

Exporting the Matrix

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The Campaign to Reform Media Laws Abroad

Edited for the
International Senior Lawyers Project
by
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“[F]reedom of thought and speech ... is the matrix, the indispensable condition, of nearly every other form of freedom.”

Justice Benjamin Cardozo, in
Palko v. Connecticut, 302 U.S. 319 (1937)

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Preface

Richard N. Winfield

How universal is the yearning for the right to speak freely? A Chinese student from a Beijing law school recently gave me a glimpse into the depths of that yearning. She was a compelling advocate, competing for her law school team in the Price International Media Law Moot Court Competition at Oxford University.

Her team was assigned to argue the appeal in the following hypothetical case: in the mythical Republic of Cabengo, a courageous journalist investigated, documented, and accurately exposed in a news story a pattern of corruption by the all-but-permanent President. The government indicted the journalist for criminal defamation; it tried, convicted, and sentenced him to prison. After the journalist exhausted his appeals in the courts of Cabengo, he appealed to the mythical Universal Human Rights Court, asserting that his rights to free expression, guaranteed by Article 19 of the International Covenant on Civil and Political Rights, had been violated. Arguing before that Universal Court, the Beijing law students represented the applicant journalist; a team of Ukrainian students from a Kiev law school argued for the government of Cabengo.

The young Chinese woman launched into a vigorous, no-holds-barred attack on the government of Cabengo, citing its systematic repression of human rights, its politicized courts, and, specifically, its laws that produced the grotesque treatment of her journalist client. She argued that Cabengo had failed to adopt the actual malice standard announced by the U.S. Supreme Court in the famous case of *New York Times Co. v. Sullivan*, the landmark case that provides the press with powerful protections against defamation suits by public officials.

The law student was allowed twenty minutes to present her oral arguments. She devoted the final five minutes to the *Sullivan* case. She recited from memory, with only an occasional glance at her notes, the stirring passages from Justice William Brennan's opinion in *Sullivan*. With an intensity bordering on passion, she quoted verbatim some memorable excerpts from that opinion:

there exists “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”; “that erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need ... to survive’”; a rule is required “that prohibits a public official from recovering damages for defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’”; and “would be critics of official conduct may be deterred from voicing their criticism even though it is believed to be true and even though it is in fact true because of doubt whether it can be proved in court or fear of the exposure of having to do so.”

It was a bravura, courageous, and emotional moment. The law student’s ardor was unmistakable. Also unmistakable was the fact that she was, of course, not speaking about a mythical republic called Cabengo.

She undoubtedly recognized the truth of another powerful Supreme Court pronouncement written by Justice Benjamin Cardozo in 1937: “Freedom of thought and speech ... is the matrix, the indispensable condition, of nearly every other form of freedom.” Not coincidentally, we have adopted that metaphor as the title for this anthology.

As that law student and her teammates can testify, theirs is an uphill struggle to realize the promise contained in the words of those Supreme Court justices. Consider some of the obstacles faced in much of the developing world by law students, journalists, lawyers, human rights activists, and civil society generally: censorship, surveillance, repressive laws, unreliable courts, authoritarian governments, powerful corporate interests, sophisticated blocking and filtering Internet technology, and legal and regulatory environments hostile to a free and independent press.

The figures from the Freedom of the Press survey published by Freedom House for 2010 show that 40 percent of the world’s population lives in suffocating regimes not too dissimilar from the People’s Republic of China that the young law student so artfully denounced. Another 44 percent of the population lives in countries with an only partly free press. The fact that she is not alone, that there are millions of like-minded men and women in these regimes, among them journalists and their lawyers, stands as a challenge to media lawyers in the mature democracies. The challenge is to offer to provide them with encouragement, friendship, expert assistance, tools, and precedents. The challenge is for our media lawyers to work side by side with their counterparts abroad in pursuing those reforms that will in time create an enabling environment for a free and independent press.

The authors of the essays in this anthology are among the most active, committed, and effective practitioners in this global campaign. Several authors describe their observations and experiences while pursuing reforms of media laws in the Middle East from 2007 through 2009. Their prescient essays, written in the months before the Arab uprising in early 2011, provide snapshots of repressive political cultures that were experiencing challenges and beginning to undergo seismic tremors. In these societies, the authors identify the conflicting forces of change and resistance to change. What emerges from their observations is the centrality of the reformers' demands for freedom of expression and information to the irresistible drive toward democratic self-rule and freedom. Their observations prove that Justice Cardozo was right: freedom of expression is, after all, the matrix, the indispensable condition of nearly every other freedom. It is a matrix worth exporting.

Foreword: Lost in Translation

Darian Pavli

I have had the opportunity to experience both ends of cross-border legal assistance. My first exposure to the field was less than encouraging: as a last-year law student at Tirana Law School, I was enlisted into a misguided (if well-intentioned) donor effort to introduce in Albania an agricultural credit regime based on the originally very successful “secured transactions” model of the U.S. Uniform Commercial Code. The transplant turned out to be so alien to the Albanian sociolegal system, and the transliteration of the common law concepts into civil law terminology so tortured, that when the bill reached the floor of the parliament, a good number of members of parliament wondered whether it was a pregnancy promotion scheme—before going on to vote nevertheless for the adoption of something they could barely understand. From what I can tell, the foreign-inspired invention has been largely rejected by the body economic. The experience seemed to be perfectly summed up by a Bosnian joke of the 1990s, which, with the familiar black humor of the Balkans, defined experts as “those who come from afar.”

Thankfully, that was not my only experience with pro bono legal advice from more established democracies. Within a few years, when I was the senior Albanian attorney with the local mission of a European intergovernmental entity, my colleagues and I found ourselves spending more than a few long nights preparing comparative law memos, or actual legislative language, for the main parliamentary drafters—on matters ranging from a new classified information bill to marathon negotiations on a new electoral code before every upcoming election.

From the many sources of solicited advice, there was one helping hand in particular that stays in mind: a network of pro bono experts recruited by the American Bar Association’s initiative for Eastern Europe—not too different from the media law reform group that Dick Winfield chaired for the same entity—who would be available at short notice, and virtually at all times of day

and night, to provide reliable, high-quality advice on almost every aspect of public law. They, of course, did not have all the answers to the quest for building a decent democracy in a country just emerging from five decades of totalitarian madness. But I found that their advice provided, for the most part, some pretty solid indications as to how a democracy should *not* function—which is a bigger gift than it may seem.

In the past decade or so, having found myself in the supply side of legal reform assistance on free speech and right to know questions, I have had the privilege to work with many of the authors of these essays as well as the terrific International Senior Lawyers Project (ISLP) team. Like colleagues and partners who have benefited directly from their assistance, I have been inspired by their commitment and the wonderful richness of their collective wisdom and leadership. From my partial vantage point, I have seen our collaboration with the ISLP network yield some important successes, as when a joint intervention in a case against Russia at the European Court of Human Rights helped persuade that tribunal to practically deny government agencies standing to sue for libel in their institutional name (a favorite tool of Russian authorities for suppressing dissent).

Other times the goals have been more challenging. Thus, as Dan Byron's essay will reveal, the practice of independent journalism continues to be a deadly trade under the thuggish regime that rules the Gambia; and Sierra Leone's colonial-style seditious libel laws remain in effect after the country's Supreme Court rejected a challenge brought by the local journalists' association. But there is hope: West Africa's own regional court recently found the Gambian authorities responsible for the state disappearance of Ebrima Manneh, the critical-minded journalist on whose case Byron worked—with more cases against Yahya Jammeh's government on the way. And in September 2010, the Constitutional Court of Uganda struck down that country's seditious libel provisions, a twin version of Sierra Leone's.

In the early years of my human rights career, I was haunted for a while by the comments of an anti-Soviet dissident who described how his grandmother would not understand why he was more concerned about the lack of free speech than food store lines. (And even though we know now that famines and food shortages have a great deal to do with free speech deficits, rights relativism continues to generate vivid debate in law schools on both sides of the development divide). But having witnessed the struggles for political and personal freedom in some otherwise very different parts of the world, I have come to believe that the human urge to speak one's mind is perhaps as strong as the need to breathe. I see the passion and experiences described in this collection as yet another testament to that idea. And to the fact that experts coming from afar are sometimes no strangers at all.