Columbia University – Global Freedom of Expression Project Workshop
Recent Cases and Trends in Global Freedom of Expression and Information

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I was asked to reflect on 'important' cases in the last year or so – and to indicate why they're important; to indicate trends; and to indicate what the most important feature of any legal regime governing freedom of expression should be.

I have taken the liberty to merge the first and second tasks, and so will be talking about five sets of cases that indicate important trends. The last question I will engage with separately.

1. ***Most important case law around the world and why***

There are different ways of defining 'important'. One category of cases that deserves to be regarded as 'important' is because they either set positive precedents for the development of the right to freedom of expression or because they mark a breakthrough or even just a positive direction of travel (positive for those who believe that free expression is a positive good in society). But cases that halt a threatened backward slide are equally important (think of the growing threat of national security laws, around the world) and sometimes even simple individual wins can be extremely important. And, of course, some cases are seminal or important because they mark a serious threat to freedom of expression.

I have divided my nominees for 'most important' cases into five categories: (a) cases that show forward movement and set precedents in the face of adversity; (b) cases concerning the right of access to information; (c) cases concerning developing issues of internet law and online publishing; (d) criminal defamation and insult cases; and (e) national security cases.

a. *Cases that show forward movement in 'difficult' legal systems*: e.g.
   - The cases taken by Malaysiakini, a Malaysian online news outlet that has taken the government to court to quash a decision refusing it a licence to produce a print edition;
   - A recent decision by the Singapore Court of Appeals involving the online journalist, James Dorsey, recognizing that he need not divulge his sources for a report on corruption in football.

In both cases a successful outcome was obtained, and both cases show that, with a good legal team and the right investment of time and resources (including by my organization, the Media Legal Defence Initiative) results can be had even in countries mainly thought of as distinctly press-freedom averse, such as Singapore.

Each of these cases set a precedent - even if only by taking a very small step forward. The Dorsey decision concerned a journalist and journalism lecturer who publishes a blog on how the sport of football (or soccer as Americans call it) is being run. Information showing serious corruption in the Asian football federation came into his possession. He wrote a story on it and was required by court order to disclose his source. He resisted and the Singapore Court of Appeals eventually sided with him, holding that journalists have an important role to play in uncovering corruption and should not be required to divulge their confidential sources of information. In the Singaporean context, this was an unprecedented decision.

The decision of the Malaysian High Court overturning the denial of a print license for one of the country's most popular websites, Malaysiakini, falls in the same category. Malaysia's print media is tightly controlled through a licensing system that requires a ministerial licence for every newspaper. There are very few print media that aren't politically aligned and Malaysiakini's print edition would have marked a first – but for the home minister's veto on the ground that its presence in the market would be against the public interest. The judge strongly disagreed, stating,

> "63. … the (minister's) decision is one that is fraught with the infirmities such that is has been a perverse decision, which a reasonable person similar circumstanced as the [Deputy Minister], would not have decided the manner in which he did. The [Deputy Minister] had misconstrued the extent of his powers when he treated the power … in relation to the issuing of a printing permit as one that is a privilege, as opposed to it being a right, that has its origin entrenched in Article 10 of the Federal Constitution. The decision by the [Deputy Minister] is defective for want of procedural fairness for affording no reason for the rejection of the application in as much as it has been littered with illegality, unreasonableness and in defiance of logic… (See more at: http://www.loyarburok.com/2013/02/04/home-minister-wrong-again-malaysiakini-press-permit/#sthash.OFkFeesU.dpuf).

In the context of Malaysia, this is a blistering judgment.

In the same category I believe we should also celebrate cases that are won even when they don't set a precedent or have wider significance for the development of the right to freedom of expression. The international media freedom community is not very good at celebrating successes – and we should improve. Press releases and alerts are frequently issued when journalists are arrested, but not when they are released. The media freedom community sometimes even skews what is in fact a victory and presents it as a loss. For example, Thai website director, Chiranuch Premchaiporn was sentenced to a suspended prison sentence for allowing comments that were defamatory of the King to be published on her website. Many media freedom groups presented her conviction as a setback for media freedom, when in fact it was probably a victory: ordinarily, individuals prosecuted for defaming the monarchy in Thailand serve actual prison sentences, often for ten years or more, and the imposition of 'only' a suspended sentence for Premchaiporn was the best possible outcome in her case and the result of a sustained campaign for her, by her lawyers in court and by wider civil society action that even had her share a podium with Hillary Clinton at a freedom online meeting.

Overall, if pushed to name just one case in the category of 'success in the face of adversity' I would nominate the decision of the Singapore Court of Appeal in *World Sports Group v. James Dorsey*.

b. Access to information: an area where international freedom of expression law shows sustained forward movement

For my second category of cases I have chosen a very specific group of 'successes' – in freedom of information litigation.

One of the real 'growth' areas of freedom of expression law over the last decade has been the recognition of the right of access to information as a 'human right'. With the exception

of the African Court of Human Rights, all major international human rights courts have now recognized that governments are under a duty to provide, as a matter of principle, access to information held by them. This is not an absolute right – there are exceptions and exemptions – but it is a right nevertheless.

The recent European Court of Human Rights decision in *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria* is a good example of how the right to access to information can be used to enforce other rights and interests, as well as how the European Court has developed the right of access to information in its case law.

The European Court sees the right of access to information as an essential corollary of the right to freedom of expression – having information is essential to being able to give an informed opinion. The Court also sees access to information as instrumental to democracy and in the enforcement of other rights.

The Court's reasoning is roughly as follows (from *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria)*:

> The Court has consistently recognised that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom, the purpose of which is to impart information and ideas on such matters. The Court has emphasised that the most careful scrutiny on its part is called for when measures taken by the national authorities may potentially discourage the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern …
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> Furthermore, the Court has held that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom ... However, the function of creating forums for public debate is not limited to the press. That function may also be exercised by non-governmental organisations, the activities of which are an essential element of informed public debate. The Court has therefore accepted that non-governmental organisations, like the press, may be characterised as social "watchdogs". In that connection their activities warrant similar Convention protection to that afforded to the press …
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> The applicant association is a non-governmental organisation the aim of which is to research the impact of transfers of ownership of agricultural and forest land on society. It also contributes to the legislative process by submitting comments on draft laws falling within its field of expertise. In the present case it wished to obtain information about the decisions [concerning] transfers of agricultural and forest land [which impact on the preservation of] land for agricultural and forestry use and avoiding the proliferation of second homes – subjects of general interest.
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> The applicant association was therefore involved in the legitimate gathering of information of public interest. Its aim was to carry out research and to submit comments on draft laws, thereby contributing to public debate. Consequently, there has been an interference with the applicant association's right to receive and to impart information…

While the European Court goes on to note that there still is no obligation on the State under European Convention law to proactively publish information, it is nevertheless clearly moving in that direction – and probably will arrive at that point in the foreseeable future.

I should say that other international human rights courts and tribunals – notably the UN Human Rights Committee and the Inter-American Court of Human Rights – have a less complicated view of the right of access to information, regarding it as a right in its own regard – under the umbrella of the overall right to receive, seek and impart information (aka the right to freedom of expression). But my nominee for most important recent case in this category is *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*.

c. Internet 'problems' and issues: Delfi

Having celebrated some important 'successes' we need to also acknowledge that there are several areas in which enjoyment of the right to freedom of expression faces real challenges.

We will stay in Europe for a few examples of recent cases illustrating this, including from the European Court of Human Rights (thus also illustrating the inconsistent nature of decisions from that court).

First: the European Court's ruling in the case of *Delfi v. Estonia*. This concerned liability of online media for comments left by users. The European Court held that media are under a duty to actively patrol their site for objectionable comments. This is likely to have a chilling effect on freedom of expression and impose unnecessary cost on media. The ruling goes against established standards even under EU law and stands for a particular category of cases: where courts/judges do not 'get' the Internet. In *Delfi*, the Court applied offline standards of liability to an online world. I think it is quite telling that the same section on the same day decided a case involving the publication of defamatory letters in a newspaper. Publication of letter in a newspaper, publication of comments on a webpage; the court rules similarly in both cases even though the context is very different – a newspaper would normally choose only a few dozen letters at most to publish out of the thousands that it receives; whereas a news website typically receives thousands of comments on its stories every day.

There are important other recent cases in this category as well – and Max Mosley's ongoing litigation against Google in various countries provides a good example. German and French courts have required Google to build a filter that will recognize Mosley in compromising situations with prostitutes dressed in prison camp gear, whether in the process of being spanked or having a cup of tea and a cigarette after the act. I don't care to see Mosley in the nude but I'm concerned at the precedent it sets: automated censorship by a private company, with it being unclear whether or not the individual whose blog or the media outlet whose website ends up censored as a result will have much recourse. It shows courts struggling with the implications of their rulings: to the German and French judges, their decisions were merely about enforcing a 'simple' (in their eyes) ruling that material that has been held to infringe privacy in some jurisdictions (btw this is problematic in itself, with standards varying from community to community and how this is likely to evolve in an increasingly connected world). But the implications of their rulings go far beyond this.

d. The ongoing abuse in 75% of the world of criminal defamation and insult laws

A further category of cases that warrants concern is the use of criminal libel and insult laws. Examples in this category abound across the world but I would like to choose two that are represented by us:

- A case of two Rwandan journalists sentenced to prison for having insulted President Kagame of Rwanda in an article in which they wrote, apparently disparagingly, of the President's policies. Even though Kagame himself very magnanimously declared that he wasn't particularly bothered by their remarks, the courts – including the Supreme Court – still held that their pieces were sufficiently insulting to warrant a year in prison.
- The second case is that of a Burkina Faso journalist, Lohe Issa Konate, currently serving a year in prison for alleging that a public prosecutor was corrupt. This case is currently up on appeal before the African Court of Human Rights where we are asking for a declaration that imprisonment for defamation violates the right to freedom of expression – and that criminal defamation laws should be replaced with adequate civil defamation laws. A coalition of 18 NGOs, including human rights defenders as well as media associations, has intervened in support. Judgment is expected by July of this year.

I should note that there are a few glimmers of hope on the horizon in this area of law, including from an unexpected corner – the Zimbabwe Constitutional Court ruled in October last year that laws that granted special protection to President Mugabe from insulted were unconstitutional. We hope that the African Court of Human Rights will follow up on this with a strong condemnation of criminal defamation laws later this year – or that it will at the very least hold that imprisonment is never an acceptable sanction in defamation cases.

My nominee for most important case in this category – because I am optimistic of a good outcome – is *Lohe Issa Konate v. Burkina Faso*, at the African Court of Human and Peoples' Rights.

e. Anti-terror laws as abused against journalists

The final category of cases that needs to be highlighted concerns the increasing challenge posed to media freedom by national security and anti-terror laws. These cases range from demands on journalists to disclose sources to denials of access to information; from journalists being stopped and searched at borders to journalists being imprisoned for having written a piece that somehow allegedly undermined national security or promoted terrorism. What makes these cases difficult to defend is that judges tend to defer to assertions of national security – even when they say they do not. This is a phenomenon that plays out in western democracies as much as in newer democracies in countries in Asia and Africa.

I would like to highlight two cases in particular – because they offer a prospect of 'hope':

- The case of Ethiopian journalists Eskinder Nega and Reeyot Alemu, both serving long prison sentences under Ethiopia's anti-terror laws for having written about issues such as minority rights and water management. They have been targeted, along with several dozen other journalists as well as hundreds of human rights activists and others, by a regime that is intolerant of criticism. There is not a shred of evidence that any of their writings undermined national security.
- the same case that I mentioned earlier against Rwandan journalists Agnes Uwimana and Saidat Mukakibibi – they are serving prison time not just for having insulted

President Kagame but also for having allegedly undermined national security by stating that there was discord in army ranks. As with Eskinder's and Reeyot's case, there is not shred of evidence of their writing actually having any impact at all on national security.

While the journalists in all four of these cases are serving prison sentences there is some hope in the form of the African Commission and Court of Human Rights, who have been petitioned and asked to rule that the abuse of anti-terror laws against oppositional voices violates media freedom and the right to freedom of expression.

Finally, I mentioned cases in the 'west' and I should highlight the recent decision of the UK High Court in a case brought by Glen Greenwald's partner, David Miranda, challenging his detention on UK anti-terror laws at Heathrow airport last year. His challenge was resoundingly defeated and the judgment, by Lord Justice Laws, pours scorn on any assertion that journalists are capable of reporting on national security issues and handling sensitive material. It was a bad decision that got a lot of press over the last few weeks – but it will be appealed.

My nominees in this category are the twin cases of *Eskinder Nega and Reeyot Alemu against Ethiopia*, before the African Commission on Human and Peoples' Rights.

2. ***What will be the one characteristic of an international information regime which will be fit for global free flow of information?***

Finally, we were asked to reflect on the essential characteristics of an international regime to promote the free flow of information. My answer would be simple: it needs to focus on implementation and enforcement. There are standards – in soft law as well as hard law – governing virtually every aspect of communication. What is sorely lacking is their implementation and enforcement. Implementation is needed at every level, and enforcement should focus on two tracks. First, there need to be properly funded and empowered courts within regions around the world where individuals can have their rights enforced. The sub-regional courts that have recently been established in Africa offer real hope in this regard and are a great example of what can be done, and similar courts are needed elsewhere – particularly in Asia and in the Middle East, two large black spots in terms of human rights enforcement. Second, States need to hold each other to account for failing to live up to their human rights commitments much more than they have done in the past.