



Freedom of Expression, International Law and the Practice in Myanmar

Week 3: General Principles of Freedom of Expression for the Media

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Lecture 1: Restrictions under International Law in the National Security Context

Review of Test for Restrictions of Freedom of Expression

- Strict three part-test under Article 19(3) of the ICCPR:
 - provided by law
 - aim to protect one of the following legitimate interests:
 - respect of the rights or reputations of others
 - national security or public order
 - public health or public morals
 - be *necessary* for the protection of the interest

Restrictions on National Security and Public Order Grounds

- National Security and public order are among the legitimate interests for restricting freedom of expression under Article 19(3)
- Restrictions of freedom of expression on national security grounds have different names (e.g treason or sedition laws, State secrets laws, counterterrorism laws and cyber security law)

Restrictions on National Security and Public Order Grounds (cont'd)

- No precise definition for “national security” under international law
- But threats must be sufficiently serious to justify restricting freedom of expression.
- The UN Special Rapporteur on freedom of expression has said that such restrictions should only apply to the “most serious cases of a direct political or military threat to the entire nation.” (Report of 14 December 1994)

Restrictions on National Security Grounds (cont'd)

- International human rights law tries to keep restrictions on national security and public order within bounds in different ways:
 - Ensuring that relevant concepts (e.g. “national security”, “extremism”, etc.) be defined sufficiently clearly, consistent with the “provided for by law” standard. Vague concepts like “glorifying” or “justifying” terrorism should not be used (— 2015 Joint Declaration).
 - Ensuring that individuals are punished only when they acted with the intent to undermine security
 - Requiring a very close nexus between the speech and the risk to national security or public order. (i.e. there must be a “direct and immediate connection” between the expression and the threat—Human Rights Committee General Comment 34, para. 35).

Kim v. Republic of Korea

- South Korea convicted a pamphleteer under a provision of its National Security Law which criminalised praising an anti-State organisation or distributing documents which benefit an anti-State organisation.
- The pamphlets in question called for reunification with North Korea and criticised South Korean policy on North Korea.
- The UN Human Rights Committee found that South Korea had not identified a clear risk to national security from the publication of the pamphlet which would make the restriction necessary.

Discussion

- Any comments or questions?



Lecture 2: General Principles of Freedom of Expression for the Media

Introduction to Media Regulation

- Regulatory bodies serve different purposes
- For example, for broadcasting, licensing is a key function (not true for print media).
- A key role of many regulatory systems is to improve media standards through complaint systems based on a code of ethics.
- Responsibilities of media outlets
 - Respect code – systems to do so
 - Cooperate on complaints
 - Respect decision
 - Introduce structural measures where needed
- Broader role of code: balancing media freedom and responsibilities

Systems of Media Regulation

- Broadly divided into self- and co-regulation and statutory regulation
- In general, should not impose special content restrictions on the media but these systems represent an exception to that
- Self-regulation: system is entirely created and run by the media
- Co-regulation: system is backstopped by a legal rule but has significant media involvement in running or overseeing it
- Statutory: legislative body in which media does not play a significant role

Core Principles: Independence of Regulatory Body

- Bodies which exercise regulatory powers over media must be protected against political and commercial interference
- Clearly recognised in international law
- Reasons:
 - To ensure that regulation is in public interest rather than the interests of those who control the regulator
 - To deliver on reasons for regulating broadcasting
- Difficult to achieve in practice

Independence in Practice

- Recognised in law
- Appointments process for members – involve different actors, competitive process
- Protection of tenure
- Prohibitions and requirements of expertise
- Protection of funding
- Remit clearly set out in law
- Accountability to people via parliament
- Annual reporting, financial audit

Media Diversity: Overview

- Freedom of Expression does not only restrict State actions but also imposes positive obligations, including the obligation to promote media diversity.
- This means that diverse voices are heard and the information needs of all segments of society are met.
- This is implied by ICCPR, Art. 19(2): FOE includes the right to “seek” and “receive” (and not just “impart”) “information and ideas of all kinds”.
- Generally understood as encompassing three types: Diversity of Outlet, Diversity of Source, Diversity of Content

Media Diversity: Diversity of Outlet

- Individuals must be able to seek, receive and impart information through “any media” of their choice (ICCPR, Art. 19(2))
- All different types of broadcaster (public, commercial and community) should be able to operate and be supported/facilitated.
- For commercial broadcasters, the licensing process should be fair, transparent and competitive.
- For public service broadcasters (PSBs), different considerations: these are not driven by profit and competition.

Media Diversity: Diversity of Outlet (cont'd.)

- PSBs serve diversity through their mandates, which often include serving the needs of different groups in society
- Key obligations of the State re: PSBs: Establish them, respect their independence and resource them adequately
- Community broadcasting gives voice and information opportunities to all communities.
- Due to resource constraints, they cannot compete with commercial broadcasters → need easier licensing process with reduced or no fees.
- A sufficient part of the frequency plan should be reserved for them (e.g. 20 per cent for community or non-profit in Thailand and USA) and they should have access to all forms of dissemination.

Media Diversity: Diversity of Source

- Concentration of media ownership limits the variety of viewpoints people are exposed to and may also impact the quality of programming.
- States should take measures to prevent undue consolidation in the media sector (beyond what is required in general anti-competition laws).
- But rules should not be too strict to undermine the financial viability of the media sector (e.g. by discouraging investment).

Media Diversity: Diversity of Source

- Rules vary depending on local context.
- Some examples:
 - Canada: No single entity may control more than 45 % of TV market and transactions leading to more than 35 % will attract careful scrutiny.
 - Italy: Newspapers may not control more than 20 % of national circulation or 50% of regional circulation
 - South Africa: Prohibits ownership of more than 1 TV licence/more than 2 FM or AM radio stations with substantially overlapping service areas. Newspaper owners may not control both TV and radio licence.

Media Diversity: Content

- Diverse content perhaps most important of the kinds of diversity but dependent on the other kinds of diversity.
- Many ways to support diverse content (e.g. funds for producing public interest content, community broadcasters, newspapers, etc.)
- Some States impose positive content obligations on broadcasters, such as carrying a minimum percentage of domestic or local content or language quotas.

Journalists

- No registration or licensing system is legitimate (See e.g. Inter-American Court of Human Rights, Advisory Opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, 1985).
- What journalists do, as opposed to other professions, is itself an exercise of the right to freedom of expression.
- Journalist activities are pursued by wide range of actors, extending beyond professional reporters to those who self-publish or blog.

Accreditation

- Accreditation is a process for ensuring the journalists have protected access to limited space venues and/or to facilities, e.g. in parliament, to support reporting from there (such as office space).
- The rationale is that journalists carry information from the venue to the public.

Accreditation, cont'd

- There are different ways of doing accreditation:
 - In some countries, recognised journalists' associations issue standard press cards which are then recognised for accreditation purposes (for example by the police).
 - A more limited system will be needed for parliament, for example, given that there is limited space there and, at least on some occasions, a high degree of interest.
 - The system should be based on objective criteria (ability to reach different parts of the public), protected against political interference and never based on the editorial stance or published content of the media outlet concerned.

Source Protections – Overview

- The right of journalists not to disclose their sources should be guaranteed by law.
- This is not to grant special rights to journalists. Rather, the purpose is to guarantee is the right of the public to obtain information; journalist as intermediary between the source and the public (See *Goodwin v. United Kingdom*, European Court of Human Rights, 1996).

Source Protections – Limits

- Grounds for overriding or potentially overriding interests:
 - Right of accused to defend him- or herself
 - Need to convict serious crimes
 - Possibly also national security although controversial
- Conditions on limits:
 - Information cannot be obtained in any other way (journalists are not surrogate police)
 - Information is central to protection of the interest (not tangential or of limited importance)
 - Order should be made only if benefits significantly outweigh harm to freedom of expression

Sources – Other Characteristics

- Scope
 - Everyone regularly involved in maintaining the flow of public interest information to the public
 - Primary and secondary holders (e.g. fixers or camerapersons)
 - All information which may identify the source, directly or indirectly, or otherwise put him or her at risk
 - Applies even if material is not published
 - Applies to prevent police from searching notes or cell phones or whatever of journalists

Sources – Protections

- Protection normally overridden only where ordered by a court, if necessary on an expedited basis
- Should also extend to cover electronic surveillance of journalists
 - This should normally not take place
 - In exceptional circumstances, where otherwise fully justified, such surveillance may be ordered by a court but taking into account source protection standards
 - Need for rules to prevent use of information on sources when discovered via these means except as otherwise justified by the standards outlined above

Print Media

- Licensing requirements for print media are illegitimate.
- They are unnecessary for any legitimate purpose and allow for extensive control over the media.
- Registration is in theory permissible but only if there is no discretion to refuse except for purely technical reasons (i.e. using the same name as another applicant).
- Even then, best to be avoided and viewed with suspicion by international experts as being unnecessary and prone to abuse (See e.g. 2003 Joint Declaration)

Rights of Reply and Correction

- The rights of reply and correction, if set out in appropriate terms, are considered under international law to be a positive, “more speech” approach to bad speech.
- A right of correction normally requires a media outlet to print a correction where it becomes aware of its having disseminated a factually incorrect statement.
- A right of reply gives the person concerned the right to have their own statement disseminated through the media in response to a statement in the media which harmed them.

Rights of Reply and Correction, cont'd

- The main conditions for these rights under international law are:
 - Where a correction will remedy the harm done, it should be the preferred remedy since it is less intrusive than a right of reply
 - A right of reply should only arise where the media has published a false statement which has harmed the rights of a third party
 - The reply should be subject to limits such as for how long it may be claimed, how long it may be, that it may not be abusive or illegal, and that it may not go beyond addressing the original false statement

Discussion

- Any comments or questions?

Exercise

- Go into breakout groups
- Appoint one person as rapporteur to be ready to report back to the group
- Discuss in groups whether the proposed newspaper registration system is consistent with international standards.



Thank you

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