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international law of contemporary media

session 2: int'l human rights pertinent to media


mira burri, dr.iur.,

spring term, 1 march 2011



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the goals of the day

- overview of the int'l human rights framework
- **focus: freedom of expression**
- freedom of expression under the UDHR
- freedom of expression under the ICCPR
- freedom of expression under the ECHR
- scope and limitations
- some case law
- changing aspects under the conditions of digital media.

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int'l human rights: basics


- human rights refer to the basic rights and freedoms to which all humans are entitled
- belong to **individuals**
- inalienable and universal rights simply by virtue of their personhood that should trump state prerogatives
- despite different value systems worldwide (cultural relativism), human rights are now a universally accepted concept of int'l law
- however still consistently violated.

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human rights: history

- origins (Magna Carta 1215; the American and French revolutions, 1776 and 1789 respectively; although these rights were to apply only within the sovereign states)
- after World War II special attention due to the fascist atrocities against humanity
- UN Commission on Human Rights, est. 1946, led by Eleanor Roosevelt
- International Bill of Rights as a two-part structure, comprising a non-binding declaration and a binding covenant.




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human rights: int'l acts

- Universal Declaration on Human Rights (UDHR), 1948
- International Covenant on Civil and Political Rights (CCPR), 1966
- International Covenant on Economic, Social and Cultural Rights (CESCR), 1966
- both entered into force only in 1976
- CCPR and CESCR similar but with some important differences (first v. second 'generations' of rights / negative v. positive rights / different compliance mechanisms).



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human rights: state obligations

- Obligation to respect:** requires states to refrain from interfering with the enjoyment of human rights (passive);
- Obligation to protect:** requires states to prevent violations of such rights by third parties; and
- Obligation to fulfil:** requires states to take appropriate legislative, budgetary, judicial and other measures towards the full realisation of such rights (active).



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freedom of expression

- **Article 19** of the Universal Declaration of Human Rights
- **Article 19** of the International Covenant on Civil and Political Rights
- **Article 10** of the European Convention on Human Rights
- **Article 13** of the American Convention on Human Rights
- **Article 9** of the African Charter on Human and Peoples' Rights.



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freedom of expression: art. 19 UDHR

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.




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freedom of expression: art. 19 CCPR

- 1. Everyone shall have the right to hold opinions without interference.
- 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- 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.




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freedom of expression: art. 19 CCPR

- although CCPR binding upon the state parties relatively weak compliance monitoring and no effective enforcement mechanisms
- the Human Rights Committee (HRC) examines state reports on the implementation of the rights; submits *Concluding Observations* (political effects but no concrete remedies are envisaged)
- possibilities for inter-state complaints and conciliation procedure under *ad hoc* Committee (never been used so far)
- individual complaints possible under the First Optional Protocol (not all states signatories-112 out of 164; US and Switzerland are not)
- decisions have only reporting character; no sanctions.

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freedom of expression: art. 19 UDHR

- Art. 19(3) expressly stresses that the exercise of the right to freedom of expression **carries with it special duties and responsibilities** and for this reason certain restrictions on the right are permitted; these may relate either to the interests of other persons or to those of the community as a whole
- restrictions allowed only when: **“provided by law”**; only **for one of the purposes** set out in subparagraphs (a) and (b); and **“necessary”** for the attainment of one of those purposes.

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freedom of expression: art. 19 UDHR

- HRC has given state parties relatively broad margin of appreciation to interpret the goals that justify restrictions and has not been very strict as to the necessity and proportionality test
- examples: *Hertzberg v. Finland* (1979) and *Faurisson v. France* (1993).

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freedom of expression: ECHR

- Council of Europe (CoE); 47 members
- signed 4 November 1950 in Rome; entry into force 3 September 1953
- ECHR developed in the gap between the completion of the UDHR and of the CCPR and CESC
- ECHR: foundation for the strongest and most institutionally developed human rights framework
- first steps towards making the International Bill of Rights truly operational.


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freedom of expression: ECHR

- the European Court of Human Rights (ECtHR) (based in Strasbourg; <http://www.echr.coe.int>)
- individual and inter-State petitions
- advisory opinions concerning the interpretation of the Convention and its protocols at the request of the CoE Committee of Ministers
- since 1998, following the entry into force of Protocol No 11, all alleged violations of human rights referred **directly** to the Court
- after **all domestic remedies have been exhausted** and **within a period of six months** from the date of the final decision.

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art. 10(1) ECHR

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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art. 10(2) ECHR

The exercise of these freedoms, since it carries with it **duties and responsibilities**, may be subject to such formalities, conditions, restrictions or penalties as are **prescribed by law and are necessary in a democratic society**, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

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freedom of expression: ECHR

“The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a ‘democratic society’. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man“

Handyside v. the United Kingdom, (5493/72) [1976] ECHR 5 (7 December 1976)

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art. 10 ECHR: scope of protection

- **freedom to hold opinions**
- **freedom of expression**
- **active:** freedom to express an opinion and to impart information and ideas (incl. freedom of art)
- all forms of expression, any media, any content (facts, opinions, entertainment). In *Groppera Radio AG* (1990, 12 EHRR 321), the Court stated that both broadcasting of programmes over the air and cable are covered by Article 10, “without there being any need to make distinctions according to the content of the programmes”.
- also commercial statements covered, incl. criticism of business practices and commercial publicity
- **passive:** freedom to receive information
- **freedom of the press and of the media**

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ECHR and Swiss Federal Constitution

ECHR:

Art. 2 Right to life

Art. 3 Prohibition of torture

Art. 4 Prohibition of slavery and forced labour

Art. 5 Right to liberty and security

Art. 6 Right to a fair trial

Art. 7 No punishment without law

Art. 8 Right to respect for private and family life

Art. 9 Freedom of thought, conscience and religion

Art. 10 Freedom of expression

Art. 11 Freedom of assembly and association

Art. 12 Right to marry

Italicised are rights contained in the Swiss Federal Constitution but not in the ECHR.

SFC:

Art. 7 Human dignity

Art. 8 Equality before the law

Art. 9 Protection against arbitrary conduct and principle of good faith

Art. 10 Right to life and to personal freedom

Art. 11 Protection of children and young people

Art. 12 Right to assistance when in need

Art. 13 Right to privacy

Art. 14 Right to marry and to have a family

Art. 15 Freedom of religion and conscience

Art. 16 Freedom of expression and of information

Art. 17 Freedom of the media

Art. 18 Freedom to use any language

Art. 19 Right to primary school education

Art. 20 Freedom of science

Art. 21 Freedom of artistic expression

Art. 22 Freedom of assembly

Art. 23 Freedom of association

Art. 24 Freedom of domicile

Art. 25 Protection against expulsion, extradition and deportation

Art. 26 Guarantee of ownership

Art. 27 Economic freedom

Art. 28 Right to form professional associations

Art. 29 General procedural guarantees

Art. 30 Judicial proceedings

Art. 31 Deprivation of liberty

Art. 32 Criminal proceedings

Art. 33 Right of petition

Art. 34 Political rights

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freedom of expression: ECHR

“Freedom of expression is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but **also to those that offend, shock or disturb the State or any sector of the population.** Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”.

Handyside v. the United Kingdom, (5493/72) [1976] ECHR 5 (7 December 1976)

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art. 10 ECHR: interference

- interferences with the freedom of expression permitted only when prescribed by law, adopted in pursuance of one of the objectives listed in article 10(2) and necessary in a democratic society; all conditions must be met
- article 10(2) objectives:
 - national security
 - territorial integrity or public safety
 - for the prevention of disorder or crime
 - for the protection of health or morals
 - for the protection of the reputation or rights of others
 - for preventing the disclosure of information received in confidence
 - for maintaining the authority and impartiality of the judiciary.

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art. 10 ECHR: examples




Caroline von Hannover v. Germany : public versus private persons; freedom of the media versus the right to privacy

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art. 10 ECHR: licensing broadcasters

- art. 10(1) notes expressly that: “This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises”
- leading case: *Informationsverein Lentia and others v. Austria* (Appl. No 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, decision of 24 November 2003)
- Swiss case: *Demuth v. Switzerland* (Appl. No. 38743/97, decision of 5 November 2002): analogies to Radio Energy?


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freedom of expression: wrap-up (1)


- there are a number of acts on the regional and int'l levels that protect the freedom of expression
- the UDHR is the underlying act but has no binding force; the CCPR is binding upon its signatories but lacks enforcement mechanism; the ECHR has had much impact on the evolution of human rights practice because of the ECtHR and the possibility for individuals to go to court against the CoE Member States

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freedom of expression: wrap-up (2)

- freedom of expression has a broad scope and encompasses the **freedom to hold opinion, passive and active freedom of information, freedom of the press and of the media, as well as freedom of art**
- interferences are permissible only if **prescribed by law**, in serving **one of the mentioned goals** and if **necessary in a democratic society**
- while allowing margin of appreciation for the Member States in the definition and the concrete contents of the noted goals, the court has tested these carefully according to the subject of protection (e.g. commercial or non-commercial speech) and according to the principle of proportionality



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freedom of expression: wrap-up (3)

- the ECtHR has stressed the critical importance of freedom of the press and of the media for the functioning of a democratic society
- quite importantly, it has also stressed the need for **media pluralism** as an institutional dimension of the freedom of expression.




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freedom of expression under the conditions of new media (1)

- **changing landscape: access** and the conditions for access become critical
- **new dimensions:**
 - filtering (state filtering but also private filtering)
 - net neutrality debate: discrimination of internet traffic
 - interoperability of networks, devices and applications
 - copyright: private ownership of information (digital rights management systems as automatic enforcement mechanisms)
 - practical barriers to access (digital divide; media literacy).



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freedom of expression under the conditions of new media (2)

- need for a new right?
- the right to communicate?
- the balancing of rights (e.g. wikileaks v. state security) more difficult
- examination of the concrete practical, economic and legal implications of digital media for freedom of expression in the following sessions.

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