



What hampers Freedom of Expression and Access to Information

-Lessons Learnt from Abroad-

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I . Freedom of Expression under threat



More autocracy
More regulation due to online disinformation

According to OECD (2021),

- **2.6 billion people living in countries undergoing autocratisation (415 million in 2016)**
- ***Liberal Democracies decreased from 41 to 32 over the past decade***
- ***68% of the global population living under autocratic regimes***
- ***Many countries which were on the democratization process are now sliding back to autocratic regimes.***

⇒ Big concerns about the shrinking space for democracy, growing polarization, *the digital spread of disinformation, restriction & control of media by autocratising leaders.....*

“States regularly censor speech on the grounds that it threatens ‘national security’” (Int'l NGO ARTICLE 19)

● Since 9/11, a lot of anti-terrorism laws and policies have been adopted throughout the world.

⇒ Many of them resulted in restriction of freedom of expression.

● Historically, national security and counter-terrorism have been frequently invoked by Governments to justify excessive curtailment of the right to freedom of expression.

⇒ American Civil Liberties Union points out:

“The rise of national security state and the proliferation of new surveillance technologies have created new challenges to media freedom”.

“The government has launched an unprecedented crackdown on whistleblowers, targeting journalists

”

.....





- **South Africa:**

- the Protection of State Information Bill has been ardently opposed by media and civil society for having a chilling effect on the media and for stopping many whistleblowers from leaking sensitive or embarrassing information to the media.

✂ **an example of how national security legislation can both intentionally and unintentionally stifle media freedom**

- **Kenya:**

- the 2018 Prevention of Terrorism Amendment Bill has been criticized for undermining human rights in an effort to protect national security

- **Zimbabwe:**

- Cyber-security and Data Protection Act 2021 exempts entities from provisions aimed at protecting the processing of personal information for national security purposes.

- **Nigeria:**

- Cyber-crimes Act 2015 provides harsh penalties for anyone who accesses computer systems or data that are vital to national security.

Under what circumstances can free expression be legitimately restricted?

- The right to free expression
= a fundamental right protected by various international and regional instruments on human rights:
 - ① Article 19 of the International Covenant on Civil and Political Rights (ICCPR)
 - ② Article 10 of the European Convention on Human Rights
- But it can be restricted under certain strict circumstances to protect specific interests including national security.

⇒ The State is responsible for showing that the restriction meets the following requirements, known as

“the Three-Part Test”

(The Johannesburg Principles 1995, et al.)

● The Three- Part Test to restrict free expression

1. **Restrictions must be clearly set out in law**, in a way that is understandable, accessible, and specific, so that individuals know what actions are covered. There must be safeguards in place against abuse of law, such as judicial scrutiny.
2. **Restrictions must genuinely be for the purpose of protecting national security**, and must have the demonstrable effect of protecting that aim.
⇒ Restrictions purported to be for protecting national security, but which in fact just stifled journalistic reporting, do not meet this test.
3. **Restrictions must be necessary, meaning the restricted expression is a serious threat to national security** and limiting the expression is the least restrictive way of addressing the threat.

So it means....

- ***Governments must not punish the person responsible for the expression if the information does not actually harm/Isn't likely to harm national security, or if the public interest in knowing the information outweighs the harm.***

Anyone subject to charges for expression on national security grounds must:

- 1) Be granted the full set of free trial rights set out under international law.
- 2) Be tried by a jury or genuinely independent judges.
- 3) Be tried in civilian courts unless members of the military, and never by specially constituted courts or tribunals.
- 4) Not be subject to disproportionate sentences or punishment.

II. Access to Information at stake

International Federation of Journalists (IFJ) points out:

- Across the world those in power are enforcing internet shutdown, social media restrictions, closing media outlets, employing outright censorship, banning journalists from attending press conference, denying them access to public information, as well as (banning them from) reporting on demonstrations and political rallies.***
- Grave breaches of the right to access information obstruct journalistic work and deliberately hinder accountability and transparency of those in power.***



Right to Access to Information as a Universal Human Right

- **Linked to freedom of expression** by numerous international bodies

☆2006 Decision by the Inter-American Court of Human Rights

- Confirmed that the right to information forms part of freedom of expression

☆2009 Decision by the European Court of Human Rights

- recognized that there is a fundamental right of access to information held by public bodies protected by Article 10 of the European Convention of Human Rights, which is the article on freedom of expression.

☆2011 Decision by the UN Human Rights Committee

- confirmed that the right to freedom of expression protected by Article 19 of the **International Covenant on Civil and Political Rights** includes the right to access to information,

☆2020 Europe Convention on Access to Official Documents

(Tromsø Convention)

- the 1st binding International legal instrument to recognize the right to access official documents held by public authorities without discrimination and regardless of the requester's status or motives in seeking access.

Internationally agreed exceptions

According to 2020 Europe Convention on Access to Official Documents (the Tromsø Convention): the exceptions to the right to information are:

1. National security, defense and international relations
2. Public safety
3. The prevention, investigation and prosecution of criminal activities
4. Disciplinary investigations
5. Inspection, control and supervision by public authorities
6. Privacy and other legitimate private interests
7. Commercial and other economic interests
8. The economic, monetary and exchange rate policies of the State
9. The equality of parties in court proceedings and the effective administration of justice
10. Environment
11. The deliberations within or between public authorities concerning the examination of a matter



The Tromsø Convention says, “all exceptions should be subject to the following tests”

- **Harm test**

- the public body must clearly state why access to this document could specifically and effectively undermine the interest protected by the exception.
- the risk must be reasonably foreseeable and not purely hypothetical.

- **Public interest test**

- the public body must balance the possible harm with the public interest in disclosure and consider whether access could still be granted despite some harm to the protected interests.

Critical Issues in Japan



Accident in Nuclear Power Plant in Fukushima
(March 2011)

Press Freedom Index (RSF)

2010: 11th ⇒ 2023: 68th

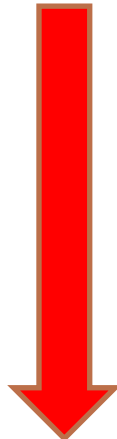
Act on the Protection of Specially Designated
Secrets (December 2013)



What is “the Act on the Protection of Specially Designated Secrets (SDS)”?

The Act

- **Designates, as Specially Designated Secrets, information which has a risk of causing severe damage to Japan’s National Security if disclosed without authorization**
- **Restricts persons who handle them**
- **Punishes those who disclose them intentionally or negligently.**



Points at Issue on the Act (Japan Federation of Bar Associations)

● **Range of “Specially Designated Secrets (SDS)”**

- Information on ①Defense②Diplomacy③Prevention of Specified Harmful Activities
④Prevention of Terrorist Activities
- **vague ⇒ can be interpreted arbitrarily by the authorities**

● **Invasion of privacy**

- Those who handle the secrets are examined ⇒ Matters for examination include:
 - ①*Relationship with any Specified Harmful Activities and Terrorist Activities*
 - ②*Criminal and disciplinary records*
 - ③*Records of improper conduct in connection with the handling of information*
 - ④*Abuse and the influence of drugs* ⑤*Mental disorders* ⑥*Moderation in drinking alcohol*
 - ⑦*Credit status and any other financial situation*
- ✕ Information on examinees' relatives (spouses, parents, children etc.) is also collected

● **Violation of access to information: “a chilling effect on the media and whistleblowers leaking information”**

- Not only those who disclose SDS, and who acquire SDS without authorization, but those who attempt, conspire to effect, induce or incite intentional leakage or acquirement of SDS are punished (imprisonment from 1-10 years)

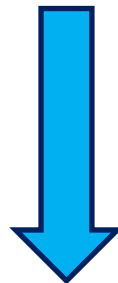
★**Suffocating journalism and suppressing access to information**

How could the situations be improved?

-Global Principles on National Security and the Right to Information-

- **Known as Tshwane Principles adopted in June 2013**
- **Based on more than 2 years of consultation around the world with UN&OSCE experts, government actors, the security sectors and civil societies**
- **Address the question of how to ensure public access to government information without jeopardizing efforts to protect people from national security threats**

Overviews on the Core Principles



Core Principles

1. The public has a right of access to government information, including information from private entities that perform public functions or receive public fund (Principle 1)
2. It is up to the governments to prove the necessity of restrictions on the rights to information (Principle 4)
3. No government entity may be exempt from disclosure requirements- including security sector and intelligence authorities (Principle 5)
4. Criminal action against those who leak information should be considered only if the information poses a “real and identifiable risk of causing significant harm” that overrides the public interest in disclosure (Principle 43 and 46)
5. Journalists and others who do not work for the government should not be prosecuted for receiving, possessing or disclosing classified information to the public, or for conspiracy or other crimes based on their seeking or accessing classified information (Principle 47)
6. There should be independent oversight bodies for the security sector, and the bodies should be able to access all information needed for effective oversight (Principle 6, 31-33)

Thank you very much !