Massive Open Online Course (MOOC) on Freedom of Expression for Parliaments and Their Members Compiled Video Transcripts and Readings

INTRODUCTION

Activity 1: Video

Welcome video by Mr. Tawfik Jelassi, UNESCO Assistant Director-General for Communication and Information

Transcript:

Ladies and Gentlemen As the Assistant Director-General for Communication and Information at UNESCO, I am thrilled to welcome you to this unique Massive Open Online Course on freedom of expression.

UNESCO, together with the Inter-Parliamentary Union, has designed this course to address the specific context and needs of parliaments and their members.
Since 1948, freedom of expression has remained a cornerstone of the international legal framework on human rights. Article 19 of the Universal Declaration of Human Rights guarantees the right to "seek, receive, and impart information and ideas through any media and regardless of frontiers".

Freedom of expression is not only an essential freedom but also an enabler of all other human rights, forming the foundation of any democratic society. Democratic institutions thrive on the free exchange of ideas and information. People must have the right and ability to assemble, voice their opinions, vote, debate issues, criticize, make demands and protect their interests and rights. The word 'parliament' originates from the Old French term *'parlement*,' which means 'discussion' or 'discourse,' derived from the verb *'parler*,' meaning 'to speak' or 'to talk.' This etymology, dating back to the 11th century, underscores the primary role of discussion and debate in parliamentary work, highlighting its deep connection to freedom of expression.

For parliamentarians, freedom of expression is especially significant, not only as a crucial right of citizenship, but also in their capacity as policymakers. As leaders in society, parliamentarians must exercise their freedom of expression responsibly, ensuring that their participation in public discourse upholds other international human rights and constitutional principles. At the same time, freedom of expression allows parliamentarians to connect with citizens, raise their concerns

and denounce possible abuses. It is thus crucial that parliamentarians can do this unhampered and without fear of reprisals.

It is especially important to acknowledge the unique challenges faced by women who make their voices heard in the public sphere. Protecting the freedom of expression for women parliamentarians is essential for fostering inclusive and representative governance. Their voices bring diverse perspectives and experiences crucial for comprehensive policymaking and democratic debate. Ensuring that parliamentarians, irrespective of their gender, can speak freely without fear of discrimination, harassment or violence upholds their individual rights but also strengthens the democratic process by promoting gender equality and empowering future generations of women leaders.

Freedom of expression and the rule of law are intrinsically linked, forming an essential element of international standards. This relationship is reflected in Agenda 2030, specifically in Sustainable Development Goal 16 on "Peace, Justice and Strong Institutions". UNESCO, as the United Nations' specialized agency, has a mandate to promote and protect freedom of expression and its corollaries. Since 2013, we have embarked on a mission to increase the knowledge and capacities of the judiciary on such crucial issues, reaching over 36,000, judicial actors in more than 160 countries.

This Massive Open Online Course is an extension of our ongoing efforts. It aims to expand the reach of this initiative by emphasizing universal standards, incorporating approaches from regional human rights courts, and presenting insights from members of parliaments and leading experts in human rights, freedom of expression and access to information.

As decision-makers and leaders in society, you play an essential role in protecting and promoting these fundamental rights. This responsibility is particularly pertinent when you propose in Parliament or examine draft legislation related to freedom of expression, press freedom, access to information, safety of journalists and media or digital regulation.

Global trends show that freedom of expression is increasingly curtailed. According to UNESCO's statistics[1], in 2021 defamation was still criminalized in 160 countries. In the last five years, at least 57 laws and regulations have been adopted or amended in 44 countries, threatening media freedom and freedom of expression online.

1 See UNESCO's World Trends Global Report on Freedom of Expression and Media Development (2021-2022): https://unesdoc.unesco.org/ark:/48223/pf0000380618?2=null&queryId=0a30ee11-7640-48c0-b1c3-8d7e1e5dc867 . See also UNESCO's issue brief "The misuse of the judicial system to attack freedom of expression': https://unesdoc.unesco.org/ark:/48223/pf0000383832

Against this scenario, parliamentarians' crucial role in shaping a legislative framework which protects everyone's freedom of expression in line with international standards is more relevant than ever. We hope that this MOOC will serve as a useful tool for you to strengthen the rule of law in your country and apply these standards in your parliamentary work.

We look forward to gaining valuable insights from you. Your active participation in this MOOC is crucial, and we hope that you can share with us your parliamentary experiences and concerns regarding Freedom of Expression. Your input on how the international community can enhance support for implementing international standards at national and regional levels is highly valued. The British writer Evelyn Beatrice Hall famously wrote "*I disapprove of what you say, but I will defend to the death your right to say it*." Let us all strive to protect and cherish the invaluable freedom of expression.

Once again, I extend our gratitude to the Inter-Parliamentary Union, for their exceptional cooperation in developing this course.

I wish you all a very fruitful and enlightening experience.

Thank you for your attention.

Activity 2: Video

Welcome Video from Mr. Martin Chungong Secretary General of the Inter-Parliamentary Union

Transcript:

Launch of the Massive Open Online Course (MOOC) on Freedom of expression for parliaments and their Members

Introductory statement – IPU SG: I am Martin Chung Wong, Secretary General of the Inter-Parliamentary Union, and it gives me great pleasure to welcome members of parliament and other participants to this online course on freedom of expression.

Question: What is the Massive Open Online Course (MOOC) on freedom of expression?
IPU SG:

This massive open online course is the first of its kind by the IPU. It is an online course on freedom of expression and has been designed in collaboration with UNESCO and the Centre for Law and Democracy. The course is designed to strengthen MPs' knowledge of freedom of expression

through relevant readings, expert videos, interactive games and quizzes to test the knowledge of participants at the end of each module.

Question: Why an online course and how does it benefit parliamentarians?
IPU SG:

Well, I must say that the online course aligns with the IPU's willingness to ensure that its resources are reaching parliamentarians around the globe, and the format, the online format that we have adopted, enables Members of Parliament everywhere to access knowledge and information about freedom of expression and how to protect and promote it inside and outside parliaments.

Question: Who is the course designed for?
IPU SG:

We have designed this course for use by Parliaments and their members, parliamentary staff, journalists and civil society representatives and I would like to add academia and other interested parties.

Question: Why a course on freedom of expression?
IPU SG:

MPs must have the ability to speak freely, to debate openly and to challenge the status quo, which is a fundamental right and a fundamental requirement to the health of our democratic institutions. By providing a comprehensive course on freedom of expression, we're also seeking to dispel misunderstandings about this right and combating hate speech, incitement to violence and disinformation That having been said, it is critical to strike a balance that upholds free expression while safeguarding individuals and communities from harm.

Question: Why is it crucial for parliamentarians to enjoy freedom of expression?
IPU SG:

Well, this is very inherent in the representative nature of parliamentary work. Parliamentarians can only do their work without fear of retribution, of censorship, if they enjoy freedom of expression, if they can express their opinions freely, freedom of expression ensures that parliamentarians can question policies, scrutinize government actions and hold those in power accountable.

Question: Has there been an uptick in human rights violations against parliamentarians recently?

IPU SG:
The number of violations has been on the rise over the years. Let's take 2023 for instance. The committee examined the cases of some 762 parliamentarians from 47 countries around the world. And I must say that these cases of human rights violations are underestimated, and when we look at this, we see that the most common violations were attacks on parliamentarians' freedom of expression.
Question: How can parliamentarians protect freedom of expression?
IPU SG:

Parliamentarians are challenged to exercise their constitutional powers in this regard, and we think that they can ensure, they must ensure that laws clearly protect freedom of expression, and they can also advocate for laws that promote transparency, access to information and the protection of whistle blowers. We also want to advocate for establishing robust and improved legislation that enables MPs to make informed decisions that reflect the needs and aspirations of the population.

Question: What do you hope this course will bring to parliamentarians?
IPU SG:
We hope that this course will provide parliamentarians and other participants with sound knowledge about how international and regional legal instruments protect freedom of expression as a right. I hope this course will support MPs' work, it can, and must, bolster MPs' work and their own commitment to protect and promote the freedom of expression.

Activity 3: Reading

About This Course

This Massive Open Online Course (MOOC) on Freedom of Expression for Parliaments and their Members was commissioned by the Inter-Parliamentary Union (IPU) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), and prepared by the Centre for Law and Democracy (CLD). The course aims to develop the skills and capacity of members of parliament, parliamentary staff, civil society

organisations, academics and others with a focus on parliaments to protect and promote freedom of expression inside and outside of parliament.

Freedom of expression is a cornerstone of any democratic society. Democracy cannot be realised without a free flow of ideas and information, and the possibility for people to gather, to voice and discuss issues, to criticise and make demands, and to defend their interests and rights. Freedom of expression takes on special significance for parliamentarians due to both the special protections under international law for their right to speak, given the important roles they play in society, and their role in safeguarding freedom of expression as lawmakers. In addition, as social leaders, parliamentarians have the duty to strike the right balance when exercising their own right to freedom of expression and to avoid using their voices to undermine international human rights and constitutional values such as equality, the presumption of innocence and even free and fair elections. Finally, parliaments themselves have systems for regulating the professional nature of debates in parliament. This course covers all of these issues, spending quite a bit of time on general international standards on freedom of expression before delving into the specific rules and responsibilities that pertain to parliamentarians.

Training Objectives

The **objectives** of this course are:

i. To familiarise parliamentarians and others concerned with parliaments with international and regional human rights norms and mechanisms for the protection of freedom of expression, media freedom and the right to information.
ii. To prepare parliamentarians and others who advocate before parliaments to work to put in place human rights-compliant legal frameworks for freedom of expression, media freedom and the right to information.
iii. To highlight the specific application of international standards on freedom of expression and the right to information to parliamentarians and parliamentary work, as well as the scope of and appropriate limits to parliamentary regulation of the freedom of expression of parliamentarians.
iv. To outline the wider role of parliamentarians, beyond legal frameworks and formal rules, in promoting and protecting freedom of expression, media freedom and the right to information.
v. To support the work of journalists who cover the work of parliaments and parliamentarians.

Structure of the Course

This course is divided into five core modules as follows:

» Module 1: Introduction to International and Regional Core Standards and Systems
» Module 2: Restrictions on Freedom of Expression

» Module 3: Regulation of the Media
» Module 4: Freedom of Expression and Parliamentary Immunity
» Module 5: Parliamentarians' Role in Promoting Freedom of Expression and their Relationships with other Social Actors

The course also has an Introduction at the beginning and an Evaluation at the end.

Each module explores relevant themes connected to its specific area of focus. Modules are divided into different types of activities, each with defined topics, aims and tasks. These activities comprise moderator and expert videos, simple interactive games, reading material, references to resources for further reading and quizzes.

Individual videos and their transcripts are available for download for offline viewing. In addition, participants may download the entirety of the readings and transcripts of the videos here [link to PDF]. Participants who would like to have an audio recording of the readings may consider using a third-party application, such as Speechify, to generate such recordings. Participants who wish to view the course from their mobile phone, should consider downloading Thinkific's dedicated phone app.

To move onto subsequent modules, participants first need to complete each activity in the previous module. Then, participants must take the quiz which appears at the end of each module and achieve a score of at least 80% on the quiz. However, participants may retake the quiz as many times as is necessary and achieving this score should not be too challenging if participants have gone through all of the material carefully. Participants will then be asked to complete an evaluation at the end of the course, following which they will receive their certificate of completion. The evaluation is an important tool for IPU, UNESCO and CLD which will assist with continuous improvement of this and future courses.

Course Creators

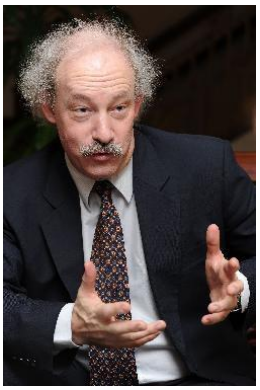
The **Centre for Law and Democracy** (CLD) is an international human rights organisation based in Canada. It provides expert legal support with the aim of advancing respect for foundational human rights underpinning democracy around the world, including the right to information, freedom of expression, the right to participate and freedom of assembly and association. It does this through a range of initiatives including engaging in capacity building, conducting strategic litigation, advocating for law reform, undertaking research and providing technical assistance to governments, inter-governmental organisations and civil society groups. You can find the Centre online at www.law-democracy.org, on Twitter at @Law_Democracy and on Facebook at @centreforlawanddemocracy, or you can contact them via info@law-democracy.org

The **Inter-Parliamentary Union** (IPU) is a global organisation of national parliaments. What began in 1889 as a small group of parliamentarians, dedicated to promoting peace through parliamentary diplomacy and dialogue, has since grown into a truly global organisation with 180 Members and 15 Associate Members. The IPU facilitates parliamentary diplomacy and empowers parliaments and parliamentarians to promote peace, democracy and sustainable development around the world. For more information on the IPU, see https://www.ipu.org/.

The **United Nations Educational, Scientific and Cultural Organization** (UNESCO**)** contributes to build peace and security by promoting international cooperation in education, the sciences, culture, communications and information. With a specific mandate to foster the free flow of ideas by word and image, UNESCO is committed to promote freedom of expression and access to information. To that effect, UNESCO's Communication and Information Sector (CI Sector) empowers key actors to safeguard fundamental human rights, both in online and off-line spaces, including in relation to freedom of expression, the safety of journalists and universal access to information and digital inclusion. For more information, see https://www.unesco.org/en/communication-information.

Course Experts

Moderator: Toby Mendel



Toby Mendel is the founder and Executive Director of the Centre for Law and Democracy. Prior to founding CLD in 2010, he was for over 12 years Senior Director for Law at ARTICLE 19, a human rights NGO focusing on freedom of expression and the right to information. He has collaborated extensively with inter-governmental actors working in these areas – including the World Bank, UNESCO, the UN and other special international rapporteurs on freedom of expression, the OSCE and the Council of Europe – as well as numerous governments and NGOs in countries all over the world. His work spans a range of areas of legal work, including legal drafting, litigation, research and publications, training, advocacy and capacity building. He has published extensively on a range of freedom of expression, right to information, communication rights and refugee issues. Before joining ARTICLE 19, he worked as a senior human rights consultant with Oxfam Canada and as a human rights policy analyst at the Canadian International Development Agency (CIDA).

Expert Speakers

David Kaye

David Kaye is a clinical professor of law at the University of California, Irvine, 2023-2024 Fulbright Distinguished Scholar in Public International Law at Lund University, Sweden, the Independent Expert of the United States to the Venice Commission, and an affiliated scholar at Oxford University's Bonavero Institute for Human Rights and Lund University's Raoul Wallenberg Institute for Human Rights and International Humanitarian Law. From 2014 – 2020 he served as the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. He is the author of Speech Police: The Global Struggle to Govern the Internet (2019), a Trustee of ARTICLE 19, and recently concluded his term as Independent Chair of the Board of the Global Network Initiative (2020 – 2024). He writes regularly for international and American law journals and media outlets. David began his legal career with the U.S. State Department's Office of the Legal Adviser, is a member of the Council on Foreign Relations, and is a former member of the Executive Council of the American Society of International Law.

FYI: https://muse.jhu.edu/article/937737

Pansy Tlakula

Advocate Pansy Tlakula is the Chairperson of the Information Regulator of South Africa. She studied law at the University of the Witwatersrand before completing her masters in law at Harvard. She has held a number of influential positions.

Advocate Tlakula was appointed in 2005 as member of the African Commission on Human and Peoples' Rights (ACHPR). She served the ACHRC for 12 years, until November 2017. She held the mandates of Special Rapporteur on Freedom of Expression and Access to Information, Chairperson of the Working Group on Specific Issues related to the work of the African Commission, and, between 2015 and 2017, she served as Chairperson of the ACHRC. In January 2020 she started her four-year tenure as a member of the United Nations Committee on the Elimination of Racial Discrimination.

Ms. Leila de Lima

Ms. Leila de Lima is a Filipina politician, lawyer, human rights activist and law professor who previously served as a Senator of the Philippines from 2016 to 2022. She was the chairperson of the Commission on Human Rights from 2008 to 2010, before serving in President Benigno Aquino III's cabinet as Secretary of Justice from 2010 to 2015.

Known as a vocal critic of the administration of President Rodrigo Duterte, she was arrested in 2017 under three charges linked to the New Bilibid Prison drug trafficking scandal during her term as Justice Secretary. She was held in pretrial detention until November 2023, although she served out her remaining term as Senator and filed legislation while in detention. In 2024, Ms. de Lima was acquitted on the final charge that was pending against her. The way in which the trial proceedings were held and the absence of any evidence against her corroborated the IPU's longstanding view that she was prosecuted in response to her vocal criticism of then President Duterte.

Ana Cristina Ruelas

Ana Cristina Ruelas is Senior Programme Specialist at UNESCO CI Sector, focusing on freedom of expression in the digital environment. Before that, she was the regional Director for ARTICLE 19's Office for Mexico and Central America and, previously, she occupied a position as the organisation's Right to Information Program Officer, spearheading the development of projects related to education for development. Ms. Ruelas also worked in the Right to Information office of Mexico's National Commission for Human Rights and has extensive experience collaborating with various human rights organisations in both Mexico and Peru. She is a lawyer and holds a Master's Degree in Public Administration and Public Policy from the Instituto Tecnológico de Estudios Superior de Monterrey.

Marjorie Buchser

Marjorie is a Senior Consultant with the UNESCO's section of Freedom of Expression and Safety of Journalists. She is also a Senior Advisor and Associate Fellow with Chatham House, the Royal Institute of International Affairs. For almost a decade, she developed and launched high priority strategic initiatives including Chatham House's Sustainability Accelerator and Digital Society Programme (DSP), the institute first research programme on technology policy. In 2018, she became the Executive Director of DSP, overseeing research projects on data flows, artificial intelligence and digital platforms governance.

Prior to Chatham House, Marjorie was a Senior Strategist at Purpose, a social impact agency. She also worked as an Associate Director and Global Leadership Fellow at the World Economic Forum where she managed the Technology Pioneer Programme.

Marjorie graduated magna cum laude from the Swiss Federal Institute of Technology in Zurich (ETHZ) with a MA in Comparative and International Studies as well as an MA in Political and Social Sciences from the Université of Lausanne.

Jean Jaques Mamba

Jean Jacques Mamba was born on August 25, 1975, in Liège. After completing his master's in business administration, he worked extensively in the private sector, in Kinshasa, Luanda, and then Brussels. Committed to addressing the challenges facing his country, in 2009 he furthered his studies by enrolling in an advanced studies diploma at the Free University of Brussels, focusing on contemporary issues in sub-Saharan Africa. Simultaneously, and in collaboration with compatriots, he founded a non-profit organization called VRIENDEN VAN CONGO, which obtained consultative status with ECOSOC. The organization's main objective is to organize aid from Brussels to support local populations, particularly in agriculture and capacity-building for self-entrepreneurship in rural areas.

In 2011, he decided to engage actively in his country's political life after joining the Congo Liberation Movement a few years prior. In 2018, he was elected as a national deputy, and over the following five years, he successively served as rapporteur for the expenditure and revenue groups, alternating within the Economic and Financial Commission (ECOFIN) of the National Assembly.

Kevin Deveaux

Kevin Deveaux is a Barrister & Solicitor from Eastern Passage, Nova Scotia, Canada, Kevin was elected to the Nova Scotia House of Assembly in 1998 for the constituency of Cole Harbour-Eastern Passage. He was re-elected in 1999, 2003 and 2006. During his time as an MP, he was the Deputy Speaker for the House from 1999-2003 and the Official Opposition House Leader from 2003-2007. In March 2007, Kevin resigned his seat in the House of Assembly to work full-time as a Senior Parliamentary Technical Adviser with the United Nations Development Programme (UNDP) in Hanoi, Vietnam. In 2008 he was appointed to the post of global Parliamentary Development Policy Adviser in New York with UNDP's Democratic Governance Group. In 2012 Kevin left his post at UNDP to establish a small consulting firm based in Canada. He has since worked with the World Bank, UN Women, UNDP, Oxfam, International IDEA, the Swiss Government, NDI, the European Union, USAID and DFID as a political governance adviser. He has worked directly with more than 80 parliaments and with MPs from more than 115 countries.

Karina Banfi

Karina Banfi Diputada Nacional por la Provincia de Buenos Aires, con mandatos 2015-2019 y 2019-2023. Vicepresidenta del Bloque de la Unión Cívica Radical en Juntos por el Cambio.

Karina Banfi is a national deputy from the province of Buenos Aires, serving terms from 2015-2019 and 2019-2023. She currently holds the position of Vice President of the Radical Civic Union Bloc within the "Juntos por el Cambio" ("Together for Change") coalition.

She is a lawyer with a degree from the University of Buenos Aires. She also has a postgraduate degree in Information Law from Oxford University in the United Kingdom and a specialization in Human Rights from American University in the United States.

Ms Banfi initiated the Public Access to Information law (2016) and contributed to the first adoption of the Environmental Public Access to Information law. She is also the author of the law on the Recognition and Protection Regime for Stateless Persons (2018).

She held the position of Director General of the Public Access to Information Office at the University of Buenos Aires (UBA).

As co-founder and former executive secretary of the Regional Alliance for Free Expression and Information (www.alianzaregional.net), she also coordinated regional programs on transparency and governance for the Organization of American States (OAS).

She is a member of the expert group that drafted the Inter-American Model Law on Access to Public Information and its Implementation guide for the OAS.

Neema Lugangira

Hon. Neema Lugangira (MP) is a Member of Parliament in Tanzania who brings forward extensive experience and successful track record in championing policy and legislative reforms for improved investment enabling environment for the agricultural, mining and oil & gas and health sectors to mention a few. As a Parliamentarians her personal prioritised agendas include food and nutrition security; digital development, community health, gender equality in politics and NGOs sector development in Tanzania and across Africa.

Her continued passion and commitment for sustainable and economic development not only in her country Tanzania but also Africa led her to be the Founding Chair of the African Parliamentary Network on Internet Governance (APNIG) and the Founding Chair of the Parliamentary Network on the World Bank and International Monetary Fund – Tanzania Chapter.

Hon. Lugangira is also the Founder of two NGOs; Agri Thamani, which is committed to ending malnutrition in Tanzania; and Omuka Hub that aims to accelerate digital inclusion in peripheral regions of Tanzania.

Internationally, Hon. Lugangira is a Member of the Multi-Stakeholder Advisory Group of the United National Internet Governance Forum; Member of the International Parliamentary Network on Education (IPNEd); the UNITE – Global Parliamentarians Network for Global Health; Vital Voices Fellow; and WSIS Gender Trendsetter for Advancing Digital Gender Inclusion.

MODULE 1. INTERNATIONAL STANDARDS

Activity 1: Expert Video

[Expert video on the importance of freedom of expression to parliamentarians' work]

Transcript:

Freedom of expression is a human right which is of fundamental importance to any functioning democracy and a key underpinning of the enjoyment of other human rights. Democracy simply cannot function without a free flow of ideas and information, and the possibility for people to advance, challenge and discuss ideas, make demands of leaders and defend their interests and rights.

Although important for all members of society, this right is particularly essential for parliamentarians. Not only does it underpin the very essence of their work – most firmly represented in minds of members of the public by parliamentarians giving speeches in parliament – but that work is itself an absolute bedrock of democracy and the protection of human rights, including freedom of expression. Put differently, if parliamentarians' right to freedom of expression is not respected, democracy and indeed all human rights are very much at risk.

Having a firm understanding of international standards on freedom of expression is not only relevant for parliamentarians in order to understand their own rights. Parliamentarians also have a responsibility to put in place a legislative framework which protects everyone's freedom of expression, in line with international standards.

Despite near universal acknowledgement of the importance of freedom of expression, it remains a highly contentious and debated right. At the heart of this dilemma is the fact that while protection for free speech is essential in a democracy, at the same time it is not an absolute right but a right which can be legitimately restricted in some limited circumstances. However, undue restrictions on this right can cause grave harm. In recognition of this, international legal guarantees for freedom of expression try to strike a balance between providing strong protection for the right while allowing for limited restrictions to it to protect other public and private interests.

Historically, what has now become known as the "legacy" media, namely newspapers, radio and television, have provided the backbone communications system for wider social debate, supplemented by other means such as books, pamphlets, theatre, paintings and music. More recently, the extensive spread and use of the Internet has had a transformative impact on how we communicate. For the most part, these changes have massively bolstered and democratised freedom of expression. Whereas once access to information was the preserve of the wealthy, it is now possible, with just an Internet connection and a digital device, to access a previously unimaginable wealth of information and to express oneself to a wide audience.

At the same time, these changes have created some challenges in terms of expression. For one thing, the business model of the new technology-based industries has massively undercut the financial resource base available to the legacy media, essentially by drawing advertising revenues away from them. This has led to a crisis for legacy media in many countries. While the new platforms perform important information and communication roles, they do not replace the need for legacy media and, so far, solutions to this problem have proven to be elusive.

Another issue is the emergence of what have been described as information silos or filter bubbles. Many tech platforms operate on a business model of feeding us what we already like or seem prone to like. They suggest options for us, for example in terms of friends and news feeds, which are based on our established track record of interests and engagements. Over time, this traps us in an echo chamber of similar views and outlooks, creating fractured spaces for debate and news sharing, in stark contrast to the more "public square" environment supported by the legacy media. This has led to increased polarisation not only on the basis of types of interests but also along political, cultural, religious and ethnic grounds.

A key obligation on States in relation to freedom of expression is to provide for an enabling legal environment for this right. This is hardwired into international guarantees, which require any restrictions to be "provided by law". As guardians of law-making processes, parliamentarians have a special responsibility to make sure that laws conform to international standards in this area.

Although ensuring that legislation is in line with international standards may stand out as the leading role for parliamentarians in terms of protecting freedom of expression, it is by no means the only one. Parliamentarians also exercise important oversight roles in relation to both the executive and other powerful social actors. Part of this is ensuring that legislation is implemented properly, i.e. in the manner intended by parliament. In some cases, parliament is given a formal role here, such as to approve budgets for freedom of expression oversight bodies – such as broadcast regulators or right to information commissions – or to participate in appointing their members.

As social leaders, parliamentarians have a duty to strike the right balance when exercising their own right to freedom of expression. This means, on the one hand, engaging in robust debate in parliament and more widely to discharge their parliamentary mandates, including by holding others to account and by criticising inappropriate behaviour. But it also brings with it certain responsibilities to respect freedom of expression. Just because parliamentarians enjoy special, almost unlimited, protection for freedom of expression within parliament does not mean that they should use that power irresponsibly. It is never appropriate, for example, to make explicitly racist comments or knowingly to tell lies. Parliament is also, under international law and often under national law, required to operate transparently, including by publishing information proactively and by responding to requests for information from individuals.

It is important that parliamentarians and their staff have an understanding of the key international standards on freedom of expression both to understand their own rights, as well as to understand their broader responsibilities both in terms of their own speech and as those who adopt laws which impact freedom of expression, whether in the form of restrictions or protections. To this end, the first three modules of this course present an overview of key international standards on freedom of expression in order to give a general introduction to this right. The course then turns in Module 4 to discussing the issue of parliamentary immunity as well as restrictions specific to parliamentarians. Finally, the last module of this course, Module 5, covers parliamentarians' role in promoting freedom of expression and their relationship with other social actors.

Activity 2: Lead Trainer Video

Transcript:

Hello. I am Toby Mendel, the lead instructor for this course. Welcome to the course. I am also the Executive Director of the Centre for Law and Democracy, a Canadian NGO that works globally to promote the rights underpinning democracy, with a particular focus on freedom of expression and the right to information.

Freedom of expression is a fundamental human right, which is guaranteed under several core international human rights instruments. These include the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *African Charter on Human and Peoples' Rights*, the *American Convention on Human Rights* and the *European Convention on Human Rights*.

Article 19 of the *International Covenant on Civil and Political Rights* states, in part:

> 1) Everyone shall have the right to freedom of opinion. 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.

The Article then goes on to detail, in its third subsection, a strict test for restrictions on freedom of expression.

Certain things are worth noting about this definition, which closely resembles the one found in the *Universal Declaration of Human Rights*, as well as regional human rights treaties. First, it applies to everyone, including foreigners, prisoners, children and government employees, although there may be different kinds of justifiable restrictions on the right for various categories of individuals. For example, soldiers have the right to freedom of expression just like anyone else, but certain of their expressive acts may be limited in order to maintain security secrets or maintain military discipline. The exact test for whether restrictions on freedom of expression are legitimate will be discussed in detail in Module 2 of this course.

The definition of freedom of expression includes the right not only to "impart" information, but also to seek and receive information and ideas. Thus, for example, in the case of *Mavlonov and Sa'di v. Uzbekistan*, the UN Human Rights Committee, the independent body which is tasked with overseeing the *International Covenant on Civil and Political Rights*, found that cancelling the licence of a newspaper amounted to an interference not only with the freedom of expression rights of the editor, but also of a regular reader of the newspaper. The right to receive information is now understood as imposing a duty on States to enact comprehensive right to information legislation.

It is also noteworthy that the guarantee of freedom of expression defines the right very broadly to cover ideas and information of "all kinds". That includes ideas which are not widely held or which are even considered shocking or offensive. In fact, it is precisely unpopular speech that is most at risk of being suppressed and for which the guarantee is, therefore, most crucial.

In addition, the guarantee of freedom of expression is transnational in scope, as indicated by the phrase "regardless of frontiers". While this does not seem very controversial in the age of the Internet, it was more forward-looking in 1948, when the *Universal Declaration of Human Rights* was first adopted.

Freedom of expression also protects the right to dissemination in any way one chooses to do so (as is reflected in the phrase "media of one's choice"). This includes expression via art, emails, social media posts, pamphlets, newspapers, the radio, television, face-to-face conversations and so on. Even the decision to wear a particular article of clothing could be an expressive act in certain circumstances.

Another key aspect of the guarantee of freedom of expression is that it includes both a negative aspect (in other words, prohibitions on the States from taking action which interferes with the right), as well as a positive aspect (in other words, actions that a State must take to ensure respect for freedom of expression). The positive aspect includes things such as the need to regulate broadcasting properly so as to avoid chaos in the airwaves, the need to enact right to information laws (also known as freedom of information or access to information laws) and the need to take steps to protect journalists against attacks.

It is also important to note that the guarantee of freedom of expression covers both direct and indirect interferences. For example, a special tax on expressive content which did not apply generally would be a restriction on freedom of expression, as would the refusal of a government to place advertising in newspapers which were critical of it.

Lastly, while this course focuses on obligations of parliamentarians under international human rights law, it is important not to lose sight of the fact that freedom of expression is, in addition to being a legal right, a very social phenomenon. In other words, culture and social values can impact our ability to "speak our minds" just as much as laws do. As such, if freedom of expression is really to flourish, a culture of tolerance of opposing viewpoints should be fostered. Parliamentarians, as high-profile individuals with a leadership role in society, have an important role to play in this area, including through leading by example.

Activity 3: Reading

Estimated reading time: 3 minutes

Selected Guarantees of Freedom of Expression

The *Universal Declaration of Human Rights* (UDHR)[2]

The UDHR is the flagship statement of human rights document, adopted in 1948, which was the first global articulation of universal human rights. Article 19 of the UDHR 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)[3]

The ICCPR, adopted in 1966, is the first global treaty giving specific legal effect to guarantees of the right to freedom of expression. Article 19(2) of the ICCPR states:

"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."

The *African Charter on Human and Peoples' Rights* (ACHPR)[4]

The ACHPR was developed to promote a human rights regime which was specific to the African context and setting. The ACHPR seeks to eradicate all forms of colonialism from Africa, to co-ordinate and intensify co-operation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation having due regard to the *Charter of the United Nations* and the *Universal Declaration of Human Rights*.

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[2] UN General Assembly Resolution 217A(III), 10 December 1948: https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F217(III)&Language=E&DeviceType=Desktop&LangRequested=False .

[3] Adopted 16 December 1966, entered into force 23 March 1976, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

[4] Adopted 27 June 1981, in force 21 October 1986, https://www.african-court.org/wpafc/wp-content/uploads/2020/04/AFRICAN-BANJUL-CHARTER-ON-HUMAN-AND-PEOPLES-RIGHTS.pdf.

Article 9 states: "(1) Every individual shall have the right to receive information; (2) Every individual shall have the right to express and disseminate his opinions within the law."

The *European Convention on Human Rights* (ECHR)[5]

The ECHR, adopted in 1950, is the first treaty guaranteeing freedom of expression, albeit limited to countries which are part of the Council of Europe (the wider group of European countries).

Article 10 of the ECHR provides:" 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."

The *American Convention on Human Rights* (ACHR)[6]

The ACHR is the equivalent of the ACHPR and ECHR for the Americas (North and South America).

Article 13 of the ACHR provides: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

Activity 4: Reading

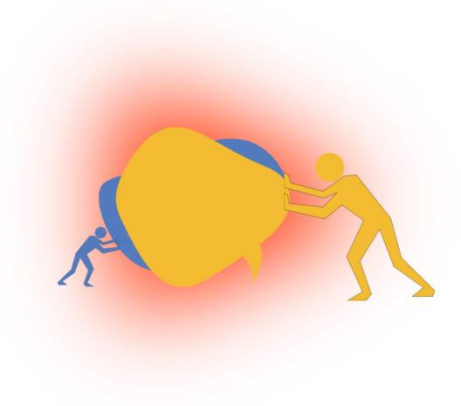
Estimated reading time: 7 minutes

Special Protection for Public Interest Speech and Positive Obligations to Ensure Safety

Special Protection for Public Interest Speech

[5] Adopted 4 November 1950, in force 3 September 1953, http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

[6] Adopted 22 November 1969, in force 18 July 1978, http://www.oas.org/juridico/English/treaties/b-32.html.

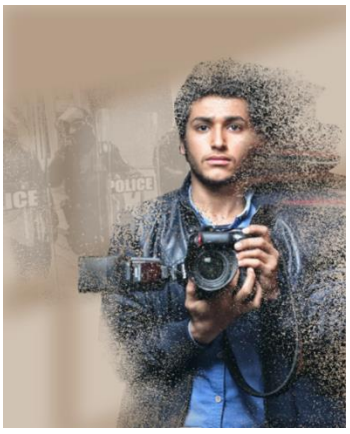


The importance of free expression to democracy has already been noted. One of the corollaries of this is that political speech or, to put it more broadly, speech on matters of public concern, deserves special protection due to its overriding importance to democracy. Looked at from a legal point of view, what this represents is the fact that restrictions on this form of speech are harder to justify (technically, it is harder to show that they are necessary, as required under international law, an issue which is examined more in the next module of this course).

A very important consequence of this for parliamentarians is the development of the doctrine of parliamentary immunity, which grants special free speech rights to parliaments and their members, in light of the incredibly important role that they play in democratic life (discussed in more detail in Module 5). The Inter-Parliamentary Union (IPU) Committee on the Human Rights of Parliamentarians has a mandate to protect the specific rights enjoyed by parliamentarians, including freedom of expression in the context of parliamentary immunity but also many other rights.

Another important consequence is that politicians, along with a range of other public figures, are required to tolerate a greater degree of criticism than ordinary citizens. The reason for this is, again, the overriding need for open debate about the actions of the powerful, and especially those wielding political power, in a democracy. This is reflected in international standards governing defamation laws or laws which protect reputation, which is discussed in more detail in Module 2.

Positive Obligations to Ensure Safety



The rights to life and security of the person impose an obligation on the State to protect everyone against physical attacks. However, where attacks are a response to what someone has said, known as "attacks on freedom of expression," then this obligation becomes

even more important from a human rights perspective, to prevent what has been termed "censorship by killing".[7]

The essence of these crimes is that they are designed to stop the flow of information and ideas, often about a matter of high public importance, such as corruption, organised crime, nepotism or other serious wrongdoing. As the special international mandates on freedom of expression[8] noted in the preamble to their 2012 Joint Declaration on Crimes Against Freedom of Expression:

> [V]iolence and other crimes against those exercising their right to freedom of expression, including journalists, other media actors and human rights defenders, have a chilling effect on the free flow of information and ideas in society ('censorship by killing'), and thus represent attacks not only on the victims but on freedom of expression itself, and on the right of everyone to seek and receive information and ideas.

States have a special obligation to provide protection to those who are at demonstrable risk of being attacked (for example as shown by threats they have received). One of the most serious problems in these cases is the very high prevailing rate of impunity, which observers such as UNESCO note is nearly 90 percent globally.[9] This gives rise to a second State obligation, namely to conduct effective investigations, wherever possible leading to prosecutions, where such attacks do occur. The special international mandates on freedom of expression described the obligations of States in the area of safety in their 2012 Joint Declaration:

> 1(c) States should:
>
> i. put in place special measures of protection for individuals who are likely to be targeted for what they say where this is a recurring problem;
> ii. ensure that crimes against freedom of expression are subject to independent, speedy and effective investigations and prosecutions; and
> iii. ensure that victims of crimes against freedom of expression have access to appropriate remedies.

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[7] See the 30 November 2000 Joint Declaration of the special international mandates on freedom of expression, https://www.osce.org/files/f/documents/c/b/40190.pdf.

[8] Special rapporteurs or other experts focusing on freedom of expression have been appointed by the United Nations, the Organization for Security and Co-operation in Europe and the Organization of American States and the African Commission on Human and Peoples' Rights. Beginning in 1999, the first three started adopting annual Joint Declarations on select freedom of expression issues and they were joined by the last one in 2006.

[9] See, for example, UNESCO, *Journalism is a Public Good: World Trends in Freedom of Expression and Media Development: 2021/2022 Global Report* (2022, Paris, UNESCO), p. 83, https://unesdoc.unesco.org/ark:/48223/pf0000380618?2=null&queryId=0a30ee11-7640-48c0-b1c3-8d7e1e5dc867.

This issue may be of particular relevance for parliamentarians, where they are themselves at risk of being attacked for their political views. Although many of the statements about safety focus on journalists, as both the title and the substance of the 2012 Joint Declaration make clear, the scope of this protection extends to anyone who is attacked for making statements about matters of public interest.

Where there is an ongoing and serious risk of crimes against freedom of expression, one of the best ways to provide ongoing protection to those at risk is to establish a specialised safety mechanism, something UNESCO has been supporting both generally and in various countries around the world.[10]

In addition to establishing specialised safety mechanisms, where warranted, States should also provide for specific legal recognition of crimes against freedom of expression. This can be done, for example, by providing for heavier penalties for these crimes, as many States do for crimes which are motivated by racism, and by removing statutes of limitation (the period after which a prosecution for a crime can no longer be brought) for these crimes.

Statements on States' Safety Obligations

The issue of attacks on freedom of expression is so serious that the UN Security Council has adopted two resolutions on it. The first, Resolution 1738 of 23 December 2006, condemned "intentional attacks against journalists, media professionals and associated personnel, as such, in situations of armed conflict, and calls upon all parties to put an end to such practices". It also called on States to take measures to end impunity for such crimes (see also Resolution 2222 of 27 May 2015).

The UN Human Rights Committee regularly issues General Comments which provide authoritative guidance on how to interpret rights found in the ICCPR. General Comment No. 34, adopted in 2011 and representing the Committee's latest guidance on freedom of expression, stated: "States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression" (paragraph 23).

[10] See, for example, Toby Mendel, *Supporting Freedom of Expression: A Practical Guide to Developing Specialised Safety Mechanisms* (2016, UNESCO and CLD), http://www.law-democracy.org/live/wp-content/uploads/2012/08/Safety-Report.16.04.20_final.pdf.

In many ways, the Inter-American human rights system, and countries in that region, have been in the forefront in dealing with this issue. In October 2000, the Inter-American Commission on Human Rights adopted the Inter-American Declaration of Principles on Freedom of Expression (Inter-American Declaration), clause 9 of which states:

> The murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression. It is the duty of the state to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation. [11]

The European Court of Human Rights has dealt with this issue in various cases and has gone so far as to note that even if a newspaper and its staff were to have supported an organisation which has been designated as a terrorist organisation and operated as propagandists for it, this would not "provide a justification for failing to take steps effectively to investigate and, where necessary, provide protection against unlawful acts involving violence".[12]

Activity 5: Video

[UNESCO video "Why #FreedomOfExpression and #AccessToInformation are so central for free and fair elections?"]

Transcript:

When we vote we're not just choosing a leader, a lawmaker, a local councillor or between two opposite policies, we're shaping the policies that have real impact in our lives, our health and our environment. In a democracy, there are three key groups who should ensure that citizens receive accurate information: they are the media, the political parties and the electoral regulators.

The media is expected to provide reliable and verified news to voters. Free, independent and pluralistic media need to be able to report elections without the threat of violence or intimidation. Through their investigations and fact-checking, professional journalism uncovers electoral wrongdoings, and also verifies the claims of those who want our vote. Political parties who

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[11] Adopted at the 108th Regular Session, 19 October 2000.

[12] *Özgür Gündem v. Turkey*, 16 March 2000, Application No. 23144/93, para. 45, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-58508%22]}.

contest the chance to govern all need to play by the rules for a fair and free electoral competition as set out by laws and democratic norms. Electoral regulators should guarantee free, fair and periodical elections, including rules for media to provide fair and balanced coverage and rules for political parties' advertisements. They should also help ensure there is freedom of expression and association during elections.

Nowadays, social media has enabled increased voter engagement and opened more direct channels of communication between candidates and citizens. It has allowed for more voices to be heard, including marginalised communities. At the same time, there are challenges like the possibility to micro-target different voters with different, even contradictory, promises. Digital disinformation is produced to confuse, distract, discourage and mislead voters and disrupt the voting process, as well as to attack and discredit independent journalists.

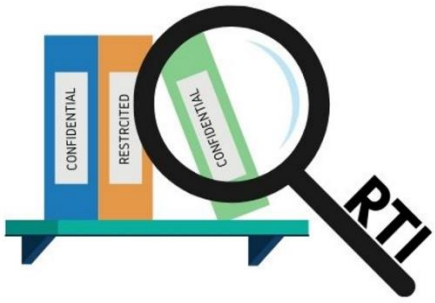
UNESCO is part of the global efforts to address these challenges by: tackling the urgency for more transparency within social media platforms and encouraging them to adopt proactive policies to protect election integrity, as well as prioritise professional journalistic content over algorithms that too often recommend harmful content and disinformation. There also needs to be transparency of all online advertisements paid for by political parties, and of the budget amounts spent. Addressing privacy issues, such as personal data harvesting, which can lead to micro targeting of voters with different messages. Governments and legislators need to work with Internet companies to keep equipping data protection laws, supporting the work of independent fact checkers that investigate the veracity of statements, speculations and rumours gaining attention on the Internet during elections, ensuring that journalists can report safely and freely on electoral processes.

Threats against the press are often aggravated during elections, and yet this is a moment in time when journalists really need to bring information to the public without fear. Promoting media and information literacy for all, so, for example, that universities, schools, cities, media and Internet companies help to educate citizens about the critical thinking skills needed to identify and flag content that seeks to manipulate or mislead them. Developing ethical pacts in political advertising, which political parties can adhere to and refrain from promoting disinformation campaigns during elections. When information is accurate, extensive and available, our elections remain free and fair, and democracy thrives.

Activity 6: Reading

Estimated reading time: 5 minutes

The Right to Information



As has already been noted, the right to freedom of expression protects the rights to "seek" and "receive", as well as to "impart" information and ideas. This can be understood as the wider idea of protecting the free flow of information and ideas in society. As part of this, and especially over the last 20-25 years, it has been recognised that the right also embraces a right to access information held by public authorities (right to information or RTI). The fundamental rationale for this is that these authorities do not hold information for themselves but, rather, hold it on behalf of the public which, as a result, and subject only to limited exceptions, has a right to access this information. Looked at from another point of view, public authorities hold a tremendous amount of information of high public interest. If this information is limited in circulation to officials, this will seriously undermine the free flow of information and ideas in society. To give effect to RTI, States need to adopt comprehensive right to information legislation.

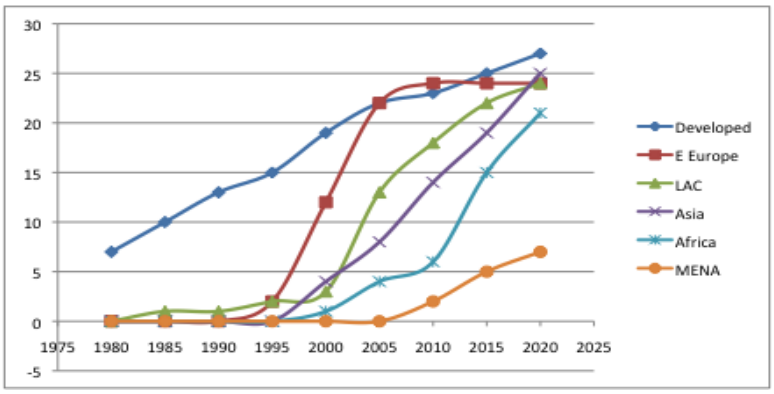
It is accepted that there are two key means of accessing information in practice. First, public authorities should proactively publish information of key public importance, so that everyone can access it reasonably easily, something that is significantly facilitated by digital communications technologies. Second, the legislation should put in place a system for making and responding to requests for information. These two approaches were recognised in paragraph 19 of General Comment No. 34:

> To give effect to the right of access to information, States parties should proactively put in the public domain government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures whereby one may gain access to information, such as by means of freedom of information legislation.

Currently, some 140 countries globally have adopted RTI laws,[13] meaning that this is very widespread, particularly among democracies. While the adoption of these laws is not spread entirely evenly in geographically terms, and there is significant variation in the quality of these laws, there has been a general, global trend towards adopting RTI laws, as shown in the below chart.

Growth in the Number of RTI Laws by Region and Over Time (E Europe: East and Central Europe; LAC: Latin America and the Caribbean; Asia includes the Pacific; Africa: Sub-Saharan Africa; MENA: Middle East and North Africa)

[13] See the RTI Rating Country page, https://www.rti-rating.org/country-data/.



Source: RTI Rating maintained by the Centre for Law and Democracy

Significantly, Sustainable Development Goal (SDG) Indicator 16.10.2 measures: "Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information". Given that the SDGs are the blueprint for the development agenda until 2030, this effectively hardwires RTI into that agenda.

In practice, what makes a good RTI law is complicated. The RTI Rating (www.RTI-Rating.org) is the leading global methodology for assessing the strength of RTI laws, and the 61 indicators used in that methodology essentially point to the different features that a good law should have (such as a broad definition of the public authorities which are covered, clear and user-friendly procedures for making and processing requests, limited exceptions to the right of access, and an accessible and independent system for appealing against refusals to provide access).

The RTI Rating groups the key features of a good law into seven main categories.

Key Features of a Good RTI Law

1) Right of Access

This refers to the guarantees of the right in the constitution and law.

2) Scope

This refers to the scope of coverage of the law which should be broad in terms of public authorities (all three branches of government, State-owned enterprises, constitutional and statutory bodies), requesters (which should be everyone, not just citizens or residents) and information (which should include all information held by public authorities).

3) Requesting Procedures

This should establish simple, user-friendly rules for making requests (limited information to be provided and requests can be submitted in different ways, including electronically, with a requirement to provide assistance to requesters who need it) and processing requests (strict time limits, limits on fees, transfer of requests where the information is not held).

4) Exceptions

This is one of the most complicated parts of an RTI law. Access should be refused only where disclosure of the information would harm one of the legitimate interests listed in the law and that harm outweighs the benefits of disclosure. There also should be overall time limits for exceptions (say of 20 years) and notice should be provided where a request is refused.

5) Appeals

It is crucially important that requesters are able to lodge an appeal with an independent administrative body when their requests have been refused, otherwise officials are essentially free to refuse (since almost no one can afford to go to court just to get information). The body needs to have the necessary powers to investigate appeals and to order appropriate remedies for requesters.

6) Sanctions and Protections

The law should provide for sanctions for officials who wilfully obstruct access to information, along with protection for those who disclose information in good faith (absent which officials, who have usually been accustomed to withhold information, may be reluctant to disclose it).

7) Promotional Measures

It is important to establish a number of promotional measures to make the law work in practice. Public authorities should appoint information officers with responsibility for processing requests and provide training to them, and be required to report on what they have done to implement the law. A central body should be tasked with raising public awareness about RTI and producing a central report on implementation.

Although openness is important, it is also important to keep legitimately confidential information secret. This can be a particular responsibility for parliamentarians who may, for example, gain access to sensitive security or personal information in the course of pursuing their oversight functions vis-à-vis the executive. To ensure this, it is common for parliamentarians to be required to swear an oath of secrecy.

Activity 7: Reading

Estimated reading time: 2 minutes

Whistleblowers

Whistleblowers are individuals who expose (blow the whistle on) wrongdoing, in particular within the public administration but also within the private sector. Even where the information they expose is legitimately confidential, this is overridden by the benefits of exposing the wrongdoing. Looked at from an international law perspective, punishing someone for exposing wrongdoing cannot be justified as a necessary restriction on freedom of expression, even if there is an interest in keeping the information secret.

In their 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations, the special international mandates on freedom of expression described the scope of whistleblower protection as ensuring that individuals who expose certain abuses are protected against legal, administrative or employment-related sanction, even if they have otherwise acted in breach of a binding rule or contract, as long as at the time of the disclosure they had reasonable grounds to believe that the information disclosed was substantially true and exposed wrongdoing.[14] These laws should cover various kinds of wrongdoing, including:

- serious maladministration;
- breaches of human rights;
- breaches of international humanitarian law (i.e. the laws of war); and
- other threats to the overall public interest, for example in terms of safety or the environment.

This makes it clear that the scope of protection should be broad in following three senses. First, it should cover the exposure of a wide range of types of wrongdoing, not just crimes but also human rights abuses, maladministration and other threats to the overall public interest. Second, it should be broad in terms of the type of protection afforded, not just against legal measures but also against employment-related sanctions. Third, it should apply broadly, with the only conditions being that the individual had reasonable grounds to believe that the information was true and exposed a relevant type of wrongdoing.

[14] Adopted 4 May 2015, para. 5(b).

Activity 10: Reading

Estimated reading time: 6 minutes

Freedom of Expression and Elections

The right to freedom of expression continues to apply in largely the same way during elections and, indeed, considerations relating to elections – such as ensuring a level playing field for parties and candidates – apply at all times, since competition for public support is an ongoing activity. At the same time, most democracies have put in place special rules governing what might be termed partisan political speech (i.e. speech which seeks to promote a particular party and/or candidate) during elections).

Many countries have in place a number of different types of rules governing partisan political speech, mostly with a view to ensuring a level playing field, as well as preventing foreign interference. First, most democracies place some sorts of limits on spending. The aim of this is to create a level playing field by preventing those with deep pockets from essentially buying elections (or at least exerting far more sway over them than one individual should be able to do). The rules on spending vary widely. These often take the form of limits on how much any one individual or corporate body can contribute to a particular party or candidate, limits on spending during a campaign, rules about direct or indirect State financing of parties and/or candidates and/or rules about transparency of funding. There is wide variance among countries as to these rules and the constitutionality of different approaches.

Constitutional Decisions on Third Party Funding for Parties: Canada and the United States

In a 2004 decision, the Supreme Court of Canada upheld legal limits on third-party funding for parties and third-party election advertising as a reasonable restriction on freedom of expression, stating:

> [U]nlimited third party advertising can undermine election fairness in several ways. First, it can lead to the dominance of the political discourse by the wealthy. Second, it may allow candidates and political parties to circumvent their own spending limits through the creation of third parties. Third, unlimited third party spending can have an unfair effect on the outcome of an election. Fourth, the absence of limits on third party advertising expenses can erode the confidence of

> the Canadian electorate who perceive the electoral process as being dominated by the wealthy. [references omitted][15]

Six years later, in 2010, the United States Supreme Court came to the exact opposite decision in *Citizens United v. Federal Election Commission*.[16] In that case, the Court held that private third parties (including commercial corporations, non-profit groups, unions and individuals) can spend as much money as they wish during an election, including directly supporting one or another party or candidate, as long as they do it through independent third party political action committees (PACs), which they might establish themselves. PACs were responsible for 48 percent of spending during the 2020 US presidential and congressional electoral cycle.[17]

Second, in most established democracies broadcasters are required to be balanced and impartial in their treatment of matters of public controversy, including specifically matters relating to elections. This is a delicate matter because it cuts right to the core content carried by broadcasters, and applying such a rule can only be done legitimately by an independent regulator (as will be discussed more in Module 3). These rules tend not to be applied strictly and to require only the presence of reasonable balance over time, but they do rule out the possibility of wealthy third parties buying up broadcast media to promote one or another party or candidate. These rules are also supplemented by rules requiring media outlets to offer advertising on a non-discriminatory basis to all parties and candidates, which would apply not only to pricing but also issues such as timing and placement of the advertisements.

In May 2009, the special international mandates on freedom of expression issued a Joint Statement on the Media and Elections.[18] The Statement noted, among other things:

> It should be illegal for the media to discriminate, on the basis of political opinion or other recognised grounds, in the allocation of and charging for paid political advertisements, where these are permitted by law.

Some countries go even further and prohibit private advertising in broadcasting and/or on television, albeit in most cases these countries place a positive obligation on broadcasters to

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[15] *Harper v. Canada*, [2004] 1 SCR 827, para. 79, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2146/index.do.

[16] 558 U.S. 310 (2010), https://supreme.justia.com/cases/federal/us/558/310/.

[17] Federal Election Commission, "Statistical Summary of 18-Month Campaign Activity of the 2019-2020 Election Cycle", 18 September 2021, https://www.fec.gov/updates/statistical-summary-18-month-campaign-activity-2019-2020-election-cycle/.

[18] 15 May 2009, https://www.osce.org/fom/37188?download=true.

provide free advertising on an equitable basis to parties. In a series of cases on this issue, the European Court of Human Rights has come up with different conclusions, holding in two cases from Switzerland and Norway that this was not legitimate,[19] but upholding a similar ban in the United Kingdom.[20] Many countries place special obligations on the public media both to raise public awareness about elections and to give voice to parties and candidates.

Third, a large number of democracies prohibit foreign actors from contributing to elections, including via both direct and indirect support for parties and/or candidates. In a survey of the countries of the Council of Europe in 2006, the European Commission for Democracy Through Law (Venice Commission) found that about 60 percent prohibited foreign funding, 35 percent did not and 5 percent were indeterminate.[21]

Fourth, some democracies also impose a media blackout, or prohibit campaigning or the publication of opinion polls, for a period – usually 24- or 48-hours – before actual voting begins. The idea behind this is that people need a short period to collect their thoughts and decide who they want to vote for. With regard to polls, an additional consideration is that this information, often already dated by the time it is published, can have a disproportionate and hence distorting impact on the election. In General Comment No. 34, the UN Human Rights Committee found that "it may be legitimate for a State party to restrict political polling imminently preceding an election in order to maintain the integrity of the electoral process" (para. 37). In some countries, however, these restrictions, and especially on campaigning until the day of the election, are considered to be unduly intrusive as a restriction on free speech.

New communications technologies are challenging all of these rules. As people turn to social media for their news and information, regulation of broadcasters has increasingly less impact. In the countries where media blackout rules are in place, their enforcement is made difficult because citizens can consult foreign publications and other news sources which are not bound by the same electoral regulations. It is also much easier for third parties to engage in election speech, as well as to hide or route election spending in ways that cannot easily be regulated. The ongoing

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[19] *VGT Verein gegen Tierfabriken v. Switzerland*, 28 June 2001, Application No. 24699/94, https://hudoc.echr.coe.int/eng#{"fulltext":["Case%20of%20VGT%20Verein%20gegen%20Tierfabriken%20v.%20Switzerland"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-59535"]}; and *TV Vest SA and Rogaland Pensjonistparti v. Norway*, 11 December 2008, Application No. 21132/05, https://hudoc.echr.coe.int/eng#{"itemid":["001-90235"]}.

[20] *Animal Defenders International v. the United Kingdom*, 22 April 2013, Application No. 48876/08, https://hudoc.echr.coe.int/eng#{"itemid":["001-119244"]}.

[21] *Opinion on the Prohibition of Financial Contributions to Political Parties From Foreign Sources*, CDL-AD(2006)014, 17-18 March 2006, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)014-e.

investigation into allegations of Russian interference in the 2016 United States' presidential election clearly demonstrate some of these challenges. The issue of false news, generally but in particular around elections, has also attracted a lot of attention recently, which is discussed more in Module 3 of this course.

The special protection that freedom of expression extends to public interest speech, noted above, is of course of particular importance during elections where the ability of parties and candidates to communicate freely with the electorate is of the greatest importance.

Protecting Public Interest Speech During Elections

In their May 2009 Joint Statement on the Media and Elections, the special international mandates on freedom of expression indicated some of the standards for protecting public interest speech during elections, as follows:

> The media should be free to report on election-related matters. They should also be exempted from liability for disseminating unlawful statements made directly by parties or candidates – whether in the context of live broadcasting or advertising – unless the statements have been ruled unlawful by a court or the statements constitute direct incitement to violence and the media outlet had an opportunity to prevent their dissemination.
>
> The obligation of political figures, including candidates, to tolerate a greater degree of criticism than ordinary persons should be clearly reaffirmed during elections.
>
> A party or candidate which has been illegally defamed or suffered another illegal injury by a statement in the media during an election period should be entitled to a rapid correction of that statement or have the right to seek redress in a court of law.

Activity 11: Further Readings

Suggested Further Readings:

- Centre for Law and Democracy, *Briefing Note on Freedom of Expression: Freedom of Expression as a Human Right*, 2015, https://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefingnotes-1.pdf
- International Special Mandates, *Joint Statement on the Media and Elections*, 2009, https://www.osce.org/files/f/documents/d/e/37188.pdf

- International Special Mandates, *Joint Declaration on Crimes Against Freedom of Expression*, 2012, https://law-democracy.org/live/wp-content/uploads/2012/08/mandates.decl_.2012.pdf
- Centre for Law and Democracy, *Briefing Note on Freedom of Expression: The Right to Information*, 2015, https://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefingnotes-3.pdf
- Transparency International, *International Principles for Whistleblowing Legislation*, 5 November 2013, https://www.transparency.org/en/publications/international-principles-for-whistleblower-legislation
- Eduardo Bertoni, *Journalism and whistleblowing: an important tool to protect human rights, fight corruption, and strengthen democracy* (2022, Paris, UNESCO), https://unesdoc.unesco.org/ark:/48223/pf0000381406
- International Special Mandates, *Joint Declaration on Freedom of Expression and Elections in the Digital Age*, 2020, https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/JointDeclarationDigitalAge_30April2020_EN.pdf
- Tarlach McGonagle, *et al.*, *Elections and media in digital times* (2019, Paris, UNESCO), https://unesdoc.unesco.org/ark:/48223/pf0000371486
- Thematic Factsheet: Freedom of Expression and Elections (July 2018, Strasbourg, Council of Europe), https://rm.coe.int/factsheet-on-media-and-elections-july2018-pdf/16808c5ee0
- Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 2 July 2014, https://undocs.org/A/HRC/26/30 (focusing on freedom of expression in electoral processes)
- Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Freedom of Expression and Elections in the Digital Age*, Research Paper 1/2019 (June 2019), https://ohchr.org/sites/default/files/Documents/Issues/Opinion/ElectionsReportDigitalAge.pdf
- Andrew Puddephatt, *Social Media and Elections* (2019, Paris, UNESCO), https://unesdoc.unesco.org/ark:/48223/pf0000370634
- Columbia Global Freedom of Expression caselaw database, https://globalfreedomofexpression.columbia.edu/cases
- Columbia Global Freedom of Expression, Special Collection of the Case Law on Freedom of Expression, https://globalfreedomofexpression.columbia.edu/a-special-collection-of-the-case-law-of-freedom-of-expression

MODULE 2: RESTRICTIONS ON FREEDOM OF EXPRESSION

Activity 1: Video

[UNESCO video on the on the three-part test for restrictions on freedom of expression]

Transcript:

The Legitimate Limits to Freedom of Expression: The Three-Part Test.

Freedom of expression is a fundamental right enshrined in Article 19 of the *Universal Declaration of Human Rights*, which states that "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." This right is also an enabling right, ensuring openness transparency and accountability in democratic societies. However, freedom of expression is not an absolute right and may be lawfully restricted in specific and limited conditions under international human rights law and specifically Article 19 of the *International Covenant on Civil and Political Rights* or ICCPR. The three-part test determines whether a restriction on freedom of expression is legitimate. Any restriction on freedom of expression must thus be provided for by law, pursue a legitimate aim and be necessary for a legitimate purpose.

Part One: restrictions must be provided for by law. A restriction to freedom of expression should be provided for by a prior existing law or binding norm, adopted by competent authorities and which is formulated with sufficient precision to enable citizens to regulate their conduct accordingly. The law or norm must therefore be clear, publicly accessible and easily understood by everyone. Otherwise, it would risk having a chilling effect on free speech by broadening the scope of permissible restrictions.

Part Two: restrictions must pursue a legitimate aim. Article 19, paragraph three of the ICCPR details four essential grounds for restrictions. One: respect of the rights or reputations of others. Two: the protection of public health. Three: the protection of national security or of public order. And four: the protection of morals. These grounds for restrictions must be narrowly framed in order to ensure compliance with international law provisions.

Part Three: restrictions must be necessary for the protection or promotion of a legitimate purpose. Restrictions should be effective, proportionate and the least restrictive possible to achieve the legitimate end pursued. However, this criteria of necessity and proportionality is often the most complex according to international standards. Courts and other public authorities should thus consider the context in which the restriction is applied. For instance, a restriction in favour of national security might be justifiable in times of war but not in times of peace. The three-part test sets a high standard to justify and clearly express the legitimacy of a restriction to the fundamental right to freedom of expression. In our rapidly changing digital environment, it is all the more important to reinforce the rule of law and the application of the three-part test to guarantee every citizen's right to freedom of expression and access to information

To engage and know more, visit our website and learn about UNESCO's work.

Activity 2: Lead Trainer Video

Hello and welcome to Module Two of this course, focusing on when freedom of expression may be restricted under international human rights law. As we discussed in the last module of this course, Article 19 of the ICCPR provides for a broad guarantee of freedom of expression. However, as noted in the introductory video, freedom of expression may be subject to restrictions as long as they meet the strict three-part test articulated in Article 19(3) of the ICCPR.

The first part of the test requires that restrictions be "provided by law". A key rationale for this is that only parliament, acting collectively pursuant to its formal law-making powers and procedures, should have the ability to decide what interests, in conformity with international law, warrant overriding freedom of expression. This rules out *ad hoc* or arbitrary action by elected officials or civil servants, no matter how senior, although it does not mean that parliament cannot delegate secondary or subsidiary law-making power to other actors. This would include, for example, rules set out in regulatory instruments, decrees or codes of conduct or procedural rules elaborated by independent regulators. However, the primary legislation needs to provide sufficient detail to limit the scope of what can be included such subsidiary instruments or the rule may still fail to meet the "provided by law" requirement. This part of the test represents a huge responsibility for parliamentarians since it falls to them to determine the scope of restrictions on freedom of expression in a manner which is consistent with international law.

It is not enough simply for there to be a law; that law must meet certain quality control standards. It must, fairly obviously, be accessible, normally meaning that it should have been published in the official gazette or its equivalent.

The law must also not be vague. When a restriction on freedom of expression is vague, it may be subject to a range of different interpretations, which may or may not reflect the proper intent of parliament in adopting the law. Put differently, vague rules effectively grant discretion to the authorities responsible for applying them to decide what they mean, whether this be a regulatory body, the police or an administrator. This clearly undercuts the very idea that it is parliament which should decide on restrictions. The same is true where a law is clear but allocates broad discretion to the authorities in terms of how it is to be applied. An example of this might be a law which allowed the police to stop a demonstration if they deemed it not to be in the public interest. This effectively grants the police the power to decide on the scope of the restriction, rather than parliament.

Vague restrictions may also be applied in an inconsistent or unclear way. This fails to give individuals proper notice of what is and is not permitted so as to allow them to adjust their conduct accordingly, another key objective of the "provided by law" part of the test. In this case, especially where sanctions for breach of the rule are significant, individuals are likely to steer well clear of the potential zone of application of the rule to avoid any possibility of being censured, leading to what has been called a 'chilling effect' on freedom of expression.

The second part of the test is that the restriction must serve to protect one of the interests or aims listed in Article 19(3). That article makes it quite clear that this list is exclusive and the UN Human Rights Committee has reiterated that point. Thus, restrictions which do not serve one of the listed interests are not legitimate. At the same time, it may be noted that the list of interests – namely "respect of the rights and reputations of others" or "the protection of national security or of public order (ordre public), or of public health or morals" – is quite broad. Furthermore, courts have tended to interpret it widely. For example, in the case of *Engel and others v. the Netherlands* the European Court of Human Rights interpreted the scope of "public order" as including "the order that must prevail within the confines of a specific special group", extending this to "disorder" in the armed forces in view of the possibility for "repercussions on order in society as a whole." In practice, international courts rarely decide freedom of expression cases on the basis that the underlying rules did not serve a legitimate interest, i.e. the second part of the test.

The third part of the test is that the restriction must be "necessary" to secure the interest. Most international cases are decided on the basis of this part of the test, which is extremely complex. A few key features are identified here:

1. The measures undertaken should address a pressing social need, not just a minor threat to the interest.
2. Restrictions must be rationally connected to the interest they wish to protect in the sense of having been carefully designed to protect the interest and representing the option for protecting it which impairs freedom of expression the least, in other words the least rights-restrictive option.
3. Restrictions must not be overbroad in the sense that they do not affect speech beyond that which poses a risk of harm to the relevant interest.
4. And, lastly, restrictions must be proportionate in the sense that the benefits in terms of protecting the legitimate interest outweigh the harm to freedom of expression. In assessing the harm, consideration should also be given to any excessive sanctions and the chilling effect these would have on freedom of expression.

The rest of this module explores these ideas in greater detail.

Activity 3: Reading

Estimated reading time: 10 minutes

A deeper dive into the three-part test

The following are some examples of cases which turned on each part of the three-part test.

Part I of the Three-Part Test: The Restriction Must be Provided by Law

In the case of *Sunday Times v. the United Kingdom*, the European Court of Human Rights (ECtHR) summarised the requirements that stem from the "prescribed by law" standard for restrictions on freedom of expression, a standard which is functionally the same as the requirement that such restrictions be "provided by law" under the ICCPR:

First, the law must be adequately accessible, i.e. the citizen must be able to access the law with a reasonable level of effort. Second, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his or her conduct: he or she must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given expressive act may entail. Those consequences need not be foreseeable with absolute certainty, which experience shows is unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[22]

One example of a case where the ECtHR found that the application of a vague provision failed to meet the "prescribed by law" standard was the case of *Zayidov v. Azerbaijan*.[23] In this case, a journalist wrote the manuscript for a book while in detention. After attempting to send the first 203 pages of the manuscript for publication, the materials were

[22] 26 April 1976, Application No. 6538/74, para. 49, https://hudoc.echr.coe.int/#{%22fulltext%22:[%22sunday%20times%22],%22languageisocode%22:[%22ENG%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57584%22]}.

[23] 24 March 2022, Application No. 5386/10, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-216356%22]}.

confiscated. The State justified this by claiming that they contained "indecent" and "insulting" statements about the country's leadership and "'information about the detention facility which was prohibited from being disclosed'" (para. 10). An additional 75 pages of the manuscript were later confiscated during a search of the applicant's belongings (para. 11). The authorities later destroyed all 278 pages of the manuscript (para. 15).

The authorities justified their actions based on an internal disciplinary rule which read as follows:

> Letters written using secret and prearranged (gizli və şərti) symbols or with indecent content (nalayiq məzmunlu), as well as letters containing information relating to activities of the penal facility which are not allowed to be disclosed, shall not be sent, the convicted prisoner shall be notified thereof, and the letter shall be destroyed.

The ECtHR noted that that there was a question as to whether the internal disciplinary rules applied at all in respect of the facility in question because it had been designated for pre-trial detainees instead of convicted prisoners (para. 69). The Court also noted the lack of clear reasoning in the State reports justifying the authorities' actions, which among other things did not describe what was considered to be "indecent" in the manuscript or what information about the detention facility was included (para. 70).

However, the Court went on to point to the generality and vagueness of the provision relied upon, which did not "define or provide any clarification as to what should be understood by 'indecent content *(nalayiq məzmunlu*)' or what was meant by 'information relating to activities of the penal facility which are not allowed to be disclosed'" (para. 71). As it had not been shown there was case law from domestic courts elucidating these terms, the provision "was susceptible to a wide range of various interpretations" (para. 71). The Court also noted that there were insufficient procedural safeguards to reign in the prison administration's discretion when it came to interpreting these rules (para. 72) and that their decision to treat a book manuscript as a "letter" was inconsistent with a "natural reading" of the provision (para. 73). The Court concluded that the provision in question, in conjunction with other provisions of the disciplinary rules:

> [W[as not foreseeable as to its effects and did not indicate with sufficient clarity the scope and the manner of exercise of the discretion afforded to the authorities in the field it regulated. In the absence of safeguards against arbitrary decisions, the discretion afforded was essentially expressed in terms of unfettered power. The provision in question did not therefore meet the "quality of law" requirement of the Convention and, for this reason, the interference in the present case cannot be considered to have been "prescribed by law". (para. 74)

Part II of the Three-Part Test: The Restriction Must Protect a Legitimate Interest

As noted previously, the text of Article 19(3) makes it clear that its list of legitimate interests is exhaustive, meaning that States may not justify restrictions to protect interests which are not included in that list. The UN Human Rights Committee has also stated, in paragraph 22 of its General Comment No. 34, that restrictions "must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated."

In practice, it is rare that cases are decided on the second part of the three-part test. Because it is clear that the list is exhaustive, States almost always put forward a justification which refers to one of the legitimate interests. Despite this, it still is possible for international human rights bodies to conclude that a restriction is entirely unrelated to a legitimate interest, either because they do not accept States' claims (noting that the restriction has to be directly linked to the interest) or occasionally because States fail to refer to a legitimate interest.

One such example occurred in the case of *Mukong v. Cameroon*,[24] in which the UN Human Rights Committee considered a complaint by a journalist who had been detained following an interview he gave to the British Broadcasting Corporation (BBC) which was critical of the government. He was then detained again following a meeting in which he had participated in discussions about possible means of introducing multiparty democracy into Cameroon. He alleged multiple rights violations, including that the State had violated his right to freedom of expression as guaranteed under Article 19 of the ICCPR. Cameroon countered by alleging that the interview included false information and amounted to "intoxication of national and international public opinion" qualifying as subversion, which he was subsequently charged with.[25]

The UN Human Rights Committee found that Cameroon had indirectly justified its actions based on national security and/or public order grounds. However, it found that the State's actions did not actually advance any legitimate interest and so did not need to proceed to the third (necessity) part of the three-part test. The Committee reasoned that:

[24] 21 July 1994, Communication No.458/199, http://hrlibrary.umn.edu/undocs/html/vws458.htm.
[25] *Ibid*., paras. 2.2, 2.3 and 4.1.

> [T]he legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights; in this regard, the question of deciding which measures might meet the "necessity" test in such situations does not arise.[26]

Part III of the Three-Part Test: The Restriction Must be Necessary

The third part of the three-part test – whether a restriction is necessary to advance one of the legitimate interests – is in practice the part of the test on which most cases are decided.

In *Konaté v. Burkina Faso*,[27] the African Court on Human and Peoples' Rights considered an appeal by the editor-in-chief of a publication who had been sentenced to a 12-month' imprisonment and ordered to pay a fine after being convicted of criminal defamation, contempt and insult. These convictions were based on the applicant's publication of three articles, two of them authored by himself, which were critical of a prosecutor. The court in Burkina Faso also ordered the publication to be suspended for six months and for their judgment to be published in several newspapers.[28]

In its analysis of whether these restrictions on freedom of expression were necessary, the Court noted that public figures, including prosecutors, are expected to tolerate a greater degree of criticism than ordinary citizens and that this also applied to sanctions (i.e. those should not be more severe for officials). In this case, the defamation and contempt provisions provided for harsher sanctions for offences against certain public figures.[29]

The Court discussed various international sources highlighting the problematic nature of imprisonment for defamation before concluding that the custodial sentence provided for under the Burkinabé legislation "constitutes a disproportionate interference in the exercise of the freedom of expression by journalists in general and especially in the

[26] *Ibid.* , para. 9.7.

[27] 5 December 2014, Application No. 004/2013, https://www.african-court.org/cpmt/details-case/0042013.

[28] *Ibid*., paras. 3-4 and 6.

[29] *Ibid*., paras. 155-157.

applicant's capacity as a journalist."[30] The Court further noted that custodial sentences for expressive acts should be limited to:

> [S]erious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality…[31]

The Court held that since imprisonment for defamation was inconsistent with the African Charter on Human and Peoples' Rights, and so the sanction on the applicant was a violation of his right to freedom of expression. The Court also noted the excessive nature of the fine, damages, interests and costs imposed on the applicant, particularly in view of the deprivation of income from his publication due to the six-month suspension order. The Court also noted that Burkina Faso had not established that the suspension of the publication was necessary to protect the rights and reputation of the prosecutor.[32]

The need for public officials to tolerate criticism was also at play in the case of *Künstler v. Austria*,[33] in which the ECtHR considered a complaint by an association of artists that a kind of court order, an injunction, prohibiting the exhibition and publishing of a painting was an infringement of freedom of expression as guaranteed under the ECHR. The painting in question depicted a number of public figures in sexual positions with blown-up pictures from newspapers representing their faces. One of the individuals who was depicted, Mr. Meischberger, was a member of the National Assembly and former leader of a political party and sought an injunction based on a provision of Austria's Copyright Act.

Mr. Meischberger, along with some other people depicted on the painting, had his eyes concealed by a black bar. During the exhibition of the painting, a visitor had damaged the picture by splashing red paint over it, further obscuring part of Mr. Meischberger's body and face. Mr. Meischberger's request for an injunction was unsuccessful at first instance but the Vienna Court of Appeal reversed that decision and barred the association of artists from continuing to display the painting.[34]

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[30] *Ibid*., para. 164.

[31] *Ibid*., para. 165.

[32] *Ibid*., paras. 167, 169 and 171.

[33] 25 January 2007, Application No. 68354/01, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-79213%22]}.

[34] *Ibid*., paras. 8, 11 and 16. They also ordered that they pay Mr. Meischberger's legal expenses and that their appeal decision be published in two Austrian newspapers.

The ECtHR found that the restriction did not meet the third part of the test, the necessity requirement, based on its implied requirement of proportionality, i.e. the weighing of the harm the restriction caused to freedom of expression against the extent to which it advanced the protection of the rights of others. In doing this, the Court noted that the painting used only photos of the heads of the individuals, that the eyes were hidden by black bars and their bodies were "painted in an unrealistic and exaggerated manner", making it clear that it was not intended to be realistic and instead amounted to a satirical caricature, noting that this type of expression "naturally aims to provoke and agitate", and consequently interferences with such expression "must be examined with particular care".[35]

The ECtHR further found that the painting was about Mr. Meischberger's role as a politician and not his private life, and consequently he was expected to "display a wider tolerance in respect of criticism".[36] The ECtHR emphasised that he was among the less well-known of the 33 figures portrayed in the painting and, moreover, before Mr. Meischberger sought his injunction, the painting had been damaged by red paint, which at a minimum left the depiction of him "certainly diminished, if not totally eclipsed, by the portrayal of all the other, mostly more prominent, persons who were still completely visible on the painting".[37] Finally, the ECtHR noted that the injunction issued by the appellate court was not temporally and spatially limited, meaning that the association could not display the painting in the future even if Mr. Meischberger were to become largely unknown by the time of a potential future exhibition. After considering all of these factors, the Court found a violation of freedom of expression after concluding that the injunction's impacts were disproportionate to the legitimate interest it pursued.[38]

Activity 4: Reading

Estimated reading time: 4 minutes

Re-cap of the three-part test

The following chart is a summary of the main requirements of each part of the three-part test under Article 19(3) of the ICCPR:

[35] *Ibid*., para. 33.
[36] *Ibid*. , para. 34.
[37] *Ibid*. , para. 36.
[38] *Ibid*., paras. 35-38.

I: Provided by Law	II: Pursuing a Legitimate Interest	III: Necessary
The restriction must be: • Clear (not vague) – otherwise it does not give fair warning and others effectively decide on scope • Accessible (i.e. published) • Not allocate too much discretion • Properly enacted under the domestic legal system Restrictions may be found in subordinate instruments, such as regulations or codes of conduct adopted by regulators, but the authorisation must be in the primary legislation, which should spell out the scope of subordinate rules.	The restriction must pursue a legitimate interest, of which Article 19(3) of the ICCPR provides an exhaustive list: • respect of the rights or reputations of others • protecting national security or public order • protecting public health or public morals	The restriction must: • Address a real and pressing social need (not just minor threats) • Be the least intrusive option to protect the interest (i.e. if various effective options exist, opt for the least rights-restrictive one) • Not be overbroad (i.e. should capture only harmful speech); overbroad rules also tend to be vague, which creates the possibility of abuse • Be proportionate, meaning the harm to freedom of expression does not outweigh the benefit in terms of protecting the legitimate interest** **Note that the proportionality analysis covers the effect of excessive sanctions, which may exert a 'chilling' effect on freedom of expression.

The requirements in the three-part test for restrictions on freedom of expression are cumulative, meaning that all of them must be satisfied for a restriction to be considered legitimate. As noted previously, most international freedom of expression cases hinge on the necessity part of this test, which involves several different considerations. The following are some statements from international human rights bodies on what the necessity requirement entails.

Statements on Necessity

The UN Human Rights Committee has summarised the necessity part of the test in paragraphs 34 and 35 of its General Comment No. 34 as follows:

> Restrictions must not be overbroad. The Committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law". The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

When a State party invokes a legitimate ground for restricting freedom of expression, it must demonstrate in specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

One of the best summaries of this part of the test by the Inter-American Court of Human Rights is the following:

> Lastly, the restrictions imposed must be necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest. If there are various options to achieve this objective, that which least restricts the right protected must be selected. In other words, the restriction must be proportionate to the interest that justifies it and must be appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right.[39]

Last, but not least, the following is a good statement on "necessity" by the ECtHR:

> In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were 'relevant and sufficient' and whether the measure taken was 'proportionate to the legitimate aims pursued'.... In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards

[39] *Claude Reyes and Others v. Chile*, 19 September 2006, Series C, No. 151, para. 91, https://corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf.

> which were in conformity with the principles embodied in Article 10 [the guarantee of freedom of expression under the ECHR].[40]

Activity 5: Expert Video

[Expert video on privacy and freedom of expression]

Pansy Tlakula, Chairperson of the Information Regulator of South Africa

Transcript:

My name is Pansy Tlakula, Chairperson of the Information Regulator of South Africa. I am also the former Special Rapporteur on Freedom of Expression and Access to Information in Africa of the African Commission on Human and People's Rights.

Privacy is, like freedom of expression, a fundamental human right, guaranteed in various international instruments, including Article 17 of the International Covenant on Civil and Political Rights. The relationship between privacy and freedom of expression is complex. On the one hand, these two rights often support each other. Freedom of expression is essential for individuals to be able to debate about practices which violate privacy and to propose solutions. Respect for privacy is also important for creating an enabling environment for freedom of expression. Where, for example, a State fails to respect privacy by adopting intrusive surveillance programmes with inadequate procedural safeguards or fails to protect against privacy violations by non-State actors, there will be a chilling effect on freedom of expression because many individuals will be afraid to voice their opinions.

On the other hand, these two rights sometimes come into conflict with privacy being invoked as a reason for restricting freedom of expression. As you have seen, the protection of the rights of others, which includes the right to privacy, is among the legitimate interests for restricting freedom of expression. However, any restrictions on this ground must of course pass the other two parts of the test. As part of the necessity part of the test (the third part), this includes a proportionality assessment involving a balancing of whether the harm to freedom of expression does not outweigh the benefits in terms of protecting privacy.

Under international law, two standards are of particular relevance for privacy as a restriction on freedom of expression. First, like all restrictions on freedom of expression, the law should define

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[40] *Cumpănă and Mazăre v. Romania*, 17 December 2004, Application No. 33348/96, para. 90, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-67816%22]}.

privacy in an appropriately clear and precise manner. Defining privacy in general is not an easy task. As far back as 1890, a famous U.S. law review article by Samuel Warren and Louis Brandeis defined it as the "right to be left alone". That definition clearly provides little detailed guidance. The European Court of Human Rights, for its part, has refused to provide an exhaustive definition of the notion of "private life" for the purposes of the European Convention's Article 8 guarantee of respect for private and family life. However, its caselaw has provided some guidance. While this flexible approach has allowed the Court's understanding of this right to keep pace with societal and technological changes, failing to provide a clear definition of privacy is inappropriate when this right serves as a basis for limiting freedom of expression.

It is generally accepted that privacy involves both an objective and a subjective element. The objective element involves a reasonable expectation of privacy. This can be due to the location (such as being in one's home or having a private meal in a restaurant) or the subject matter (such as pertaining to one's medical or banking information).

The subjective element involves the individual having in fact treated the matter as private, or at least not having treated it in a way that deprives it of its private quality. This is particularly relevant for public figures, including parliamentarians, who may publicise and use for campaign purposes material that is otherwise private. Thus, a politician may use their family status, where they live, their background or religion to create a public image for campaigning purposes. If they do, they cannot then claim that this is private, for example for purposes of trying to prevent the media from reporting on it. A key idea here is that one owns one's own privacy and one may always consent, either explicitly or implicitly, to waiving one's right to privacy.

The second key standard for privacy as a restriction on freedom of expression is that, when the two rights come into conflict, the analysis of which right should prevail is based on where the greater overall public interest lies. Principle 10 of the Inter-American Declaration of Principles on Freedom of Expression reflects this idea, stating: "Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest." Similarly, Principle 21(2) of the African Commission on Human and Peoples' Rights' Declaration of Principles of Freedom of Expression and Access to Information in Africa states: "Privacy and secrecy laws shall not inhibit the dissemination of information of public interest."

This point is again of cardinal relevance to parliamentarians, since there is often a heightened public interest in debate about them, including about their private lives. For example, where a parliamentarian has taken a public position on an issue, say protection of the environment, the dissemination of information about whether he or she engages in proper recycling at home, which would normally be private, would likely be considered to be a public interest matter.

Activity 6: Reading

Estimated reading time: 7 minutes

Case studies on freedom of expression and privacy

The Von Hannover Cases: Privacy and Freedom of Expression

In two cases involving Princess Caroline of Monaco in 2004 and 2012 (*Von Hannover v. Germany* and *Von Hannover v. Germany (No. 2)*), the ECtHR set out clearly how to address situations where privacy comes into conflict with freedom of expression. Both cases involved the publication of photos of the Princess in public places. In the first case, the German courts largely upheld the publication of the photos, on the basis that the Princess was a figure of contemporary society "par excellence" (eine "absolute" Person der Zeitgeschichte), whose privacy essentially stopped when she left her home.

The European Court, on the other hand, held that a number of the photos – for example of her riding on horseback, skiing and tripping over something on a private beach – did not involve any public interest at all, stating:

> The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions.[41]

Significantly, the Court also noted that the notion of a figure of contemporary society "par excellence" might be appropriate for a politician exercising an official function but not for the Princess given her lack of official functions.

In the second case, which was decided by a Grand Chamber,[42] the photos focused on the way the family, including Princess Caroline, were looking after the reigning Prince of

[41] *Von Hannover v. Germany*, 24 June 2004, Application No. 59320/00, para. 63, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-61853%22]}.

[42] A Grand Chamber involves a larger number of judges, normally 17, and its decisions carry far more weight.

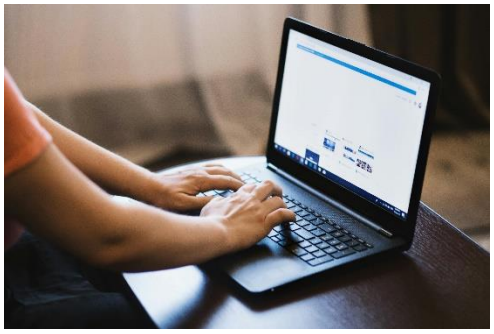
Monaco, Prince Rainier III, during his illness. In that case,[43] the Court set out a number of factors to be taken into account when balancing freedom of expression against privacy. In general, the dominant consideration was whether the publication contributed to a matter of public interest (para. 109). Other factors to be considered include:

- how famous the person is and the subject matter of the expressive content (para. 110);
- the previous conduct of the person (para. 111);
- the content, form and consequences of the publication (para. 112); and
- the circumstances in which the photos were taken (para. 113).

In the case, the European Court upheld the decision of the German courts to allow publication of the photos, showing that it was prepared to allow wide latitude to otherwise privacy-invading content which made some contribution to a debate on a matter of public interest.

The case of *Éditions Plon v. France*, which involved the publication of sensitive medical details about former French President François Mitterrand by his physician, provides an indication of how far the ECtHR, at least, is prepared to go to protect freedom of expression relating to politicians. Although the Court upheld a temporary injunction against the publication of the material, it held that a subsequent injunction less than a year later was not legitimate, on the basis that "the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand's two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality".[44]

The 'Right to Be Forgotten'



The past decade has seen a number of jurisdictions recognise what is often called the 'right to be forgotten'. This refers to a right, which is analogous to the 'right to erasure' of data under some data protection laws, to have commercial search engines remove links to some personal information upon request. The basic premise of this is that there is little to no public interest in some past personal information. As a result, it should not be prominently displayed in

[43] *Von Hannover v. Germany (No. 2)*, 7 February 2012, Application Nos. 40660/08 and 60641/08, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-109029%22]}.

[44] *Éditions Plon v. France*, 18 May 2004, Application No. 58148/00, para. 53, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-61760%22]}.

search engine results even though it might remain on the website containing the information.

The right to be forgotten was recognised in a 2014 Court of Justice of the European Union (CJEU) decision.[45] This case concerned a Spanish individual, Mr. González, who filed a complaint with the Spanish Data Protection Agency (Agencia Española de Protección de Datos) against a Spanish newspaper and Google Spain in relation to two articles from 1998 which appeared when searching for his name on Google and which referred to legal proceedings against him for the recovery of social security debts. Mr. González asked for the newspaper to be required to remove and change references to him on their website and for Google to remove or hide his personal information so that this would not be included in search results. The Spanish Data Protection Agency declined to order the newspaper to remove the information. However, the Agency found that Google, as a search engine, was bound by data protection legislation, which required it to stop granting access to certain personal information which infringed the rights to data protection and personal dignity.[46] Google Spain and Google Inc. brought judicial actions challenging that decision, and the Spanish court referred several questions about the matter to the CJEU for consideration.

The CJEU upheld the applicability of the data protection regulation in force at the time to Google, finding that the "very display of personal data on a search results page constitutes processing of such data", and search engines should not be able to "escape obligations and guarantees" established by an EU directive on personal data protection.[47] It further found that a search engine's processing of personal data was "liable to affect significantly the fundamental rights to privacy" when done as a result of a search for someone's name, allowing searchers to establish a detailed profile of someone and have access to a large amount of information on private life which would not have been easily accessible without the assistance of a search engine.[48]

The CJEU found that the economic interests alone of search engine operators were insufficient to justify such an infringement of privacy. However, they acknowledged that the delisting of results could impact Internet users' "legitimate interest" in accessing information, which would have to be balanced against the data subject's rights. The CJEU found that as a "general rule" the data subject's rights would override the interests of other users but that the outcome of the balancing would depend upon "the nature of the

[45] *Google Spain SL and Another v. Agencia Española de Protección de Datos (AEPD) and Another*, 13 May 2014, Case No. C-131/12, , https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131.
[46] *Ibid*., paras. 14-17.
[47] *Ibid*., paras. 57-58.
[48] *Ibid*., para. 80.

information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life".[49]

The CJEU went on to hold that data subjects may request that information about them no longer be included in a list of search results where, having regard to all the circumstances, the information appears to be inadequate, irrelevant or no longer relevant, or excessive in relation to purposes of the processing carried out by the operator of the search engine, taking into account the public interest in accessing it. In such circumstances, the information should be delinked from search engine results.[50]

The CJEU has subsequently shown a relatively cautious approach to the expansion of the right to be forgotten to other contexts. In 2017, the Court considered an Italian case involving a request by an individual, Mr. Manni, to have a chamber of commerce erase, anonymise or block references linking him to the liquidation of company of which he had been the director and liquidator.[51] The CJEU noted that there were a number of legitimate uses of data in company registers and that the national court would have to assess whether access to such information should exceptionally be limited on an on a case-by-case basis after considering various factors, including the length of time since the dissolution of the company.[52]

The right to be forgotten remains controversial among freedom of expression advocates. The freedom of expression advocacy NGO, ARTICLE 19, suggested in their 2017 policy brief Global Principles of Freedom of Expression and Privacy that the right, to the extent it is recognised in a given jurisdiction, should be limited to the "right of individuals under data protection law to request search engines to delist inaccurate or out-of-date search results produced on the basis of a search for their name" (Principle 18.1). It further suggests that de-listing requests be "subject to ultimate adjudication by the courts or independent adjudicatory bodies with relevant expertise in freedom of expression" (Principle 18.2).

[49] *Ibid*. , para. 81.
[50] *Ibid*., para. 94.
[51] *Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni*, 9 March 2017, Case No. C-385-15, paras. 23-26, https://curia.europa.eu/juris/document/document.jsf?text=&docid=188750&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=446798).
[52] *Ibid*., paras. 59-60, 63.

Activity 8: Reading

Estimated reading time: 9 minutes

Special challenges for freedom of expression: reputation

The protection of reputation is one of the most important and also complex types of restriction on freedom of expression. It is recognised, in every country, as a legitimate area of restriction and laws protecting reputation – which go by different names, including libel, slander, defamation and desacato laws – are more-or-less universal (we use the term defamation here for any law which aims to protect reputation). At the same time, many of these laws are overbroad in nature, sometimes very significantly so, and a significant percentage of the freedom of expression cases before international courts represent challenges to defamation laws, or the way they have been interpreted and applied.

Defamation is also a serious matter for parliamentarians, including in cases where they are charged with having committed defamation. An example of this was a series of 15 cases involving parliamentarians from Cambodia (case CMBD/27 and others before the IPU Committee on the Human Rights of Parliamentarians), some of which involved criminal convictions of the parliamentarians for defamation.[53] Another example is the case of Jean Marc Kabund, a member of the Democratic Republic of Congo's parliament and former First Deputy Speaker of the National Assembly, who was sentenced to seven years' imprisonment for "defamation against the Head of State" and "spreading false rumours" after making a speech critical of the President of the Republic.[54]

A key international standard for defamation relates to the question of whether it should be dealt with as a matter of criminal or civil law. A number of international authorities have stated that criminal defamation as a whole represents a breach of the right to freedom of expression. For example, in their 2002 Joint Declaration, the special international mandates on freedom of expression stated: "Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws."[55] Other statements have indicated that, at a minimum, penal

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[53] Decision adopted by consensus by the IPU Governing Council at its 201st session (St. Petersburg, 18 October 2017), http://archive.ipu.org/hr-e/199/cmbd27.pdf.

[54] Decision adopted by consensus by the IPU Governing Council at its 212th session (Luanda, 27 October 2023), https://www.ipu.org/file/17905/download.

[55] Adopted 10 December 2002, https://www.osce.org/files/f/documents/8/f/39838.pdf.

sanctions for defamation are not legitimate. For example, the UN Human Rights Committee stated in paragraph 47 of General Comment No. 34: "States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty." Essentially, criminal defamation laws do not meet the "necessity" criterion of the three-part test for restrictions on freedom of expression since a less intrusive measure, i.e. civil defamation laws, is adequate to protect reputations.

Despite international statements cautioning against criminal defamation, UNESCO has reported that, as of 2021, at least 160 UNESCO member States (that is to say most) still had criminal defamation laws with varying frequencies of use.[56] However, several countries have done away with general criminal defamation laws and several others have removed the possibility of imprisonment as a possible punishment for defamation. A 2022 UNESCO report relates the following regional distribution of UNESCO Member States which have partially or fully decriminalised defamation: 12 (Africa), 0 (Arab States), 7 (Asia and the Pacific), 14 (Central and Eastern Europe), 18 (Latin America and the Caribbean) and 6 (Western Europe and North America). Concerningly, the same report noted that the gradual trend towards decriminalisation was slowing and reported an increased use of criminal defamation provisions to restrict online expression.[57]

Another key international standard is that public figures, and especially politicians, should be required to tolerate a greater degree of criticism than ordinary citizens. In other words, defamation laws should recognise, either explicitly or in the way they are applied by courts, that the public interest in open criticism of public figures needs to be safeguarded. Public figures should also understand that they will be subject to criticism and scrutiny and have accepted this when they take on their political roles. This clearly applies to parliamentarians, who have specifically decided to represent their constituents and to wield public power, and so need to be open to critical public debate. Different countries put this rule into practice in different ways. Laws which provide special protection against criticism to senior politicians and/or officials, including the head of State, run counter to this rule and are not legitimate.

Special Protection for Public Interest Speech

In paragraph 47 of General Comment No. 34, focusing on defamation laws, the UN Human Rights Committee described the need for special protection for public interest speech: "In any event, a public interest in the subject matter of the criticism should be

[56] Rosario Soraide, *The "misuse" of the judicial system to attack freedom of expression* (2022, UNESCO), p. 8, https://unesdoc.unesco.org/ark:/48223/pf0000383832.

[57] *Ibid*., pp. 8, 10 and 11.

recognized as a defence." The African Commission on Human and Peoples' Rights' Declaration of Principles of Freedom of Expression and Access to Information in Africa placed the focus more on public figures stating, in Principle 21(b): "Public figures shall be required to tolerate a greater degree of criticism". This was also the approach taken in Principle 11 of the Inter-American Declaration of Principles on Freedom of Expression: "Public officials are subject to greater scrutiny by society."

The Inter-American Court of Human Rights also made it clear that public figures should show greater tolerance of criticism than ordinary citizens:

> The Court has stated that, in a democratic society, individuals who have an impact on matters of public interest are more exposed to public scrutiny and criticism. A different threshold of protection is applied because their activities go beyond the domain of the private sphere and belong to the realm of public debate. Therefore, they have voluntarily laid themselves open to a more intense public scrutiny. This in no way means that the honor of those who take part in matters of public interest should not be legally protected, but that it should be protected in accordance with the principles of democratic pluralism.[58]

The African Court on Human and Peoples' Rights has adopted a similar approach:

> The Court is of the view that freedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures. Consequently, as stated by the Commission, "people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether.[59]

The ECtHR has frequently made it clear that there is broad scope to criticise politicians, including in its first case on defamation:

> The limits of acceptable criticism are … wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.[60]

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[58] *Baraona Bray v. Chile*, 24 November 2022 (Preliminary objections, Merits, Reparations and Costs), Para 111, https://www.corteidh.or.cr/docs/casos/articulos/seriec_481_ing.pdf.

[59] *Konaté v. Burkina Faso*, Judgment (Merits) of 5 December 2014, Application No. 004/2013, para. 155, https://www.african-court.org/cpmt/details-case/0042013.

[60] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 42, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-57523%22]}.

The space for criticism of government is even wider:

> The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.[61]

In the same case, the Court stressed the importance of freedom of expression for elected representatives:

> While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court.[62]

A broad scope for criticism also applies to officials: "Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals."[63] This is not limited to political debate but covers debate about any matter of public concern, with the Court making it clear that there is "no warrant" for distinguishing between politics and other matters of public concern.[64]

Large corporations must also show a high degree of tolerance for criticism:

> [L]arge public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies.[65]

It is beyond the scope of this course to explore all aspects of defamation law in detail. However, two statements give a good sense of some of the key protections that should be built into these

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[61] *Castells v. Spain*, 23 April 1992, Application No. 11798/85, para. 46, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-57772%22]}.
[62] *Ibid.*, para. 42.
[63] *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, para. 47, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-59363%22]}.
[64] *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 64, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-57795%22]}.
[65] *Steel and Morris v. the United Kingdom*, 15 February 2005, Application No. 68416/01, para. 94, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-68224%22]}.

laws to ensure an appropriate balance between protecting reputations and respecting the right to freedom of expression. The first is paragraph 47 of General Comment No. 34, which states:

> Defamation laws must be crafted with care to ensure that they comply with [Article 19(3) of the ICCPR], and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should **include such defences as the defence of truth** and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, **a public interest in the subject matter of the criticism should be recognized as a defence**. Care should be taken by States parties to **avoid excessively punitive measures and penalties**. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party. [emphasis added]

This highlights two key defences, namely truth and statements on matters of public interest, as well as the idea that sanctions for defamation should not be excessive.

An even clearer statement of appropriate standards for defamation laws can be found in the 2000 Joint Declaration of the special international mandates:

> At a minimum, defamation laws should comply with the following standards:
>
> - the repeal of criminal defamation laws in favour of civil laws should be considered, in accordance with relevant international standards;
> - the State, objects such as flags or symbols, government bodies, and public authorities of all kinds should be prevented from bringing defamation actions;
> - defamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens; in particular, laws which provide special protection for public figures, such as *desacato* laws, should be repealed;
> - the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern;
> - no one should be liable under defamation law for the expression of an opinion;
> - it should be a defence, in relation to a statement on a matter of public concern, to show that publication was reasonable in all the circumstances; and
> - civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritise the use of a range of non-pecuniary remedies.[66]

[66] Adopted 30 November 2000, https://www.osce.org/files/f/documents/c/b/40190.pdf.

Activity 9: Reading

Estimated reading time: 17 minutes

Special challenges for freedom of expression: equality, hate speech and religion

In general, international law, and specifically Article 19 of the ICCPR, allows States to restrict freedom of expression to protect certain public or private interests, such as the rights and reputations of others and public order, but it does not require them to do this. There are two main exceptions to this, namely the requirements, set out in Article 20 of the ICCPR, to ban propaganda for war and hate speech. The former is no doubt due to the fact that the ICCPR was adopted relatively recently after the horrors of the Second World War. The latter, however, derives from the importance of respecting the equality and dignity of all human beings. Specifically, Article 20(2) of the ICCPR states: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

This is generally understood as including a number of different elements, as follows:

1. The term "advocacy" is understood as requiring intent so that it is only where the speaker wishes to incite hatred that liability may be imposed.
2. The speech must incite to hatred based on one of the three listed grounds, namely nationality, race or religion. This is one area where national laws generally go much further, banning incitement to hatred on a number of other grounds, such as ethnicity, gender, sexual orientation and so on.
3. The speech must incite others to hatred, discrimination or violence. It is clear from the jurisprudence that this requires a very close nexus between the speech in question and the result. A mere tendency or general risk of promoting the result is not enough. There must be a direct and high likelihood that the result will ensue.
4. The speech must incite to one of three results, namely discrimination, hostility or violence. Two of these – discrimination and violence – are specific acts (with discrimination normally being defined in national law but generally involving the denial of services or benefits). The third – hostility – is a state of mind and so inherently harder to observe or demonstrate. However, it is clear that it is a very strong emotion, beyond mere prejudice or stereotyping. It seems likely that the word "hostility" was used to avoid repeating the word "hatred", but that the intention was for this to represent a similar sort of intense emotion.
5. For the most part, "prohibited by law" has been understood as referring to a criminal law prohibition. However, civil and administrative law measures should also be considered in this area, such as codes of conduct for broadcasters and/or the right to bring a civil claim when one has suffered losses due to hate speech.

While restrictions of freedom of expression to combat actual hate speech pursue the legitimate interest of protecting the rights of others, they still must meet the other two parts of the three-part test for restrictions on freedom of expression, namely that they be provided by law and necessary. More detailed standards on hate speech can be gleaned from the jurisprudence of various courts and other oversight bodies. However, a good summary of the standards which hate speech laws should respect can be found in a Joint Statement on Racism and the Media adopted by the special international mandates on freedom of expression at the UN, OSCE and OAS in 2001:

- no one should be penalised for statements which are true;
- no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- no one should be subject to prior censorship; and
- any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.[67]

It is also clear that laws which prohibit the making of statements in a general way about historical events, such as Holocaust denial laws, face a very heavy burden of justification as a restriction on freedom of expression. As the UN Human Rights Committee stated in paragraph 49 of General Comment No. 34:

> Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.

These standards mean that racist or biased speech, however morally reprehensible, does not necessarily engage the legal responsibility of the speaker. It is only where the speech meets the strict conditions outlined above that it should be prohibited legally as hate speech. This is, however, without prejudice to codes of conduct for the media or adopted by political parties which often adopt stricter standards in this area.

However, when hate speech is perpetrated by prominent public figures, it can be particularly harmful and more likely to incite hatred, discrimination or violence. Public figures typically have a larger audience than the average person and their words are often more influential. This point was reflected in the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, which was adopted in 2012 under the auspices of the United Nations after a long and involved process of

[67] Adopted 27 February 2001, https://www.osce.org/files/f/documents/f/1/40120.pdf.

consultation with experts in different regions of the world.[68] The Rabat Plan of Action provides guidance on how to apply criminal hate speech provisions, and lists the position and status of the speaker as one factor to consider. The Committee on the Elimination of Racial Discrimination has also considered the position or status of a speaker in society, as well as the audience to which the speech is addressed, as a relevant factor when deciding if conduct may be qualified as a criminal offence.[69] The ECtHR has engaged in similar reasoning. For example, it found that a fine imposed on a famous football player who encouraged a crowd to chant a racist slogan was a necessary and otherwise legitimate restriction on freedom of expression, because the player should have been aware of the potentially harmful impact of his behaviour given his fame and status as a role-model.[70]

Of the international human rights courts, the ECtHR has considered the issue of hate speech most frequently. The Court's Grand Chamber has emphasised that politicians have particular responsibilities, in view of their roles as social leaders, to avoid fostering intolerance and to defend democratic values.[71] However, the Court has also emphasised the high degree of protection afforded to political speech and has at times found sanctions imposed by domestic courts on political figures on hate speech grounds to be a violation of freedom of expression. Below are two examples of how the Court has grappled with the issue of politicians who were convicted under hate speech provisions, coming to two different conclusions.

The European Court of Human Rights on Hate Speech

Féret v. Belgium: A Belgian politician was the editor of his party's publications. His party distributed anti-immigrant publications which included xenophobic slogans and advocated for discriminatory policies. The Belgian courts, after waiving his parliamentary immunity, convicted him of incitement to discrimination or hatred and imposed a penalty of community service, a 10-year ban on being elected to Parliament and required him to pay a sum of 1 euro to the civil parties in the case.[72] The Belgian courts also provided for him to serve 10-months but only in case he did not fulfil the other parts of his sentence.[73]

[68] Adopted 5 October 2012, https://undocs.org/A/HRC/22/17/Add.4.

[69] General recommendation No. 35: Combating racist hate speech, 26 September 2013, para 15, https://undocs.org/ CERD/C/GC/35.

[70] *Šimunić v. Croatia*, 22 January 2019, Application No. 20373/17, para. 45, https://bit.ly/3EfoZtH.

[71] *Sanchez v. France*, 14 May 2023, Application No. 45581/15, para. 150, https://hudoc.echr.coe.int/eng?i=001-224928.

[72] 16 July 2009, Application No. 15615/07, https://hudoc.echr.coe.int/eng?i=001-93626, decision is only in French but a summary in English in available at https://bit.ly/3WBgDnf.

[73] This is known as a "subsidiary" sentence under Belgian law.

The ECtHR found that Belgium had not violated the politician's freedom of expression and met all three parts of the three-part test. The Court stressed that free political discourse was of fundamental importance in a democratic society but also noted that being a parliamentarian did not protect the individual from responsibility for disseminating hate speech. During election periods, while open political debate was particularly important, at the same time there was a heightened risk of slogans based on stereotypes being prioritised over reasonable arguments and a risk that racist and xenophobic language would be more impactful. The Court, examining the leaflets in question, determined that they clearly incited racial hatred, and also found that the penalty imposed was not disproportionate.[74]

Erbakan v. Turkey: Turkish courts sentenced a former Prime Minister to one year' imprisonment and a fine on charges of inciting hatred or hostility for a speech he had given, along with the loss of certain civil and political rights, such as the right to found an association or be elected to parliament. His conviction was based on allegations that the speech made distinctions between nonbelievers and believers and portrayed other political parties as being opposed to God.[75]

The ECtHR held that the conviction was an unnecessary restriction of Mr. Erbakan's right to freedom of expression. Unlike in the above *Féret* case, where the leaflets were found to have clearly incited racial hatred, Türkiye had not shown that the speech had or would likely have led to any imminent danger or present risk. In addition, the severe penalty imposed in this case on a well-known politician was found to be disproportionate, particularly given the dissuasive effect such a sentence would have and the interest of maintaining free political debate in a democratic society.[76]

In one case, the UN Committee on the Elimination of All Forms of Racial Discrimination found that Denmark had violated its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination where the prosecutor and police refused to open an investigation into the application of hate speech provisions regarding alleged hate speech by a member of parliament.[77] Nevertheless, authorities which have acted diligently to investigate and prosecute individuals under hate speech provisions cannot be faulted for a finding of innocence after a fair trial. This was made clear in a decision from the UN Human Rights Committee where

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[74] *Ibid*., paras. 76-80.

[75] 6 July 2006, Application No. 59405/00, https://hudoc.echr.coe.int/eng?i=001-76232. The decision is only in French but an English summary is available at https://bit.ly/3E3q9Iz.

[76] *Ibid*., paras. 68, 70.

[77] *Gelle v. Denmark*, 6 March 2006, Communication No. CERD/C/68/D/34/2004, paras. 7.4-7.6, https://juris.ohchr.org/casedetails/1737/en-US.

the Committee found that Article 20(2) does not impose an obligation on States to ensure that those charged with hate speech "will invariably be convicted by an independent and impartial court of law".[78] The case at issue concerned a Dutch politician known for his anti-immigration views who had been acquitted of the hate speech charges at issue following a trial in which the Court issued a detailed judgment evaluating his statements.

The narrow scope of hate speech restrictions under international law does not mean that racist or biased speech is socially or morally acceptable. Furthermore, parliamentarians, as leaders in society, have a particular moral obligation not only to avoid making racist statements but also to promote intercultural understanding. The Camden Principles on Freedom of Expression and Equality, the product of a discussion by experts on international standards on freedom of expression and equality issues, indicate:

> Politicians and other leadership figures in society should avoid making statements that might promote discrimination or undermine equality, and should take advantage of their positions to promote intercultural understanding, including by contesting, where appropriate, discriminatory statements or behaviour.[79]

The UN Committee on the Elimination of Racial discrimination has recognised that political speech is highly protected, noting in their General Recommendation 35:

> [T]he expression of ideas and opinions made in the context of academic debates, political engagement or similar activity, and without incitement to hatred, contempt, violence or discrimination, should be regarded as legitimate exercises of the right to freedom of expression, even when such ideas are controversial.[80]

However, in the same General Recommendation, the Committee emphasised the instrumental importance of public officials rejecting hate speech to fostering tolerance in society:

> Formal rejection of hate speech by high-level public officials and condemnation of the hateful ideas expressed play an important role in promoting a culture of tolerance and respect. The promotion of intercultural dialogue through a culture of public discourse and

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[78] *Rabbae v. Netherlands*, 14 July 2016, Communication No. 2124/2011, para. 10.7, https://undocs.org/CCPR/C/117/D/2124/2011.

[79] ARTICLE 19, April 2009. Principle 10.1, https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf.

[80] General Recommendation No. 35: Combating racist hate speech, 26 September 2013, para. 25, https://undocs.org/CERD/C/GC/35.

> institutional instruments of dialogue, and the promotion of equal opportunities in all aspects of society are of equal value to educational methodologies and should be encouraged in a vigorous manner.[81]

To this end, the Committee recommended in its General Recommendation 30 on discrimination against non-citizens that State parties to the International Convention on the Elimination of All Forms of Racial Discrimination:

> Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of "non-citizen" population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large.[82]

Similarly, paragraphs four and five of the Parliamentary Assembly of the Council of Europe's Resolution 2275 (2019), *The role and responsibilities of political leaders in combating hate speech and intolerance*, sets out parliamentarians' moral obligations to promote tolerance:

> The Assembly considers that the most effective way of preventing hate speech is to strengthen adherence to the principles of democracy, human rights and the rule of law, and to promote a model of society that embraces diversity and respects human dignity. Politicians, along with other public figures, have a vital role to play in this process. Their status and visibility allow them to influence a wide audience and to define to a significant degree the themes and the tone of public discourse.
>
> In fact, politicians have both a political obligation and a moral responsibility to refrain from using hate speech and stigmatising language, and to condemn promptly and unequivocally its use by others, as silence may be interpreted as approval or support. The enhanced protection of freedom of expression that they enjoy also strengthens their responsibility in this area.

The Resolution also encourages political parties to self-regulate by adopting charters and statutes, which it notes are "particularly effective and more likely to be respected due to their voluntary nature" (para. 7). The Charter of European Political Parties for a Non-Racist and Inclusive Society,[83] endorsed by the Council of Europe's Parliamentary Assembly, lists the following recommended commitments for parties to agree upon to address hateful speech and promote tolerance:

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[81] *Ibid*., para. 37.

[82] 1 October 2004, para. 12, https://www2.ohchr.org/english/bodies/cerd/docs/cerd-gc30.doc.

[83] AS/Ega/Inf (2022) 28, https://assembly.coe.int/LifeRay/EGA/NoHate/CharterPoliticalNonRacistInclusiveSociety-EGA-Inf-2022-08-EN.pdf, endorsed by the Parliamentary Assembly in Resolution 2443 (2022), adopted 20 June 2022, para. 8.1, https://pace.coe.int/en/files/30121/html.

- Defending basic human rights and democratic principles and reject all forms of racism and intolerance, hate speech, incitement to racial hatred and harassment;
- Taking open, firm, and pro-active stands against racism, xenophobia, hatred and intolerance on whatever grounds and however they manifest themselves;
- Refusing to display, to publish or to have published, to distribute or to endorse in any way, including online, views and positions which advocate, promote or incite, or may reasonably be expected to advocate, promote or incite, in any form, denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatisation or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of "race", colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation, social origin and other personal characteristics or status, dealing firmly with hate speech, sentiments and behaviour within our own ranks and engaging in counter-speech and alternative speech;
- Dealing responsibly and fairly with sensitive topics relating to such groups; avoiding negative stereotyping and stigmatisation;
- Refraining from any form of political alliance or co-operation at all levels with any political party which incites racial or ethnic prejudices and racial hatred;
- Striving for the fair representation of the above-mentioned groups at all levels of our political parties, with a special responsibility for the party leadership to stimulate and support the recruitment of candidates from these groups for political functions as well as membership.

Many countries still have some form of blasphemy laws on their books and for a long time this sort of rule was considered to be a legitimate restriction on freedom of expression. However, it is now clear that while everyone has a right to practise the religion of their choice, this does not extend to prohibiting others from discussing, even in harsh ways, that religion. The fact that the right to freedom of expression protects even offensive speech is very relevant here; the mere fact that people may be offended or upset by certain speech is not enough to warrant banning that speech.

This standard is clear from paragraph 48 of General Comment No. 34:

> Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.

The meaning of the first sentence here is that while it is legitimate to ban incitement to hatred against individuals on the basis of their religion (as provided for in Article 20(2) of the ICCPR), it is not legitimate to ban criticism of a religion, *per se*. In other words, there is a difference between criticism of an idea (religion) and attacks on people (adherents to a particular religion) on the basis of their religious beliefs. This point was set out even more clearly in the Rabat Plan of Action, paragraph 25 of which states: "States that have blasphemy laws should repeal them, as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion."

Beyond the issue of hate speech, political figures should also not abuse their platforms to pressure individuals not to participate in public debates, especially in situations of social tensions, as noted by the Inter-American Court of Human Rights in the below case.

The Inter-American Court of Human Rights on Officials' Responsibilities to Avoid Harassing Speech

In *Ríos v. Venezuela*,[84] the Inter-American Court of Human Rights considered a complaint against Venezuela by several employees of Radio Caracas Televisión (RCTV). Between 2001 and 2005, during a period of significant political tensions, individuals affiliated with RCTV had been subjected to a series of physical and verbal attacks. Among other things, State officials referred to RCTV using incendiary language, including calling them "horsemen of the Apocalypses", "fascists", "liars, perverts, immoral people, rebels, and terrorists" (para. 115).

As part of its reasoning, the Court made the following observations about State authorities' responsibilities in respect of their public discourse:

> In a democratic society it is not only legitimate, but on occasions it is a duty of state authorities, to issue statements with regard to matters of public interest. However, upon doing so they are submitted to certain limitations since they must verify in a reasonable, but not necessarily exhaustive, manner the facts on which they base their opinions, and they should do so with a diligence even greater to the one employed by individuals due to their high investiture, the ample scope and possible effects their expressions may have on certain sectors of the population, and in order to avoid that citizens and other interested people receive a manipulated version of specific facts. Additionally, they must take into consideration that as public officials they have a position of guarantor of the fundamental rights of people and, therefore, their statements cannot ignore those

[84] 28 January 2009 (Preliminary Objections, Merits, Reparations, and Costs), https://corteidh.or.cr/docs/casos/articulos/seriec_194_ing.pdf.

> rights or constitute forms of direct or indirect interference or harmful pressure on the rights of those who seek to contribute with public deliberation through the expression and diffusion of their thoughts. This duty of special care is specifically true in situations of greater social conflict, alterations of public order or social or political polarization, precisely because of the set of risks they may imply for certain people or groups at a given time (para. 139).

The Court noted that, in the context of this case, the appropriate response to avoid "erroneous" interpretations of political speeches would have been to publicly condemn acts of aggression against journalists (paras. 140 and 142). While the Court did not find that the statements and speeches at issue "authorized, instigated, instructed, or ordered, or promoted acts of aggression or violence" (para. 144), they nonetheless increased the vulnerability of the RCTV employees (para. 145). The Court considered that in a situation where these individuals were actually vulnerable, a fact known by State authorities, "some content of the mentioned pronouncements is not compatible with the state's obligation to guarantee the rights of those people to personal integrity and the freedom to seek, receive, and impart information" (para. 149).

The Court also considered that most of the investigations into abuses were not carried out in an effective manner (para. 331). Various incidents of "obstruction, hindrance, and intimidation to the exercise of the journalistic tasks" of the victims, taken in conjunction with the lack of due diligence in the investigations and in the context of the antagonistic pronouncements by State authorities, led the Court to conclude that the State had failed to guarantee the rights to freedom of expression and to humane treatment (para. 334).

Activity 10: Video

[UNESCO video on the Rabat Plan of Action on the Prohibition of Incitement to Hatred]

Transcript:

The legitimate limits to freedom of expression: The Rabat Plan of Action on the Prohibition of Incitement to Hatred. Freedom of expression is a fundamental right, indispensable in democratic societies. This right is both enshrined in the *Universal Declaration of Human Rights* as well as in Article 19 of the *International Covenant on Civil and Political Rights*, or ICCPR, which gives everyone the right to freedom of expression, regardless of frontiers and through any media of their choice.

However, freedom of expression is not an absolute right and may be lawfully restricted according to certain principles and conditions. Besides the limitations and safeguards included in Article

19, Article 20 of the ICCPR specifies that certain kinds of speech must be prohibited by law, such as propaganda for war and advocacy of national, racial or religious hatred that incites discrimination, hostility or violence. Incitement to hatred is such an example of unprotected speech. But how do we determine when speech becomes incitement to hatred and therefore is illegal? The United Nations Rabat Plan of Action provides a comprehensive set of factors for States to address this issue, drawing a clear line between freedom of expression and incitement to hatred and violence. Coordinated by the United Nations Office of the High Commissioner for Human Rights and adopted in October 2012, the Rabat Plan of Action proposes a six-part threshold for courts to test whether a speech may be prohibited or punished. This threshold is measured by:

1) The context of incitement to hatred, which assesses if a speech is likely to incite discrimination, hostility or violence against the target group by having a direct bearing on intent and/or causation.
2) The speaker's position or status in society in the context of the audience of the speech.
3) The intent of the speech, which distinguishes advocacy or incitement from mere distribution or circulation of material.
4) Its content or form, determining the degree to which the speech was provocative and direct as well as the style and nature of the arguments.
5) Its extent, which determines the reach of the speech, its public nature, magnitude and the size of its audience.
6) The likelihood of causing harm: Determining if there was a reasonable probability that the speech would successfully incite direct action against the target group.

Through this six-part threshold, national and regional courts may conduct a thorough analysis of the severity of cases of hate speech as aligned with international human rights standards. In the case where a certain type of speech is deemed unlawful, the Rabat Plan of Action advises to prioritise civil or administrative sanctions as opposed to criminal sanctions whenever possible. The Rabat Plan of Action thus represents an important step in defining state obligations to prohibit incitement to hatred while protecting the right to freedom of expression.

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Activity 11: Expert Video

[Expert video on duties of State officials to avoid spreading disinformation and hate speech and harassing political opponents.]

Leila de Lima, former Chairperson of the Commission of Human Rights, former Justice Secretary and former Senator of the Republic of the Philippines

Transcript:

I am Leila de Lima, former Chairperson of the Commission of Human Rights, former Justice Secretary, or Justice Minister, and former Senator of the Republic of the Philippines. I'm also a former prisoner of conscience, unjustly detained for nearly seven years. Hate speech and disinformation are serious problems, which sow division in society and erode trust in democratic institutions. Unfortunately, some politicians resort to spreading disinformation or hate speech in a cynical attempt to exploit divisions for electoral gains. This has particularly negative impacts on marginalised groups in the short-term and proves corrosive to the overall functioning of democratic societies in the long-term.

Although disinformation and hate speech are distinct phenomena, disinformation often contributes to and enables the spread of hate speech. Parliamentarians have a vital role to play in stemming the spread of both kinds of harmful speech and particular moral duties due to their high profile and the influential nature of their speech. Look what happened to me. I was subjected to massive black propaganda, character assassination and vilification by no less than the highest official of the land, then President Rodrigo Duterte, chimed in by certain members of Congress with little help to me, if not nil, from my fellow senators, culminating in the filing of bogus criminal charges against me. Disinformation and hate speech against me were at its peak.

At a basic level, they have an individual moral and political duty to share information only from reliable sources and to avoid purposely disseminating false or misleading information. They also have a moral and political duty to avoid spreading hateful content in their speeches, press releases and social media posts. This includes not only a legal duty to refrain from speech which meets the high criminal threshold of incitement to hatred, but also a political and moral duty to refrain from statements which sow division and distrust between different groups in society. That would include things like using harmful stereotypes or indirectly stoking animosity through coded language. In addition, parliamentarians, as actors with a key legislative and oversight role, have a duty to help stem hate speech from other actors by supporting research to determine drivers of hate speech and to make necessary legislative reforms to ensure that the legal framework is addressing this issue in an effective manner which is consistent with international standards on freedom of expression.

Several worthwhile parliamentarian initiatives have emerged to help stem hate speech. One of these is the No Hate Parliamentary Alliance, which was launched in January 2015 by the Committee on Equality and Non-Discrimination of the Parliamentary Assembly of the Council of Europe. This is a network of parliamentarians who have committed to standing against racism, hatred and intolerance. It is open to members of the Parliamentary Assembly of the Council of Europe and to members of delegations with observer and partner for democracy status.

Among other things, the alliance organises hearings and seminars for parliamentarians on racism, xenophobia and other kinds of hatred, and engages in awareness-raising activities. Members sign up to a Charter of Commitments to join the alliance, which commits them to taking stands against racism, hatred and intolerance, promoting non-discrimination, engaging in awareness-raising on this issue among politicians and civil society, conducting campaigns against racism, hatred and intolerance, and exchanging information and best practices.

More generally, self-regulatory measures can be an effective way to promote inclusive leadership and tolerance among members of parliament. In a 2023 issue brief, the UNDP suggested that parliaments consider the following actions: 1) expanding a ban and related sanctions on unparliamentary language to include hateful and degrading language, 2) requiring members to commit to and respect a code of conduct banning hate speech outside of parliament, and 3) promoting parliamentary administrative procedures and systems which foster a culture of inclusivity and diversity.[85] The latter would include things like taking measures to foster employment equity and addressing harassment and bullying, all of which play an important role in determining institutional culture.

Thank you for listening. I bid this massive open online course success.

Activity 12: Reading

Estimated reading time: 5 minutes

Special challenges for freedom of expression: national security and public order

National security and public order present a special challenge for States inasmuch as the safeguarding of these interests is essential, among other things because rights themselves cannot be respected when security and/or order are jeopardised. At the same time, history has shown us that States very often interpret these notions unduly broadly when it comes to speech limitations, banning a far wider scope of speech than is necessary.

[85] *Stepping Forward: Parliaments in the Fight Against Hate Speech* (31 January 2023, UNDP), p. 5, https://www.undp.org/publications/dfs-stepping-forward-parliaments-fight-against-hate-speech.

This is an issue which has assumed even greater importance in the modern world, with the increase in terrorist attacks and governments responding by adopting all too often very broad and undefined rules restricting the promotion of terrorism.

International human rights law has sought to keep national security and public order restrictions on freedom of expression within their proper bounds in three key ways. First, in line with the "provided for by law" part of the test for restrictions, they have called for relevant concepts to be defined clearly and narrowly.

Statements on Defining National Security

In paragraphs 30 and 46 of General Comment No. 34, the UN Human Rights Committee stated:

> Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of [Article 19(3) of the ICCPR]. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress. The Committee has found in one case that a restriction on the issuing of a statement in support of a labour dispute, including for the convening of a national strike, was not permissible on the grounds of national security.
>
> Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities.

In their 2018 Joint Declaration on Media Independence and Diversity in the Digital Age, the special international mandates on freedom of expression stated:

> Restrictions on freedom of expression which rely on notions such as "national security", the "fight against terrorism", "extremism" or "incitement to hatred" should be defined clearly and narrowly and be subject to judicial oversight, so as to limit the discretion of

> officials when applying those rules and to respect the standards set out in sub-paragraph (a), while inherently vague notions, such as "information security" and "cultural security", should not be used as a basis for restricting freedom of expression.[86]

In their 2008 Joint Declaration, the special international mandates on freedom of expression stated:

> The definition of terrorism, at least as it applies in the context of restrictions on freedom of expression, should be restricted to violent crimes that are designed to advance an ideological, religious, political or organised criminal cause and to influence public authorities by inflicting terror on the public.[87]

Second, individuals should only be punished on grounds of national security where they acted with the intent to undermine security. In several decisions, the ECtHR has held that national security restrictions did not involve the requisite intent. One example of this involved a conviction in Türkiye for publishing poems:

> [E]ven though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.[88]

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information were adopted in 1995 by a group of international freedom of expression and security experts.[89] Principle 6 of the Principles refers to the need for intent in such cases, stating, in part:

> Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that:
> (a) the expression is intended to incite imminent violence;

Third, and most importantly, there needs to be a very close nexus between the speech and the risk to national security or public order. Absent this requirement, the risk of abuse of these sorts of provisions is very great, because authorities can claim there is a very general risk in relation to a wide swath of expression. Reflecting this, Principle 22(5) of the African Commission on Human

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[86] Adopted 2 May 2018, para. 3(f), https://www.law-democracy.org/live/wp-content/uploads/2018/12/mandates.decl_.2018.media-ind.pdf.
[87] Adopted 10 December 2008, https://www.osce.org/files/f/documents/4/b/35639.pdf.
[88] *Karataş v. Turkey*, 8 July 1999, Application No. 23168/94, para. 52, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-58274%22]}.
[89] Adopted 1 October 1995, https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf.

and Peoples' Rights' Declaration of Principles of Freedom of Expression and Access to Information in Africa states:

> Freedom of expression shall not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.

In their 2005 Joint Declaration, the special international mandates stated:

> While it may be legitimate to ban incitement to terrorism or acts of terrorism, States should not employ vague terms such as 'glorifying' or 'promoting' terrorism when restricting expression. Incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.

Finally, Principle 6 of the Johannesburg Principles states:

> Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that:
> …
> (b) it is likely to incite such violence; and
> (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Activity 13: Reading

Estimated reading time: 1 minute

Special challenges for freedom of expression: morals

Every country has some limits on freedom of expression based on moral grounds, such as limits on the dissemination of obscene content. At the same time, this is an area where restrictions can be very vague and also unduly wide. The UN Human Rights Committee made an important comment on the scope of these sorts of restrictions in paragraph 32 of General Comment No. 34:

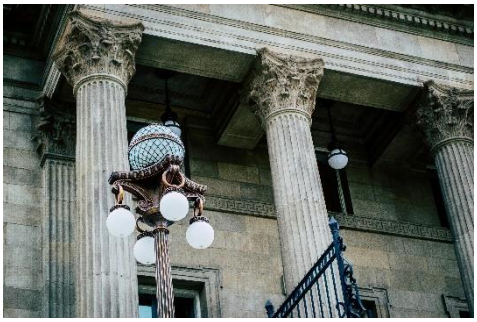
> The Committee observed in general comment No. 22, that "the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition". Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.

This significantly limits the scope of possible restrictions here.

Activity 14: Reading

Estimated reading time: 4 minutes

Special challenges for freedom of expression: the administration of justice



A number of issues arise in relation to the administration of justice and freedom of expression. One is openness of the judicial process. Article 14(1) of the ICCPR makes it clear that court hearings should be presumptively open to the public with only limited exceptions to this principle.

In practice, trials are rarely closed in most countries, although this does not necessarily apply to cases involving children, as Article 14(1) envisages.

A second interest is protection of the impartiality of the judicial system. A number of types of expression may legitimately be prohibited to protect this interest, such as intimidating witnesses, disrupting court hearings or lying to the court.

To protect the impartiality of the judicial system, international courts have also held that there needs to be special protection for statements made before courts, much along the same lines as parliamentary immunity. Thus, in the case of *Nikula v. Finland*, the ECtHR held that statements made in the course of judicial proceedings should enjoy a similar degree of protection as statements by parliamentarians:

> It is therefore only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel's freedom of expression can be accepted as necessary in a democratic society.[90]

This applies with particular force to statements made in court by lawyers, because of the important role lawyers play as "intermediaries between the public and the courts" and the idea that they must be free to defend their clients properly.[91]

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[90] *Nikula v. Finland*, 21 March 2002, Application No. 31611/96, para. 55, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-60333%22]}.

[91] *Ibid.*, para. 54.

A difficult issue is how to balance the presumption of innocence in criminal trials with the right to freedom of expression. This presumption is itself a very important human right. However, the courts are public bodies, and it is also important that they are open to media monitoring and criticism. On this interplay, the ECtHR has noted:

> Whilst the courts are the forum for the determination of a person's guilt or innocence on a criminal charge, this does not mean that there can be no prior or contemporaneous discussion of the subject matter of criminal trials elsewhere, be it in specialised journals, in the general press or amongst the public at large.
>
> Provided that it does not overstep the bounds imposed in the interests of the proper administration of justice, reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement … that hearings be public. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.[92]

There is a difference here between cases which are heard by a judge and those which involve a jury, with the latter being presumed to be more likely to be influenced by media reporting. Even in jury trials, however, there may be ways to limit the impact of media reporting, for example by sequestering the jury. It is also important not to overestimate the influence the media may have on juries. They are, after all, subjected to the sophisticated arguments made by legal counsel in cases, and yet we assume that, with proper instruction from the judge, they will still come to the right decisions.

Under international law everyone, including parliamentarians, has the right to discuss ongoing court cases, including how the cases are being dealt with by the courts, although national law in some countries does not respect this. It is only in rare cases where it would be appropriate for a court to place a complete ban on discussion, including by parliamentarians, about a case. One example of a situation where this might be appropriate would be to protect the identity of minors who are involved in court cases. Under international law the courts, like all public institutions, need to be open to criticism and this default position also applies to individual cases, which is the main function of the courts in a democracy.

Activity 15: Further Readings

Suggested Further Readings:

- *Briefing Note on Freedom of Expression: Restrictions on Freedom of Expression* (2015, Centre for Law and Democracy), https://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefingnotes-2.pdf

[92] *Worm v. Austria*, 29 August 1997, Application No. 22714/93, para. 50, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-58087%22]}.

- *Briefing Note on Freedom of Expression: Criminal Content Restrictions* (2015, Centre for Law and Democracy), https://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefingnotes-10.pdf
- *Briefing Note on Freedom of Expression: Civil Content Restrictions* (2015, Centre for Law and Democracy), https://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefingnotes-11.pdf
- *Model Training Materials: Hate Speech, Defamation and National Security*, (2022, Centre for Law and Democracy), https://www.law-democracy.org/live/wp-content/uploads/2022/12/Training-Materials-2.Content-Restrictions.FINAL_.pdf
- Toby Mendel, "Hate Speech Rules under International Law" (2010, Centre for Law and Democracy), https://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf
- Toby Mendel, "Restricting Freedom of Expression: Standards and Principles" (2010, Centre for Law and Democracy), https://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf
- *Parliamentary Toolkit on Hate Speech* (2023, Council of Europe), https://rm.coe.int/handbook-parliamentary-toolkit-on-hate-speech/1680aa571c
- *Stepping Forward: Parliaments in the Fight Against Hate Speech* (31 January 2023, UNDP), https://www.undp.org/publications/dfs-stepping-forward-parliaments-fight-against-hate-speech
- *Joint statement of United Nations experts on strengthening democracy and human rights in a year of worldwide elections*, 30 April 2024, https://www.ohchr.org/sites/default/files/documents/issues/association/statements/2024-04-30-joint-statement-elections.pdf
- *Guidelines for Judicial Actors on Privacy and Data Protection* (2022, UNESCO), https://unesdoc.unesco.org/ark:/48223/pf0000381298
- *The 'misuse' of the judicial system to attack freedom of expression* (2022, UNESCO), https://unesdoc.unesco.org/ark:/48223/pf0000383832

MODULE 3: REGULATION OF THE MEDIA, ONLINE CONTENT AND DIGITAL SERVICE PROVIDERS

Activity 1: Lead Trainer Video

Transcript:

Hello and welcome to Module 3, where we'll be looking at international standards for media regulation. Although much public attention is focused on restrictions on freedom of expression, especially when these give rise to high-profile legal cases, the rules governing the regulation of the media are also incredibly important for freedom of expression because they create the overall

environment in which key expressive actors – namely the media – operate. By media, we are referring to print publications, such as newspapers and magazines; broadcast media (in other words television and radio broadcasters); and also various kinds of digital actors which resemble media, such as online publications or broadcasters. But we are not including social media which, despite the name, are not actual media. If the rules unduly limit the media or give the government control over it, the public will not have access to quality, independent news reporting. On the other hand, if the rules support the development of a robust, diverse media sector, the public's access to quality reporting will increase. The approach taken thus ultimately affects everyone's right to freedom of expression which, as we have seen, includes not only the right to impart information and ideas but also the rights to seek and receive them.

Around the world, one finds many different kinds of media regulators, the precise functions of which depend, among other things, on the type of media covered. For example, a key function of broadcast regulators is to license broadcasters, whereas print media regulators are more likely to work on promoting professionalism.

Regardless of the exact role of the regulatory body, one of the bedrock principles here, as articulated in many authoritative statements by international human rights bodies and experts, is the need for regulators to be independent of both the government and the sector they regulate. This means that any bodies which exercise regulatory powers over the media should be protected against interference of a political or commercial nature. That applies to any body which exercises any kind of regulatory powers over the media, whether this be in relation to licensing, accreditation, allocation of subsidies, professional standards or any other issue.

The reasons for this should be fairly apparent. Absent such protection, the decisions of these bodies may be influenced by political or commercial considerations instead of freedom of expression and the public interest. The lack of protection for the independence of regulators is one of the most serious threats to freedom of expression in many countries.

A key challenge here is guaranteeing independence in practice, which depends in part upon a strong legal framework for this. Ultimately, this needs to be tailored to the specific context in each country. However, there are certain general principles which should guide policy makers' approach to this issue.

It is essential that the independence of the regulator be enshrined in the law. This starts with a clear reference to the independence of the regulator but also includes detailed provisions establishing safeguards for this. One of the most important elements of this is to ensure that the appointments process for members of the governing boards of regulators is open and transparent and involves different kinds of actors, including civil society and the legislative branch. The appointments process therefore should not be controlled by a ministry, the president or head of

State or a particular party. It is also important to have legal prohibitions on those with strong political or commercial conflicts of interests from being appointed, in addition to requirements of sufficient expertise.

Security of tenure is another key means of ensuring the independence of regulators, so that members may be removed only in narrow and well-defined circumstances, such as gross misconduct. One Council of Europe resolution describes these circumstances as "non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions". In addition, any decisions to remove members from their positions should involve sufficient due process, often in the form of the need for approval from the legislature.

Another key means of bolstering the independence of regulatory bodies is through protecting the funding of these bodies because if their funding is, for example, subject to the whims of a Minister, this can be a way to exert influence over them. Financial independence should be bolstered by vesting parliament with the power of directly determining these bodies' budgets. It is also important that the regulator's remit be set out clearly in the law and that it be accountable to the people, usually through reporting to parliament instead of directly to the executive branch. As part of this accountability process, there should be a requirement annually to report and to undergo financial audits.

Another key principle underpinning media regulation is the need for such regulation to promote media diversity. Broadly, this refers to the range of information, ideas and perspectives available to citizens via print, broadcast and digital media. States' obligations to promote diversity derive from the right of everyone to seek and receive information and ideas of all kinds.

In their 2007 Joint Declaration on Diversity in Broadcasting, the special international mandates on freedom of expression identified three different aspects of media diversity: outlet, source and content. Diversity of outlet refers to the existence of a range of different types of media. This is particularly relevant in terms of broadcasting, where courts and commentators refer to the need for public service, commercial and community broadcasters. Each of these kinds of broadcaster serves different social information needs. States have positive obligations to ensure that all media outlets can access modern means of communication and thrive in terms of access to the resources they need. Different kinds of policies are needed for different types of media. In the case of public service broadcasters, States should not only create them, but also ensure that they are well-resourced and guarantee their independence. States should put in place various measures to support community broadcasters, as they generally have limited resources compared to commercial broadcasters. This should include providing financial support through direct or indirect subsidies, such as reduced or waived licensing fees, establishing a less onerous licensing process and reserving frequencies for this sector.

Diversity of source refers to the idea that ownership of the media is not unduly concentrated. The rules on media concentration will vary from one jurisdiction to another based on factors like the population and strength of the media as a sector. They should be more stringent than general commercial anti-competition rules, but it is also important to strike the right balance as overly stringent rules can discourage investment and competition in the media sector. Source diversity can also be bolstered through subsidy schemes to help local media remain financially viable. The Nordic countries have particularly well-developed systems of direct subsidies for news media.

Diversity of content is, ultimately, the most important of the three kinds of diversity, referring to the idea that content serving the needs and interests of all groups in society should be available through the media. This is ultimately primarily dependent on the two other kinds of diversity, but it also can be furthered through specific policies, such as funding schemes for certain types of media or media content. Some countries also have minimum quotas for local artistic or news production or diverse language requirements for certain kinds of broadcasters. Depending on the local context, and if designed in an appropriate manner, such rules may assist with promoting content diversity.

The first part of this Module delves into some of the key standards relating to media regulation. It then turns in the second part to the issues of regulating online harms and digital platforms. Formally, this is a separate issue from media regulation, but one which is a key issue for parliamentarians to review. The tricky question of how to deal with online harms while upholding freedom of expression is something which policy makers are grappling with in many countries. Among the topics covered here are differing approaches to intermediary liability for illegal content, as well as some novel initiatives for regulating online platforms in the form of the UNESCO Guidelines and the European Union's Digital Services Act. I hope you enjoy this module.

Activity 2: Reading

Estimated reading time: 3 minutes

Regulation of Journalists

Two issues are addressed in this section, licensing and protection of confidential sources of information. As with other subjects addressed in this course, it is important for parliamentarians to have a general familiarity with these issues so as to ensure that they pass laws which are consistent with international standards on freedom of expression and revise laws which fail to reflect these standards. A third issue regarding journalists, namely accreditation, is dealt with in Module 5 of this course, with a focus on accreditation to parliament.

Licensing

Although some countries still require journalists to be licensed, to register or to meet certain conditions, such as having a university degree, it is well established under international law that this is not legitimate. In paragraph 44 of General Comment No. 34, the UN Human Rights Committee made it clear that the prohibition on licensing applies broadly to everyone who undertakes journalistic functions:

> Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with [Article 19(3) of the ICCPR].

As part of this, it is also clear that journalists, unlike professionals such as doctors and lawyers, cannot be required to join a specific professional association or to meet certain minimum professional requirements, such as having a university degree or a certain number of years of experience.

Protection of Sources

The right of journalists to protect the identity of their confidential sources of information, subject only to narrow overrides, has long been recognised by international courts. Confidential sources are an important way for journalists to access information, itself protected as part of the right to seek and receive information and ideas, part of the right to freedom

of expression.[93] Looked at differently, in many cases sources are only prepared to provide the public interest information they possess to journalists in return for a promise of confidentiality. If journalists cannot deliver on such a promise in practice, the source will not provide them with the information in the first place. And that, in turn, will deprive the public of access to the information via the journalist. As a result, we can see that what looks like a privilege for journalists is actually designed to protect the right of the public as a whole to access information and ideas.

In practice, protection of sources is almost always referred to as a right or privilege of journalists. However, better practice in this area is to provide protection to a wide range of actors who are engaged in providing information to the public. Thus, in their 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations, the special international mandates on freedom of expression stated:

> Natural and legal persons who are regularly or professionally engaged in the collection and dissemination of information to the public via any means of communication have the right to protect the identity of their confidential sources of information against direct and indirect exposure, including against exposure via surveillance.[94]

Understood in this way, the right should also apply, where relevant, to parliamentarians since they are clearly both regularly and professionally engaged in disseminating information to the public. So far, there do not appear to be any cases before international courts or other bodies where parliamentarians have claimed a right to protect their sources.

Activity 3: Reading

Estimated reading time: 8 minutes

Regulation of the Print Media

[93] A clear explanation of this was provided by the European Court of Human Rights in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, para. 39, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-57974%22]}.

[94] Adopted 4 May 2015, para. 5(a), https://www.law-democracy.org/live/wp-content/uploads/2015/05/JD-2015.final_.Eng_.pdf.

Three issues are dealt with in this section, namely licensing/registration, the rights of reply and correction, and the issue of complaints and promoting professionalism.

Licensing/registration

Licensing systems are generally understood to be those which require an applicant to obtain permission to operate while registration systems provide for registration upon the provision of the requisite information (and perhaps meeting some very simple conditions). However, even registration systems may be abused.

It is very clear that, under international law, the print media should not be required to obtain a licence. In paragraph 39 of General Comment No. 34, the UN Human Rights Committee noted:

> It is incompatible with article 19 to refuse to permit the publication of newspapers and other print media other than in the specific circumstances of the application of paragraph 3. Such circumstances may never include a ban on a particular publication unless specific content, that is not severable, can be legitimately prohibited under paragraph 3.

A licensing system, inasmuch as it involves the ability to refuse to accept an application, would fall foul of this standard.

International observers have also expressed some concern about registration systems for the print media, given the potential for abuse. It is unnecessary to require print media to register where they are already registered as commercial entities, which is true for the vast majority of print media in most countries. Thus, in the United Kingdom, for example, newspapers are only required to register if they are not already registered as a company or other legal entity. Even then, registration is done with the Registrar of Companies.

In their 2003 Joint Declaration, the special international mandates on freedom of expression both expressed concern about registration in general and highlighted some of the minimum conditions which any system of registration should respect:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematic.[95]

[95] Adopted 18 December 2003, https://www.osce.org/files/f/documents/4/0/28235.pdf.

In order for a registration system to not become a *de facto* licensing process, the grounds for refusal should be limited to purely technical matters (namely that the registrant has the same name as another registered entity or that the registration form was not properly completed or submitted).

Some cases on Newspaper Registration

There have only been a few cases decided by international human rights bodies on registration, but they help give a sense of the standards which these systems should respect. In *Laptsevich v. Belarus*, the UN Human Rights Committee was faced with a requirement to register which extended even to a leaflet of which only 200 copies had been printed.[96] The Committee applied the three-part test for restrictions on freedom of expression and found that there was no justification for taking registration requirements that far.

In *Gaweda v. Poland*, the Polish authorities had refused to register two periodicals based on the claim that their titles were "in conflict with reality" (the titles in question were: *The Social and Political Monthly – A European Moral Tribune* and *Germany – a Thousand-year-old Enemy of Poland*). The European Court of Human Rights held that this was a breach of the right to freedom of expression, essentially on the basis that it was "inappropriate from the standpoint of freedom of the press" to impose a substantive condition like this on media outlets as part of a registration system. This was especially the case because non-registration was a form of prior censorship, which is a very intrusive restriction on freedom of expression.[97]

In *Media Rights Agenda and others v. Nigeria*, the African Commission on Human and Peoples' Rights considered a decree which entrusted a registration board with determining whether registering a newspaper was "justified having regard to the public interest".[98] The decree failed to provide any review procedures for decisions of the board. In finding that freedom of expression had been violated, the Commission expressed concern about the finality and absolute discretion of the board's decision-making, which effectively gave the government the power to "prohibit publication of any newspapers or

[96] 20 March 2000, Communication No. 780/1997, https://juris.ohchr.org/casedetails/895/en-US.

[97] 14 March 2002, Application No. 26229/95, paras. 40 and 43, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-60325%22]}.

[98] 31 October 1998, Application Nos. 105/93-128/94-130/94-152/96, para. 5, https://achpr.au.int/en/decisions-communications/media-rights-agenda-constitutional-rights-project-media-rights-agenda.

magazines they choose". They found that this "invites censorship and seriously endangers the rights of the public to receive information".[99]

The Rights of Reply and Correction

A right of reply gives an individual, and potentially a legal entity, who has been the subject of media reporting which meets certain conditions a right to have his or her reply carried in the same media outlet. There is some debate about the right of reply. As a *prima facie* interference with freedom of expression, it clearly needs to be justified according to the three-part test for restrictions.[100] In the United States, the Supreme Court has ruled that a legally mandated right of reply for the print media is unconstitutional.[101] However, most democracies see it as an appropriate "more speech" way of addressing problematic speech. It is, for example, provided for explicitly in Article 14 of the American Convention on Human Rights:

> 1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
> 2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

The Council of Europe has also recognised it as a positive approach.[102]

Even those who support the right of reply recognise that there is a need to impose some limits on the circumstances in which it may be claimed and how it works, to ensure respect for freedom of expression. The Committee of Ministers of the Council of Europe adopted a resolution on the

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[99] *Ibid*., para 57.

[100] See, for example, *Enforceability of the Right to Reply or Correction*, Advisory Opinion OC-7/86 of 29 August 1986, Series A, No.7 (Inter-American Court of Human Rights), https://www.oas.org/en/iachr/expression/showDocument.asp?DocumentID=28.

[101] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), https://supreme.justia.com/cases/federal/us/418/241.

[102] See, for example, *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights, Admissibility Decision).

right of reply in 1974 to provide guidance in this regard. This resolution limits the right to replying to factually incorrect statements and provides for the following exceptions:

i. if the request for publication of the reply is not addressed to the medium within a reasonably short time;
ii. if the length of the reply exceeds what is necessary to correct the information containing the facts claimed to be inaccurate;
iii. if the reply is not limited to a correction of the facts challenged;
iv. if it constitutes a punishable offence;
v. if it is considered contrary to the legally protected interests of a third party;
vi. if the individual concerned cannot show the existence of a legitimate interest.[103]

Some 30 years later, the Committee of Ministers adopted another recommendation extending the right of reply to Internet news services and recognising two additional exceptions:

- if the reply is in a language different from that in which the contested information was made public;
- if the contested information is a part of a truthful report on public sessions of the public authorities or the courts.[104]

The UN Special Rapporteur on Freedom of Opinion and Expression has recommended a self-regulatory approach towards the right of reply and noted that, where it exists, it should be limited to false statements of fact.[105]

International standards have tended to focus on the right of reply. However, in some contexts, a right of correction – which requires media outlets to correct factually incorrect statements – provides adequate redress for mistakes. A correction is inherently less intrusive for the media, in particular for editorial independence, than a right of reply. Thus, a right of correction should be prioritised for simple inaccuracies, while a right of reply might be appropriate in the context of more complex criticism which cannot be addressed fully through a correction.

Dealing With Complaints/Promoting Professionalism

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[103] *Resolution (74)26 on the right of reply – position of the individual in relation to the press,* 2 July 1974, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805048e1.

[104] *Recommendation No. Rec(2004)16 on the Right of Reply in the New Media Environment*, adopted 15 December 2004, Principle 5, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805db3b6.

[105] Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Report of the mission to Hungary, 29 January 1999, para. 35, https://undocs.org/E/CN.4/1999/64/Add.2.

In addition to a right of reply/correction, it is widely recognised that a system of complaints regarding unprofessional behaviour of the print media should be available to the public. Different complaints systems set different rules for print media outlets, but common areas addressed include the responsibility to report accurately; not to promote racism or other forms of bias; to show appropriate respect for those involved in the news, for example because they are children or are suffering; and to use subterfuge only where this is justified by the circumstances.

For the print media sector, two main approaches to complaints systems are used globally. The first is what is called self-regulation, which is where the industry sets up the system by itself, without the support of legislation or indeed any official involvement. The second is called co-regulation, which is where the system is established by law but where media representatives play a dominant or at least very significant role in the system. Many freedom of expression experts have observed that, where they are effective, self-regulatory systems are preferable. This is because the independence of self-regulatory systems is most clearly guaranteed and there is less of a risk of the oversight body becoming coopted or media regulation being used for illegitimate purposes. However, the establishment and continued effectiveness of self-regulatory systems are dependent on the goodwill and cooperation of the media sector, which can be difficult to obtain. As a result, in some contexts it is more practical to establish a co-regulatory system.

Activity 4: Reading

Estimated reading time: 4 minutes

Principles Governing Broadcast Regulation

It is well established that States may impose more intrusive forms of regulation on broadcasting than on the print media. This is in part because the broadcast media are a more powerful and intrusive form of media. Indeed, the guarantee of freedom of expression in Article 10(1) of the European Convention on Human Rights says that: "This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".

Whereas licensing is not legitimate for the print media, it is accepted and still widely practised for broadcasters. A key difference is that, at least historically, broadcasting was distributed by

way of a limited public resource, namely the spectrum or the airwaves. The spectrum is owned by each country, and regulation has been needed to ensure the orderly use of this resource to prevent interference between broadcasters and to ensure that the public airwaves are used for the public benefit. As a result, the main justification for licensing has been that it is a proper way to provide an exclusive grant to use a public resource.

However, modern technologies are now challenging this rationale. In particular, newer technologies such as cable, satellite, digital and, of course, Internet broadcasting are starting to do away with both scarcity and the use of a public resource to distribute broadcasting. In response to this, many countries are moving away from licensing to more of a registration-like approach for broadcasters which distribute using these newer technologies. One issue here is deciding which jurisdiction should be responsible for regulating purely online services. Some countries limit their control to those companies which are legally registered in their jurisdiction, as international legal problems may well arise if one country tries to regulate a company based in another country.

In those places where licensing is still in place, it can be done in a way that contributes to all three of the types of media diversity which were described in the first video of this Module. Content diversity can be promoted by making this an explicit licensing criterion so that, for example, broadcasters which are proposing to provide a greater degree of content diversity will be given preference for the award of a licence. Similarly, the need to allocate licences to all three types of broadcasters – public service, commercial and community – can be built directly into the licensing process, which supports outlet diversity. And source diversity can be promoted by licensing rules which limit the number of licences any one owner can hold to ensure that no one exerts too much control over broadcasting.

Licensing itself should be conducted in a manner which respects basic democratic criteria such as fairness, non-discrimination and transparency. To give effect to these standards in practice, the law should set out clearly the process according to which licence applications will be assessed. This includes things like the details about each step in the process, including any rights of interested parties and the public to make representations, clear time limits, details of the cost of making any application and any ongoing annual fees, any technical conditions attached to licences and, very importantly, a list of the criteria which will be used to make the licensing decisions.

It is common for licensing conditions to include a number of positive content requirements. These often include requirements to carry a certain amount of domestic or regional content. They can also include requirements to carry a certain amount of local programming. Local audiences are often hungry for local news in addition to national and international news, but it can represent more effort and cost to produce local news, so formal requirements can help ensure that there is

sufficient coverage of local matters. Another common kind of positive content requirement is an obligation to purchase a certain percentage of content from independent producers which are not affiliated with any broadcaster. This can help foster creative talent and develop an independent broadcasting sector. Some countries have maintained these positive content requirements even where broadcasters are not subject to licensing.

The imperative for a complaints system to address problematic content and boost professionalism is the same for broadcasters as it is for the print media. And this applies whether broadcasters have been licensed or are just registered. However, whereas complaints systems for the print media are normally self- or co-regulatory, complaints systems for broadcasters are normally either co-regulatory or statutory in nature. Both are established by law but, in a co-regulatory system, the oversight body will be set up with significant input from broadcasters rather than by a body which is set up without such input (as set out in the law).

Another difference between complaints systems for broadcasters and the print media is that sanctions for the print media tend to be very limited in nature. The print media may be required to publish an apology or a statement acknowledging the breach. However, broadcasters are generally also liable to fines and even the possibility of their service being suspended or, if the offences are particularly serious and frequent, having their licence revoked. This no doubt derives from the fact that broadcasting is a more powerful and intrusive form of media, and it therefore has far more potential to cause harm as a result of something that is broadcast rather than something which is merely read.

Activity 5: Reading

Estimated reading time: 5 minutes

Regulation of Public Service Media

Public media, and especially public broadcasters, are found in countries around the world. However, there is a big difference between public service broadcasters and government broadcasters. The former can make an important contribution to quality, public interest news and other media content. By contrast, government broadcasters are normally controlled by the government of the day and tend to distort the media environment rather than contributing to diversity. As a result, international law calls for the transformation of any government broadcasters into public service broadcasters. Three main crosscutting issues define public service media or distinguish them from government media, namely independence, adequate funding and accountability to the public as a whole rather than to the government of the day.

It is accepted that public service broadcasters are an important part of a robust media environment, and this was clear from the statements about diversity which were cited above. An issue which has not attracted very much attention, but which is important, is whether it is legitimate also to have public service print media. The fact is that in most cases where public print media do exist, they remain under the control of the government and so do not qualify as public service media. That said, there is no reason why, in principle, print media could not also be independent, adequately funded and accountable to the public. Absent these features, however, they will not qualify as public service media.

The main rationale for public service broadcasters is their contribution to media diversity, thereby enhancing the range of information and ideas which are available to the public. A key idea here is that these broadcasters provide quality content rather than being driven by only considerations of audience share, and the advertising revenues which follow it, which can promote a lowest common denominator approach to programme content. Public service broadcasters can also help ensure that minority voices and perspectives, which may be ignored by commercial broadcasters, feature in their programming.

Protecting Independence

It is necessary to protect the independence of public service broadcasters. This is to ensure that they provide public interest information rather than information which supports one or another political party or the government. This seems obvious, and the core rationale behind this was set out very eloquently some 25 years ago by the Supreme Court of Ghana:

> [T]he state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouth-piece of any one or combination of the parties vying for power, democracy would be no more than a sham.[106]

In practice, two key means are used to ensure independence. First, the broadcaster should be overseen by an independent board of directors or governors. This board's independence, in turn, should be protected, much in the same way as for regulators, including via the way its members are appointed, through strong guarantees and protection of tenure and through both prohibitions on political figures being appointed and requirements of expertise.

Second, the editorial independence of these broadcasters should be guaranteed. Editorial independence means that responsibility for editorial decision-making rests with the staff – and ultimately with senior editors – rather than with governing bodies. The powers of the governing body should be limited to having overall responsibility for the organisation, while managers and editors should be responsible for day-to-day and editorial matters. This creates a two-tier structure to protect independence: the board generally oversees the work and reports to parliament (i.e. provides accountability at the highest level) while management makes specific editorial (i.e. content) decisions.

Funding Public Broadcasters

If public service broadcasters are to contribute to diversity in the ways outlined above – namely through producing quality programming which covers all voices and perspectives in society, including comprehensive news programming – they need to be adequately funded.

This is reflected in a number of international statements about funding for them. Thus, Principle 13(4) of the Declaration of Principles of Freedom of Expression and Access to Information in Africa states: "Public service media shall be adequately funded in a manner that protects them from undue interference." In their 2007 Joint Declaration on Diversity in Broadcasting, the special international mandates on freedom of expression noted:

> Special measures are needed to protect and preserve public service broadcasting in the new broadcasting environment. … Innovative funding mechanisms for public service broadcasting should be explored which are sufficient to enable it to deliver its public

[106] *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.

> service mandate, which are guaranteed in advance on a multi-year basis, and which are indexed against inflation.[107]

As with regulators, it is important that funding systems not be allowed to be abused to exert control over public broadcasters. Most public service broadcasters rely on a mixed funding model using both public and private sources, mainly advertising. Paragraph 14 of Recommendation 1878 (2009) of the Parliamentary Assembly of the Council of Europe refers to the following possible sources of funding:

> The funding of public service media may be ensured, through a flat broadcasting licence fee, taxation, state subsidies, subscription fees, advertising and sponsoring revenue, specialised pay-per-view or on-demand services, the sale of related products such as books, videos or films, and the exploitation of their audiovisual archives.

Broadcasting fees have the advantage of being relatively insulated against political interference, but it can be hard to put them in place where they are not already being levied. Where a public service broadcaster receives a direct State subsidy, it is useful to have parliament set the level of this subsidy.

Accountability

Independence does not mean that public service broadcasters are free to do whatever they want. They are still bound by obligations of accountability to the public. In general, these systems work by having a clear mandate for the public service broadcaster set out in legally binding form (whether in a law or some form of subordinate legislation), and then having the body present an annual report to parliament, which is also made public. The effectiveness of such a system depends on parliament taking its oversight role seriously.

Several international statements recognise the importance of a clear mandate for public service broadcasters. For example, in their 2007 Joint Declaration on Diversity in Broadcasting, the special international mandates on freedom of expression noted:

> The mandate of public service broadcasters should be clearly set out in law and include, among other things, contributing to diversity, which should go beyond offering different types of programming and include giving voice to, and serving the information needs and interests of, all sectors of society.

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[107] See also: Thomas Gibbons, "Concentrations of Ownership and Control in a Converging Media Industry", in Chris Marsden & Stefaan Verhulst, eds., *Convergence in European Digital TV Regulation* (London, Blackstone Press Ltd., 1999), pp. 155-173, at 157.

Principle 13(6) of the Declaration of Principles of Freedom of Expression and Access to Information in Africa states:

> The public service ambit of public broadcasters shall be clearly defined and include an obligation to ensure that the public receive adequate and politically balanced information, particularly during election periods.

This highlights another obligation which is commonly imposed on public service broadcasters, namely to be balanced and impartial, especially in their news and current affairs programming.

Activity 7: Reading

Estimated reading time: 15 minutes

Regulating Online Content and Digital Service Providers

The right to freedom of expression clearly applies to the Internet, as it does to any other form of communication. This flows directly from the language of Article 19 of the ICCPR, which protects expression through "any other media of his choice". However, the advent of the Internet represented a major shift in how we communicate due to the speed, breadth and accessibility of information sharing it enables. Printed newspapers, radio and television tended to give powerful platforms to a very limited number of individuals. But with the rise of the Internet and particularly social media, any individual can now transmit thoughts to a potentially vast number of people immediately and, also instantaneously, has access to a tremendous number of sources of information from around the globe. These unique properties of the Internet have necessitated developing new approaches to regulation.

General Regulatory Standards

States cannot just apply regulatory systems designed for other means of communication to the Internet, just as they cannot simply apply broadcasting systems to the print media, because of the profound differences between these types of media. Thus, in paragraph 39 of General Comment No. 34, the UN Human Rights Committee noted: "Regulatory systems should take into account the differences between the print and broadcast sectors and the

internet". Similarly, in their 2011 Joint Declaration on Freedom of Expression and the Internet, the special international mandates on freedom of expression stated:

> Approaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet but, rather, need to be specifically designed for it.[108]

In terms of licensing/registration, international actors have made it clear that it is not appropriate to impose special licensing systems on Internet service providers or Internet-based communications services above and beyond those which apply generally to telecommunications service providers, which is the category of business they fall into. Thus, paragraph 43 of General Comment No. 34, the Human Rights Committee indicated:

> Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with [Article 19(3) of the ICCPR].

In their 2005 Joint Declaration, the special mandates went even further, noting:

> No one should be required to register with or obtain permission from any public body to operate an Internet service provider, website, blog or other online information dissemination system, including Internet broadcasting. This does not apply to registration with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation.[109]

This is supported by the Council of Europe's leading statement on this issue, the Declaration on Freedom of Communication on the Internet, which states:

> The provision of services via the Internet should not be made subject to specific authorisation schemes on the sole grounds of the means of transmission used.[110]

Regulating Content

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[108] Adopted 1 June 2011, para. 1(c), https://undocs.org/CCPR/C/GC/34.

[109] Adopted 21 December 2005, https://www.osce.org/fom/27455.

[110] *Adopted by the Committee of Ministers on 28 May 2003, Principle 5*, https://rm.coe.int/16805dfbd5.

States should not impose general blocking or filtering measures, or shutdowns of the Internet, something which is, unfortunately, still quite prevalent in many countries around the world. Thus, in their 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations, the special international mandates stated:

> Filtering of content on the Internet, using communications 'kill switches' (i.e. shutting down entire parts of communications systems) and the physical takeover of broadcasting stations are measures which can never be justified under human rights law.[111]

A similar idea is expressed in Principle 3 of the Council of Europe's Declaration on Freedom of Communication on the Internet:

> Public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers. This does not prevent the installation of filters for the protection of minors, in particular in places accessible to them, such as schools or libraries.

Internet shutdowns have been the subject of litigation before the Community Court of Justice of the Economic Community of West African States (ECOWAS). In *Amnesty International Togo and others v. the Togolese Government*, the government attempted to justify, on national security grounds, an Internet shutdown which occurred in a context of protests. However, the Court found the restriction on freedom of expression to be unjustified, relying on the lack of any legal basis for it under Togolese law.[112] More recently, the Court considered the case of an Internet shutdown in *Associations des Blogeurs de Guinée (ABLOGUI) and 3 others v. State of Guinée*, in which the government failed to mount a defence.[113] In addition to finding that the restriction on freedom of expression was not provided by law, the Court noted that, even if the authorities had been pursuing a legitimate interest, "the measures used to block access to the Internet would remain a

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[111] Adopted 4 May 2015, clause 4(c), https://www.law-democracy.org/live/wp-content/uploads/2015/05/JD-2015.final_.Eng_.pdf. See also the 2005 Joint Declaration, https://www.osce.org/files/f/documents/5/d/27455.pdf; the 2011 Joint Declaration, clauses 3 and 6(b), https://www.osce.org/representative-on-freedom-of-media/78309; and the 2017 Joint Declaration, clauses 1(f) and (g), https://www.osce.org/fom/302796.

[112] 25 June 2020, Judgment No. ECW/CCJ/JUD/09/20, para. 45, http://www.courtecowas.org/wp-content/uploads/2022/08/JUD-ECW-CCJ-JUD-09-20-Amnesty-Int.-TOGO-7-ORS-vs.-REP.-OF-TOGO-25_06_20-vA.pdf.

[113] 31 October 2023, Judgment No. ECW/CCJ/JUD/38/23, http://www.courtecowas.org/wp-content/uploads/2023/12/JUDGMENT-ABLOGUI-V-GUINEA-ENG.pdf.

disproportionate means insofar as they render communications almost impossible, and the internet inaccessible to all users".[114]

There is a major global debate taking place currently about how to address the problem of harmful speech online. It is accepted that (otherwise appropriate) rules relating to content, such as hate speech, obscenity and defamation laws, should also apply to online content. But an issue arises as to who should be held responsible for this content. It is clear that intermediaries cannot be responsible for the often vast numbers of statements made through their systems and which they simply cannot monitor. It is indeed widely accepted that intermediaries should not be required to monitor content for illegality (i.e. they should not be required to inform themselves about what is being made available through their systems). This is reflected in Principle 6 of the Council of Europe's Declaration on Freedom of Communication on the Internet:

> Member States should not impose on service providers a general obligation to monitor content on the Internet to which they give access, that they transmit or store, nor that of actively seeking facts or circumstances indicating illegal activity.

There is also broad agreement that actors who merely facilitate access to the Internet or the flow of information over the Internet (sometimes referred to as Internet service providers or ISPs), should not be liable for the content which flows through their services. This is again reflected in Principle 6 of the Council of Europe's Declaration on Freedom of Communication on the Internet:

> Member States should ensure that service providers are not held liable for content on the Internet when their function is limited, as defined by national law, to transmitting information or providing access to the Internet.

This is sometimes referred to as the 'mere conduit principle', as noted by the special international mandates in their 2011 Joint Declaration:

> No one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not

[114] *Ibid*., para. 58.

> specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so ('mere conduit principle').[115]

However, beyond that, there is less agreement.

When it comes to other kinds of intermediaries, it is apparent that a strict liability model is inappropriate. If, for example, search engines and social media companies were to be held reliable for every harmful information they transmitted or directed users to, whether or not they were aware of its content, this would simply not be a workable system. However, there are various more limited approaches to intermediary liability with no clear consensus as to the kind of approach to adopt.

One more limited (i.e. conditional) liability model is called a 'notice and takedown' approach. This entails that once an intermediary has been notified of illegal content, it must remove or block access to that content. The intermediary is protected against liability for the content as long as they act expeditiously once they receive notice of its alleged illegality.[116]

The possibility of notice and takedown systems is foreseen in Principle 6 of the Council of Europe's Declaration on Freedom of Communication on the Internet. This is also the approach taken in the European Union's Digital Services Act (DSA). The details of notice and takedown systems differ, for example in respect of what exact consequences there are for intermediaries which fail to take down content. However, there are general concerns that these systems fail to provide sufficient protection for freedom of expression because they incentivise intermediaries to take down content when they are notified about a breach, even if the content may not clearly be illegal. Intermediaries do not have the means to assess every claim and they are not in any case willing to take on the potential risk of liability should a court subsequently disagree with their assessment.

In paragraph 2(b) of their 2011 Joint Declaration on Freedom of Expression, the special international mandates essentially ruled out pure notice and take down systems:

> Consideration should be given to insulating fully other intermediaries, including those mentioned in the preamble, from liability for content generated by others under the same conditions as in paragraph 2(a) [which describes the 'mere conduit principle']. At a minimum, intermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide

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[115] Joint Declaration on Freedom of Expression and the Internet, 1 June 2011, para. 2(a), https://www.osce.org/representative-on-freedom-of-media/78309.

[116] Rebecca MacKinnon, *et al.*, *Fostering Freedom Online: The Role of Internet Intermediaries* (2014, Paris, UNESCO), pp. 40- 42, http://unesdoc.unesco.org/images/0023/002311/231162e.pdf.

sufficient protection for freedom of expression (which is the case with many of the 'notice and takedown' rules currently being applied).

Another approach to intermediary liability, which provides greater protection for freedom of expression, is a 'notice and action' system. Under such a system, intermediaries are required to make some determination as to what action to take when notified of allegedly illegal content. Following this, they must engage in a good faith determination of whether the content is illegal and needs to be taken down or blocked, or legal and left up. What distinguishes such a system from a notice and takedown approach is that the intermediary is not responsible for whether their determination was correct; i.e. they are not held liable if their determination is ultimately deemed to be incorrect by a court as long as they came to a good faith determination of what action to take.

Yet another possible approach to intermediary liability, which is likewise more freedom of expression-friendly than a notice and takedown approach, is a 'notice and notice' model. This requires intermediaries to notify authors of content which has been impugned. The authors then have the option either of defending their content directly (which might require them to emerge from behind a veil of anonymity) or not defending it, in which case the process essentially translates into a notice and takedown approach with the intermediary taking action.

Notice and Takedown	Notice and Action	Notice and Notice
• Intermediaries must remove or block access to allegedly illegal content upon notification. • May overly incentivise intermediaries to take down content to avoid liability even where illegality is not clear.	• Intermediaries must make a determination as to what action to take upon notification of allegedly illegal content. • There is less of an incentive for intermediaries to take down content because they do not face liability if they make a determination which is ultimately deemed to be incorrect. • This depends on intermediaries making good faith efforts to come to correct determinations.	• Intermediaries must notifiy authors of content upon notification of allegedly illegal content and give them the opportunity to either defend their content or not, in which case the intermediary will normally take it down. • This may help reduce intentives for excessive takedowns.

It should be noted that other issues arise in relation to breaches of intermediaries' terms of service, where a much wider range of potential responses is available, the appropriateness of which will depend on various factors, including the nature of the content, whether the user has repeatedly posted harmful content, and the nature of the intermediary and its terms of service. Potential

actions here could be to do nothing; providing a warning message for sensitive or misleading content; demonetising or otherwise demoting content; providing links to accurate information or allowing users to do so, as is the case with the community notes feature on X (formerly known as Twitter); removing content; or potentially temporarily suspending or banning the user. The large range of options available to platforms differs considerably from the far more limited options available to States to deal with illegal content. This brings certain opportunities from the standpoint from freedom of expression, by enabling less intrusive options which still deal effectively with harmful speech than existed previously. However, this also means that the question of how platforms should deal with certain content is still very much a live debate.

Beyond the issue of intermediary liability, the borderless nature of the Internet also raises some challenges for determining liability for authors of content, as it is not always apparent where jurisdiction should be asserted in relation to online content. This content is available in every country in the world. Yet, it is obviously not appropriate to make authors liable in every country, which would lead to a lowest common denominator approach (i.e. where everyone would be held to the standards of the most restrictive country). To address this, paragraph 4(a) of the 2011 Joint Declaration of the special international mandates states:

> Jurisdiction in legal cases relating to Internet content should be restricted to States to which those cases have a real and substantial connection, normally because the author is established there, the content is uploaded there and/or the content is specifically directed at that State. Private parties should only be able to bring a case in a given jurisdiction where they can establish that they have suffered substantial harm in that jurisdiction (rule against 'libel tourism').

Standards are also starting to emerge to address the tendency in many States to impose sweeping restrictions on digital content which essentially duplicate rules governing the same content disseminated offline, often with harsher punishments. Rather than having two parallel sets of rules for the same content, better practice is just to tweak the offline rules so that they also cover digital content. Thus, in their 2018 Joint Declaration on Media Independence and Diversity in the Digital Age, the special international mandates on freedom of expression stated:

> Restrictions which are designed specifically for digital communications should be limited in scope to activities which are either new or fundamentally different in their digital forms (such as spamming)… .[117]

Encryption and Anonymity

[117] Adopted 2 May 2018, para. 3(c), https://www.law-democracy.org/live/wp-content/uploads/2018/12/mandates.decl_.2018.media-ind.pdf.

Tools allowing for encryption and anonymity are enormous facilitators of free speech online. In general, international law supports the use of these tools, recognising that any limits should be applied only on a case-by-case basis. Thus, clause 8(e) of the 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations of the special international mandates states:

> Encryption and anonymity online enable the free exercise of the rights to freedom of opinion and expression and, as such, may not be prohibited or obstructed and may only be subject to restriction in strict compliance with the three-part test under human rights law.

An exception to this is targeted police actions against criminal suspects. This is reflected in Principle 7 of the Council of Europe's Declaration on Freedom of Communication on the Internet:

> In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity. This does not prevent member states from taking measures and co-operating in order to trace those responsible for criminal acts, in accordance with national law, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements in the fields of justice and the police.

In recognition of the importance of anonymity, the outcome document of a multistakeholder conference hosted by UNESCO in 2015 put forward the following option for UNESCO to pursue: "Recognise the role that anonymity and encryption can play as enablers of privacy protection and freedom of expression, and facilitate dialogue on these issues."[118]

At the same time, it has to be recognised that anonymity has been one of the factors prompting a flood of online speech ranging from nasty to downright illegal. As noted in the 2021 UNESCO report *Letting the sun shine in: transparency and accountability in the digital age*:

> Anonymity, though a benefit in some circumstances, often appears to allow people to express themselves in anti-social ways they would not dare if their identity was known. Closed groups may be used to advance or oppose human rights. The environment is also vulnerable to manipulation through the creation of false identities and the dissemination of disinformation, which is often funded and well-organised, and which is increasingly used

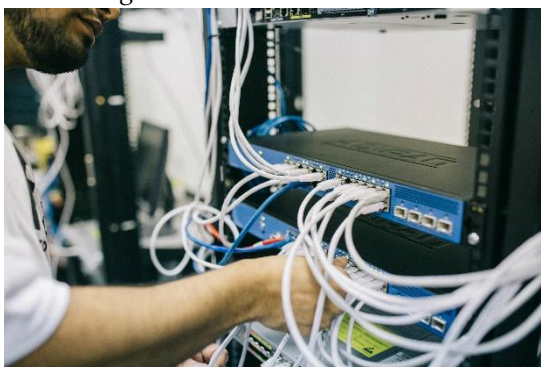
[118] Outcome document of the "CONNECTing the Dots: Options for Future Action" Conference (2015, UNESCO), Annex p. 3, https://unesdoc.unesco.org/ark:/48223/pf0000234090.

> to affect democratic elections globally as well as to attack critical journalists and civil society actors.[119]

Due to their high profile, members of parliament are often singled out for harassment, including online harassment. A report from the 2019-2020 UK House of Commons Joint Committee on Human Rights found that many parliamentarians avoided social media due to the problem of online abuse, and many believed that anonymity "fostered online abuse".[120] If parliamentarians feel pressure to no longer participate in social media to minimise harassment, that is not only problematic from the standpoint of their own human rights, but also is unfortunate because social media can be a useful tool for constituents to connect directly with their representatives.

The notice and notice system, referred to above, is one way to address the issue of harmful, anonymous content (i.e. anonymous posters either have to stand up for their content or accept that whichever company is hosting it may take it down).

Promoting Access to the Internet



States also have positive obligations in the context of the Internet. Due to its incredibly important role not only in facilitating voices but also in giving access to information which is needed to support a range of other rights, it is increasingly accepted that States need to promote universal access to the Internet. Thus, in paragraph 15 of General Comment No. 34, the UN Human Rights Committee stated:

> States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.

Similarly, in paragraph 6(a) of their 2011 Joint Declaration, the special international mandates stipulated:

> Giving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet. Access to the Internet is also necessary to promote

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[119] Andrew Puddephatt, *Letting the sun shine in: transparency and accountability in the digital age* (2021, UNESCO), p. 6, https://unesdoc.unesco.org/ark:/48223/pf0000377231.

[120] *Democracy, freedom of expression and freedom of association: Threats to MPs*, 18 October 2019, HC 37, HL Paper 5, paras. 100 and 105, https://publications.parliament.uk/pa/jt201919/jtselect/jtrights/37/37.pdf.

> respect for other rights, such as the rights to education, health care and work, the right to assembly and association, and the right to free elections.[121]

This does not mean that States are expected to provide universal access immediately, an impossibility for many States. Instead, they need to devote appropriate attention and resources to this issue. Paragraph 6(e) of the 2011 Joint Declaration puts forward some ideas about how this could be done, including through regulatory measures (such as universal service obligations for access providers), direct support, promoting awareness and giving special attention to access for persons with disabilities.

Activity 8: Video

UNESCO video "How to address online #HateSpeech with a human rights-based approach?"

Transcript:

Words have power. So do images. They can change lives for better or worse. But some people use messages that violate other people's rights to dignity, equality and safety, so when does free speech become criminal hate speech and how do we best respond to it?

There's no agreed definition of "hate speech". That's why in some cases those with privilege try and discredit critics by opportunistically accusing them of hate speech. Usually, hate speech is classified as derogatory or discriminatory language towards an individual or group based on their religious beliefs, ethnicity, race or nationality. The UN Strategy and Plan of Action on Hate Speech include sex and gender. International law dictates that some of this speech shouldn't be protected. In other words, some can be criminalised, only when it is linked to incitement to violence, hostility or discrimination, and to racism.

Two helpful guidelines here are the International Covenant on Civil And Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Additionally, the United Nations Rabat Plan of Action on the Prohibition of Incitement to Hatred advises us at which point specific speech crosses the line into causing violence, hostility or discrimination. These three instruments have helped lawmakers define and courts to assess

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[121] See also the 2005 Joint Declaration, https://www.osce.org/files/f/documents/5/d/27455.pdf; the 2014 Joint Declaration on Universality and the Right to Freedom of Expression, 6 May 2014, clause 1(h)(iii), https://www.osce.org/fom/118298; and Principle 4 of the Council of Europe's Declaration on Freedom of Communication on the Internet, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dfbd5.

whether speech qualifies as hate speech and what to do about it. And especially what to do when hateful expression is not directly linked to hate crimes involving incitement and/or racism.

While Internet companies today have to obey laws prohibiting hate speech, there is a question of how they interpret and implement these laws in practice. There is also a question of how they treat hateful content that appears to be within the law, like whether they tolerate, delete or downgrade it. Tech companies are working to address these problems, especially after advertiser boycotts and accusations that profits are generated by allowing hate to proliferate online while not spending serious money to combat it. But the way they treat hateful content remains vague and hidden from independent research and public scrutiny. It's unclear when or why algorithms automatically recommend, downgrade or remove hateful content or groups. And although they use artificial intelligence to manage the issue, this doesn't sufficiently cater for the context of words and images. The risk is that news reports on hate speech are caught in the net while coded words and images for hate are not recognised. Another problem is inaction by the companies even though with their data they can see when hateful content begins to scale to incitement and organising of attacks.

Key strategies to address this problem? First: promoting Internet transparency is key if companies are to fall in line and deliver full respect for human rights, maintaining people's dignity and safety, while legitimate expression is allowed and indeed promoted. Second: ensuring that journalists are free to report and expose hate speech, working without fear when they call out leaders and their followers who whip up anger through insulting stereotypes and memes. Third: supporting citizens through building their media and information literacy so they can recognise and respond to hate speech through critical thinking and human rights awareness. Navigating the fine line between free speech and hate speech isn't easy. But in the interests of protecting human rights for all, we can and must work together more intensively to address the problem without silencing free expression and the benefits it has for democracy, development and human rights.

Activity 9: Reading

Estimated reading time: 10 minutes

New Challenges Posed by Online Speech

The dominant view of the Internet until very recently was one of a space which massively facilitates and democratises free speech. For relatively little cost, an increasingly large proportion of the world has access to a medium which allows them to speak globally and to access a previously unimaginable range of information. More recently, however, the potential for online speech to cause harm or undermine key social values, including democracy, has become apparent.

A leading example of this is the abusive use of personal data for purposes of influencing elections. In the past, the options for tailoring the targeting of advertisements was limited to adjusting the timing and/or placement of advertisements, for example in a particular television programme or type of magazine, so as to reach a certain audience. With social media, however, very precise psychological and political profiles on individuals can be constructed based on the vast trail of data which most people leave behind them online, whether through Facebook, Google, Amazon or some other online service. Furthermore, this can be done automatically, at very little cost and almost instantaneously. Automated tools can then be used to send out political messages which are carefully tailored to the individual in question. This ability to micro-target very precise messages aimed at a particular individual has sometimes been referred to as "weaponising" our personal data.

The case of Cambridge Analytica

Cambridge Analytica

The case of Cambridge Analytica and its role in the Brexit referendum and the 2016 United States presidential election are complicated, but the essential facts are not. Aleksandr Kogan, a researcher who worked at the University of Cambridge, built an application, "This is your digital life", for use on the Facebook platform (with Facebook's agreement). Some 270,000 users took the personality quiz which was part of the app, voluntarily sharing extensive personal data. Kogan then provided the data he had harvested to Cambridge Analytica, and a flaw in Facebook's systems allowed them to harvest additional data from friends of those who had consented to this use of their data. Facebook has indicated that 87 million users were affected, mostly based in the United States (with also over a million users in the United Kingdom), but some estimates put the number much higher than that.

Using this treasure trove of information, Cambridge Analytica then sent targeted messages to voters to convince them to vote for Donald Trump, after being hired to do so by Trump supporters. The company, which closed in early May 2018, boasted of its role in supporting the Trump campaign:

> Analyzing millions of data points, we consistently identified the most persuadable voters and the issues they cared about. We then sent targeted messages to them at key times in order to move them to action. All of this was achieved in a fraction of the time and at a much lower cost than was spent by our rivals.[122]

While access to alternative sources of information via social media has the benefit of overcoming certain limitations of legacy media, it has also had some negative repercussions. One issue which is of increasing concern, especially in relation to the democratic process, is the growing prevalence of information silos or "filter bubbles". This problem refers to the fact that many social media platforms prioritise the provision to users of information they already want to hear or believe in. In the worst-case scenario, this leads to situations where people live in confined information silos and hear the same information, whether true or false, and political or social attitudes. This may be contrasted with the situation in the past, where a large majority of citizens came together around the main evening news on a small number of television channels or radio broadcasts. As one commentator put it:

> In truth, social media is not a telescopic lens — as the telephone actually was — but an opinion-fracturing prism that shatters social cohesion by replacing a shared public sphere and its dynamically overlapping discourse with a wall of increasingly concentrated filter bubbles.[123]

Closely related to this is what is a very old problem of disinformation or "false news". Although it is irresponsible of them to do so, politicians and others seeking influence in society have always been tempted to be economical with the truth, so to speak. But in the modern, social media world, it is much easier to spread lies than before, a problem exacerbated by filter bubbles, which make it far more difficult to expose and thus defeat the lies. The problem is also exacerbated by the

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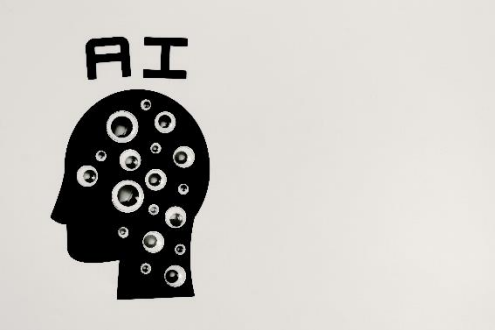
[122] Reproduced in Ann E. Cudd, Mark C. Navin (eds.), *Core Concepts and Contemporary Issues in Privacy* (Cham, Switzerland, 2018, Springer), p. 201.

[123] Natasha Lomas, "Social media is giving us trypophobia", TechCrunch, 27 January 2018, https://techcrunch.com/2018/01/27/social-media-is-giving-us-trypophobia.

operation of bots, automated programmes which now account for almost 50 per cent of Internet traffic.[124] A lot of bots help make our online lives easier by automating and simplifying tasks for us. But bots can also be used to create fake social media accounts which automatically distribute disinformation or give the erroneous impression of greater public support for or opposition to policies than truly exists. They can also sow division in societies by amplifying polarising narratives or turbocharging harassment campaigns.



The growth of artificial intelligence (AI) risks further aggravating this problem. Meta publishes quarterly updates on what it calls "coordinated inauthentic behavior", meaning "coordinated efforts to manipulate public debate for a strategic goal, in which fake accounts are central to the operation", as well as the actions it has taken in response. According to its May 2024 Adversarial Threat Report, while the company has not yet seen "photo-realistic AI-generated media of politicians as a broader trend", it has found "photo and image creation, AI-generated video news readers, and text generation".[125]

While we are still in the relatively early stages of AI, there are troubling signs about the potential for abuses of this technology, particularly during electoral periods. For example, in 2023, two days before Slovakia's election, an audio recording purportedly showing a party leader discussing with a journalist how to manipulate elections was posted to Facebook.[126] While media fact-checkers found evidence the audio recording had been manipulated by AI, the existence of a 48-hour period where media are supposed to remain silent before elections made efforts to debunk the recording more difficult.[127] Further complicating matters was the fact that Facebook's policies towards AI-generated content focused on deepfake videos rather than audio recordings,

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[124] Security Magazine, "47% of all internet traffic came from bots in 2022", 11 May 2023, https://securitymagazine.com/articles/99339-47-of-all-internet-traffic-came-from-bots-in-2022.

[125] P. 4, https://scontent.fyhz1-1.fna.fbcdn.net/v/t39.8562-6/445235204_402858536059630_7403303878106178024_n.pdf?_nc_cat=100&ccb=1-7&_nc_sid=b8d81d&_nc_ohc=H60p-CJWk3YQ7kNvgH_EDO-&_nc_ht=scontent.fyhz1-1.fna&oh=00_AYBRv-eJRS0n2LySrHXQhuvi1G56ny0Up2Oyba7AxVhHGA&oe=666505FF.

[126] Morgan Meaker, "Slovakia's Election Deepfakes Show AI Is a Danger to Democracy", 3 October 2023, Wired, https://www.wired.com/story/slovakias-election-deepfakes-show-ai-is-a-danger-to-democracy.

[127] *Ibid*.

an issue Facebook has since acknowledged by pledging to begin labelling a "wider range" of content as "Made with AI" when this is discovered.[128]

Disinformation (i.e. the intentional spreading of false information, in contrast to misinformation which lacks such intent), while a problem for society and democratic discourse as a whole, often has a disproportionate impact on marginalised groups in societies. The preamble to the 2017 Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda of the special international mandates on freedom of expression recognised the problem of disinformation:

> *Taking note* of the growing prevalence of disinformation (sometimes referred to as "false" or "fake news") and propaganda in legacy and social media, fuelled by both States and non-State actors, and the various harms to which they may be a contributing factor or primary cause.

The Joint Declaration noted that general prohibitions on "false news" were incompatible with the guarantee of freedom of expression, while recognising that false statements in particular contexts, such as defamation, might give rise to a civil cause of action. This finding is consistent with more recent statements and even jurisprudence. Notably, in *Federation of African Journalists and others v. The Republic of The Gambia*, the Community Court of Justice of the Economic Community of West African States ordered the Gambia to review and decriminalise the publication of "false news", as well as sedition, libel and defamation, after finding that the practice of using such provisions to impose criminal sanctions had a "chilling effect" on freedom of expression and that the criminal sanctions imposed in that case were disproportionate.[129]

In terms of alternative, non-punitive solutions to "false news", the 2017 Joint Declaration focused heavily on the idea of promoting an enabling environment for freedom of expression, in the hope that this would, over time, privilege the truth. It also called, in paragraph 2, on State actors both to avoid making false statements and to disseminate accurate information:

> c. State actors should not make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda).
>
> d. State actors should, in accordance with their domestic and international legal obligations and their public duties, take care to ensure that they disseminate reliable

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[128] Monika Bickert, "Our Approach to Labeling AI-Generated Content and Manipulated Media", 5 April 2024, Meta, https://about.fb.com/news/2024/04/metas-approach-to-labeling-ai-generated-content-and-manipulated-media.

[129] 13 March 2018, Judgment No. ECW/CCJ/JUD/04/18, pp. 43-44, http://www.courtecowas.org/wp-content/uploads/2019/02/ECW_CCJ_JUD_04_18.pdf.

> and trustworthy information, including about matters of public interest, such as the economy, public health, security and the environment.

While this focuses mainly on officials, it could also be read as applying to parliamentarians.

Interacting with a lot of these problems is the fact that a small number of online companies have now become massively dominant market players. The power of these companies to effect changes in our behaviour simply by tweaking their algorithms and the programmes which determine how information flows through their platforms and websites is a subject of growing debate and concern around the world.

Oftentimes, false information, such as conspiracy theories, are just the kind of content which makes for sensational stories which spread virally on these platforms. As the Filipino/American journalist and 2021 Peace Prize winner Maria Ressa has put it, social media "prioritizes the spread of lies, laced with anger and hate over facts, over boring truth".[130] The problem of mis- and disinformation online has been exacerbated by the business models of most social media companies, which thrive on users spending additional time on their platforms. As part of this, many amplify sensational content, including much false or misleading content.

One significant harm from disinformation is the issue of gendered disinformation, which has garnered increasing attention in recent years.

Gendered disinformation often targets multiple aspects of individuals' identity, with racialised groups, religious minorities and LGBTQ+ communities' being disproportionately impacted.[131] Ultimately, gendered disinformation, as well as the distinct but sometimes overlapping phenomena of gendered hate speech and gender-based online violence, can make women less willing to participate in the public sphere. The relationship between disinformation campaigns and other forms of online abuse was described in a 2021 UNESCO report on online violence against female journalists as follows:

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[130] Giannina Ong, "Maria Ressa On Fighting Disinformation Globally", 7 February 2024, Mochi Magazine, https://www.mochimag.com/activism/maria-resa-disinformation-philippines.

[131] *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan*, 7 August 2023, paras. 40-41, https://undocs.org/A/78/288.

> The weaponisation of false and misleading content functions both as a method of attack (e.g., the deployment of disinformation tactics) and a lightning rod for attacks (stimulating misogynistic 'pile-ons') in the context of online violence against women journalists. Simultaneously, orchestrated disinformation campaigns operationalise gendered online violence to chill critical reporting.[132]

Women who are more visible, such as journalists, human rights defenders and politicians, are more likely to be "attacked as part of a deliberate strategy to intimidate, silence and exclude them from engaging in political and public life".[133] A 2021 IPU survey of parliamentarians in Africa found that 46 percent of female parliamentarians reported having been the target of sexist attacks online, and a similar 2018 IPU survey of female parliamentarians in Europe found that 58 percent of respondents reported being subject to online attacks.[134]

Where gendered disinformation or other forms of harassment of women is systematic, it has a chilling effect on freedom of expression in addition to undermining equality. It impacts not only the rights of would-be female participants in the public sphere, but also the right of the broader public to receive diverse information due to the resultant absence of certain voices and perspectives. Here again, the development of artificial intelligence risks turbocharging this phenomenon, including because, as outlined in a UNESCO report on this subject, it can be used to facilitate gender-based online harms, such as through the creation of more realistic fake pornographic videos and images imitating real individuals.[135]

Activity 10: Video

UNESCO video "How the Internet became toxic (and what tools we built to fix it!)"

Transcript:

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[132] Julie Posetti, *et al.*, *The Chilling: global trends in online violence against women journalists; research discussion paper* (2021, UNESCO), p. 16, https://unesdoc.unesco.org/ark:/48223/pf0000377223.

[133] *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan*, 7 August 2023, para. 37, https://undocs.org/A/78/288.

[134] *Issue Brief: Sexism, harassment and violence against women in parliaments in Africa (November 2021, Inter-Parliamentary Union)*, pp. 4 and 9, https://www.ipu.org/resources/publications/issue-briefs/2021-11/sexism-harassment-and-violence-against-women-in-parliaments-in-africa.

[135] Rumman Chowdhury and Dhanya Lakshmi, *"Your opinion doesn't matter, anyway": exposing technology-facilitated gender-based violence in an era of generative AI* (2023, UNESCO), https://unesdoc.unesco.org/ark:/48223/pf0000387483.

It's dinner time. Your family are around the table. The food is steaming hot. The mood is mellow. Then, someone drops a bombshell: "Have you seen the latest news on social media?" "No, that's not true; it's a load of conspiracies." The debate begins, and the mood changes…

Recognise this? 30 years ago, the Internet and social media revolutionised our lives. It was a moment of real social change. Suddenly voices that had never been heard came loud and clear. In recent years, malicious actors who want to silence those voices and polarise opinion are making social media a fertile ground for mis- and disinformation, for hate speech and conspiracy theories. It's become toxic. The very same tools that changed the world are now being used to tear us apart.

And the problem doesn't stop there. In order to "protect" us, governments consciously or unconsciously restrict freedom of expression and resort to censorship, even shutting down the Internet and putting journalists in jail for posting on social media. Meanwhile, digital platforms and tech companies stand by as harm is done. Things have to change. We need to allow people to participate in the conversation. We need reliable information, empowered citizens and content which reflects a diversity of voices.

So how can we fix this? We all share the responsibility. This is why UNESCO has kicked off a global conversation. We held consultations around the world and thousands gave us their feedback. Our goal? Fostering peace and dialogue in the digital sphere. Fighting disinformation and hate speech. And protecting everyone's right to express themselves freely and access reliable information.

UNESCO has produced a set of "Guidelines for the Governance of Digital Platforms". These can help governments protect freedom of expression and journalists, without using the wrong kind of restrictions. They're a tool for companies to manage risks and become more transparent. And for civil society and the media to act as a watchdog when human rights are violated. We have the tools. Now it's time to act. Let's build an Internet for trust. Learn how to participate at www.unesco.org.

Activity 11: Expert Video

[Expert video on ongoing challenges surrounding regulation of online media and content and outlining the UNESCO Internet for Trust initiative]

Ana Cristina Ruelas, Senior Programme Specialist, UNESCO

Transcript:

I'm Ana Cristina Ruelas, Senior Programme Specialist at the Freedom of Expression and Safety of Journalists section at UNESCO. UNESCO has the global mandate to protect and promote freedom of expression, access to information and safety of journalists, both offline and online.

In May 2022, UNESCO embarked on a journey to discuss the governance of digital platforms, aiming not only to mitigate online harms, but also to foster peace, dialogue and understanding in the digital sphere. This endeavour led to the creation of the Guidelines for the Governance of Digital Platforms, a human-centred multi-stakeholder framework conceived to guide various forms of governance. The first internally drafted version came to life in September 2022, initiating a ground-breaking consultation process committed to adhering to the good practice principles from deliberative democracy, achieving through fostering open, diverse, and inclusive public dialogue. At the closing of the consultation, UNESCO had gathered over 10,000 comments and engaged individuals from 134 countries.

The Guidelines may serve as a result for a range of stakeholders: for policymakers such as yourselves in identifying legitimate objectives, human rights principles, and inclusive and participatory processes that could be considered in policymaking; for regulatory and other governance bodies dealing with the implementation and evaluation of policies, code of conducts or regulation; for digital platforms in their policies and practices; and for other stakeholders, such as civil society and media, in their advocacy and accountability efforts.

For UNESCO, it is important to acknowledge that multi-stakeholder participation in the development, monitoring or evaluation of new regulation is indispensable to ensure independence and a human rights-based approach. Thank you very much.

Activity 12: Expert Video

[Expert video on ongoing challenges surrounding regulation of online media and content and outlining the UNESCO Internet for Trust initiative]

Marjorie Buscher, Executive Director, Digital Society Initiative, Chatham House

Transcript:

Hello, my name is Marjorie Buscher. I work with government thinktanks and UN agencies on technology governance. In this Module, I'm going to walk you through some of the key principles of UNESCO Guidelines for the Governance of Digital Platforms. So, why are the Guidelines so important for parliamentary work? The Guidelines are essentially a global instrument to enable human rights-respecting systems of governance. For parliamentarians like yourself, they should

be considered as a critical resource in support to your legislative work. They outline international standards for governing digital platforms and offer tangible ways to increase transparency, participation and accountability in the digital world.

So, what are the objectives of the Guidelines? The aim of the Guidelines is to safeguard the right to freedom of expression, including access to information, while dealing with content that can be permissively restricted under international human rights law and standards. Typically this refers to content that could be classified as restricted speech under Article 19.3 and 20 of the ICCPR. Put simply, the dual goal of the Guidelines is to address the risk related to the systemic spread of harmful content while protecting freedom of expression and access to free and reliable information.

So, what are the Guidelines' leading principles? Before we cover the responsibilities of key actors such as States, it's important to highlight a series of critical principles upon which the Guidelines have been structured. Firstly a human rights-based approach, which means that international human rights standards are the compass for all decision-making at every stage and by every stakeholder. The Guidelines promote also a risk and system-based approach, which focus on systems and processes for moderating content. Rather than trying to determine the legality of every piece of content online, it targets systemic and recurring risk. Thirdly, the Guidelines call for a multi-stakeholder approach, which requires a broad and inclusive participation among all actors of society. Finally, the Guidelines foster a human-centric model and highlight the importance of user-empowerment.

So, the Guidelines highlight a set of duties for all stakeholders involved in the governance of digital platforms. But for the purposes of this Module, we're only going to focus on States and digital platforms. First, concerning States. So, States around the world have been grappling with how to deal with online harms. There is, however, significant divergence in their approaches. The Guidelines recognise this diversity and have been designed to apply to a wide range of regimes. They provide a comprehensive set of recommendations, which we'll not be able to cover in their entirety in this Module. However, I invite you to consult the Guidelines for more detail on this topic.

So, I want to bring to your attention three requirements for States. Firstly, independent oversight. This implies that regulation of digital platforms should be considered only when there's an independent regulatory authority responsible for its implementation. Second, transparency. States should disclose the requirements they place on digital platforms, including the requests to takedown, remove and block content. Third, lawful approach. States should ensure that any restrictions imposed upon platforms respect the condition of legality, legitimate aim, necessity and proportionality, which also means avoiding measures that severely restrict access to information, such as Internet shutdowns.

So, what is the role of digital platforms, the meaty bit of this discussion? So platforms should comply with five key principles. They should conduct human rights due diligence and define mitigation measures. This human rights and due diligence process should be integrated into all stages of the design, including content moderation and curation policies and practices. It's worth noting this applies to both human and automated content moderation mechanisms. These mechanisms should be reliable, effective and at scale. This should be true in all jurisdictions where the platform operates and take into account the context and wide variations of linguistic and cultural particularities. Platforms should also be transparent and open about how they operate with understandable and auditable policies. This includes the need to report regularly and publicly on their responses to government demands for information and content removal.

Platforms should also make information accessible for users in their own language to understand the different products and services provided and enable them to make informed decisions about the content they share and consume. Finally, platforms should be accountable to all relevant stakeholders—that includes users and non-users—and establish reporting mechanisms for potential policy violations and appropriate redress against content-related decisions. So, to conclude, these are only a few of the principles highlighted in the Guidelines, which are designed to contribute in a practical way to the national and global efforts and your work to realise a human-centred model for digital governance. They are a living document and subject to periodic reviews and updates, including to consider the lessons learned from their implementation, as well as subsequent technological changes and impacts. Thank you for watching.

Activity 13: Reading

Estimated reading time: 6 minutes

Emerging Approaches to Regulating Online Content and Platforms

States have been wrestling with how to deal with regulating online content and the services providing it for several years, especially since the explosion in popularity of social media platforms. An early example was the German Act to Improve Enforcement of the Law in Social Networks (NetzDG), which was adopted in 2017 and

creates a notice and takedown regime.[136] The most important operative provision of this law requires online service providers to maintain an "effective and transparent procedure for handling complaints about unlawful content", which must block content normally within 24 hours for manifestly unlawful content and seven days for other kinds of unlawful content.[137] NetzDG covers 20 different provisions of the German Criminal Code provisions.[138] These cover a wide range of content crimes, including controversial ones from a human rights perspective such as criminal insult and defamation (both providing for imprisonment) and blasphemy, as well as more accepted ones such as child pornography and incitement to crime. Because platforms face heavy fines for failing to block reported content, NetzDG incentivises platforms to err on the side of caution and "over-remove" content.[139]

A more recent example of regulation of platforms is the European Union's (EU) Digital Services Act (DSA),[140] whose adoption on 19 October 2022 was a major landmark in dealing with online harms. This Regulation came into force for very large online platforms and search engines on 25 August 2023 and is applicable to all platforms as of 17 February 2024. It is influential not only because it is binding throughout the European Union, but also because it includes several novel approaches to dealing with platform regulation, including trying to address some of the systemic issues driving much of the proliferation of online harms.

The Digital Services Act (DSA)

The DSA applies to all intermediary services offered to natural or legal persons established or located in the EU (Articles 2(1) and 3(b)). It provides for very hefty fines for failure to comply with its provisions, with Member States authorised to impose fines of up to six percent of annual

[136] 12 July 2017, https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2. The Law has since been amended by the Act to Combat Right-Wing Extremism and Hate Crime, 3 April 2021 and the Act Amending the Network Enforcement Act, 28 June 2021.

[137] NetzDG, *ibid*., Articles 1(3)(1)-1(3)(3).

[138] *Ibid*., Article 1(1)(3).

[139] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, *Disinformation and freedom of opinion and expression*, 13 April 2021, para 58, https://undocs.org/A/HRC/47/25.

[140] *Regulation of the European Parliament and of the Council on a Single Market for Digital Services* (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, 15 December 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2065.

worldwide turnover on intermediaries, while also providing generally that sanctions must be "effective, proportionate and dissuasive" (Articles 52(2)-52(3)).

The DSA distinguishes between three types of intermediaries, namely those which provide "mere conduit", "caching" and "hosting" services. Those acting as "mere conduits" are not liable for content unless they engage with the content (Article 4). Caching and hosting services, on the other hand, are generally protected against liability as long as they act expeditiously to remove or disable access upon obtaining "actual knowledge" that the content is illegal (Articles 5(1)(e) and 6(1)(b)).

The DSA leaves open the possibility that judicial or administrative authorities may order intermediaries to "terminate or prevent an infringement", (Articles 4(3), 5(2) and 6(4)). The DSA also establishes certain due diligence and transparency obligations for all intermediaries (Articles 11-15).

Providers of hosting services are subject to additional obligations under Articles 16-18 of the DSA. Key among these is the requirement to establish a "notice and action" mechanism whereby they facilitate the provision, by individuals or entities, of notice to them of what the former consider to be illegal content and then process these notices in a "timely, diligent, non-arbitrary and objective manner" (Articles 16(1) and 16(6)).

Section 3 (Articles 19-28) establishes additional obligations for online platforms while excluding those which qualify as "micro or small enterprises". These include the need to establish effective internal complaint mechanisms, to facilitate access for users to an "out-of-court dispute settlement body" and to establish a system of "trusted flaggers" (Articles 20-22). Platforms also have transparency obligations, including in relation to advertising and their recommender systems (Articles 26-28).

The DSA also establishes some obligations specific to very large online platforms and search engines, defined as having average monthly service recipients in the EU of 45 million or more, although this number may be adjusted in the event of major changes in the overall EU population (Articles 33(1)-33(2)). In April 2023, 17 very large online platforms and 2 very large online search engines were designated as having met these criteria.[141] These entities are required to carry out assessments to determine systemic risks from their operations relating to the dissemination of illegal content, negative impacts on the exercise of fundamental rights; on civic discourse, electoral processes and public

[141] European Commission, "Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines", 25 April 2023, https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2413.

security; and on gender-based violence, public health and minors, as well as "serious negative consequences to the person's physical and mental well-being" (Article 34(1)). The DSA specifies particular factors which have to be taken into account in these assessments, including the design of recommender systems and algorithms and content moderation systems (Article 34(2)). Very large platforms and search engines are then required to put in place "reasonable, proportionate and effective mitigation measures" to respond to identified risks, and the DSA lists several examples of possible measures, such as adapting terms and conditions of service and algorithmic systems, and undertaking awareness measures (Article 35(1)). These entities are also subject to yearly independent audits of their DSA obligations (Article 37).

The DSA's measures to address systemic issues surrounding the proliferation of online harms is also being explored in other regions of the world. For example, Canada's parliament is currently considering an Online Harms Bill, which would include among other things a requirement for the social media services it regulates to prepare "digital safety plans" and to put in place measures to mitigate risks. [142]

While this reading has focused on platform regulation, it is important not to neglect other approaches to address some online harms, notably mis- and disinformation. A well-informed public is far less likely to be swayed by false information online. As a result, increasing media literacy among both the general public and key actors positioned to address these issues is especially important. Finland is often cited as a model here, topping the Open Society Institute – Sofia's 2023 European Media Literacy Index, which aims to assess the potential for resilience to disinformation and misinformation.[143] Finland has made concerted efforts to make media literacy a key part of the general education system.[144]

Another approach to addressing mis and dis-information online is through initiatives to identify and fact-check false information online. There have been several initiatives in this area, but

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[142] *Bill C-63, An Act to enact the Online Harms Act, to amend the Criminal Code, the Canadian Human Rights Act and An Act respecting the mandatory reporting of Internet child pornography by persons who provide an Internet service and to make consequential and related amendments to other Acts*, First Reading, 26 February 2024, sections 55(1) and 62(1), https://www.parl.ca/DocumentViewer/en/44-1/bill/C-63/first-reading.

[143] *"Bye, bye, birdie": Meeting the Challenges of Disinformation: The Media Literacy Index 2023* (June 2023, Open Society Institute Sofia), https://osis.bg/wp-content/uploads/2023/06/MLI-report-in-English-22.06.pdf.

[144] See, for example, Jon Henley, "How Finland starts its fight against fake news in primary schools", 29 January 2020, The Guardian, https://www.theguardian.com/world/2020/jan/28/fact-from-fiction-finlands-new-lessons-in-combating-fake-news; and Jenny Gross, "How Finland Is Teaching a Generation to Spot Misinformation", 10 January 2023, New York Times, https://www.nytimes.com/2023/01/10/world/europe/finland-misinformation-classes.html.

unfortunately some are themselves responsible for spreading disinformation. For example, the Myanmar military founded the "Tatmadaw True News Information Team", which released doctored or mislabelled photos related to the Rohingya crisis.[145] Even those which are less overtly propagandistic in nature sometimes lack sufficient guarantees of independence and a sufficiently clear mandate. A better approach may be to support independent fact-checking initiatives. South Africa, for example, has referred people to Real 411, which is an independent service run by the NGO Media Monitoring Africa and which allows individuals to flag misinformation, disinformation and election-related harms for platforms and the oversight body for elections.[146]

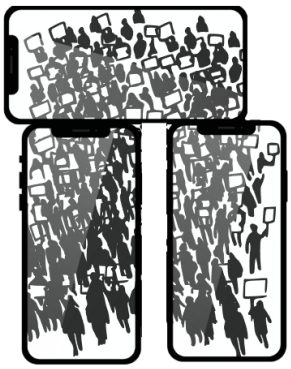
Activity 14: Reading

Estimated reading time: 8 minutes

The Responsibility of Parliamentarians to Moderate Their Social Media Pages

To what extent do political figures have duties to moderate their social media pages? This question rose to prominence following a European Court of Human Rights Grand Chamber decision described below.

Sanchez v. France



In the case of *Sanchez v. France*,[147] the applicant, Mr. Sanchez, brought a human rights complaint alleging his freedom of expression had been violated because of a criminal conviction imposed on him for failing to remove hateful comments on his Facebook page.

At the time of the events leading to the conviction, Mr. Sanchez was mayor of Beaucaire and running for office in the French parliamentary elections (para. 13). In October 2011, Mr. Sanchez made a post about a rival candidate, F.P., on his

[145] Poppy McPherson, "Exclusive: Fake Photos in Myanmar Army's 'True News' Book on the Rohingya Crisis", 28 December 2018, Reuters, https://www.reuters.com/article/us-myanmar-rohingya-photos-exclusiveidUSKCN1LF2LB.

[146] William Baloyi, "Uncover the truth through fact checking", 14 September 2023, South African Government, https://www.gov.za/blog/uncover-truth-through-fact-checking; and Mark Scott, "Digital Democracy, South Africa edition", 23 May 2024, Politico, https://politico.eu/newsletter/digital-bridge/digital-democracy-south-africa-edition.

[147] 14 May 2023, Application No. 45581/15, https://hudoc.echr.coe.int/eng?i=001-224928.

Facebook page to which around 15 individuals responded with comments (para. 15). Two of the comments contained discriminatory language about Muslims and one mentioned F.P.'s wife Leila by name (paras. 15 and 17).

Leila approached the commenter who mentioned her by name, who indicated he was unaware the post had been public and promptly deleted it (para. 17). Leila then filed a criminal complaint against the authors of the comments and Mr. Sanchez (para. 18). Mr. Sanchez then posted a new comment in which he requested that people be mindful of the content of their comments but he did not delete any comments (para. 19). During the criminal investigation, he claimed "he had been unable to monitor the large number of comments posted every week on the 'wall' of his Facebook account" due to the large number of friends he had (para. 23).

Ultimately, Mr. Sanchez and the two commenters were found guilty of incitement to violence and hatred against a group, with the former charged in his capacity as a "producer" of a website (paras 24 and 28). They were each fined EUR 4,000 and Mr. Sanchez and the author of the post which named Leila also were ordered to pay her EUR 1,000 compensation (para. 25). Mr. Sanchez unsuccessfully appealed his conviction before the French appellate courts (paras. 30-34) and then filed a human rights complaint before the European Court of Human Rights. Both the Fifth Section of the European Court of Human Rights and subsequently the Grand Chamber found that there had been no violation of his right to freedom of expression.

The Grand Chamber found that the restriction on the applicant's right to freedom of expression was prescribed by law and pursued the legitimate interest of protecting the reputation or rights of others (paras. 122-144). While noting that there was little scope for restrictions on political speech, especially by elected representatives, in view of its importance in democratic societies, the Court also noted that freedom of political debate is not absolute and could legitimately be restricted (paras. 146-148). It also recalled that political figures have certain "duties and responsibilities" to avoid intolerant speech including promoting the "exclusion of foreigners" and that actions in response to "delicate or sensitive" matters, such as "problems linked to immigration" may be proposed but only in a manner which avoids "advocating racial discrimination and resorting to vexatious or humiliating remarks or attitudes" (paras. 150-151).

In assessing the necessity part of the test, the Court applied factors which it had articulated in an earlier case on intermediary liability.[148] One such factor was the context of the

[148] *Ibid*., para. 163, citing European Court of Human Rights, Grand Chamber, *Delfi AS v. Estonia*, 16 June 2015, Application No. 64569/09, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-155105%22]}.

remarks. Here, the Court looked at the nature of the comments, the political context and Mr. Sanchez's responsibility for third-party comments. The Court found that the comments were "clearly unlawful" after holding, among other things, that they clearly targeted Muslims with objectively harmful language and that hateful comments were particularly impactful during the election periods even if they touched on local matters of concern (paras. 169-178). The Court found that Mr. Sanchez had greater responsibilities than an ordinary citizen considering that he was using this account for political purposes and during an election. He also had expertise in digital services since he had been responsible for his party's "Internet strategy" for seven years (para. 180). The Court found that, as a matter of principle, there was no problem with France having attributed liability to him as a "producer" and that professional entities which create social networks may have some obligations imposed on them as long as liability is shared proportionally with other relevant actors (paras. 183 and 185). In view of a politician's influence in society, he could be expected to be "all the more vigilant" (para. 187).

The Court also considered as important the steps taken by the applicant. At the time, there was no technical possibility of prior moderation of comments on Facebook, but he had been free to make his Facebook page available to the general public or not. In electing to make it public, the Court surmised that he must have been aware of the risk of reply comments becoming visible to a large audience. In addition, it was difficult to explain Mr. Sanchez's apparent failure to have checked the content of visible comments, considering he deemed it necessary to warn his followers to be careful with comments (paras. 191-194).

The Court ultimately found that it would have been unreasonable to require Mr. Sanchez to have deleted the comment which explicitly mentioned Leila because its author deleted it within 24 hours, but it was still reasonable to hold him liable and require him to pay compensation to Leila for the other comment, which was found to be linked to the first, even if it did not mention her by name (paras. 195-196). The Court also found that Mr. Sanchez's assertion that it was not practicable for him to monitor comments in view of how many friends he had was irrelevant as there had only been around 15 comments in reply to his post (para. 200).

The *Sanchez* decision, which proved controversial among some freedom of expression advocates,[149] establishes that, for the purposes of the European Convention, it is not necessarily a

[149] See, for example, the response from the NGO Media Defence, which intervened in the case. "ECtHR Grand Chamber decision in Sanchez v France raises serious concerns over online speech", 16 May 2023, https://www.mediadefence.org/news/sanchez-v-france-raises-serious-concerns-over-online-speech.

violation of freedom of expression to hold political figures responsible for their failure to take action to remove comments which are clearly unlawful. However, the analysis of whether liability is appropriate will be quite fact-dependent. The rules surrounding liability will necessarily vary from jurisdiction to jurisdiction in view of differing approaches to intermediary liability.

While the *Sanchez* decision concerned clearly unlawful comments, there is a risk that parliamentarians or public officials may violate users' freedom of expression if they take unnecessary or arbitrary steps to delete posts which are not clearly illegal or abusive. As a result, this issue should be approached with caution. Since the events which underpinned the *Sanchez* decision, Meta has developed its policies further, giving managers of Facebook pages more control over comments posted to their pages.[150] Parliamentarians should be aware of different functionalities and moderation powers associated with the social media services they use and determine in advance how they will approach the issue of moderating any comments.

A related issue is when it is appropriate for parliamentarians and public officials to block users on social media. This not only restricts the ability of the user to comment publicly on posts, but also restricts their ability to access information in view of the increased use of social media to disseminate important information to the public. While international human rights bodies have not yet addressed the issue of social media blocks, several national courts have weighed in on this issue.

In the United States, there have been numerous lawsuits involving politicians or public officials who have blocked individuals on social media. For example, in *Knight v. Trump*[151] the Court held that then-President Trump's blocking of users on Twitter (now X) because their tweets were critical of him or his policies was unconstitutional viewpoint discrimination.[152]

There have also been some cases addressing social media blocks by public officials in Europe. In a case from France, a French immigration office's decision to block the Twitter account of the coordinator of an immigration rights organisation was found to be unlawful.[153] And this issue has

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[150] See Meta Business Help Center, "Manage comment moderation for Facebook Pages", https://www.facebook.com/business/help/845417592621623.

[151] U.S. Court of Appeals for the Second Circuit, *Knight v. Trump*, 928 F.3d 226, 9 July 2019, https://law.justia.com/cases/federal/appellate-courts/ca2/18-1691/18-1691-2019-07-09.html (the case was subsequently vacated by the Supreme Court as moot because Mr. Trump was no longer president).

[152] *Ibid.*, p. 11.

[153] Cour administrative d'appel de Paris (1ère Chambre) (Paris Court of Administrative Appeal, First Chamber), N° 21PA00815, 27 March 2023, https://www.legifrance.gouv.fr/ceta/id/CETATEXT000047357595?init=true&page=1&query=21pa00815&searchField=ALL&tab_selection=al.

also arisen in several Latin American cases. For example, in a 2012 case, after the Costa Rican president's official Twitter account blocked a follower for several months without explanation (the follower was then unblocked), the Constitutional Chamber of the Supreme Court of Costa Rica found that the block violated the user's right to freedom of expression.[154]

Parliamentarians should be aware that when they use social media accounts in a public manner to share information with the general public, it is likely that they incur some duties not to block individuals, or to delete or hide their comments without proper justification. To ensure their actions meet the "provided by law" standard, parliamentarians should consider adopting public policies outlining their approach to moderation on different platforms and what actions they will take in response to different kinds of harmful content. At a minimum, they should be aware of platforms' terms of service and what constitutes unlawful speech under domestic law to ensure that their decisions have some clear basis in law. They should also be sure their moderation policies serve a legitimate interest. This would normally preclude deleting posts or blocking users because of their political beliefs but could allow such actions in response to abusive behaviour, such as spreading spam or hate speech. Before blocking a user, parliamentarians should consider any less restrictive option, such as responding to posts to correct incorrect information or reporting abusive reports to the platform.

Activity 15: Further Readings

Suggested Further Readings:

- *Briefing Note on Freedom of Expression: Independent Regulation of the Media* (2015, Centre for Law and Democracy), https://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefingnotes-4.pdf
- *Briefing Note on Freedom of Expression: Regulation of Journalists* (2015, Centre for Law and Democracy), https://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefingnotes-5.pdf
- *Briefing Note on Freedom of Expression: Print media* (2015, Centre for Law and Democracy), https://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefingnotes-6.pdf
- *Briefing Note on Freedom of Expression: Media Diversity* (2015, Centre for Law and Democracy), https://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefingnotes-8.pdf
- *Briefing Note on Freedom of Expression: Public Service Broadcasting* (2015, Centre for Law and Democracy), https://www.law-democracy.org/live/wp-content/uploads/2015/02/foe-briefingnotes-9.pdf

[154] Sala Constitucional de la Corte Supreme de Justicia, Sentencia Nº 16882, 4 de Diciembre de 2012, https://vlex.co.cr/vid/-499776530.

- Article 19, *Central Asian Pocketbook on Freedom of Expression*, 2006, https://www.article19.org/data/files/pdfs/tools/central-asian-pocketbook.pdf
- Toby Mendel, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (ARTICLE 19, 2002), https://www.article19.org/data/files/pdfs/standards/accessairwaves.pdf
- Toby Mendel, *Public Service Broadcasting: A Comparative Legal Survey* (2011, UNESCO), https://unesdoc.unesco.org/ark:/48223/pf0000192459
- Rumman Chowdhury and Dhanya Lakshmi, *"Your opinion doesn't matter, anyway": exposing technology-facilitated gender-based violence in an era of generative AI* (2023, UNESCO), https://unesdoc.unesco.org/ark:/48223/pf0000387483
- Julie Posetti, *et al.*, *The Chilling: global trends in online violence against women journalists; research discussion paper* (2021, UNESCO), https://unesdoc.unesco.org/ark:/48223/pf0000377223
- Toby Mendel and Eve Salomon, *The Regulatory Environment for Broadcasting: An International Best Practice Survey for Brazilian Stakeholders* (2011, UNESCO), http://unesdoc.unesco.org/images/0019/001916/191622e.pdf
- UNESCO, *Guidelines for the governance of digital platforms: safeguarding freedom of expression and access to information through a multi-stakeholder approach* (2023), https://unesdoc.unesco.org/ark:/48223/pf0000387339
- UNESCO Internet for Trust Working Papers, https://www.unesco.org/en/internet-trust/working-papers?hub=71542
- Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 6 April 2018, https://undocs.org/A/HRC/38/35 (on online content regulation)
- Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 11 May 2016, https://undocs.org/A/HRC/32/38 (on freedom of expression, states and the private sector in the digital age)

MODULE 4: PROTECTIONS FOR AND REGULATION OF PARLIAMENTARY SPEECH

Activity 1: Lead Trainer Video

Transcript:

Hello and welcome to Module 4 of the course which focuses on freedom of expression and the privileges of parliamentarians, as well as on disciplinary matters against parliamentarians and their duties when it comes to transparency obligations. The first part of this Module focuses on parliamentary immunity, which refers to immunities which are granted to parliaments to allow them to run their affairs without undue interference from the executive or judicial branches of government. Although this doctrine is often cast as a "privilege" of parliament, the real goal is to

protect the general public through ensuring the effective functioning of their parliament and their parliamentary representatives.

The idea of parliamentary immunity generally encompasses two different doctrines, the interpretation of which differs from jurisdiction to jurisdiction. One doctrine is known as the doctrine of non-liability, or as it is generally known in English-speaking countries, non-accountability. This refers to a special set of heightened protections for freedom of expression of parliamentarians. We will return to this doctrine and exactly what it entails in the next readings.

The second doctrine is known as the doctrine of inviolability, which essentially aims to enforce the separation of powers by providing for broad protections for parliamentarians from interference by other branches of government. Its strongest form can be seen in the French model, which dates back to the 18th century and since has been adopted in several other countries. Under this approach, parliamentarians cannot be arrested, prosecuted or, indeed, subjected to binding legal process, especially of a criminal nature. However, there are certain exceptions to this, such as when parliament has agreed to lift immunity or where a parliamentarian is caught committing a crime in *flagrante delicto*.

It should be stressed that this is not intended to create a form of impunity but, rather, to protect parliamentarians against interference by other branches of government. This gives parliament the power to assess whether the charges are fair and well-founded. But, where they are, parliament should accept them and justice should then be pursued in the normal way. It also empowers parliament to safeguard the ability of its members to fulfil their parliamentary duties as far as possible during judicial proceedings. Where parliament does elect to lift immunity, the process should follow proper procedural fairness standards, including by following a transparent and predictable procedure and allowing the parliamentarian in question to mount a defence. Unfortunately, some decisions to lift parliamentary immunity have not been done in a procedurally fair manner, and the IPU Committee on the Human Rights of Parliamentarians has often been critical where this was the case.

Whereas the French model includes protections for both inviolability and non-liability, in the so-called 'Anglo-Saxon' model—which has been influential in common law countries and some others, such as Nordic countries—the concept of inviolability is more limited. Traditionally, in the Westminster parliamentary system, members of parliament were granted limited protection during travels to and from parliament to avoid a situation where the reigning monarch could prevent the parliament from sitting, an idea which also found its way into Article 1, section 6 of the US Constitution.

The Westminster system has a concept called 'exclusive cognisance', which functions as a limited analogue to the concept of inviolability. In essence, exclusive cognisance is the idea that

parliamentary supremacy prohibits the courts from interfering directly in the affairs of parliament. As a result, courts should tread very carefully when their actions may affect the 'core functions' of parliament. Three privileges of individual parliamentarians are derived from this, namely not to be arrested in civil actions (such as civil contempt of court actions or, in earlier times, actions for non-payment of a debt), not to be forced to appear in court as a witness and not to be forced to serve as a juror. The latter two of these, i.e. the protections from appearing as a witness or serving as a juror, also apply to officers of parliament. These three privileges derive, in essence, from the idea that parliamentarians should be free to attend and participate in affairs at parliament. Parliamentarians often waive their right not to appear as witnesses in criminal matters, so as not to obstruct the course of justice. More generally, parliamentarians may be subjected to criminal law procedures as accused persons, much as any other citizen, subject only to limited procedural rules (such as a requirement to inform the Speaker in case of arrest for a period of time or imprisonment upon conviction).

In contrast to the French model of inviolability, this provides relatively weak protection against possible interference in the work of parliament since parliament has more limited power in this system to prevent intrusion, for example by the police, into the work and activities of its members.

Activity 2: Reading

Estimated reading time: 8 minutes

Inviolability

As noted in the last video, the concept of inviolability essentially derives from the idea that parliament cannot be subjected to scrutiny and oversight by the other branches of government, and, as a particular aspect of this, the idea that parliament has a right to secure the attendance of its members. As such, it provides protection for parliament from any civil, criminal or administrative law proceedings, and provides certain protections for members of parliament from the these actions, whether or not they are engaged in acts relating to their parliamentary mandates. The essence of this doctrine is that neither the judiciary nor the executive (under which the police normally operate) can hold parliament to account. However, it should be noted that parliament retains the power to waive immunity for its members.

Rules on inviolability were originally developed in a distinct historical context, namely 18th and 19th century Europe, although this concept was adopted elsewhere later on. One may therefore wonder about this doctrine's role and function in contemporary democracies. A 2014 Report from the Venice Commission, an independent advisory body of the Council of Europe, made some interesting observations in this regard. The report noted that in many countries, the threat of the

executive unduly harassing parliament has largely subsided.[155] However, opposition members of parliament may still risk being pressured the executive and thus special protections may be relevant for them. The doctrine has thus been transformed into primarily a "minority guarantee".[156]

The report also noted that since the advent of the doctrine of inviolability, there have been important developments in the form of increased independence and autonomy of the judiciary, which mitigate the possibility of the executive weaponising the judicial system against parliamentarians. Further reducing the potential for abuses has been the development of human rights such as freedom of expression and guarantees against arbitrary arrest, which are applicable to everyone, including parliamentarians. At the same time, the report notes that there has been a growing understanding of the importance of transparency and the potential negative impacts of parliamentary immunity with regard to combatting corruption.[157]

The question of whether a strong doctrine of inviolability is appropriate raises difficult questions, as noted in the Venice Commission report:

> In recent debates on parliamentary immunity a distinction is sometimes drawn between old and new democracies. The argument is that such immunity is less necessary in democratic systems that have reached a certain level of maturity and stability, where the political functions of members of parliament are adequately protected in other ways, and where there is little or no reason to fear undue pressure against members of parliament from the executive and the courts. In contrast, it is argued that rules on parliamentary immunity are still necessary in new and emerging democracies, that are not yet wholly free from their authoritarian past, and where there is real reason to fear that the government will seek to bring false charges against political opponents and that the courts may be subject to political pressure. At the same time, it is often new democracies that are most exposed to political corruption and the misuse of immunity by extremist parliamentarians to threaten democracy itself. Thus the paradox of parliamentary immunity – that it can serve both to foster and to undermine democratic development.[158]

While debates on the appropriate scope for the doctrine of inviolability in different contexts will undoubtedly continue, it is an unfortunate fact that, in many countries, parliamentarians cannot rely solely on general legal protections for individual rights and often do not benefit from a robustly independent judiciary. As a result, despite the risks of abuse of parliamentary immunities, the doctrine of inviolability continues to play an important role in many systems.

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[155] European Commission for Democracy Through Law (Venice Commission), *Report on the Scope and Lifting of Parliamentary Immunities*, 21-22 March 2014, para. 24, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e.

[156] *Ibid*.

[157] *Ibid*., paras. 25-27.

[158] *Ibid*., para. 29.

However, it is essential to ensure that appropriate safeguards are in place and that the doctrine is not abused.

The IPU has been making efforts to create a single set of standards for both inviolability and non-accountability through a multi-partner initiative it has coordinated called the Indicators for Democratic Parliaments.[159] These 25 indicators strive to allow parliaments to assess how "accountable, transparent, responsive, inclusive, participatory and representative they are". Included in this is an assessment of legal protections for non-accountability and inviolability. The first two assessment criteria for these relate to the doctrine of non-accountability, while the third and fourth pertain to inviolability. Assessment Criterion Three reflects a preference for a strong conception of inviolability by assessing the very existence of a strong guarantee:

> **No 3: Legal provisions on parliamentary inviolability**
> The legal framework contains strongly entrenched provisions restricting the arrest or detention of MPs, and/or searches of their person and their personal/working space, without parliamentary consent. Such consent is always required when an MP faces legal action in connection the exercise of their parliamentary duties.[160]

Assessment Criterion Four sets out how the doctrine should be applied in practice:

> **No 4: Parliamentary inviolability in practice**
> Parliament follows due process when it receives a request to lift the inviolability of an MP, including by allowing them to present a defence and by carefully reviewing the legal and factual soundness of the request. The legal framework governing the inviolability of MPs is implemented in a clear and unambiguous manner. MPs, regardless of political affiliation, are not faced with politically motivated legal action. [161]

There also has been some judicial guidance as to how the doctrine of inviolability should be applied in order to respect international human rights law, as reflected in the case below from the Inter-American Court of Human Rights.

The Inter-American Court of Human Rights on Parliamentary Immunity

The Inter-American Court of Human Rights examined the doctrine of inviolability in the 2021 case *Barbosa de Souza et al. v. Brazil*.[162] The case concerned the 1998 murder of a 20-year-old student, Márcia Barbosa de Souza, which was attributed to then state legislative representative,

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[159] See https://www.parliamentaryindicators.org.

[160] Indicators for Democratic Parliaments, "Dimension: 1.2.2 Non-accountability and inviolability", https://www.parliamentaryindicators.org/indicators/effective/members-parliament/non-accountability-and-inviolability.

[161] *Ibid*.

[162] 7 September 2021, https://corteidh.or.cr/docs/casos/articulos/seriec_435_ing.pdf.

Aércio Pereira de Lima (para. 69). On 14 October 1998, the Attorney General of Justice filed criminal complaint against de Lima, with the condition that it could be initiated only if authorised by the state Legislative Assembly. This Assembly rejected two request to lift immunity(para. 75).

Brazil then amended its approach to parliamentary immunity so that, instead of prior authorisation of the legislature being required to initiate prosecutions, legislatures only had the power to suspend criminal proceedings brought against one of their members (para. 101).[163] The Following the amendments, the case was referred to a court because de Lima no longer benefitted from parliamentary privilege (paras. 76-77). In 2007, de Lima was sentenced to 16 years' imprisonment (para. 79). Before his appeal of the judgment could be considered, he died from a heart attack (para. 80).

The case before the Inter-American Court of Human Rights concerned whether Brazil was responsible for violating the right of de Souza's parents to access justice and whether Brazil had failed in its obligation to investigate the crime with sufficient due diligence and timeliness (para. 88). One of the arguments that the applicants advanced was that parliamentary immunity had been wrongly applied. As a result, the Court took the opportunity to articulate standards on this issue.

The Court noted that parliamentary immunity in Brazil is divided into two categories: material or non-liability immunity (i.e. non-accountability) and formal or procedural immunity (i.e. inviolability) (para. 102). This case concerned the latter of these, which the Court then focused on (para. 103).

The Court noted that many countries in Latin America, as well as most European countries, had various forms of protection for parliamentarians against legal procedures (paras. 104-106). It also noted that the application of parliamentary immunity must be decided on a case-by-case basis and that it was necessary for the legislative chamber to assess whether there were "clear elements of arbitrariness" in the exercise of the criminal action against a parliamentarian (para 107). The Court also noted that "it is necessary to carefully weigh the guarantee of the exercise of the mandate for which the parliamentarian was democratically elected, on the one hand, and the right of access to justice, on the other" (para. 107). The Court also found that there must be an assessment of the "serious, nature and circumstances of the alleged facts" (para. 108).

The Court ultimately articulated three requirements for a decision to waive parliamentary immunity:

[163] The Court notes that Article 27(1) of the Brazilian Constitution "grants state deputies the same prerogatives as federal deputies" and that the constitution of the relevant Brazilian state, that of Paraíba, had a similar provision, which was also amended. See *ibid*., paras. 61-62.

- It must "follow an expeditious procedure, provided for by law or in the rules of procedure of the legislative body, with clear rules and respecting the guarantees of due process";
- It must "include a strict proportionality test", taking into account the "impact on the right of access to justice of the persons who may be affected and the consequences of preventing the prosecution of a criminal act";
- Reasons must be provided regarding the existence or not of a *fumus persecutionis* (i.e. whether or not the prosecution is in fact a veiled attempt to cause political damage to a parliamentarian) (para. 111).

In the case at hand, the Court found that the legal framework previously in place in Brazil, under which prior approval of the legislature was necessary, had been inadequate and rendered the possibility of lifting parliamentary immunity "illusory" (para. 113). The Court noted that Brazil did not dispute that the legal framework had been inadequate and had highlighted their efforts to modify it through the constitutional amendment (para. 113). In addition, the Court found that the rules surrounding the lifting of immunity were unclear, failing to specify which committee or other competent body was responsible for issuing a decision and what criteria were to be considered in deciding whether or not to lift immunity (para. 114). In addition, the two decisions issued by the state legislative assembly for not lifting immunity did not contain substantive reasons and there was thus no analysis or weighing of a possible *fumus persecutionis*, on the one hand, and, on the other, the rights of access to justice for the deceased's family and obligations to investigate acts of violence against women with due diligence (paras. 118 and 120). In addition, the Court noted certain procedural irregularities in the decision-making process (para. 119). As a result of these considerations, the Court found that the refusal to lift legislative immunity was an arbitrary act and that the application of parliamentary immunity in this case violated the rights of de Souza's parents to access justice (paras. 122-123).

Activity 3: Reading

Estimated reading time: 7 minutes

Non-Accountability: Scope of Protection in Terms of Persons

The essence of the doctrine of non-liability (generally known as 'non-accountability' in English-speaking countries) is that parliamentarians enjoy special protection for their right to freedom of expression in relation to their parliamentary mandates ("proceedings in parliament", as per the UK's 1689 Bill of Rights). The primary reason for this protection is to protect the freedom of expression of parliamentarians, as well as to protect the parliament from interferences from other branches of government. This protection exists virtually universally among democratic States, although the precise parameters of it vary from jurisdiction to jurisdiction, and there are a number of features, as well as variants, in the application of this doctrine.[164] In view of the importance of this protection, the existence of strongly entrenched legal protections for non-accountability is included among the assessment criteria for the Indicators for Democratic Parliaments.[165]

One of the ways this doctrine varies across different jurisdictions is in the scope of protection in terms of which persons it applies to. As noted, the primary role of this protection is to allow parliamentarians to speak freely in parliament, so they are the primary direct beneficiaries of this doctrine. It may be noted that the protection extends not only to words spoken but also to other actions, such as voting, introducing a bill, motion or resolution, or presenting a report. In addition, given that a key goal is to protect parliamentary debates, in some countries it covers anyone who takes part in those debates. Thus, in addition to parliamentarians, it covers witnesses or experts who appear before parliament or a committee, or who present petitions for or against bills, as well as any officers of parliament who are in the same situation.

In many countries, protection is also extended to bodies which officially, or mandatorily (i.e. at the behest of parliament), publish full reports of parliamentary debates. This has now in many countries been extended to broadcasts, whether radio or television, and also direct Internet feeds from parliament. It may be noted that video reporting, at least, raises more difficult questions than documentary or oral reports, inasmuch this provides a lot more scope to introduce coverage which is not impartial. Parliamentarians may be shown in unflattering poses or with telling facial expressions, and it is even possible to focus the camera elsewhere than on the person who is speaking. To address this, in many countries strict rules apply to the recording of live video

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[164] For an overview of some statements about this right in different European jurisdictions, see *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97, paras. 37-57 (European Court of Human Rights), https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-60822%22]}.

[165] Indicators for Democratic Parliaments, "Dimension: 1.2.2 Non-accountability and inviolability", https://www.parliamentaryindicators.org/indicators/effective/members-parliament/non-accountability-and-inviolability.

content within parliament. In some cases, parliament does the recording itself and then makes it available to all interested broadcasters.

Absolute protection often does not extend to the publication of extracts and abstracts of parliamentary debates. There are good reasons for this, since the process of extracting or abstracting can, whether intentionally or otherwise, lead to serious distortions of the substance of what was said. Under the defamation law in most common law countries, however, a form of qualified privilege applies to extracts and abstracts, so that the publisher is protected against liability in defamation law if the statements were a fair and accurate representation of what was communicated in parliament as long as the publication was made without malice.

Once a statement is covered by this doctrine, the protection lasts forever (i.e. it does not cease to apply once the person ceases to be a parliamentarian or, as relevant, a witness). The reasons for this are reasonably obvious, perhaps particularly in the case of a witness, who ceases to be a witness as soon as they exit the relevant parliamentary proceeding. The protection for free speech would be very limited indeed if it were to be lost as soon as a witness left parliament. Similarly, perpetual protection is necessary to give parliamentarians the confidence to speak freely in parliament without fear of future prosecution.

Where protection is based on the status of a person as a parliamentarian, that protection exists in relation to matters which occurred when the person was a parliamentarian. Therefore, the scope of protection in terms of statements covers only matters relating to the parliamentary mandate and not normally to communications made before or after the mandate. This is, in fact, proper practice for parliamentary immunity generally, and the OSCE Parliamentary Assembly has urged parliaments of OSCE States to ensure that the "privilege of parliamentary immunity must not apply to actions taken by an individual before they have assumed office or actions taken after they have left public office".[166]

Countries vary considerably as to the conditions under which the parliamentary mandate may be revoked and which body is responsible for enforcing this. Parliaments normally have the power to take various measures against parliamentarians, which may include expelling the member (i.e. relieving them of parliamentary duties in such a manner that their seat or elected position becomes vacant, usually leading to a byelection). Responsibility for this does not always rest with Parliament alone. For example, under the Jordanian constitution, the King must ratify

[166] *Resolution on Limiting Immunity for Parliamentarians in Order to Strengthen Good Governance, Public Integrity and the Rule of Law in the OSCE Region*, Article 11(b), adopted as part of the *Brussels Declaration of the OSCE Parliamentary Assembly and Resolutions*, 3-7 July 2006, p. 34, https://www.osce.org/pa/19799.

decisions on disqualification of legislators issued by the senate.[167] In other countries, a judicial body regulates the issue of parliamentary incompatibilities, such as the Conseil d'Etat in France[168] or the Constitutional Court in Chile.[169]

In some countries, imprisonment for a period of time, say for a year or more, or, as is the case under Mongolia's constitution, a conviction for a crime, will lead to removal of protection.[170] In some systems certain other actions which are deemed to be fundamentally incompatible with the office, such as holding an office in another branch of government, will lead either automatically or by convention to expulsion.[171]A number of countries also have rules on expulsion based on a parliamentarian's relationship with his or her party. The IPU Committee on the Human Rights of Parliamentarians has always held that the revocation of a parliamentarian's mandate is a serious measure because it deprives a member of the possibility of carrying out the mandate entrusted to him or her, and that any decision to revoke a parliamentary mandate should only be made in full compliance with the law and where the grounds for this are very serious.[172]

Loss of a Parliamentary Mandate for Illegitimate Reasons

Unfortunately, in some cases parliamentarians' mandates have been stripped for legitimate exercises of freedom of expression. Such was the case of Mr. Ömer Faruk Gergerlioğlu, a member of the Turkish parliament who was deprived of his parliamentary mandate based on a 2018 criminal conviction for spreading "terrorist propaganda" in relation to his having shared a news report on social media with an accompanying message. [173] The news report in question

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[167] Constitution of Jordan of 1952 (revised 2016), Article 75(3), https://constituteproject.org/constitution/Jordan_2016.

[168] France's Conseil d'Etat is essentially the Supreme Court for the administrative branch of the court system but it also advises the government on certain legal matters.

[169] Constitution of Chile of 1980 (revised 2021), Article 93(14), https://www.constituteproject.org/constitution/Chile_2021.

[170] Constitution of Mongolia, 1992 (revised 2001), Article 29(3), https://www.constituteproject.org/constitution/Mongolia_2001.

[171] Thus, in the United Kingdom, members are automatically expelled, pursuant to the Representation of the People Act 1981, if they are imprisoned for a year or more, if they are found guilty of illegal or corrupt electoral practices, pursuant to the Representation of the People Act 1983, where they have been found to be guilty of treason, pursuant to the Forfeiture Act 1870, and for holding certain incompatible offices, pursuant to the House of Commons Disqualification Act 1975.

[172] See *Ecuador: Resolution adopted unanimously by the IPU Governing Council at its 181st session*, Case Nos. EC/11-EC/67 (Geneva, 10 October 2007), para. 4, http://archive.ipu.org/hr-e/181/Ec11.htm; and *Rwanda: Resolution adopted unanimously by the Governing Council at its 173rd session*, Case Nos. RW/01-RW/04 (Geneva, 3 October 2003), http://archive.ipu.org/hr-e/173/Rw01.htm.

[173] Case No. TUR-139, 25 May 2021, https://www.ipu.org/documents/2021-06/decisions-adopted-ipu-governing-council-its-207th-session.

contained a statement from the militant group, the Kurdistan Workers' Party (PKK), which is designated a terrorist group by Türkiye and several other countries. The PKK statement in question professed a willingness to find a solution to the conflict if the government were in favour of taking steps and Mr. Gergerlioğlu's accompanying comment stated that "this call should be evaluated properly, there is no end to this!"

The IPU Committee on the Human Rights of Parliamentarians expressed its profound concern about the deprivation of his parliamentary mandate and prison sentence for implicitly calling for peace negotiations and considered his detention to be arbitrary.[174] Fortunately, ultimately Türkiye's Constitutional Court ruled in 2021 that his conviction had violated his rights to freedom of expression and to stand for elections and engage in political activities. This finding paved the way for his release from prison and restoration of his parliamentary mandate.[175]

Activity 4: Reading

Estimated reading time: 5 minutes

Non-Accountability: Scope of Protection Based on the Nature of the Statements

At the heart of non-accountability protection is statements made on the floor of parliament or in committees (including related communications such as motions and votes), which are normally absolutely protected against legal suit. However, in some countries there are limits to the scope of this protection. As a report of the Parliamentary Assembly of the Council of Europe noted:

> [S]ome countries have restricted the scope of the non-liability so as not to cover insults, defamation, hate speech and racist remarks, threats or incitement to violence or crimes. Some counties also exclude from the scope of protection insulting the head of state, criticism of judges, disclosure of state secrets or remarks that are considered treason.[176]

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[174] *Ibid*., para. 3.

[175] Case No. TUR-139, 30 January 2022 to 11 February 2022, https://www.ipu.org/file/13759/download.

[176] Parliamentary Assembly of the Council of Europe, *Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly*, 23 May 2016, para. 11, https://pace.coe.int/en/files/22801/html.

The validity of some of these limitations can be questioned. Thus, it seems absolutely central to the whole idea of non-accountability that defamatory statements, statements about the head of State and criticism of judges should be protected, although the arguments in favour of protecting hate speech and incitement to violence may be less persuasive. While the exact kinds of statements which are excluded from non-accountability varies considerably across countries, in practice it is common to address speech falling into these various categories primarily via parliamentary disciplinary procedures, which operates outside of the doctrine of non-accountability.[177]

The scope of protection is generally narrower in countries following the Westminster model. For example, under this model, the repetition outside of parliament of statements made in parliament is generally not protected.[178] Communications with constituents are also generally not protected, although they may benefit from other forms of protection, such as qualified privilege in defamation law, which refers to a common law defence which applies where there was a moral or legal duty to provide information, as well as a duty or interest of the receiving party in receiving the information.[179]

Civil law countries have tended to protect a broader range of statements, traditionally including all expressive activity which is closely related to the political work of a parliamentarian. In some countries, the protection extends to meetings of political groups within the premises of parliament on the basis that this relates to their ability to conduct their parliamentary business. In a small number of countries, this even extends to statements by parliamentarians in the media. According to a report by the Parliamentary Assembly of the Council of Europe covering 32 Member States of the Council of Europe, 13 limit protection to the floor of parliament, committees or questions, while 19 provide wider protection.[180]

Despite the (generally) absolute nature of non-accountability, there may be cases where it is not possible in practice for parliamentarians to broach certain themes or issues, even within parliament. Where one party is particularly dominant, various forms of abuse of power may undermine the rules on non-accountability to the detriment of opposition parties. It may be difficult for opposition parties to engage in criticism or strong criticism of the governing party

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[177] European Commission for Democracy Through Law (Venice Commission), *Report on the Scope and Lifting of Parliamentary Immunities*, 21-22 March 2014, para. 69, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e.

[178] See, for example, *Jennings v. Buchanan*, [2004] UKPC 36 (UK Privy Council).

[179] See Oxford Reference, "Qualified Privilege", https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100357427, citing *Watt v Longsdon*, [1930] 1 KB 130.

[180] Parliamentary Assembly of the Council of Europe, *Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly*, 23 May 2016, para. 19, https://pace.coe.int/en/files/22801/html.

and its representatives and officials, or of other power structures, such as the military, even though this is technically perfectly legal. This is very problematic since the whole point of non-accountability is that parliamentarians should feel free to discuss any issue at all.

In other countries, there may be subjects which are simply taboo, such that social or other forms of pressure prevent parliamentarians from addressing them, even when debate about them is otherwise legitimate. Some common themes falling within the scope of this include religious issues, ethnic conflicts, territorial conflicts, conflicts with neighbouring or other States, and/or separatist movements. While each individual parliamentarian needs to decide for him- or herself how best to deal with these situations, in general, censorship, particularly within parliament, regardless of what causes it, is unlikely to be a productive way of addressing even a very difficult social problem. Instead, respectful debate about issues is likely to surface underlying problems, which opens the door to resolving them.

Many countries generally respect what is known as a *sub judice* convention, although there is normally no legal obligation to do so. The substance of this is that care should be exercised when discussing matters which are awaiting judicial decision and which should not be the subject of motions or questions in parliament. The goal of this is twofold, namely to protect the rights of parties before the courts and to maintain respect for the separation of powers between parliament and the judiciary, just as parliament expects the courts to do in respect of its work. Outside of parliament, such issues would normally be dealt with via contempt of court proceedings. The precise scope of this convention is not defined but is, in general, left to be determined by the Speaker. It is generally applied with discretion and on the understanding that, if there is a doubt as to where the balance of interests lies, a presumption should favour free speech. The IPU Committee on the Human Rights of Parliamentarians has repeatedly stated that the *sub judice* rule "cannot be invoked as an obstacle to justice or accountability and that parliament is responsible for helping to ensure that all state institutions fully abide by the rule of law, including the judiciary" and has urged parliaments to take necessary measures to ensure that due process guarantees are respected in proceedings involving parliamentarians.[181] Obviously this needs to be done within the confines of respecting the division of powers between the legislative and judicial branches of government.

Activity 5: Reading

Estimated reading time: 5 minutes

Legal Scope of Protection Under Non-Accountability

[181] Decisions adopted 3 November 2020, Case No. TZA-04, para. 4 and Case No. ZWE-45, para. 3, https://www.ipu.org/file/9860/download.

In general, the legal scope of protection for statements which are covered by non-accountability, as described above, is absolute. This rules out criminal, civil or administrative proceedings in respect of those statements. Thus, one may not be subject to civil suit for defamation, criminally prosecuted for hate speech or held administratively responsible for broadcasting content which breaches an established code of conduct for broadcasters. However, in some countries, the legal scope is limited to penal procedures.[182]

When the scope of protection has been challenged, even in the context of statements causing grave harm and manifesting little public interest value, courts have almost always protected the speech in question. A high-water mark of this is perhaps the case of *A. v. the United Kingdom*, before the European Court of Human Rights. In that case, a parliamentarian had, in parliament, accused the applicant, naming her specifically, of being a "neighbour from hell" and of a range of grossly anti-social behaviour, allegations he apparently never attempted to verify the accuracy of. The applicant, having no remedy before the United Kingdom courts, appealed to the European Court on the basis that this was a breach of her right to a fair trial. Despite recognising the inappropriateness of the statements, the Court upheld the sanctity of non-accountability, stating:

> The Court agrees with the applicant's submissions to the effect that the allegations made about her in the MP's speech were extremely serious and clearly unnecessary in the context of a debate about municipal housing policy. The MP's repeated reference to the applicant's name and address was particularly regrettable. The Court considers that the unfortunate consequences of the MP's comments for the lives of the applicant and her children were entirely foreseeable. However, these factors cannot alter the Court's conclusion as to the proportionality of the parliamentary immunity at issue, since the creation of exceptions to that immunity, the application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued.[183]

Redressing the Imbalance Caused by Non-Accountability

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[182] European Commission for Democracy Through Law (Venice Commission), *Report on the Scope and Lifting of Parliamentary Immunities*, Adopted 21-22 March 2014, para. 54, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e.

[183] *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97, para. 88 (European Court of Human Rights), https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-60822%22]}.

The fact that parliamentarians benefit from an absolute right to say whatever they wish in parliament can sometimes lead to injustice. In particular, it allows a parliamentarian to make any allegation whatsoever about an individual, without that person having any formal right of redress, whereas otherwise individuals would have various forms of redress, most notably to sue in defamation (but also often complaints systems against the media, commercial remedies and so on).

To address this, on 27 August 1997 the Australian House of Representatives adopted a motion[184] which allows citizens or residents of Australia to apply for a right to have their responses included in the parliamentary record. Responses also are available on the Committee of Privileges and Members' Interests webpage.[185] The substantive conditions for making such an application are that the person has been named or is readily identifiable from a statement made in the main legislative chamber and that his or her reputation, privacy, dealings with others, or occupation or trade have been adversely affected.

A number of procedural rules apply, including:

- The application must be made in writing to the Speaker, normally within three months of the original statement, by a natural person (i.e. not a legal person).
- The Speaker may either reject an application on the basis that it is trivial, frivolous, vexatious or offensive or refer it to the Committee of Privileges and Members' Interests, which deals with issues of privilege.
- The Committee may also reject an application on the same grounds as the Speaker. Where the Committee considers an application, it may only recommend to the

[184] The original motion, which was amended on 13 February 2008, along with the Guidelines adopted thereunder, are available at: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Privileges_and_Members_Interests/Right_of_Reply.

[185] Parliament of Australia, House of Representatives Committee of Privileges and Members' Interests, "Completed inquiries and reports", https://www.aph.gov.au/Parliamentary_Business/Committees/House/Privileges_and_Members_Interests/Completed_inquiries#Tabcontent-tab-0.

House either that no further action be taken or that a response by the applicant be published.[186]

The procedure has been used several times. One example is that of Leo Zussino, who responded to a statement by a parliamentarian that "Chairman Leo Zussino was stood down" with the following clarification:

> This is incorrect. I voluntarily requested the Board of the GPC grant me leave of absence whilst administrative matters with respect to the GPC were assessed by the Queensland Crime and Corruption Commission (CCC). After 6 weeks the CCC resolved not to investigate the matters and handed the file back to Queensland Treasury to conduct an internal investigation.
>
> This fact was reported in the Gladstone Observer of Friday 5th October 2018.[187]

Another example is that of Mr. Andrew Dettmer, who replied as follows to statements by a parliamentarian which he claimed adversely affected his reputation:

> Ms Ley stated that I am completely unprofessional. Ms Ley also implied that I am an aggressive man; am receiving a golden handshake; talk over women at meetings; insult the appearance of women in meetings; am incapable of compromise; am aggressive to and dismissive of women; and am receiving preferential treatment as a "union mate".
>
> I am none of these things. Ms Ley adduces no proof of these things because there is none. My reputation is critically important to me, and these words are deeply offensive to me.[188]

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[186] See Factsheet 17 – Citizen's right of reply, https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_17_-_Citizens_right_of_reply.

[187] Parliament of Australia, House of Representatives Committee of Privileges and Members' Interests, "Report concerning an application from Mr Leo Zussino for the publication of a response to a reference made in the House of Representatives", Appendix 1, September 2019, https://www.aph.gov.au/Parliamentary_Business/Committees/House/Privileges_and_Members_Interests/~/media/82F60346673F4721BF81956BDDA1126C.ashx.

[188] Parliament of Australia, House of Representatives Committee of Privileges and Members' Interests, "Report concerning an application from Mr Andrew Dettmer for the publication of a response to a reference made in the House of Representatives", Appendix 1, June 2023, https://www.aph.gov.au/Parliamentary_Business/Committees/House/Privileges_and_Members_Interests/-/media/5082F9D2F2DB4C65A9E5C645BE0D0E8A.ashx.

Non-accountability also generally allows parliamentarians to avoid responsibility for exposing confidential information, whether this is protected by law (for example under an Official Secrets Act, such as still exist in many former British colonies) or a court injunction (for example, related to reporting on an ongoing case).[189]

Activity 6: Expert Video

[Presentation of a case study on the importance and scope of immunity]

Transcript:

Jean-Jacques Mamba, former parliamentarian from the DRC

Hello, my name is Jean-Jacques Mamba. I am an honorary parliamentarian from the Democratic Republic of Congo for the 2018-2023 legislature. It is a pleasure for me to share my experience within the framework of this capacity-building initiative regarding issues related to flagrant offenses and parliamentary immunities. I will directly share my story, and I will try to keep it brief.

What happened was that during my time as a member of parliament, I initiated a procedure for the impeachment of the first vice-president of the bureau following remarks he made in public, alleging that Congolese deputies received $7,000 per hour during a congress, which was completely false. As a result, I requested explanations, which he refused to provide. After sending three letters, I was compelled, according to our internal regulations, to initiate a removal process. Unfortunately for me, he was at that time the president of the ruling party, and I believe that the President of the Republic, along with members of his political family, disagreed with my approach. So, while I was collecting the required signatures - 50 at a minimum, and I managed to gather about 60 - one colleague, who had actually signed and for whom we later established proof of his signature, retracted his signature and claimed that I had committed a forgery and fraud. This meant that I allegedly imitated his signature and affixed it without his consent. This led to a spectacular arrest, as I was apprehended at home, in my underwear with my children, by the military.

When I asked to see the document, it stated that I had been summoned twice and had failed to respond to the invitations of the investigating magistrate, thus necessitating the issuance of an arrest warrant to bring me in forcefully. This was done.

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[189] As a high-water mark of this see *Denis O'Brien v. Clerk of Dail Eireann*, 31 March 2017, RECORD NO: 2015/4888P (Irish High Court), https://static.rasset.ie/documents/news/brien-v-clerk-of-dail-eireann-ors.pdf.

However, unfortunately, when I was arrested, they did not inform me why I was being arrested. There was no preliminary judicial instruction. I was brought directly before a judge for trial, in the Court of Cassation, where rulings are not subject to appeal, putting me at risk of five years in prison for something I did not do and in a completely cavalier manner.

So, the question to consider here, and I would like to share it with you, is: What are parliamentary immunities?

Parliamentary immunities are rights granted to deputies to not be held criminally liable during the exercise of their functions. This means that everything we do as deputies, especially related to our work, whether within the hemicycle or outside it, we are not criminally responsible for our actions. For example, if deputies in parliament engage in a physical altercation, they cannot be taken to court because it occurred during a parliamentary discussion, which is governed by internal regulations. The internal regulations are an organic law that is generally validated by the Constitutional Court, as is the case in my country, so these matters are regulated within the framework of this chamber in the name of the separation of powers. All offenses documented in the internal regulations that carry sanctions cannot be subject to intervention by any magistrate. But what was the matter at that time?

The magistrate alleged that there was a public outcry and that, due to my supposed imitation of my colleague's signature, the population or the city of Kinshasa was in an uproar, and therefore it was his right to apprehend and arrest me in *flagrante delicto*.

There is plentiful jurisprudence, as I have just mentioned, which indicates that when a deputy has immunities, and the act committed falls within the scope of their work, they cannot be arrested in flagrante delicto. At most, they may be sanctioned according to their internal regulations, or if a deputy runs a red light or commits a common law offence, the magistrate must seek from the National Assembly's bureau the lifting of their immunities to begin proceedings. That being said, it is possible, for example, that if a crime is committed by a deputy, one can justify the notion of being caught in *flagrante delicto* because the crime falls completely outside the scope of their duties.

I was able to benefit from the intervention of the Inter-Parliamentary Union, to which I presented my case, and they intervened by sending letters, notably to the government and to the president of the chamber. Without this intervention, I would have faced many difficulties. However, what we can emphasize at this time is that we are indeed covered by parliamentary immunity. This immunity renders us not criminally liable for all acts committed in the exercise of our activities.

One last example: if today you initiate a parliamentary mission or question a minister and allege that this minister has misappropriated funds, you cannot be prosecuted for defamation, even if it is later established that the minister did not misappropriate those funds.

So that is a bit of my contribution. I hope that everyone can benefit from it and perhaps improve their understanding of the concept of immunities.

Thank you.

Activity 7: Reading

Estimated reading time: 13 minutes

Regulation of Parliamentary Speech by Parliaments

The fact that parliamentarians benefit from absolute protection against legal suits for what they say inside parliament does not mean that they may say whatever they wish. To this extent, the term "non-accountability" may be misleading. It simply means that parliamentarians may not be held accountable by judicial or quasi-judicial bodies.

Parliament itself, however, normally retains the ability to regulate its own proceedings and this usually extends to disciplining members for statements which fail to meet the standards expected of them. The precise scope of this varies considerably from country to country, including the nature of the sanctions which may be imposed. These may include calling a member to order, censuring a member, requiring a member to stop speaking, imposing salary penalties without suspension, requiring a member to apologise, requiring a member to leave the legislative chamber or the premises of parliament altogether, either for the rest of the day or for a specified period of time (suspension, during which time the salary may also be suspended), or expelling them from parliament. Under the Westminster approach, parliaments may even retain, at least in theory, the power to imprison individuals up until the end of the parliamentary session.[190]

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[190] See Robert Marleau and Camille Montpetit, ed., *House of Commons Procedure and Practice, 2000 Edition*, https://www.ourcommons.ca/MarleauMontpetit/DocumentViewer.aspx?Sec=Ch03&Seq=7&Language=E#:~:text=imprison under Power to Discipline.

A range of speech-related actions may be deemed to undermine the ability of parliament to function. It should be noted that, for most parliaments, the rights of the collective, i.e. parliament itself, trump the rights of individual members, i.e. parliamentarians, and that where a true conflict exists, this makes sense. However, there can be instances where the party or parties which control parliament claim there is a conflict when in fact none exists, and the situation is just one of harsh criticism by opposition parties.

It is clear that disciplinary measures are an appropriate response to certain disruptive behaviour, including disruptive speech-related behaviour (such as shouting or undue heckling). In practice, warnings are often enough to control this sort of behaviour and are usually the only measure applied. It is also common for parliaments, normally via the Speaker, to control irrelevant or unduly lengthy speeches by members, so as to allow the legislature as a whole to get on with its business, or to uphold certain traditions around decorum, notably in the form of restrictions on unparliamentary speech or certain attire.

The premature disclosure of official parliamentary (or committee) reports and other documents is another breach of privilege which may be punished, although often in such cases the individual responsible leaks the document confidentially and so cannot be identified. However, an issue arises as to whether only the parliamentarian who was responsible for the primary leak should be held responsible or also any third parties who publish the information. In 2003, the Commonwealth Parliamentary Association Study Group on Access to Information recommended that only the parliamentarian should be held responsible:

> (6.4) Where confidential parliamentary documents are leaked in breach of Standing Orders, the Group believes it is a matter for Parliament to deal with Members who commit the breach but not journalists who are recipients of the information. However, it noted that leaks would become less relevant if parliamentary procedures, especially committee proceedings, were more open to the media.[191]

Claims by parliamentarians that statements either by other members or outside speakers, such as the media, have undermined their ability to function effectively as parliamentarians are rarely entertained in democracies today, although history is replete with examples of this. As the same study group stated:

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[191] Reproduced in Appendix Seven: Recommendations for an Informed Democracy in Toby Mendel, *Parliament and Access to Information: Working for Transparent Governance* (2005, World Bank Institute), https://documents1.worldbank.org/curated/en/704531468139797130/pdf/33639a10WBI0Pa1ccess1to1Information.pdf.

> (6.3) Inaccurate reporting by the media should not be considered as a contempt of Parliament. Contempt should be reserved for serious cases of interference with Parliament's ability to perform its functions.[192]

In essence, parliamentarians are expected to have thick skins and to tolerate the free speech of others, just as their own right to free speech is specially protected. Where tempers flare and statements on the floor of the legislative chamber become unduly heated, the best approach is often for the Speaker to issue either a general warning, in an attempt to cool down the discussion generally, or to caution one or more individual members if they need to rein in their rhetoric. Thus, mild measures to address speech which fails to show due respect for other members, is sexist or racist, or is otherwise unduly rude and disrespectful, are common.

As an example, the Westminster system has several longstanding rules governing the speech of members of parliament within parliament. These include refraining from: referring to another member by name, calling into question another member of parliament's character or integrity or imputing to him or her dishonest motives, and using offensive expressions. If a member uses 'unparliamentary language', the speaker may request that the member clarify the statement and if this does not resolve the issue, he or she may ask the member to withdraw the statement and, if the member refuses, he or she can be removed from parliament for the day. While some view these rules as necessary to further public order by allowing parliament to function properly, there are questions about whether some of the rules go too far. For example, a former speaker of the UK's House of Commons has opined that the rule that members of parliament should not accuse one another of lying should be changed, arguing that it protects those who have in fact lied while disgracing those who call them out for their lies.[193]

Dealing with Offensive Speech: The Table

The Table: The Journal of the Society of Clerks - At-The-Table in Commonwealth Parliaments[194] is an annual publication devoted to parliamentary matters. In each edition, it has a section

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[192] *Ibid*.

[193] "Don't ban MPs for accusing others of lying," The Times, 26 July 2021 reproduced in Nathan Cooper, "'Are You Calling Me a Liar?': Reflections on Unparliamentary Language at the Legislative Assembly of Alberta and Beyond", Canadian Parliamentary Review, Article 2 / 10 , Vol 45 No. 4 (Winter), https://www.revparlcan.ca/en/are-you-calling-me-a-liar-reflections-on-unparliamentary-language-at-the-legislative-assembly-of-alberta-and-beyond; See also Adam Forest, "Change 'absurd' rules so MPs can accuse each other of lying, says John Bercow", 26 July 2021, The Independent, https://www.independent.co.uk/news/uk/politics/boris-johnson-lie-butler-bercow-b1890404.html.

[194] See https://www.societyofclerks.org.

on Unparliamentary Expressions from Commonwealth countries, namely phrases to which speakers objected.

Some of the expressions which were reported as being "unparliamentary" in the 2023 edition of *The Table* include:

- "I said the Prime Minister was a fraud..." (House of Representatives, Australia)
- "So-called Minister" (Manitoba Legislative Assembly, Canada)
- "I would be ashamed to be a Liberal MP" ("*j'aurais honte d'être un député liberal*") (Quebec National Assembly, Canada)
- "Useless and worthless..." (Rajasthan Legislative Assembly, India)
- "Well, let's look at the selection of the leader. It's done by the union movement." (House of Representatives, New Zealand)

The Indian lower house of parliament, the Lok Sabha, has also compiled a list of expressions found to be unparliamentary both within Indian parliaments and abroad.[195]

In an effort to consolidate or concretise the obligations of parliamentarians, a number of parliaments have adopted codes of conduct or ethics codes for their members.[196] While an important focus of codes of conduct is on conflicts of interest, including financial probity and transparency,[197] some of these codes explicitly prohibit members from engaging in certain kinds of speech. For example, the Latvian Code of Ethics requires members of parliament to avoid "using words, gestures and other actions that can be insulting" and to "not use offensive or otherwise inappropriate statements that may dishonour the Saeima [parliament]."[198] It also requires them to observe "the principles of human rights" and not to "appeal to race, gender, skin colour, nationality, language, religious beliefs, social origin or state of health to justify his/her argumentation".[199]

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[195] *Unparliamentary Expressions 2021* (2022, Lok Sabha Secretariat), https://drive.google.com/file/d/1wyR_eagCiAbBe9iFZxwVx2T9wIjYUFp2/view.

[196] A 2014 survey reported that 11 out of 28 European countries including the European parliament had adopted a code of conduct for parliamentarians, 12 indicated they had no such code and five indicated they were intending to adopt one. See https://www.parliament.uk/globalassets/documents/commons-committees/Standards-Committee/Codes-of-Conduct-and-rules-systems-in-other-jurisdictions.pdf.

[197] For example, the 2011 report *Parliamentary Ethics: A Question of Trust*, by the European Union Office for Promotion of Parliamentary Democracy, focuses heavily on these issues to the detriment of other ethical issues which might be addressed, https://www.parlament.cat/document/intrade/59368.

[198] Code of Ethics for Members of the Saeima of the Republic of Latvia, Article 7, contained in the Rules of Procedure of the Saeima, https://www.saeima.lv/en/legislative-process/rules-of-procedure.

[199] *Ibid*., Article 8(2).

Preparing codes of conduct can be a useful means of consolidating standards and providing greater certainty as to expectations of parliamentarians. There is, unfortunately, a risk that parliamentary disciplinary procedures, whether codified or not, can be abused, leading to the imposition of disproportionate sanctions or sanctions on speech which should not be subject to sanctions.

Excessive or Otherwise Illegitimate Parliamentary Sanctions Against Parliamentarians

In a case from Fiji, then-parliamentarian Tupou Draunidalo was subjected to a long-term suspension of her mandate for accusing the Minister of Education of being a fool for "calling us 'dumb natives, you idiot'". Although the matter was not addressed by the Speaker at the time, it was later determined that these statements represented both a breach of the privileges of parliament and a contempt of parliament. Draunidalo was ordered to apologise and had her mandate suspended until the end of the term of that parliament. A consensus decision by the IPU Governing Council held that the suspension was "wholly disproportionate" and that "although Ms. Draunidalo could have responded differently to the situation at hand, her words fall squarely within her right to freedom of expression".[200]

The case of Malalai Joya, a woman and former parliamentarian from Afghanistan, raises not only freedom of expression issues but also that of gender discrimination. Joya was suspended for the remaining three years of her mandate for refusing to apologise for making disparaging remarks about parliament on a television show. The Supreme Court refused to act on her complaint about the suspension, while parliament subsequently brought a legal case against her for insulting public institutions, based on the same statements. In contrast, male parliamentarians who made highly offensive comments about her were merely reprimanded. The IPU Governing Council unanimously condemned the failure of parliament to redress the injustice done to Joya by expelling her without any legal basis and by discriminating against her.[201]

The risk of parliaments abusing their powers are perhaps particularly troubling where they use their powers to censure speakers from outside of parliament, given the abuse which this obviously lends itself to and, in particular, the natural tendency of parliaments to wish to insulate themselves against criticism. At a Seminar in 2005 on freedom of expression, parliament and the

[200] Case FJI/02, 27 October 2016, http://archive.ipu.org/hr-e/199/fji02.pdf.
[201] Case AFG/01, 6 October 2010, http://archive.ipu.org/hr-e/187/afg01.htm.

promotion of tolerance, organised by the IPU and the NGO Article 19, the concluding recommendations of the Rapporteur of the Seminar stated: "[A]s public figures, we must show greater tolerance to criticism and show restraint. A public response to criticism is most appropriate, rather than resorting to the justice system."[202]

One issue that parliamentary disciplinary processes raise is whether they respect due process guarantees under international human rights law. The IPU has expressed concern in cases where proceedings against members of parliament lacked basic procedural fairness. For example, in a case where the Comptroller General of Venezuela disqualified an opposition member of parliament from holding office for 15 years and where the latter alleged that she never received formal notification or a right to defend herself, the IPU Governing Council expressed concern that she was "being prevented from standing as a candidate in the forthcoming presidential elections as a result of a unilateral act by the Comptroller General, a non-judicial authority, and a procedure that did not allow her to exercise her right of defence".[203]

The IPU Governing Council also has held that where parliaments retain the power to sit as courts, internationally recognised fair trial guarantees, including the right of appeal to a "higher tribunal", should be applied.[204] However, this case concerned the unusual situation of the Parliament of Zimbabwe having imposed a punishment of one-year's imprisonment with hard labour on a member of parliament for assaulting a minister and fellow parliamentarian during parliamentary debate. As a result, this conclusion is not unsurprising in view of the clear guarantee under Article 14(5) of the ICCPR, which states: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

Some parliamentary disciplinary processes, particularly in civil law countries, allow for the imposition of significant fines. This could lead to some processes being considered, for the purposes of international standards, as being penal in nature,[205] thus attracting certain fair trial

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[202] Seminar for Chairpersons and Members of Parliamentary Human Rights Bodies on Freedom of Expression, Parliament and the Promotion of Tolerant Societies, 25-27 May 2005, http://archive.ipu.org/splz-e/sfe/conclusions.pdf.

[203] Case VEN/18, 27 March 2024, para 2, https://www.ipu.org/file/19019/download.

[204] See the Resolution of the IPU Governing Council on the case of Mr. Roy Bennett and others, October 2004. Referenced in Inter-Parliamentary Union, *Parliamentary Immunity*, September 2006, p. 12, https://www.gopacnetwork.org/wp-content/uploads/2023/03/IPU-UNDP-Immunity-Paper.pdf.

[205] UN Human Rights Committee, *General Comment No. 32*, 23 August 2007, para. 15, https://undocs.org/CCPR/C/GC/32 (noting that: "Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity").

guarantees. These include a presumption of innocence (Article 14(2) of the ICCPR); adequate time to prepare one's defence (Article 14(3)(b) of the ICCPR); the right to examine witnesses (both for and against the defendant) (Article 14(3)(e) of the ICCPR); and the right of an accused person not to be compelled to testify against him- or herself (Article 14(3)(g) of the ICCPR). A more fundamental problem of parliamentary disciplinary proceedings in such cases is that they would arguably not meet the requirement of being an "independent and impartial" tribunal, as required under Article 14(1)) of the ICCPR.

However, many parliamentary disciplinary proceedings are not so comparable to criminal justice proceedings and the issue of what due process guarantees are necessary or appropriate is not always as clear cut. The European Court of Human Rights held that the guarantee of a fair and public hearing before an independent and impartial tribunal under Article 6(1) of the European Convention on Human Rights did not apply to a disciplinary proceeding before the UK parliament.[206] At the same time, when considering the right to freedom of expression (Article 10), the European Court of Human Rights has found that sufficiently robust due process guarantees are needed for disciplinary restrictions to be deemed to be "necessary", as described below.

Procedural Protection for Free Speech of Parliamentarians

The case of *Karácsony and Others v. Hungary*,[207] before the European Court of Human Rights, demonstrates the need for strong procedural protection for freedom of expression of parliamentarians. In that case, the applicants – members of the national parliament – had all been fined by parliament, after a proposal to this effect by the Speaker, for placing, a placard and banner with political messages in the centre of the chamber, while one applicant had used a megaphone in parliament. The fines were relatively modest but not inconsequential, with the largest being around Euro 600, representing one-third of the individual's monthly salary.

[206] *Hoon v. United Kingdom*, 13 November 2014, Application no. 14832/11, paras. 29-30, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-148728%22]}.

[207] 17 May 2016, Applications Nos. 42461/13 and 44357/13, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-162831%22]}.

The Hungarian Constitutional Court upheld both the procedure, despite the fact that it offered no opportunity to appeal against the original decision, and the sanction, even though it represented one of the more severe sanctions available under the rules.

A Grand Chamber of the European Court noted that a survey of Council of Europe Members States suggested that 24 of them did not provide for any appeal in case of disciplinary measures being imposed on parliamentarians for disorderly conduct, 14 did, mostly involving an internal objection procedure, while 6 allowed in principle for a judicial remedy (para. 61). It recognised the difference between the substance of speech and the way in which it was communicated and, in particular, the disruptive impact of the megaphone (paras. 140 and 149). While the Court noted that States have a "very limited latitude" in regulating the content of parliamentary speech – with some narrow exceptions, such as "direct or indirect calls for violence" – further regulation might be justified to regulate the "time, place and manner" of speech occurring in parliament due to the need to ensure that parliament can function properly (paras. 139 and 140).

While the Court did not doubt the legitimacy of imposing sanctions for certain disruptive conduct, the Court found that freedom of expression demands that restrictions on free speech be accompanied by safeguards against abuse, which were missing in this case. The nature of these safeguards may depend on the situation and be less onerous in a context where immediate measures were needed, for example to prevent an ongoing disruption. In a case such as this, however, where the measures were applied *ex post facto*, at a minimum the parliamentarians should have been afforded a right to be heard (para. 156) and given reasons for the imposition of disciplinary measures (para. 158). Since neither happened in this case, it was a breach of the right to freedom of expression.

Activity 8: Reading

Estimated reading time: 11 minutes

Systems for Addressing Parliamentary Misconduct

As seen in the last reading, many parliaments have established disciplinary procedures, often to enforce rules contained in a code of conduct. However, there is considerable variation in how these processes work. They can be classified broadly as being based on self-regulation, external regulation and what might be deemed a 'hybrid' or 'co-regulatory' system.[208] In a purely self-

[208] *Background Study: Professional and Ethical Standards for Parliamentarians* (25 January 2013, OSCE), p. 63, https://www.osce.org/odihr/98924.

regulatory system, parliament is responsible for enforcing disciplinary rules, sometimes with a dedicated committee being responsible for dealing with more serious matters. This approach has benefits where democratic institutions are more fragile and parliaments are at greater risk of interference from the government. However, to function properly, parliamentarians responsible for discipline must do their work in a non-partisan, disinterested manner, which can be difficult for highly political actors. The lack of independence of such systems may also raise procedural fairness concerns where sanctions are severe. The OSCE Parliamentary Assembly has expressed an apparent preference for some degree of external regulation by encouraging parliaments of member States to "[e]stablish an office of public standards to which complaints about violations of standards by parliamentarians and their staff may be made".[209]

The United States is one country which has moved towards more external regulation with the 2008 establishment of the Office of Congressional Ethics to oversee allegations of misconduct against members, officers and staff of the US House of Representatives.[210] This body is independent from the US House of Representatives, has its own staff and is governed by a board of directors consisting of ordinary citizens.[211] The Office is empowered to investigate violations of any law, rule, regulation, or other standard of conduct" and to refer cases where there is a "substantial reason to believe" a violation has occurred to the US House Committee on Ethics, which is ultimately responsible for enforcement.[212]

It is also possible for parliaments to retain a more central role in the disciplinary process while incorporating substantial outside involvement, in a system which could be classified as more clearly co-regulatory in nature, as in the UK's current system, which is described below.

Discipline in the United Kingdom's House of Commons

[209] *Resolution on Limiting Immunity for Parliamentarians in Order to Strengthen Good Governance, Public Integrity and the Rule of Law in the OSCE Region*, Article 12(c), adopted as part of the *Brussels Declaration of the OSCE Parliamentary Assembly and Resolutions*, 3-7 July 2006, p. 34, https://www.osce.org/pa/19799.

[210] Office of Congressional Ethics, "About", https://oce.house.gov/about.

[211] Office of Congressional Ethics, "Citizen's Guide", https://oce.house.gov/about/citizen-s-guide.

[212] *Ibid.*

In the UK, members of the public or of parliament may submit complaints about violations of the House of Commons' Code of Conduct (Code) to the Parliamentary Commissioner for Standards.[213] The Code regulates aspects of members of parliament's public life more generally and is distinct from the Rules of behaviour and courtesies in the House of Commons,[214] which focus on conduct within the House and which are enforceable by the Speaker. The Code does not include specific freedom of expression rules but some obligations may restrict certain expressions. For example, section 17 reads: "Members shall never undertake any action which would cause significant damage to the reputation and integrity of the House of Commons as a whole, or of its Members generally".

The Parliamentary Commissioner for Standards is an officer of the House of Commons, appointed by that body, and who can only be removed upon a resolution of the House of Commons following a report from the Committee on Standards that the individual is "unfit to hold his office or unable to carry out his functions".[215] The Commissioner is authorised to investigate breaches of the Code but not matters such as conduct in the chamber (normally reserved for the Speaker) or allegations of criminal conduct (normally reserved for the police).[216]

For certain breaches, the Commissioner may recommend certain remedial actions.[217] In other cases, or where the MP refuses to follow a recommendation or disagrees that a breach has occurred, the Commissioner may refer the matter to the Committee on Standards.[218] This select Committee consists of seven members of parliament and seven lay members,[219] thus ensuring public input into the disciplinary process, and can decide

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[213] Procedural Protocol in respect of the Code of Conduct, 7 February 2023, section 8, https://publications.parliament.uk/pa/cm5803/cmcode/1084/1084.pdf.

[214] September 2021, https://www.parliament.uk/globalassets/documents/rules-of-behaviour.pdf.

[215] Standing Orders 2023, sections 150(1) and 150(8), https://publications.parliament.uk/pa/cm5803/cmstords/so-1932-23102023/so-2023i.pdf.

[216] Procedural Protocol in Respect of the Code of Conduct, 24 February 2023, section 19, https://publications.parliament.uk/pa/cm5803/cmcode/1084/1084.pdf.

[217] *Ibid*., sections 47-49.

[218] *Ibid*., sections 50 and 53.

[219] Standing Orders 2023, Section 149(2), https://publications.parliament.uk/pa/cm5803/cmstords/so-1932-23102023/so-2023i.pdf.

on whether a breach has occurred and recommend certain sanctions. MPs may appeal decisions of the Committee on Standards to the Independent Expert Panel, which was established in 2020, and whose members are independent of parliament.[220]

Under the Recall of MPs Act 2015, a decision by the Committee on Standards ordering the suspension of an MP for at least 10 sitting days or 14 days is one of three situations which lead to an MP being subject to a recall petition process.[221] If 10 percent of eligible electors sign the recall petition, the MP's seat is vacated and a byelection is called, although the MP is not barred from running in this election.[222]

Several other jurisdictions also have provisions for recall elections for elected officials, such as several states in the United States, Ecuador, Venezuela, several Swiss cantons and two Canadian provinces. In some systems, like the UK, certain conditions, such as criminal convictions or findings of misconduct, are required to trigger a recall election whereas in others any petition which meets the required percentage threshold is valid. In the Canadian province of British Columbia, for example, a recall petition is successful if it gathers the high threshold of 40 percent of eligible voters.[223]

Some electoral laws, regulations and codes also impose certain restrictions on disinformation during election periods. While it is legitimate to sanction certain types of disinformation, for example relating to how to exercise the right to vote, such as incorrect information about the location of polling stations or the eligibility of people to vote, some States have gone further. While deliberate falsehoods by politicians during election periods is a problem, it is important that any measures in this area respect the particularly robust protections for political speech under international law and avoid the potential for abuse. International standards only allow false statements to be prohibited where they are linked to a clear harm, such as in the case of defamatory statements, perjury or fraud.

One example of a jurisdiction which has addressed a particular kind of electoral disinformation is the Australian state of South Australia, the electoral law of which establishes an offence, punishable by a fine, for electoral advertising which is both inaccurate and misleading. This

[220] Procedural Protocol in Respect of the Code of Conduct, 24 February 2023, sections 86-100, https://publications.parliament.uk/pa/cm5803/cmcode/1084/1084.pdf; See also UK Parliament, "Independent Expert Panel", https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/independent-expert-panel.

[221] 2015 c. 25, section 1, https://www.legislation.gov.uk/ukpga/2015/25/section/1.

[222] UK Parliament: Erskine May, "Recall of MPs", https://erskinemay.parliament.uk/section/4912/recall-of-mps.

[223] Elections BC, "Recall", https://elections.bc.ca/events-services/recall.

applies to a person (natural or a corporation) who "authorises, causes or permits the publication of an electoral advertisement" containing "a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent", with protections for those who were not involved in determining the advertising's content or who "could not reasonably be expected to have known" the statement was inaccurate and misleading.[224]

While this rule is broad, certain safeguards are built into the law, as summarised in a report by the state's Electoral Commission:

> For a breach of this section to be determined and for the Electoral Commissioner to intervene, a number of elements must be established. The subject of the complaint must be an electoral advertisement that contains electoral matter, defined as matter calculated to affect the result of an election. The electoral advertisement must contain a statement purporting to be a statement of fact. Opinions and predictions of the future cannot be considered statements of fact, as neither a person's opinion nor the future can be proven. Finally, and most significantly, the statement must be shown to be both inaccurate and misleading to a material extent; one of these alone is insufficient for the Electoral Commissioner to intervene.[225]

In Canada, there is no general provision on misleading political advertising but a prohibition on certain kinds of false statements about a candidate has existed in various forms since 1908, although it has evolved over the years.[226] The current version of this provision is limited to certain categories of disinformation. It prohibits making or publishing, during an electoral period and with the intention of affecting the election's results, "a false statement that a candidate, a prospective candidate, the leader of a political party or a public figure associated with a political party has committed an offence" or a false statement about such an individual's "citizenship, place of birth, education, professional qualifications or membership in a group or association".[227]

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[224] Electoral Act 1985, sections 113(2) and 113(3), https://www.legislation.sa.gov.au/lz?path=%2FC%2FA%2FELECTORAL%20ACT%201985.

[225] Electoral Commission, *South Australia, Election Report: 2022 South Australian State Election and 2022 Bragg By-election*, p. 82, https://www.ecsa.sa.gov.au/component/edocman/2022-sa-state-election-and-bragg-by-election-report/download?Itemid=0.

[226] *Canadian Constitution Foundation v. Canada (Attorney General)*, 2021 ONSC 1224 (Ontario Superior Court of Justice), para. 12, https://www.canlii.org/en/on/onsc/doc/2021/2021onsc1224/2021onsc1224.html?resultIndex=1&resultId=449eda9007864577b17d70e5ba25b321&searchId=2024-05-23T17:45:27:604/e7b55a4ec3624fc9b1b40b13ff748f9f.

[227] *Canada Elections Act*, S.C. 2000, c. 9 (current to 19 June 2024), section 91, https://laws-lois.justice.gc.ca/eng/acts/e-2.01/.

Where electoral restrictions aim to combat false statements by politicians, it is important that they be drafted and applied narrowly, in view of the cardinal importance of open political speech in democratic systems, especially during electoral periods, as is apparent from the case below decided by the European Court of Human Rights.

The European Court of Human Rights on Electoral Restrictions on False Information

In *Brzeziński v. Poland*,[228] the European Court of Human Rights considered the case of candidate for local political office who made an electoral booklet which was critical of the mayor and members of the local council. The case involved a challenge to a decision by a Polish tribunal against him under the law governing local elections, which provided for sanctions where publicity or campaign materials contained false information.[229] The tribunal ordered Brzeziński to stop disseminating the brochure, to correct the information by publishing a statement in two local daily newspapers, to pay money to a charity and to cover the costs of the applications.[230]

The European Court of Human Rights held that the reasons given by the Polish judiciary failed to establish any pressing need for restricting the candidate's freedom of expression after considering factors which included that it was unclear that the Polish judiciary had adequately examined whether the candidate's statements had a sufficient factual basis, that he was involved in a debate on important local issues and that the onus was inappropriately placed on the candidate to establish the truth of the statements. The Court also found that the nature of the sanctions was likely to have a chilling effect on local debate.[231]

[228] 25 July 2019, Application no. 47542/07, available in French: https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22FRE%22],%22appno%22:[%2247542/07%22],%22documentcollectionid2%22:[%22COMMITTEE%22],%22itemid%22:[%22001-194958%22]}.

[229] *Ibid*., para 28.

[230] *Ibid*., paras. 16-17.

[231] *Ibid*., paras. 57-58, 60-61, and 63-64. This was one of several European Court of Human Rights decisions finding that this provision of the local electoral law violated freedom of expression. See, for example, *Kwiecień v. Poland*, 9 January 2007, Application no. 51744/99, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-78876%22]}.

Some countries have prohibitions on electoral candidates' engaging other kinds of harmful speech, such as incitement to violence or hate speech. South Africa's Electoral Act, 1998 contains an Electoral Code of Conduct for candidates and political parties.[232] A court is authorised to impose a variety of measures in response to violations of the Code, including issuing a warning, imposing fines, disqualifying candidatures and cancelling a party's registration.[233] The Code has a number of quite broad obligations, such as the need to "respect the role of the media before, during, and after an election" and to "facilitate the full and equal participation of women in political activities".[234] It prohibits certain kinds of speech for candidates and registered parties, including language which "may provoke" violence during electoral periods, "the intimidation of candidates, members of parties, representatives or supporters of parties or candidates, or voters", or "false or defamatory allegations" about another party or its members or about a candidate or its representatives.[235]

Electoral codes of conduct or similar laws or regulations can also be used to address and deter certain harmful behaviour by political parties and figures, which can ultimately help support an enabling environment for freedom of expression. For example, a South African court found that in 'doxxing' a journalist by publishing her personal contact information on Twitter, which resulted in exposing her to harassment by others, an opposition politician had breached the Code of Conduct's requirement that "every registered political party and candidate must take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters."[236] Nevertheless, overly broad provisions such as this could be abused. For example, the requirement in the South African Code to avoid language or statements that "may provoke" violence or intimidation – as opposed to those which are likely to have such an effect – likely fails to pass muster under international standards.

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[232] Section 99, https://www.gov.za/sites/default/files/gcis_document/201409/act73of1998.pdf. The Electoral Code of Conduct is contained in Schedule 2.

[233] *Ibid*., section 96(2).

[234] Electoral Code of Conduct, *ibid*., sections 6(b) and 8(a).

[235] *Ibid*., sections 9(1)(a) and 9(1)(b).

[236] Committee to Protect Journalists, "South African court rules Malema, EFF violated Electoral Code of Conduct in Karima Brown doxxing incident", 6 June 2019, https://cpj.org/2019/06/south-african-court-rules-malema-eff-violated-elec.

Another way to address problematic behaviour by candidates is through voluntary codes of conduct which parties adopt, thereby demonstrating a shared commitment to uphold minimum standards. In 1998, the International Institute for Democracy and Electoral Assistance (International IDEA) developed a model Code of Conduct for Political Parties and in 2017 published a Guide on such codes of conduct. These codes can be a useful means for parties to establish ground rules before elections, reinforce or fill in gaps in electoral regulations and may also lay the groundwork for reforms to electoral regulations. Parties may also establish monitoring or enforcement systems for such codes. For example, in Peru, in 2016, signatories to a code of conduct established, with support from the country's electoral monitoring body, a 'tribunal' with agreed upon, respected figures to hear disputes and issue denunciations of violations.[237] Similarly, in 2024, Uruguayan parties signed on to an "Ethical Pact against Disinformation" which included a commitment to agree upon a permanent consultation mechanism to follow up on it.[238]

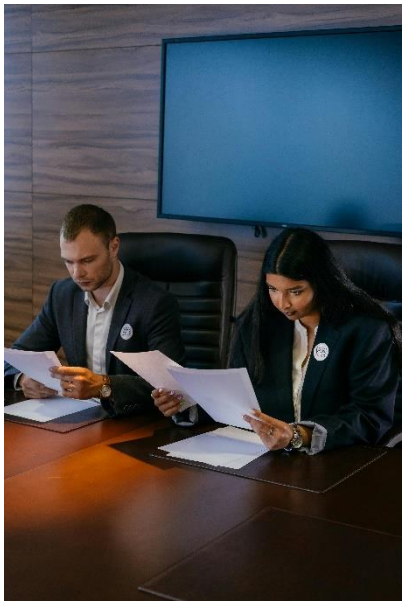
Activity 10: Reading

Estimated reading time: 5 minutes

Political Parties and Regulation of Their Elected Representatives

[237] *Dialogues on Voluntary Codes of Conduct for Political Parties in Elections: A Facilitator's Guide* (2017, International IDEA), p. 59, https://www.idea.int/publications/catalogue/dialogues-voluntary-codes-conduct-political-parties-elections-facilitators.

[238] UNESCO, "Representantes de los partidos políticos uruguayos refuerzan pacto ético contra la desinformación", 17 April 2024, https://www.unesco.org/es/articles/representantes-de-los-partidos-politicos-uruguayos-refuerzan-pacto-etico-contra-la-desinformacion. A copy of the pact in Spanish can be viewed here: https://www.undp.org/sites/g/files/zskgke326/files/migration/uy/undp-uy-pacto-etico-definformacion.pdf.



Political parties play an extremely important, indeed dominant, role in most modern parliaments. They serve to aggregate opinion, creating the possibility of coherent electoral platforms and governing programmes. They also enhance the engagement of citizens in elections by providing clear and centralised policy programmes spearheaded by visible and relatively better-known leaders. It is fair to say that it is often parties as opposed to individual candidates (from those parties) which dominate electoral choices by the public, even outside of voting systems based on proportional representation, where this may be even more true.

The relationship between parties and their elected representatives (members of parliament) is in most cases set out primarily in the internal rules and workings of each party. It is key to the whole idea of a party that it be able to command the loyalty of its members of parliament, and so every party has rules to ensure that. There are normally provisions for various disciplinary measures for members who breach the rules, as well as procedures for applying these measures. The measures normally include the power to suspend a member, for example pending determination of an allegation of wrongdoing, such as sexual impropriety, and, in extreme cases, to expel a member, for example where the member has not sided with the party on an important vote.

All of this is part of the exercise of the right to freedom of association. At the same time, there are important arguments in favour of protecting the freedom of parliamentarians vis-à-vis their parties, including the idea that parliamentarians should ultimately be free to act in accordance with their own appreciation of what is the best policy and decision at any particular time. This idea, which derives in part from the notion of a free parliamentary mandate, also has strong human rights roots, including in the freedoms of expression and association.

In some countries, legislation sets important rules governing the relationship between parties and members of their caucuses. A 2011 study by the IPU, *The Impact of Political Party Control over the Exercise of the Parliamentary Mandate*,[239] focused on the rules regarding termination of the parliamentary mandate based on relations between a parliamentarian and his or her party in 162 countries. 42 of the countries, or roughly 25 per cent, have legal rules regarding the loss of the parliamentary mandate based on relations with the party.

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[239] Zdzisław Kędzia and Agata Hauser, https://www.ipu.org/resources/publications/reports/2016-07/impact-political-party-control-over-exercise-parliamentary-mandate.

The most common rule, applicable in 33 countries, is that a change of party membership following the election – whether due to the choice of the parliamentarian or of the party – leads to loss of the parliamentary mandate. This can also include cases where someone elected as an independent joins a party. In five countries, voting against the party's directives can lead to the loss of the mandate, while in three of the five merely abstaining against the party's directives has this effect.

The loss of a parliamentary mandate where an individual leaves the party or a party expels him or her raises an issue of whether the State, which ultimately controls the retention or loss of a parliamentary mandate, should be involved in enforcing party discipline and whether this is consistent with freedom of expression. The IPU Committee on the Human Rights of Parliamentarians has taken a clear position on this, stating:

> [I]t cannot accept, in the light of the provisions of Article 19 of the ICCPR, that mere expression of a political view can lead to such a serious sanction as loss of the parliamentary mandate.[240]

The resolution of any specific case raising this issue may require a closer examination of all of the circumstances, including the electoral system as a whole and, in particular, the way in which seats are allocated in the first place. Certainly the idea of terminating the parliamentary mandate based on relations with a political party outside of a system based on proportional representation seems hard to justify.

Another consideration is the risk of abuse of these sorts of rules, as detailed in the box below.

Termination of the Parliamentary Mandate in the Maldives

One of the issues raised in Case MDV16-78 from the Maldives before the IPU Committee on the Human Rights of Parliamentarians was the question of whether the termination in 2017 of the mandates of 12 parliamentarians who had defected from the ruling Progressive Party of Maldives (PPM) was legitimate. There were some suspicious circumstances surrounding the termination. Despite a number of floor crossings since 2014, only these 12 parliamentarians had their mandates terminated. The termination occurred just as a no confidence vote which depended on the votes of these members was before parliament, and the Supreme Court ruling ratifying

[240] *Ibid.*, p. 21.

the terminations was adopted just three days after the matter had been presented to the Court. The terminations came in the context of repeated allegations from the opposition that since 2014 the ruling party, with support of the Speaker, had restricted opportunities for the opposition to contribute to parliamentary work and that parliament had passed laws negatively impacting freedom of expression and other rights.

An IPU delegation mandated by the Committee on the Human Rights of Parliamentarians carried out a mission to the Maldives from 19 to 21 March 2018. In its preliminary observations, the delegation stated that there were clear indications that the termination was "arbitrary" and called on the authorities to allow the 12 members to take their seats in parliament as soon as possible.[241]

An interesting case from Togo, following the 2010 elections, illustrates another way this can play out. Twenty parliamentarians, elected under the banner of the Union of Forces for Change (UFC) opposition party, left that party and formed a new political party, called the National Alliance for Change (ANC). In accordance with established practice at the time, the members had given their original party undated blank letters of resignation as a condition of being included in its electoral rolls. Following their resignations, these letters were forwarded by the Speaker to the Constitutional Court, which vacated their seats, without the members concerned ever having been given a chance to be heard. In due course, and after discussions involving the IPU Committee on the Human Rights of Parliamentarians, the members were compensated and the Standing Orders were amended to provide explicitly that a resignation letter of a member could only be relied upon if it emanated from and was handed in by the resigning member.[242] This should go some way to preventing abuse of this practice in future.

Activity 11: Expert Video

[Expert Video on Party Discipline]

Transcript:

Kevin Deveaux, Former Canadian Parliamentarian and International Expert on Parliaments

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[241] As reported in the Decision adopted unanimously by the IPU Governing Council at its 202nd session, Geneva, 28 March 2018, pp. 7-8, https://www.ipu.org/download/4695.

[242] Cases TG/05-TG/13, 24-27 January 2015, http://archive.ipu.org/hr-e/comm146/TG05.pdf.

Hello. My name is Kevin Deveaux. I'm a former member of the provincial parliament in Nova Scotia, Canada, where I had the privilege over two terms of being the official opposition House leader, which has given me some valuable experience in the area of political party discipline in Canada. I've also had the privilege over the last 17 years of working internationally directly with more than 80 parliaments. So I come to this video with a bit of experience in Canada, but also internationally.

Let me start by saying that I think party discipline globally can be found on a spectrum. You obviously have at one end very strict disciplined political parties in which members of parliament have very little space to be, to speak their mind or to be able to challenge party policy. Probably one of the most obvious examples of that is in Bangladesh where the constitution of the country specifically mandates that if a member of parliament votes against the party position on a bill, that that member of parliament immediately loses their seat, creating a constitutionally mandated strong party discipline. On the other end, you might have parties that are much weaker. The United States is probably a good example of that, where most of their congressmen and women, senators, state assembly people are actually being elected through open primaries where voters decide who the candidate is. This creates a very weak link and accountability link between the party and the individuals who are elected and as a result you see in the United States that voting based on interests of the member or their constituents is much greater than, and very little party discipline can actually be imposed.

In Canada we're somewhere in the middle. Let me start by saying that there are a couple of key elements to party discipline in Canada. First of all is caucus solidarity, caucus being the party block, the party group; in Canada, we call them party caucuses. Those caucuses, it's expected that there will be a full robust debate on any given issue or how the party will vote on a bill in parliament within the confines of the caucus in an in-camera meeting in which there are very, as I said, strong discussions. But then whatever decision is made in those discussions, all members are expected to be behind them in public. So even if you as a member of parliament in Canada have debated vigorously within your party caucus for position A and the party decides to go with position C, the expectation is that when you leave that room, you're going to be speaking in favour of position C. That discipline is expected to be outside in the public face of the party. Within the party caucus, there's room for debate. But once a decision is made, every member in it must get behind it.

The second is that in Canada, the political parties are very much leadership-driven. We have a situation in which the leaders have a lot of control over the party apparatus, how the caucus operates, and, of course, over the disciplining of members. So, in those circumstances, it can be very difficult for party members, individuals, members of parliament to actually be able to, you know, move or advocate for changes in party policy, particularly ones that are near and dear to

the leader because the leader will have a lot of final say in the party's position and therefore all members again are expected to fall in line with that position.

What are the reasons why discipline is issued in Canada by political parties? Well, there's a few of them that I wanted to touch on. First of all, if there's a violation of a code of conduct that the parliament may have—sexual misconduct, financial irregularities, conflicts of interest, criminal, criminal charges being laid—of course, in those circumstances, members are often disciplined. If you break from caucus, if you vote against the caucus position on a bill, if you happen to be someone who's caught leaking confidential caucus debates into the media, these would be reasons as well why you might be disciplined. If you challenge the leadership of the party, which happens from time to time, when political party leaders are weak and other members of the caucus, our party may see that it's time to move on, calling for that leadership change could actually result in a lot of discipline being imposed if you're not successful.

And then of course, there's ideological and policy differences. Obviously, members of parliament are elected with their own personal values, their morals, and they may not always coincide with that of the party that they decided to run for. And in those circumstances, we can see those ideological differences can actually result in discipline. What type of discipline are we talking about here? Well, again, it's a spectrum.

On one side, you may have fairly small discipline being meted out. It could be that the number of questions an MP gets during question period, question time, might be reduced. If the member is on a specific committee or wants to be on a certain committee as a member or maybe a committee chair, they may not get that. Or if they have it, it may be removed. You also see, perhaps, on the other side expulsion, in which the member is permanently removed from caucus. Something slightly less strong might be suspension, where for a period of time the member is suspended, but they may be there may be an opportunity for you to come back. And then in the middle, you may see situations in which there are ministerial posts or shadow cabinet posts that have been given out to certain members of the parliament in the caucus. And, of course, discipline can result in them getting a reduced post ministerially or shadow cabinet or perhaps being removed from cabinet altogether. Finally, the one I just want to talk about which is less formal and one that doesn't necessarily address, you know, formal discipline, and that would be public shaming. I know from my experience on more than one occasion as House leader in our caucus, I had to go before the media and critic and be critical of one of our members who voted in a way that we didn't agree on or who were saying things in the media that perhaps were not good for the public image of the party.

In those circumstances, the public shaming can have a very strong impact, in trying to discipline a member. It's not a formal form of discipline, but at the same time if you're calling them out in public obviously that is heard by their constituents. It can have an impact on their electoral

success going forward, but it also creates a situation in which that public shaming in front of the media should and may help to ensure that those members that perhaps are stretching the bounds of caucus solidarity are going to come back into the fold.

I hope you found this discussion around Canadian political party discipline helpful, and I wish you best of luck with the rest of your course. Thank you.

Activity 12: Further Readings

Suggested Further Readings

- European Commission for Democracy Through Law (Venice Commission), *Report on the Scope and Lifting of Parliamentary Immunities*, Adopted 21-22 March 2014, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e.
- Parliamentary Assembly of the Council of Europe, *Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly*, 23 May 2016, https://pace.coe.int/en/files/22801/html.
- *Background Study: Professional and Ethical Standards for Parliamentarians* (25 January 2013, OSCE), https://www.osce.org/odihr/98924.
- Zdzisław Kędzia and Agata Hauser, *The impact of political party control over the exercise of the parliamentary mandate* (2011, IPU), https://www.ipu.org/resources/publications/reports/2016-07/impact-political-party-control-over-exercise-parliamentary-mandate
- *Code of Conduct for Political Parties: Campaigning in Democratic Elections* (1998, International IDEA), https://www.idea.int/publications/catalogue/code-conduct-political-parties-campaigning-democratic-elections.
- *Dialogues on Voluntary Codes of Conduct for Political Parties in Elections: A Facilitator's Guide* (2017, International IDEA), https://www.idea.int/publications/catalogue/dialogues-voluntary-codes-conduct-political-parties-elections-facilitators.
- European Union Office for Promotion of Parliamentary Democracy, *Parliamentary Ethics: A Question of Trust*, 2011, https://www.parlament.cat/document/intrade/59368

MODULE 5: PARLIAMENTARIANS' ROLE IN PROMOTING FREEDOM OF EXPRESSION AND THEIR RELATIONSHIPS WITH OTHER SOCIAL ACTORS

Activity 1: Lead Trainer Video

Hello and welcome to the final module of this course, which addresses parliamentarians' role in promoting freedom of expression and their relationships with other actors. There are three functions which are common to parliaments in democracies: representation, law-making and oversight. The first refers to the idea of representing the interests of citizens or constituents, the second to parliament's role in adopting legislation and the third, while broad in scope, focuses particularly on oversight of the executive and, in particular, oversight of the proper implementation of laws.

It is quite clear that under international law parliaments are bound to respect human rights guarantees, including those of freedom of expression. Parliaments and their members should factor respect for freedom of expression, and sometimes the explicit protection and promotion of free speech, into their work regarding all of their three main functions. While all parliamentarians should do this, where parliaments have established human rights committees, they will play a particularly important role here.

Parliaments should take positive steps to ensure respect for freedom of expression. Examples given of this are the need to ensure protection against attacks on freedom of expression, to ensure appropriate regulation of the media (for example to promote media diversity and prevent undue concentration of ownership) and to provide protection to whistleblowers (including through legislation).

In some cases, international human rights guarantees provide fairly clear guidance as to how to protect freedom of expression, whether through legislation or by other means. For example, international law defines quite precisely not only the obligation to prohibit hate speech but also the standards for this (i.e. what speech to prohibit). In other cases, for example as to how best to foster a diverse media environment, there will be more space for local adaptation, albeit while remaining within the parameters set by international law.

Parliaments are, by their very essence, forums for contesting ideas and engaging in debates. These often assume a partisan dimension. However, it is important for parliamentarians, when taking positions on human rights, to make an effort to respect international standards. Taking a position in favour of blasphemy laws or blocking all content from a hostile neighbouring country may sometimes win votes, but it can never be legitimate. Parliamentarians should resist the temptation to put short-term personal or party gains above human rights. In other words, when the work of parliamentarians relates to human rights, partisan behaviour should give way to the need to respect rights.

To be effective in promoting human rights, parliamentarians need to be informed about those rights. The main sources of human rights obligations for States are usually the human rights part

of the constitution, which may be described as a charter or bill of rights, and international human rights obligations.

Every parliamentarian should make a general effort to be aware of these two sets of obligations. Given the foundational importance of freedom of expression – to the work of parliamentarians, to democracy in its wider sense and to the protection of all other human rights – it is perhaps particularly important for parliamentarians to be aware of the main features of this right. Organisations like the IPU, the Office of the United Nations High Commissioner for Human Rights and UNESCO (in relation to freedom of expression and access to information), as well as a number of civil society groups, run programmes to inform parliamentarians about human rights.

At the same time, it is not realistic to expect every parliamentarian to be a deep expert on freedom of expression, which is a quite complex right. Despite this, parliamentarians sitting on committees which focus on legislation and other issues which directly impact freedom of expression should make an effort to inform themselves about this right. They should also reach out, when specific issues come before them, to those who are expert in the matter – for example, academics, national human rights institutions, parliamentary human rights committees and/or civil society organisations – so as to ensure that the expertise gets factored properly into parliamentary discussions.

Parliamentarians can also play a role in ensuring that their States ratify relevant human rights treaties and in exercising oversight over any reservations and declarations entered into by their States. Once treaties have been ratified, parliamentarians have a key role to play in monitoring their implementation. Many human rights treaties have mechanisms to promote their effective implementation. Under the ICCPR, for example, States are required to report regularly (every five years) to the oversight body, the UN Human Rights Committee. Parliaments can collaborate with other State actors on the reporting process and play an oversight role in ensuring that the recommendations which come out of the process are acted upon properly. Running alongside this, with roughly analogous roles for parliamentarians, are non-treaty-based procedures, such as the Universal Periodic Review, overseen by the UN Human Rights Council. As with the ICCPR, States are reviewed by the Council on a regular basis (in principle every four and one-half years) in relation to a wide range of human rights obligations, including freedom of expression. Unlike the ICCPR, all 193 UN Member States must go through the UPR process. The UPR process also leads to a set of recommendations to improve performance, again with a role for parliament in oversight.

This module looks a number of roles of parliamentarians in promoting freedom of expression, including as legislators and as social leaders.

This is the last time I will be speaking with you so let me take this opportunity to wish you all the very best of luck with the rest of the course.

Activity 2: Reading

Estimated reading time: 11 minutes

Responsibilities of Parliamentarians to Promote Freedom of Expression in their Role as Legislators

One of the most important ways that parliaments and their members can help to promote respect for freedom of expression is through ensuring that legislation is not only compatible with international, regional and constitutional human rights standards but goes beyond this to reflect better or even best practice.

Although most rights depend at least to some extent on a supportive legislative framework, laws play a particularly important role when it comes to freedom of expression. Indeed, international law specifically requires any restriction on freedom of expression to be provided by law. The creation of independent media regulators and the rules by which they regulate the sector also need to be set out in legislation. What is not in required by law is often as important as what is. For example, the law should not require newspapers to obtain a licence or impose minimum conditions on who may practise journalism. Similarly, legislation provides the backbone for systems regarding access to information, protection of whistleblowers and, often, safety mechanisms for journalists and others who are at risk of attack, which may also include parliamentarians.

Parliamentarians should pay particular attention to certain areas where legislation which fails to respect human rights standards is often proposed. In recent years, many countries have passed anti-terrorism laws, many of which impose unduly restrictive limits on freedom of expression. Secrecy rules, again often adopted in the name of national security are another area where laws tend to fail to conform to international standards. The imposition of states of emergency, during which States may derogate from some rights, including freedom of expression, should also be mentioned here. International law, specifically Article 4 of the ICCPR, sets out clear standards governing states of emergency. These include the existence of a "public emergency which threatens the life of the nation", which is officially proclaimed and about which other States have

been informed through the UN Secretary-General. Derogations are justified only to the extent that they are "strictly required by the exigencies of the situation".

Abuse of Terrorism and Other Security-Related Charges Against Parliamentarians

On 16 November 2017, the Supreme Court dissolved the Cambodian National Rescue Party (CNRP), leading to the loss of mandates held by 55 CNRP members in the National Assembly and two members of the Senate. Before the dissolution of the party, Kem Sokha, then President of the CNRP, was charged under Article 443 of the Criminal Code, which states:

> The acts of entering into secret agreement with a foreign state or with its agents in order to create hostilities or aggression against Cambodia is punishable by imprisonment from 15 (fifteen) years to 30 (thirty) years.[243]

Sokha's crime appears to consist of having given a speech in Australia in 2013 explaining why he created a human rights organisation, the Cambodian Human Rights Centre. In its consensus decision on the case, the IPU Governing Council noted that Sokha's speech contained "nothing whatsoever that could constitute a criminal offence" and that "his freedom of expression has clearly been violated in the present case", expressing deep shock "that this video has been used as evidence of treason".[244] In 2023, Sokha was ultimately sentenced to 27 years of house arrest.[245]

In another case, brought before the IPU Committee on the Human Rights of Parliamentarians from Malaysia in early 2017, three opposition parliamentarians, N. Surendran, Ng Wei Aik and Sivarasa Rasiah, were charged under sections 4(1)(a), (b) and (c) of the Sedition Act. Another opposition parliamentarian, Chua Tian Chang, was sentenced to three months' imprisonment under the same Act in September 2016 for calling for street demonstrations to protest the election results, which he contested. Due to a further conviction for "insulting the modesty of a police officer", Tian Chua was

[243] See https://sherloc.unodc.org/cld/document/khm/2009/criminal_code_of_the_kingdom_of_cambodia.html.
[244] Case CMBD/60, 18 October 2017, http://archive.ipu.org/hr-e/201/cmbd27.pdf.
[245] Prak Chan Thul, "Cambodian opposition figure Kem Sokha sentenced to 27 years of house arrest", 3 March 2023, Reuters, https://www.reuters.com/world/asia-pacific/cambodian-opposition-figure-kem-sokha-sentenced-27-years-treason-2023-03-03.

prevented from running in the May 2018 Malaysian elections.[246] The IPU Committee has repeatedly expressed serious reservations about the Sedition Act,[247] which remains notoriously vague and broad as a restriction on freedom of expression.[248]

Although primary legislation, passed by parliament, provides an overall framework, subordinate legislation (known variously as rules, regulations, by-laws and so on), normally passed by the executive, can also be of great importance. Parliaments have two roles to play here. First, the primary legislation should define the scope for subordinate legislation in an appropriate manner, i.e. not too widely and not too narrowly. There is sometimes a tendency for legislation to leave unduly broad scope for issues to be dealt with by subordinate legislation. Matters which change over time or from case to case – such as the appropriate fee for a broadcasting licence – need to be left to secondary rules because flexibility is needed, and the legislation cannot be changed easily. It is also unnecessary for primary legislation to get into minutiae, which can create confusion and rigidity. At the same time, it is a specific requirement of international law that restrictions on freedom of expression be prescribed by law which, in turn, requires the rules to be clear and precise and not to grant too much discretion to officials in determining their exact scope.

Second, in most cases, parliament has some formal power of review over regulations. Broadly speaking, the power of review falls into two categories, sometimes referred to as the positive and negative review procedures. Under the positive review procedure, parliament is required to (positively) approve the regulations, while under the negative review procedure, the regulations will be valid unless parliament votes against them. Regardless of the procedure, parliamentarians should take seriously their role in reviewing regulations to make sure that they do not undermine human rights.

While parliamentarians have a primary responsibility to ensure that proposed legislation respects human rights, other actors should assist with this, including the executive branch, in addition to independent experts in international and domestic law. Below are some examples of tools and practices which may assist parliamentarians with their duties to scrutinise the human rights impacts of proposed legislation.

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[246] Tang Ruxyn, "Tian Chua Backs 22-Year-Old Independent Candidate After KL High Court Dismisses His Suit", 4 May 2018, SAYS, http://says.com/my/news/high-court-dismisses-tian-chua-suit-challenging-disqualification-from-contesting-in-batu.

[247] Cases falling between MAL21-40, 23 January to 3 February 2017, http://archive.ipu.org/hr-e/comm152/mal21.pdf.

[248] Malaysian Bar Association, "Why the Sedition Act stifles democracy in Malaysia", 29 April 2015, http://www.malaysianbar.org.my/legal/general_news/why_the_sedition_act_stifles_democracy_in_malaysia.html.

Practices to Assist Parliamentarians with Human Rights Scrutiny

- The Ugandan parliament's Standing Committee on Human Rights adopted a checklist to help assess the compliance of proposed legislation, strategies, policies and government programmes with human rights standards.[249]
- In recognition of the key role which government information plays in effective legislating, a Council of Europe handbook recommends that the executive be required to attach a detailed human rights memorandum to each piece of proposed legislation.[250]
- Along these lines, since 2019, in Canada, when a bill is introduced into parliament, the Minister of Justice is required to submit a statement describing its potential effects on constitutionally guaranteed rights and freedoms, with the stated goal of informing both parliamentarians and the general public about these effects.[251]

Cross-party groups of parliamentarians provide a useful tool for discussing legislation. These informal groups, composed of members of different parties with common interests, can help parliamentarians from different parties overcome partisan divides and build consensus on issues, including on human rights matters. Freedom of expression and access to information may be particularly amenable to cross-party work because differing positions on such issues often do not reflect partisan cleavages. The UK parliament has a large number of cross-party parliamentary groups, known there as 'all-party parliamentary groups', focusing on a variety of different country or thematic issues. As of a 30 May 2024 update to an official register, these include groups dedicated to human rights, whistleblowing, UN Sustainable Development Goals, media and media freedom.[252]

So far, the focus in this reading has been on the adoption of new legislation. But in many States, a key problem with legislation which impacts freedom of expression is the existence of unduly restrictive rules adopted in the past, sometimes a very long time ago. For example, many former British colonies still have in place Official Secrets Acts dating from the colonial period, which are often similar if not identical to each other, and which take a highly secretive position on official

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[249] Checklist For Compliance with Human Rights in Policy, Bills, Budgets, Government Programmes and all Business Handled by Parliament, https://chapterfouruganda.org/sites/default/files/downloads/Human%20Rights%20Compliance%20Checklist.pdf.

[250] Alice Donald and Anne-Katrin Speck, *National parliaments as guarantors of human rights in Europe: Handbook for parliamentarians* (2018, Council of Europe), p. 38, https://pace.coe.int/en/pages/jur-handbook.

[251] *Department of Justice Act*, R.S.C., 1985, c. J-2 (with amendments through 13 December 2019), section 4.2, https://laws-lois.justice.gc.ca/eng/acts/j-2/FullText.html; see also Government of Canada, "Charter Statements", https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/index.html.

[252] UK Parliament, "Register Of All-Party Parliamentary Groups [as at 30 May 2024]", https://publications.parliament.uk/pa/cm/cmallparty/240530/contents.htm.

documents which is fundamentally at odds with the human rights-based right to information. Sedition laws are another example of laws which have often been left in place after the end of the colonial period and which unduly restrict freedom of expression. It is, therefore, important to review laws which have an impact on freedom of expression with a view to revising and updating them so as to bring them into line with international human rights standards, a process which is often called 'post-legislative scrutiny'. There are several reasons for this practice, including to assess whether laws are working as intended, to improve secondary legislation, to improve implementation and to assess impacts on fundamental human rights.[253]

Some parliaments have dedicated committees to undertake post-legislative scrutiny, as demonstrated in the below examples.

Examples of Committees Tasked with Post-Legislative Scrutiny

- In 2007, Belgium created a joint parliamentary committee for reviewing legislation.[254] This committee may examine legislation following any of three 'triggers': following the receipt of a petition, following a decision by the Constitutional Court or in response to annual reports submitted by the General Prosecutor.[255]
- In Indonesia, there is a standing committee on legislative review called Badan Legislasi (BALEG), which plays a key role in post-legislative scrutiny and refers the results of its reviews to pertinent subject matter committees.[256]
- In South Africa, in January 2016, a 17-member external panel was commissioned to review all legislation adopted since the end of the white-minority, apartheid regime.[257]

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[253] Franklin De Vrieze and Victoria Hasson, *Post-Legislative Scrutiny: Comparative study of practices of Post-Legislative Scrutiny in selected parliaments and the rationale for its place in democracy assistance* (2017, Westminster Foundation for Democracy), p. 7, https://www.wfd.org/what-we-do/resources/comparative-study-post-legislative-scrutiny.

[254] See Comité parlementaire chargé du suivi législatif, https://www.comitesuivilegislatif.be/indexF.html.

[255] Franklin De Vrieze and Victoria Hasson, *Post-Legislative Scrutiny: Comparative study of practices of Post-Legislative Scrutiny in selected parliaments and the rationale for its place in democracy assistance*, note 253, p. 21.

[256] *Ibid*., pp. 8 and 25-26.

[257] *Ibid*., pp. 34-36; *Report of the High Level Panel On The Assessment Of Key Legislation And The Acceleration Of Fundamental Change*, November 2017, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf.

Parliaments sometimes include clauses in legislation which require it to be reviewed at a certain period (review clauses) or which provide for an expiration date for legislation where parliament does not act to renew it (sunset clauses). In some countries, a general requirement to engage in certain kinds of post-legislative scrutiny is a legal requirement. One example is Greece where the law on the Executive State (Law 4622/2019) requires the results of legislation to be assessed three to five years post-enactment.[258] In the case of Switzerland and France, parliamentary duties to evaluate legislation are even mandated constitutionally.[259]

Reviews of legislation can also be triggered in other ways, such as in response to media or civil society reports, or recommendations to revise laws made by international human rights actors, such as through reports by UN or regional human bodies, international special mandates or the Universal Periodic Review (UPR) process. The United Nations High Commissioner for Human Rights notes that most recommendations emerging from the UPR, "require or involve parliamentary action". [260] The outcome document of an international expert panel on the relationship between parliaments and national human rights institutions (NHRIs), known as the Belgrade Principles, recommended: "Parliaments and NHRIs should jointly develop a strategy to follow up systematically [on] the recommendations made by regional and international human rights mechanisms".[261]

Where States have accepted the jurisdiction of a regional human rights court or UN treaty bodies over individual complaints, individual decisions finding that a State has violated human rights also may call, explicitly or implicitly, for a law to be amended or repealed to avoid future human rights violations. In such cases, parliaments will normally need to take steps to repeal or amend the

[258] Franklin De Vrieze and Maria Mousmouti, *Parliamentary Innovation through Post-Legislative Scrutiny: Manual for Parliament*s (July 2023, Westminster Foundation for Democracy), p. 18, https://www.wfd.org/what-we-do/resources/parliamentary-innovation-through-post-legislative-scrutiny.

[259] *Ibid*.

[260] *Contribution of parliaments to the work of the Human Rights Council and its universal periodic review*, Report of the Office of the United Nations High Commissioner for Human Rights 17 May 2018, para 11, https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F38%2F25&Language=E&DeviceType=Desktop&LangRequested=False.

[261] Belgrade Principles on the Relationship Between National Human Rights Institutions and Parliaments, adopted 22-23 February 2012, para. 36, https://www.theioi.org/downloads/frved/Belgrade%20Principles%20on%20the%20Relationship%20between%20NHRIs%20and%20Parliaments.pdf.

human-rights violating laws (unlike in the case of domestic courts, where the decision may automatically suspend the legal rule in question).

Examples of Changes to Legislation After Decisions by International Human Rights Courts

- Criminal defamation was abolished in Argentina following the Inter-American Court of Human Rights' explicit order in *Kimel v. Argentina* that Argentina bring its legislation into conformity with its human rights obligations.[262]
- The French parliament repealed the crime of insulting the head of State after the European Court of Human Rights found, in *Eon v. France*,[263] that the right to freedom of expression of an activist had been infringed through his conviction under this provision.[264]
- Burkina Faso amended its defamation laws following the African Court of Human and Peoples' Rights finding in *Konaté v. Burkina Faso* that criminal defamation, contempt and insult provisions ran contrary to Burkina Faso's international human rights obligations.[265]

It is also possible for international human rights mechanisms to highlight broader structural problems giving rise to human rights violations, such as insufficient budget allocations to oversight bodies. In many such cases, parliament, in its legislative or oversight capacities, has a central role to play in responding to structural deficiencies or ensuring that the executive branch does.

Activity 3: Reading

Estimated reading time: 9 minutes

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[262] *Kimel v. Argentina (Merits, Reparations and Costs)*, Series C No. 177, 2 May 2008, p. 32, https://corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf. The repeal of the legislation occurred through Law 26.551, 26 November 2009, available in Spanish at: https://www.argentina.gob.ar/normativa/nacional/ley26551-160774/texto.

[263] 14 March 2013, Application No. 26118/10, https://hudoc.echr.coe.int/#{%22itemid%22:[%22001-117742%22]}.

[264] Parliamentary Assembly of the Council of Europe, *Impact of the European Convention on Human Rights in States Parties: selected examples*, 8 January 2016, AS/Jur/Inf (2016) 04, p. 13, https://website-pace.net/documents/19838/2008330/AS-JUR-INF-2016-04-EN.pdf/12d802b0-5f09-463f-8145-b084a095e895.

[265] 5 December 2014, Application No. 004/2013, para. 164, https://www.african-court.org/cpmt/details-case/0042013. See also UNESCO, "African Court's landmark decisions ensure prosecution of crimes against journalists", 12 March 2021, https://www.unesco.org/en/articles/african-courts-landmark-decisions-ensure-prosecution-crimes-against-journalists.

Responsibilities of Parliamentarians to Promote Freedom of Expression through Oversight and as Social Leaders

The Oversight Role of Parliaments and Their Members

A key role of parliament is to monitor and oversee powerful actors in society, especially the executive. While this is a general role, it is perhaps particularly important for parliament to ensure that legislation is being properly implemented, given that it is somehow the custodian of that legislation, having passed it in the first place.

There are a number of general ways in which parliaments can oversee the way in which legislation is being implemented, including putting questions about this to ministers, officials and oversight bodies, engaging in fact-finding exercises, and conducting formal reviews, for example through committees. The most appropriate approach will depend on the type of oversight needed. In some cases, the presence of problems around the way a law or set of legal rules is being applied may spark a review.

The appropriate way to resolve problems will depend on all of the circumstances. In some cases, there will be a need to amend the law, which can be recommended or even undertaken by parliament. In other cases, administrative solutions, perhaps including the provision of training to relevant officials, may be needed. Again, parliament can recommend this.

A number of roles exist for parliament where oversight bodies are involved, which is usually the case, among other areas, in respect of the right to information, broadcast regulation and the public broadcaster, if one exists. First, it is normal for these bodies to be required to report on a regular, usually annual, basis to parliament (whether directly or through a minister). This provides an opportunity to review their work and the wider systems which they oversee (the annual reports will often include general recommendations for reform). Parliament should take these oversight responsibilities seriously. Whenever possible, for example, a hearing should be held before the relevant committee, and the head or a senior representative of the body should be brought in to give evidence and answer questions.

Second, in some cases parliament is, through the legislation establishing it, given a formal role in relation to appointments to regulatory or oversight bodies. In this case, parliament should engage seriously in this role, keeping in mind the overarching need for bodies with regulatory powers over the media or indeed any freedom of expression issue to be independent of government and

to be led by credible, competent people with experience and expertise relevant to the issue in question.

Finally, in many cases parliament will play a role in terms of allocating the budget to these bodies.[266] This is a crucial matter since bodies which are underfunded will not be able to discharge their duties effectively. Where this is a problem, it is often fairly easy to identify, for example in poor reporting by a public service broadcaster, decisions based on inadequate information and research by a broadcast regulator, or delays in the processing of complaints by an information commission.

The way the budget comes before parliament will depend on the nature of the relevant law, as well as on the overall budget process. Best practice in this area is for budgets allocated to oversight bodies to be agreed upon separately by parliament, so as to ensure appropriate attention is given to them. At a minimum, parliament should demand that a separate budget line be devoted to these bodies in the budget. At the time the proposed budget is presented, interested parliamentarians should have a right to pose questions about relevant issues, for example about budgetary trends over time and about any recommendations on changes to the budget made by the oversight body.

Many parliaments exercise human rights oversight via a dedicated human rights committee, which should have a sufficiently robust and clear mandate.[267] For an overview of such committees' functions and recommendations for how to structure them, consult the Draft Principles on Parliaments and human rights developed by the Office of the United Nations High Commissioner for Human Rights (OHCHR).[268] In some parliaments, no specific parliamentary committee is responsible for human rights issues, which are instead considered as they arise in relation to their work on areas within different committees' remits.[269] In order to function

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[266] A wider budget issue is overall spending on the promotion and protection of human rights, for example to support national human rights institutions, training for officials and so on, which can also impact positively on freedom of expression.

[267] *Parliaments and Human Rights A self-assessment toolkit* (2023, Inter-Parliamentary Union), pp. 24, 26-27, https://www.ipu.org/resources/publications/toolkits/2023-10/parliaments-and-human-rights-self-assessment-toolkit.

[268] Found in Annex I to *Contribution of parliaments to the work of the Human Rights Council and its universal periodic review*, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, 17 May 2018, https://undocs.org/A/HRC/38/25 (available as a standalone document at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/UPR/Parliaments/DraftPrinciplesParliament_EN.pdf).

[269] A Council of Europe Handbook categorises this as a "cross-cutting model". It identifies two other models for parliamentary oversight of human rights: a "specialised model" whereby a single standing

properly, such an approach requires a high degree of mainstreaming of human rights into different committees' work.

Where they exist, dedicated media committees (or subcommittees of human rights committees) have particular duties to promote freedom of expression. It is important for whichever parliamentarians are responsible for the oversight of the media to be adequately trained in relevant human rights standards on freedom of expression and safety of journalists. To this end, it may be helpful for former journalists or media professionals, as well as international legal and media experts, to participate in trainings, as well as to testify in relevant hearings.

Where international human rights mechanisms make recommendations, in addition to the role of parliaments in taking necessary legislative action, noted above, parliaments also have a role in overseeing implementation in other ways, including by ensuring appropriate follow up by the executive branch. As noted by the OHCHR:

> Parliamentarians can also play a leading role in the implementation and follow-up of recommendations made by United Nations human rights mechanisms and other regional mechanisms, for example, through the presentation, by the executive, of the universal periodic review outcome and the subsequent discussion thereof. In particular, parliaments have a fundamental role in calling for the establishment of a national mechanism [for] reporting and follow-up, and could play an active part in the work of such a mechanism, and in ensuring an integrated approach to the reporting on, and the implementation of, human rights mechanisms' recommendations.[270]

The key role of parliaments in ensuring implementation of human rights recommendations was recognised by the UN Human Rights Council in a 2017 resolution in which it acknowledged,

> … the crucial role that parliaments play in, inter alia, translating international commitments into national policies and laws, including by supporting the implementation of recommendations generated by the international human rights mechanisms, especially the recommendations supported by the State concerned in the framework of the universal periodic review.[271]

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committee is responsible for human rights and "hybrid" model whereby more than one committee has an interest in human rights "and/or a specialised human rights sub-committee is established within an otherwise mainstreamed system". See Alice Donald and Anne-Katrin Speck, *National parliaments as guarantors of human rights in Europe: Handbook for parliamentarians* (2018, Council of Europe), pp. 48-54, https://pace.coe.int/en/pages/jur-handbook.

[270] *Contribution of parliaments to the work of the Human Rights Council and its universal periodic review*, Report of the Office of the United Nations High Commissioner for Human Rights 17 May 2018, paras 31-32, https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F38%2F25&Language=E&DeviceType=Desktop&LangRequested=False.

[271] *Contribution of parliaments to the work of the Human Rights Council and its universal periodic review*, Human Rights Council Resolution 35/29, 13 July 2017, https://undocs.org/A/HRC/RES/35/29.

One approach to implementing human rights decisions is through the creation of a multi-stakeholder body which includes parliamentarians. In Czechia, a consultative body established in 2015 – called the Committee of Experts on the Execution of Judgments of the European Court of Human Rights – consists of high-level representatives from senior institutions from all branches of government, including parliament, as well as academics, NGOs and the bar association. This Committee recommends possible measures in response to European Court of Human Rights judgments either against Czechia or against other States which raise concerns that a similar problem exists in Czechia.[272]

Parliaments and Their Members as Social Leaders

While legislating and oversight are at the core of parliamentarians' responsibilities in relation to freedom of expression, they should also be sure to exercise their roles as social leaders to promote and protect this right. The exact needs here will vary depending on the local situation. Even in countries with good laws and solid respect for the rule of law, abuses may occur, for example where powerful social actors bring abusive defamation cases simply as a way of avoiding criticism (a kind of strategic lawsuit against public participation or SLAPP). Where the courts are not independent and where the laws do not conform to international standards, the chilling effect of abusive lawsuits can be even more severe. Having parliamentarians expose these sorts of practices publicly can be a very important way of limiting this sort of abuse.

Even good laws often leave a wide scope of discretion to officials. For example, the government may try to influence broadcast regulators to get them to act in ways which are biased, depending on whether the media outlet concerned is more or less friendly towards the government. In almost every country, officials have a tendency to interpret the exceptions in right to information laws in an overbroad way, keeping documents secret which are not in any way sensitive. Parliamentary oversight and criticism can limit these abuses.

More generally, parliamentarians can do an enormous amount to raise general awareness about the importance of freedom of expression, as well as its key features. This helps build support for core guarantees and decreases the risk of abuse by government or other powerful actors. Parliamentarians can act in concert with official human rights bodies, civil society, academics and others to magnify one another's voices and influence.

In the same vein, Parliamentarians should also be vigilant in defending the freedom of expression rights of other parliamentarians, regardless of political or party affiliation. Attacks on the right to

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[272] Alice Donald and Anne-Katrin Speck, *National parliaments as guarantors of human rights in Europe: Handbook for parliamentarians* (2018, Council of Europe), p. 46, https://pace.coe.int/en/pages/jur-handbook.

freedom of expression of members can often be emblematic of a wider attack on freedom of expression and often democracy more generally. It is thus crucial that parliamentarians use their power and social leadership roles to fight back against this. Parliamentarians also should consider submitting complaints about violations of other parliamentarians' rights to the IPU Committee on the Human Rights of Parliamentarians, and can do so using the latter's online complaint form.[273]

As part of their role as social leaders, it is important that parliamentarians avoid spreading unverified or false information, as well as hate speech or otherwise abusive content against political opponents (as discussed in Module 2). This includes, of course, any communications made via social media platforms, which many political figures use to issue frequent and sometimes less formal statements which can have significant reach and impact. In their 2021 Joint Declaration, the international special mandates on freedom of expression acknowledged:

> [P]oliticians and public officials play an important role in shaping the media agenda, public debate and opinion and that, as a result, ethical behaviour and attitudes on their part, including in their public communications, is essential for promoting the rule of law, the protection of human rights, media freedom and intercultural understanding, and for ensuring public trust in democratic systems of governance.[274]

They also denounced,

> the increase in public communications by some politicians and public officials which are intolerant and divisive, deny established facts, attack journalists and human rights defenders for exercising their right to freedom of expression, and seek to undermine democratic institutions, civic space, media freedom and human rights, including freedom of expression.[275]

That declaration recommended, among other things, that politicians and public officials refrain from making "statements that are likely to promote intolerance, discrimination or dis/misinformation" and instead "take advantage of their leadership positions to counter these social harms and to promote intercultural understanding and respect for diversity".[276] The international special mandate holders also recommended that politicians and public figures treat participants in press conferences with respect and "ensure that they have an equitable

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[273] See https://www.ipu.org/file/9064/download.

[274] 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression, 20 October 2021, preamble, https://www.osce.org/representative-on-freedom-of-media/501697.

[275] *Ibid*.

[276] *Ibid*., para. 3(iii).

opportunity to pose questions", as well as that they do not "intentionally make false statements attacking the integrity of journalists, media workers or human rights defenders".[277]

Activity 4: Expert Video

[Presentation from a parliamentarian on the role of parliamentarians in promoting freedom of expression]

Transcript:

Karina Banfi, Member of the National Congress of Argentina

Hello, my name is Karina Banfi and I am a member of the National Congress of Argentina. I have been working for many years on issues related to freedom of expression and media pluralism. We are in a time of great challenges, mainly due to increasing pressure to adopt strictly opposing positions.

This tendency within the new public debate to reinforce opinions and positions stems from the lack of debate and exchange of ideas. Indeed, this complicates matters, as it creates biases that we, as states, must be vigilant about, mainly to avoid authoritarianism and prevent hostility in all spheres where public debate takes place.

These may include social networks, political debates or discussions in the media. There is a fundamental tendency to adopt such positions as a way of validating or claiming truth, determining who owns it. And therein lies the important work we need to undertake at congresses: ensuring access to information.

Thank you.

Activity 5: Reading

Estimated reading time: 8 minutes

Parliaments and Transparency

[277] *Ibid*., paras. 3(iv) and 3(v).

Part of the obligation of parliaments and their members to respect freedom of expression is their obligation to respect better practice standards regarding the right to information or transparency. The Commonwealth Parliamentary Association and the World Bank Institute, in partnership with the Parliament of Ghana, brought together a Study Group on Access to Information in Accra, Ghana, from 5 to 9 July 2004. The report from this meeting, *Parliament and Access to Information: Working for Transparent Governance*, noted the following:

> The Study Group highlighted the particular role of Parliament, not only as the body that passes legislation, but also in terms of the need for it to be transparent itself, its role in promoting broader transparency in society and its oversight role in relation to the legislation.[278]

The Declaration on Parliamentary Openness, adopted by civil society parliamentary monitoring groups in 2012, states some of the reasons why parliamentary transparency is important:

> [P]arliamentary openness enables citizens to be informed about the work of parliament, empowers citizens to engage in the legislative process, allows citizens to hold parliamentarians to account and ensures that citizens' interests are represented.[279]

The need for transparency is also reflected in some parliamentary codes of conduct. For example, section 3.5 of the Code of Conduct for the Members of Parliament of the Republic of Ghana states:

> Members of Parliament should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.[280]

According to international standards, right to information legislation should also cover the legislative branch of government and parliaments should adopt the necessary measures to implement this legislation. This involves a number of issues, but some of the key steps include:

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[278] Toby Mendel, *Parliament and Access to Information: Working for Transparent Governance* (2005: Washington, World Bank), p. 7, http://documents.worldbank.org/curated/en/704531468139797130/Parliament-and-access-to-information-working-for-transparent-governance.

[279] See https://openingparliament.org/declaration.

[280] See https://citifmonline.com/wp-content/uploads/2014/12/CODE-OF-CONDUCT-FOR-MEMBERS-OF-PARLIAMENT-OF-THE-REPUBLIC-OF-GHANA.pdf.

- Appointing individuals – information officers – within parliament with dedicated responsibilities to lead on implementation of the legislation, including by acting as a central point for the receipt and processing of requests for information.
- Adopting internal protocols for the processing of requests, including an obligation on all of those working within parliament to cooperate, as needed, with the information officer, so the latter can process requests within the time limits set out in the legislation.
- Ensuring that appropriate records management systems are in place so that information which has been requested can be located and provided promptly.
- Ensuring the necessary training is provided to information officers, as well as raising awareness more widely about this right among officers and members.
- Preparing an annual report on what has been done to implement this legislation.

Although the larger part of right to information laws is normally devoted to the issue of requests for information, most such laws also require public authorities, including parliament, to publish certain key information on a proactive basis. This is not only far more efficient – it takes a lot less time to post a document online, after which everyone who has an Internet connection can access it, than to process even one request for it – but it also fosters interest in parliament and its work, to the benefit of all.

Due to the power and importance of proactive publication, and to their leadership roles in society, parliaments should aim to be model actors in this area. This suggests that full use should be made of technology to drive proactive publication and that documents and other information should go online as soon as possible. A Commonwealth Parliamentary Association Study Group on Parliament and the Media adopted the following recommendation on proactive publication:

> (8.4) Parliaments should provide the media with as much information as possible. Attendance and voting records, registers of Members' interests and other similar documents should be made readily available. Members have an obligation to update their entries in the register of interests and registers should be kept in such a way as to give a clear and current picture of both a Member's full interests and changes to those interests.[281]

However, the Declaration on Parliamentary Openness goes much further, setting out a long list of types of information which should be disclosed proactively.[282]

As part of their broader commitment to transparency and operating generally in a democratic fashion, parliaments should ensure that draft laws (bills) are made public, including online, as

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[281] Recommendations for an Informed Democracy: Conclusions of a CPA Study Group on Parliament and the Media, held in partnership with the World Bank Institute and the Parliament of Western Australia, Perth, Western Australia, reproduced in Appendix 7 of Toby Mendel, *Parliament and Access to Information: Working for Transparent Governance*, note 278, p. 70.

[282] See clauses 13-26, https://openingparliament.org/declaration.

soon as they are formally submitted to parliament for consideration. Updated versions should be made available at each stage of the legislative process. Beyond that, parliaments should, at least for legislation of general public interest, including any legislation which affects freedom of expression or the right to information, ensure that they engage in a process of genuine consultation whereby members of the public can provide inputs and comments on draft legislation before it is passed.

As part of its proactive transparency efforts, parliaments should either televise or be working to televise all of their debates, ideally live. These should be available both live and for subsequent viewing over the Internet and this should also apply to committee meetings. It may, in certain circumstances, be necessary to close a meeting for overriding confidentiality reasons, such as security or privacy, but in such cases better practice is to hold a public vote to close meetings.

Given the power which parliamentarians exercise and the temptation for third parties to want to influence the exercise of that power, many parliaments impose special openness obligations on their members to help prevent, or at least be transparent about, conflicts of interest. These obligations may be imposed through legislation, standing orders or, increasingly, through codes of conduct.

Core Elements of the South African Code of Conduct

The Parliament of the Republic of South Africa has adopted a Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members.[283] As the title suggests, it applies only to parliamentarians and is a wider framework of ethical rules for members. Clause 2.1, its first substantive provision, sets out the "minimum ethical standards of behaviour that South Africans expect of public representatives". Clause 2.3 describes the purpose as being to "create public trust and confidence in public representatives and to protect the integrity of Parliament".

Clause 4, titled Standards of Ethical Conduct, provides six requirements for parliamentarians, including:

- To act at all times in accordance with the public trust placed in them.

[283] See https://www.parliament.gov.za/co de-conduct.

- To discharge their obligations by placing the public interest above their own interests.
- To maintain public confidence, respect and trust in parliament.

In terms of financial conflicts of interest, each member must resolve them in favour of the public interest, always declare them, where appropriate recuse him- or herself from any forum considering the matter, not accept any gift or reward which would create such a conflict, not use his or her influence to gain improper advantage, and not use non-public information gained through his or her position for personal advantage. In addition, no benefit may be received from an organ of State and remunerated employment outside of parliament is permitted only where it is compatible with his or her functions, and when sanctioned by his or her party and where that sanction has been communicated to the Registrar of Members' Interests.

Clause 9 includes an extensive list of 13 types of interests which must be disclosed, which are elaborated upon in some detail. Some of these are kept confidential, while others are made public. Among the confidential items are the amount of remuneration for employment outside of parliament, including directorships and partnerships, details about private residences and the value of any pensions. Anything which is not specifically listed as being confidential is made public.

Fully one-half of the Code is devoted to clause 10 on breaches and investigations. A complex process is set out for investigating and assessing breaches, which generally includes strong protections for the due process rights of the member concerned. Sanctions for breach of the disclosure parts of the Code range from being ordered to rectify the breach to a reprimand to a fine of up to 30 days' salary. For breach of many other provisions, including the Standards of Ethical Conduct in clause 4 and the conflict of interest rules, the Committee shall not recommend one of the lower sanctions available for disclosure but may recommend "any greater sanction it deems appropriate" to the House, which shall decide on the matter.

This Code of Conduct, which dated from 2014, has recently undergone a review. The new version of the Code, which has been adopted by the National Assembly, reportedly introduces new changes which include new content regulating interactions with the public on social media.[284]

[284] Independent Online "National Assembly adopts reviewed code of conduct setting out strict guidelines for MPs", 11 May 2024, https://www.iol.co.za/capetimes/news/national-assembly-adopts-reviewed-code-of-conduct-setting-out-strict-guidelines-for-mps-a229b111-8721-475c-8a23-c581a0f90e71.

All of the codes include an important focus on financial and conflict of interest disclosure issues. A report titled *Codes of Conduct in National Parliaments: Transparency* describes the purposes of the financial disclosure parts of these codes as follows:

> Most codes aim to provide a clear view of all outside financial interests of officials. To this end, parliamentarians in some countries have to provide information on their income situation (e.g., Ireland, Denmark), on their professional activities (e.g., Luxemburg, Germany), on any property owned (e.g., Belgium and Portugal) and on any company stock owned (e.g., United Kingdom).[285]

Some of the key variations found in these codes, in particular in relation to transparency, include:

- To whom they are applicable, such as parliamentarians only or also others, such as parliamentary officials.
- In terms of the conflict of interest rules, whether they simply require disclosure of a potential conflict or also the recusal of the person involved from any debate and decision-making regarding the matter concerned.
- Whether the financial disclosures are public or just made to an internal actor.
- What sorts of sanctions are available for breach of the code (noting that other sanctions are always available under other regimes, such as for breach of parliamentary privilege).

One of the ways parliaments can help foster greater transparency both for themselves and more broadly is through the Open Government Partnership (OGP). This is a multilateral initiative which began in 2011 and which requires States to make, in consultation with civil society, commitments to promote open government, improve governance and combat corruption. There are a few different ways for parliaments to participate—either as part of a broader national or subnational OGP process, through submitting a stand-alone open parliament plan or by promoting openness outside of the OGP framework— and the OGP's Steering Committee issued a Memorandum on Parliamentary Engagement providing guidance specifically on this issue.[286]

Activity 7: Reading

Access to Parliament by the Media and Others and Systems of Accreditation

Estimated reading time: 8 minutes

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[285] In the CESifo DICE Report 3/2012 (Autumn), Ifo Institute, Munich, 2012, p. 84, https://www.cesifo-group.de/DocDL/CESifoDICEreport312.pdf.

[286] 24 November 2021, https://www.opengovpartnership.org/documents/memorandum-on-parliamentary-engagement.

Access

Media access to parliament, including the issue of accreditation, is crucially important given that the media provide something of a two-way communication channel between parliament and its members and the public. For parliament and its members, and of course for candidates in elections, the media are key for getting messages out to citizens. For citizens, the media are equally essential as a means for ensuring they know what parliament is doing, the role of individual members, and of course the specific positions of parties and candidates during elections.

The parliamentary Study Group on Access to Information which met in Accra, Ghana, in July 2004, placed some emphasis on the importance of media access in its report, Parliament and Access to Information: Working for Transparent Governance, as follows:

> Media access to Parliament is also of the greatest importance. Parliamentary sessions and committee meetings should be open to the media, including the broadcast media. In addition, active efforts should be made to promote greater and smoother interaction between the media and Parliament. Facilities should be provided in or near Parliament for the media, so that they have the support they need to report effectively. Many Parliaments have special committees, such as Nigeria's Media and Public Affairs Committee, to promote good relations with the media. … Media efforts should not be restricted to outlets based in the capital; efforts should be made to promote access for the local media as well.[287]

A similar idea is reflected in the Group's Recommendations for Transparent Governance:

> (8.1) Parliaments should provide as a matter of administrative routine all necessary access and services to the media to facilitate their coverage of proceedings. Parliament should not use lack of resources as an excuse to limit media access and should use its best endeavours to provide the best facilities possible.[288]

Beyond the core idea of ensuring media access to parliament, Recommendation 8.1 refers to two further ideas. First, a lack of resources should not be used as an excuse to limit media access. The core idea here is that parliament needs to have the necessary physical facilities to allow for reasonable access, i.e. it needs to have sufficiently large public galleries, including for committees, to enable appropriate public access. Of course, there may be some cases where heightened public interest in a matter being debated means that not everyone will be able to attend. This is why it

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[287] Toby Mendel, *Parliament and Access to Information: Working for Transparent Governance*, note 278, p. 33.
[288] *Ibid*., p. 69. See also Principle 29 of the Declaration on Parliamentary Openness.

is necessary to provide for special accreditation for media representatives, so that they will always have access even in such situations.

The second idea goes beyond the mere notion of access and calls on parliament to provide the "best facilities possible" for media representatives. Although technology has started to overcome this, journalists need more than just access to be able to report effectively from parliament. At a minimum, they need Internet access, but other facilities, like office space and furniture, can also facilitate their reporting work. Access to sessions is important but, in many cases, they are also given access to parliamentarians in general, obviously subject to the willingness of members to speak to them. This may require physical access to parts of parliament beyond just the main chamber and committee rooms.

Special rules on media access to parliament, and especially access which is privileged over ordinary citizens, including where parliament provides the media with access to special facilities, may look like a form of bias towards the media. However, here, as in the case of protection of sources, what is really being protected is the public's right to access information. If the media do not have special (protected) access to parliament and, as a result, are unable to report from there, the real consequence will be that all of their readers, listeners and viewers – i.e. ultimately the public as a whole – will be deprived of access.

As has already been noted, there is a strong trend towards ensuring that the proceedings of both the full parliament and its committees are normally broadcast, ideally live as well as over the Internet. The Accra Study Group on Access to Information included detailed standards about this in its Recommendations for Transparent Governance:

> (8.8) Electronic media in Parliament
> (8.8.i) Given the importance of broadcast and other electronic access to the proceedings of Parliament both in Chambers and committees, Parliament should either provide an uninterrupted feed or access for broadcasters to originate their own feed, if appropriate on a pool basis. Guidelines for electronic coverage should be as flexible as possible.
> (8.8.ii) Guidelines for electronic coverage should ordinarily be put in place in consultation with broadcasters. Terms of availability should not be discriminatory between different media outlets and access to such feeds should not be used for censorship or sanctioning.
> (8.8.iii) Parliaments should be encouraged to provide live coverage of their proceedings on a dedicated channel and/or online.[289]

There are a number of key elements here. First, access may be provided either by allowing broadcasters to create their own feeds or by providing access to a feed prepared by parliament. Whichever way the system works, access to feed should be non-discriminatory. Second, better practice is to create a dedicated channel, which in some countries is operated by the public

[289] *Ibid*., p. 70.

broadcaster, to cover parliament. This should be accompanied by making this channel available online. Third, this should cover both the main chamber of parliament and committees.

Fourth, while it is appropriate to have guidelines for this coverage, for example to ensure that the coverage is politically balanced, the guidelines should be relatively light-touch in nature and should be developed in consultation with broadcasters. The guidelines should, in particular, focus specifically on issues relating to broadcast, and particularly television, coverage of parliament. Wider issues of media standards should not be included in these sorts of guidelines. As the Group's Recommendations noted:

> (8.6) The development of professional and ethical standards for journalists is a matter for the media. Integral to this is the media's responsibility to ensure that a journalist's private interests do not influence reporting.[290]

So far, the comments on media access have focused on granting access to those media which are specially engaged in covering parliament. The Accra Group went beyond this, to suggest that parliaments should actively reach out to the media and try to stimulate interest from a wider range of media outlets and even more generally to the public:

> (8.3) Parliaments should employ public relations officers to publicize their activities, especially to the media which do not cover Parliament, and education staff to run outreach programmes to stimulate interest in parliamentary democracy. Both services should operate in an apolitical way under guidelines set by the House.[291]

Accreditation

To provide privileged access to parliament for journalists, including access to facilities to support reporting, parliaments need to have some sort of system for accrediting journalists, i.e. for deciding who will have access to those privileges. Although it is not legitimate to license journalists, this does not apply to accreditation systems, which aim to ensure journalistic access to limited space venues, of which parliament is a leading example. In paragraph 44 of its 2011 General Comment No. 34, the UN Human Rights Committee stated:

> Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.

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[290] *Ibid*.

[291] *Ibid*.

The special international mandates on freedom of expression made a very similar point in their 2003 Joint Declaration:

> Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non discriminatory criteria published in advance.

Accreditation should never be subject to withdrawal based on the content of an individual journalist's work. The 2003 Joint Declaration highlights the need to avoid linking accreditation to the work of an individual journalist, with a view to avoiding accreditation systems being used as levers of control or censorship. This has also been highlighted by the OSCE:

> Recalling that the legitimate pursuit of journalists' professional activity will neither render them liable to expulsion nor otherwise penalize them, [member States] will refrain from taking restrictive measures such as withdrawing a journalist's accreditation or expelling him because of the content of the reporting of the journalist or of his information media.[292]

The Need for Accreditation Systems to be Scrupulously Fair

In a case from 1999, the UN Human Rights Committee held that the system for accrediting journalists to Parliament in Canada represented a restriction on freedom of expression which did not meet the standards required under Article 19(3) of the ICCPR. The system was overseen by a private association, the Parliamentary Press Gallery. The Speaker had recognised the Gallery for the purpose of accrediting media representatives to parliament and had pursued a policy of strict non-interference in it work.

The applicant had been refused full membership of the Gallery and, as a result, full accreditation status, in part due to a lack of clarity about the regularity with which his newspaper was published, a condition for full Gallery membership. He had never actually been unable to access parliament but did not have access to the same rights and facilities as full members of the Gallery.

[292] Conference for Security and Co-operation in Europe, Follow-up Meeting 1986-1989, Vienna, 4 November 1986 to 19 January 1989, Concluding Document, para. 39, https://www.osce.org/mc/40881?download=true.

The Committee recognised that a system of accreditation was needed in these circumstances but held that the existing system breached the applicant's right to freedom of expression, noting:

> The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. In the instant case, the State party has allowed a private organization to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there will be no arbitrary exclusion from access to the Parliamentary media facilities. In the circumstances, the Committee is of the opinion that the accreditation system has not been shown to be a necessary and proportionate restriction of rights within the meaning of article 19, paragraph 3, of the Covenant, in order to ensure the effective operation of Parliament and the safety of its members.[293]

The Committee also noted that the system did not provide any possibility of recourse, either to the courts or parliament itself, for an individual to complain about a denial of media privileges.

Activity 8: Expert Video

[Presentation by a parliamentarian on tolerating criticism and the wider relationship between parliamentarians and the media]

Neema Lugangira, Member of Parliament (United Republic of Tanzania) and Chair of the African Parliamentary Network on Internet Governance (APNIG)

Transcript:

Hi, everyone. I'm Neema Lugangira, a member of Parliament from Tanzania. I'm really excited to be joining the UNESCO/IPU course on Freedom of Expression for Parliamentarians. This is a very critical course that comes at a timely moment. Why do I say this? There's lots of confusions around freedom of expression. What is acceptable as freedom of expression? What is not? At what point does it cross over and become not acceptable? How do we legislate to ensure that we have an enabling environment for each side, for everybody in the community to use their freedom of expression. And I think as parliamentarians, this course is very important for us. It is important

[293] *Gauthier v. Canada*, Communication No. 633/1995, views adopted 5 May 1999, para. 13.6, https://juris.ohchr.org/casedetails/768/en-US.

for us to understand the dynamics of freedom of expression, the interpretation of freedom of expression and again, how to legislate. When I say how to legislate, we must recognise that freedom of expression is a fundamental right, where in most of our countries, in our constitutions, it is stipulated that there is freedom of expression. However, as parliamentarians, we also have to make sure that one group of the community don't use their freedom of expression to make another group of the community not be able to use theirs. That means that forcing a certain group to self-censor or to back out. And that is where the challenge is.

As parliamentarians, it is so easy for us to legislate and create a very stringent environment whereby it kind of stifles the freedom of expression. But, with good understanding, with understanding of the crust of freedom of expression and the importance of freedom of expression and even the role that freedom of expression plays towards our own work, plays towards improving our abilities to better serve the people, to better lead the people that we represent—this is why this course is really important. I can share as a member of parliament and as a female member of parliament, I have personally experienced immense amount of online abuse. And when I tell you immense, I'm telling you, you cannot even imagine. And there are times which you think "why am I still online?" And I know a good number of my colleagues across the world decide to self-censor and not be online because of the sheer amount of online abuse that is subjected to women in politics. However, when I started to voice it, a lot of people were like, "hang on, just because you're a parliamentary, you need to accept to be criticised", and this is what I say: there is a difference between criticism and abuse. Criticise me for my work, criticise me on the issue raised, criticise me on the agenda. But when you shift from the agenda to my gender, that is no longer criticism. And I believe that should not be acceptable as freedom of expression.

And this is a tough part. Now, where do we draw the line? Where is it Is it acceptable as freedom of expression and where is it not? And then in the world of today, there are challenges in terms of the context of the language, interpretation of the language, culturally. So, one might write something to me or say something in Kiswahili. When you translate that to English, maybe it's acceptable as freedom of expression. But the context of how the person presented it, the language, the culture in Kiswahili, that is abuse. So, I think this course is very important, and I would like to highly recommend all members of parliament across the globe to be part of this course, because in the world that we live in, freedom of expression is key, because that is the only way that we're going to get feedback on the development programs that we have. We're going to get feedback on the work that we're doing. We're going to get feedback on the needs of the communities that we lead. So how else are we going to be able to better serve if the communities are not able to express themselves? But then it comes down to what is freedom of expression, what is acceptable under freedom of expression, and what is not. Now, the part of what is not is then how do we legislate to make sure that the environment will be conducive for everyone to use their freedom of expression. So once again, I'm Neema Lugangira, member of parliament from Tanzania, and I

highly commend UNESCO and the IPU for coming up with this course of freedom of expression for members of parliament. Thank you.

Activity 9: Reading

The relationship between parliamentarians and civil servants and parliamentary staff

Parliamentarians interact with officials in a range of capacities, from officials working for parliament to senior bureaucrats who may be called before parliament to provide information or evidence potentially to whistleblowers who leak information to parliamentarians. While these relationships are, overall, far simpler than the relationships with the media, there are still some important considerations to keep in mind.

First, although this is sometimes not fully observed, officials' primary duties are supposed to be to the public as a whole (which is why we often refer to them as 'civil servants') and, although they also serve the government of the day, they are supposed to avoid acting in a manner which is politically partisan.[294] The lines between professional and partisan activity can become blurry, especially to outside observers, because the party in power (however that is defined in a particular political system) runs the executive, which involves among other things setting priorities and policies (of course subject, ultimately, to parliament's power to approve the budget and laws) and, at least at the top level, overseeing the management of the executive.

Civil servants are supposed to provide independent advice to government and to implement government decisions but to avoid political activities of any sort when acting as civil servants. They should, for example, avoid distortions of the truth when communicating publicly (or, for that matter, internally) and not allow public resources to be used for partisan ends. Thus, advertising of government services should never contain any party symbols or references (i.e. it should be clear that this is a government service, not a service provided by a particular party). Civil servants are still allowed to participate politically as private individuals, subject to certain constraints which usually become more onerous as the rank of the official increases.

[294] This clearly does not apply to staff working within an office of a parliamentarian.

While this is always the case, it becomes particularly sensitive during election periods. Better practice here is for government to perform only the necessary day-to-day functions during an election or the most sensitive election period, known as operating in caretaker mode, with several countries having developed conventions around how governments should act in such time periods.[295] In Pakistan, to prevent any abuse by the outgoing party in power, oversight of the executive is handed over to a caretaker government whose role is limited by legislation.[296]

Second, there is the issue of confidentiality of information which may be shared between parliamentarians and officials. In many countries, the staff hired by parliamentarians owe them a strong obligation of confidentiality, which essentially extends to all information they receive during the course of their employment which is not otherwise required by law to be disclosed. Certain information – such as private information or information rendered secret by parliamentary privilege – remains confidential forever while other information, for example relating to general employment matters, may be confidential for a shorter period of time, such as five years.[297]

In countries where the offices of parliamentarians are covered by the right to information law, this may override these rules and impose its own regime regarding the confidentiality of information. Right to information laws normally incorporate developed regimes of exceptions to the presumption in favour of openness which they create, and only information which falls within the scope of that regime of exceptions may be refused should an individual make a request for it. As noted above, better practice in this area is for exceptions to apply only where disclosure of the information poses a concrete risk of harm to a protected interest, such as privacy or national security.

There are also often bans on any officials, including the staff of parliamentarians, using information obtained while in office for lobbying purposes. One way to enforce this is to impose a ban of a period of time (such as one or two years) on engaging in any lobbying after an official leaves his or her position. It is also common for officials to be subject to bans on using, to obtain personal benefits, non-public information which they obtained as part of their work

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[295] See, for example, Australian Government, Department of the Prime Minister and Cabinet, *Guidance on Caretaker Conventions: 2021*, https://www.pmc.gov.au/sites/default/files/resource/download/guidance-caretaker-conventions-2021.pdf.

[296] See Chapter XIV of the Elections Act 2017, https://pakistancode.gov.pk/pdffiles/administratorf21c97fb85cfdc593f840a4c008caa45.pdf.

[297] This is the case in Canada, for example. See Backgrounder: Confidentiality and Conflicts of Interest, p. 3, http://www.ourcommons.ca/content/boie/pdf/Backgrounder-26-02-2014-E.pdf.

Another aspect of this is the provision of information by officials from the government to parliamentarians. In many countries, parliament can summon anyone to appear before it, or one of its committees, as a witness. Under the Westminster approach to government, ministers are responsible to parliament for everything which they do. As part of this responsibility, ministers often call upon civil servants who are well informed about a particular matter to provide information or evidence to parliament. But, in this capacity, the official appears not as an independent citizen but in support of their minister, to assist him or her discharge his or her responsibility towards parliament. Subject, as always, to the law, an official should not, absent authorisation from his or her minister, disclose confidential information to parliament. Furthermore, the convention of collective Cabinet, or ministerial, responsibility not only allows but actually requires ministers, again subject to the law, to refuse to disclose information about the deliberative process within cabinet to anyone, including parliament. Ministers may also be privy to other types of confidential information – say relating to national security issues – which they are again authorised to refuse to provide to parliament.

On the other hand, in other constitutional systems, different rules apply. For example, in the United States, Congress has very broad powers to compel the production of evidence and documents. As noted in an explainer by the law firm Mayer Brown: "Put simply, Congress can compel the production of documents and sworn testimony from almost anyone at almost any time."[298] Certain legislation also grants rights to request the preparation of special kinds of reports. For example, under section 502(B)(c) of the Foreign Assistance Act of 1961, the US House of Representatives and the Senate, as well as the House and Senate committees which are responsible for foreign affairs, are each authorised to order the Secretary of State to prepare a report within 30 days on the human rights practices in another country, as well as information on steps the US has taken to address human rights concerns there and information on whether security assistance should continue to that country.[299]

Some parliaments have a specified role in rendering certain documents accessible to the public under RTI laws. Under Ecuador's RTI law, public authorities are required to classify documents as "reserved" where their publication would present a clear risk of harm to certain interests.[300]

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[298] Hon. David M. McIntosh, Hon. Mark Gitenstein and Sean P. McDonnell, "Understanding Your Rights in Response to a Congressional Subpoena", 2014, p. 1, https://www.mayerbrown.com/files/Publication/ec1203b2-a787-44ac-8344-5d5fab374ffa/Presentation/PublicationAttachment/11509b8b-df81-4db6-9e89-1d1b16c20856/White-Paper-Congressional-Subpoena.pdf.

[299] See https://www.foreign.senate.gov/imo/media/doc/Foreign%20Assistance%20Act%20Of%201961.pdf.

[300] Organic Law of Transparency and Access to Public Information, 7 February 2023, Article 4(7), available in Spanish,

The public authorities are required to transmit to the Ombudsman and the National Assembly a resolution listing the documents which have been classified and the reasons for doing so.[301] However, the National Assembly, by a qualified majority vote, may order documents to be declassified at any time, other than those which were classified on grounds of national security.[302]

Parliamentarians also have confidentiality obligations. One is the obligation not to release parliamentary reports prematurely. But parliamentarians may also have wider confidentiality obligations. Although they are protected through non-accountability for the disclosure of otherwise secret information originating from outside of parliament, they may have obligations to protect the confidentiality of certain parliamentary information. For example, where a committee meeting is closed due to the sensitive nature of the information being discussed, members of the committee are normally expected not to disclose confidential information discussed during that part of the meeting. This may flow from the doctrine of privilege, from internal rules (such as standing orders) or from legislation.

Activity 10: Reading

Estimated reading time: 5 minutes

Steps to Improve Freedom of Expression: Checklist for Parliamentarians

What steps can parliamentarians take to improve respect for freedom of expression?

- Parliamentarians should place the promotion of respect for freedom of expression above partisan or political interests whenever they come into conflict.

- Parliamentarians should inform themselves about general freedom of expression standards and become more specifically informed about issues which come up as policy or legal matters in the parliamentary committees they sit on. As part of this, they should be aware of the three-part test for restrictions on freedom of expression, which requires restrictions to:
    - be provided for by law;
    - serve to protect one of the interests recognised by international law; and
    - be necessary and proportional to protect that interest.

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http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/eyJjYXJwZXRhIjoicm8iLCJ1dWlkIjoiYzA2NDc3NGYtMzIzMS00MGU5LTkzYTItNzJjMTZlNmExNzk5LnBkZiJ9.

[301] *Ibid*., Article 17(1) and 17(2)(4).

[302] *Ibid*.

- Parliamentarians should promote the ratification of relevant international human rights treaties guaranteeing freedom of expression, such as the ICCPR and regional treaties, and then take steps to ensure that the law and practice in their State is brought into line with the standards in those treaties. This may include:
    - Participating in mechanisms under the treaties to promote respect for them.
    - Adopting relevant legislation to incorporate treaty standards into national law.

- Parliamentarians should review their legal frameworks for compliance with international standards regarding freedom of expression, including both gaps in the positive framework and unduly limiting legislation. Following such a review, they should take steps to ensure that the framework is amended, as necessary, to bring it more fully into line with international standards, taking into account the following:
    - Particular care should be taken to ensure that proposed legislation does not infringe the right to freedom of expression.
    - While it is essential for States to protect national security and combat terrorism, this does not justify unduly broad or vague restrictions on freedom of expression or restrictions which are not necessary in all of the circumstances.
    - When adopting laws affecting freedom of expression, care should be taken to ensure that the scope for regulations (secondary legislation) under the law does not grant too much discretion to government to restrict freedom of expression.

- Parliamentarians should take full advantage of their various powers to promote effective implementation of legislation which supports freedom of expression, which should include:
    - General efforts to ensure implementation.
    - Specific efforts to ensure that oversight bodies are independent and appropriately funded, and that there is effective review of the work of these bodies, including of any recommendations they may make to improve the systems which they are responsible for.

- Parliamentarians should be aware of and respond to instances where laws are abused (or simply used, in the case of repressive laws) to limit freedom of expression and should use their role as social leaders to speak out against such abuses. They should be particularly attentive about doing this where the victims of the abuse are themselves parliamentarians, regardless of their political affiliations, given the cardinal importance of free speech to parliamentarians.

- Parliamentarians should support institutional efforts to make parliament a leader among public authorities in terms of transparency, through both responding to requests for information and publishing information on a proactive basis.

- Parliamentarians should, if this is not already the case, ensure that a code of conduct applies to them which incorporates rules on transparency, and asset and conflict of interest disclosures.
- Parliamentarians should ensure that the process for adopting legislation is transparent and consultative.
- Parliamentarians should promote the live broadcasting and online video streaming of parliamentary sessions, both plenary and committee.

- Parliamentarians should make sure that they understand, in detail, the rights and duties which accrue to them through parliamentary immunity.

- Parliamentarians should be aware of the impact which their statements can have and be careful not to abuse their free speech rights, for example by making statements which may promote discrimination or harm individuals.
  - Parliamentarians should also use their leadership roles to combat, in appropriate ways, social barriers to open debate about matters of public importance.
  - Parliamentarians should speak out against cases where parliaments unduly limit freedom of expression, especially of parliamentarians.

- Parliamentarians should also seek to improve, as needed, systems relating to parliamentary immunity in their countries. This might involve:
  - Seeking to address any limitations in terms of protection against legal suits for statements made as part of parliamentary proceedings.
  - Considering putting in place appropriate systems which afford individuals who have been harmed by statements made in parliament some sort of redress, such as a right of reply.
  - Establishing appropriate procedural safeguards and, in particular, due process rights, including a right of appeal, before parliament may impose sanctions for speech-related matters.
  - Establishing proper mechanisms and appropriate procedural safeguards in countries where the parliament's authorisation is required before criminal action against its members can be launched.

- Parliamentarians should participate in and support the work of international human rights bodies, including the IPU Committee on the Human Rights of Parliamentarians.

- Parliamentarians should promote best practices within their parliaments in terms of ensuring media access through appropriate systems of accreditation, and adequate physical access spaces and support facilities.

- Parliamentarians should seek to foster positive relations with relevant media and/or journalists, recognising the important positive impact which the media can have in terms of helping them discharge their responsibilities, whether in terms of representing constituents, passing good legislation or overseeing government. They should also inform themselves about the most effective ways to take advantage of social media to communicate directly with their constituents.

- Parliamentarians should inform themselves about the extent of their rights to access otherwise confidential information, if necessary through in camera proceedings, and take advantage of those rights. They should also inform themselves about and respect their own confidentiality obligations.

- Parliamentarians should review and where necessary amend the legal rules governing the relationship between parliamentarians, parties and the parliamentary mandate. In particular, where automatic loss of the mandate is triggered by certain actions, such as leaving a party, the appropriateness of this should be reviewed and, where necessary, the law should be amended.

Activity 11: Further Readings

Suggested Further Readings

- Franklin De Vrieze and Victoria Hasson, *Post-Legislative Scrutiny: Comparative study of practices of Post-Legislative Scrutiny in selected parliaments and the rationale for its place in democracy assistance* (2017, Westminster Foundation for Democracy), https://www.wfd.org/what-we-do/resources/comparative-study-post-legislative-scrutiny.
- Franklin De Vrieze and Maria Mousmouti, *Parliamentary Innovation through Post-Legislative Scrutiny: Manual for Parliaments* (July 2023, Westminster Foundation for Democracy), https://www.wfd.org/what-we-do/resources/parliamentary-innovation-through-post-legislative-scrutiny.
- *Parliaments and Human Rights A self-assessment toolkit* (2023, Inter-Parliamentary Union), p. 24, 26-27, https://www.ipu.org/resources/publications/toolkits/2023-10/parliaments-and-human-rights-self-assessment-toolkit.
- *Human Rights: Handbook for Parliamentarians* (2005, Inter-Parliamentary Union and United Nations High Commissioner for Human Rights), https://www.ipu.org/resources/publications/handbooks/2016-07/human-rights-handbook-parliamentarians.
- *Contribution of parliaments to the work of the Human Rights Council and its universal periodic review*, Report of the Office of the United Nations High Commissioner for Human Rights

17 May 2018, https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F38%2F25&Language=E&DeviceType=Desktop&LangRequested=False.

- *Social media guide for parliaments and parliamentarians* (2021, Inter-Parliamentary Union), https://www.ipu.org/resources/publications/reference/2021-02/social-media-guidelines.
- Alice Donald and Anne-Katrin Speck, *National parliaments as guarantors of human rights in Europe: Handbook for parliamentarians* (2018, Council of Europe), https://pace.coe.int/en/pages/jur-handbook.
- Brian Chang and Graeme Ramshaw, *Strengthening parliamentary capacity for the protection and realisation of human rights* (2017, Westminster Foundation for Democracy), https://www.wfd.org/sites/default/files/2022-05/research-wfd-strengthening-parliamentary-capacity-for-the-protection-and-realisation-of-human-rights-synthesis-report.pdf.
- Kirsten Roberts Lyer, *Effective Human Rights Engagement for Parliamentary Bodies: A Toolkit* (2022, International IDEA), https://www.idea.int/publications/catalogue/effective-human-rights-engagement-parliamentary-bodies-toolkit.
- John K. Johnson, *The Role of Parliament in Government*, 2005, https://documents.worldbank.org/en/publication/documents-reports/documentdetail/322091468174864214/the-role-of-parliament-in-government.
- Toby Mendel, *Parliament and Access to Information: Working for Transparent Governance* (2005, World Bank), http://documents.worldbank.org/curated/en/704531468139797130/Parliament-and-access-to-information-working-for-transparent-governance.
- *Guiding Principles of Democratic Lawmaking and Better Laws* (2024, OSCE Office for Democratic Institutions and Human Rights), https://www.osce.org/odihr/561715.