Background Paper: Freedom of Expression and International Law[1]

November 2021

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Freedom of expression is protected under international human rights law. Article 19 of the Universal Declaration of Human Rights states:

> 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.

The International Covenant on Civil and Political Rights (ICCPR) elaborates on this right, including with strict guidance on when it may be restricted, in Article 19:

> 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.

Around the world, courts must decide how to interpret the fundamental rights guarantees in national constitutions. Specifically, they must determine whether laws enacted by parliament infringe on the rights guaranteed under the constitution. In making these decisions, international human rights law may provide guidance to judges on how to interpret the protections in national constitutions. Standards articulated in international human rights law

are also a helpful source for lawyers who are making their arguments before courts and seek to help judges draw clear principles for the protection of freedom of expression.

This Background Paper provides an introduction to the standards governing freedom of expression as it is protected in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. It aims to enable lawyers to use these standards to inform their own arguments in domestic courts.

Basic Features of Freedom of Expression and its Benefits

Freedom of expression under international law includes the right to "seek, receive and impart" information and ideas of all kinds. A key aspect of this is the right of everyone to impart their ideas to others, no matter what the medium or form of the expression. This includes speaking to another person in one's own home, making a public statement, writing a post on Facebook, publishing an article or book and all other means of communicating one's ideas.

However, freedom of expression also includes the right to seek and receive information and ideas, or the rights of the listener (and not just the speaker). As such, it really protects the free circulation of information and ideas in society. It therefore includes an individual's right to obtain information, such as by reading a newspaper or accessing information online. Under international human rights law, the right to seek and receive information includes the right to access information *held by the government.* Governments hold information on behalf of the public and to serve the public and the public has a right to access this information. Governments should enact right to information laws to provide a legal framework for public access to government-held information.

Another attribute of freedom of expression is that it protects the right to express, and to access, all sorts of information and ideas, even deeply controversial and unpopular ones. Indeed, in some respects it is when individuals express very unpopular ideas that the protection of freedom of expression is most important.

Freedom of expression protects the right of *everyone* to freedom of expression. This includes foreigners visiting another country, non-citizen residents, children and so on. It also applies "regardless of frontiers". This means that everyone has a right to access not only information from their own country but also information from abroad, whether over the Internet, by importing a newspaper or talking to someone in another country over the phone.

Freedom of expression has both what are called "negative" and "positive" aspects. Negative does not mean harmful and is, in fact, what we mostly think about when we think about freedom of expression. State's negative freedom of expression obligations mean that they should *not* act to restrict the right (outside of very limited circumstances where restrictions are allowed, which are discussed in the next section). But it also has a positive aspect, meaning that in some cases States are required to take action to protect the right. The adoption of right to information legislation is one such area. Putting in place a positive framework for licensing broadcasters is another.

A final attribute of freedom of expression is that States should not only refrain from

restricting it directly, for example through law, but indirect restrictions are also not allowed. For example, it is not legitimate for a public authority to refuse to place advertising in a newspaper just because that newspaper is critical of the government or for the government to impose additional taxes on newsprint, over and above those paid by other businesses.

Freedom of expression is one of the most cherished rights in a democracy. When freedom of expression is protected, it benefits the individual, the community and the health of a democratic government. Individuals exercise freedom of opinion and expression to form their own consciences, beliefs and understanding of the world. By accessing information, individuals can better inform themselves about political, social and cultural issues which may impact their health and well-being. Communication between people also strengthens the entire community and society. Although individuals can sometimes express themselves in a way which harms other people, fundamentally, without open communication, communities cannot work together to address economic, health, environmental, cultural or other challenges they may experience.

Freedom of expression also creates stronger governments by enabling the exchange of different political views. Voters rely on access to information and open discussion of public interest issues to inform their voting decisions. In addition, freedom of expression and access to information is important for a country's sustainable development. Without it, people cannot speak out freely about corruption, environmental hazards, harms caused by political mismanagement, public health and social concerns, and other issues which are crucial for a healthy and flourishing democracy.

When Can the Government Restrict Freedom of Expression?

Although freedom of expression is important, it is not an absolute right unlike, for example, the right to be free from torture. This means the government can restrict it in certain circumstances when this is necessary to protect other human rights or overriding public interests. However, international law carefully constrains State's power to restrict freedom of expression. Otherwise, exceptions would become the rule, compromising the right itself.

International human rights law sets out a three-part test for whether any given restriction on freedom of expression is valid. A restriction must pass all three parts of the test to be valid. This test is derived from the International Covenant on Civil and Political Rights but is widely accepted in other contexts as well. The three-part test is:

1) The restriction must be provided by law.
2) The restriction must aim to protect a legitimate interest, namely respect for the rights or reputations of others, or the protection of national security, public order, public health or public morals.
3) The restriction must be necessary to protect the legitimate interest.

The first part of this test requires any restriction to be provided for in a law, often referred to as the principle of legality. It is not enough simply to have a law. The law must, for example, be accessible and it should not apply retroactively.

Importantly, the law must be clear and precise so as to provide sufficient guidance for people to adjust their behaviour accordingly. This means that the law should contain enough detail to

make it clear what kinds of speech are and are not allowed. For example, a law which stated in vague terms that any speech which harmed national security or public order was prohibited would not pass this part of the test. These terms would need to be defined clearly so that people would know what they could and could not say.

This part of the test also rules out laws which give too much discretion to officials to decide when to restrict freedom of expression. Thus, a law which allowed the police to fine someone whenever they deemed that person to have said something which undermined public order would not pass this part of the test.

The second part of the test identifies those legitimate interests which may justify a restriction on freedom of expression. No other interests beyond those found on this list may be relied upon to restrict free speech. However, some of the listed interests are fairly broad. For this reason, restrictions are more likely to fail the first or third part of the test compared to the second. However, some guidance also constrains the second part:

- Public morality can have different meanings in different cultural contexts, but restrictions here should still be read in light of other human rights principles, such as the principle of non-discrimination. For this reason, the UN Human Rights Committee, the body that interprets and applies the ICCPR, has stated: "limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition".[2]
- Public order is a potentially unclear concept. Great caution should be taken to ensure that references to public order really do refer to the need to maintain order in society. The Inter-American Court of Human Rights, for example, has suggested that public order concerns should be "strictly limited to the 'just demands' of 'democratic society'".[3]
- National security is also a category which is frequently abused. For this reason, any restrictions on national security should carefully define the security interest in question. National security harms include genuine threats of the use of force against a country's existence, like a military threat or violent overthrow of the government. They do not include calls for political change through peaceful means.

The third part of the test requires any restriction on freedom of expression to be necessary to protect the legitimate interest identified in part two of the test (such as national security or public order). This part of the test is crucial. Without it, all that would be needed would be for a restriction to be set out in a law and to have as its aim the protection of a legitimate interest. A law which banned all forms of criticism could be justified on as protecting reputations and yet such a law would be anathema to the very principle of democracy.

There are several aspects to the necessity part of the test. First, if there is another way to protect the interest which does not require restricting freedom of expression or is less restrictive of this right, the restriction fails this part of the test. The government should

[2] General Comment No. 22, The right to freedom of thought, conscience and religion, 27 September 1993, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.4&Lang=en.

[3] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, 13 November 1985, Advisory Opinion OC-5/85, Ser. A, No. 5, para. 67, http://www.worldcourts.com/iacthr/eng/decisions/1985.11.13_Compulsory_Membership.pdf.

choose the alternative option instead. The example above about banning all criticism is a good example of an approach to protecting reputations which is too restrictive. A better approach is to prohibit only untrue statements which harm reputation.

A second requirement of the necessity part of the test is that restrictions are not overly broad. An overly broad restriction on freedom of expression will prohibit both harmful and innocuous speech. The restriction should be carefully tailored so as only to capture harmful speech.

A third requirement is that the restriction is proportionate, meaning that the harm caused by the restriction to freedom of expression should not outweigh the benefits in terms of protecting the legitimate interest. For example, speech about matters of public interest, such as debate about public policy, discussion of public figures, or information about human rights violations, is very important to democracy and should receive heightened protection, even if this results in less protection for the reputations of public figures. Penalties must also be proportionate. Criminal penalties, for example, are a disproportionate response in many cases. Speech which only causes minor harms should not be addressed through imprisonment.

Applying the Three-Part Test: Examples of Content Restrictions

"Content restrictions" refer to laws or policies which prohibit expression based on the *content* of the speech. For example, laws which prohibit defamation, hate speech, obscenity, sharing State secrets or contempt of court laws all constitute content restrictions. It is not the purpose of the Background Paper to probe in detail all of the different types of content restrictions. Instead, this section looks at some which are frequently controversial or which raise challenging questions as a way of illustrating how the three-part test works in practice.

Defamation

Defamation laws include civil or criminal laws which prohibit statements which harm the reputation of another person. Protecting the reputation of other people is a legitimate aim under the second part of the test. However, defamation laws may fail to meet parts one and/or three of the test if they are not carefully crafted. In reality, in many countries defamation laws often do not pass muster as restrictions on freedom of expression.

International human rights law has developed clear standards on applying the three-part test in the context of critical statements. These include:

- Criminal defamation laws are not legitimate. They will always be disproportionate. Imprisonment is too severe a penalty for merely causing harm to someone's reputation. Although reputation should be protected, civil defamation penalties and systems are sufficient to do this. This is shown by the many countries in all parts of the world which have done away with their criminal defamation laws and yet still manage to protect reputations.
- Defamation laws should protect individuals, not symbols or institutions. Restrictions on freedom of expression are justified to protect the reputation *of others*, meaning other human beings. Symbols and institutions do not have a reputation *per se* to

protect. So laws prohibiting insult to the government, for example, violate human rights law.

- Public figures and officials should not have special protections for their reputation. Indeed, international law calls for the opposite, namely for these individuals to tolerate a higher degree of criticism than ordinary citizens. As such, laws should not impose steeper penalties for insulting the head of State, members of parliament or public officials. These people are, by virtue of their position, engaged in public affairs and wield public power. As a result, the public has a significant interest in open debate about their actions, leading the three-part test to dictate that they should be required to tolerate more criticism.
- Defamation laws should only punish the sharing of false and not true statements. This means that persons accused of defamation should always be able to raise a defence to the effect that the information is true. This is because the public should always be able to hear the truth. Also, if someone has in fact done something that harms his or her reputation, such as steal or tell a lie, that person is responsible for the harm to their own reputation, not the person who talks about it.
- Defamation laws should not punish people for sharing opinions.

Hate Speech

Hate speech is a very serious concern in many parts of the world today. Because hate speech can result in grave violations of the rights of others, and especially the right to equality, States can restrict the right to freedom of expression by prohibiting hate speech. Indeed, States are obligated by human rights to prohibit hate speech. Article 20(2) of the International Covenant on Civil and Political Rights states:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 4 of the International Covenant on the Elimination of All Forms of Racial Discrimination also requires States Parties to ban incitement to racial discrimination. The Convention on the Prevention and Punishment of the Crime of Genocide also prohibits "direct and public incitement to commit genocide".[4] Although this is specific to genocide, a narrower category than hate speech, it reflects a similar principle: States have an obligation to prohibit speech which constitutes incitement to ethnic, national, racial or religion violence, discrimination or hatred.

Human rights law therefore clearly requires States to prohibit hate speech. However, this requirement must be executed in a manner that is compatible with the right to freedom of expression. Hate speech laws should therefore comply with the three-part test, like any other restriction on freedom of expression.

This means, first, that hate speech laws must be precise enough to meet the "provided by law" requirement. Hate speech, as defined in the ICCPR, includes advocacy of national, racial or religious hatred. This hatred must then incite discrimination, hostility or violence.

[4] Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, in force 12 January 1951, Article III, https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf.

This is a precise definition which has several components. In contrast, general prohibitions on causing division, inciting racial or religious discontent or similarly vague language do not constitute proper hate speech laws. Such language is far too broad and will encompass protected speech as well as hate speech.

In order to meet the necessity and proportionality part of the three-part test, hate speech laws should only impose penalties on those who share hate speech with a hateful intent. This intent requirement protects academics, journalists and members of civil society who are writing about hate speech and engaging in legitimate discussions about how to prevent or respond to hate speech. Merely sharing a clip of another person engaged in hate speech is not, in itself, engaging in hate speech, if the context makes it clear that the intent is to condemn the hate speech in question.

Misinformation and Disinformation

In recent years, there has been a lot of concern over the spread of false or misleading information, sometimes called "fake news' or "false news". Especially during the COVID-19 pandemic, the spread of incorrect information about the disease can have dangerous health consequences, but misleading information can be harmful in other areas of life as well.

However, general prohibitions on disseminating "false news" can seriously damage the exercise of the right to freedom of expression. One problem is that terms like "fake news" or "false information" are very unclear and should not be used to prohibit speech legally. More precise terms include "disinformation" and "misinformation":

- Disinformation occurs when someone know information is false and shares that information anyways. It is an intentional act to mislead other people.
- Misinformation occurs when people share information that is false, but believe that information is true.

Another problem is that not all so-called "false" statements (for there is often disagreement about whether a statement even is false) cause harm to a protected interest, as required by the second part of the test for restrictions on freedom of expression. Thus, laws which generally prohibit false statements cannot meet the three-part test. Instead, laws should link false statements to specific harms. For example, a law can specifically prohibit false claims about the safety of a consumer product, to ensure the safety of persons using that product. A law can prohibit failing to disclose harmful side effects of a medical treatment, in the interest of protecting public health. By tying prohibitions to specific harms, these more targeted laws ensure that only speech which is actually harmful to public health or other interests is prohibited, meeting the "legitimate interest" and "necessity" parts of the three-part test.

Similarly, laws prohibiting disinformation should always include an intent requirement. Otherwise, ordinary persons might be punished for sharing a Facebook post without knowing that it contains false information, for example. Imposing a penalty for such an innocent mistake would not meet the proportionality requirement of the three-part test. It is, as a result, not legitimate to prohibit misinformation, this this is not disseminated with intent. Instead, governments should explore other non-punitive policy measures for combating misinformation.

Freedom of Expression and Media Regulation

The right to freedom of expression also imposes obligations on States to respect media freedom. Journalists, editors and other media workers enjoy the right to freedom of expression like everyone else. However, their right to freedom of expression has heightened importance. This is because the right to freedom of expression includes not only the right to speak but also the right to receive information. The free circulation of information throughout society is a crucial part of the right to freedom of expression. The media, by reporting on matters of public importance, promote the right to freedom of expression and information of everyone in society.

Regulation of the media should be governed by the principle of *media independence.* Media independence means that the media should not be under the direct or indirect control of the government. The media should also have editorial independence, meaning staff and editors should have the ability to make decisions about what to publish and what content to publish.

However, the State also has a positive obligation to promote *media diversity.* This is again related to the right to receive information. If one or a small number of individuals or companies dominate the media industry, they are likely to have too much influence over the media, thereby limiting the range of information and ideas it carries. Media diversity ensures a range of viewpoints and perspectives are heard and debated in society. It also protects the rights of minorities both to voice their opinions and to access information relevant to their communities and in their languages.

To promote a diverse yet independent media, government should only impose licensing regimes where doing so is necessary to promote media diversity. Print media outlets, for example, should not be required to apply for licences to operate. A formal registration requirement, such as would be required of a business, may be appropriate for administrative purposes, but authorities should not have the power to deny or limit such registration. Numerous print media outlets can exist in a country, so limiting their number has no purpose, and will only undermine media diversity.

In contrast, broadcasting media can be required to obtain licences. Traditional broadcast media relies on access to a limited number of radio frequencies. States should ensure that a diversity of voices have access to broadcasting and that frequencies are allocated in a fair manner. Clear licensing procedures allow for this and can protect against one or two broadcasters obtaining a monopoly.

Broadcast licensing, and any other form of media regulation, should be undertaken by an independent regulatory body. An independent regulatory body should, ideally, be governed by a board, the members of which are appointed via a process which is protected from direct political influence. The body should not be under the authority of a government office or ministry. And it should have protections in place for its funding and from arbitrary dismissal of its board members.

The primary responsibility of a broadcast regulator should be issuing licences. However, some regulation of content is legitimate, for example, to protect children, who may be likely to be listening to broadcast media at certain hours. This type of regulation is sensitive so it

should be strictly in accordance with the three-part test and be handled by an independent body. For print media, better practice is for a professional self-regulatory body to handle development and enforcement of a press code, for example. However, if an official body oversees print media regulation, it should also have strong protections for independence.

Media independence means that any State owned media should not be controlled by the government. Such media does not have the requisite editorial independence to serve the public interest and will instead serve the interests of the government currently in power. However, the State can still promote media with a public service mandate. Known as "public service media", this includes media outlets which are owned and supported by the State, but which have a mandate to serve the public interest and are protected from direct political influence.

Public service media can play a crucial role in a democracy. Because of their public interest mandate, they can focus on reporting about matters which may be of high public interest but which are not covered well by commercial interests. Public service media can also offer high quality content on a free or low-cost basis to the public, which ensures more equitable and universal access to information. However, public service media must have rigorous safeguards for their independence, just like the broadcast regulator, and a clear public interest mandate.

International Human Rights Law Sources on Freedom of Expression

UN Human Rights Committee, General Comment No. 34: The Human Rights Committee is responsible for interpreting the ICCPR. This General Comment provides detailed guidance on how to interpret Article 19's protections for freedom of expression. UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, 12 September 2011, CCPR/G/GC/34, http://undocs.org/ccpr/c/gc/34.

Joint Declarations of the Special Rapporteurs on Freedom of Expression: These annual statements by the special rapporteurs at the UN, OSCE, OAS and African Commission elaborate on key standards on a different freedom of expression theme each year. Some of the most relevant statements include:

- 2019 Twentieth Anniversary Joint Declaration: Challenges to Freedom of Expression in the Next Decade: https://www.law-democracy.org/live/wp-content/uploads/2019/07/Mandates.decl_.2019.20th.English.pdf
- 2018 Joint Declaration on Media Independence and Diversity in the Digital Age: https://www.law-democracy.org/live/wp-content/uploads/2018/12/mandates.decl_.2018.media-ind.pdf
- 2017 Declaration on "Fake News", Disinformation and Propaganda: https://www.law-democracy.org/live/wp-content/uploads/2017/03/mandates.decl_.2017.fake-news.pdf
- 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations: http://www.law-democracy.org/live/wp-content/uploads/2015/05/JD-2015.final_.Eng_.pdf
- 2011 Joint Declaration on Freedom of Expression and the Internet: http://www.law-democracy.org/wp-content/uploads/2011/06/11.06.Joint-Declaration.Internet.pdf

- 2007 Declaration on Diversity in Broadcasting: https://www.osce.org/files/f/documents/f/0/29825.pdf

Other International Standards:

- African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression and Access to Information in Africa*, November 2019, https://www.achpr.org/legalinstruments/detail?id=69#:~:text=The%20Declaration%20establishes%20or%20affirms,to%20express%20and%20disseminate%20information
- Article 19, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, 2002, https://www.article19.org/data/files/pdfs/standards/accessairwaves.pdf
- Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Defamation*, 2000, https://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf.
- Article 19, the Camden Principles on Freedom of Expression and Equality: https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf
- Article 19, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1995, https://www.article19.org/wp-content/uploads/2018/02/joburg-principles.pdf.
- Inter-American Commission on Human Rights, *Declaration of Principles on Freedom of Expression*, October 2000, http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26&lID=1.
- International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 1985, https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf.
- Office of the High Commissioner for Human Rights, *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*, A/HRC/22/17/Add.4., 5 October 2012, https://undocs.org/A/HRC/22/17/Add.4.

Prominent Cases and Opinions from International Human Rights Bodies:

- *Amnesty International Togo and Ors v. Togo*, 25 June 2020, Judgment No. ECW/CCJ/JUD/09/20, (Community Court of Justice of the Economic Community of West African States), https://www.accessnow.org/cms/assets/uploads/2020/07/ECOWAS_Togo_Judgement_2020.pdf (finding an Internet shutdown violated the right to freedom of expression).
- *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, 13 November 1985, Advisory Opinion OC-5/85, Series A, No. 5 (Inter-American Court of Human Rights), http://www.worldcourts.com/iacthr/eng/decisions/1985.11.13_Compulsory_Membership.pdf (finding that a law requiring journalists to be members of a journalism association violated freedom of expression; also articulating important standards around freedom of expression generally).
- *The Word "Laws" in Article 30 of the American Convention on Human Rights*, 9 May

1986, Advisory Opinion OC-6/86, Ser. A No. 6 (Inter-American Court of Human Rights), http://www.internationalhumanrightslexicon.org/hrdoc/docs/iachrhabeascorpus.html (setting out standards on interpreting the "provided by law" part of the three-part test).

- *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74 (European Court of Human Rights), https://hudoc.echr.coe.int/eng?i=001-57584 (an early landmark case on freedom of expression by the European Court of Human Rights).
- *Lingens v Austria*, 8 July 1986, Application No. 9815/82 (European Court of Human Rights), https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2016/08/CASE-OF-LINGENS-v.-AUSTRIA.pdf (criminal defamation conviction violated a journalist's right to freedom of expression).
- *Jersild v. Denmark*, 23 September 1994, Application No. 15890/89 (European Court of Human Rights), https://hudoc.echr.coe.int/eng?i=001-57891 (highlights the importance of intent for a hate speech conviction).
- *Claude Reyes v. Chile*, 19 September 2006, Ser. C No. 151 (Inter-American Court of Human Rights), https://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf (affirming the right to information).
- *Lohé Issa Konaté v. Burkina Faso*, 5 December 2014, Application No. 004/2013, (African Court on Human and People's Rights) http://www.ijrcenter.org/wp-content/uploads/2015/02/Konate-Decision-English.pdf (criminal defamation penalties are disproportionate).