



Freedom of Expression, International Law and the Practice in Myanmar

Week 2: Restrictions on Freedom of Expression under International Law

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Raphael Vagliano
Legal Officer



Lecture 1: When Can States Limit Freedom of Expression?

Idea of Restrictions

- Not an absolute right
 - May restrict to protect other interests such as security, reputation, privacy
- International law: start with broad protection, allow limits
- Not impose restrictions – allows States to do so
 - One exception, Article 20 of the ICCPR – hate speech and propaganda for war

Test for Restrictions

Article 19(3) of the ICCPR:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Test for Restrictions, cont'd

- Strict three part-test:
 - provided by law
 - aim to protect one of the interests listed in paras. (a) or (b)
 - be *necessary* for the protection of the interest

Provided by Law

- Gives fair warning and allows sufficient notice to regulate conduct
- Otherwise, chilling effect on freedom of expression
- Other actors might abuse this power (e.g. government, police)
- Rules out *ad hoc* or arbitrary restrictions
- Ensures elected representatives responsible for limitations

Provided by Law, cont'd

- Conditions:
 - Clear (not vague) – otherwise not fair warning and others effectively decide on scope
 - Accessible
 - Not allocate too much discretion
 - Should be properly enacted under the domestic legal system
- Does not necessarily rule out subordinate legislation such as regulations or code of conduct by regulator
 - But the authorisation must be in the primary legislation, which should spell out scope of subordinate rules

Legitimate Interests

- Those in Article 19(3):
 - respect of the rights or reputations of others
 - national security or public order
 - public health or public morals
- Only important interests can override
- Need a limited list to avoid abuse by States
- Does not include economy
- But also quite broad (rights of others)
- And courts have interpreted it quite broadly

Necessary

- Seems obvious but most important part of test
- 90% of international cases decided on this basis
- Pressing social need
 - Minor threats not enough (compelling public interest)
 - E.g. privacy regarding selection of meal
- Least intrusive, interfere as little as possible
 - If various options, use the least intrusive one
 - E.g. licensing newspapers to avoid concentration vs. requiring ownership to be transparent

Necessary, cont'd

- Not overbroad – only capture harmful speech
 - Prohibiting criticism to protect reputation
 - Also problem of vague rules
- Proportionate
 - Balance between harm to freedom of expression and benefit in terms of protecting interest
 - This also includes sanctions – excessive sanctions exert a chilling effect

Discussion

- Any comments or questions on the three-part test?

Exercise

- Go into breakout groups
- Appoint one person as rapporteur to be ready to report back to the group
- Using the three-part test, discuss in groups whether the scenarios are a breach of freedom of expression,



Lecture 2: Hate Speech, Defamation and Other More Complex Content Restrictions

Hate Speech-Overview

- Under international human rights law, States have an obligation to prohibit hate speech which incites discrimination, hostility or violence
- ICCPR Article 20(2): “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”
- “The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.” (UN Human Rights Committee, General Comment 34, para. 50)

Hate Speech-Overview (cont'd)

- Other instruments are also relevant, for example:
 - The Convention on the Elimination of Racial Discrimination requires States to prohibit the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and incitement to acts of racial violence
 - The Genocide Convention requires States to criminalise direct and public incitement to genocide.

Hate Speech-Constraints

- Constraints on what constitutes hate speech under IHRL:
 - Hatred understood as “intense and irrational emotions of opprobrium, enmity and detestation towards the target group” (Camden Principles)
 - Intent to promote hatred publicly (implied by reference to “advocacy” of hatred in ICCPR). E.g. a conviction of a journalist for reporting on hate speech was found to be illegitimate (*Jersild v. Denmark* (ECtHR, 1994))
 - Incitement refers to statements which “create an imminent risk” of discrimination, hostility or violence” (Camden Principles)

Hate Speech-Constraints (cont'd)

- 2013 Rabat Plan of Action set out an influential list of six factors to consider in determining whether to adopt criminal sanctions for hate speech following expert meetings coordinated by the UN Office of the High Commissioner for Human Rights (OHCHR). The factors are:
 - **Context** (e.g. social and political) should inform whether the speech is likely to incite discrimination, hostility or violence, and may be relevant to establishing intent
 - **Speaker**: position or status, especially re: audience
 - **Intent**: Specific intent required
 - **Content and form**: for example, whether balanced arguments were provided

Hate Speech-Constraints (cont'd)

- Six factors from the Rabat on whether criminal sanctions are appropriate (cont'd):
 - **Extent of the speech act:** e.g. how far was its reach, how was it distributed, the size of audience and whether it was public.
 - **Likelihood, including imminence:** A high nexus should be present, such that there is a reasonable probability that the speech will actually incite harm (although the harm need not actually occur).

Defamation-Overview

- Defamation is defined as a false statement of fact that is harmful to one's reputation. It has been recorded as a legal cause of action since the Roman Empire.
- The legal basis for defamation is enshrined in international law under Article 12 of the UDHR and Article 17 of the ICCPR, which provide for protection against unlawful attacks on a person's honour and reputation, and Article 19(3) of the ICCPR, which includes the reputation of others as a legitimate ground for restricting freedom of expression.

Defamation-Overview (cont'd)

- Defamation laws can serve an important purpose by providing a remedy for those whose reputations were unjustly harmed due to falsehoods.
- But they are often abused to stifle FOE.
- Rights concerns raised by many defamation laws/proceedings include:
 - Vague/overbroad provisions
 - Inadequate defences
 - Disproportionate damages/punishments
 - Their application for improper purposes (for example, to target humorous or political commentary or in strategic lawsuits against public participation (SLAPPs))
 - Unnecessary, duplicative defamation laws, such as “cyber libel” laws

Criminal Defamation

- There is a growing realisation that criminal defamation is unnecessary, disproportionate and impermissibly chills freedom of expression.
- “Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws”—2002 Joint Declaration
- “States Parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty”. -- UN Human Rights Committee, General Comment 34, para. 47

Criminal Defamation (cont'd)

- Where criminal defamation laws are maintained, they should include safeguards: proof beyond a reasonable doubt, a requirement of *mens rea*, relevant defences, and prohibitions on imprisonment or revocation of rights as punishments.
- While imprisonment is always disproportionate, fines can also be excessive and thus disproportionate.
- For example, the Inter-American Court of Human Rights found a criminal fine (and suspended prison sentence) to be disproportionate as a penalty for speech criticising the conduct of a judge in *Kimel v. Argentina* (2 May 2008, Series C, No. 177)

Civil Defamation

- Although generally posing less of a risk of disproportionate sanctions, civil defamation laws can also unjustifiably restrict freedom of expression by being applied too broadly (for example to criticism of leaders) or by imposing unduly harsh sanctions.
- Because punitive damage awards have a chilling effect on expression, remedies should be focussed on repairing the harm done, including through other measures such as the publication of an apology or correction.

Defences to Defamation

- International standards have identified a few key defences which are key to preventing defamation from unduly restricting FOE:
 - They should not apply to true statements. (“All such laws, in particular penal defamation laws, should include such defences as the defence of truth -- UN Human Rights Committee, General Comment 34, para. 47)
 - Increasingly international standards have been calling for shifting the burden of proof to the plaintiff in matters of public concern (For example, 2000 Joint Declaration)
 - They should not apply to opinions (“...they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification” -- UN Human Rights Committee, General Comment 34, para. 47.

Defences to Defamation (cont'd)

- There should be no strict liability for false statements and there should be a defence of reasonable publication. This applies when it was reasonable under the circumstances to make such a statement.
- For journalists, journalistic ethics are relevant to determining what is reasonable. Other similar defences are based on if the speaker acted in good faith.
 - *Tromsø and Stensaas v. Norway* (ECtHR Grand Chamber, 1999): found that a newspaper had acted in good faith in relying on a report on seal hunting which contained cruel and illegal hunting methods. Later investigations revealed the report was partially unsubstantiated.
 - Reputational interests did not outweigh the “vital public interest in ensuring an informed public debate” (para. 73).

Defences to Defamation (cont'd)

- No liability for reporting statements made by others, at least where there are grounds to assume that these are reliable
 - For example, *Herrera Ulloa v. Costa Rica* (Inter-American Court of Human Rights, 2004), a judge held a journalist liable for not proving the truth of a Belgian newspaper report he reproduced.
 - Such a standard of proof was found to be “an excessive limitation” on freedom of expression which has a “deterrent, chilling and inhibiting effect” on the practice of journalism (paras. 132-133).
- “In any event, a public interest in the subject matter of the criticism should be recognized as a defence”-- UN Human Rights Committee, General Comment 34, para. 47.

Special Protections for Public Figures

- Special protections for public figures such as criminal insult provisions are illegitimate.
- Public figures are expected to tolerate a greater amount of criticism.
- Otherwise, there a risk of chilling debate on matters of concern.
- Also, public figures have voluntarily opened themselves to public scrutiny
- “Those individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate” (*Ricardo Canese v. Paraguay*, Inter-American Court of Human Rights, 2004, para. 103).

Strategic Lawsuits against Public Participation (SLAPPs)

- Cases designed to bury critics under expensive and lengthy litigation, often brought by large corporations or other powerful actors to avoid criticism.
- Some jurisdictions have enacted anti-SLAPP legislation that allow for expedited procedures for dismissing SLAPPs in the early stages of litigation (and sometimes other measures like the possibility of awarding costs)
- 2021 Joint Declaration called on States to “Ensure that courts have the power, either at the request of the defendant or on their own motion, to dismiss, in a summary fashion at an early stage of the proceedings, defamation lawsuits involving statements on matters of public interest that do not have a realistic chance of success”

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)

- National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force. . . National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order--
Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, paras. 29-30

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.
 - Ensuring that individuals 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.

Restrictions on National Security Grounds (cont'd)

- “Subject to Principles 15 and 16 [which further limit restrictions], expression may be punished as a threat to national security only if a government can demonstrate that: ... (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence”-- *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, Principle 6
- Derogations allowed under exceptional circumstances (ICCPR, Article 4(1)). However, they must do so only “to the extent strictly required by the exigencies of the situation”, and the derogation may not be discriminatory or inconsistent with a State’s other international law obligations.

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?



Thank you

Raphael Vagliano, Legal Officer, Centre for Law
and Democracy

raphael@law-democracy.org

www.law-democracy.org