Submissions to the thematic report of the Special Rapporteur on Freedom of Expression in Challenging Times

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This report explains that freedom of expression and the prohibition of hate speech are enshrined not only in international human rights treaties but also in customary international law. Building on this foundation, the report examines hate speech regulations and constitutional review jurisprudence in Malaysia, Singapore, the Philippines, and India.

1. Freedom of expression in customary international law

Freedom of expression is safeguarded not only through international treaties[2] but also under customary international law, which is crucial as it fills gaps where treaties do not exist and it binds all states, regardless of whether they have ratified specific treaties. Consequently, even though Singapore and Malaysia have not ratified the International Covenant on Civil and Political Rights (ICCPR), they remain legally obligated to uphold freedom of expression.

Customary international law encompasses freedom of expression for several compelling reasons. Firstly, the Human Rights Committee's General Comment on freedom of expression explicitly stated that any reservation to Article 19(1) of the ICCPR would be incompatible with the Covenant's object and purpose, considering the specific terms of Article 19(1) and its connection to the rights to opinion and thought protected under Article 18.[3] Secondly, reservations to Article 19 of the ICCPR exist, yet none fundamentally challenge the core principles of freedom of expression.[4] These reservations typically pertain to the regulation of broadcasting and cinema[5], as well as the political activities of public officers and non-nationals.[6] This indicates that freedom of expression, as articulated in Article 19 of the ICCPR is recognized as binding treaty law by the 173 states parties to the Covenant.[7] Thirdly, additional evidence that states not party to the ICCPR nonetheless acknowledge the rights articulated in Article 19 can be found in the Universal Periodic Review (UPR) reports[8], including those from

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[2] International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, art.19; International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195, art. 5(d)(viii); International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, (2003) 2220 UNTS 3, art. 14; Convention on the Rights of Persons with Disabilities, (2008) 2515 UNTS 3, art. 21; Convention on the Rights of the Child, (1990) 1571 UNTS 3, art. 13.

[3] General Comment 34, art. 19: Freedoms of opinion and expression, CCPR/C/GC/34, para. 5.

[4] https://treaties.un.org/pages/viewdetails.aspx?chapter=4&clang=_en&mtdsg_no=iv-4&src=ind.

[5] France, C.N.335.1980.TREATIES-10; Germany, C.N.76.1988.TREATIES-4; Italy, C.N.231.1978.TREATIES-11; Luxembourg, C.N.265.1983.TREATIES-3/8/2; Monaco, C.N.382.1997.TREATIES-5/9; Netherlands, C.N.316.1978.TREATIES-14; Australia, C.N.230.1980.TREATIES-6.

[6] C.N.304.1990.TREATIES-4/11/4.

[7] https://indicators.ohchr.org/.

[8] Page 195, Schabas, William A., *The Customary International Law of Human Rights* (Oxford, 2021; online edn, Oxford Academic, 19 Aug. 2021). The author listed other 19 countries, which are not states parties to the ICCPR but recognized freedom of expression in their UPR reports.

Singapore[9] and Malaysia[10]. Fourthly, freedom of expression has also been recognized in a number of regional human rights treaties.[11] Worth mentioning, although Asia lacks a regional human rights convention, the ASEAN Human Rights Declaration affirms freedom of expression in paragraph 23.[12]

Not only is freedom of expression enshrined in customary international law, but so are the restrictions on this freedom.[13] Such restrictions are not only permissible but, in some cases, mandated by international human rights law. The prohibition of hate speech is arguably one such mandated restriction. The International Convention on the Elimination of All Forms of Racial Discrimination obliges States Parties to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin".[14] The Committee on the Elimination of Racial Discrimination has affirmed that "the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression".[15] Similarly, Article 20 of the ICCPR mandates the prohibition of propaganda for war and of advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence. In General Comment 24, the Human Rights Committee listed customary norms and emphasized that States could not "permit the advocacy of national, racial or religious hatred".[16]

2. States' practice: hate speech regulation

a. Malaysia

In 2015, Malaysia's Sedition Act was amended to reinforce the protection of religious harmony.[17] Section 3 stipulates that promoting ill will, hostility, or hatred between individuals or groups based on religion constitutes an offense. Section 4 criminalizes the dissemination of seditious speech, extending its scope to include actions such as printing, publishing, selling, offering for sale, distributing, reproducing, and, notably, "causing to be published" seditious material.

The amendments increase penalties, replacing fines with mandatory imprisonment. Previously, the law allowed for a maximum imprisonment term of three years, providing courts the discretion to impose shorter sentences. The revised Act mandates a minimum imprisonment

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[9] Singapore, National report, A/HRC/WG.6/11/SGP/1, paras. 141, 145–154; Singapore, Views on conclusions, A/HRC/32/17/Add.1, paras. 47–50; Singapore, Report of the Working Group, A/HRC/32/17, paras. 72–75.

[10] Malaysia, Report of the Working Group, A/HRC/40/11, paras. 8, 73, Views on conclusions, A/HRC/40/11/Add.1, National report, A/HRC/WG.6/17/MYS/1, paras. 87, 97, 146, and National report, A/HRC/WG.6/31/MYS/1, paras. 30–32.

[11] European Convention on Human Rights, (1953) 213 UNTS 221, art. 10; American Convention on Human Rights, (1978) 1144 UNTS 123, art. 13; African Charter on Human and Peoples' Rights, (1986) 1520 UNTS 271, art. 9; Arab Charter on Human Rights, art. 24(3); Charter of Fundamental Rights of the European Union, OJ C 326/391, art. 11; African Charter on the Rights and Welfare of the Child, art. 7.

[12] Adopted by the Heads of State/Government of ASEAN Member States, including Malaysia, the Republic of the Philippines, the Republic of Singapore. November 19th, 2012.

[13] Schabas, supra n 9 at 197-200.

[14] International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195, art. 4(a).

[15] General Recommendation 15 on art. 4 of the Convention, A/48/18, p. 114, para. 4.

[16] General Comment 24, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under art. 41 of the Covenant, CCPR/C/21/Rev.1/Add.6, para. 8.

[17] Sedition (Amendment) Act 2015 [Act A1485].

term of three years, with the possibility of up to seven years, thus removing judicial discretion to impose fines upon conviction for a Section 4 sedition offense.[18]

The Act explicitly includes electronic means within its definition of publications.[19] Courts are empowered to issue prohibition orders requiring individuals to remove allegedly seditious material from electronic platforms and barring them from accessing electronic devices.[20] Non-compliance with such orders is punishable by a fine, imprisonment of up to one year, or both.[21]

b. Singapore

In 2019, the Singaporean government issued the Protection from Online Falsehoods and Manipulation Act.[22] Section 7(1) stipulates what constitutes "communication of false statements of fact" that "A person must not do any act in or outside Singapore in order to communicate in Singapore a statement knowing or having reason to believe that … (v) *incite feelings of enmity, hatred or ill-will between different groups of persons*" (emphasis added).

According to Article 19(3) of the ICCPR, and as pointed out by previous Special Rapporteur[23], a law restricting freedom of expression should fulfil requirements of legitimacy, necessity, and proportionality. However, Article 14(2) of the Constitution of Singapore[24] allows Parliament to impose restrictions on freedom of expression as it deems "necessary or expedient," without the constraint of reasonableness. This language potentially grants the legislature broad authority to determine the necessity of such limitations. Furthermore, the High Court of Singapore, in its constitutional review, has affirmed that proportionality has not been recognized within constitutional law.[25] The Court acquiesced that whenever Parliament passes legislation, it means that Parliament has found the legislation to be "necessary or expedient" to achieve the objectives set out in Article 14(2) of the Constitution and that it is therefore constitutional.[26]

c. The Philippines

On July 1, 2019, the Anti-False Content Bill was introduced in the Senate of the Philippines, aiming to "protect the public from the deleterious effects of false and deceiving content online."[27] Under this bill, the new "Punishable Acts" include publishing information that the publisher knows or reasonably believes to be false or misleading to the public, providing a service to facilitate such activity, financing such activity, or failing to comply with a Section 5 Order. Section 5 grants the Department of Justice Office of Cybercrime (DJOC) the authority to determine whether a Punishable Act has been committed and to issue orders for the modification or removal of the published information. Violating any of these provisions results in sanctions of imprisonment, fines, or both. The bill employs an undefined standard of

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[18] Sections 4 & 10.
[19] E.g., Section 8(b)(IA)(b) states that, "in the case of a prohibited publication by electronic means…"
[20] Section 10.
[21] Section 10.
[22] Protection from Online Falsehoods and Manipulation Act, No. 18 of 2019 (Singapore).
[23] See e.g., para. 77, A/67/357, 7 September 2012.
[24] Article 14(2) stipulates that "(2) Parliament may by law impose — (a) on the rights conferred by clause (1)(a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence". (The Constitution of the Republic of Singapore, 1965)
[25] *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 at [87].
[26] The High Court of Singapore developed a so-called *Jolovan Wham* framework to evaluate whether legislations limiting freedom of expression are constitutional or not. *Wham Kwok Han Jolovan v Public Prosecutor* [2021] 1 SLR 476.
[27] Anti-False Content Bill, Senate Bill No. 9 (Philippines, 2019).

"reasonable belief"[28] to identify false content and empowers the DJOC to modify or remove information from a website on a "valid and sufficient basis,"[29] without incorporating any safeguards.

d. India

The Indian Penal Code (IPC) of 1860 penalizes sedition under Section 124A, which defines the offense and prescribes the corresponding punishment.[30] Section 124A states:

> "Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine."

Section 124A further clarifies that mere expression of discontent towards government actions, or efforts to bring about constructive change through legal means without inciting hatred, contempt, or disaffection among the populace, does not constitute sedition. Additionally, Section 95 of the Criminal Procedure Code of 1974 empowers the state to ban any form of writing or publication that embodies seditious ideas or content.[31]

In the case of *Romesh Thappar v. State of Madras*[32], the Supreme Court established that any law restricting freedom of speech and expression must directly pose a threat to the security of the state as outlined in Article 19(2) of the Constitution. Laws imposing such restrictions cannot be considered sedition unless they explicitly challenge or jeopardize state security. Subsequently, in *Kedar Nath Singh v. State of Bihar*[33], the Supreme Court articulated the principle that only actions leading to public disorder and inciting violence within the state amount to sedition. The case of *Arup Bhuyan v. State of Assam*[34] further clarified that Section 124A of the Indian Penal Code applies solely to acts that directly incite imminent violence. In *Common Cause v. Union of India*[35], the Court reaffirmed that the principles laid down in the *Kedar Nath Singh* case must guide the state in handling allegations of sedition.

3. Conclusion

In conclusion, freedom of expression, enshrined in customary international law, imposes obligations on all states regardless of their treaty ratification status. This right is globally acknowledged, including by non-ICCPR states such as Singapore and Malaysia. Nevertheless, international law necessitates restrictions on this freedom to prevent harm, notably hate speech. National regulations in Malaysia, Singapore, the Philippines, and India reflect these requirements. However, it is contentious whether these restrictions align with the legal standards of Articles 19 and 20 of the ICCPR, particularly given Singapore's constitutional review's lack of proportionality assessment. Indian jurisprudence underscores that such restrictions must directly pertain to state security and public order, thereby balancing the protection of individual rights with the maintenance of societal harmony.

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[28] Section 4.
[29] Section 5.
[30] The Indian Penal Code, Act No. 45 of 1860.
[31] The Code of Criminal Procedure, Act No. 2 of 1974.
[32] 1950 SCR 594.
[33] 1962 Supp SCR 769.
[34] (2011) 3 SCC 377.
[35] (2016) 15 SCC 269.