or at public and free libraries, with the sole purpose of instructing, educating, informing, or entertaining – excluding commercial or public use of the works – constitutes the exercise of right to access to culture.

Article 2 defines "the repeal of any norm that opposes the free exercise of the right referred to in Article 1".

49. www.palermo.edu/cele/pdf/investigaciones/la-tension-entre-la-proteccion-de-la-propiedad-intelectual.pdf

50. www.derechoaleer.org/2012/05/pino-solanas-y-la-despenalizacion-del-p2p.html

The drafters of the law argued there was a need to harmonise and define the scope of the constitutional rights of authors, as well as to define the right to access cultural goods, among which authors' works occupy a prominent place.

The bill is the most recent parliamentary attempt to modify the law and its consideration occurred in the context of the cases mentioned before. But although the bill had the backing of specialists and leaders of local organisations, the political organisation that promoted it had little force in Congress.

Latent threats to freedom of expression

In 2009, Senator Guillermo Jenefes presented a bill (S-0209/09)⁵¹ that concerned the regulation of internet content through the imposition of obligations and sanctions on internet service and/or connectivity providers. By the time he introduced this bill, he was the president of the Systems, Media and Freedom of Expression Commission of the Senate.

Jenefes based his bill⁵² on the argument that anonymity on the internet "constitutes shelter from punishment for libel, slander and committing crimes". The bill also states that even though internet service providers are not responsible for the content, it does not mean that they have to be passive actors when it comes to enforcing regulations.

Jenefes' bill tried to establish a system to identify all internet users. In this way, according to Jenefes, any individual would be in a better position to defend their rights and to have other people's opinions removed from the net.

In relation to the sanctions mentioned in the bill and the responsibilities of the hosting service providers, it is worth mentioning that making companies control the information that their users store is against the requirements established by national Law 25.326 on Personal Data Protection.⁵³ Besides this, the following questions should be considered: what kind of information should the hosts monitor? Who would be the one to provide these parameters? Would these intrusions fall under what the national Law 26.388 on Cybercrime⁵⁴ sanctions as an improper access to a data bank, system or repository?

According to the bill, any individual can act as "judge" and practice censorship against others, leaving aside the course of justice. Interestingly, the senator needed 2,154 words in the introduction to

51. www.senado.gov.ar/web/proyectos/verExpe.php?origen=S&tipo=PL&numexp=209/09&nro_comision=&tConsulta=3

52. Ibid

53. www1.hcdn.gov.ar/dependencias/dip/textos%20actualizados/25326.010408.pdf

54. infoleg.mecon.gov.ar/infolegInternet/anexos/140000-144999/141790/norma.htm

make his argument, and just 473 words for the bill itself and its articles.

Initiatives such as Jenefes' proposed bill are against what is internationally established regarding freedom of expression in the Universal Declaration of Human Rights, the UN International Covenant on Civil and Political Rights, the Pact of San José de Costa Rica, and in Argentina, Article 14 of the National Constitution.

In Argentina, Law 26.032⁵⁵ (2005) concerning internet services specifically establishes that "... the searching, reception and imparting of information and ideas of all kinds through internet services is included in the constitutional guarantee that protects freedom of expression".

"Faced with a vacuum in the legislation and since the industry has not shown, to-date, a satisfactory self-regulation policy on this issue, we need regulation of those individuals that, relying on their freedom of expression, trick both the constitutional guarantees and the existing rules on liability using the anonymity that the internet provides", Jenefes stated in an article.

In Article 1, the bill proposed that "[e]very inhabitant of Argentina may ask internet service providers (ISP) to block any access to content, including providing the name and designation of the author of the content, if the content causes injury to that person". The bill considers ISPs both internet access providers and hosting service providers.

In Article 2, the idea of bypassing the formal justice system is clear: "Where there is content deemed harmful to personal rights, the potential victim must notify the ISP. Upon receipt of the notification the ISP shall immediately initiate the necessary measures to prevent access by any user to the content, provided that the content is illegal, harmful or offensive to the person concerned. Also, it should inform the person concerned of the identity and address of the author of the content".

In Article 3 it states that if the ISP does not fulfill the requirements established in Article 2, the company will be directly responsible for the moral and material harm and prejudice that could have been occasioned to the affected individual since the date of the notification of the existence of the controversial content. Article 4 states that only if the ISP does not remove the controversial content, does the affected person have the right to go to the courts to have the access to the content blocked.

Bertoni recalls that in Argentina there were a series of legal actions initiated by celebrities and public officials against content search engines, particularly Google and Yahoo. The legal actions called for search engines to be responsible for content of third party websites to which they were linking. The judges' reaction was not uniform and in some cases this non-uniformity has led to the liability imposed on intermediaries for content that they neither created nor controlled. This is where we need to pay attention, because in Argentina we have no specific regulation on the liability of intermediaries. The judges who are making decisions in these cases are doing so on the basis of insights or interpretations of existing legislation and the results often pose a serious risk to the exercise of freedom of expression.⁵⁶

After Jenefes failed to get his bill passed in 2009, a second, similar bill was introduced. On March 2011, deputy Federico Pinedo proposed a bill to the Congress entitled "Regime for internet service providers"⁵⁷ (Régimen para proveedores del servicio de internet)⁵⁸ which includes regulation for internet services, hosting and content providers.

According to Pinedo, the purpose of the bill, made up of ten articles, was to exempt ISPs from liability for information on their networks, provided that there is a court order to force them to terminate the content that violates laws or rights of third parties.

Pinedo's initiative to regulate internet services was defended by its followers as an attempt to eliminate "malicious" content on internet websites. But in fact the Pinedo initiative raised more questions than it answered about restricting freedom of expression. For instance, who gets to decide what is bad and what is good content?

The main points of the bill are:

- The bill establishes that under the "internet service providers" category there are others such as the "internet access providers", "interconnection facilities providers", "hosting providers", "content or information providers" and "service providers", defining each one of them. Article 1 of the bill places ISPs, web hosting companies and content creators all in the same category. Under this situation, a simple order against a hosting provider would be enough to have a piece of content removed and the author could say nothing about it.

55. www.infoleg.gov.ar/infolegInternet/anexos/105000-109999/107145/norma.htm

56. es.scribd.com/doc/102758515/Desafios-para-la-libertad-de-expresion-en-internet

57. www1.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=8793-D-2010

58. parlamentario.com/noticia-34666.html

- In Article 2, it is proposed that all ISPs will be responsible for content generated by third parties from the moment that they have effective awareness that that content is against the law.
- Article 3 establishes another general concept, similar to that provided under the Jefes bill, where the operating mechanism is only partially established. Essentially, any person can ask a judge to eliminate or block any kind of content that “harms the rights and guarantees recognised by the Constitution”. Article 3 of the bill states that “the judge may order the action required without hearing the other party, in particular where any delay is likely to cause irreparable harm to the rights holder, or where there is a demonstrable risk of evidence being destroyed”. This means that a judge shall have the power to order an ISP to put down a website or any content without having to hear the defence of the accused party.
- In Article 5, ISPs will be considered responsible for allowing the transmission of content generated by third parties when they are the ones originating that transmission or when they modify or select the content, or select the destination of the transmitted or retransmitted information.⁵⁹
- One of the most controversial points on the bill can be found in Article 6, which refers to website links: “Webhosting providers, content providers and service providers that offer links to other websites or offer information provided by third parties shall be liable for the information provided by third parties only in cases where they have actual knowledge that the information stored violates laws or rights of others”. This bill puts links on a website and the information hosted on sites at the same level, ignoring the interconnected nature of content on the internet. “If linking to other people’s websites can make us criminally responsible for what they do or say, then one of the main principles of the internet shall be broken”,⁶⁰ says Beatriz Busaniche,⁶¹ member of *Vía Libre* Foundation and Wikimedia Argentina.

This initiative puts in serious danger rights such as the due process of law and the presumption of

innocence, shaping what Busaniche described as a “mine field on the web”.⁶² Moreover, he says the bill presented by the deputy is built on a fallacy: the idea that there is no regulation on the internet.⁶³ “To pretend that there is no law on the internet is not an innocent move, but is one of the old strategies to try to impose on the network tougher laws and restrictions that force the elimination of constitutional guarantees such as freedom of expression and the presumption of innocence”.⁶⁴ Interestingly, Pinedo defends his proposal by saying that it is achieving what the bill is accused of denying: “It is a project that cares for the expansion of the internet and for free speech”, said Pinedo in a newspaper article.

Pinedo’s bill also entails a huge contradiction: the bill aimed to free companies from responsibility by actually holding them responsible for not eliminating suspected illegal or offensive content quickly or thoroughly enough.

Besides being a threat to individuals’ freedom of expression on the internet, what comes out very clearly from this bill are the interests of the entertainment industry to terminate any content that could harm their business interests, similar to the Lleras law⁶⁵ in Colombia or the Free Trade Agreements from the European Union and its intellectual property sections. This bill has also been frequently compared to the controversial *Sinde* law from Spain.

Busaniche is very clear about the nature of Pinedo’s bill: “What Pinedo proposes is to enable the ability to terminate content fast and without defence of the victims from this form of censorship, regardless of the constitutional guarantees of freedom of expression and the right to fair and adequate defence. Laws do already exist for all of Pinedo’s concerns”.⁶⁶

Awareness

We started this research assuming that human rights organisations in Argentina did not address the internet as a particular field for human rights concerns. As part of this work, we investigated the level of awareness that the human rights movements have when it comes to human rights issues on the internet. We created a survey to analyse the level of understanding of the concept of internet rights and their relation to human rights, and distributed this by email amongst national human rights defenders

59. As enshrined in Article 12 of European Directive 2000/31/EC of the European Parliament and the Council of Europe

60. Beatriz Busaniche, *Las recurrentes malas ideas sobre cómo regular internet*, www.unr.edu.ar/noticia/3439/las-recurrentes-malas-ideas-sobre-como-regular-internet

61. Beatriz Busaniche is a social communicator and member of *Vía Libre* Foundation, public leader of Creative Commons in Argentina and executive director of Wikimedia Argentina. She is also a professor at Buenos Aires University

62. Busaniche, “Las recurrentes malas ideas”

63. *Ibid*

64. *Ibid*

65. www.mij.gov.co/Ministerio/Library/Resource/Documents/ProyectosAgendaLegislativa/Derechos%20de%20Autor%20en%20Internet1680.pdf

66. Busaniche, “Las recurrentes malas ideas”

in general, and women's human rights defenders in particular, as well as ICT activists. The survey addressed the level of awareness on the subject, the existence of advocacy work in this area, and problems and opportunities considered pertinent.

The questions were sent to a total of 36 email addresses for diverse civil society organisations, and also to the Red Informativa de Mujeres de Argentina mailing list, which has 800 subscribers, all of them Argentinian women involved in the defence of women's rights in the country. Interestingly, the total number of the people who answered (13) were women's rights activists.

We consider that this could be a strong indicator of two trends:

First, that the women's movement in Argentina has a strong and long-standing tradition of using the internet for their work and they are aware of the potential of online spaces for advocacy and for the defence of human and women's rights.

Second, the lack of response to the survey from the other human rights advocates, most of them working specifically on seeking justice for the crimes committed during the last military dictatorship in the country, supports our initial hypothesis that human rights practice and discourse in Argentina are mostly related to rights-related issues of the past. The debate on internet rights from the human rights perspective is quite new to the human rights advocacy agenda and this situation could have been mirrored in the survey by the lack of participation.

Nevertheless, the survey showed that current debates taking place in the national arena on human rights and the internet are mainly focused on freedom of expression and secondarily, on whether access to the internet should be considered as a human right.

Even though the survey did not pretend to be exhaustive, thoughtful answers were obtained and interesting conclusions could be extracted from them:

1. All respondents agreed that respect for human rights is also necessary on the internet. Among the reasons they gave were that human rights are universal and they must be respected independently of the medium, without any kind of distinctions or discrimination.

Highlighted comment: *"There should be no area in which human rights are not worth it. All human activity must ensure respect for human rights."*

2. All respondents (except one) agreed that human rights can also be violated on the internet. Many of the respondents felt that anonymity is an incentive to commit crimes online. Many

respondents also mentioned the double face of the internet: it gives the freedom to exercise rights and also the freedom to violate them.

3. All participants in the survey (again, except for one) named at least two human rights that they considered relevant to the internet. Ordered from the highest to the lowest number of responses, the rights mentioned were: right to information; right to freedom of expression; right to life; right to privacy; right to freedom; and right to a life free from violence; among many others. The right to information and the right to freedom of expression were mentioned by the majority of the respondents as important rights that should be respected on the internet.
4. The majority of respondents answered that they do think that the internet in Argentina is a valid space to implement policies related to human rights. They gave many examples of policies or practices on the internet specifically related to human rights, such as the increasing possibilities of accessing online information (legislative debates can be seen online and there is online access to sex education materials), e-learning opportunities, and online campaigning for human rights, among others.
5. All respondents said they support the need for the protection of human rights on the internet, such as the right to non-discrimination, the right to education, the right to freedom of expression, the right to privacy, the right to freedom of association, the right to freedom of belief, intellectual property rights, the protection of children's rights, and the right to protection of personal data, among others.

Highlighted comment: *"We must consider that the internet is the medium, and that the use or abuse is created or designed by people. It is naive to think that the internet is a panacea, but it is a means we now have to spread and connect with each other when we are fighting for the fundamental rights of all people regardless of social status, race, religion, and gender choice who are censored, tortured or persecuted."*

Highlighted comment: *"Having to rely on private companies (responsible for search engines, telecommunications, among other services) for access to information on the internet has the consequence that, depending on their interests, they can restrict our ability to reach content. In various cities of the world we can access the same information as that blocked in certain countries."*

States need to take over the development of tools that facilitate access to information on the internet, as well as ensuring that all citizens can use this medium, which is not the case today.”

6. The majority of respondents showed that their organisations or groups had developed some kind of work related to the internet on activities such as capacity building processes, information dissemination about human rights using websites, blogs, webcasting, social networking, VoIP, and running news agencies with a gender perspective.

Impact on other rights

The first issue we want to mention at this point is the importance of the right to access the internet and its impact on other rights; more precisely, one should consider the lack of access as a loss of rights. Communication infrastructure in Argentina is still concentrated in the main urban centres, and is very scarce in smaller urban areas. As mentioned, the national government is slowly rolling out the National Fibre-optic Network (Red de Fibra Óptica Federal) that will greatly improve access in the future. However, this situation has not changed yet.

Secondly, as a general statement, when it comes to freedom of expression, we find that restrictions to this also violate other related human rights.

Right to privacy

Delegating ISPs control over the content circulating on the internet not only affects freedom of expression, but also threatens the privacy of users.⁶⁷ Bertoni describes what happened in the US, where ISPs asked not to be forced to violate the privacy of individuals, arguing that this would mean a dramatic increase in their costs. In response they obtained “a kind of legal immunity for possible copyright violations committed by users of their services, provided they cooperate in the control of content”.

Argentina has a National Law on Data Protection (Law 25.326)⁶⁸ that “aims at a comprehensive protection of personal data entered in files, registers, databanks or other technical means of data processing, either public or private”. However, empowering ISPs to be responsible for content violates this right.

Right to access to information

Restrictions imposed on content on the internet imply the lack of access to that information online. This situation affects mainly vulnerable groups. For example, some content related to women’s rights could be taken down for religious or ideological reasons. Women undergoing an unwanted pregnancy or dealing with gender violence might not be able to access information, considered inappropriate for some reason, and consequently the exercise of their sexual and reproductive rights would be affected.

Right to access to culture

We understand that restrictions applied to the free movement of content on the internet on the grounds of violation of intellectual property involve not only a restriction on freedom of expression, but also the infringement of the right to access to culture. “Given the increased possibility of access to culture in a multiplicity of formats, restrictive regulations over the circulation of cultural goods are increased. But the cultural industries have not stopped increasing their earnings, which have even been enhanced by internet”, said researcher Martín Becerra.⁶⁹

Conclusion

Freedom of expression on the internet has become an important issue over the last year in Argentina. The cases mentioned in this report were largely debated and discussed by groups linked with the issue, but the subject has had public significance as well.

While Argentina has a law that gives constitutional range to freedom of expression online, some legislative reforms relating to the role of intermediaries are being proposed, each with varying degrees of power and control over content. Other initiatives related to the definition of the place that author rights should occupy in relation to other rights are also being discussed. None have yet been approved, making this moment a key time to intervene in these discussions.

However, as shown in this report, the legal vacuum and the absence of a specific legislative framework means that the legal criteria applied in each case is left to the interpretation of judges who generally favour private agreements between parties (with the notable exclusion of other affected groups).

The following quote from Frank La Rue’s report is particularly relevant:

As with offline content, when a restriction is imposed as an exceptional measure on online content, it must pass a three-part, cumulative

67. www.palermo.edu/cele/pdf/investigaciones/la-tension-entre-la-proteccion-de-la-propiedad-intelectual.pdf

68. infoleg.gov.ar/infolegInternet/anexos/60000-64999/64790/norma.htm

69. www.pagina12.com.ar/diario/economia/2-194126-2012-05-16.html

test: (1) it must be provided by law, which is clear and accessible to everyone (principles of predictability and transparency); (2) it must pursue one of the purposes set out in article 19, paragraph 3, of the International Covenant on Civil and Political Rights, namely: (i) to protect the rights or reputations of others; (ii) to protect national security or public order, or public health or morals (principle of legitimacy); and (3) it must be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality). In addition, any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory. There should also be adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.⁷⁰

We believe that legislative frameworks in Argentina should be very clear, accessible and with very specific criteria in order to determine the cases where content should be taken down through court orders.

As mentioned before, we find that restrictions over freedom of expression imply the violation of other related human rights such as the right to privacy (by giving ISPs control over content), the right to access to information (by restrictions imposed over content on the internet that causes the lack of access to that information online), and the right to access to culture (by the restrictions over the free movement of content on the internet on the grounds of violation of intellectual property).

We argue that it would be healthy for Argentina to start a legislative debate on the neutrality of the net – an issue where typically only a few voices are heard. If this discussion takes place, we will surely be working on a key node in the challenge of human rights and the internet.⁷¹

As mentioned at the beginning of the report, we also celebrate the national government's fibre-optic network initiative, since we consider that no real access to infrastructure is the first concrete restriction for the exercise of the right to freedom of expression.

When we started this research, we began by assuming that human rights organisations in Argentina did not address the internet as an issue of particular human rights concerns. But the survey we carried among representatives of the human rights movement (women's human rights defenders in particular, but also ICT activists) showed that the advocacy terrain for freedom of expression on the internet is much more mature than we initially suspected.

All the respondents agreed that respect for human rights is also necessary on the internet, and agreed that human rights can also be violated online. The right to information and the right to freedom of expression were prioritised as the main rights that should be freely exercised and guaranteed on the internet. They considered the internet a valid space to implement policies related to human rights and, interestingly, most of the respondents showed that their organisations or groups had developed some kind of work related to the internet. We feel that the survey results are really useful and even hopeful in terms of the upcoming development of national and regional debates around the right to freedom of expression on the internet.

Looking forward, we believe that the debates around the right to freedom of expression during the lobbying phase of the Law of Audiovisual Communication Services might allow the debate to be extended to the internet. Broadening and deepening discussion on this subject will require the determination, skills and sustained advocacy work of a number of civil society groups. ■

70. Frank La Rue, *Report of the Special Rapporteur*, para. 69

71. Eben Moglen: *Why Freedom of Thought Requires Free Media and Why Free Media Require Free Technology*, www.youtube.com/watch?v=sKOk4Y4inVY

THE STRUGGLE FOR INTERNET FREEDOM IN AZERBAIJAN



Vugar Gojayev
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Introduction

Azerbaijan, an oil-rich country located in the South Caucasus, gained its independence from the Soviet Union in 1991, but only abolished the official state censorship of the media in 1998. Though the country's early years of independence saw relatively unrestrained reporting, the general dramatic reduction in political freedoms and the government's concerted efforts to stifle freedom of expression have become a grave source of concern under the presidency of Ilham Aliyev, who succeeded his ailing father, Heydar Aliyev in 2003.¹ Ilham Aliyev further consolidated power in the presidency and steered Azerbaijan towards a full-fledged autocracy. Political space for alternative voices has continued to shrink ever since, with the considerable restriction of freedom of expression, association and public assembly.²

The authorities often employ a wide range of administrative, financial, legal and arbitrary measures against media outlets: threats and violent attacks against independent voices, hefty fines imposed on or closure of media critical of the state; politically-motivated charges against journalists; the ban on transmission of foreign radio stations and the general climate of impunity – including the lack of the political will to thoroughly investigate the murder of prominent journalists such as Elmar Huseynov and Rafiq Tagi – best illustrate the government's intention to suppress the sources of dissent and control society.³ International media freedom organisations have documented a significant number of cases

where journalists have been obstructed from doing their work by police and have been subject to dubious criminal charges such as drug possession and the ubiquitous accusation of “hooliganism”. By clamping down on independent media, the regime has mostly managed to close the usual channels for expressing dissent. The government, keeping firm control on the broadcast media, virtually controls all influential media outlets.⁴

With the country's traditional media stagnating under severe government constraints, a vibrant and rapidly growing online community has taken shape in the past five years. Azerbaijan's internet usage has exploded in recent years, a period that has coincided with the government crackdown on more traditional broadcast and print media outlets.⁵ The internet has become an increasingly viable source of information, even though its penetration is limited outside of the capital, Baku. Despite a scarcity of internet service providers (ISPs) in the region, Azerbaijan features an active network of bloggers, while social networking sites like Facebook, YouTube and Twitter are also routinely used to disseminate information critical of the government. Youth activists, NGOs and opposition parties often use social media as a platform to provide information, organise activities and events, and initiate flash mobs via the internet.

The internet, a surprisingly free tool for information and activism in Azerbaijan, has inevitably also become a target of the government in past years. The conviction of two bloggers in 2009, Emin Milli and Adnan Hajizada, was seen by many as a warning signal to the online media community about the consequences they might face for critical reporting via the internet.⁶ Following their arrests,

1. International Crisis Group, *Azerbaijan: Vulnerable Stability*, Europe Report No. 207, 3 September 2010, [www.crisisgroup.org/~media/Files/europe/caucasus/azerbaijan/207%20Azerbaijan%20-%20Vulnerable%20Stability.ashx](http://www.crisisgroup.org/~/media/Files/europe/caucasus/azerbaijan/207%20Azerbaijan%20-%20Vulnerable%20Stability.ashx)
2. Human Rights Watch, *Beaten, Blacklisted and Behind Bars: The Vanishing Space for Freedom of Expression in Azerbaijan*, 26 October 2010, www.hrw.org/en/reports/2010/10/26/beaten-blacklisted-and-behind-bars
3. Elmar Huseynov, the founder and editor of the opposition weekly news magazine Monitor, was gunned down in his apartment building in Baku in March 2005. Rafiq Tagi, a journalist for Sanat newspaper, was assassinated in November 2011. The halfhearted investigations into the deaths of these two journalists have produced no results

4. U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, “Azerbaijan” in *2010 Human Rights Reports* (Washington, D.C.: U.S. Department of State, 8 April 2011), www.state.gov/documents/organization/160448.pdf
5. For more on internet use in Azerbaijan, see *Freedom on the Net 2011* (New York: Freedom House, 2011), www.freedomhouse.org/images/File/FotN/Azerbaijan2011.pdf
6. Ellen Barry, “In Azerbaijan, a donkey suit provokes laughs and, possibly, arrests” *The New York Times*, 14 July 2009; Brian Whitmore and Anna Zamejc, “Azeri Bloggers Receive Prison Sentences for ‘Hooliganism’” *Radio Free Europe/Radio Liberty* 11 November 2009, www.rferl.org/content/Azerbaijan_Bloggers_Get_TwoYear_Jail_Sentences/1874853.html

social media networks were placed under strict government scrutiny, and some websites were hacked and blocked from time to time. In 2011, several online activists were punished and given harsh prison sentences.⁷

Azerbaijan's Communications and Information Technology Ministry said 65% of Azerbaijan's population are internet users, with 30% of them using a broadband connection.⁸ According to Communications and Information Technology Minister Ali Abbasov this is 2.5 times higher than the average world rate:

The speedy tempo [of internet usage] makes it difficult even to pinpoint the exact number of internet users in Azerbaijan. ...The World Economic Forum predicts the number of internet users in Azerbaijan will reach around 50% by the end of 2013.⁹

However, some disagree with these statistics.¹⁰ For instance, Azerbaijan Internet Forum President Osman Gunduz thinks the figures Abbasov has cited differ from the data recorded by the country's Statistics Committee:

According to Statistics Committee numbers, only 3-4% of the population had access to broadband internet, while 40% of the population in Azerbaijan had internet access, including mobile-phone users.¹¹

Around 70% of internet users continue to use poor quality dial-up connections,¹² while internet access is still relatively rare in rural areas.¹³ Media expert Alasgar Mammadli pointed out that more than 5,000 villages have no access to the internet and

youngsters travel long distances to get to internet cafés.¹⁴

In general, high costs remain a key obstacle to access, although other factors, such as education, lack of computer literacy, socioeconomic status, and gender also play a role.¹⁵ Accessing the internet via mobile phones is also popular, especially in rural areas, where fixed

infrastructure and dial-up services are poor and people are increasingly subscribing to mobile services, though prices for high-speed mobile internet are still very high.¹⁶

The government, aiming to attract foreign aid to help boost the telecommunications and ICT sectors, has signed grant agreements with the UNDP (National Information Communication Technologies Strategy for 2003-2012), the World Bank (for expanding telecommunications in the rural areas of the Southern Caucasian countries), and other international organisations.

Azerbaijan's media landscape

Azerbaijan's media is highly polarised and, as mentioned, the independent and opposition press are the target of continual pressure. Azerbaijan is near the bottom in international rankings on media freedom, and its position has been steadily worsening.¹⁷ Libel continues to be a criminal offense and traditional media journalists who criticise the authorities are frequently prosecuted and imprisoned.¹⁸ In 2011, 32 lawsuits were filed against journalists, most of them against pro-opposition dailies, mainly the "Yeni Məsavat" and "Azadlıq" newspapers. The US-based international media watchdog Committee to Protect Journalists (CPJ) characterised Azerbaijan as one of the region's [Europe and Central Asia] worst jailers of journalists.

The space for investigative journalism is extremely narrow and risky. Almost every journalist,

7. Human Rights Watch, "Azerbaijan: Concerns Regarding Freedom of Expression and Media" Briefing paper, 12 April 2012, www.hrw.org/news/2012/04/12/azerbaijan-concerns-regarding-freedom-media-and-freedom-expression

8. "17 pct of women use internet" *Azernews*, 18 July 2012, www.azernews.az/azerbaijan/42693.html

9. "Azerbaijani President Praises Country's 'Internet Freedom'", *RFE/RL*, 13 July 2011, www.rferl.org/content/president_praises_azerbaijan_internet_freedom/24264938.html

10. According to one report there were over 36,000 internet users in Azerbaijan, with official figures citing over 13,000 domain names registered with the ".az" suffix. www.freedomhouse.org/sites/default/files/inline_images/Azerbaijan_FOTN2011.pdf; A report by Opennet.net in 2010 said the number of internet users in Azerbaijan has grown over the last several years to 1.5 million users, or 18.2% of the population, as of March 2009 or close to 17% for 2008 according to the estimates of ITU. opennet.net/sites/opennet.net/files/ONL_Azerbaijan_2010.pdf

11. "Azerbaijani President Praises"

12. IREX Media Sustainability Report 2012, Azerbaijan chapter, www.irex.org/resource/azerbaijan-media-sustainability-index-msi

13. International Telecommunication Union, "ICT Statistics 2009—Internet" (Geneva: ITU, 2009), www.itu.int/ITU-D/ICTEYE/Indicators/Indicators.aspx

14. IREX Media Sustainability Report 2012

15. Freedom House, *Freedom on the Net 2011* (New York: Freedom House, 2011), www.freedomhouse.org/images/File/FotN/Azerbaijan2011.pdf; According to a report based on the annual Caucasus Barometer poll conducted by the Caucasus Research Resource Center, 22% of Azerbaijani families own a computer, 40% of them live in the capital Baku, 17% in rural towns, and 6% in villages. www.azernews.az/azerbaijan/42693.html

16. Azerbaijan has three mobile cell provider companies: Azercell, Bakcell, and Azerphone. They provide WAP, GPRS, 3G and 4G services. These mobile providers use Delta Telecom's external channel for Internet. See below paragraphs on more about Delta Telecom

17. Azerbaijan ranked 162 out of 179 in the Reporters Without Borders press freedom index in 2010, is led by a "Predator of press freedom" and remains hidebound by authoritarian and corrupt schemes

18. OSCE and the Council of Europe have long called on the government to accept a law on defamation, or to decriminalize it. Even though local NGOs worked out draft laws together with international experts, the government has not hurried to adopt the law

blogger and human rights activist resorts to self censorship out of fear of possible legal or physical repercussions while talking, or writing articles criticising the numerous corruption cases in the government, amongst powerful individuals and business monopolies, or to do with the business interests of the First Lady and her daughters. Through ingrained self-censorship in the media and systematic attacks on government critics, the widespread climate of impunity has had a negative impact upon the rights of Azerbaijan's citizens to receive information that is in the public interest.¹⁹

The country's Constitution protects freedom of opinion and speech and freedom of the mass media. Article 50 of the Constitution stipulates that everyone has the right to distribute information, that freedom of the mass media is guaranteed, and that censorship is prohibited.²⁰ Article 47 states that "[e]veryone has the freedom of thought and speech. Nobody may be forced to either promulgate or renounce his/her thoughts and convictions... Propaganda inciting racial, ethnic or religious animosity or hostility is inadmissible". Article 50 provides that "[e]veryone is free to look for, acquire, transfer, prepare, and distribute information", and that "[f]reedom of the mass media is guaranteed. State censorship in the mass media, including press, is prohibited".²¹

Azerbaijan is also bound to respect the right to fundamental freedoms, including freedom of expression, as a member of the UN, the Council of Europe (COE), the OSCE, and through its accession to international and regional human rights treaties such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights. Azerbaijan's international obligation on the right to freedom of expression extends to online expression under article 10 of the ICCPR.²²

19. See more on that at HRW, *Beaten, Blacklisted and Behind Bars*

20. See the Constitution of Azerbaijan www.president.az/azerbaijan/constitution/?locale=en

21. Constitution of the Republic of Azerbaijan, adopted 12 November 1995

22. The UN Human Rights Committee has written: "Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3 [of article 19]. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government." United Nations Human Rights Committee, General Comment No. 34, para. 43; see also: Manfred Nowak, *UN Covenant on Civil and Political Rights, CCRP Commentary* (Kehl, Strasbourg, Arlington: N.P. Engel, 1993), 291-294

The country does not *lack* media outlets, as print, electronic and online media have created multiple sources of information for citizens. However, the government uses its regulatory authority to expand the number of pro-government media outlets, while wiping out the availability of those that engage in critical content. In early 2009, authorities banned the Azerbaijani service of Radio Liberty, Voice of America and the BBC. Dissenting voices and alternative information had only been available in Azerbaijan via those outlets.

Through arbitrary and politically motivated regulations, direct ownership or indirect economic control, the government has strengthened its hold over broadcast media. TV still remains the major source of information for about 90% of the population.

Control over the internet

The government has attempted to exercise greater control over the internet, though it remains much less restricted than print and broadcast media, which are the main sources of news for most citizens. With the Law on Mass Media of 1999, the internet is designated as part of the mass media. Because of this all rules applied to traditional media, which media freedom advocates consider highly problematic, could be used for internet regulation as well.²³ The Ministry of Communications and Information Technologies is the major body regulating the role of the internet, but experts underline the urgent need to share this role with an organisation that is not under state control.²⁴ According to the Baku-based media watchdog, Institute of Reporters Freedom and Safety (IRFS), there is a restriction on the assignment of the ".az" national domain to legal entities and the Ministry of Communication and Information Technologies controls the assignment of the domain.

While online media is largely free from government censorship, the authorities have expressed the strong desire to regulate it.²⁵ The government has a long record of monitoring, interfering with, and sometimes censoring online expression, occasionally blocking pro-opposition and critical websites it has disliked and prosecuting persons for their posts in social media. The government was believed to be behind the sabotaging of the email accounts and Facebook messages of critical journalists, human rights activists and opposition party

23. Law of the Republic of Azerbaijan. About Mass Media, Azerbaijan National Academy of Sciences, ict.az/en/index.php?option=com_content&task=view&id=477&Itemid=95

24. Mina Muradova, "Azerbaijani Government Pondering Ways to Control the Web", *Eurasianet.org*, 13 May 2010, www.eurasianet.org/node/61060

25. *Ibid*

representatives. A number of journalists and activists have been imprisoned for critical articles they posted online.

No specific legislation restricting the internet exists, although statements by top administration officials suggest that some controls may be forthcoming, including the licensing of internet-based television programming.²⁶ Almost all these worrying statements, which are mostly made with regard to online video and audio content, show that the government intends to take control of internet content which offers an extensive platform for news not covered by local television and radio, and alternative views.²⁷

Both the Minister of Communication and Information Technologies and the head of the pro-governmental National TV and Radio Company have underlined the need to license websites and online commercial services for the sake of Azerbaijan's information security (this would go hand-in-hand with the licensing of TV and radio stations, a process which is also not yet formalised). In early 2010, the government expressed its intent to require ISPs to obtain licenses and sign formal agreements with the Ministry of Communications and Information Technology, although those plans seem to have been put on hold.²⁸ In November 2010, it was announced that the government-controlled Press Council will start monitoring online news sources for their compliance with the rules of professional journalism.²⁹ Such statements by the authorities have been denounced by media experts, who believe that the government's aim was to further control alternative media and the free flow of information.

In May 2011, officials made the act of spreading "misinformation" a "cyber-crime" and targeted Skype and Wikipedia as potential threats to national security.³⁰ This act was seen by several Azerbaijani civil rights activists as an initiative to restrict Azerbaijani web users' access to online information. The authorities argued that the proposed changes to Azerbaijan's Criminal Code are meant only to reinforce the country's electronic security.³¹

Internet television outlets, mainly Kanal13, ObyektivTV, ANTV and a few others, enjoy popularity among the young Azeris because of their independent coverage and focus on issues of public interest as well as politically sensitive ones. The emergence of newly-launched pro-governmental Yurd TV was seen as the government's attempt to oppose the popular US-financed Objective TV internet project.³² Several media experts are hesitant about the advantages of internet TV, as "more than 90% of Azerbaijan's internet users still rely on slow dial-up connections".³³

Criticising the government's effort to maintain its monopoly on information, Reporters Without Borders has said:

The authorities keep on making dramatic statements about their desire to protect the country's morals, but in practice what they want is to maintain their monopoly of news and information. ...They already control TV and the most part of print media and now they are staging a shameless offensive against the internet.³⁴

For instance, government officials have attempted to make the act of spreading "misinformation" a "cyber-crime". Some Azerbaijani civil rights activists worry that the initiative is driven by a desire to restrict Azerbaijani web users' access to online information. By criminalising the misinformation, according to media expert Alasgar Mammadli, the new charges of "spreading false information" could potentially be used to intimidate and censor online journalists, bloggers and social network users.³⁵

The government, for its part, denies these claims, with President Ilham Aliyev saying there are no restrictions on access to the internet in Azerbaijan, in line with the government's desire to promote media freedom:

Some countries impose restrictions on the internet. [But] the internet is free in Azerbaijan, which shows that we pay attention to freedom of the press. ...Unrestricted access to the internet and freedom of speech naturally go hand in hand.³⁶

However Mammadli's skeptic assumption became true when the country's Ministry of Justice issued a warning to local media watchdog Institute of

26. "Control Over Online Sources and Facebook-like Sites in Azerbaijan", *Today.az*, 27 November 2010, www.today.az/view.php?id=77287

27. Rashid Hajili, "Freedom of Media in Azerbaijan", fpc.org.uk/fsblob/1462.pdf

28. Freedom House, *Freedom on the Net 2011*

29. "Control Over Online Sources"

30. The Anti-Cybercriminal Organization is the main body working against cyber attacks in Azerbaijan. The country ratified the Council of Europe's Convention on Cybercrime in March 2010, and it took effect in July

31. Shahin Abbasov, "Baku Moving to Restrict Online Free Speech", *Eurasianet.org*, 25 May 2011, www.eurasianet.org/node/63554

32. IREX Media Sustainability Index 2012

33. According to Osman Gunduz, president of Internet Forum

34. Reporters Without Borders, "Disturbing Plan to Introduce Internet TV Licensing in Runup to Legislative Elections", 6 May 2010, en.rsf.org/azerbaijan-disturbing-plantointroduce-06-05-2010,37403.html

35. Abbasov, "Baku Moving to Restrict"

36. "Azerbaijani President Praises"

Reporters Freedom and Safety (IRFS) on 12 February 2012, citing the dissemination of biased information via www.nakhchivan.org.az. A month later the IRFS chairman got an email from director of Network Technologies (a company selling “.az” domains) where she mentioned pressure from the authorities and asked the IRFS to stop using the nakhchivan.az domain.³⁷

The government, which has already tagged Skype and Wikipedia as potential threats to national security, maintains that the proposed changes to Azerbaijan’s Criminal Code are meant only to reinforce the country’s electronic security. Under amendments proposed by the Ministry of National Security, attacks on computer networks and websites, virus attacks, online money-laundering, theft of funds from e-payment systems, online copyright violations, the dissemination of “misinformation”, and false terrorist threats would be considered criminal offenses.

Monopolising the internet: Delta Telecom

Azerbaijan’s biggest ISP is the state-run Delta Telecom, which web users often accuse of holding a monopoly on internet provision and offering low quality services. Critics say the international gateway provider is slow, costly, and has a track record of censorship.³⁸ By the end of 2011, around 12% of ISPs were connected to newly registered Azertelekom, which consists of several small enterprises, including DataCELL, Bakcell, Ultel, Azerfon, Baktelekom, and Azerbaijan Telecommunication ISP.³⁹ But even that did not help to break Delta Telecom’s monopoly, which continues to hold an 88% share of the internet market and thwarts larger capacity and faster speeds while maintaining high subscription rates.⁴⁰ The lack of open competition has an adverse effect on the quality of the internet market in the country and Delta’s monopoly status gives a green light to the government to block websites it does not like.

The expensive internet tariffs have often come under serious criticism by the media and online community, with various IT NGOs proposing concrete proposals on amendments and price cuts. Though the Ministry of Communication decreased the tariffs by 35% in 2011, experts say it was at the

cost of internet quality. Prices are still high outside the capital and the quality of connectivity has gone down considerably.⁴¹

The battle against social media

Azerbaijani authorities have their own way of monitoring internet users: they do not filter or block the internet heavily, choosing to leave it relatively open and allowing the government to better monitor and punish rebellious activities.⁴² The use of social networking as a political tool is on the rise, with youth activists disseminating and discussing politically sensitive issues which would almost never be covered in local media because of the existing political censorship. In this way youth activists use the internet, including social networking sites like Facebook, Twitter, YouTube and blogs, to compensate for a lack of traditional avenues for freedom of expression and assembly. This helps them to reach large numbers of people, both in Azerbaijan and abroad, and exchange information that is hardly ever covered in the mainstream media. According to Freedom House, there were about 27,000 blogs in Azerbaijan in 2011, most of which are young bloggers writing in Azerbaijani.⁴³

Azerbaijan’s political opposition is weak because of the existing authoritarian rule and systematic repression of dissent. Even though the opposition does not pose a serious challenge to the ruling regime, the authorities feel highly threatened by the widespread use of the internet as a platform by critics. Fearing the potential of online activism for political mobilisation, the Azerbaijani government is extending its methods of controlling, shaping and monitoring digital media content. By inhibiting online activism, the government hopes to control alternative forms of political thought. It is widely believed that the internet communications of certain individuals are monitored, especially outspoken human rights advocates, opposition party activists, and business figures.⁴⁴

Through the years of harassment, arrest and intimidation, the Azerbaijani authorities have largely managed to encourage self-censorship, not only in the traditional media, but also in online media.

37. Institute of Reporters Freedom and Safety, *Azerbaijan Critical voices in Danger*, Semi-Annual Azerbaijan Freedom of Expression Report, 1 January-1 July 2012, www.irfs.org

38. Muradova, “Azerbaijani Government Pondering”

39. IREX Media Sustainability Index 2012

40. Delta telecom still maintains a monopoly on internet provision with 30 local providers www.irex.org/sites/default/files/u105/EE_MSI_2012_Azerbaijan.pdf

41. IREX Media Sustainability Index 2012

42. Sarah Kendzior and Katy Pearce, “How Azerbaijan Demonizes the Internet to Keep Citizens Offline”, 11 May 2011, www.slate.com/blogs/future_tense/2012/05/11/azerbaijan_eurovision_song_contest_and_keeping_activists_and_citizens_off_the_internet_.html

43. Freedom House, *Freedom on the Net 2011*

44. “This is What Can Happen To You”: Networked Authoritarianism and the Demonization of Social Media in the Republic of Azerbaijan, caucasusedition.net/analysis/this-is-what-can-happen-to-you-networked-authoritarianism-and-the-demonization-of-social-media-in-the-republic-of-azerbaijan

Self-censorship extended to the blogosphere in 2009, when the authorities launched criminal charges against two young bloggers, Milli and Hajizade. Both of these activists were using YouTube, Facebook and blogs to mobilise Azerbaijani youth in their non-violent struggle against the authoritarian regime in an environment where freedom of expression had increasingly come under threat. As active bloggers, both were believed to reach around 10,000 internet users in Azerbaijan, addressing issues such as education, abuse of power, corruption and mismanagement of oil revenues. Weeks prior to their arrest, the two had posted a video craftily satirising the ruling regime, which had spent a large amount of state money importing two donkeys from Germany. According to government critics, the video, which was posted online, was a great source of anger for officials and was thought to be the major cause of their incarceration. The verdict against those bloggers sent a strong message to those who were critical of the government, and intimidated other bloggers, leading to self-censorship.⁴⁵

A new cycle of intimidation and harassment against social media activists started in early 2011, when the Azerbaijani authorities detained dozens of people for participating in a series of pro-democracy protests inspired by events in the Middle East and North Africa. In addition to arresting activists involved in organising the demonstrations, police questioned a number of bloggers and social media users in connection with their activities and political writings on Facebook.⁴⁶ Some online activists, like Jabbar Savalan, had used Facebook to organise protests against the government.⁴⁷ Savalan and several other online activists were arrested on trumped-up and politically-motivated charges.⁴⁸ These cases

signaled an alarming new strategy on the part of Azerbaijani authorities and frightened the bloggers' peers. As a result, Azerbaijan's frequent internet users became less supportive of activism, and online dissent has quieted.⁴⁹

Below are brief accounts of other cases of harassment of social media activists:

- Bakhtiyar Hajiyev, a Harvard University graduate and a member of the youth movement "Positive Change", was arrested on 4 March 2011 in advance of an 11 March protest that he actively promoted through social media. He was charged with evading mandatory military service and sentenced to two years in prison. Hajiyev alleges police severely beat him while he was in their custody, but the prosecutor's office has failed to investigate his complaint about the abuse. He was freed in early June following a widespread international campaign for his release.⁵⁰
- Elnur Majidli, Strasbourg-based activist and blogger, faced criminal charges for inciting hatred and calling for the violent overthrow of the government, when he called for protests on Facebook. Although the charges were later dropped, Majidli still faces restrictions on his right to participate in public life and cannot return to Azerbaijan.⁵¹
- Charges against two individuals, Vugar Gonagov and Zaur Guliyev, appear to be linked to their alleged posting of a video on YouTube of a speech by a Guba official. Many believe this was the catalyst for large protests in the northern Azerbaijani town on 1 March 2012, when the residents gathered to protest against a local official who publicly insulted the community. Following the protests, some of which led to attacks on properties owned by the governor, there were reports that some internet cafés were being searched in an attempt to identify the person who posted the video.⁵²
- Taleh Khasmammadov, a blogger and human rights defender, remains in detention on charges of hooliganism and physically assaulting a public official following his arrest in November 2011. Rights watchdogs believe that he was targeted for his blogging and human rights activities, as

45. Vugar Gojayev, "Azerbaijan: Donkey Bloggers Punished", Index on Censorship, 25 November 2009, www.indexoncensorship.org/2009/11/azerbaijan-donkey-bloggers-punished

46. Institute of Reporters Freedom and Safety, *Azerbaijan Critical voices in Danger*

47. Amnesty International, "Jailed for Organizing a Protest on Facebook", www.amnestyusa.org/our-work/cases/azerbaijan-jabbar-savalan

48. Jabbar Savalan, served 11 months in prison on trumped-up charges of drugs possession before his early release by presidential pardon in December 2011. The day before his arrest, he had posted on Facebook. He was arrested the next evening without explanation or being informed of his rights in the city of Sumgayit as he was returning home from an opposition party's meeting. He was handcuffed and manhandled in and out of the vehicle before being searched at a police station where the police claim to have found 0.74g of marijuana in his outer jacket pocket. Despite the blood test taken following his arrest, which showed no traces of drug use, Jabbar Savalan was convicted and sent to prison. There has been no investigation into the allegations that police planted evidence on him. Amnesty International considered him to be a prisoner of conscience, detained solely for the peaceful exercise of the right to freedom of expression and assembly. www.amnestyusa.org/our-work/cases/azerbaijan-jabbar-savalan

49. "This is What Can Happen To You"

50. Institute of Reporters Freedom and Safety, *Azerbaijan Critical voices in Danger*

51. Ibid

52. Shahin Abbasov, "Azerbaijan: Is Guba Protest Response a Harbinger of a Political Shift in Baku?", 6 March 2012, www.eurasianet.org/node/65092

he had reported on mafia activity and human trafficking in the Ujar region of Azerbaijan.⁵³

Besides harassment of bloggers, several websites continue to be subject to blocking and cyber attacks initiated from within the country. As the government does not officially admit to blocking public access to websites, there is no established process through which affected entities can appeal to take legal action. Pro-opposition newspapers, *Azadliq* and *Bizim Yol*, the Turan News Agency and Radio Free Europe/Radio Liberty's Azerbaijani stations have occasionally been denied access. In early 2007, when energy prices were sharply raised, a site (www.susmayaq.biz) allowing web users to send a protest letter to the president was closed.⁵⁴ Web users in Azerbaijan can still not use the popular site www.tinsohbeti.com, which contains satirical articles, photographs, videos and more. The author of the website www.pur.gen.az, infamous for its biting humorous content, was arrested in 2007 when he posted a caricature of the president of Azerbaijan.⁵⁵

During the 2008 presidential elections, access to another political site was blocked, and web users were barred from reading about the candidacy of an invented "man of the people" candidate called Shiraslan on www.shiraslan.info.⁵⁶

The government versus Facebook

To reinforce the government's surveillance of the internet and to demonise social media in an effort to avoid its use as a political tool, authorities often stress the issue of morality online, arguing that Facebook and certain websites violate the country's moral values and standards of conduct.

Among the social media tools, Facebook is highly popular and widely used throughout the country. According to Facebookers, a Facebook analytic tool,

in January 2010 there were 105,000 Azerbaijanis on the site, and in December there were 279,000. At the end of July 2011 there were 431,600. Two-thirds of the July 2011 users are under 24 years of age.⁵⁷

In 2011, when the pro-opposition youth groups effectively used Facebook as a political tool to arrange anti-government protest actions in the capital, the government-controlled television stations launched campaigns against social network sites, broadcasting interviews with psychologists and internet experts arguing that online activities could have a detrimental effect on Azerbaijan's image and pose a threat to the country's security.⁵⁸

Because of the above, social media has become synonymous with deviance, criminality, and treason. Tightly-controlled television programmes show "family tragedies" and "criminal incidents" after young people join Facebook and Twitter. In March 2011, the country's chief psychiatrist proclaimed that social media users suffer mental disorders and cannot maintain relationships. In April 2012, the Interior Ministry linked Facebook use with the trafficking of women and sexual abuse of children. Since May 2011, the Azerbaijani parliament has been debating laws to curtail social media, citing their deleterious effect on society.

The internet in election season

Elections in Azerbaijan have always resulted in the suppression of opposition candidates, independent political forces, critical media and non-partisan civil society groups. These in turn have had a detrimental effect on the plurality of opinions and on freedom of expression. Almost all the elections in Azerbaijan have failed to meet international standards and media freedom has routinely been a special concern.⁵⁹ The OSCE/ODIHR Election Mission Observation Final Report on 2010 legislative polls stated:

The fundamental freedoms of peaceful assembly and expression were limited and a vibrant political discourse facilitated by free and independent media was almost impossible.⁶⁰

53. www.irfs.az/content/view/8224/28/lang,eng/ and www.irfs.az/content/view/7711/28/lang,eng

54. Another case followed the rapid increase of the price of petrol, gas, and electricity in the country in January 2007. The author of www.susmayaq.biz published a protest letter to the president online. As a result, the author was arrested, and the website was temporarily inaccessible on ten Azerbaijani ISPs from January to March 2007. After a protest by youth organizations, the author was released without charges. "In Azerbaijan – the Author of a Website Protesting Price Increases is Arrested", *Day.az*, 15 January 2007, www.day.az/news/politics/68040.html

55. In 2007, the Ministry of National Security searched one of the Internet cafes in Baku and discovered this caricature on the cache page. The author and the webmaster of the site, as well as several cafe guests, were arrested and indicted for organized criminal activities. The individuals were released several days later, but the website was shut down by its owners in order to avoid further prosecution. "Azerbaijan Country Report", *Opennet.org*, 2010, opennet.net/sites/opennet.net/files/ONI_Azerbaijan_2010.pdf

56. Maharram Zeynalov, *Azerbaijan's Web Users Claim Censorship and Poor Quality of Service*, Institute of War and Peace Reporting (IWPR), 19 June 2009, iwpr.net/report-news/azeri-internet-blues

57. "This is What Can Happen To You"

58. IRFS

59. Polls are routinely marred by a deficient candidate registration process, a restrictive political environment, unbalanced and biased media coverage, disparity in access to resources to mount an effective campaign, misuse of administrative resources as well as interference by local authorities in favor of candidates from the ruling party, creating an uneven playing field for candidates. See: OSCE/ODIHR, *Republic of Azerbaijan Parliamentary Election*, 7 November 2010; OSCE/ODIHR, *Election Observation Mission Final Report*, January 2011, www.osce.org/odihr/elections/azerbaijan/75073

60. OSCE/ODIHR *Election Observation Mission Report*, 2010

With the traditional media languishing under such tight government control, the parliamentary elections of 2010 saw the internet play a key role as a powerful campaigning tool – and a tool for agitation – for the first time in Azerbaijani elections. Through their Facebook group lists, large numbers of independent groups, opposition politicians and alliances used the internet as the only available instrument to air their campaign messages, policies and strategies, to update the voters on the election process, and to respond to any questions and concerns. Social networking sites like YouTube and numerous blogs made it possible for marginalised sections of Azerbaijani society to reflect alternative perspectives on how society and politics are taking shape in Azerbaijan.⁶¹

A gender perspective: the case of Khadija Ismayilova

The Azerbaijani internet population is young, mostly male, and largely concentrated in urban areas. The country's capital, Baku, as a rapidly growing cosmopolitan urban centre, has large numbers of women using internet. However, framing social media as a dangerous place has made men in highly conservative families hesitant to allow their wives and daughters to access the internet, especially social media.⁶² It is not by coincidence that women, mainly those living in rural areas, are hardly seen engaging in discussion forums. More than 70% of internet users, as well as Facebook users, are men, while only 14% of Azerbaijani women have ever used the internet.⁶³ According to Osman Gunduz, head of the Azerbaijan Internet Forum, there has been major progress in the country with regard to the number of internet users when it comes to men and women, with a rise in the number of women using the internet, mainly after the recent drop in internet fees.⁶⁴

In 2011 Azerbaijan's leading investigative female journalist and active social media user Khadija Ismayilova faced an outrageous blackmail attempt when unknown sources secretly filmed her in an intimate manner in her home.⁶⁵ She received a

collection of intimate photographs of her through the post, with a note warning her to “behave” or she would be “defamed”. After failing to blackmail her into silence, these images appeared on the internet a week later on a series of fake news sites and she was subject to personal attack in the pro-government *Yeni Azerbaijan* and *Iki Sahil* papers.

As an active social media networker, Ismayilova's fame on the internet undeniably contributed to the attempt to silence her. Ismayilova has never drawn back from the taboo subject of the business interests of the president and his family and has published several investigative articles unearthing corruption at the heart of the president's family. She often posts and discusses politically sensitive issues on Facebook, which has made it possible for her work to reach a wider audience.

Ismayilova is not the only journalist whose private life has been filmed using secret cameras and publicised. The pro-government *Lider TV*, which broadcasts throughout the country, has disgracefully aired secretly filmed videos of a private nature of Azer Ahmadov, editor of opposition *Azadliq* newspaper, as well as Tural Jafarov and Natiq Aliyev, journalists at that paper, in an attempt to silence them.⁶⁶ As a tool in government propaganda to harass its critics, the notorious *Lider TV* has also smeared journalist Agil Khalil, who was accused of having had a homosexual partner.⁶⁷

Conclusion

The internet has already started to surface as an important medium and space for political communication, and there are some indications that restrictions on content may emerge in the future. Further, the harassment of online activists has created a climate of intimidation and self-censorship that makes this all the more frightening.

61. International Partnership Group for Azerbaijan, “Running scared: Azerbaijan's Silenced Voices”, 2012, azerbaijanfreexpression.org/wordpress/wp-content/uploads/2012/05/12-03-22-REPORT-azerbaijan-web.pdf

62. Kendzior and Pearce, “How Azerbaijan Demonizes the Internet”

63. Ibid

64. “17 pct of women use internet”

65. “Salacious Video Defames Journalist Critical of Azerbaijani Government”, *CNN*, 20 March 2012. edition.cnn.com/2012/03/19/world/asia/azerbaijan-video-defamation/index.html; also see: International Partnership Group for Azerbaijan, “In Solidarity with Khadija Ismayilova”, *article19.org*, 15 March 2012, www.article19.org/resources.php/resource/2994/en/azerbaijan:-in-solidarity-with-khadija-ismayilova

66. “Azerbaijani State TV Airst Sex Video of Opposition Editor”, *RFL/RL*, 26 October 2010, www.rferl.org/content/Azerbaijani_State_TV_Airs_Sex_Video_Of_Opposition_Editor/2202050.html

67. Homophobia is rife in Azerbaijan, where gays and lesbians have to keep a low profile and fear violent attacks. The country decriminalised homosexuality in 2001, but discrimination and harassment are widespread for many members of the country's gay community. Government has used smear campaigns focused on allegations of “being gay” against political opponents in order to disgrace them in the public eye. Regime-critical journalists have been secretly filmed while masturbating and then “exposed” as gay in reports on the pro-government television station *Lider*. The leader of the opposition Popular Front Party, Ali Karimli, has also been accused of being homosexual, which the government says makes him unfit to be a politician. See: Annette Langer, “Gays Face Rampant Homophobia in Azerbaijan”, *Spiegel Online*, 25 May 2012, www.spiegel.de/international/world/homophobia-rampant-in-eurovision-host-country-azerbaijan-a-835265.html

The government's plan to license internet TV is clearly intended to restrict opportunities for free debate and to control public discourse. Freedom House has given the country the status of "partially free" when it comes to the internet, which implies that obstacles exist and the rights of internet users are routinely violated. As the internet market is yet to be liberalised, commercial ISPs operate under economically inconvenient conditions set mainly by the state monopolist Delta Telecom, which stifles smaller competitors and offers substandard service quality. It plays into the hand of the government and makes informal requests to other ISPs to filter, control and shut down critical websites.

The government's campaign against social media has so far been unsuccessful and it is likely that social media will continue to grow as a platform for mass communication between people on various issues, including political, social and economic issues. Social-networking sites are routinely used to disseminate content that is critical of the government by the average citizen.⁶⁸ Even though the government does not engage in widespread censorship on the use of the internet, the positive impact of the internet on forming alternative public opinion could worry the authoritarian powers of Azerbaijan. The government is increasingly aware of how powerful online tools can be, particularly as seen in the wake of the Arab spring, and there are signs that tighter restrictions on internet use and content are on the horizon.

The detention of photographer and social media activist Mehman Huseynov,⁶⁹ who was active in the "Sing for Democracy" campaign⁷⁰ and who has posted about human rights abuses on Facebook, comes amid a host of troubling signs in Azerbaijan after the end of the Eurovision Song Contest.⁷¹ Ongoing retaliation and a number of politically motivated arrests following Eurovision suggest the Azerbaijani government has no intention of ceasing its repressive policies. On the eve of the seventh Internet Governance Forum, Azerbaijan's international partners should take these trends as a signal of a potentially broader crackdown against critical voices. ■

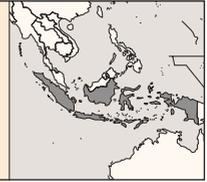
68. Citizen journalism in internet played an important role on reporting on property demolitions taking place as part of the process of "beautifying" Baku ahead of the Eurovision Song Contest

69. Human Rights Watch, "Retribution against photographer", 14 June 2012, www.hrw.org/news/2012/06/14/azerbaijan-retribution-against-photographer

70. "Sing for Democracy" coalition included a group of local and international NGOs to raise human rights concerns before and during the Eurovision Song Contest, which was held in May 2012 in Baku

71. Azerbaijan hosted the 2012 Eurovision Song Contest despite protests over the country's abysmal rights record. Local and international human rights groups criticised Azerbaijan's hosting the event, accusing the government of serious abuses, including restrictions of free speech, the arrest of the government critics and blatant violation of property rights. Opposition activists and human rights groups viewed it as a golden opportunity to focus international attention on the country's sullied human rights record. With the Eurovision now over and the world's attention turned elsewhere, the government has started to look for revenge against activists and government critics. See: Shahla Sultanova, "After the Curtain Call, the Crackdown Starts", *Interpress Service News Agency*, 19 June 2012, www.ipsnews.net/2012/06/after-the-curtain-call-a-crackdown-begins

MONITORING AND DEFENDING FREEDOM OF EXPRESSION AND ASSOCIATION ON THE INTERNET IN INDONESIA



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Background

The Indonesian experience in 1998, marked by the end of a repressive era under Soeharto's administration, has often been seen as one of the most vibrant political turning points in the Southeast Asian region. The media environment has become a central indicator in gauging the degree of openness, equality, and democratisation that has occurred since that change.

The media sector blossomed following the post-Soeharto social and political reform period (or *Reformasi*) in the country. It has transformed the national culture of public expression, both in the way Indonesian people relate to the conventional and "mainstream" press, as well as to the internet and social media. But in terms of freedom of expression and assembly as well as other fundamental rights, the narrative has far from a happy ending.

Contingencies of power, capital and historical contexts remain pertinent factors in the dynamic between the internet and democracy in Indonesia. For instance, although Freedom House in 2011 described Indonesia as a "free" country in terms of political rights and civil liberties, the country's status of press freedom and internet freedom is deemed only "partly free".¹ This ambiguous position can be attributed to the precarious terrain of recognising human rights in the country's historical trajectory.

A long list of human rights violations has left ominous patterns that frame the everyday realities of the country. It includes the brutal mass killing which marked the beginning of Soeharto's dictatorship and its anti-communist propaganda drive in the late 1960s; prolonged violent military campaigns in the conflict areas such as Timor Timur (now Timor Leste), Aceh and Papua; and many incidences of censorship and the muting of political expression across the media landscape. Entering the so-called democratic era, popular elections may run fairly

smoothly, but justice and reconciliation efforts to address past abuses remain half-hearted at best, and evidence of military-sanctioned torture continues to emerge. In addition to abuses still committed by security forces, overtly or behind the scenes, the nation is now facing an array of conflicting interests, including religious and class interests, and attitudes to sexuality and sexual identity. In various instances, such as the Ahmadiyah case in West Java, frictions between community members lead to violent outbreaks, or in extreme cases, death.²

The early adoption and use of the internet by human rights activists has played a crucial role in facilitating social change, both during the authoritarian era under Soeharto and today. During the upheaval, the internet provided a more democratic space compared to conventional media. Highly unregulated, it attracted political dissidents who created networks and disseminated knowledge. It became a medium that civil society movements could use to mobilise. Awareness about universal human rights, particularly the right to freedom of expression, were quickly circulated between activists and gradually spread to the rest of society. Through the net, human rights activists working both online and offline were introduced to new means for monitoring, defending and advancing freedom of expression and association.

The explosive growth of internet use (from 30 million in 2009 to 45 million in 2010, or approximately 18.5% of the total population)³ has opened the flow and exchange of information across

1. Freedom House, *Freedom on the Net Report* (New York: Freedom House, 2011)

2. Ahmadis, who practice the Ahmadiyah form of Islam, have been subject to various forms of persecution since the movement's inception in 1889. Ahmadiyah is a controversial religious minority in Indonesia that rose sharply in the 2000s with the rise of Islamic fundamentalism. As of 2011, the sect faces widespread calls for a total "ban" in Indonesia. In February 2011, hundreds of villagers in Banten province, west of Jakarta, marched to a house where twenty Ahmadis had met. Three Ahmadi men were then stripped and beaten to death. Alexandra Crosby, "Documenting Torture, the Responsibilities of Activists" in *Global Information Society Watch 2011* (APC and HIVOS, 2011), 138

3. Ardhi Suryadhi, "Pengguna Internet Indonesia Capai 45 Juta" [Indonesian Internet Users Reach 45 Million] *Detikinet*, 9 June 2010, us.detikinet.com/read/2010/06/09/121652/1374756/398/pegguna-internet-indonesia-capai-45-juta

boundaries and elevated civic engagement in political, social, and economic issues. Given the total size of the country's population, however, the density of internet users who have landline access in Indonesia is still low by global standards, with only 5.61 users per 100 citizens.⁴ Available broadband connections remain prohibitively expensive.⁵ In 2009 only 0.8 per 100 people had home connections to the internet, making cybercafés the main point of access, where 64% of internet users access the web.⁶

However, the urban-rural access divide is gradually diminishing due to the rapid spread of mobile technology. Based on an Intermedia report in 2010⁷ mobile penetration is over 88%, with the total number of mobile phones reaching 211 million.

Nevertheless, as elsewhere across the global south, the looming challenge in Indonesia is uneven digital connectivity, marked by increasing yet unequal access to information. This has partly contributed to the division of society based on knowledge-power relations. This is defined by the unequal rate of content produced in urban versus rural settings and by broadband service which is prohibitively expensive for most people. Language also negatively affects access. With most online content still in English, most Indonesians are limited in their ability to appropriate the advantages of digital media into their daily lives. Despite the pervasiveness of the cybercafé and the massive uptake of convergence media (thanks to low-cost smart phone technology and a cultural readiness to interact with new technologies), these layered barriers to participation continue to effect the social formation of who gets to the internet, from where, as well as what is being expressed once they are present.

Internet regulatory framework in Indonesia

Concerns are often raised over the return of media censorship and surveillance, including of the internet. This is despite the *Reformasi* promise, which was heralded with the enactments of positive media policies such as the Press Law and Broadcasting

Act, as well as the constitutional amendments and the subsequent bylaws introduced during the shifting political climate between 1998-2002. With the guarantee of a free press by the Press Law and better media access by the Broadcasting Law, stepping stones towards citizens' right to media were laid.⁸

Currently the internet falls under the purview of the Ministry of Communication and Informatics (MCI). The institution was a renewed version of the Ministry of Information, which was formed in 1945 during the early formation of the Indonesian Republic. Under Soeharto's rule the ministry acted to maintain and extend state control and to censor public expression. After being dissolved during the *Reformasi* in 1998, the ministry was reinstated in 2001 under the new name of State Ministry of Communication and Information, and reintroduced once again in 2005 under its current name.

There are two main bodies working under the MCI jurisdiction: the Directorate General of Post and Telecommunication (DGPT) and the Indonesia Telecommunication Regulation Body (BRTI). In charge of overseeing telephone and internet services, the directorate is responsible for issuing licenses for ISPs, cybercafés, and mobile-phone service providers. BRTI exercises regulation, supervision, and control functions related to telecommunications services and networking. In practice however the Freedom House report stated that the extent of BRTI's independence and effectiveness remains questionable as it is led by the DGPT director, and its budget draws from DGPT allocations.⁹

One of the ministry's key mandates is the development of a democratic media landscape – but on many occasions its policies (or lack of policies) have been counterproductive in this regard. Examples include censorship, content blocking and filtering, and intervening in the operations of ISPs and search engines. This is largely attributed to the spectrum of vague legislation, contingent political gestures, and a lack of policies and governance based on human rights principles.

Another official authority that regulates the media sector is the Indonesian Broadcasting Commission (KPI), an independent body established by the Broadcasting Law. However, the KPI has not been able to solve many of the problems mentioned above. Firstly, its focus is on television broadcasting, and it does not have jurisdiction over the internet. Secondly, KPI's authority and credibility as an independent controlling body are eroded by current allegations of corruption and backdoor policies.

4. Yanuar Nugroho, Muhammad Fajri Siregar and Shita Laksmi, *Mapping Media Policy in Indonesia* (Jakarta: CIPG and HIVOS, 2012)

5. Merlyna Lim (2011) reported that currently, personal broadband users in average spend 200,000-500,000 Indonesian rupiahs (USD23-59) per month. By comparison, the monthly per capita income among the poor is less than 355,000 rupiah (USD41). In Jakarta the minimum wage for workers is about 1.29 million rupiah (around USD151) per month

6. Merlyna Lim, @crossroads: *Democratization & Corporatization of Media in Indonesia* (Jakarta: Participatory Media Lab at Arizona State University & Ford Foundation Indonesia, 2011)

7. Ibid

8. Nugroho, Siregar and Laksmi, *Mapping Media Policy*

9. Freedom House, *Freedom on the Net Report*

This leaves the job of independent oversight and monitoring to a handful of businesses that take an active interest, and, increasingly, to civic agencies. They have become some of the most active proponents of upholding freedom of expression online.

With multiple stakeholders and interests involved, tensions over control of the internet continue to linger, particularly evident in the authorities' tendency to limit the flow of information and free expression, as well as the influence over regulation by private interests and local pressure groups. The next section takes a closer look at the internet's pivotal status as an arena that enables struggles for human rights and fundamental freedoms in Indonesia.

Consolidating power and control

Since 2008 the regulation of the internet has been built around the Electronic Information and Transactions (ITE) Law. First proposed in 2003 by the MCI, its main purpose is to protect electronic business transactions and internet-based activities. But the law also contains vague definitions on defamation which inhibit online expression and expose netizens to heavier penalties than those set out by the Penal Code. Anyone convicted of committing defamation online may face up to a six-year prison term, and a fine of up to one billion rupiah (USD 111,000).

The case of Prita Mulyasari

By mid-2010 there were at least eight people prosecuted under ITE Law, the most notable being Prita Mulyasari. Her case was built upon the alleged circulation of defamatory statements online about a private hospital in Java in 2009, which culminated in a 204 million rupiah fine. Her case sparked a great deal of public sympathy: a Facebook page was set up that led to one of the biggest online campaigns ever in Indonesia, both in terms of moral support and donations. Concurrently, Mulyasari was also charged under at least two articles of the Criminal Code on defamation. Later, the hospital dropped the lawsuit against Mulyasari for online defamation, but two years after her acquittal, in 2011, the Supreme Court found her guilty under the Criminal Code and convicted her with one-year probation.¹⁰

Mulyasari's case illustrates how online expression is curtailed by heavier punishments for libel than those found in conventional media, and how a second layer of legal restrictions exposes internet activities to severe penalties. The abuse of defamation charges enabled by the only existing Indonesian cyberlaw (the ITE), combined with

criminal codes and at times contradictory court rulings over online cases, threatens to create an environment where self-censorship is a regular practice on the internet.

The Anti-Pornography Law and The Informational Technology Crime Bill

To a great extent existing restrictions that negatively affect internet freedoms rely on general state law such as the Criminal Code. Another example is the 2008 Anti-Pornography Law. Exploiting the broad-sweeping terms of "public morality", the law stipulates that possessing or downloading pornography is liable to a four-year prison sentence and a "sexually enticing" performance may result in a twelve-year sentence. In the years following its introduction, the law garnered strong criticism from social and cultural activists due to its apparent neglect of individual rights and its discriminative stance to women's rights. It also throws into question the diverse forms of cultural expression, which represent the various ethnicities in Indonesia. For example, the traditional dress of many ethnic groups in Indonesia includes exposed breasts for women, made illegal under the law. Needless to say, the law has been ineffective in actually stopping the viewing of pornography, which is bought easily from unofficial distributors.

The use of moral injunctions as a basis for legal arguments and action is pervasive and multi-layered. This is seen, for example, by MCI's statement in 2011 claiming that it has to "clean out" the web of morally inappropriate content. It began by blocking 300 websites, allegedly publishing radical content and promoting terrorism.¹¹ The number continued to grow to almost one million websites in 2012, including numerous sites for their alleged pornographic content.¹² The Minister, Tifatul Sembiring, also made a public statement about the draft of Multimedia Content Ministerial Decree which he described as an attempt to control the use of social media and the internet. The proposed decree failed to reach formal deliberation, however, as it was immediately met with a strong public reaction.¹³

10. Lim, @crossroads

11. "Kominfo Blokir 300 Situs Kekerasan" [Ministry of Communication and Informatics Block 300 Violent Sites] *Republika*, 26 September 2011 www.republika.co.id/berita/nasional/umum/11/09/26/l55147-kominfo-blokir-300-situs-kekeraan; also cited in Nugroho, Siregar and Laksmi, *Mapping Media Policy*

12. "We've Blocked 1 Million Porn Sites, Government Claims", *The Jakarta Post*, 6 February 2012, www.thejakartapost.com/news/2012/02/06/we-ve-blocked-1m-porn-sites-govt-claims.html

13. Freedom House, *Freedom on the Net Report*, 180

The democratically elected President, Susilo Bambang Yudhoyono, recently set up an anti-pornography task force as an extension to the existing law. Its tasks would include clamping down on women wearing mini-skirts.¹⁴ The State's gender discriminatory practices also trickle down to local governance levels, reflected in the ordinances of various local administrations.¹⁵

Concerns are running high over more legal repercussions and violations of users' rights with two upcoming pieces of legislation: the Informational Technology Crime (TIPTI) and Media Convergence bills. Critics have warned that TIPTI will control digital activities to a greater extent than the ITE. The bill is considered more repressive and vague than the ITE, as charges will not be sufficiently based on digital evidence and bears harsher penalties for online offences. Meanwhile the Media Convergence Bill is an integration of the ITE, broadcasting, and telecommunications laws. At the same time it will merge the three media regulating bodies, namely the Broadcasting Commission, the Information Commission, and the Indonesian Telecommunications Regulatory Body into a single commission. The bill has received heavy criticism, and has been accused of trying to create a monolithic body whose intervention could apply across all media and telecommunications platforms.

The role of business

The country's intricate regulatory framework has also shaped the dynamic of internet-related businesses. After the first waves of reform in 1998, the Indonesia media industry moved further towards market liberalisation, resulting in media conglomeration and a concentration of ownership amongst several major players. In the telecommunication sector, as of 2007, there were six main players dominating the market, controlling around 300 ISPs operating across Indonesia. They are Bakrie Telecom, Indosat, Indosat Mega Media, Telkom, Telkomsel, and XL Axiata.¹⁶ Reportedly, in 2010, the mobile phone service provider industry was joined by nine companies, with Telkomsel leading the market with a 50% share.

Aside from unfavourable market competition, restrictive policies inhibit the activities of smaller ISPs in the market, such as instructions to filter information, including information that has political ramifications. In 2008, the Minister of Communication and Informatics ordered ISPs to block the circulation of the Dutch film *Fitna* in Indonesia due to its anti-Islamic sentiments. As a consequence, ISPs across the country blocked access to content-sharing sites including YouTube, MySpace, and Multiply. This decision sparked a public outcry, forcing the minister to retract the ban the following week.¹⁷ Another potential setback in infrastructure provision of the internet is the concentration of network access providers (NAP) to only a handful of institutions, including the abovementioned big players. With NAPs acting as gatekeepers, linking local ISPs to the internet backbone, the system is exposed to government intervention, as in the controversy surrounding *Fitna*.

The liberalisation of the market has, however, also opened up possibilities for businesses to protect their consumers, and in turn, to join efforts to endorse wider public interest priorities. For example, in mid 2010, the Indonesian Association of Internet Cafe Entrepreneurs (APIII) and several other ISPs dismissed a government request to restrict access towards certain Facebook group accounts which had held a competition for artists to submit drawings of the prophet Muhammad. APIII has also started the Indonesian Internet Governance Forum (IDIGF), a multi-stakeholder platform for collaborative policy-making, which pushes for an open internet environment.

Local content providers play a significant role in the Indonesian internet environment despite the domination by global giants such as Facebook, Google and Yahoo!. The popularity of online media such as Detik.com, Kompas.com, Vivanews.com and Okezones.com can be attributed to language preferences and their news offerings, which are immediate and close to unfolding events. The removal of content has been carried out under government directives and in some cases after pressure from private actors, as was the case with the Okezone online news website in 2008. The website, owned by one of Indonesia's largest media corporations, MNC, had to change its coverage on a corruption scandal after the company owner, who had financial ties with high political figures, stepped in.¹⁸

14. "Indonesia Considering Banning Short Skirts", *The Jakarta Globe*, 28 March 2012, www.thejakartaglobe.com/home/indonesiaconsidering-banning-short-skirts/507630

15. See also Ferdiansyah Thajib, "Indonesia" in *The Greenwood Encyclopedia of LGBT Issues Worldwide Vol.1*, ed. Chuck Stewart (Santa Barbara, CA: ABC CLIO, 2010), 411-412

16. Arif Wismadi and David N. Townsend, "Country Case Study Indonesia Draft 1", Asian Development Bank-International Telecommunication Union Project on Rural ICT Policy Advocacy, Knowledge Sharing and Capacity Building, 9 September 2010, www.scribd.com/doc/78526279/ITU-ADB-Interrim-Indonesia-Country-Report

17. Freedom House, *Freedom on the Net Report*, 177

18. "Geger di Sisminbakum, Sunyi di RCTI dan Okezone", in *Wajah Retak Media: Kumpulan Laporan Penelusuran*, [Dispute in Sisminbakum, Quiet at RCTI and Okezone, the Negative Face of Media: Fact Finding Report] (Jakarta: AJI Indonesia, 2009)

The drastic changes that come about with the advancement of media technology and shifting political realities have made the government and media industry strange bedfellows with sometimes conflicting and other times mutually beneficial measures to control, regulate, and censor expressions online. In the face of sophisticated censorship and filtering methods, a more controlled society seems inevitable. At stake here is the sustainability of diversity of views, opinions and content. In such a large country made up of so many different groups, diversity is essential for peace and human rights.

The next section explores how notions of diversity are being negotiated in the online sphere.

Negotiating diversity online

Vague and normative legal frameworks, as noted previously, have restricted the circulation and expression of ideas on the net in the form of self-censorship among content producers. With fierce market competition, national and multinational enterprises have also worked to extend the government's control and monitoring, mobilized by their own vested interests.

However, the internet remains relatively free compared to film distributed in cinema or printed newspapers, for instance, and enables a high degree of content diversity in comparison to conventional media. Unlike persistent cases against the Indonesian press, there has been no report of extralegal repercussions for internet users. The online sphere in Indonesia manages to harbour a broad spectrum of political differences, ideologies and behaviours ranging from sexual minority groups to radical religious ones, from environmental activism to online shopping. In this open environment, heated debates between conflicting interests flow through various outlets, mainly email groups, online forums and chatrooms and on social media. While it is not uncommon for exchanges to result in hate speech, the MCI as the government monitoring unit continues to take a role as arbitrator, and in some cases, given enough political weight, they interfere by blocking or removing content.

There are national policies that support freedom of expression online, such as the Human Rights Law 39/1999 and Freedom of Information Law 14/2008, but the realities of policy-making in Indonesia have made it difficult to ensure consistent implementation. In terms of infrastructural development of the ICT sector, the MCI came up with a clearer policy towards closing down the disparities in connection, such as the issuance of Ministerial Regulation

32/2008 on Universal Service Obligation (USO) that pertains to ICT businesses' involvement in supporting infrastructure provisions based on the USO agreement. In addition actual measures to broaden internet connections across the region have been stepped up as part of the positive obligations of the State.

The discourse on internet freedom in the civic realm has shown a more vibrant outlook in recent years. ICTs have been catering to both civil and democratic organisations and the individual's need to express and share ideas and opinions. Accompanying the dramatic shift is the popularisation of social-networking applications with Indonesia becoming home to the second largest number of Facebook users – approximately 40 million – just below the United States. This number represents some 15% of the country's total population. Besides Facebook, the use of Twitter has also risen exponentially. Reportedly 20% of Twitter subscribers globally are based in Indonesia, with 60% concentrated in urban centres such as Jakarta, Bandung, Medan and Yogyakarta.¹⁹

Both these social media platforms have generally developed without significant interference while successfully hosting several civic movements. Aside from the Prita Mulyasari case mentioned earlier, another prominent example is the “One Million Support for Bibit-Chandra” which started in 2009 when a Facebook campaign was started to challenge the politically motivated arrests of the two deputy chairs of the Corruption Eradication Commission (KPK).²⁰ The online protests garnered 1.3 million supporters by August 2010 and the charges were dropped not long after that. Both cases (Prita Mulyasari and Bibit-Chandra) are exceptional examples of critical rifts in the political landscape due to the use of the internet. This can be partly attributed to the degree of exposure the campaigns received in the mainstream media, mainly through television. This demonstrates the need for links between different forms of media for effective activism.

Without an acknowledgement of these links, campaigns tend to fail. Other stories of the violations of fundamental human rights had limited circulation amongst concerned groups, despite various attempts to attract broader public support through online participation. Among these is the Lapindo case in East Java. In 2006, more than 10,000

19. Lim, @crossroads

20. Wikipedia, “Corruption Eradication Commission”, accessed 2 May 2012, en.wikipedia.org/wiki/Corruption_Eradication_Commission

residents of Sidoarjo village and the surrounding area where affected by mudflows due to excessive natural gas exploitation by Lapindo Brantas Corporation. Until now, there has been no reported settlement between the victims and the corporation – although rumours of backdoor settlements persist – which is partly owned by Indonesia’s current Coordinating Minister of Welfare, Aburizal Bakrie. While the online response to Lapindo was widespread, there has not been a clear and coordinated campaign that integrates with conventional media. Another major violation of human rights that has failed to gain critical mobilisation despite an online presence is the circulated video of the fatal attack on Ahmadiyah Islamic followers by a militant Islamist group in West Java in early 2011.²¹ Despite this, social networking continues to become an important tool in mobilising solidarity for socio-political causes. During the writing of this report in May 2012, social networks were flooded by criticism of the silencing of Canadian author and Muslim activist Irshad Manji who conducted a tour in Java to launch her latest publication. The public gathering with the openly lesbian Muslim activist turned sour when Islamist hardliners succeeded in pressuring the Indonesian police force to stop the book launch in Jakarta. In Yogyakarta the event ended in a wave of attacks by another Islamist radical group called Majelis Mujahidin Indonesian (Indonesian Mujahedeen Council), leaving a number of people injured.

The Indonesian blogosphere is also active, although from the estimated number of 1.2 million bloggers in 2009, only 80 blogs, typically managed by activists, human rights defenders, or journalists, are devoted to good governance and the support of civil society causes²². NGOs have also increasingly adopted ICTs as platforms for civic activism, including social network applications. Groups such as Women’s Solidarity for Human Rights (Solidaritas Perempuan), dedicated to fighting for women’s rights in grassroots communities,²³ is also using offline and online strategies to achieve their mission.

Another positive development is seen in collective action, bridging organisational differences to reach a wider audience. Online video activism has been on the frontline in appropriating the advantages of ICTs as a platform for strategic alliances and tactical networking. Video activist groups like Kampung Halaman, the Kalyana Shira Foundation and

EngageMedia collaboratively explore the potential of online video as a medium for change focusing on youth issues, women’s rights, and social justice, respectively.

Civic initiatives are also instrumental in affecting internet policy-making processes. The promotion of open knowledge circulation, free expression and ethical practice on the net have been the main foci of institutions like the Indonesian Telematics Society (Mastel), the SatuDunia Foundation and ICT Watch. Inventive ways to solve access limitations by civic agencies working in the technological sector can also be found. This is exemplified by the introduction of RT/RW-Net by Onno Purbo and his group in 2004. The RT/RW network system is designed using wireless technology to enable the sharing of broadband connectivity amongst multiple community members in the same location, thereby reducing the cost of access per household significantly.

In 2011, a strategic network initiative called Cipta Media Bersama (Creating Common Media) was introduced to the public as a means to promote media content diversity, equal access and media freedom. The initiative, involving Ford Foundation Indonesia, ICT Watch, Alliance of Independent Journalists (AJI), and Wikimedia Indonesia, has launched a nationwide call-out for participants in order to forge a generation of users aware of issues such as diversity, ethics and equity.

The term “diversity” has been a recurrent theme in Indonesia since the Republic was founded in 1945, seen in the adoption of the national motto *Bhinneka Tunggal Ika* (Unity in Diversity) – this to the extent that it was even abused by the New Order in forging a sense of national citizenship in which political dissent and criticism was ostracised. But with the free expression found on the internet, society has now been exposed to considerable challenges given the differences between ethnicities, ideologies, religion and political identities. If anything, the internet has shown that the notion of diversity needs to be constantly negotiated.

Awareness

As mentioned, mainstream discourse in the Indonesian online sphere is still tainted by incitement to discrimination and hate speech, in part due to the capacity of the internet to accommodate a diversity of expression. While limitations to content are called for in some cases, such as those categorised as offences under international law (for example, child pornography and inciting intolerance or hatred), the government has not yet responded proportionally to the need for these limitations. Over-generalised

21. Angela Dewan, “Why We Should Support Indonesian Schools”, *New Matilda*, 16 February 2011, newmatilda.com/2011/02/16/why-we-should-support-indonesian-schools

22. Freedom House, *Freedom on the Net Report*

23. www.solidaritasperempuan.org

efforts to prohibit hate speech on the internet through the introduction of Defamation Codes in the ITE Law did not solve the problem.

On the other hand, human rights defenders and civil society organisations have been actively formulating and building ethical practices in producing and distributing online content. In terms of regulating the press and its use of social media, in 2012 the Cyber Media Code of Ethics (*Rancangan Pedoman Pemberitaan Media Siber*) was developed by the Press Council. Meanwhile ICT Watch Indonesia has been building a campaign on *Internet Sehat* (Wise Internet) since 2005. The programme promotes safe, secure and responsible practices on the internet. It recently gained nationwide recognition and was adopted as policy by various stakeholders.

Governmental bodies that formed following the *Reformasi*, such as the Indonesian National Human Rights Commission (Komnas HAM), have also been pushing a credible human rights agenda into the wider governmental sector. During her speech in the United Nations Expert Panel on Freedom of Expression and the Internet, Komnas HAM country representative Hesti Armiwulan called on the State to re-evaluate some of the regulatory frameworks that tend to criminalise public expression on the internet while stepping up educational measures for increasing content production and public access.²⁴

Attempts to generate public awareness and organise support related to human rights issues are currently underway with various individuals and organisations using digital media to disseminate information. Two blogs dedicated to awareness raising, managed by Andreas Harsono and Anggara, stand out as exceptions in a blogosphere crowded with content on urban middle-class popular culture.²⁵ While the mainstreaming of the human rights agenda in public life still has a long way to go, there have been gradual improvements. For instance, the Indonesia Media Defense Litigation Network (IM-DLN) initiated a human rights blogger award, to spur Indonesian bloggers to produce and circulate content that respects, protects, and fulfils human rights principles. The initiative also runs a portal that archives related information.²⁶

Currently there are only a handful of independent organisations with an online presence dedicated to human rights causes. Amongst these are: Kontras, the Commission for “Missing and Violence

Victims”,²⁷ which channels support and information to victims of human rights violations through its on-line portal; the Indonesian Human Rights Monitor or Imparsial,²⁸ which gathers and investigates abuses online; an organisation called West Papua Alerts,²⁹ which provides independent news in response to the constant threats experienced by journalists reporting on/from the conflict-prone Eastern provinces; and feminist groups like the Women’s Journal Foundation (YJP)³⁰ and the Kalyanamitra Foundation³¹ that facilitate awareness campaigns about women’s rights, and build networks around women’s issues.

These activists engage with human rights goals largely through digital media. Although still limited in number, they have helped widen the interactions between different communities they work with and for. This is mainly achieved by linking the internet with grassroots issues and communities, including setting up structures to address the lack of access for many vulnerable groups. Strategic appropriation of social media by these agencies has the potential to keep pushing human rights issues into the public agenda.

Impacts on other rights

The vague anti-pornography law introduced in 2008 was based on “public morality” and in practice is contingent on interpretation, a type of policy-making that is often conducted by the current Minister of Communication and Informatics, Tifatul Sembiring. Its primary impact has been the infringement of minority rights, particularly those of lesbian, gay, bisexual, and transgender (LGBT) people. The use of technical filtering that targets keywords and domain names related to sexualities under the category of “pornography”, including blanket terms like “lesbian” and “gay”, has severely limited the ability of LGBT people for organization and education.

Recently, the International Gay and Lesbian Human Rights Commission (IGLHRC) reported through a circulated email that its website had been banned by mobile phone operators Telkomsel and IM2. In the email, Cary Alan Johnson, IGLHRC Executive Director stated that “according to a spokesperson for... IM2, the order came from the Minister of Communication and Information who banned [the website] due to its

24. For Armiwulan’s complete statement, see www.unmultimedia.org/tv/webcast/2012/02/hesti-armiwulan-panellist-panel-on-right-to-freedom-of-expression-19th-session-human-rights-council.html

25. Some prominent examples include ndorokakung.com, or see saling-silang blogger directory: blogdir.salingsilang.com

26. hamblogger.org

27. kontras.org

28. www.imparsial.org

29. westpapuamedia.info

30. Founded in 1995 in Jakarta, YJP is working to produce and distribute knowledge, information and documents about women’s rights and issues through feminist approaches (jurnalperempuan.com)

31. Founded in 1985 Kalyanamitra Foundation works to promote awareness on women’s rights and with marginalised communities like women labourers and women who work in informal sector (kalyanamitra.or.id)

content which, they determined contains pornography". The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) website also experienced the same fate. In 2010, an ILGA regional congress in Surabaya, East Java, was dispersed by police under local Islamist militant pressure. Critics warned that as these internet blocks appear to be systematically conducted to hamper communication between local and global LGBT rights activists, they run contrary to the Yogyakarta Principles for the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity.³²

Moreover, the anti-pornography law enables police to abuse their power of surveillance by searching cybercafés without prior notice and often without warrant since these venues are suspected of facilitating the viewing, storing and distribution of pornographic material. The law also spurred similar campaigns carried out by non-state actors such as the Islamic vigilante group Islamic Defenders Front (FPI).

Little has been done to address the increasing religious-laden frictions currently preoccupying both online and offline spaces. The public sphere has had to bear witness to violence targeted at minority Islam communities, and conflicts among supporters of freedom and diversity and Islamic hardliners. Among the limited number of initiatives tackling this particular issue, there is Women's Solidarity for Human Rights, which initiated an ICT-based campaign called "Women and Religious Politicisation" in 2012 and the Institute for Research Policy and Advocacy (ELSAM), which promotes a dialogue between human rights and Islam on its website.

While further investigation still needs to be done regarding how the incitements to discrimination and hostility on the internet contribute to violence in the field, this report sees the urgency for a clear regulatory framework which underscores the protection of individuals from hostility, discrimination and violence, rather than to protect belief systems, religions or institutions from criticism. This is in line with a report by Frank La Rue, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.³³ La Rue argues that the endorsement of freedom of opinion and expression should accommodate open

debate and criticism, and ideas and opinions – including religious ones – as long as these do not advocate hatred or incite hostility, discrimination or violence against an individual or group.

Conclusion

This report has framed some of the experiences that followed the 1998 reforms in terms of internet development and political mobilisation towards change in Indonesia. Today Indonesia faces the dynamic of increasing digital media use coupled with more layered and intricate challenges to internet and new media freedom. The country's infrastructural and political landscapes are key factors affecting the degree of freedom currently enjoyed on the internet. Despite rapid innovations in mobile technology and lower costs that have enabled higher levels of access, unequal distribution of digital connectivity still undermines many people living in the vast archipelago. The commitment to prioritise internet expansion has been demonstrated by the government, especially the MCI. However the pre-conditions for greater freedom of expression is not solely determined by technological provisions but also a regulatory framework that upholds democratic tenets and human rights.

The efforts of human rights defenders and media rights activists need to be directed at the pressure points of this regulatory framework. Such work is in line with the recommendations of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the General Assembly. In concluding his report, La Rue recommends that States take up the responsibility of guaranteeing the free flow of information online. He also points out that laws that prohibit the flow of content must be unambiguous and must pursue a legitimate purpose. In this vein, it is clear that a review of the Anti-Pornography Law in Indonesia is necessary as the evidence in this report demonstrates that it restricts the right to freedom of expression of minority groups, particularly LGBT people. It has become clear that the blocking of content by the State in Indonesia is a form of censorship that lacks both transparency and accountability.

Criminalisation of internet users based on vague legislation, and citing "public morality" arguments, should be reviewed in accordance with the diverse situations that constitute the Indonesian public sphere. With the still limited number of civic initiatives currently participating in policy-making processes, public awareness campaigns that highlight online control and censorship are required so that Indonesia's politically repressive history will not repeat

32. *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007), www.yogyakartaprinciples.org/principles_en.pdf

33. Frank La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/17/27 (Geneva: United Nations General Assembly, Human Rights Council, 2011), www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

itself. Collective action, such as that demonstrated by online video activists and media rights defenders in their use of the internet and social media, is potentially useful for raising human rights awareness in the mainstream. Creative technical solutions like those developed by groups such as Airputih³⁴ and the Combine Resource Institution (CRI)³⁵ are also relevant to this struggle. More understanding about the relation between new media advances and public welfare needs to be acquired among activists, media workers and civil servants alike, to move existing debates beyond ideas of the “excesses” of the internet towards pushing its advantages for the betterment of communities.

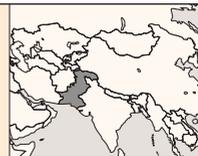
The fact that Indonesia is bidding as the host for the eighth annual meeting of the Internet Governance Forum in 2013, could elevate the discussion of freedom of expression on the internet in policy dialogues. On one side, local activists would gain substantial benefit from the event, including sensitising the public about the human rights agenda at the forum. Given the presence of transnational stakeholders working in the field of internet governance and freedom of expression, not only will such a forum serve as a platform for critical exchange between internet rights activists and initiatives from across the globe, it will also feed into future debates on human rights protection in the country.

More generally, Indonesian society needs to be vigilant about the escalation of discriminatory language and hate speech in the public sphere, both online and offline. Strategic responses to rising intolerance should include more education, in local languages, about cultural differences and diversity, more promotion of open and non-hostile ways of communicating, as well as more avenues for empowering minorities (ethnic, sexual and religious minorities, the economically disenfranchised, indigenous people, etc.) to voice and represent their rights online. Monitoring and identifying new, critical problems that are the result of increased online interaction is more productive if there is an emphasis on the creation of new ethics norms, instead of on control. In other words, what is needed is more freedom, not more restrictions. ■

34. Airputih (www.airputih.or.id) is an institution that encourages Indonesians to become more literate in information technology. Airputih emphasises open source technology as the key to improving access. It collaborates with the Ministry of Research and Technology and the Indonesian Linux Mover Foundation

35. Combine Resource Institution (CRI) (combine.or.id) is a community-based information network aiming to empower poor or marginalised communities through information-sharing

THE CHALLENGE OF INTERNET RIGHTS IN PAKISTAN



Shahzad Ahmad and Faheem Zafar

Bytes for All

Background

Pakistan has been lurching from one crisis to another thanks to its geo-political importance, political instability, economic problems, cultural conservatism and religious extremism. Added to that are frequent natural disasters, a seemingly unsolvable energy crisis, rising unemployment and rampant inflation. The country became a playground for external powers after 9/11 when the US launched a war in Afghanistan against Al-Qaeda and its Taliban hosts, resulting in widespread unrest within neighbouring Pakistan. Social, political and economic development has also been slowed by the seemingly intractable tensions with India on the Eastern border.

Pakistan lags behind much of the world on almost all socio-development indicators (health, education, income, gender equality) on the Human Development Index.¹ A large percentage of the national budget is devoted to defense expenditures with comparatively little spent on health, education and public development projects.² Regular military coups have hampered political development in the country and left vital institutions like political parties, the judiciary, the media and civil society inordinately weak.

The prevalence of dictatorial regimes has also taken a toll on the basic human rights and freedoms guaranteed in the constitution. Human rights have often been sacrificed to nebulous concepts like “national security”, “religious morality” and “the war on terror”. The strong influence of religious groups has often made discussion of issues like women’s rights, minority rights, sexual rights, ethnic diversity and other types of discrimination taboo. Such is the power of conservative forces in the country that even self-proclaimed progressive and liberal political parties have to follow the agenda set by them.

Freedom of expression, choice and opinion have always been threatened by the government and intelligence agencies. Many clauses in the Constitution are vague and open to interpretation and, unfortunately, the most discriminatory interpretations are used by the government to restrict the free flow of information.

Sixty-three percent of Pakistan’s population is under the age of 25.³ This partly explains the explosion of citizens using internet-based technologies and modern forms of communication.⁴ These, too, have come under government scrutiny and, especially since 2005, are often strictly controlled, with the government citing reasons such as national security, religion and morality.

The internet emerged in Pakistan in the early 1990s with the introduction of text-based internet and email communications.⁵ With the help of the United Nations Development Programme (UNDP), Pakistan established the Sustainable Development Networking Programme (SDNP)⁶ in December 1992. The SDNP was successful in enhancing computer literacy and providing dial-up internet and offline email services to urban centres across the country through five nodes in Islamabad, Karachi, Lahore, Quetta and Peshawar.

Pakistan is also lagging behind in e-government development infrastructure. According to the United Nations E-Government Survey of 2010, Pakistan was ranked 131 in 2008 in the world e-government development index and fell even further to 146 in 2010.⁷

Mobile phone penetration in Pakistan is around 65.2%,⁸ while internet penetration is comparatively

1. UNDP, International Human Development Indicators, “Pakistan, Country Profile”, hdrstats.undp.org/en/countries/profiles/PAK.html
2. Shahbaz Rana, “Proposed Budget Share: 2% for Higher Education, 20% for Military”, *The Express Tribune*, 15 April 2012, tribune.com.pk/story/364865/proposed-budget-share-2-for-higher-education-20-for-military

3. Board of Investment (BOI), “About Pakistan – Youth in Pakistan”, www.pakboi.gov.pk/index.php?option=com_content&view=article&id=128&Itemid=55
4. Muhammad Yasir, “Internet Users in Pakistan Cross 20 Million Mark”, *The Express Tribune*, 28 October 2011, tribune.com.pk/story/283253/internet-users-in-pakistan-cross-20-million-mark
5. “Brief History of .PK ccTLD, IMRAN.PK, Internet Email in Pakistan”, *imran.pk*, www.imran.com/imran.pk.html
6. Sustainable Networking Development Programme (SDNP), “Project Document for Sustainable Development Networking: Pakistan”, www.sdnpp.undp.org/countries/as/pk/pkpdoc.html
7. United Nations, *E-Government Survey 2010* (New York: UN-DESA, 2010), 69, unpan1.un.org/intradoc/groups/public/documents/un/unpano38851.pdf
8. PTA Telecom Indicators, www.pta.gov.pk/index.php?option=com_content&view=article&id=269:telecom-indicators&catid=124:industry-report&Itemid=599

low at 11%.⁹ There are many factors responsible for this disparity, including poor infrastructure, lack of reliable services, high costs, a low literacy rate and low average incomes.¹⁰

Internet freedom in Pakistan

The rise in internet usage in Pakistan is being accompanied by a corresponding increase in the government's attempts to control and regulate the internet. Under the guise of national security, religious sentiments and morality, there have been massive infringements on the fundamental rights of citizens. The government has been trying to censor the internet since 2003. Recent attempts by the Pakistan Telecommunication Authority (PTA) to ban the use of certain words in SMSes,¹¹ set up an Internet Filtering System along the lines of the Great Firewall in China and to employ a kill switch on digital communication in Balochistan¹² and Gilgit-Baltistan are just some examples of how the government is eroding the communication rights of its citizens.

The courts, whose role is to uphold the rule of law, have been disappointing in their defense of freedom of expression in general, and internet freedom in particular. There are still many petitions pending in different high courts demanding certain websites be banned on the grounds of "religious morality", "national interest" and other constitutional loopholes. Unfortunately, the courts have often entertained and even ruled in favour of such petitions.

These anti-free speech practices have a chilling effect. There is constant pressure on human rights organisations and activists, who are using the internet to spread awareness through blogging and networking, to not say anything that might be construed as being "objectionable" or "offensive".

Frank La Rue, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, issued an excellent report which explores the issues, global trends and challenges regarding the freedom of internet communication. The report also presents important suggestions and recommendations to ensure the

freedom of internet communications for citizens all over the world.¹³

In light of La Rue's work, this report will focus on violations of internet freedom in Pakistan, unclear laws, and legislation and constitutional provisions used by the government to limit freedom of expression, choice and access to the internet in the country. This report will also give an overview of different cases and incidents where government authorities used constitutional loopholes to restrict freedom of expression. It will then explain how these violations negatively impact other human rights issues in the country.

Access to internet and the right to information

Internet communications in Pakistan started surging during the 2000s¹⁴ when many internet service providers (ISPs) emerged and began offering low-cost packages.

In his report to the UN General Assembly in 2011, La Rue said:

In particular, States take proactive measures to ensure that Internet connectivity is available on an individual or communal level in all inhabited localities of the State, by working on initiatives with the private sector, including in remote or rural areas. Such measures involve the adoption and implementation of policies that facilitate access to Internet connection and to low-cost hardware, remote and rural areas, including the subsidization of service, if necessary.¹⁵

Around 64% of Pakistan's total population lives in rural areas¹⁶ where internet connectivity is limited due to a lack of infrastructure. The government's role in promoting internet access in these areas has not been satisfactory and very few projects have been started for this purpose. One example of this failure has been the establishment of 365 Rabta Ghar¹⁷ (connectivity centres) in rural areas to provide internet and telephone services. After the pilot phase of this project in 2007, there has been very little information available about its impact on the ground.

Another initiative was the establishment of a Universal Service Fund (USF) to promote access to

9. Internet World Stats, www.internetworldstats.com/stats3.htm#asia

10. Arzak Khan, *Gender Dimensions of the Information Communication Technologies for Development* (Karlstad: University of Karlstad Press, 2009).

11. Shaheryar Popalzai and Jahanzaib Haque, "Filtering SMS: PTA May Ban over 1,500 English, Urdu Words", *The Express Tribune*, 16 November 2011, tribune.com.pk/story/292774/filtering-sms-pta-may-ban-over-1500-english-urdu-words/

12. Bytes for All, "Communication Siege in Balochistan to Mark Pakistan Day 2012", 25 March 2012, content.bytesforall.pk/node/45

13. Frank La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/66/290* (Geneva: United Nations General Assembly, 2011), www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf

14. *Broadband Penetration in Pakistan*, a study undertaken by the Ministry of IT, n.d., www.ispak.pk/Downloads/MoITStudyonBroadbandPenetration.pdf

15. La Rue, *Report of the Special Rapporteur*, para. 89

16. "Rural Population in Pakistan", *Trading Economics*, 2012, www.tradingeconomics.com/pakistan/rural-population-wb-data.html

17. "RabtaGhar Updates – PTA Press Release", Telecom, 7 January 2009, telecompk.net/2009/01/07/rabta-ghar-updates

ICT services across Pakistan by establishing Multi-purpose Community Telecentres (MCTCs)¹⁸ in rural areas. However, the project has fallen victim to organisational corruption and mismanagement and has been unable to deliver satisfactory results.¹⁹

Further, the Special Rapporteur suggests that “[a]s mobile technology is increasingly being used, and is more accessible in developing States... States [should] support policies and programmes to facilitate connection to the Internet through the use of mobile phones”.²⁰

As many countries start developing fourth-generation (4G) networks, which will allow speedy internet access on mobile phones, Pakistan, due to a lack of planning and awareness, has not even developed third-generation (3G) networks.²¹ This shows a lack of vision and the absence of a policy to adopt these new technologies that would benefit citizens who use mobile phones for internet access.

La Rue also stresses the need to loosen regulation on the internet to ensure a “free flow of ideas and information and the right to seek and receive as well as to impart information and ideas over the Internet”.²²

Article 19 of the Constitution of Pakistan states:

Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of 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 or incitement to an offence.²³

Article 19 highlights the complexity of laws regarding freedom of speech and the right to information in Pakistan. Historically, Pakistan was among the few countries to introduce a law on freedom of information, called the Freedom of Information Ordinance (1997), which was aimed to ensure the right of citizens to demand information from the government. Unfortunately, this ordinance was allowed to lapse and was never brought before Parliament. In October

2002, the President of Pakistan promulgated the Freedom of Information Ordinance 2002. This ordinance was an improvement of the 1997 ordinance and ensured transparency by allowing citizens access to official records held by any public body of the federal government, including ministries, departments, boards, councils, courts and tribunals. However, the ordinance does not apply to government-owned corporations or to provincial governments.

Meanwhile, Article 19-A, newly-inserted under the 18th Amendment, states:

Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.²⁴

Both Article 19 and 19-A qualify the fundamental rights of citizens by setting “reasonable restrictions” on grounds relating to the glory of Islam, security or defense of Pakistan, friendly relations with foreign states, public order, decency or morality. The language of these articles is very vague and unclear. In practice, government authorities use these laws to restrict information and curb freedom of speech by taking advantage of their vague language.

In 2011, a lawmaker from the ruling Pakistan People’s Party, Sherry Rehman, introduced the Right to Information Bill in the National Assembly, intended to prevent all public bodies from blocking access to public records.²⁵ The bill was entrusted to a Standing Committee of the National Assembly for further discussion and is progressing towards becoming law.

This bill proposed a number of changes and additions to the Freedom of Information Bill of 2004. A few of the important changes and additions include an expansion of whistleblower protection, an expansion in the definitions of complaints, public records, and public bodies, and protection against premature disclosure. The refusal to disclose records would need to be accompanied by a comprehensive written response by a public official. Additional recourse to the courts emphasised, along with the imposition of a mandatory requirement on the government to maintain and index comprehensive public records, the encouragement of partial disclosure of information if full disclosure is not possible.²⁶ All these proposed amendments are intended to make the bill clearer, more result-oriented and productive.

24. Ibid

25. Javaid-ur-Rahman, “Right to Info Bill Lands in NA”, *The Nation*, 12 October 2011, www.nation.com.pk/pakistan-news-newspaper-daily-english-online/politics/12-Oct-2011/Right-to-Info-Bill-lands-in-NA

26. Jinnah Institute, “The Right to Information Program”, 11 October 2011, jinnah-institute.org/programs/open-democracy-initiative/right-to-information

18. Absar Kazmi, “USF Connects Pakistani Villages to the World of Infinite Possibilities”, *Pakistan Insider*, 6 June 2009, insider.pk/technology/usf-connects-pakistan

19. Abrar Mustafa, “Move to Use Rs45 bn of Telecom Companies for BISP”, *The News*, 25 July 2011, www.thenews.com.pk/TodaysPrintDetail.aspx?ID=7644&Cat=13&dt=7/25/2011

20. La Rue, *Report of the Special Rapporteur*, para. 91

21. “PTA Delays 3G Licensing Auction Indefinitely”, *dawn.com*, 26 April 2012, dawn.com/2012/04/26/pta-delays-3g-licensing-auction-indefinitely

22. La Rue, *Report of the Special Rapporteur*, para. 81

23. *The Constitution of Pakistan and Fundamental Rights* www.sdpi.org/know_your_rights/know%20you%20rights/The%20Constitution%20of%20Pakistan.htm

All the proposed amendments and additions presented in the Right to Information Bill 2011 can transform the functionality of the Right of Information Law in Pakistan if approved by the Standing Committee and subsequently adopted by the National Assembly and Senate.

Content blocking

La Rue also said,

With regard to technical measures taken to regulate types of prohibited expression, such as the blocking of content, the Special Rapporteur reiterates that States should provide full details regarding the necessity and justification for blocking a particular website and that the determination of what content should be blocked must be undertaken by a competent judicial authority or a body that is independent of any political, commercial or other unwarranted influences in order to ensure that blocking is not used as a means of censorship.²⁷

The mechanism used by the government to censor the internet, usually done on vague constitutional grounds, is very opaque. This inadequate protection for fundamental rights and freedoms is especially concerning when combined with the government's track record and its plans to filter and block internet content throughout the country.

On 23 February 2012, for example, the National ICT R&D Fund placed an advertisement in the press, calling relevant national and international service providers and companies to submit proposals "for the development, deployment and operation of a national level URL Filtering and Blocking System".²⁸

To understand the magnitude of this move, we can look at just one requirement of the proposal, which was posted on the National ICT R&D Fund website: "Each box should be able to handle a block list of up to 50 million URLs (concurrent unidirectional filtering capacity) with processing delay of not more than 1 milliseconds".

Filtering on this massive scale will continue to be governed by unclear concepts like "undesirable content". Once again, the government did not explain what it meant by "undesirable", what kind of websites or material will fall under the term or even why such drastic action was necessary.

Last August, the government launched yet another unprecedented attack on internet freedom. This time it was by issuing a legal notice to all ISPs

ordering them to inform government authorities if they found that any of their customers were using virtual private networks (VPNs) to browse the web. VPNs allow internet users to browse the internet anonymously so they can access banned websites and exchange emails without fear of detection. The notice urged ISPs to report customers who are using "all such mechanisms including encrypted virtual private networks (EVPNs) which conceal communication to the extent that prohibits monitoring". The reason they provided for this ban was that it would hinder communication between terrorists.²⁹

Article 19,³⁰ a UK-based human rights organisation, presented a report³¹ on the Pakistan Telecommunication Act 1996 and examined its compatibility with international standards relating to the rights to freedom of expression, information and privacy. The report concluded that there are many provisions in the act which are incompatible with Pakistan's obligations under international laws and violate citizens' rights of freedom of expression, access to information and protection of privacy.

The Article 19 report pointed to Article 31 of the Pakistan Telecommunication Act which contains a number of broadly-drafted provisions that criminalise certain categories of speech. Article 31(d) of the act also restricts the transmission of any kind of material which is "indecent or obscene". Without defining the term "mischief" Article 31(h) also creates a penalty for anyone who "commits mischief".

Article 19's report strongly condemned the

strong power given to the Federal Government in the name of national security to set limitations on free expression and the privacy of communications: Article 8(2)(c) allows the Federal Government to issue decrees on "requirements of national security"; Article 54 overrides all other laws and gives the Government the power to intercept communications and shut down telecommunications systems (see below for detailed analysis of sections) without need for any other legal authorisation or court approval; and Article 57(a)(g) authorises the Government to set rules on "enforcing national security measures."³²

Article 54(1) of the Pakistan Telecommunication Act also provides government authorities with the

27. La Rue, *Report of the Special Rapporteur*, para. 82

28. Bytes for All, "Locking up the Cyberspace in Pakistan", 24 February 2012, content.bytesforall.pk/node/39

29. Josh Halliday and Saeed Shah, "Pakistan to Ban Encryption Software", *The Guardian*, 30 August 2011, www.guardian.co.uk/world/2011/aug/30/pakistan-bans-encryption-software

30. Article 19, www.article19.org

31. Article 19, *Pakistan: Telecommunications (Re-organization) Act - Legal Analysis* (London: Article 19, 2012), www.article19.org/data/files/medialibrary/2949/12-02-02-pakistan.pdf

32. *Ibid*

power to intercept communications “in the interest of national security or in the apprehension of any offence”. The broad nature of these laws and provisions, and their inappropriate and unfair application by authorities, show how the government is violating the spirit of the law on freedom of expression, opinion and choice when it comes to the internet. This is clearly illustrated by the categories of online content which authorities are focused on restricting and blocking.

The content which is most targeted by the Pakistani authorities falls mostly into three categories:

Blasphemous material

Religion plays a very important role in Pakistani society. When internet communication was reshaping itself as an important part in the lives of young Pakistanis, the government used Islam to justify instructing all ISPs to block any website displaying any kind of blasphemous content. The government has been attempting to censor the internet on these grounds since 2003.³³ In March 2006, the Supreme Court of Pakistan issued orders to regularly monitor the internet for blasphemous material and ban anything which hurts the religious sensitivities of Pakistanis.³⁴ In Pakistan, due to the high influence of religion in society, the ethical codes of Islam take precedence over certain human rights, such as freedom of speech and expression and the government uses this religiosity to start the process of censorship in Pakistan. That’s why blasphemy is an ideal tool for the government to initiate censorship in Pakistan.

In February 2008, the government, in another move to restrict freedom of the internet in Pakistan, ordered all ISPs to ban access to the popular video-sharing website YouTube because it carried “blasphemous” content and material considered offensive to Islam.³⁵ This attempt at censorship briefly affected worldwide access to YouTube for a few hours as it rerouted many users across the globe when they tried to access the site.³⁶

The first attempt at wide-scale censorship was after controversy over a caricature published in Denmark satirising the Prophet Mohammed. In

response, the PTA issued instructions to all ISPs in Pakistan to block any website displaying the controversial cartoon images.³⁷ Since then, the PTA has often restricted access to different websites and online material that it deems blasphemous. Besides YouTube, websites that have been banned at one time or another for the alleged presence of blasphemous material include Flickr, and the user-generated online encyclopedia Wikipedia.³⁸

In May 2010, a page on Facebook announced a competition called “Draw Muhammad Day”. The government reacted to this by taking the extraordinary step of blocking Facebook, using the same excuse of blasphemy.³⁹ Instead of respecting the right of citizens to choose what they wish to see on the internet, the government chose censorship.

Due to public outcries, the blanket blocks were only temporary and by the end of May 2012, most of these services were available, although the authorities appeared to shift their strategy by blocking individual webpage links instead.

The latest battle over internet censorship took place on 20 May 2012 when the newly-appointed Minister of Information Technology Raja Pervez Asharaf tried to exploit the religious sentiments of the people by ordering a ban on the micro-blogging website Twitter. He said “it [Twitter] failed to respond and take action regarding the publishing of blasphemous content”.⁴⁰ After protests by civil society and NGOs⁴¹ working for internet freedom, the blockade was lifted following an intervention from Prime Minister Yousuf Raza Gilani.⁴² However, the eight-hour long blanket ban showed that the government of Pakistan is not sincere in providing free and fair internet access to its citizens and has tools and systems in place to ban any website whenever they choose.

In another recent development, on 21 May 2012, the police in the capital city of Islamabad, on the orders of a city court, registered a case against

33. Bahzad Alam Khan, “PTCL Begins Blocking Proxy Servers: Proscribed Sites”, *dawn.com*, 27 July 2003, archives.dawn.com/2003/07/28/local7.htm

34. “Blasphemous Websites to be Blocked, Orders SC”, *Asia Pacific Arts*, 2 March 2006, www.asiaarts.ucla.edu/071102/article.asp?parentid=40226

35. “Pakistan Blocks YouTube for ‘Blasphemous’ Content”, *Google*, 24 February 2008, afp.google.com/article/ALeqM5jo-SE_bmENEZM46rwdVuDt9iK5zg

36. “Pakistan’s YouTube Ban Briefly Affected Worldwide Access”, *The Economic Times*, 26 February 2008, articles.economictimes.indiatimes.com/2008-02-26/news/27721225_1_danish-newspapers-internet-service-pakistani-cleric

37. Jefferson Morley, “Pakistan’s Blog Blockade”, *The Washington Post*, 8 March 2006, blog.washingtonpost.com/worldopinionroundup/2006/03/pakistans_blog_blockade.html

38. Association for Progressive Communication (APC), “The Shameful Saga of the Internet Ban in Pakistan”, 22 July 2010, www.apc.org/en/node/10786

39. Rob Crilly, “Facebook Blocked in Pakistan over Prophet Mohammed Cartoon Row”, *The Telegraph*, 19 May 2010, www.telegraph.co.uk/news/worldnews/asia/pakistan/7740295/Facebook-blocked-in-Pakistan-over-Prophet-Mohammed-cartoon-row.html

40. “Twitter Blocked in Pakistan”, *The News*, 20 May 2012, www.thenews.com.pk/article-50052-Twitter-blocked-in-Pakistan-

41. Bytes for All, “Federal Minister for IT Slaps Nationwide Twitter Ban on Pakistani Citizens”, 20 May 2012, content.bytesforall.pk/node/51

42. Chris Smith, “Twitter Blocked, Then Restored in Pakistan Over ‘Draw Muhammad’ Row”, *techradar.com*, 20 May 2012, www.techradar.com/news/internet/twitter-blocked-then-restored-in-pakistan-over-draw-muhammad-row-1081214

Facebook.⁴³ The petitioner, Advocate Rao Abdur Rahim, was quoted as saying, “We will approach the High Court for registration of an FIR [First Information Report] against the US embassy”. This anger against the US was (according to the petitioner) due to the fact that Twitter is an American company.

In July 2012 the Pakistan Telecommunication Authority banned the official website of a religious minority group, Ahmadiyya.⁴⁴ Once again, the excuse offered was blasphemous content on the website. This attempt was an indication that authorities are willing to restrict the rights of religious minorities by censoring their websites.

A week after the incident, another ban was imposed on a watchdog website in Pakistan.⁴⁵ This website had been documenting the ruthless killings of Shia people in Pakistan. A protest by the Shia community in Karachi after the banning of the website was dealt with very harshly by the police who blocked the protesters on a road and fired into the air.

Decency or morality

Once the door of internet censorship was opened in the name of blasphemy, the government expanded its efforts. Other excuses for censorship, such as morality, offensive content and unethical material, were added to the list of reasons for content to be filtered in cyberspace. It is important to note that such terms remain undefined and hence unjustifiable.

The most popular target under these new excuses is internet pornography. In October 2011, the PTA announced that a list of 150,000 pornographic websites had been sent to different ISPs, mobile phone service providers and international bandwidth providers to be blocked. In the first stage, over 13,000 pornographic websites were banned.⁴⁶ The PTA has further plans to add more websites in a crackdown which plainly violates the freedom of choice granted to individuals under the Constitution.

The real problem with such moral policing is that morality is subjective and open to different interpretations by different individuals. For example, a ban on porn may start with blocking pictures and videos which contain nudity or the depiction of a sexual act, but could

well end up making sure all medical documentations of the human body are also blocked. The definitions of concepts like modest or decent attire also differ from person to person. Some may object to women wearing jeans or skirts because it is against their religious values, but it would be difficult to cater to everyone’s norms. In addition, such bans directly affect the already dire state of women’s rights in the country.

Political dissent

The third kind of justification used by the government to filter the internet – and possibly the most dangerous of all – has been the eradication of anti-government material.

Content on the internet which is not favourable towards the government and, most importantly, towards the all-powerful security establishment (armed forces and intelligence agencies) is already being blocked. The most systematically censored is information disseminated by Baloch and Sindh political dissidents. Many Baloch websites, forums and online newspapers, including Baloch Warna, Crisis Balochistan, Baloch Hal, Baloch Johd and others, have been blocked all over Pakistan.⁴⁷

In February 2010, the PTA blocked access to some videos on YouTube showing President Asif Ali Zardari telling an unruly audience member to “shut up”.⁴⁸ In May 2011, Pakistan also banned the popular American music magazine *Rolling Stone*. This ban coincides with the magazine publishing a short article highlighting Pakistan’s “insane military spending”⁴⁹. Even after a year, the PTA still hasn’t explained why the website was first banned or why it continues to be blocked to this day.

The government justifies this internet censorship spree by citing Section 99 of the Penal Code, which allows the government to restrict access to information that might be prejudicial to the national interest.⁵⁰

Cyber laws

The Electronic Crimes Ordinance (PECO) 2007 is the most recent attempt at instituting cyber law legislation in Pakistan. However, critics decried the bill as being politically motivated and designed to curb

43. Qaiser Zulfiqar, “‘Blasphemous Content’: Police Register FIR Against Facebook”, *The Express Tribune*, 22 May 2012, tribune.com.pk/story/382334/blasphemous-content-police-register-fir-against-facebook

44. “PTA Bans Official Ahmadi Website: Report”, *The Express Tribune*, 6 July 2012, tribune.com.pk/story/404509/pta-bans-official-ahmadi-website-report

45. “Ban on Shia Website: Police Disperse Protest Rally in Karachi”, *The Express Tribune*, 17 July 2012, tribune.com.pk/story/409505/ban-on-shia-website-police-disperse-protest-rally-in-karachi

46. Aamir Attaa, “PTA Decides to Ban Explicit Websites”, *Pro Pakistani*, 20 October 2011, propakistani.pk/2011/10/20/breaking-pta-decides-to-ban-explicit-websites

47. “Baloch Websites Banned”, *Daily Times*, 28 April 2006, www.dailytimes.com.pk/default.asp?page=2006\04\28\story_28-4-2006_pg7_5

48. Tasadduq Bashir, “PTA Restricts President Zardari’s Famous ‘Shut Up’ Youtube Video”, *TechReaders.com*, 9 February 2010, www.techreaders.com/2010/02/pta-restricts-zardari-shut-up-youtube-video

49. Jillian York, “Pakistan Escalates its Internet Censorship”, *Al-Jazeera*, 26 July 2011, www.aljazeera.com/indepth/opinion/2011/07/201172511310589912.html

50. “Internet Censorship is in ‘National Interest’”, *BBCUrdu.com*, 29 July 2006, www.bbc.co.uk/urdu/pakistan/story/2006/07/060729_ptc_website.shtml

dissent. This draconian law was introduced via a presidential ordinance from the dictator Pervez Musharraf but, thanks to effective advocacy by civil society and other stakeholders, it was finally discredited in November 2009.

There are several cases⁵¹ which show that the absence of a cyber crime law is hurting not only internet freedom but directly affecting women and young girls. The government uses the excuse of security to stifle voices of dissent on the internet, but whenever real crimes take place online law-enforcement agencies claim they are helpless to act due to an absence of legislation.

Awareness

In the last decade, Pakistan has witnessed a huge boom in internet communication. The use of social media, internet portals, resources and blogs has surged, but this has also been accompanied by increased attempts at government control. To counter this, the combined efforts of the media, political parties and civil society will be crucial. However, the former two have not yet shown strong support for internet freedom.

Civil society organisations, on the other hand, are working to raise their voice against unjust internet censorship. Recently, when the government tried to initiate a countrywide internet filtering project, civil society organisations dedicated to internet freedom initiated a major campaign protesting this unconstitutional decision.⁵² The protest was supported and amplified by the national and international media, human rights organisations and concerned citizens, who demanded the restoration of unconditional internet freedom in the country.

So far, these groups have been very successful in their efforts. First, citizens were educated about implications of this move by issuing public statements⁵³ and spreading their message through social media. A few parliamentarians who are vocal about freedom of speech and expression were contacted and briefed about the situation.⁵⁴ Open letters were sent to the Ministry of Information Technology to seek explanations for the proposed system and the objections of the rights organisations were conveyed to them. All of this work resulted in the government shelving the firewall proposal although, since the

cancellation was not accompanied by an official statement, activists suspect that this may just have been a temporary measure to placate them.

The media, on the other hand, has been tardy to address threats to internet freedom. This has especially been the case with the Urdu media. The mainstream electronic media still lacks a strong focus on issues relating to internet freedom. The print media as a whole also ignores these issues, but at least a few individuals are able to get op-ed columns published on the matter.

Few can doubt, however, just how important the internet has become to various actors in Pakistan. For instance, over the past decade, individual activists and groups have made great use of the internet to advance their agenda and fight for their cause, revealing it as a vital tool in their efforts toward social justice.

Pakistan Tehreek-e-Insaf⁵⁵ (an emerging political party in Pakistan led by former cricketer Imran Khan) has been a pioneer in harnessing the potential of the internet to build digital networks, spreading promotional content, mobilising the masses and obtaining real-time feedback. Key figures in the party have made active use of platforms like Twitter and Facebook. Following suit, other major political parties such as the Pakistan Peoples' Party (PPP),⁵⁶ Pakistan Muslim League-Nawaz (PML-N),⁵⁷ and Muttahida Qaumi Movement (MQM),⁵⁸ have also used the medium as a core tool for political activism.

Similarly, the lawyers' movement of 2007,⁵⁹ when a large number of protestors took to the streets against Musharraf's removal of judges, was a forerunner in the use of the internet for political purposes. Protests were scheduled on the internet and the movement was strengthened through online petitions, discussions and activism, such as blacking out online images to signal anger and disgust.

There have also been successful online protests against the PTA's SMS filtering campaign, moral policing by a popular TV show host, government plans to build a massive firewall and the Twitter ban.

The outcome of these online protests is cause for hope. The government was put on the defensive and had to accept the demands of civil society and rights organisations. The online protests also forced the mainstream electronic media to take notice and conduct programmes during primetime which debated these issues and raised awareness about citizens' rights.

51. Maham Javaid, "A World Without Law", *Herald Dawn.com*, 17 January 2012, herald.dawn.com/2012/01/17/a-world-without-law.html

52. Bytes for All, "Locking up the Cyberspace in Pakistan", 24 February 2012, content.bytesforall.pk/node/39

53. Ibid

54. Bytes for All, "Internet in Shackles: an Alarming Attack on Pakistan's Nascent Democracy!", 17 March 2012, content.bytesforall.pk/node/44

55. Pakistan TehreekInsaf, www.insaf.pk

56. Pakistan People's Party, www.ppp.org.pk

57. Pakistan Muslim League, pmln.org

58. MuttahidaQaumi Movement, www.mqm.org/default.aspx

59. Lawyers Movement Pakistan, www.movementforruleoflaw.com/lawyersmovementpakistan.php

Impact on other rights

The importance of internet rights is no longer limited to freedom of expression and opinion. Restricting internet freedom now adversely affects many other rights – in areas such as education, the economy, health, women’s rights, participation in policy-making, freedom of association and peaceful assembly – and reduces the overall quality of life for citizens.

Education is a basic human right and the internet is a vital resource in accessing it. In the modern world, most educational institutions are using this medium to make the educational experience more efficient and effective. Blanket bans on popular websites like Wikipedia, YouTube and Facebook affect students who use these sites for educational purposes.

Students and young entrepreneurs set up Facebook pages to publicise their small businesses⁶⁰ and so when the government bans such websites it ends up significantly hurting them. Additionally, the information technology industry in Pakistan suffers setbacks due to these blanket bans as it cuts off their contact with worldwide business partners.

Websites like Facebook and Twitter also play an important role in creating awareness of important social issues among Pakistani youth. There are many campaigns running on Facebook to promote women rights,⁶¹ sexuality, reproductive health, lesbian, gay, bisexual, and transgender (LGBT) rights,⁶² and education.⁶³ Other campaigns against extremism, forced marriages, conservatism and lawlessness also employ social media. Banning these websites affects these campaigns and frustrates much of their work.

Access to the internet also makes it easier to raise issues about local problems. Social media plays an important role in this regard, mostly in urban centres, as engaged users can voice complaints about issues that are directly affecting them.

In health care, too, the use of social media is having a positive effect. Important health campaigns like polio vaccinations are treated with suspicion in conservative areas of the country⁶⁴ and social media plays an important role in breaking such taboos.⁶⁵

The rapid increase in the popularity of internet communication led to the establishment of a spe-

cialised government department, the Electronic Government Directorate, to allow digital interaction between the government and its citizens. But the constant attacks on freedom of the internet have prevented this initiative from transforming into a workable solution that would ease digital communication between the government and citizens.

Conclusion

This report examined different areas of internet freedom in Pakistan in light of La Rue’s report on the promotion and protection of the right to freedom of opinion and expression on the internet. It also focused on violations of internet freedom in Pakistan, unclear laws, legislation and constitutional provisions used by government authorities to limit freedom of expression, choice and access to the internet in the country. An overview of different cases and incidents where government authorities used constitutional loopholes to restrict the freedom of expression and speech in Pakistan is also presented in the report. This report concludes that:

- Freedom on the net in Pakistan is under constant threat from government authorities. Different excuses have been made to violate the basic right of the citizens to express themselves or access any information they want.
- Civil society, human rights groups and NGOs play an important role in condemning government censorship, but there is a need to widen this role by raising more awareness about internet-related human rights in the country.
- Apart from organisations focused on technology, other civil society organisations working on diverse issues should also join the struggle for internet freedom in Pakistan.
- A new Right to Information Bill has been presented in Parliament and should be adopted immediately.
- Content blocking has been practiced by the government since 2003 and has been used on numerous occasions to block political speech and curb dissent.
- As Pakistan draws close to the next general election, the government is stepping up its censorship efforts. This report requests the international community to take urgent notice of violations of freedom of expression, association and speech in Pakistan and bind the Pakistani government to allow a free and fair flow of information on the internet during the general election.

60. Small Business Entrepreneurs in Pakistan, www.facebook.com/pak.entrepreneur

61. Women’s Rights Association Pakistan, www.facebook.com/pages/Womens-Rights-Association-Pakistan/13898865951276

62. LGBT Rights in Pakistan, www.facebook.com/pages/Gay-rights-in-Pakistan/138477319510457?rf=138462952849403

63. Education Emergency, www.facebook.com/edemergencypk

64. Alex Rodriguez, “In Pakistan, Polio Vaccines Cause for Fear”, *Los Angeles Times*, 17 October 2011, articles.latimes.com/2011/oct/17/world/la-fg-pakistan-polio-20111017

65. Make Pakistan Polio Free, www.facebook.com/groups/172917472784836

Recommendations for civil society and other stakeholders

This report suggests the following recommendations to improve the situation of internet freedom and human rights in Pakistan. Given the current environment, it is essential to think and plan proactively instead of being reactionary and waiting for the government to launch an attack on internet freedom in the country. It is therefore important to strengthen the role of civil society and build the capacity of the media on internet freedom issues. This can be done by employing the following measures:

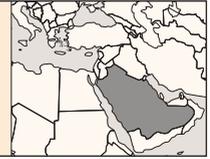
- Raise awareness about the importance of freedom of the internet in the country by linking it with other basic human rights. This can be done by campaigning actively in the print and electronic media to educate citizens about their rights and how the government can violate the basic right of free expression and opinion by blocking content on the internet.
- Build the capacity of young activists and volunteers who are eager to spread the message of internet freedom. Such workshops can be organised in different parts of the country by engaging colleges and university students and teachers.
- Engage with progressive voices present in Parliament to streamline the agenda of internet freedom by using the existing system and educating parliamentarians about the importance of the essential right of free expression and opinion.
- Actively and unapologetically condemn every government action which goes against the basic right of free speech guaranteed to the citizens of Pakistan.
- Organise a joint strategy by uniting all groups, activists, NGOs and civil society organisations in Pakistan on the one-point agenda of protecting internet freedom in the country. This by working together and pressurising the government to abstain from any act that will damage internet freedom in the country.
- Participate in the on-going policy processes and work with other stakeholders like IT companies, software houses, ISPs and telecommunication companies to express the concerns NGOs and civil society have regarding the internet regulations in the country.
- Strengthen the consumer rights movement around internet service availability and quality of access.

- Maintain a more coordinated and effective relationship with the international community and human rights bodies to make the world aware of violations of internet freedom in Pakistan.

Recommendations for the government

- Acknowledge the critical importance of universal access to the internet as a facilitator of not only civil, political and economic progress but also in improving social and cultural human rights.
- Provide complete details in clear words regarding the reasons and justification for blocking any particular website and the process must be undertaken by a competent judicial authority or a body that is independent of any political, commercial or other unwarranted influences, in order to ensure that blocking is not used as a means of censorship.
- Ensure internet freedom in Pakistan by removing all restrictions on accessing the internet. Provide its citizens a basic right to express themselves in any way they choose on the internet and stop any kind of internet surveillance or banning of content, regardless of political, religious and social excuses.
- Take steps to ensure the flawless and corruption-free working of the Electronic Government Directorate (a specialised government department established to make digital interaction between citizens and government departments and ministries convenient and efficient).
- Enact pro-people cyber crime legislation to ensure citizens' safety and online privacy.
- Ensure access to the internet for all, including women, the aged, children and people with disabilities. This includes ensuring affordable public internet access, especially in rural areas where infrastructure, education and opportunities are scarce. The government should monitor previous projects aimed at providing internet access in rural areas to analyse weaknesses and develop better infrastructure and projects in these areas. ■

SECURING INTERNET RIGHTS IN SAUDI ARABIA



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Background

Saudi Arabia is a theocratic monarchy that some¹ have argued does not recognise freedom of expression and association, a presumption more recently fuelled by the development of internet policy in the country. It has become a popular assumption amongst commentators that the internet will help to drive political liberalisation throughout the Middle East and North African (MENA) region. For instance, Al-Jazeera's first Managing Director Mohamed Jassim Al Ali has stated that "democracy is coming to the Middle East because of the communication revolution".² However, the relationship between the internet and the Saudi political sphere as a liberalising force in the country is profoundly ambiguous. While a casual link between the internet as a liberalising medium and a backdrop to political reform might be the case in some states in the Middle East, Saudi political and socio-economic fabric is historically very different. Although the internet does have a transformative agency, some have overlooked the fact that this agency might be conservative in nature.

While Saudi Arabia's internet penetration has been growing at a very slow pace – 39% in 2009 increasing to 40% in 2010 (during the Arab uprising the number of internet users spiked significantly) penetration still remains an extremely low rate considering that almost 60% of the population are under the age of 24.³ The number of Facebook users in the country was logged at 4,534,769 users on December 2011 (29% of internet users in Saudi Arabia

visit Facebook). Women under 25 account for 48% of all internet users in the kingdom.⁴

When it comes to the information society, Saudi Arabia is a place of contradictions. While the Saudi government has been spending heavily on the ICT sector, Saudi Arabia, along with China, is widely considered to have one of the most restrictive internet access policies.⁵ Before granting public access to the internet in 1999, the Saudi government spent two years building a controlled infrastructure, so that all internet traffic would pass through government-controlled servers. With the huge expansion in public network and wireless access, government policy is changing to allow the development of new technologies while maintaining the same security and control of media use that is part of Saudi socio-political culture.

The country's filtering system is run by the internet services unit at King Abdulaziz City for Science and Technology (KACST), and regulated by the Communications & Information Technology Commission (CITC). It blocks clear-cut violations⁶ – including criminal activity, porn and gambling – by assessing all incoming web traffic to the Saudi Kingdom. This passes through a proxy farm system running content filtering software – a system commonly used by many governments to ensure internet content in their sovereignties comply with national laws.⁷ A list of addresses for banned sites is maintained by the filtering system. This unpublished list is updated daily based on the content filtering policy team. A list of sites deemed to be "pornographic" is also provided periodically by the filtering software provider.

KACST is a scientific institution reporting to the Saudi Arabian King Abdullah Bin Abdul-Aziz and the Prime Minister. It includes both the Saudi Arabian national science agency and its national laboratories.

1. See the Arabic Network for Human Rights Information, "ANHRI Condemns Ongoing Stifling of Freedom of Expression by Authorities", *The Global Network of Free Expression*, 18 October 2011, www.ifex.org/saudi_arabia/2011/10/18/show_staff_detained; and Human Rights Watch, *World Report 2012: Saudi Arabia*, www.hrw.org/world-report-2012/world-report-2012-saudi-arabia
2. Mohamed Zayani, "Introduction - Al Jazeera and the Vicissitudes of the New Arab Mediascape" in *The Al-Jazeera Phenomenon* (Boulder, CO: Paradigm Publishers, 2005)
3. Internet World Stats – Usage and Population Statistics, "Saudi Arabia", www.internetworldstats.com/middle.htm

4. Ibid

5. OpenNet Initiative, "China", 9 August 2012, opennet.net/research/profiles/china-including-hong-kong

6. For more information on what is deemed "clear-cut" by the Saudi authorities, please visit: Rafid Fatani, "Saudi Arabia" in *Global Information Society Watch*, 2009, www.giswatch.org/country-report/2009-access-online-information-and-knowledge/saudi-arabia

7. OpenNet Initiative, "China"; and OpenNet Initiative, "Global Internet Filtering Map", map.opennet.net

The functions of the science agency include policy-making on science and technology, data collection, funding of external research, and services such as the patents office. As a result, KACST is responsible for developing and coordinating internet-related policies and managing the connections between the national and international internet. All privately owned service providers are linked to the country gateway server at KACST.

In spite of the fact that Saudi Arabia is considered to be one of the world's main internet content "over-regulators",⁸ the Saudi government devotes very few resources to regulating internet content. There are only 25 government employees managing the censoring of content. The kingdom, however, encourages citizen control by relying on a bottom-up approach to censorship, allowing citizens to report what they deem inappropriate content.⁹ KACST maintains a web-based form that users can fill-out to report sites they feel should be blocked for whatever reason, and CITC receives roughly 1,200 requests a day from the public to have sites blocked (as of early 2012, blocking and unblocking requests are made through the CITC website). While this is arguably not the most efficient way to safeguard the interests of citizens, it is a system in which the government relies heavily on a very conservative citizenship, and in doing so does not safeguard the interest of all citizens.

The small team of full-time employees at KACST study the citizen requests and implement them based on personal evaluations of the request. Sites of various kinds are also blocked based upon direct requests from governmental security bodies.¹⁰ KACST has no authority in the selection of these sites and its role is limited to carrying out the directions of the security bodies.

While the UN Special Rapporteur on the right to freedom of expression and opinion Frank La Rue suggests that any restriction to the right to freedom of expression must meet the strict criteria under international human rights law,¹¹ the Saudi authorities justify the limitation on access to internet content from a cultural, religious and national security perspective. However, it is claimed by Khalid M. Al-Tawil, from the College of Computer Sciences &

Engineering at the King Fahd University of Petroleum & Minerals in Dhahran, that control and censorship in Saudi Arabia is an historical phenomenon, and is motivated by socio-political reasons.¹² Email and chatrooms are also reportedly monitored by the Saudi Telecommunications Company,¹³ and it is not uncommon for the Saudi Arabian government to temporarily block BlackBerry and other smart-phone messaging services.¹⁴ The government's lack of transparency in not publishing a list of offending sites only highlights the need for change.

Internet-related human rights issues in Saudi Arabia

In March 2007, Saudi Arabia's legislative body, the Council of Ministers, issued a set of laws¹⁵ affecting policy and regulations for internet users in the kingdom. The new policy measures and regulations prohibited internet users from

[P]ublishing data or information that could contain anything contravening the Saudi interpretation of Islamic principles (directly or implicitly) or infringing the sanctity of Islam and its benevolent Shari'ah, or breaching public decency, anything damaging to the dignity of heads of states or heads of credited diplomatic missions in the Kingdom, or harms relations with those countries, the propagation of subversive ideas or the disruption of public order or disputes among citizens and anything liable to promote or incite crime, or advocate violence against others in any shape or form among many other things.¹⁶

While some on this list mentioned above tend to security matters and are arguably clearer to identify, most clauses are very ambiguous and come down to interpretation.

While Saudi Arabia's history and culture is unique in its contribution to Islam, understanding this history and culture holds the key to understanding the government's relationship with the religious right. The kingdom is host to Mecca and Medina, cities of

8. Fatani, "Saudi Arabia"

9. The Kingdom of Saudi Arabia Internet Portal, "General Information on Filtering Service", www.internet.gov.sa/learn-the-web/guides/content-filtering-in-saudi-arabia

10. Ibid

11. Frank La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27* (Geneva: United Nations General Assembly, Human Rights Council, 2011), www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

12. Khalid Al-Tawil, "The Internet in Saudi Arabia", College of Computer Sciences & Engineering report, at the King Fahd University of Petroleum & Minerals in Dhahran, 2007, www.faculty.kfupm.edu.sa/coe/sadiq/.../Internet%20in%20SA-update1.doc

13. Freedom House, *Freedom of the Press 2011 - Saudi Arabia*, 17 October 2011, www.unhcr.org/refworld/docid/4e9bec2fc.html

14. Josh Halliday, "BlackBerry Service Back in Saudi Arabia", *The Guardian*, 6 August 2010, www.guardian.co.uk/technology/2010/aug/06/blackberry-saudi-arabia

15. The Kingdom of Saudi Arabia, Council of Ministers Report 11561/B, "Electronic Transitions Legislation", 27 Mar 2007, www.ncda.gov.sa/media/low217.pdf (in Arabic)

16. Ibid

immense religious significance to nearly two billion Muslims globally, and the royal family comes under frequent pressure from religious bodies to maintain the sacredness of the land. In most cases, the Saudi government is under pressure not for being intolerant, but for not being intolerant enough. As a result, when internet legislation is taken on face value, it is no surprise that human rights activists describe the current status of freedom of expression and association in Saudi Arabia to be repressive. However, a religious-political context must be applied to the debate in order to fully examine the reasons behind the status quo.

Additionally, government censorship on internet users in Saudi Arabia, while invading internet users' privacy and right to information, is not a new concept – nor is it a concept that is only available in the East. Most, if not all, governments censor their internet content depending on local laws, norms and customs. Government censorship generally highlights an important debate on the right to privacy, and access to content over citizen security, and many countries tend to abuse such powers and over-regulate internet content. This by no means is an excuse to over regulate internet content, but puts the issue of censorship in Saudi Arabia in perspective.

One core element that the Saudi Arabian authorities have to deal with is balancing modernisation – including access to and use of the internet – and local cultural values and traditions. The religious establishment in the country has been leading a mass call to “purify” Saudi society from any entity that could destabilise the monotonous structure it currently holds, often campaigning for further censorship, and encouraging people to report material they deem “inappropriate” – including what individuals deem “offensive” and might consider “vulgar”¹⁷ – thereby legitimising the censorship process.

Given the restricted environment for print and broadcast media, there has been a significant rise in the number of Saudi blogs in recent years. A report from Freedom House estimates the number to be 10,000 in 2011.¹⁸ The Saudi government has increasingly responded by blocking select blogs and in some instances, such as the case of Foad Al-Farhan, by harassing and detaining bloggers.¹⁹

According to the Freedom House report, the Saudi authorities also continued to attempt to block websites, and pages on the Twitter micro-blogging service that comment on political, social, religious, and human rights issues. Despite the cultural and religious context, this is a clear example of criminalising legitimate expression, as imprisoning individuals for seeking, receiving and imparting information and ideas can rarely be justified as a proportionate measure to achieve one of the legitimate aims under Article 19, paragraph 3, of the International Covenant on Civil and Political Rights.²⁰

Content “over-regulation”

While some Saudi youth and human rights activists agree that the authorities over-regulate internet content in the kingdom, government censorship has a lot of support amongst the wider Saudi population. This public pulse can be assessed via debates on online forums and reactions to liberalisation projects. This said, there is still a struggle between socio-religious groups, human rights activists and the few civil society organisations in the kingdom promoting freedom of expression. The public outcry against the arrest and execution of those with opposing opinions has turned to the internet as the new battle ground of choice, and different social media campaigns such as the ‘Free Hamza’, the Mannal Al-Sharif and the Josoor campaigns, have been using social media tools such as Twitter, Facebook and YouTube, while conservative groups have been doing the same.

To reflect on the type of support that religious authorities have in the country, one only needs to look at the interest and support Islamic scholars enjoy online and compare this to local music artists and celebrities. Some preachers have in the excess of a million followers on Twitter, with similar figures on Facebook, compared to the tens of thousands local celebrities have. For instance, the religious scholar Mohamed Al-Arifi has just under two million followers on Twitter and over a million ‘likes’ on his Facebook page, and the scholar Salman Al-Oda has 1.2 million followers on Twitter. This compared to the most popular non-religious celebrities and public figures such as Fahad Al-Butairi who has just under 340 thousand Twitter followers and Omar Hussein with just under 200 thousand followers.

With the Saudi Arabian authorities responding to what might be considered “overzealous” cries of protection from modernisation, and the government

17. OpenNet Initiative, “Saudi Arabia”, 6 August 2009, opennet.net/research/profiles/saudi-arabia

18. Freedom House, *Freedom of the Press 2011 – Saudi Arabia*

19. Claire Soares, “Blogger Who Dared to Expose Saudi Corruption Is Arrested”, *The Independent*, 3 January 2008, www.independent.co.uk/news/world/middle-east/blogger-who-dared-to-expose-saudi-corruption-is-arrested-767807.html

20. Frank La Rue, *Report of the Special Rapporteur*

attempting to play a balancing act in order to sustain the status quo in the kingdom's governance structure, arguably more human rights are being denied to minorities, particularly those opposing the Saudi interpretation of Islamic teachings.

In September 2010, the Ministry of Information proposed a new law²¹ that would require online newspapers, blogs, and forums to obtain licences from the government in order to operate (the new legislation took effect in January 2011). In 2012, the same ministry introduced a new law²² making it illegal to be an internet journalist without a licence issued by the government. It is still not clear how the Saudi authorities intend to define journalism, and what will eventually fall under that category, or how they intend to regulate it.

To cause further confusion, according to the Human Rights Watch annual report of 2011, the Saudi Arabian Ministry of Culture and Information spokesperson made conflicting statements regarding the requirement that blogs and news websites obtain a licence.²³ The report highlighted that journalists and bloggers strongly condemned the proposed legislation, which would significantly increase the government's oversight of online expression.²⁴

Despite these arguably draconian laws, Saudi Arabia has the largest number of Twitter users per capita in the Middle East. The Saudi billionaire Prince Al-Waleed Bin Talal recently bought USD300 million in shares of Twitter, which will give him a 6% stake in the company. Surprisingly, the country is said to have amongst the highest YouTube usage in the world.²⁵

While the balancing act of maintaining security and freedom of expression is not new to almost all governments, the Saudi authorities use security concerns as an excuse to over-regulate and control content. In his report, La Rue was concerned about the emerging trend of timed (or "just-in-time") blocking that prevents users from accessing or disseminating information at key political moments, such as times of social unrest.²⁶ In Saudi Arabia, when an Arabic website published US diplomatic cables obtained by WikiLeaks, the site was blocked as some of the content was embarrassing to sen-

ior royal family members.²⁷ In other instances of censorship, in August 2009 prosecutors charged Nasir Al-Subai'i under unspecified articles of a law against cybercrime with making allegedly libellous comments against the Saudi consul in Beijing. Al-Subai'i had written on his website about his ordeal trying to secure funding for his brother's medical care abroad.²⁸ On the 13 November 2010 Facebook was blocked for a day after some users published content that was deemed to "cross a line", according to Saudi authorities.²⁹

In response to the use of the internet by human rights defenders the Saudi authorities have also issued several detentions without trails and travel bans on activists. In 2012, public prosecutors banned foreign travel to two human rights activists, Mohammed Al-Qahtani and Walid Abu Al-Khair. This was after they used the internet as a way to gather momentum in highlighting some of the country's human rights shortcomings.

Abu Al-Khair, who founded the internet page Human Rights Monitor in Saudi Arabia, was due to leave for the United States on 23 March 2012 to participate as a fellow in the Leaders for Democracy Fellowship, the US State Department's flagship international engagement project. However, he had to decline participating due to the ban.

Al-Qahtani is a university professor, and the president and co-founder of the Saudi Association of Civil and Political Rights (ACPRA), for which the Saudi authorities have denied an operating licence. Since mid-February 2012, ACPRA has filed more than three dozen court cases against the Ministry of Interior's intelligence service and the Department for General Investigations for arbitrary detention, and in some cases torture. To date, all attempts to overturn court rulings have been lost.

There have also been online campaigns calling for the closing of some of the few cultural venues in Saudi Arabia, where young people meet to discuss and talk openly about a variety of topics. For example, Jusoor (literally meaning "Bridges"), a bookstore and café where young people hold lectures, workshops and run book clubs, was closed in April 2012 after another "religious" campaign, supported by the Ministry of Interior.

There have also been a notable number of social events cancelled, mainly those promoting public

21. The Saudi Arabian Ministry of Information, "Media Legislation", 2011, www.info.gov.sa/Files/activities.doc (in Arabic)

22. Ibid

23. Human Rights Watch, "Saudi Arabia" in *World Report 2012* (New York: HRW, 2012), www.hrw.org/world-report-2012/world-report-2012-saudi-arabia

24. Ibid

25. According to interview with YouTube spokesman Aaron Zamost (2012).

26. Frank La Rue, *Report of the Special Rapporteur*

27. Committee to Protect Journalists, "After Running Leaked Cables, Websites Face Harassment", 10 December 2010, cpj.org/2010/12/after-running-leaked-cables-websites-face-harassme.php

28. Human Rights Watch, "Saudi Arabia"

29. Jorge Cino, "Saudi Arabia Temporarily Blocks Facebook", *All Facebook*, 13 November 2012, allfacebook.com/saudi-abiatariporiarly-blocks-facebook_b23072

intellectual debate. Some of these show the influence the kingdom has on its neighbours. For example, *Multaqa Al-Nahda* is a forum held annually for young people to meet with different intellectuals in the Arab world. This was supposed to be held in Kuwait recently and was reportedly cancelled by a royal decree issued by the Prince of Kuwait, allegedly due to pressure from the Saudi government, backed by the far right religious establishment.

Another event cancelled was the Choose Your Career Conference (CYCC) – a conference that was to be held in the Western region city of Jeddah, with the intention of young people meeting professionals from different sectors to get an idea of the different career paths they could follow. However, it was cancelled one day prior to the date it was supposed to be held, with no official reasons given as to why.

Again, these are all signs of non-proportionate content censorship, and a lack of transparency in the system.

Online journalism and citizen media

The internet has had a significant impact on human rights when it comes to the new role of citizen and online journalism. However this has not discouraged the continuation of the over-regulated system that exists when it comes to old media.

As mentioned, in September 2010, the Ministry of Information proposed a new law that would require online newspapers, blogs, and forums to obtain licences from the government in order to operate.³⁰ The new legislation took effect of January 2011, making governmental journalist licences subject to several restrictive conditions including: Saudi citizenship, a minimum age of 20 years, a high school degree, and “good conduct”. The final condition is so general and ambiguous that it could be used to prevent anyone from practising journalism.³¹

In 2012, the Ministry of Information also imposed a new law making it illegal to be an internet journalist without a governmental journalism licence.³² The 2012 amendment to the media law suggests that first-time violators could face fines of 500,000 Saudi riyals (USD135,000), while second-time offenders could draw a one million riyal fine (USD270,000) and a potential life-time ban on working in journalism. The new law also suggests that editors-in-chief of online newspapers must be approved by the Ministry of Culture and Information.

Without transparency or accountability mechanisms included, this law could be used to stop anyone from practising journalism.

Saudi Arabia has been added to the Committee to Protect Journalists’s (CPJ) 2012 list of most-censored countries, ranking at number eight.³³ CPJ’s staff judged all countries according to fifteen benchmarks. They included the blocking of websites; restrictions on electronic recording and dissemination; the absence of privately owned or independent media; restrictions on journalists’ movements; licence requirements to conduct journalism; the monitoring of journalists by security services; jamming of foreign broadcasts; and blocking of foreign correspondents. All of the countries on the list met at least ten benchmarks.

The Case of Hamza Kashgari and Twitter

Under Saudi Sharia law, insulting the Islamic prophet Mohammad is considered blasphemous and is punishable by death. The criminalisation of apostasy is incompatible with the right to freedom of thought, conscience and religion as set out in Article 18 of the Universal Declaration of Human Rights.³⁴

In this context, there was a furore when a 23-year-old Saudi columnist and blogger Hamza Kashgari, who was a former columnist for the daily newspaper *Al-Bilad*, posted his reflections on the occasion of the Prophet’s birthday on 4 February 2012. He wrote three tweets on Twitter about the occasion in a very sarcastic manner in response to a series of articles by the Saudi Grand Mufti (the highest religious authority in the land). In his tweets he depicted the Prophet as a human, and not in the sacred state that most Muslims observe him in. His supposed offence was to have tweeted part of an imaginary conversation with the prophet Muhammad: “I have loved things about you and I have hated things about you and there is a lot I don’t understand about you”, he tweeted; and: “I will not pray for you.”

Fuelled by Saudi religious scholars, over 30,000 tweets about Hamza’s comments flew through cyberspace within hours. Many “scholars” accused him of being an apostate. Different groups with tens of thousands of followers formed on Facebook, calling for his execution. Others suggested that his upbringing was at fault, and the number of hate crimes towards him and his immediate family grew fast. A far right Saudi scholar Nasser al-Omar used YouTube as a platform and wept during a lecture, supposedly over the “harsh” words that Hamza had

30. The Saudi Arabian Ministry of Information, “Media Legislation”, 2011, www.info.gov.sa/Files/activities.doc (in Arabic)

31. Ibid

32. Mariam Abdallah, “Saudi Ties the Tongues of Its Journalists”, *Alakhbar*, 2 June 2012, english.al-akhbar.com/content/saudi-ties-tongues-its-journalists

33. cpj.org/mideast/saudi-arabia

34. Universal Declaration of Human Rights, Article 18, www.un.org/en/documents/udhr/index.shtml

dared to say about Prophet Mohammad. This clip received over 1.5 million views.

After seeing this reaction on the social media platforms, within hours Hamza removed the tweets and issued a lengthy apology, but to no avail. Hours after that he removed his account from Twitter and fled for his life to Malaysia late at night on 6 February. In the early hours of 7 February, Saudi Arabia's king reportedly called on the Saudi Arabian Ministry of Interior to arrest Hamza and to hold him accountable for the statements he made. Hamza arrived in Kuala Lumpur on 7 February, and was arrested two days later as he was trying to continue his journey to New Zealand. Under the request of the Saudi Arabian authorities, some claim an Interpol arrest warrant had been issued, and the Malaysian authorities deported him back to his home country (however Interpol has denied its involvement). To date, he is still detained in a Saudi Arabian jail.

According to Amnesty International, court proceedings in Saudi Arabia fall far short of international standards for fair trial.³⁵ Defendants are rarely allowed formal representation by a lawyer, and in many cases are not informed of the progress of legal proceedings against them. This was not the case with Hamza. According to local sources, on 7 March the court accepted Hamza's apology and his life is no longer in any danger, but they cannot release him due to the grave danger he faces from the general public. His mother is allowed to visit him and, under the circumstances, Hamza is doing well. It is impossible at this time to predict how long they will keep him there. There are measures that could be put in place to protect Hamza – however that would put the Saudi government in a difficult political situation with the public who have been calling for the death penalty. According to Hamza's close supporters, allowing the dust to settle would allow time for public anger to cool down, however it would be difficult for the 24-year-old to continue to make a living as a writer in Saudi Arabia.³⁶

Ever since the Hamza incident, there have been several campaigns launched against “liberals” and those “calling for atheism” on Twitter. To highlight the conservative reaction of the general public, the BBC reported that many Saudis phoned their broadcast service to complain that reporting on the Hamza case showed that the Saudi media were controlled by a liberal elite, given that they did not call for the death penalty to be imposed on Hamza. In the comments in one Saudi newspaper a writer said: “[T]he

only choice is for Kashgari to be killed and crucified in order to be a lesson to other secularists”. The Saudi information minister even tweeted that he had burst into tears when he read Hamza's tweets: “When I read what he posted, I wept and got very angry that someone in the country of the two holy mosques attacks our Prophet in a manner that does not fit a Muslim...”; and “I have given instructions to ban him from writing for any Saudi newspaper or magazine, and there will be legal measures to guarantee that.”

The religious “scholar” Al-Arifi, has, along with other religious icons, led an aggressive campaign against liberals³⁷ and anyone calling for freedom of expression and belief, in an attempt to “rid” the Saudi society from secularist thoughts and liberal lifestyles that their “opponents” advocate. Al-Arifi is a young populist who appeals to a young audience. He is the most popular Saudi on any social media site by far.

His followers are called Al-Arifi “soldiers”, and they follow his every word as doctrine without question. Al-Arifi soldiers frequently request CITC to block and censor websites. Any criticism of Al-Arifi usually results in personal attacks by his followers. This ranges from verbal written abuse, to the illegal hacking of personal emails and Twitter accounts – including those of Hamza supporters.

Awareness

The role of civil society

It is illegal to form a civil society group without prior permission from the Saudi Arabian authorities. In general the government takes little notice of civil society activities, as long as they do not cross what it deems as political or religious boundaries. As a result, the official and unofficial civil society organisations that do exist participate in various cultural, social, professional and some religious activities only.

The need for permission to form a civil society group means that there is no legislative framework governing unofficial civil society organisations in Saudi Arabia. Because of this, they cannot register or ask international organisations for cooperation or funding. Moreover, the Saudi authorities, via different bodies, also interfere in the management of civil society groups, including in their governance and financial management, limiting their role and impact where necessary.

Licences granted by the Saudi authorities to civil society groups are issued only in very limited cases

35. Amnesty International, “Saudi Arabia” in *Annual Report 2012*, 2012, www.amnesty.org/en/region/saudi-arabia/report-2012#ai-reports

36. Source from Kashgari's support group

37. A term used for anyone influenced by the West

and under extreme exceptions, and are usually permitted by special royal decrees issued by the Saudi King himself. Furthermore, there is no official public intent to relax or increase the number of permits to new civil society associations, or expanding their activities. Currently, the law is still the biggest obstacle in the way of increasing the number of organisations and the scope of their activities.

There are two main human rights institutions officially working in Saudi Arabia. These two institutions work on observing, documenting and responding to human rights violations by reporting them to the authorities. They also hold general human rights educational programmes and publish reports and studies. The first is an official research institute called the Human Rights Commission (HRC). The second, the National Society for Human Rights, was granted special permission under a royal decree. It has a broader scope than the HRC, and organises workshops, public lectures and conferences on human rights issues.

There are also some smaller and “non-official” human rights groups that act as civil society defenders in their own capacity and through their own private networks. These include Human Rights First Society, Association for the Protection and Defence of Women’s Rights in Saudi Arabia, the Saudi Civil and Political Rights Association (ACPRA), the Human Rights Monitor in Saudi Arabia, and the Saudi Liberal Network. Another organisation founded in the Eastern Province is the Society for Development and Change that campaigns for equal human rights for the Shia minority in the Eastern Province (the organisation calls for a constitution and elected legislature in that province).

Despite their size, the role played by these civil society groups using social media networks has had an important effect on human rights awareness in Saudi society. The Facebook page of the Human Rights Monitor in Saudi Arabia has almost 5,500 fans and its supervisor, Waleed Abualkhair, has almost 40,000 followers on Twitter. Other human rights defenders have similar figures on Twitter, making Twitter a real battlefield between campaigns aimed at raising the awareness of rights, democracy and violations, and the conservative masses fuelled by the religious right.

Gender: internet and human rights issues

The socio-economic empowerment of women has emerged in the last few years as a priority in the kingdom. There has been an emphasis on national policies and strategies aimed at increasing women’s participation in the economic and social development processes, without contradicting Islamic laws

and cultural values. However, there is still a lot to be done before gender equality is achieved.

Women’s rights issues recently came to the fore in the ‘Women2Drive’ campaign, led by Manal Al-Sharif. On 17 June 2011, around 40 women with international drivers’ licences participated in the campaign by recording Saudi female drivers driving through the streets of Saudi Arabia and uploading the pictures and videos on YouTube. Officially, no law bars women from driving, but senior government clerics have ruled against the practice, a ruling generally supported by the public. Saudi Arabia is the only country in the world to tacitly prohibit women from driving. The campaign is still active after over a year since its inception.

Al-Sharif’s video of the social protest received over 700,000 views just before she was arrested in May 2011 on charges of “disturbing public order” and “inciting public opinion”.³⁸ Although Al-Sharif was released nine days later, her release was on the conditions that she post bail, return for questioning upon request, and refrain from driving and from speaking to the media.

Al-Sharif recently spoke at the Oslo Freedom Forum 2012 about the campaign, mentioning the positive effect the YouTube video of her driving had in Saudi Arabia. She used the opportunity to talk about how social media and the internet changed her life, and the lives of many women in Saudi Arabia. Her speech was a trending topic online for days, with both positive and negative results. Discussions went as far as attempting to disown her as a Saudi citizen, while others applauded her for her courage to speak openly and freely.

The *New York Times* described Al-Sharif’s campaign as a “budding protest movement” that the Saudi government tried to “swiftly extinguish”, attributing Al-Sharif’s detention to the Saudi authorities fear of a wider protest movement in the country.³⁹

New and emerging advocacy strategies

While the internet has helped to improve awareness of human rights issues, it has, as mentioned, also been used by religious icons, such as Al-Arifi, to create a new public-driven approach to censorship by their supporters. During the Hamza Kashgari case, human rights activists only provided limited support to his case, and advocated support for the

38. The original video was removed, but this is a copy: www.youtube.com/watch?v=sowNSH_W2ro (video).

39. Robert Mackey, “Saudi Woman’s Driving Video Preserved Online”, *The New York Times* (blog) – *The Lede*, 24 May 2011, thelede.blogs.nytimes.com/2011/05/24/saudi-womans-driving-video-preserved-online

case indirectly. This was out of fear of religiously led campaigns against Hamza – as they would be personally attacked if they supported his case. Many activists fear to be seen as sympathetic to what is deemed as unforgivable crimes by many in the country, weakening their effect on Saudi society when it comes to human rights issues.

As the religious icons make huge gains on social media networks as well as traditional media, it diverts the human rights struggle. However, examples of campaigns led by human rights activists do manage to gain a foothold. These include the Twitter campaigns #Saudi, #WhatWeNeedInSaudi, #SaudiWomen, and others where Saudis have been expressing themselves freely and openly in an unprecedented manner.

Detention without trial remains a big issue in the country, mainly due to the Saudi authorities absolute denial of such detentions. However, the public, through the internet, is becoming more aware of these cases, with video footage often being leaked using YouTube.

At times, the liberty with which these campaigns can operate is surprising. The Saudi hashtag #tal3mrak, which can be translated as “your majesty”, has served as a way for citizens to express themselves to the Saudi King in an open way, and has become so famous that even non-Saudi’s have started using it to express dissent against the Saudi government. Such venting on a large scale in Saudi Arabia is unprecedented, and highlights the role the internet has on modern day Saudi society. This venting is one of limited ways in the country to test the political waters, since public policy polls are limited.

Another important role the internet has played in relation to Saudi human rights activism is e-petitioning. In the Hamza case, 25 thousand signatories were raised worldwide in his support, while Al-Sharif’s campaign received over 12 thousand supporters on Facebook. E-petitions have not been used by the conservative far right, possibly because they would not gain much momentum abroad compared to human rights campaigns and causes.

A further interesting development is an anonymous Saudi Twitter account with the name @Mujtahid – which translates to “assiduous” – that has been set up, which now has nearly half-a-million Twitter followers. This regularly denounces various excesses of princes, ranging from those who earn huge commissions on government contracts, to those who have huge palaces. It is revealing that some of the princes have even responded to the accusations, by joining Twitter and defending themselves personally, something that would never happen in

traditional media, which is tightly controlled by the government.

Freedom of expression has also been felt in other quarters online. On YouTube, around a dozen filmmakers are gaining thousands of followers with their shows, mini-series of 15-minute episodes, which they post regularly. These deal with a wide variety of topics ranging from urban poverty to recent local news.

Conclusions and recommendations

The internet has become a vital tool for social change in Saudi Arabia, in reporting human rights violations and acting against them. Moreover, the internet is a key resource for activists in reporting either to the outside world, or in raising awareness amongst the local population at very little cost. The internet also helps them avoid traditional media regulations.

International human rights organisations depend on the internet to access local news directly from the source, and in doing so avoid the distortion of government censorship. In light of the Arab uprising in the region, social networks have proved to be a very important tool for spreading news and a faster method of communication.

The Saudi Arabian government has often responded to external calls to change its heavily censored system by suggesting most censorship is self regulated by citizens, and, in doing so, suggesting a quasi-democratic self-imposed regulation in its place. However, this response is too simple, as there is no policy in place to protect minorities from the wider religious community, led and often fuelled by conservative religious “scholars”. Most censored websites are not filtered automatically by software, but are blocked based on requests made by government bodies. These requests lack transparency, and are sometimes only in the interest of the ruling elite.

The general public has often been accused of blind support of religious icons, empowering the authority to control those who oppose them in the process. While citizen self-censorship is supported and encouraged by religious-led campaigns that repress human rights to free speech and association, marginalised groups such as women, Shia minority and liberals are sidelined in the governance process.

The Saudi government, like many other states, is burdened in its attempt to balance internal security concerns and human rights commitments, with broad support from the masses pushing for more censorship. Religious icons and personalities, who enjoy growing popularity, have made their battles personal, making it harder for activists to support specific causes without losing the support of the wider public. This limits public campaigns, and

diverts their efforts into spending much of their time defending themselves.

To a large degree, the regulation of the internet in Saudi Arabia reflects the approach to regulation elsewhere. However, Saudi human rights activists and liberals⁴⁰ have also found the internet a great platform to express themselves freely and openly, especially using Twitter.

On occasion, the Saudi government has been accused of not being neutral, more often than not supporting the religious right. This is embodied in the fact that it is almost impossible to register civil society groups legally in order to report human rights abuses and hold governmental bodies accountable for such behaviour. This is also prevalent in travel and writing bans. Activists promoting freedom of speech and association face arbitrary detentions and travel bans, and journalists are arrested with no charges brought against them.

If Saudi Arabia wants to be a leader in the region, it needs to promote the free-flow of information without infringing on the rights of individuals on the internet. In order to do this, the government censorship system needs to be reviewed. Checks and balances need to be made when content is filtered on religious or national security grounds. Furthermore, transparency in content regulation needs to be encouraged by publishing a list of all filtered websites, with reasons for their filtering. The introduction of privacy and individual rights laws is overdue.

Human rights activists have been remarkably successful in stopping injustices occurring in Saudi Arabia by highlighting issues for a wider audience. The internet has been promoting great opportunities for progressive change. However, while it provides further opportunities for young people to learn about their rights, it has also been used as a platform for many conservative right wing groups to expand their majority in the country.

This said, there are approximately 150 thousand Saudis currently studying in North America, Europe and Australasia on scholarships from the Saudi government. Many human rights activists hope that this group of young Saudis will return in a couple years and support human rights causes, changing the shape of Saudi society and its views on issues related to freedoms and equality.

Some of the main issues Saudi Arabia needs to confront include allowing civil society groups to form and freely associate around human rights issues. Additionally, it needs to adjust the current laws to allow freedom of expression, both online and offline. Civil society organisations could also form stronger partnerships with foreign NGOs in order to establish best practises on human rights issues. ■

40. This term is used to identify citizens who are more accepting of Western influences.

MONITORING AND DEFENDING FREEDOM OF EXPRESSION AND PRIVACY ON THE INTERNET IN SOUTH AFRICA



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In 1994, South Africa experienced a largely peaceful transition to democracy after decades of apartheid. This transition also led to constitutional guarantees for fundamental human rights, including the rights to freedom of expression and privacy – rights that are central to internet freedom. While freedom of expression has been largely respected, in the past few years, South Africa's media freedom rating has been downgraded by several international media freedom monitoring organisations, such as Reporters Without Borders (RWB) and Freedom House. Local media and civil society organisations such as the South African National Editors' Forum (SANEF) and the Right 2 Know Campaign (R2K) have expressed concern about a growing trend towards securitisation of the state and attempts to censor critics. Against this backdrop, this report will assess the extent to which the rights to freedom of expression, association and privacy are enjoyed on the internet in South Africa.

Background

This section examines the socio-economic challenges South Africa is facing eighteen years into democracy and will set the context for the rest of the report. A final Constitution, drafted by a Constitutional Assembly consisting of the major political parties, was adopted in 1996, and this Constitution has set the legal framework for transformation in the country. The new constitutional order also replaced parliamentary sovereignty with constitutional sovereignty, presided over by an independent Constitutional Court. The Constitution recognises first, second and third generation rights, although the majority of cases heard by the court have been in relation to first and second generation rights.¹ There

is no hierarchy of rights, and each right has to be interpreted on a case by case basis, especially when it comes into conflict with other rights. Furthermore, most rights are not absolute, and are subject to a general limitations clause.

South Africa still faces significant development challenges, especially in the wake of the 2009 global recession which has made it even more difficult to reverse entrenched structural inequalities inherited from apartheid and to create sustainable jobs. According to the Presidency's development indicators for 2010,² most of the country's main economic indicators have declined markedly since the start of the 2009 global recession, with the exception of inflation and interest rates. South Africa's ranking in the knowledge economy index has slipped gradually from 49th in 1995 to 65th in 2009, which it attributes to low university through-put, slow internet penetration and decreasing funding for research and development.³

Unemployment is in long-term decline, although it remains exceedingly high at 25.3% of the economically active population according to the narrow definition of unemployment and 35.9% according to the expanded definition of unemployment (which includes discouraged work-seekers). The problem has been exacerbated by the global recession. The largest number of unemployed people falls within the 15-34 age group, and unemployed men outnumber unemployed women.⁴ Poverty has been alleviated by the introduction of social grants, but inequality remains extremely high, with 70% of income accruing to the richest 20%, while the poorest 10% earn a mere 0.6% of income.⁵ Modest gains have been made in increasing access to formal housing, and the country is

1. Jackie Dugard, Socio Economic Rights Institute, speech at local government workshop, University of the Witwatersrand, 29 July 2011.

2. us-cdn.creamermedia.co.za/assets/articles/attachments/31523_development_indicators2010.pdf

3. South African Presidency, "Development Indicators 2010", 17, www.thepresidency.gov.za/MediaLib/Downloads/Home/Publications/NationalPlanningCommission4/Development%20Indicators2010.pdf

4. *Ibid*, 22

5. *Ibid*, 23

well on the way to ensuring universal access to water, but electricity roll-out has slowed down after a large increase in the number of connections between 1994 and 2010.⁶

In spite of significant inroads into addressing service delivery backlogs, the country is also beset by mass discontent at the pace of delivery. Since 2004, South Africa has experienced an upsurge in protest action on issues relating to service delivery, corruption, lack of accountability and labour issues (including salary demands), with the number of what the Ministry of Police refer to as “crowd management” incidents reaching record levels in 2010-2011. Sociologist Peter Alexander has referred to these as a “rebellion of the poor”, which he maintains is unparalleled for any other country.⁷ Youth under the age of 35 constitute 70% of the population, with 35% of the population under 15.⁸ Nearly three million of the 6.7 million youth are disengaged from society’s major institutions, and youth discontent has been recognised as a key factor in social unrest. The country’s youth make up a large percentage of those engaged in protest action.⁹

In response to rising discontent, there are signs of the government becoming increasingly defensive and intolerant of dissent. In response to what they consider to be growing threats to media freedom, RWB has down-rated South Africa’s press freedom from 26th place in 2002 to 43rd place in 2012, and Freedom House has also down-rated South Africa from “free” to “partly free”.¹⁰ Furthermore, public protests are often banned on spurious grounds and police violence against protestors has also become more prevalent since the re-introduction of the military ranking system in the police which existed under apartheid (considered a “re-militarisation of the police”).¹¹

An overview of internet-related human rights in South Africa

This section examines the legal, policy and regulatory environment for internet rights. It sets out current approaches to regulation of access to and content on the internet, and outlines the main policy and regulatory initiatives in support of internet rights, as well as areas where internet freedom is limited. This section also maps who the main players are in relation to internet service provision and internet content.

Relevant constitutional and regulatory provisions

The right to freedom of expression guarantees the right to receive or impart information and ideas, but does not extend constitutional protection to propaganda for war, incitement to imminent violence and hate speech, which is defined as advocacy of hatred on the basis of race, gender, ethnicity or religion and speech that constitutes incitement to cause harm.¹² Access to information is also protected as a stand-alone right in the South African Bill of Rights.¹³ The Act that gives effect to this right, including over the internet, is the Promotion of Access to Information Act. A related piece of legislation is the Protected Disclosures Act, which protects whistleblowers from occupational detriment if they disclose confidential company information on certain protected grounds.

The Constitution also includes a provision for an independent broadcasting regulator to regulate broadcasting in the public interest, and provides for several independent institutions to assist Parliament in its role as overseer.¹⁴ Other media regulators include the Film and Publications Board, a statutory body falling under the Ministry of Home Affairs, and the self-regulatory Broadcasting Complaints Commission of South Africa (BCCSA).

Communications services are regulated by the Independent Communications Authority of South Africa (ICASA) according to the Electronic Communications Act (ECA), which was promulgated in 2005 to facilitate convergence. The ECA incorporates a semi-layered approach to licensing, with three layers having been identified: Electronic Communications Services (ECS), Electronic Communications Network

6. Ibid, 30-33

7. Peter Alexander, “A Massive REbellion of the Poor”, *Mail and Guardian*, 13 April 2012, mg.co.za/article/2012-04-13-a-massive-rebellion-of-the-poor

8. Statistics South Africa, “Social Profile of Vulnerable Groups in South Africa 2002–2010”, www.statssa.gov.za/Publications/Report-03-19-00/Report-03-19-002002.pdf

9. Prim Gower, “Idle Minds, Social Time Bomb”, *Mail and Guardian*, 31 July 2009, www.mg.co.za/article/2009-07-31-idle-minds-social-time-bomb

10. “How Others Are Reading Us”, *Daily News*, 3 May 2012, www.iol.co.za/dailynews/opinion/how-others-are-readingus-1.1287993

11. “Police Brutality”, *Leadership Online*, 19 April 2011, www.leadershiponline.co.za/articles/politics/1261

12. Constitution of the Republic of South Africa No. 108 of 1996, Section 16, www.info.gov.za/documents/constitution/1996/a108-96.pdf

13. Ibid, Section 32

14. Ibid, Section 192

Services (ECNS) and broadcasting.¹⁵ Internet service providers (ISPs) are classified as ECSs and therefore require a licence from ICASA; however the Act does not give ICASA jurisdiction over the content of ECSs. ICASA has regulated the cost of Asymmetric Digital Subscriber Lines (ADSL) since 2007.¹⁶

Internet connectivity in South Africa

Universality of communications has been a central feature of South African communications policy, law and regulation, and as a result universal service and access obligations have been placed on ECNS licencees in the form of meeting roll-out targets as well as contributing financially to universality. A separate agency was established by the 1996 Telecommunications Act, and subsequently the ECA, to promote universal service and access to ICTs in South Africa, called the Universal Service and Access Agency of South Africa (USAASA). The agency manages the Universal Service and Access Fund, which is funded from a levy on licencees, and is meant to provide subsidies for people in need in order to assist them to access ICTs, finance construction of electronic communications networks in under-served areas, and facilitate access to ICTs for schools and other public centres.¹⁷ The ECA also makes provision for the licensing of underserved area licencees, in order to promote access to ICTs in areas with a teledensity of 5% or less.

Internet connectivity is provided on a fixed line or mobile basis, with fixed-line connectivity (largely through ADSL) being provided by the partially privatised fixed-line telephone parastatal Telkom. In 2006, competition to Telkom was introduced in the form of the fixed-line operator Neotel. There are three main mobile networks, Vodacom, MTN and Cell-C, and other service providers such as Virgin Mobile and 8ta riding on these networks, and all provide wireless 3G broadband access to the internet.¹⁸ In 2009, a state-owned broadband company called Broadband Infraco was established with the objective of promoting affordable access to electronic communications by providing long-distance backhaul connectivity nationally and regionally. The

major players have invested in several undersea cables landing in South Africa which have greatly increased the bandwidth capacity in the country.¹⁹

South Africa's internet user base grew 25% from 6.8 million in 2010 to 8.5 million at the end of 2011, which means that penetration is approaching 20% of the population, but access is unevenly spread across the country. Smartphones are the main drivers of internet access in South Africa. Of the total user base, 7.9 million access the internet on their cellphones, with the majority accessing the internet both on their cellphones and through computers, laptops or tablets.²⁰ By 2011, 81.8% of the population used a cellphone, with 73.3% of these connecting on a pre-paid basis; the fact that cellphones are nearly ubiquitous happened in spite of, not because of, national policy.²¹ Vodacom is the most popular network operator, followed by MTN.²²

According to Research ICT Africa, by 2007-2008, more women than men owned cellphones, although for every one woman that accessed the internet, two men accessed it. While monthly mobile expenditure constituted 29.3% of monthly disposable income, women spent more of their disposable income than men.²³ More recently, and drawing on MyBroadband statistics, the Internet Society of South Africa has stated that 69% of internet users are male, and 31% female. Most users access the internet at work, and the country's economic hub, Gauteng, boasts the largest proportion of internet connections of any of the provinces. Most internet users fall within the 35-54 age group, which is out of synch with the preponderance of youth in South Africa.²⁴

Fixed-line connectivity through ADSL is constrained by the lack of growth of the fixed-line network after an initial period of growth after the

15. Arthur Goldstuck, "Telco Jabberwock is Dead!", *Leader*, 6 September 2008, www.leader.co.za

16. Ryan Hawthorne, "Local Loop Unbundling Versus Encouraging the Growth of Wireless Local Loops: Lessons for South Africa from other Countries", n.d., 1

17. Universal Service and Access Agency of South Africa, "About USAF", www.usaasa.org.za/usaif/index.html

18. Rudolph Muller, "Local Loop Unbundling: What Should Be Achieved?", *MyBroadband.com*, 10 October 2011, mybroadband.co.za/news/telecoms/35608-local-loop-unbundling-what-should-be-achieved.html

19. "South Africa – Fixed Line Market and Infrastructure – Overview and Statistics", *Budde.com*, n.d., www.budde.com.au/Research/South-Africa-Fixed-line-Market-and-Infrastructure-Overview-and-Statistics.html

20. South African Press Association, "Internet Use in SA Growing", 10 May 2012, www.news24.com/SciTech/News/Internet-use-in-SA-growing-20120510#

21. Charlie Lewis, "Achieving Universal Service in South Africa: What Next for Regulation?", paper presented at the International Telecommunications Society Conference, Telecommunications: Ubiquity and Equity in a Broadband Environment, Wellington, New Zealand, 26-28 August 2010, link.wits.ac.za/papers/Lewis-2010-USA-RSA-regulation-ITS-paper.pdf

22. All Media Products Survey, 2007BA – January-December 2011, www.saarf.co.za/amps/cellphone.asp

23. Alison Gillwald, Anne Milek and Christoph Stork, "Gender Assessment of ICT Access and Usage in Africa", Vol. 1, Policy Paper 5, 2010, www.ictworks.org/sites/default/files/uploaded_pics/2009/Gender_Paper_Sept_2010.pdf

24. Internet Society South Africa, "South African Internet Users", 24 October 2011, www.isoc.org.za

1994 transition to democracy.²⁵ By 2011, South Africa's fixed broadband penetration rate was a mere 1.5%: significantly lower than the Organisation for Economic Co-operation and Development (OECD)'s average broadband penetration rate for OECD countries.²⁶ This distortion in connectivity makes it more difficult for South African internet users to optimise their usage of the internet for the purposes of accessing information, given that mobile connectivity is generally slower and more limited than fixed-line connectivity. South African ADSL subscribers also have to contend with restrictive caps, with some plans only offering 1GB of data per month, although some service providers have begun to offer uncapped ADSL.

South Africa's ability to connect to both voice and data networks has been marred by high user costs, and the lack of transparency about pricing has allowed operators to continue these practices relatively unchallenged. According to Research ICT Africa, South Africa ranked a dismal 30th out of 46 African countries for prepaid mobile telephone affordability. Poor subscribers are the worst affected by the excessively high prices of prepaid or pay-as-you-go rates, including out-of-bundle costs, as the poor were more likely to access the internet on an out-of-bundle basis. Data bundle prices have also been the source of considerable controversy in South Africa, although Blackberry has been particularly successful as it offers data at a relatively affordable flat rate.²⁷

Internet-related policies

Recognising the fact that the low broadband penetration rate was going to impact negatively on South Africa, the Department of Communications has also developed a National Broadband Policy, which was gazetted in 2010. It defines broadband as an always available, multimedia capable connection with a download speed of at least 256 kbps, and aims to ensure universal access to broadband by 2019, with household penetration standing at

15% by the same year.²⁸ The department has also gazetted a Local and Digital Content Development Strategy, which proposed the establishment of a digital content fund and content generation hubs to stimulate the development of local content, and the prioritisation of the following content areas: animation, wild-life, documentaries, games and ring-tones.²⁹ While the development of the policies has been broadly welcomed, concerns have been raised about the weakness of the Broadband Policy and its relatively low target in terms of download speed,³⁰ as well as its lack of an implementation plan.³¹ Furthermore, the elite nature of media discourses surrounding the policy, which tended to adopt a techno-centric rather than development-centric approach that could have made the issues more accessible, has contributed to the lack of proper public scrutiny of the policy.³² More decisive targets were, however, set in the ICT Industry Competitiveness and Job Creation Compact, approved in July 2011, which commits to 100% broadband penetration by 2020.³³

Other laws regulating internet content

Electronic transactions are regulated according to a separate Act, the Electronic Transactions Act of 2002. Importantly for ISPs, the Act provides for the limitation of liability for service providers, providing they are members of an industry representative body recognised by the Department of Communications.³⁴ The Act also criminalises a range of online crimes (such as hacking and spamming and email bombing) and creates cyber-policing in the form of cyber-inspectors, employed by the Department of Communications, who are given wide-ranging powers to monitor and inspect any website or information system and search premises for evidence of

25. Robert Horwitz and Willie Currie, "Politics, Privatisation and Perversity in South Africa's Telecommunications Reform Programme" in *Media Policy in a Changing Southern Africa: Critical Reflections on Media Reforms in the Global Age*, eds. Dumisani Moyo and Wallace Chuma (Pretoria: Unisa Press, 2010), 11-38

26. Rudolph Muller, "SA Broadband Penetration Rates: How Do We Compare?", *MyBroadband.com*, mybroadband.co.za/news/broadband/29586-sa-broadband-penetration-rates-how-do-wecompare.html

27. Lloyd Gedye, "Broadband Price Drop Expected", *Mail and Guardian*, 6 January 2012, mg.co.za/article/2012-01-06-broadband-price-drop-expected

28. Department of Communications, Broadband Policy for South Africa, Government Gazette No. 33377, 13 July 2010

29. Department of Communications, Local and Digital Content Development Strategy for South Africa, Government Gazette No. 32553, 4 September 2009

30. Association for Progressive Communications, "Analysis of the Broadband Policy of South Africa", October 2010, www.apc.org/en/node/11294

31. Lewis, "Achieving Universal Service", 21

32. Wallace Chigona, Johannes Willem Vergeer, Andile Simphiwe Metfula, "The South African Broadband Policy: In the Eyes of the Media", *Info*, 14, 4 (2012): 65-77

33. Staff writer, "100% Broadband Penetration in SA by 2020: DoC", *MyBroadband.com*, 31 July 2011, mybroadband.co.za/news/broadband/30550-100-broadband-penetration-in-sa-by-2020-doc.html

34. Government of South Africa, Electronic Communications and Transactions Act, Chapter XI: Limitation of Liability of Service Providers, Act 25 of 2002, www.info.gov.za/view/DownloadFileAction?id=68060

cyber-crime on reasonable cause shown, provided they are in possession of a warrant. Their powers have been criticised as overbroad, creating potential for infringements of the right to privacy, and the system remains open to abuse particularly because South Africa lacks a dedicated law on privacy.³⁵

Internet content falls within the regulatory framework of the Film and Publications Board, which was set up in 1996 to replace the apartheid-era Publications Control Board. The Board is a portfolio organisation of the Ministry of Home Affairs. The essential difference between the old Board and the new one is that while the old Board acted as a censorship board, particularly of political content that challenged the legitimacy of the apartheid regime, the new Board is meant to confine its role to content classification, with a very narrow range of content being restricted or even prohibited: hence the Board's motto, "We inform, you choose".³⁶

Another law that impacts on internet freedom is the Regulation of the Interception of Communications and Provision of Communication-Related Information Act (ROICA) of 2002. The Act regulates the interception of certain communications, including internet traffic, and makes it illegal for communications to be intercepted except according to the framework set out in the Act, which makes provision for a designated judge to issue interception directions requested by law enforcement officers (in the defence force, the intelligence services or the police) on crime-related or national security grounds. Interception directions will be undertaken by the Office of Interception Centres (OIC).

ROICA makes it illegal to establish communications networks that are not capable of surveillance. It places obligations on communications service providers, including ISPs, to assist the state in the interception of communications. Telecommunications operators and ISPs are required by the law to facilitate interception and monitoring of communications and to store communications-related information at their own expense for not less than three years and not more than five years.³⁷ Furthermore, all cellphone users are required to register

their SIM cards, and provide proof of residential address and identity numbers. ROICA was part of a basket of laws passed in the early 2000s to assist in the global "war against terror". All these acts were hotly contested in Parliament on the grounds that they threatened the rights to privacy and freedom of expression and while many unpopular clauses were amended, they were not completely cured of deficiencies and as a result still continue to evoke controversy.

There are other statutory or common law provisions impacting on internet rights. The Promotion of Equality and Prevention of Unfair Discrimination Act, otherwise known as the "Equality Act", was promulgated in 2000 and prohibits unfair discrimination and harassment. It prohibits hate speech, which is defined as "...speech that is or could be reasonably construed to demonstrate a clear intention to be hurtful, harmful or to incite harm, or promote or propagate hatred".³⁸ Concerns have been expressed about the constitutionality of this provision as it adopts a broader definition of hate speech than what the constitution allows for, which is likely to open the Act up to constitutional challenge.³⁹

The common law of defamation can also impact on online content. Defamation in South Africa is defined as the wrongful and intentional publication of a statement which has the effect of injuring a person's reputation.⁴⁰ Apartheid-era defamation law gave maximum protection to the plaintiff, and imposed strict liability on the defendant; since then defamation law has been revised in the light of the constitutional guarantee of freedom of expression, and holds that in the case of media defendants, a publication cannot be considered unlawful even if it is incorrect, providing there were reasonable grounds for publication.⁴¹

South Africa does not have sufficient safeguards for privacy, data protection and online security. The right to privacy is protected in the Constitution, but there is no law in place to give effect to this right. A

35. Shumani Gereda, "The Electronic Communications and Transactions Act", in *Telecommunications Law in South Africa*, eds. Lisa Thornton, Yasmin Carrim, Patric Mtshaulana and Pippa Reburn (2006), link.wits.ac.za/papers/tele-law.html. Also see Paul Furber, "At the Coalface of Cyber-Crime", *ITWeb*, 1 September 2007, www.brainstormmag.co.za/index.php?option=com_content&view=article&id=481:at-the-coalface-of-cyber-crime

36. Film and Publications Board, www.fpb.gov.za

37. ROICA, Section 30(2)(a)

38. Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000, Section 10

39. Pierre de Vos, "Malema Judgment: A Re-think on Hate Speech Needed", *Constitutionally Speaking* (blog), constitutionallyspeaking.co.za/malema-judgment-a-re-think-on-hate-speech-needed/; Stephen Grootes, "Malema, a Freedom of Speech Revolutionary?", *Daily Maverick*, 8 May 2011, dailymaverick.co.za/article/2011-09-08-juliusmalema-a-freedom-of-speech-revolutionary/; Victoria Bronstein, "What You Can and Can't Say in South Africa", paper commissioned by the Democratic Alliance, n.d., www.da.org.za/docs/548/Censorship_document.pdf

40. Johan Moorcroft, "Defamation on the Internet", *Advocates of Southern Africa*, 22 March 2011, www.southafricanadvocates.info/index.php/legal-articles/64-defamation-on-the-internet

41. Bronstein, "What you can and can't say in South Africa"

draft Protection of Personal Information Bill is being considered by the government, but has not yet been brought forth for discussion in Parliament. South Africa is also in the process of developing a cyber-security policy, which has been transferred from the Ministry of Communications to the Ministry of State Security, but has not been released publicly at the time of writing.⁴²

Self-regulation of internet content

Self-regulation is also widely practiced for online content. The Internet Service Providers' Association (ISPA) is the industry representative body for ISPs recognised by the Department of Communications in terms of the ECT Act. This means that ISPA members have the right to self-regulate, according to a code of conduct adopted in 2008.⁴³ In order to qualify for immunity from liability in terms of the ECT Act, ISPs that are members of an industry representative body must include a process for handling take-down notifications of content that violates the code. According to the code, members must respect the constitutional right to freedom of expression, as well as the privacy of their communications.⁴⁴ However, internet users can send a take-down notice to ISPA, requesting that material considered unlawful be removed. If the user requesting a take-down knowingly misrepresents the facts then s/he is liable for damages for wrongful take-down.⁴⁵

The Wireless Applications Service Providers' Association (WASPA) is the industry body for mobile based value-added service providers. It too has a code of conduct which provides a framework for adult content, and sets in place procedures to protect children from harmful content.⁴⁶ The Digital Media and Marketing Association (DMMA) is the industry body for digital publishers, and also has a code of conduct that sets out the expected standards of professional practice of its members.⁴⁷ Newspapers operate a self-regulatory system in the form of the Press Council of South Africa, which incorporates a Press Ombudsman and Press Appeals

Panel. There has been some uncertainty about whether the system applies to online newspapers, and in 2011 as part of a review of its own processes, the Council recommended that its code should cover the online publications of its members.⁴⁸

Summary of issues

South Africa has an impressive array of laws, policies and regulatory measures impacting on internet access and content. On paper, the country is clearly committed to universality of communications, including of the internet. However, in reality weak policy arrangements coupled with ineffective government interventions and high costs have set the country back when it comes to ensuring universal access to the internet. Disparities in access are highly gendered. With respect to internet content, while strong constitutional guarantees exist for freedom of expression, the effectiveness of these guarantees has been gradually reduced by an array of laws that have chipped away at internet freedom. Self-regulatory measures for internet content are well-developed.

Civil society and the media have also become increasingly concerned about upcoming threats to freedom of expression posed by new or proposed legislation. Parliament is considering a Protection of State Information Bill that seeks to protect valuable state information and classify information on national security grounds. If passed in its current form, the Bill could have a chilling effect on freedom of expression, forbidding whistleblowing about the activities of security agencies if the publication concerned (including an online publication) relies on classified documents and even if there are strong public interest grounds for revealing the classified information. The ANC ruling party has also proposed the reintroduction of statutory regulation for the press in the form of a Media Appeals Tribunal accountable to Parliament, and has proposed that Parliament conduct an investigation into the desirability of this. Media organisations have expressed fears that such a move could pave the way for state control of newspaper content, including their online versions.⁴⁹

42. "South African Cybersecurity Policy Approved", *MyBroadband*, mybroadband.co.za/news/security/45225-southafrican-cyber-security-policy-approved.html

43. Internet Service Providers' Association, "About ISPA", ispa.org.za/about-ispa

44. Internet Service Providers' Association, "Code of Conduct", ispa.org.za/code-of-conduct

45. Internet Service Providers' Association, "How to request a take-down notice", ispa.org.za/code-of-conduct/takedown-guide

46. Wireless Application Service Providers' Association, "Code of Conduct", www.waspa.org.za/code/waspa_coc_11.6.pdf

47. Digital Media and Marketing Association, "Code of Conduct", www.dmma.co.za/about-us/code-of-conduct

48. Press Council of South Africa, "Review", 7, www.presscouncil.org.za/media/PDFs/report/A5%20report%20for%20web%20pdf.pdf

49. Jackie Bischoff, "SANEF Launches Campaign to Oppose Media Tribunal", *Journalism.co.za*, n.d., www.journalism.co.za/index.php?option=com_content&Itemid=100009&catid=165&id=3337&view=article

Regulation of internet content in South Africa

This section will explore the regulation of internet content in more detail, and considers whether or not this regulation impinges unduly on online freedom of expression and privacy.

The Film and Publications Act

The 1996 Film and Publications Act has been amended several times, and each amendment has broadened the scope for classification and prohibition of material, the type of material covered by the Act, and reduced the independence of the Board and the transparency of its appointment process.

In the 1996 Act, a publication was defined as printed or duplicated matter, pictures and sculptures, recordings for reproduction (with the exception of a film soundtrack), and computer software.⁵⁰ This meant that internet content was covered only once it was downloaded or printed out. However, in 1999, the Act was amended to broaden the definition of publication to include “... any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the internet”⁵¹ – an amendment which effectively gave the Board jurisdiction over internet content. The 1999 amendment also introduced a definition of child pornography that was widened by a 2004 amendment to include descriptions of child sexual abuse, in addition to depictions.⁵² The definition of “distribute” was also broadened to include failure to take reasonable steps to prevent access by a person under 18 to classified publications.⁵³ The 2004 amendment also required ISPs to register with the Board, take all reasonable steps to prevent their services from being used for the hosting or distribution of child pornography, and report the distribution of child pornography.⁵⁴

With respect to the Act’s objectives, the 1996 Act regulated the distribution of certain publications, mainly by means of classification, the imposition of age restrictions and the giving of consumer advice, with due regard to the fundamental rights enshrined in the Constitution.⁵⁵ However, the 1999 amendment required the Board to regulate

the creation and production, possession and distribution of certain publications – to allow for the criminalisation of the creation of child pornography – and replaced the reference to the Constitution with a clause enjoining the Board to have “due regard to the protection of children against sexual exploitation or degradation in publications, films and on the internet”. The Act also made the exploitative use of children in pornography, including on the internet, punishable.⁵⁶ According to an ISPA advisory, this definition “...is wide enough to be construed as targeting pornography that may in other circumstances be acceptable. For example, portraying someone to look as being under 18 years of age may impact on a large amount of acceptable pornography”.⁵⁷

In the 1996 Act, films were subject to pre-classification, but publications were classified only if complaints were received about them and they were found to fall into a classifiable category. However, a 2009 amendment allows anyone to request classification of a publication and further places the onus on the publisher (except newspaper publishers) to submit for classification material that contains sexual violence which violates or shows disrespect for the right to human dignity of any person; degrades a person or constitutes incitement to cause harm; advocates propaganda for war; incites violence; or advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm.⁵⁸ The Board then submits such material to a classification committee.

In terms of the 2009 amendments, a publication constitutes a “refused publication” if it contains child pornography, propaganda for war or incitement to imminent violence, and the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, unless the publication is a bona fide documentary or has scientific, literary or artistic merit or is on a matter of public interest. “Refused publication” is not defined in the Act, but presumably refers to publications that are banned for possession and distribution. If the publication contains any of the offending material mentioned above, it will be classified XX (prohibited for distribution), unless it has artistic, scientific or public interest merit, in which case it will be classified as X18 and classified to protect children from “harmful

50. Film and Publications Act, No. 65 of 1996, Section 1

51. Tracy Cohen, “Internet Service Providers Association Advisory 3: the Film and Publications Act, No. 65 of 1996 and the Film and Publications Amendment Act, No. 34 of 1999”, 22 May 2000, old. ispa.org.za/regcom/advisories/advisory3.shtml

52. Film and Publications Amendment Act, No. 18 of 2004, Section 1

53. Ibid

54. Ibid, Section 12

55. Film and Publications Act, No. 65 of 1996, Section 2

56. Film and Publications Amendment Act No. 34 of 1999, Section 2

57. Cohen, “Internet Service Providers Association Advisory 3”, 5

58. Film and Publications Amendment Act, No. 3 of 2009, Section 19 (substitution of Section 16 of the Film and Publications Act)

or age-inappropriate materials”. X18 publications can only be distributed by licensed owners of adult premises. The 1996 Act, in contrast, allowed publications to escape classification requirements entirely if they had artistic or scientific merit (with the exception of child pornography).

These 2009 amendments continue to be controversial, and are the subject of Constitutional litigation by SANEF and Print Media South Africa (PMSA). The Constitutional Court heard the case in March 2012, and judgment is pending.⁵⁹ These organisations seek to strike down the provision that allows for pre-publication classification on the issues mentioned in the earlier paragraph as unconstitutional. In 2011, the North Gauteng High Court declared this provision unconstitutional, but the government has since appealed this ruling.

A public interest litigation organisation, Section 16, which was granted “Friend of the Court” status, focussed specifically on the implications of the amendments for internet freedom, and argued in its written submission to the Court that the classification specifications were vague and capable of abuse. They were also discriminatory, as newspapers and broadcasters were exempt from this requirement. The self-regulatory system that operates in relation to newspapers, and that is recognised by the Act as a ground for exemption, is less restrictive of freedom of expression than the Act as it accepts post-publication sanction as an appropriate form of sanction for errant publication rather than pre-publication censorship.⁶⁰ If a publisher made a mistake and did not submit material that fell into the offending categories before publication, s/he would still be liable for criminal prosecution, which placed small publishers like bloggers and other publishers of user-generated content at particular risk as they were less likely to have access to legal counsel to evaluate their publications than larger, mainstream publishers.

Furthermore, the classification of public interest material in the XX category as X18 was incapable of being enforced for internet content, as this classification category required material to be purchased from an adult shop, which presupposed classification of a physical publication: this meant that material was effectively prohibited, even if it fell within the exemptions. The Section 16 submission described the amendments as “redolent of moral censorship”, arguing that “[it] interposes,

between the reader and the creator of the content, the opinion of a state-body that imposes its interpretation upon the exchange of thoughts and ideas. Thus, even before picking up the relevant publication, the would-be adult reader is told by the state that what he [sic] is about to read is harmful or degrading. His ability to form his own opinion, autonomously and independently, and absent a prior moral label from the state, constitutes a pernicious form of thought control”.⁶¹

With respect to the Board’s independence, according to the 1996 Act, the Board was appointed by the President of South Africa, on advice of an advisory panel set up by the President to advise him/her on suitable members. The advisory panel was obliged to invite public nominations, and ensure transparency in the appointment process. Nominees could not have a direct or indirect financial interest in the film or publication industry, or hold “an office of profit” in the service of the state.⁶² The 1999 amendment changed these arrangements, to ensure that the minister of Home Affairs appoints Board members.⁶³ The minister was no longer obliged to invite nominations for the Board, but may do so. The amendments also broadened the grounds for removal of Board members and gave the minister powers of removal.⁶⁴ This amendment also made it clear that the minister could lodge complaints against publications.⁶⁵ While the Board (whose governance structure was renamed the Film and Publications Council) can issue directives of general application, such as classification guidelines, it can do so only in consultation with the minister, which further undermines its independence.⁶⁶

Regulation of Interception of Communications Act

As mentioned earlier the Act that regulates the interception of communications, ROICA, continues to remain controversial on the grounds that it infringes unduly on the right to privacy and freedom of expression. In 2001, the international non-governmental organisation Privacy International warned during Parliamentary hearings on the Bill that it lacked basic safeguards. In finalising the law, Parliament responded to criticisms by introducing

59. Print Media South Africa and another v. Minister of Home Affairs and another CCT 113/11

60. Section 16’s written submissions, PMSA and SANEF v Minister of Home Affairs and Film and Publications Board, 5 March 2012

61. *Ibid*, 10

62. Film and Publications Act, No. 1811 of 1996, Section 7(1)

63. Film and Publications Amendment Act, No. 34 of 1999, Section 3

64. Film and Publications Amendment Act, No. 3 of 2009, Section 6(3); Cohen, “Internet Service Providers Association Advisory 3”

65. Film and Publications Amendment Act, No. 34 of 1999, Section 5-7

66. Film and Publications Amendment Act, No. 3 of 2009, Section 4(a)(1)

judicial, legislative and executive oversight measures to prevent abuses. As a result, the Act ensures that interception centres that carry out the directions report to the Minister of State Security and Parliament's Joint Standing Committee on Intelligence. The designated judge also provides the Committee with an annual report, which becomes publicly available when the Committee's report is released. Furthermore, intelligence activities are certified as being legally compliant by the Inspector General, who is selected by, and reports directly to, Parliament. The Act also disallows communications to be intercepted without a direction being granted by the judge on the grounds specified in the Act, and it requires the judge to be satisfied that less intrusive methods of police or intelligence investigation are not likely to yield the required information.

But Privacy International persisted with their warnings, noting that the US federal wiretapping law contains what they maintained is a higher standard for issuing of interception orders than South Africa's, namely that the application must demonstrate "probable cause" to believe that an individual is committing, has committed, or is about to commit a serious crime. In the South African system, the judge merely has to be satisfied that there are reasonable grounds that a crime has been, or is likely to be committed. Furthermore, directions may also be issued in relation to serious offences that may be committed in future, which may not be constitutional as it allows law enforcement officers to speculate on future acts that have not yet occurred.⁶⁷ As a result of their reservations, in a 2006 report on the leading surveillance societies in the world, Privacy International listed South Africa as being among the countries that showed a systemic failure to uphold safeguards.⁶⁸

A key flaw in South Africa's law is lack of public oversight, as the public is provided with too little information to be able to monitor whether the Act is achieving its intended results, namely to fight crime and to ward off genuine threats to national security.⁶⁹ While the designated judge's reports are made available as part of the Joint Standing

Committee's reports to the National Assembly, they contain little information, and the legislation governing the oversight of the intelligence services, the Intelligence Services Oversight Act, is ambiguous about the content of these reports. As a result, between 2006 and 2008, the designated judge's report merely contained bald statistics on the number of interception orders granted. The designated judge for 2009-2010 issued a more detailed report for that period, but it still falls far short of the reporting obligations needed for effective public oversight. In contrast, in the US federal system, the publicly available annual reports on "wiretaps" in relation to criminal matters include information on the number of interception orders, the major offences for which orders were granted, a summary of different types of interception orders, the average costs per order, the types of surveillance used, and information about the number of arrests and convictions resulting from intercepts. Furthermore, in South Africa there is no provision for people whose communications have been intercepted to be informed once the investigation is completed, or if the judge turns down the application for an interception direction.⁷⁰

Another source of controversy in relation to ROICA is that the time period for retention of data by telecommunications companies and ISPs is far longer than in comparable jurisdictions, and other jurisdictions merely require targeted data preservation rather than wholesale data retention as required by ROICA. These requirements add considerably to the cost of implementing ROICA, and given that most of the costs of implementation are borne by the service providers, the requirement may prove to be too onerous for small companies, especially ISPs. While provision has been made in ROICA for an Internet Service Providers' Assistance Fund, the fund covers a limited array of the total costs of implementing the Act.⁷¹

Interception statistics in terms of ROICA have been available since 2008. According to the reports of the various designated judges to the Joint Standing Committee on Intelligence, there have been 826 interception directions granted between 2006 and 2010. Between 2008-2009 and 2009-2010, there was a 120% increase in interception orders (from 189 directions to 416 directions); no information is available to explain this large increase.⁷² While there

67. Nazreen Bawa, "The Regulation of Interception of Communications and Provision of Communications Related Information Act" in *Telecommunications Law in South Africa*, eds. Lisa Thornton, Yasmin Carrim, Patric Mtshaulana and Pippa Reburn (2006), 320, link.wits.ac.za/papers/tele-law.html

68. Privacy international, "World's Top Surveillance Societies" www.wired.com/threatlevel/2007/12/worlds-top-surv

69. Jane Duncan, "Another View: Time to Oversee the Officials Who Spy on Us", *Sunday Times*, 30 October 2011, www.timeslive.co.za/opinion/commentary/2011/10/30/another-view-time-to-oversee-the-officials-who-spy-on-us

70. Bawa, "The Regulation of Interception of Communications"

71. *Ibid*, 330

72. Reports of the designated judges in terms of ROICA, 2006-2010, contained in reports to the National Assembly by the Joint Standing Committee on Intelligence.

is no information about the reasons for interception directions in 2008-2009, in 2009-2010 directions were granted to assist the investigation of drug dealing and drug trafficking, vehicle theft and car hijacks, armed robberies, corruption and fraud, and assassinations, murder and terrorism.⁷³ Most directions are granted to the Crime Intelligence Division of the South African Police Service, followed by the National Intelligence Agency (NIA, now known as the State Security Agency). By 2009-2010, the designated judge was receiving an average of 35 applications for interception directions a month, and he approved the applications in 94% of cases in the case of the police and 87.3% of cases in the case of the NIA.⁷⁴

The system has proved itself capable of subversion. The *Sunday Times* newspaper has reported that in 2010 intelligence officers duped the designated judge into signing an order to tap the phones of the then Police Commissioner General Bheki Cele, as well as two of the paper's journalists who were reporting on a controversial lease deal the General was implicated in. According to court papers, the intelligence officers lied about who the cellphone numbers contained in the application belonged to. This incident has fuelled fears that other applications to tap the communications of journalists and public figures may have been granted under false pretences.⁷⁵

Significantly, ROICA does not cover foreign signals intelligence, or intelligence derived from any communication that emanates from outside South Africa, or passes through or ends in the country. The state agency that intercepts these signals is the National Communications Centre (NCC), which falls under the Ministry of State Security, and not the OIC. This means that these signals can be intercepted without a warrant; a major lacuna in the law that has been criticised for creating space for violations of the right to privacy on national security grounds. According to the *Mail and Guardian* newspaper, "...this means that you can be bugged completely outside of the law, and without a judge's direction, if your communication involves a party in another country".⁷⁶ As a great deal of internet traffic originates outside the country, the interception

of this information can take place without judicial oversight, which is wide open to abuse.

In 2008 a Ministerial Review Commission appointed by the then Minister of Intelligence found the unregulated interception of foreign signals intelligence to be unconstitutional, and recommended that the activities of the NCC should be covered by ROICA.⁷⁷ This argument was reiterated by several civil society organisations and academics in public hearings on the General Intelligence Laws Amendment Bill in March 2012, which was introduced to amalgamate the various intelligence services into the State Security Agency (SSA). At the time of writing, this Bill is still being considered, but in response to a submissions on this point by the Right2Know Campaign, the Chair of the ad-hoc Committee on the Bill, Cecil Burgess, argued that the international nature of criminal syndicates required law enforcement officials to be proactive and the ROICA warrant procedure took some time, therefore there were circumstances where the intelligence services would need to intercept signals before a warrant could be obtained.⁷⁸ This point implied that the Committee may well be open to leaving foreign signals intelligence unregulated.

Take-down notices and acceptable use policies

Self-regulatory mechanisms are less susceptible to state capture, which is why they are preferred for regulation of internet content. However, while self-regulation has many advantages, it is also susceptible to industry capture and as a result can adopt an overly cautious approach towards controversial speech.⁷⁹ ISPA's take-down notification procedure does not make any provision for representations to be made by the alleged infringer before the take-down takes place, and there is no in-built right of appeal, which makes the procedure vulnerable to accusations of procedural unfairness and which has led intellectual property lawyer Reinhardt Buys to argue that the take-down pro-

73. J A M Khumalo, "Statistical Briefing by Designated Judge for the Period 1 April 2009 to 31 March 2010", report to the National Assembly of the Joint Standing Committee on Intelligence.

74. Ibid

75. Rob Rose, Stephan Hofstatter and Mzilikazi Wa Afrika, "Bugging: How Cops Lied", *Sunday Times*, 19 May 2012, www.timeslive.co.za/sundaytimes/2012/05/19/bugging-how-cops-lied

76. Heidi Swart, "Secret State: How the Government Spies on You", *Mail and Guardian*, 14 October 2011, mg.co.za/article/2011-10-14-secret-state

77. Ministerial Review Commission in Intelligence, "Intelligence in a Constitutional Democracy", final report to the Minister for Intelligence Services, the Honourable Mr. Ronnie Kasrils MP, 2008.

78. Parliamentary Monitoring Group, "General Intelligence Laws Amendment Bill: Public Hearings", 27 March 2012, www.pmg.org.za/report/20120328-generalintelligence-laws-amendment-bill-b25-2011-public-hearings

79. Frank La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/17/27* (Geneva: United Nations General Assembly, Human Rights Council, 2011), 12, www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

cedures are unconstitutional.⁸⁰ These lacunae are significant in view of the propensity recognised in other jurisdictions for take-down notices to be based on contestable grounds.⁸¹ Furthermore, in terms of the ECT Act, a service provider is not liable for wrongful take-down, which acts as a disincentive to scrutinise requests for take-downs carefully; rather liability rests with the lodger of the notice. However, if ISP's do not implement take-down notices they could be liable for hosting illegal content, which incentivises them to err on the side of caution and "take down first and ask questions later", irrespective of the legitimacy of the complaint.⁸² The problems with these arrangements were highlighted in 2008, when the Recording Industry of South Africa's (RISA) Anti-Piracy Unit issued take-down notices to ISPA, which then issued the hosting ISP with a take-down notice, and Buys challenged the constitutionality of the take-down procedure.

Another area of self-regulation that requires further examination is the acceptable use policies of South African ISPs and the extent to which they pass constitutional muster. An overview of the policies of some of the largest ISPs in South Africa suggests a tendency to identify prohibited content that would otherwise be protected speech under South Africa's constitution.

For instance, MWEB's acceptable use policy states that it prohibits use of the IP services in a way that is "...harmful, obscene, discriminatory... constitutes abuse, a security risk or a violation of privacy...indecent, hateful, malicious, racist... treasonous, excessively violent or promoting the use of violence or otherwise harmful to others".⁸³ Most of the quoted grounds are vague and would cover speech that would ordinarily receive constitutional protection, which implies that MWEB has adopted an inappropriately censorious approach towards controversial speech. iBurst's policy is even more restrictive in that it forbids publication of illegal material which it defines as including material that is obscene and discriminatory. However,

it also forbids material that "...could be deemed objectionable, offensive, indecent, pornographic, harassing, threatening, embarrassing, distressing, vulgar, hateful, racially or ethnically offensive, or otherwise inappropriate, regardless of whether this material or its dissemination is unlawful". There can be little doubt that this provision is unconstitutional, given its over-breadth, which covers offensive and not just harmful material, whereas the constitution requires a harms test to be applied before the right can be limited on justifiable grounds.⁸⁴ In contrast, Internet Solutions' policy restricts prohibited content to "...copying or dealing in intellectual property without authorisation, child pornography and/or any unlawful hate-speech materials".⁸⁵ The Codes of Conduct of WASPA and the DMMA are also unduly restrictive of freedom of expression and use highly subjective measurements of unacceptable material, covering material, for instance, that merely causes grave and wide-spread offence.

Awareness

This section assesses whether there is widespread awareness about the issues in the previous section, and whether civil society is organising to address problems and threats to internet rights. It maps the civil society landscape, identifying the key organisations of human rights defenders, and assesses their effectiveness in addressing internet rights.

South Africa does not have an organisation dedicated to internet rights. However, the country has a lively civil society sector that acts as an important check against unrestrained use of state and private power. An important positive development has been the recent formations of civil society coalitions around specific issues. The two most prominent coalitions are:

- SoS: Support Public Broadcasting Coalition is a civil society coalition which was formed in 2008 and which focuses on addressing the multiple crises at South Africa's public broadcaster, the South African Broadcasting Corporation (SABC). It also lobbies for citizen-friendly policies, laws and practices for public and community broadcasting, and advocates for an effective and independent communications regulator.⁸⁶ The coalition has made South Africa's digital

80. Rudolph Muller, "Local Websites in Danger", *MyBroadband.com*, mybroadband.co.za/news/internet/5948-local-websites-indanger.html

81. Jennifer Urban and Laura Quilter, "Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act", *Santa Clara Computer & High Technology Law Journal* 22, 4 (2006): 621, lquilter.net/pubs/UrbanQuilter-2006-DMCA512.pdf; Tyler Moore and Richard Clayton, "The impact of Incentives on Notice and Take-down", Seventh Workshop on the Economics of Information Security (WEIS 2008), 25-28 June 2008, www.springerlink.com/content/g856v7w02303n620

82. Muller, "Local Websites in Danger"

83. MWEB, "MWEB Acceptable Use Policy", www.mweb.co.za/legalpolicies/GeneralPage/AcceptableUsePolicy.aspx

84. iBurst, "Acceptable Use Policy", www.iburst.co.za/documents%5Clegal%5Cdocument_2.pdf

85. Internet Solutions, "Acceptable Use Policy", www.is.co.za/legal/Pages/default.aspx

86. SoS, "About SoS", www.supportpublicbroadcasting.co.za/about

migration process part of its core work, and is one of the few civil society organisations actively involved in the lobbying around the process.⁸⁷ SoS has also made a submission on the draft Local and Digital Content Development Strategy.

- Another civil society coalition, the Right2Know Campaign, was established in 2010 to campaign for a Protection of State Information Bill that meets what it refers to as its “seven point freedom test”. The campaign has been successful in raising public consciousness about the Bill and mobilising opposition. It has also managed to ensure significant legislative amendments to the Bill. More recently, R2K has also begun to conduct advocacy on broader issues relating to the transparency and accountability of the security cluster. In the context of this advocacy, R2K has argued for greater oversight of monitoring and interception of communications, especially foreign intelligence signals.⁸⁸ R2K does not have any dedicated activities, however, on internet rights.
- Other South African-based organisations taking up issues that touch on internet rights are as follows (not an exhaustive list):
- Media Monitoring Africa, which promotes quality media in Africa from a rights-based perspective through acting as a watchdog of media ethics and freedom. It undertakes advocacy on these issues as well, and includes online media rights in its work.⁸⁹
- The Freedom of Expression Institute (FXI), which was formed in 1994 and whose mandate is to fight for and defend freedom of expression, oppose censorship and to fight for access to information and media diversity. The FXI has on occasion taken up cases of online censorship.
- Section 16, which advocates for law reform in relation to freedom of expression and access to information, including online.⁹⁰

- Genderlinks focuses on promoting gender equality, especially through the media, in the SADC region and comments on and publicises issues around gender equality and media and ICTs.⁹¹
- The South African National Editors’ Forum (SANEF) is an association of editors and journalism educators. It engages in advocacy on media freedom issues, which may also extend to online media.⁹²
- While less public than SANEF, ISPA and WASPA also undertake advocacy on behalf of their members on issues affecting internet freedom, and were active in making representations to amendments to the Film and Publications Act that they felt threatened the rights of their members.
- The Open Democracy Advice Centre (ODAC), which conducts litigation and advocacy around the Promotion of Access to Information Act and the Protected Disclosures Act. ODAC has also been instrumental in organising civil society participation in the Open Governance Partnership, and in that context has raised the need for the South African government to embrace open data principles.⁹³
- The Alternative Information Development Centre (AIDC), which was formed in 1996 to promote social justice in South Africa’s then newly-established democracy. It ensures the dissemination of progressive alternative perspectives through participatory peoples’ media including social media, and has also undertaken advocacy on issues affecting internet rights.⁹⁴
- The South African NGO Network (SANGONeT), provides non-governmental organisations with a range of tools and services, but is not really involved in advocacy on South African internet rights. SANGONeT publishes an online newsletter focussing on the NGO sector called NGO Pulse.⁹⁵
- The Link Centre is based at the University of the Witwatersrand, conducts research and training on ICT-related issues, and offers post-graduate courses. It also undertakes advocacy in the form of submissions to various fora.⁹⁶

87. SoS – Support Public Broadcasting, “Policy Submission on the Digital Dividend”, 23 March 2011, www.supportpublicbroadcasting.co.za/library/entry/sos_-_policy_suggestions_on_the_digital_dividend

88. Right2Know Campaign, “Submission to the Ad-hoc Committee of the National Assembly on the General Intelligence Laws Amendment Bill”, 16 March 2012, d2zmx6mlq7g3a.cloudfront.net/cdn/farfuture/mtime:1333357073/files/docs/120322right2know_1.pdf

89. Media Monitoring Africa, “About Media Monitoring Africa”, www.mediamonitoringafrica.org/index.php/about

90. Section 16, “About us”, www.sectionsixteen.org/newsletters/index.cfm?category_home&company=1&subsection=9&newsletter=0

91. Genderlinks, “About us”, www.genderlinks.org.za/page/about-us

92. SANEF, “About Sanef”, www.sanef.org.za/about

93. South African Open Governance Activity, opengovpartners.org/za

94. AIDC, “About AIDC”, www.aidc.org.za/index.php?option=com_content&view=article&id=47&Itemid=76

95. SANGONeT, “About SANGONeT”, www.ngopulse.org/about

96. Link Centre, link.wits.ac.za

- The South African Chapter of the Creative Commons popularises the use of creative commons licences that seeks to protect the copyright in a way that acknowledges the need for access to information in the digital era.⁹⁷
- Research ICT Africa conducts research, training and capacity building on ICT-related issues in 20 African countries, including South Africa, and undertakes advocacy on the ICT policy environment in South Africa.⁹⁸

There are several online sites devoted to digital media issues, and other that touch on digital media-related issues, such as MyBroadband.com, ITWeb, The Media Magazine, FreeAfricanMedia, Hellkom and Daily Maverick. These online sites are important repositories of information and analysis on issues affecting the internet, and keep their readers informed and engaged in issues that affect their rights. Largely, these sites have not become engaged in direct advocacy in support of internet rights, but have the potential to do so.

This brief overview shows that civil society and the media space is rich with activity on internet-related issues. However, the fact that serious incursions have been made into internet freedom suggests that civil society advocacy on internet rights has not been sufficiently robust, and that the advocacy that has taken place has been piecemeal, relatively uncoordinated and of limited impact on key issues. In spite of the proliferation of IT-related sites, reflecting the complexity and breadth of the ICT sector, there has been little public education work on the impact of these creeping erosions of internet freedom. This is in contrast to legacy media freedom issues, where threats to this freedom have been met with strong reactions from civil society, and hence concessions by the government and Parliament. No ongoing monitoring is taking place of decisions being made by the Film and Publications Board or the Equality Courts or ISPs, for instance, to assess their impact on online freedom. As a result, it is impossible to assess the true import of the problems outlined in the earlier section. It has been shown that coalitions work well in South Africa when it comes to advocacy in rights-related issues, especially if they have a mass base, and what should be considered is the possibility of a coalition-based approach to advocacy on internet rights in South Africa.

Impact on other rights

This section focuses on the rights that are affected by the problems identified in the earlier section. With respect to the universality of the internet, the widespread penetration of mobile phones has expanded access to the internet. But because of the inherent technical limitations of mobile phones, they cannot be used as easily as fixed-line connections via ADSL for accessing large amounts of information. This problem could fail to narrow and in fact even sharpen the divide between the information-haves and information have-nots. The cost of connectivity is possibly the single largest barrier to popular access to and usage of the internet, which impacts negatively on both freedom of expression and access to information as poor users, women and youth are affected disproportionately, making them even more vulnerable to economic and social marginalisation and therefore impacting negatively on their right to equality. Linguistic diversity is sadly lacking on South African-orientated sites, which impacts negatively on the right to cultural and linguistic identity of those who do not consider English their home language or mother tongue. To this extent, language acts as a significant barrier to online usage for many South Africans. While there are plans to ensure the roll-out of a national broadband infrastructure, and to ensure a greater diversity of online content, the targets set for the roll-out are not ambitious, and may fail to ensure that access to the kind of high-speed broadband needed to ensure social and political participation becomes a reality.

The lack of affordable internet access limits the potential of the internet to be put to a range of beneficial uses, such as improving service delivery and encouraging political participation, and therefore impacts on a range of rights. One of the most significant impacts is on the right to education. While the government made proposals as far back as 2001 for a special e-rate to apply to schools to facilitate access to the internet, and ICASA held public hearings on the matter in 2010, the rate has still not been implemented.⁹⁹ These problems make it difficult to ensure widespread connectivity to the internet in schools, which in turn reduces the ability of learners to develop the skills needed to participate meaningfully in the information society. Teachers and learners in unconnected schools are also deprived of rich online educational resources.¹⁰⁰

97. Creative Commons South Africa, www.creativecommonsza.org

98. Research ICT Africa, "About Research ICT Africa", www.researchictafrica.net/about.php

99. Rudolph Muller, "E-rate Battle Stage Set", *Mybroadband*, 18 February 2010, mybroadband.co.za/news/telecoms/11537-e-rate-battle-stage-set.html

100. J Nonyane and N Mlitwa, "ICT Access and Use in Rural Schools in South Africa: A Case Study in Mpumalanga Province", unpublished paper, Cape Peninsula University of Technology

Lack of affordable access also impacts negatively on e-health deployment. The Presidential National Commission on the Information Society and Development viewed ICTs as vehicles to bridge the gap between rural and urban healthcare by linking medical practitioners who are separated geographically. However, lack of access to an internet connection has been cited as one of the most significant barriers to the realisation of the potential of e-health in rural clinics.¹⁰¹ Political participation is also adversely affected as it makes it difficult for citizens to participate in political activities and to interact with government online, including accessing government services.

Unduly restrictive internet content regulation also impacts negatively on a range of rights. In the past ten years, South Africa lawmakers have demonstrated a tendency to prioritise national security over civil liberties, resulting in insufficient privacy safeguards, and the fact that South Africa still lacks privacy legislation exacerbates the problem. The overly broad powers of the cyber-inspectors provided for in the ECA Act potentially threatens the right to privacy. Furthermore, the lack of basic safeguards to protect the right to privacy when communications are intercepted in terms of ROICA also creates space for abuses of this right, and indeed evidence has emerged of abuse. However, as with the application of the ECA Act, too little information is available to establish whether abuses are occurring on a widespread basis. The inability of civil society to hold the government to account in this regard is in itself a concern that needs to be addressed.

The lack of safeguards may well lead to users self-censoring out of fear of their communications being intercepted. In the run up to the ANC's previous elective conference in 2007, evidence emerged of the communications of some of the then President Thabo Mbeki's political opponents being intercepted, which led to the Ministerial Review Commission mentioned in the earlier section. Ahead of the next elective conference in Mangaung, politicians and trade unionists have also expressed fear that a similar problem is occurring, leading to extreme caution in communicating any information and expressing opinions about the suitability of the incumbent Jacob Zuma for office

and a possible successor.¹⁰² Such fears are likely to have a chilling effect on the right to engage in free political activity.

With respect to freedom of expression, the fact that internet content was brought under the jurisdiction of a government agency with limited independence, the Film and Publications Board, with hardly any public debate about its implications, is deeply concerning. Both the Film and Publications Act and the Equality Act have stretched definitions of hate speech beyond what is constitutionally permissible. In the process, the robust exchange of opinions on a range of issues could be discouraged on the basis that they constitute hate speech, especially if these opinions cause widespread shock or offence.

The self-regulatory system for internet content is also not without its flaws. In order to escape liability when they are informed, as argued it is very possible that ISPs are adopting an overly cautious approach to complaints they receive on allegedly illegal material. Furthermore, the fact that major ISPs have largely adopted acceptable use policies that restrict legitimate speech, and not just speech that does not receive Constitutional protection, is of concern. The fact that ISPA's take-down procedure does not allow the alleged infringer the right to make representations or to appeal a decision is an additional factor that risks tilting the self-regulatory regime towards censorship.

Conclusions and recommendations

South Africa largely respects online freedoms, and to this extent the country could be considered to have a free online media environment. Many of the instances of internet censorship apparent in more repressive countries, and outlined by the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, are absent in South Africa.¹⁰³ Bloggers, for instance, are not criminalised for expressing their views, as they are in much more repressive contexts. The fact that ISPs are not held liable for internet content – unless they are informed of the existence of illegal content and they fail to take the content down – is a positive feature of the ECT Act. There is no evidence of internet users being disconnected, even if they violate intellectual property laws. Cyber-attacks have become a growing problem in South Africa, but

101. Nkqubela Ruxwana, Marlien Herselman and Pieter Conradie, "ICT Applications as E-health Solutions in Rural Healthcare in the Eastern Cape Province of South Africa", *Health Information Management Journal*, 39, 1 (2010): 17-26

102. Njanji Chauke, "Mduli Admits Writing a Letter to Zuma", *SABC News.com*, 11 May 2012, www.sabc.co.za/news/a/414815804b35447fa7d4efe756e8533f/Mduli-writes-to-Zuma

103. La Rue, *Report of the Special Rapporteur*

these are largely perpetrated by criminals against businesses;¹⁰⁴ there is no evidence of such attacks being used against political opponents.

However, there are indications that the conditions for internet rights are not optimum and need to be improved. According to La Rue's report, there are legitimate grounds for restricting certain types of information such as child pornography, hate speech, defamation, and direct and public incitement to commit genocide. However, any limitation must meet a three-part cumulative test, which ensures that limitations are predictable and transparent: they must be legitimate and they must be necessary and proportional to the aim. He noted that many countries are placing undue restrictions on the internet.¹⁰⁵ Three aspects of this trend cited in his report are relevant for South Africa: criminalisation of legitimate expression, arbitrary blocking and filtering of content, and inadequate protection of the right to privacy and data protection. With respect to the first, it is apparent from an analysis of the various amendments to the Film and Publications Act that the scope for criminalisation of "unacceptable" content has been gradually expanded beyond the constitutionally recognised limitations on freedom of expression. With respect to the second, aspects of the self-regulatory system for internet content are also unduly restrictive of freedom of expression. With respect to the third, safeguards to protect abuses of the government's monitoring and interception of communications capability are inadequate.

La Rue has also argued for government to prioritise internet access, given that it has become an indispensable tool for realising human rights, which includes making the internet available, accessible and affordable.¹⁰⁶ Where access is present, La Rue has also called on governments to ensure that usable, meaningful content is provided online. South Africa clearly has some way to go in realising these three dimensions of universality. A key weakness in South Africa's ICT landscape has been a confused policy framework that attempts to balance conflicting objectives, but that has on balance allowed excessive profit-taking by parastatal and private network operators at the expense of universal service. In the case of Telkom, the Department of Communications, which is also the custodian of Telkom's shares, has protected the parastatal from

competition to enable it to meet universal service targets. However, it has largely failed to meet these targets because the company sought to extend the network on commercial principles, which led to massive churn as users could not afford the rising costs of the service. Cellphone network operators have been largely unregulated by policy, which has allowed them to entrench their dominance relatively unchallenged.

An added dimension to the problem is that ICASA has been weakened by the Department of Communications through a variety of measures, including underfunding, and an erosion of its administrative and institutional independence. The regulator's weakness has meant that it cannot hold the network operators to account sufficiently, which has exacerbated the problems mentioned above. These weaknesses also point to the ineffectiveness of USAASA in promoting universal service and access to ICTs. Like ICASA, USAASA has struggled to assert itself independently of the Department of Communications, and has been plagued by ineffective management.¹⁰⁷

The ANC has attempted to address weaknesses in the ICT landscape, including the affordability problem, by developing a draft ICT policy framework for its forthcoming national conference. It remains to be seen if this development, as well as the Department's ICT Policy Review, will address ongoing problems of affordable access to ICTs generally, including the internet.

The following recommendations are made for civil society:

- A coalition of existing organisations around internet rights could be considered. Rather than forming another coalition, exploratory discussions could be held with the Right2Know Campaign and the SoS: Support Public Broadcasting Coalition to establish an internet rights project, which could then become a campaign focus among their members. These coalitions could also be broadened to include organisations that specialise in IT issues and that therefore should have an interest in internet rights. Not only will this coalition lobby to remove the current restrictions in internet content, but it will organise communications users, especially the poor, and campaign for affordable access to communications. These organisations should be provided with the necessary assistance to build the capacity of their

104. Charlie Frapp, "Cyber-attacks Remain Problematic", *IT News Africa*, 19 October 2011, www.itnewsafrika.com/2011/10/cyberattacks-remain-problematic

105. La Rue, *Report of the Special Rapporteur*

106. *Ibid*

107. Lewis, "Achieving Universal Service"

members to advocate on questions of internet freedom.

- Audits should be conducted of decisions of the following institutions, to establish whether online freedom is being unduly compromised: decisions of the Film and Publications Board that impact on online freedom; ISPA take-down notices; interception reports of the designated judge in terms of ROICA; and activities of the cyber-inspectors set up in terms of the ECT Act. Where information is not publicly available on their activities, Promotion of Access to Information Act requests should be filed to obtain the information, and if the information is refused, then the right should be enforced through litigation. The findings of these audits should be released publicly to build public awareness of the extent of internet rights.
- Monitoring of the decisions of these institutions should also take place on an ongoing basis. Where internet rights violations take place, these should be publicised and the responsible institution “named and shamed”.
- An audit should be conducted of the acceptable use policies of ISPs, and where necessary these ISPs should be approached to change these policies if they are unduly restrictive of online freedom.
- ISPA should be approached to reconsider its take-down notification procedure to ensure that it is procedurally fair. This recommendation and the one above are designed to address La Rue’s concern that “...corporations also have a responsibility to respect human rights, which means that they should act with due diligence to avoid infringing the rights of individuals”.¹⁰⁸

The following recommendations are made for Parliament and government:

- Parliament should amend ROICA to ensure that people whose communications have been intercepted should be informed after the completion of investigations, or if the designated judge refuses to grant an interception direction. ROICA should also be made applicable to foreign signals intelligence.

- The Intelligence Services Oversight Act should also be amended setting out the required content for reports of the designated judge in ROICA. At the very least, annual reports should include the following information: the number of directions granted; the offences for which orders were granted; a summary of types of interception orders; the average costs per order; the types of surveillance used; and information about the resulting arrests and convictions.
- The Film and Publications Bill should be amended to ensure that the Board’s jurisdiction does not extend to the internet. Alternatively, if this amendment is not winnable then its jurisdictions should only extend to child pornography, hate speech, propaganda for war and incitement to imminent violence, and that if internet content has artistic, scientific, or public interest merit, then it does not have jurisdiction over such content at all. Furthermore, the independence of the Board should be enhanced, and the Board should be made accountable to Parliament. This will bring the Board into line with La Rue’s recommendation that “any determination on what content should be blocked must be undertaken by a competent judicial authority or a body which is independent of any political, commercial or other unwarranted influences”.¹⁰⁹ The pros and cons of collapsing the Board into ICASA, given the latter’s constitutionally protected independence, and given the inevitable convergence of content classification systems, should also be evaluated.
- The Protection of Personal Information Bill should be expedited to ensure legislative protection of the right to privacy.
- The Department of Communications’ ICT policy should conduct an honest assessment of the strengths and weaknesses of the communications environment, including an assessment of the profit-taking practices of network operators and its own role in allowing these practices to continue, either through acts of commission or omission. The review should also identify structural conflicts of interest in the communications environment that impede universality, and provide solutions to these problems.

108. La Rue, *Report of the Special Rapporteur*, 21

109. *Ibid*, 20

- Through the above review, weaknesses in ICA-SA's administrative, financial and institutional independence must be identified and improved to ensure that it becomes a more effective regulator, less susceptible to governmental and industry capture.
- The review also needs to ensure that ICASA regulates the costs of communications much more effectively to ensure affordable access to communications.
- The Department of Communications' Broadband Policy should be accompanied by an implementation plan and budget and should be amended to increase download speeds and penetration rates for households. The department's ICT review should also actively canvass synergies between broadcasting and broadband to ensure that the benefits of converged networks are optimised and made widely available.
- The mandate of USAASA should be reviewed to ensure that it makes a meaningful difference to universality by providing targeted subsidies that improve access to communications. USAASA must be mandated to develop access plans for women and youth especially to address the yawning digital divide for both social groups. ■

This publication is a follow-up to the 2011 issue of **GLOBAL INFORMATION SOCIETY WATCH** (GISWatch), an annual report that offers a civil society perspective on critical emerging issues in information societies worldwide. The theme for **GISWATCH 2011** was internet rights and democratisation, with a focus on freedom of expression and association online. In line with this, the reports gathered here offer an in-depth account of the human rights challenges faced online in six countries: South Africa, Argentina, Pakistan, Indonesia, Saudi Arabia and Azerbaijan.

As Jillian York writes in the introduction, the reports

...seek to inform, from a human rights-focused perspective, on the challenges facing freedom of expression—and its advocates...Each country of the six is different, with varied forms of government, cultural backgrounds, and national aspirations, but the similarities in the challenges faced by their citizens in preserving the principles of free expression on the frontiers of the internet are all too similar.

We hope that this publication helps to alert activists to the critical issues faced when it comes to the internet and human rights in the countries surveyed, and also serves as a way to galvanise civil society advocacy in these areas.

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