

Chapter 14

Digital Rights in Southeast Asia: Civil Society's Legal Tactics and Courts' Roles

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A. INTRODUCTION

Technology plays an increasingly important role in every facet of people's lives, and, with its rise, human rights understanding has changed. While the digital age has opened new spaces for the enjoyment of human rights, such as the right to freedom of expression, it has also brought a range of new threats and risks to them. Technological developments not only enable individuals to use new information and communications technologies that improve lives, strengthen justice and boost productivity but also enhance the capacity of governments, businesses and individuals to undertake surveillance and interception, which may violate or abuse human rights. For this very reason, regulatory systems need to adapt to counteract the ways they can be exploited to threaten fundamental human rights and freedoms in the digital space. The responsibility to uphold and protect digital rights, dispersed across multiple layers of society, lies with a range of stakeholders. From states to businesses, to civil society, to international organisations, to academia, each of them has a specific role; and, unless they abide by their role, there is little prospect of living in a society where digital rights are respected for all.

While states face the challenge of reforming their laws to keep pace with the digital revolution, civil society is confronted with ensuring that new rules meet international standards and represent an appropriate adaptation of offline rules to online contexts, which all too often is not the case. Protecting the space for civic engagement and activities is not particularly straightforward nor easy to achieve in an environment of weak rule of law, where online democracy is under attack, which is the case in the Southeast Asia region.¹ In many countries across the region, the very concept of the rule of law is something the powerful are constantly negotiating, as we experience the expansion of authoritarian regimes. Authorities have utilised new and old legislation and government-aligned courts to punish critics and silence the outspoken. This view gains currency from the intensification of repression against opposition voices, both through legal and extrajudicial means,

but tougher enforcement through the courts indicates the ever-shrinking room for discourse. In the struggle for the rule of law and in holding the authorities accountable for the respect for human rights, civil society plays a significant role.

This chapter explores how civil society actors (CSAs) are approaching courts to guarantee digital rights in Southeast Asia, by analysing five cases initiated by CSAs from across the region. The secondary purpose of studying these cases is to determine how well the courts have conceptualised digital rights and how much expertise is required for them to act on these matters. The chapter concludes with recommendations for states to defend internet freedom as a vital form of democracy, and to protect and enhance civic space; and for civil society to promote and ensure good governance, while contributing to the promotion, protection and advancement of human rights online.

B. HOW CIVIL SOCIETY IS APPROACHING COURTS TO FACILITATE AND GUARANTEE DIGITAL RIGHTS IN SOUTHEAST ASIA

Southeast Asia is a heterogeneous regional setting comprising a number of countries with differing sizes, levels of development and governance systems. A multi-tiered judicial system exists in many of the countries in the region, but its effectiveness in preserving people's rights and freedoms is often compromised by its vulnerability to executive pressure.

Southeast Asia has over 400 million internet users and a booming digital economy, and the internet penetration rate ranges from around 70 per cent in all countries but Laos, Myanmar and Timor-Leste.² In fact, the digital space has become an integral part of people's everyday lives and has expanded the democratic and civic space, which are essential for ensuring freedom of expression and political participation, among others. Yet, it has brought with it immense challenges in protecting human rights and democracy.

While the remarkable power of the internet to enable millions of people to express their opinions, organise, share and receive information is obvious, the actions of governments in Southeast Asia in recent years have demonstrated just as clearly how the internet has given states unprecedented power to stem the flow of information and opinion through technical means, with rapid and widespread effect. The declining internet freedom was documented in the Freedom on the Net 2022 Report by Freedom House, which reveals that none of the eight countries monitored in the region have an online sphere rated as 'free'.³ On top of inadequate safeguards to protect digital rights, the legal systems have repeatedly proved inadequate, with judges handing down decisions that legitimised governments to suppress already curtailed digital rights.

In this chapter, cases show how CSAs petitioned courts and called upon them to review the constitutionality or legal conformity of provisions, driving

collective action to defend digital rights and resist authoritarianism. Although their success in bringing strategic litigation to quash online repression has been limited to a certain extent, nonetheless these cases show the tenacity of civil society in defending digital rights and its courageous and proactive role in approaching the courts to guarantee these rights.

I. Thailand

With the rise of digital dictatorship, which Prayuth's regime has sparked, respect for digital rights is being lost.⁴ Thailand has a restrictive political environment, and blocking and punishing opinions deemed critical of the monarchy and the government are frequent. Over 200 people are currently charged with *lèse-majesté* under the Criminal Code, which enshrines the crime of defamation against the monarchy and sets out draconian penalties.⁵ The authorities also frequently charge activists and netizens with sedition and violations of the Computer Crime Act,⁶ which gives officials broad powers to prosecute online expression.⁷ Hundreds of people are guilty until proven innocent and detained, and courts, which suffer from politicisation and corruption,⁸ regularly deny them bail.⁹

To counter digital rights restrictions, civil society actors have had to find alternative forms of resistance, including building regional solidarity and reaching out to the international community to call on the Thai government to respect its human rights obligations and protect democratic values.¹⁰ Youth pro-democracy activists have even resorted to unconventional outlets to show their grievances.¹¹ In addition, civil society has turned to the judiciary, petitioning courts to uphold digital rights. A landmark case from 2021 shows dogged civil society's success in approaching courts and pushing back against digital repression.

On 29 July 2021, the Prime Minister promulgated a regulation under section 9 of the Emergency Decree on Public Administration in Emergency Situations B.E. 2548 (2005),¹² which would have authorised the suspension of internet services for those who share content that may 'instigate fear', 'mislead' or affect security.¹³ It also required internet service providers (ISPs) to identify IP addresses accused of producing content deemed illegal, report the details to the government, and immediately suspend internet service to that IP address. In front of this, civil society did not stand idly by while their liberties were attacked. On 2 August of the same year, a group of human rights lawyers and twelve Thai media companies filed a petition before a civil court challenging the regulation.¹⁴

On 6 August, in extremely positive news, the Civil Court issued a judgment strongly in favour of upholding and advancing the human rights of people online. In its decision, the court ruled that a prohibition relating to 'content that may instigate fear among the people' is ambiguous and may lead to an unnecessarily broad interpretation affecting freedoms of expression

and the press guaranteed by the constitution. Additionally, it held that 'the importance of the internet access is recognised throughout the society, particularly, in the current situation of Coronavirus Disease (COVID-19) pandemic', which Thailand was going through at that time. The court confirmed that regulations requiring ISPs to cease providing internet services for owners of content violating the regulation results in an impermissible blockage of communication channels and is unconstitutional. Furthermore, it determined that the regulation would place a disproportionate burden on the people to interpret and comply with the law.¹⁵ The court issued an emergency order that prevented the Prime Minister from enforcing the regulation, whereupon the government issued a regulation repealing it.¹⁶ The regulation's quashing marked a positive step for freedom of expression online in Thailand and for the role of civil society as a key player in contributing to the realisation of digital rights.

In a more recent development, civil society actors in Thailand have once again demonstrated their importance as agents of change for enhancing accountability and promoting fundamental rights. For the first time in Southeast Asian history, eight Thai citizens jointly filed a lawsuit against NSO Group, the Israeli company that developed the Pegasus spyware,¹⁷ for violating their rights after their phones were infected by Pegasus over the past two years.¹⁸ The lawsuit was dismissed by a civil court in Bangkok on the grounds that the cases could not be combined. Following this, Yingcheep Atchanon, one of the individuals who had originally filed the lawsuit in November, stated he would bring a new lawsuit with himself as the plaintiff.¹⁹ In June 2023, Yingcheep Atchanont, alongside an activist, filed a lawsuit against nine Thai government agencies, demanding 2,500,000 baht in compensation for alleged privacy violations due to the government's reported use of Pegasus spyware. The Court ruled that the case was outside its jurisdiction and declined to proceed. As of now, the case is awaiting appeal.²⁰ The decision is likely to echo far beyond Thailand when it is handed down.

II. Indonesia

In Indonesia, freedom of expression, including online, is protected in the constitution and other laws, but the right is routinely curtailed in practice. Digital repression is rampant and includes disruptions to internet access, criminalisation of people's online activities, as well as digital attacks against civil society, especially critical groups such as journalists, activists and human rights defenders.²¹ Moreover, the new Criminal Code passed in December 2022 poses a massive threat to human rights, as it contains problematic provisions which are bound to push Indonesia deeper into authoritarianism, leaving no space for civil liberties and threatening freedom of expression.²² Although the judiciary has occasionally shown its independence, the court

system is rife with corruption and is subject to political influence.²³ In a case related to internet shutdown episodes, courts reached opposing conclusions, with the final court failing to uphold digital rights.

Disrupting internet services during times of social unrest is a classic authoritarian tactic, and the Indonesian government used it in August and September 2019 during protests in Papua and West Papua. Following this, a coalition of civil society groups filed a lawsuit against the government for purposely shutting down the internet.²⁴ The petitioners argued that the government's action to shut down the internet violated press freedom and the right to information, as journalists were unable to report and inform the public about the protests. In what was then a victory, the Jakarta State Administrative Court held on 3 June 2020 that internet shutdowns were 'a violation of the law by government bodies or officials'. It held that the Electronic Information and Transactions (ITE) Law, which the government relied on in court to argue that the internet shutdown was in compliance with it, should only be used to restrict online information or documents that are 'unlawful', not to terminate access in its entirety. The court ruled that 'any decision that limits people's right to information should be made in accordance with the law and not merely based on the government's discretion'.²⁵ Nevertheless, the victory for human rights lasted a fleeting moment. In October 2021, the Constitutional Court found that it is constitutionally acceptable for the government to block and throttle the internet in times of social strife, overturning the precedent established in the previous court decision. The court explained that the government has the responsibility to 'prevent[...] the dissemination and use of electronic information and/or electronic documents that have prohibited contents in accordance with statutory provisions'.²⁶ In effect, the court held that the decision to block internet access was lawful and 'within reason', given the threat to public order.²⁷

Therefore, in its decision, the court focused on the arguments concerning the legality and proportionality of the restrictions. The limitation of this approach was that the court recognised deference to the state in its assessment, and this created the implication that shutdowns may sometimes be justified and proportionate. The ruling has set a dangerous precedent for online freedoms. Worse still, it perpetuates authoritarian rule and aids and abets the consolidation of power. Without internet access, activists, dissidents and opposition parties are cut off from each other, making it difficult for them to organise and mobilise their ideals and capabilities.²⁸ The court also shrugged off the potential of long-term internet shutdowns to take on the characteristics of apartheid by excluding specific populations from public participation in a highly interconnected and digitised world.²⁹ Such judgment has the potential to reverberate globally.

Dictatorship is far from being a distant memory in Indonesia and is even expanding. At the same time, the fight against digital repression is also increasing, oftentimes led by civil society organisations (CSOs).

On 30 November 2022, Indonesian CSOs filed a lawsuit against the Ministry of Communication and Informatics with the Jakarta State Administrative Court, over its decision to block access to a number of online platforms that had violated the law by failing to register with the government.³⁰ The civil society group alleged that the termination of access violated economic rights, hindered journalists' work, and prevented the public from obtaining information. The court's decision, in this case, will set a significant precedent for human rights online.

III. The Philippines

The Philippines has taken a turn towards authoritarianism over the past years and the decline in internet freedom has occurred amidst an erosion of political and civil rights under ex-president Rodrigo Duterte.³¹ Following the May 2022 elections, the ascent of President Bongbong Marcos, son of ousted dictator Ferdinand Marcos, exacerbated this, as it revived memories of large-scale human rights abuses and corruption that the Philippines had to endure only several decades ago.³² The former president's government has been notable for diminishing the independence of the judiciary, which has been plagued by inefficiency, corruption and intimidation.³³

Similar to Thailand and Indonesia, civil society groups approached courts to guarantee the respect of digital rights, showing at the same time resistance to attempts to crack down on rights and civil liberties. In July 2020, former president Duterte signed into law the Anti-Terrorism Act of 2020.³⁴ Almost all advocacy actions, including speeches and publications, fell under the law's broad definition of 'terrorism', which prompted civil society groups from different sectors to file thirty-seven petitions with the Supreme Court challenging the law's constitutionality and preventing its implementation.³⁵ The groups expressed concern over the Act's broad scope and its potential for use by state authorities as another instrument to persecute opponents and limit free speech. In fact, one of the common themes of the petitions was threats to free speech posed by many provisions under the law, such as the one on inciting terrorism.

The Supreme Court's decision from December 2021 was highly controversial. The Court upheld the constitutionality of the law, keeping most of its repressive provisions, and only striking down two provisions: section 4, which allowed 'advocacy, protest, dissent, stoppage of work, (and) industrial or mass action' to be classed as terrorism; and section 25, which empowered the Anti-Terrorism Council to designate people and groups as terrorists at the request of other countries or international organisations.³⁶ Lawyers in the country put the ruling in the crosshairs. While some considered it a 'small victory'³⁷ and others a 'consolation',³⁸ they unanimously agreed that the upheld provisions continue to pose a threat to human rights defenders, activists, members of marginalised groups, and others wrongly accused of

terrorism, by giving the government sweeping, unrestrained authority and leaving room for arbitrary enforcement.³⁹ To illustrate, the vague prohibition on 'inciting to commit terrorism' in section 9 may have important implications and ramifications for the right to freedom of opinion and expression, as it extends criminalisation beyond acts or threats of lethal violence to acts protected under international law. In April 2022, the Supreme Court dismissed the six appeals filed by petitioners to reverse its ruling on their pleas against the law, due to the 'lack of substantial issues and arguments raised by the petitioners'.⁴⁰

The court's decision, in this case, is particularly important because the law is presumed to have received the most criticism of any piece of legislation in Philippine history.⁴¹ The Constitutional Court has failed to protect not only civil liberties and human rights but also procedural rights and the rule of law, as democratic space shrinks. In the prevailing climate of impunity and attacks on human rights defenders, the court's decision portends peril for them, as the law grants excessive and unchecked powers to the government.

IV. Malaysia

Malaysia's legal framework is made up of a great number of repressive laws, such as the Sedition Act, and provisions that aim to impose censorship and punish those exercising their right to freedom of expression, including online.⁴² In addition to inadequate protections, the judicial system has proved to be weak at times, compromised by executive influence,⁴³ failing to rule in respect of fundamental rights.

On 17 September 2014, law professor Azmi Bin Sharom⁴⁴ challenged the constitutionality of the 1948 Sedition Act, hereinafter the Act.⁴⁵ He contended that the Parliament alone, and not any other bodies, had the authority to enact laws restricting freedom of speech and expression. He claimed the Act was unconstitutional since it was passed during the British colonial era, before independence, being therefore not an Act of the Parliament of Malaysia. On 6 October 2015, the Federal Court ruled that the Act is constitutional, thus compatible with Article 10 of Malaysia's Federal Constitution, which guarantees the right to freedom of speech and expression. The court determined that the assessment of what is 'necessary or expedient' in balancing fundamental rights with security interests lies with Parliament, and not with the courts.⁴⁶ The holding, in this case, is particularly disconcerting, in light of the elusive nature of the Sedition Act provisions that allow for investigation and prosecution, if not conviction, of virtually any utterer whose speech is not to authorities' liking.

With this ruling, the Federal Court, in its position as the highest judicial authority in Malaysia, defied international human rights law that protects freedom of speech and legitimised the government to continue using this Act as a tool to quell it. At the same time, the decision has brought into question

the judiciary's ability to safeguard fundamental rights, especially considering the illiberal and undemocratic nature of the Act, which has been used to suppress legitimate dissent in Malaysia, both offline and online.⁴⁷

In Southeast Asia, where the path to democracy is onerous and many countries are heading towards authoritarianism,⁴⁸ civil society – recognised for its role as a check and balance on compliance with international human rights standards – is particularly important. The cases presented in this chapter highlight civil society's crucial role in bringing human rights claims to court, leading to contentious and far-reaching verdicts, while also providing lessons on how to meaningfully seek and effect change through litigation in domestic courts. This is despite the fact that civil society has frequently struggled with poorly capacitated court systems lacking independence.

In the case of civil society challenging Regulation No. 29 in Thailand, the Civil Court demonstrated a thorough understanding of the importance of access to internet services for society. Although it did not make an explicit reference to digital rights in its judgment, it did note that a particular clause that forbade the dissemination of information that may instigate fear among people led to a superfluous and unnecessary deprivation of people's rights and freedoms. Thus, it highlighted the revolutionary impact that technology has on human rights. Despite civil society's approach to courts and their intention to assist them in upholding and guaranteeing digital rights in the other instances from Indonesia, the Philippines and Malaysia, the final court's decision in each case flagrantly failed to take into account and uphold human rights. These cases indicate that courts, overall, have loosely conceptualised digital rights, with some not even peripherally considering the impact of technology on human rights, and hence overlooking the implications that their rulings might have on digital rights.

To effectively conceptualise digital rights in Southeast Asia, a comprehensive and nuanced approach is imperative. This involves the formulation of clear digital rights frameworks that are consistent with international human rights standards while being responsive to local cultural contexts. Given the increasing significance of the online space – particularly in authoritarian regimes where it frequently serves as a crucial platform for expression – it is essential that legal protections robustly encompass freedom of expression, privacy, and data protection. Additionally, fostering digital literacy and continuously updating legal frameworks to address emerging technological advancements are integral to this endeavour.

C. CONCLUSION AND RECOMMENDATIONS

A set of recommendations for states to defend internet freedom, protect and enhance civic space, and for civil society to ensure good governance, is provided below.

I. Recommendations to states to defend internet freedom as a vital form of democracy, and protect and enhance civic space

1. Promote and advance internet freedom as a key element to contribute to the development of democracy. Support programmes aimed at bolstering judicial independence and improving technical literacy among judges and other members of the judiciary.
2. Ensure that limits to rights, including the rights of freedom of expression and association, are legal and proportionate.
3. Recognise and strengthen the role of the judiciary in upholding digital rights. In particular, ensure that the judiciary contributes to influencing the understanding of digital rights, addressing gaps in legislative guarantees of these rights, and ensuring accountability for violations of these rights.
4. Considering the significant role CSA actors play in society and in defending democracy and the rule of law, offer them institutional support to stay alert and react to deviations from the rule of law.
5. Develop or reinforce legal frameworks to ensure that the rights of citizens, including online, and civil society organisations are protected.
6. Improve and strengthen legal frameworks that allow citizens and civil society organisations to form and operate.
7. Protect online civic space and strengthen access to information frameworks.

II. Recommendations to civil society to promote and ensure good governance and the protection of human rights

1. Set up an independent multi-stakeholder body with the cooperation of various sectors to monitor and provide recommendations on trends in and individual cases of digital rights abuses.
2. Support the independent evaluation and analysis of substantive aspects, including the use of the principles of necessity and proportionality through established global standards, and the impact of responses on society and economy.
3. Hold implementing authorities and officials liable for the misuse of their powers or information obtained, while carrying out their duties in the existing legal framework.
4. Reinforce the power of individuals to play a greater role in making online spaces more free, secure and inclusive.
5. Strengthen solidarity for underprivileged people.
6. Promote a civilised environment for free online expression.
7. Continue to increase knowledge of digital rights through training and capacity-building programmes.
8. Continue disseminating information to the public on various legal violations to make them more aware of existing problems and require adherence to laws from the public institutions.

NOTES

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