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## **Freedom of Expression, International Law and the Practice in Myanmar**

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Week 6: Digital Rights under International Law (Part II)

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# Core Motivation

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- Focus on developments in the EU and UNESCO
- Online intermediaries, and especially social media platforms, have massively enabled free speech
- At the same time, this has included a lot of so called “lawful but awful” speech
- Causing harm:
  - Arguably resulted in skewed election results
  - Supporting hatred and violence
  - Hounding certain types of speakers out of the public sphere



## Discussion

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- What do you think? Has the harm reached a level where we now need to regulate the platforms? What about the differences between democracies and other countries in addressing this?



# Key Freedom of Expression Standards

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- Freedom of expression as free flow of information and ideas in society
- Protects both speaker and listener
  - Sometimes conflict (e.g. regulation of concentration of media ownership)
- Imposes both positive and negative obligations on States
- Clear that rights of listener include idea of diversity
  - Mostly focused on media but applies equally to Internet and actors which exert control over online communications



# Freedom of Expression: Diversity

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- Diversity online has important implications
  - Disinformation not just random – sometimes, but also other factors, e.g. largest source of vaccine disinformation in US from alternative medicine providers
  - Also business model boosts disinformation since more exciting than “boring truth” and clicks drive profit
  - So what looks like controlling speech is actually restoring a level playing field (to the detriment of corporate profits)
  - Addressing this is analogous to protecting listener through controlling concentration of ownership



# Freedom of Expression: Protecting Speakers

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- Harassment of speakers, e.g. female journalists and others
  - Pits speaker against speaker
  - Impacts rights of female speakers
  - Where attacks systematic – e.g. against vocal female speakers – leads to important perspectives being absent or muted
  - At that point, it also impacts the rights of listeners and has potentially much broader free speech implications (not just one speaker against another)



# Restrictions on Speech

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- Clear general standards for this under international law
- And clear standards in different areas
  - E.g. defamation, hate speech
  - Clear that cannot generally prohibit disinformation (but OK to ban certain types, such as defamation, perjury and fraud)
- Individual speech act doesn't create harm; different when combined and boosted with 1000s of statements online
- Thus, intervention of platforms that creates harm
- Big difference between criminalising an individual and imposing administrative requirements on platforms



# Developments in this Space

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- 2017 – Germany NetzDG
  - Listed 20 provisions in Criminal Code which platforms were required to take down
  - 24 hours if “manifestly unlawful” and 7 days for other content
  - Very strongly criticised by digital rights actors
- Today, developments around the world
- EU DSA – in force 16 Nov '22
  - Regulation so directly binding
  - Important because covers 27 countries but also because has some very cutting edge approaches





## DSA: Core Approach

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- Basically co-regulatory in nature – rules set out in law but platforms left to implement them, albeit subject to oversight and coercive measures by regulators
- Main part essentially notice and take down approach
  - Once notified, intermediaries are no longer protected against liability (so must take down or risk consequences)
  - Problematical from a free speech perspective since incentivises taking down speech
- Entire system designed to be effective
- Sanctions for breach of the rules are required to be “effective, proportionate and dissuasive”



## DSA: Who

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- All intermediaries (“mere conduit”, “caching” and “hosting” services)
- Different set of obligations for “online platforms” – hosting services which, at the request of users, store and disseminate to the public information
  - Small ones excluded though (50 staff, EUR 10m)
- Different obligations for “very large” platforms: 45m users in EU
  - List of about 5-8 actors (e.g. Meta, LinkedIn, Wikimedia, Alibaba)



## DSA: What and How

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- Applies to all illegal content (“attracts liability under the law”), whether civil or criminal
- Must “remove or disable access” expeditiously to benefit from protection against liability
- Not required to monitor but once receive (proper) notice must act
- How is left up to the intermediary but measures must be effective
- Very large users must also have systems to suspend users who “frequently provide manifestly illegal content”



## DSA: Support Measures

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- Must create accessible, user-friendly notice systems that users and others can take advantage of
  - Notice must indicate why illegal, location of content, name and address (with some exceptions)
- Platforms must also put in place trusted flagger systems; apply for status; conditions for recognition but if meet them must be recognised
- Intermediaries must then provide notice to both complainant and user (if measures taken)
  - Why content addressed (legal or terms of service rule); the URL of the content and the scope of the measure taken; whether the decision was automated or human; options for redress



## DSA: Redress

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- Platforms must create effective internal complaints systems
  - Must be easy to access and user-friendly
  - Where “sufficient grounds” are shown that measure not warranted, must reverse it
- Also provides for an out-of-court settlement procedure
  - Bodies apply to digital services coordinator for approval if meet certain conditions
  - Independent, expertise, capable, cost-effective, procedures
  - Decisions are binding
  - Costs only go one way
- Can also go to court



## DSA: Other Removal Rules

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- If not established in EU must designate legal representative there
- Very large platforms must appoint compliance officers
- Very importantly: must act in a “diligent, objective and proportionate” manner to apply own restrictions
  - I.e. must apply your own terms of service fairly



# Discussion

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- What are your impressions of this?
- Does this seem like a good system which maybe needs tweaks or more problematical?



# DSA: Transparency

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- No more Mr. Nice Guy: days of encouraging are over
- Long list of rules on this
- Content standards and systems:
  - Transparent about policies, procedures, tools, including which are automated and which human
- Recommender systems:
  - Very large platforms need to set out parameters in clear, accessible and easily comprehensible manner
  - Plus give users options to modify





## DSA: Transparency, cont'd

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- Reporting on annual basis:
  - Including any orders from States (to take action or just provide information) and responses; *suo moto* content moderation activities; complaints
  - Very large: every 6 months
- Advertising:
  - Make clear, in real time and in unambiguous language, what is advertising, on whose behalf it is being disseminated and how it got displayed to the user
  - Very large platforms need to maintain a public repository with the content of ads, who sponsored them, when they ran, who was targeted by them and the parameters used for this



# DSA: Due Diligence

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- Very large platforms must conduct annual assessments of significant systemic risks
  - Focus on negative impacts on privacy, freedom of expression, discrimination, the rights of the child, and any intentional manipulation, including automated, that impacts health, civic discourse or elections
  - Also how content moderation systems and advertisements impact those risks
- If requested by Digital Services Coordinator, they must allow vetted academic researchers with sufficient access to their systems to be able to assess risks



## DSA: Due Diligence, cont'd

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- Must then put in place “reasonable, proportionate and effective” measures to mitigate those risks
  - A list of possible types of measures is set out in the DSA
- They must also conduct audits of their compliance with DSA obligations
  - And then take due account of the recommendations and the audit impact report to adjust their behaviour



## DSA: Due Diligence, cont'd

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- This then goes far beyond just illegal content and focuses on the broad systemic risks created by the operations of platforms
- So far, we have no idea how muscular and effective this will be
  - Depends on how oversight bodies apply the rules and how demanding they are of platforms
  - Likely that the requirements will ratchet up over time
  - Key issue will be whether and to what extent platforms will be expected to put in place measures, where needed, that cut into their bottom line (i.e. adjusting their recommender systems in ways that reduce rather than boost engagement)



# DSA: Institutional Structures

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- Each country is required to appoint a Digital Service Coordinator, essentially a regulator (competent authority) to oversee the rules
  - Must be impartial, transparent and independent
  - Can assess compliance and impose fines of up to 6% of total global turnover for intentional or negligent infringements of the Regulation
  - Can also order intermediaries to take specific measures to bring themselves into compliance and, failing that, suspend them



# DSA: Institutional Structures

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- EU Board comprised of representatives of each DSC
  - General role, along with Commission, to encourage and facilitate the adoption of codes of conduct
  - Can adopt crisis protocols relating to security or health
  - Can act against very large platforms where needed
- This would likely have the competence and real power to take strong measures where this was not possible or happening at the national level



## UNESCO: Process

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- Developed Guidance for the Governance of Digital Platforms under Internet for Trust process
- Final Version October 2023
- Regional/online consultations
- Three public versions
- Major conference in Paris in Feb. 2023



# UNESCO: Content

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- Many different elements but some run in parallel to DSA approach
- Strong focus on independent regulation with appropriate powers
- Some key elements of system:
  - Co-regulatory idea where law sets framework of rules, platforms apply and regulator oversees
  - Roles for different actors (States, platforms, IGOs, CSOs)
  - Key element for platforms, human rights due diligence on risks and impacts of operations (including elections, emergencies, content moderation and curation)
  - Also, transparency (lot of detail), user empowerment and accountability





## Discussion

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- Does the UNESCO approach seem more realistic for a wider range of countries? Or does the democracy-non-democracy issue still arise?
- Any other solutions to harmful speech online?



## Exercise

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- Key directions for regulating platforms
- Go into breakout groups
- Appoint one person as rapporteur to be ready to report back to the group



# Conclusion

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Thanks for listening

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