

HUMAN RIGHTS AND THE INTERNET

Joy Liddicoat

Introduction

The internet has transformed our lives. When I began university studies in 1983 I had to queue to submit my enrolment application in person. All of my papers and exams were written in long hand. The only ‘computer’ at the Canterbury Law School Library contained microfiche records of newspaper articles and other materials: I tended to do my best to avoid using it. In 2008, I enrolled in my Master of Laws course at Victoria University online, without leaving home. More than 90% of my research and dissertation work was online. Today, more than 83% of New Zealanders use the internet and government and academic institutions rely increasingly on it to provide services.ⁱ But what are the implications for our human rights? For example, what do freedom of expression and freedom of association mean in relation to our use of the internet? In this paper I outline key definitions and concepts related to the internet and human rights, and briefly examine some current issues.

Broad framework for the internet and human rights

There is no international treaty or other instrument governing the operation of the internet. Nor is the internet governed by any single regulatory framework or single organisation; there is no ‘government of the internet’.ⁱⁱ A loose coalition of bodies operate technical and other policies which, taken together, allow the internet to function. This is co-ordinated by the International Corporation for Assigned Names and Numbers.ⁱⁱⁱ However the internet ecosystem^{iv} is much wider encompassing telecommunications networks, network operators, government regulatory policy (such as on access to broadband), internet service providers (ISPs), platform providers (such as YouTube and Facebook), and many other elements. Individual users navigate this ecosystem daily to do simple tasks such as sending and receiving email, reading news, conducting research, chatting with family and friends, watching movies and more.

Human rights belong to people, not to networked computers or assigned domain names and numbers. What then are ‘internet rights’? The internet is a new space in which humans increasingly seek, receive and impart information. Indeed, for many the internet is a space where they exist, connect and interact on a daily basis. ‘Internet rights’ is not referring to new rights – in the first place it is simply the application of existing human rights to our access to, and use of, the internet and information communication technologies (ICTs).

Despite this apparent conceptual simplicity tensions quickly emerged over the openness and freedom of the internet, both being factors in its success and as points of contention in debates about internet governance: a space where governments did not rule.^v Early adopters of the internet and ICTs reached for rights as a way to navigate through these tensions by articulating their freedom to create and use online spaces, and to resist state or other government interference with the internet.^{vi}

In 2006, partly in response to these tensions, the United Nations established the Internet Governance Forum (IGF) as a multi-stakeholder, rather than multi-lateral forum for internet-related policy discussions. Here governments sit together with civil society, the private sector, and the technical community, as all participate equally in their respective roles. The Forum supports the United Nations Secretary General in carrying out the mandate of the World Summit on the Information Society (WSIS), which is to promote discussion about the internet.^{vii} The Geneva Declaration of Principles, which established the Forum, states:^{viii}

Communication is a fundamental social process, a basic human need and the foundation of all social organization. It is central to the Information Society. Everyone, everywhere should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers.

The centrality of human rights was affirmed by the WSIS, with Article 19 of the Universal Declaration of Human Rights (UDHR) cited in paragraph 4 of the Geneva Declaration of Principles in 2003. In 2005 IGF stakeholders agreed to the Tunis Agenda, which affirmed:

... our commitment to the freedom to seek, receive, impart and use information, in particular, for the creation, accumulation and dissemination of knowledge.

Some individuals^{ix} and organisations subsequently began to develop the application of these human rights statements to the internet. The APC Charter of Internet Rights, for example, affirms the UDHR and defines its application in online contexts, including freedom from censorship, the right to online organising and protest, and freedom to express opinions and ideas when using the internet.^x The Charter of Human Rights and Principles for the Internet, developed by the IGF Dynamic Coalition on Internet Rights and Principles, similarly includes the freedom to protest, freedom from censorship, the right to information, and the freedom of the news media.^{xi} The latter Charter refers to the right to “form, join, meet or visit the website or network of an assembly, group, or association for any reason” and calls for access to assemblies and associations using ICTs not to be blocked or filtered.^{xii}

A range of charter and principles initiatives are emerging in regional bodies (such as the Council of Europe) and on particular issues at national levels (for example, reference to internet access in the Peruvian Constitution, and in Estonia and Finland’s law on access to the internet as a right).^{xiii} It is not clear yet that a new super-charter will emerge, or that there is agreement any such charter is needed.

Discussion about human rights and the internet

United Nations

Within the human rights discourse there appears to be broad consensus that, while some restrictions on free expression are proper, there is a core part to freedom of expression that should not be restricted at all (for example, freedom of opinion). National constitutional documents (such as charters or bills of rights) generally affirm these basic principles. At the same time Cavalli notes that “factors such as competing interests, the complexity of issues, and variation in national legal systems and traditions can make it difficult to reach broad agreement on restrictive or permissive interpretations”.^{xiv}

Despite the centrality of human rights to the WSIS, the Geneva Principles and the IGF, the internet-related aspects of freedom of expression and freedom of association have received remarkably little scrutiny in United Nations human rights mechanisms. For example, only in 2011, in the annual report of the Special Rapporteur on Freedom of Opinion and Expression,^{xv} did the Human Rights Council first consider a report specifically focused on human rights and the internet. The Special Rapporteur emphasised that limitations on freedom of expression must be prescribed by law, for a lawful purpose, and do so proportionately.

In 2010, the UN Human Rights Committee began a review of General Comment 34 (a key document which it uses to interpret Article 19 of the ICCPR on freedom of expression). The HRC's preliminary report was released in May 2011 with a proposed new General Comment, which was finalised in July 2011.^{xvi} The new General Comment includes specific reference to "electronic and Internet-based modes of expression".^{xvii} This is a welcome development and will strengthen recourse and reporting mechanisms for Internet-related violations of freedom of expression under Article 19. States must now deal with internet-related matters in their periodic ICCPR reports.

In September 2011, the HRC agreed to hold an Expert Panel on Human Rights and the Internet at its 19th Session in March 2012. At this session it is likely that civil society groups will bring forward some of the new issues and concerns that they have about human rights and the internet.

Current issues

Citizen journalism and crowd-sourcing applications offer new ways to empower citizens and participate in democratic movements.^{xviii} The use of ICTs for human rights monitoring, documenting and advocacy is growing, but has its challenges. For example, uprisings in the Middle East and North Africa regions were characterised as "twitter revolutions" and "facebook revolutions" because of widespread use of user generated content distributed over social networks by protestors, activists and supporters of protests as well as by those following events around the globe.^{xix} But how are states responding?

Deibert^{xx} and others argue that it is clear the balance of power has shifted, and that new norms have emerged in internet and information control techniques.^{xxi} No longer do democratic governments shy away from stating that they want internet regulation. Indeed, Deibert argues, governments are actively promoting regulation, invoking their obligations as states to protect human rights – increasingly on the grounds of protecting security, curbing child pornography or preventing criminal activity.^{xxii} Some governments are embracing the new technology and using it in new ways to infiltrate lawful groups, conduct surveillance and disrupt the activities of human rights defenders, moving to second and third generation forms of internet control techniques that interfere with, or violate, human rights.^{xxiii} These techniques include so-called 'astro turfing' (the creation of fake grass-roots movements) and 'sock puppetry' (using fake identities to infiltrate lawful activities of civil society groups).

In the wake of the 2011 London riots, the British Prime Minister was quick to assert that control of access to the internet and social networking sites was a legitimate option for the British authorities to utilise. In a statement in reply, the Chinese state-run news agency Xinhua commented:^{xxiv}

We may wonder why Western leaders, on the one hand, tend to indiscriminately accuse other nations of monitoring, but on the other take for granted their steps to monitor and control the Internet ... For the benefit of the general public, proper Web-monitoring is legitimate and necessary.

There are more worrying examples. Pakistan, for instance, the inventor of ‘faith-based filtering’ (so-called blasphemous content which is frequently, in fact, political content) has recently moved to ban encryption of software (including email) with severe security and privacy implications for human rights activists, lawyers and journalists.^{xxv} The effect of such a ban would be felt widely since encryption is used in Pakistan to provide secure banking and e-commerce, as well as to bypass the PTA’s regular blocking of entire websites.

It is likely that these sorts of issues will be taken before the HRC Expert Panel. Advocates are calling for a clear statement from the HRC about the application of international human rights law in relation to use of the internet and ICTs.

New Zealand

The picture of human rights and the internet in New Zealand is a patchy one. The right to freedom of expression is affirmed by section 14 of the New Zealand Bill of Rights Act 1990. Within civil society, there have been some excellent initiatives and strong human rights advocacy by a small number of individuals and groups (in particular InternetNZ^{xxvi} and, for example, in relation to infrastructure, Rural Women New Zealand). New Zealand played a critical role in the establishment of the IGF and has had both government and non-government New Zealand participation since its creation. New Zealand governments have traditionally been active human rights advocates within the United Nations, but it is clear that the government’s position on the internet and human rights remains undeveloped and unevenly weighted across its United Nations participation and trade-related negotiations.^{xxvii}

In 2010, while then a Commissioner with the New Zealand Human Rights Commission and also a member of InternetNZ, my concerns and questions about these issues prompted me to work with InternetNZ to convene the first Human Rights and the Internet Roundtable.^{xxviii} The Commission subsequently released a status report on human rights in New Zealand which included a chapter on Freedom of Expression, which specifically referenced the internet.^{xxix} In 2011, InternetNZ convened the inaugural Net Hui, based upon the Internet Governance Forum model in Auckland.^{xxx} Human rights was a clear theme at the Net Hui spanning a wide range of issues.

Current issues in New Zealand include: access to the internet (for disabled people and those in rural areas); content filtering (for example, by schools and academic institutions); restrictions on public Wi-Fi (such as key word content blocking); network neutrality (a highly contested and contentious topic); introducing more competition to lower costs (for example, through the Pacific Fibre initiative); internet intermediary liability for content; and new intellectual property laws, aimed at restricting the downloading of copyright material. Controversial aspects of New Zealand’s trade policy have been a major cause for concern. Strong lobbying by United States based intellectual property rights groups is leading to proposals to extend copyright periods, terminate user accounts for minor copyright infringements, stifle innovation and prevent access to knowledge by people with disabilities. Failing to take into

account the wider implications of proposals to protect a narrow range of rights, particularly through extreme measures, puts all of our human rights at risk.

But rights-affirming alternatives and other models exist that we can draw upon. For example, the Privacy Act 1993 has generally worked well as a set of principles for the collection, storage, retention and disposal of personal information. Yet we have no clear principles to guide internet-related policy and regulatory developments. Instead, the Attorney-General, Chris Finlayson, at the Net Hui in Auckland in 2011 suggested the government take each issue on a case-by-case basis. In my view this is not adequate. For example, the Law Commission has a reference on “Regulatory Gaps and the New Media”.^{xxxii} I believe we need a clear set of principles against which to measure the Commission’s proposals relating to the internet, particularly those seeking to regulate online content.^{xxxiii}

Without such principles, and as old and new forms of media increasingly converge, we are at risk of assuming that the rules that apply to media offline should also apply online. Perhaps some do, perhaps some do not, and perhaps new ones are needed. The case of *Slater v The Police*^{xxxiii} demonstrates that new legal principles and new legislation are not always needed.

When it comes to human rights and the internet our approach to the law needs to transform. If, as suggested, we simply take each issue on its own, we will not see the policy and regulatory picture in totality, or the multiple and intersecting human rights issues. The open and free basis of the internet must remain, including its multi-stakeholder nature.

Conclusion

Human rights apply to both our online and offline lives. Governments have the same roles and responsibilities to protect, respect and promote human rights in relation to the internet-related aspects of our human rights. However discussion and debate about human rights and the internet remains under-developed – both globally and in New Zealand. More New Zealanders – including the legal community – need to grasp these current issues and bring their diverse perspectives to policy and legal debates about best reconciling them.

Endnotes

ⁱ Philippa Smith et al, *World Internet Project New Zealand: The Internet in New Zealand 2009* (World Internet Project New Zealand, Institute of Culture, Discourse and Communication, Auckland: Auckland University of Technology, 2010), at 2.

ⁱⁱ For an overview of the main internet governance theories see David Harvey, *Internet.law.nz* (2nd ed. LexisNexis NZ Limited, New Zealand, 2005) Chapter 3, at 105.

Joy Liddicoat, *Domain Name Disputes: Is Private Dispute Resolution Working?* (LLM Dissertation, Victoria University of Wellington, 2010), at 21-24.

ⁱⁱⁱ Internet Corporation for Assigned Names and Numbers, www.icann.org.

^{iv} Internet Society, <http://www.isoc.org/Internet/issues/ecosystem.shtml>.

^v Olga Cavalli, ‘Openness: Protecting Internet Freedoms’, in William J. Drake (Ed.), *Internet Governance: Creating Opportunities for All* (United Nations, 2010) at 15.

^{vi} For more detailed discussion see Joy Liddicoat, *Human Rights Online: New Issues and Threats*, Association for Progressive Communications (2011), www.apc.org.

^{vii} Internet Governance Forum, www.intgovforum.org.

^{viii} “Building the Information Society: a global challenge in the new Millennium” also known as the Geneva Declaration of Principles www.worldsummit2003.de/en/web/586.htm

^{ix} Perhaps, most famously, John Perry Barlow’s, ‘Declaration of the Independence of Cyberspace’.

^x APC Internet Rights Charter, Theme 2: Freedom of Expression and Association (Association for Progressive Communications, November 2006), www.apc.org.

^{xi} The Charter of Human Rights and Principles for the Internet, Internet Rights and Principles Coalition (2010), www.Internetrightsandprinciples.org.

^{xii} Ibid.

^{xiii} In relation to Estonia see: Colin Woodard, ‘Estonia, Where Being Wired is a Human Right’, *Christian Science Monitor*, 1 July 2003. In relation to Finland see: ‘732/2009, Decree of the Ministry of Transport and Communications on the minimum rate of a functional Internet access as a universal service’ (original: Liikenne- ja viestintäministeriön asetus tarkoituksenmukaisen Internet-yhteyden vähimmäisnopeudesta yleispalvelussa), FINLEX, 22 October 2009, <http://www.finlex.fi/en/laki/kaannokset/2009/en20090732>.

^{xiv} Above n 5, at 16.

^{xv} Above n 9.

^{xvi} Human Rights Committee, *Draft General Comment No.34 (upon completion of the first reading by the Human Rights Council, CCPR/C/GC/34/CRP.6* 3 May 2011.

^{xvii} Ibid, para 11.

^{xviii} Lisa Horner, *A Human Rights Approach to the Mobile Internet* (Association for Progressive Communication, April 2011), www.apc.org.

^{xix} Alex Comminos, *Twitter Revolutions and Cyber-crackdowns: The Use of User-generated Content and Social Networking in the Arab Spring and Beyond* (Association for Progressive Communications, June 2011), www.apc.org.

^{xx} R. Deibert, J. Palfrey, R. Rohozinski, & J. Zittrain (Eds.), *Access Controlled: The Shaping of Power, Rights, and Rule in Cyberspace* (MIT Press, 2011).

^{xxi} Ibid, at 6.

^{xxii} Ibid.

^{xxiii} Ibid.

^{xxiv} For a critique, see Rebecca MacKinnon, ‘Squelching Social Media After Riots Bad Idea’, 15 August 2011, <http://edition.cnn.com/2011>.

^{xxv} See <http://www.article19.org/resources.php/resource/2719/en/pakistan:-ban-on-encrypted-software-a-violation-of-freedom-of-expression>.

^{xxvi} A charitable organisation promoting the internet in New Zealand, www.Internetnz.net.org.

^{xxvii} See, for example, Carter, Jordan, ‘Copyright Conundrums’, *Global Information Society Watch* (publication forthcoming in 2011 – update this information?), www.giswatch.org.

^{xxviii} Carter, Jordan and Liddicoat, Joy, ‘Human Rights and the Internet Roundtable’, Human Rights Commission and InternetNZ (Wellington, 2010).

^{xxix} Human Rights Commission, *Human Rights in New Zealand Today* (Wellington, 2010), www.hrc.co.nz.

^{xxx} See www.nethui.org.nz.

^{xxxi} See <http://www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media>.

^{xxxii} The Commission released an Issues Paper in December 2011, ‘The News Media Meets “New Media”: Rights, Responsibilities and Regulation in the Digital Age’ IP27, calling for submissions by March 2012.

^{xxxiii} *Slater v The Police* (HC, Auckland, CRI 2010-404 379, 10 May 2011, White J) citing, with approval, the legal principles that apply in cases related to name suppression and the internet set out by District Court Judge Harvey, at para 45-46.