

# *Freedom of Expression and Regulation of the Media*

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## *Introduction*

The right to freedom of expression is a complex right, and the implications of this right in terms of media regulation are even more complex. This Note aims to provide readers with a basic understanding of the key attributes of the right to freedom of expression as guaranteed under international law. It also provides an overview of which approaches to media regulation are consistent with these international guarantees.

## *Freedom of Expression under International Law*

### **International Guarantees**

The right to freedom of expression is one of the most fundamental rights, important in its own right and also as an underpinning of all other rights. At its very first session, in 1946, the United Nations General Assembly adopted Resolution 59(I), which states: “Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”<sup>1</sup>

Two years later, in 1948, the UN General Assembly adopted the *Universal Declaration of Human Rights* (UDHR), its flagship statement of the human rights recognised by the United Nations.<sup>2</sup> Article 19 of the UDHR guarantees the right to freedom of expression in the following terms:

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

The UDHR, as a UN General Assembly resolution, is not formally legally binding on States. However, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.

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<sup>1</sup> 14 December 1946.

<sup>2</sup> UN General Assembly Resolution 217A(III), adopted 10 December 1948.

The *International Covenant on Civil and Political Rights* (ICCPR)<sup>3</sup> is one of the two international treaties which elaborate on the provisions of the UDHR and which, along with it, form the International Bill of Human Rights.<sup>4</sup> Ratified by 167 States as of January 2012, the ICCPR imposes formal legal obligations on State Parties to respect its provisions. Article 19 of the ICCPR guarantees the right to freedom of expression in very similar terms to Article 19 of the UDHR, as follows:

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.

International courts and other authoritative bodies have repeatedly stressed the fundamental significance of freedom of expression as a human right. For example, the UN Human Rights Committee has stated:

The right to freedom of expression is of paramount importance in any democratic society.<sup>5</sup>

The UN human rights system recognised the importance of freedom of expression in a very formal way in 1993, when the UN Commission on Human Rights (now replaced by the Human Rights Council)<sup>6</sup> created the office of the UN Special Rapporteur on Freedom of Opinion and Expression.<sup>7</sup> This office, which is still active today, serves as a central point within the UN for promoting this key human right.<sup>8</sup>

### **The Main Attributes of Freedom of Expression**

The right to freedom of expression, as guaranteed under international law, is a complex right with a number of different characteristics. Some of the key characteristics of the right are as follows:

1. The right to hold opinions is absolute  
Individuals have a right to hold any opinion whatsoever, no matter how extreme, ridiculous or anti-social. In other words, the right to freedom of opinion is absolute. One does not always have a right to expression one's opinions, but one should never be punished simply for holding an opinion, or be forced to hold another opinion.
2. The State is under an obligation to respect freedom of expression

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<sup>3</sup> UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, entered into force 23 March 1976.

<sup>4</sup> The other is the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

<sup>5</sup> *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para. 10.3.

<sup>6</sup> See <http://www2.ohchr.org/english/bodies/hrcouncil/>.

<sup>7</sup> Commission Resolution 1993/45, 5 March 1993.

<sup>8</sup> See <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>.

Like all human rights, freedom of expression places obligations on the State, and not on other individuals or social actors. The State in this context means all three branches of government, individuals acting on behalf of the government, and other public sector actors, such as independent constitutional bodies.

3. Everyone enjoys the right to freedom of expression

The right to freedom of expression belongs to everyone, not just citizens or residents. States are required to respect the freedom of expression rights of everyone under their jurisdiction. Everyone means everyone, including children, prisoners, officials and members of the military.

4. Freedom of expression includes the right to seek, receive and impart information and ideas

The most obvious attribute of the right to freedom of expression is the right to speak, or to impart information and ideas. Under international law, however, it also includes the right to seek and receive information and ideas. In other words, it protects not only the right of the speaker, but also of the listener. This is a key aspect of the right, as it is our right to receive information and ideas that enables us to participate in society as full citizens.

5. States have both negative and positive obligations to respect freedom of expression

We tend to think of freedom of expression as the right to be free of State interference: our right to speak without the State trying to stop us or sanctioning us afterwards. Freedom of expression also requires States to put in place certain positive measures to ensure the free flow of information and ideas in society. In most cases, these positive obligations flow from the right of everyone to seek and receive information and ideas.

6. Freedom of expression includes information and ideas of all kinds

It is central to the very idea of freedom of expression that it protects all kinds of information and ideas, not just those that are popular or uncontroversial. Anything that communicates meaning is covered whether it is right or wrong, whatever its purpose, including commercial speech, and even if most people find it offensive.

7. Freedom of expression includes the right to information

The right to freedom of expression, and in particular to seek and receive information, includes a right to access information held by public bodies. To give effect to this aspect of the right, States are under an obligation to adopt what are commonly referred to as right to information or freedom of information laws.

8. Expression is protected regardless of the medium

All forms of expressive activity – i.e. activity that communicates meaning – are protected. This includes obvious forms of communication – such as speaking, writing, publishing newspapers and broadcasting – as well as less obvious forms –

such as painting, sending SMS messages or smoke signals, acting, graffiti and sometimes even how we dress.

#### 9. Freedom of expression is protected regardless of frontiers

The right to freedom of expression is not limited to individual States, but applies across international borders. Thus, we have a right to import newspapers from abroad, send and receive international letters, and access material from around the world on the Internet.

### **Restrictions on Freedom of Expression**

The right to freedom of expression is extremely broad in nature, creating a presumption in favour of all forms of communication. But in a small number of cases, communications can cause harm which is greater than the value of protecting the expressive activity. Thus, children may be harmed by seeing mature sexual material, an individual's reputation may be harmed if someone tells malicious lies about them, national security may be harmed if intelligence agents sell military secrets to the enemy, and business will not flourish if the State does not keep their sensitive commercial information confidential.

International law recognises this and, as a result, it does not provide absolute protection to expression. Instead, it allows States to impose restrictions on the right to protect overriding public and private interests. However, international law sets careful limitations or conditions on the scope of such restrictions. The test for whether or not a restriction is legitimate is found in Article 19(3) of the ICCPR:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

This has consistently been interpreted by international courts as imposing a three-part test for assessing whether or not restrictions on freedom of expression are legitimate. Only restrictions which meet all three parts of the test are deemed to be legitimate.

#### 1. Provided by law

Only restrictions which are set out in law are legitimate. This reflects the idea that only the legislature should have the power to restrict a fundamental right like freedom of expression. Other public actors – such as the police, individual MPs, senior officials or military personnel – may not limit freedom of expression unless they are acting pursuant to a law. Furthermore, laws which restrict freedom of expression must not be unduly vague: they must be “formulated with sufficient precision to enable an individual citizen to regulate his or her conduct accordingly.”<sup>9</sup>

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<sup>9</sup> UN Human Rights Committee, General Comment No. 34, 21 July 2011, para. 25.

This is both to be fair – i.e. to avoid punishing individuals without giving them fair warning – and to avoid a chilling effect – as individuals will be wary of speaking if they fear this might lead to punishment.

## 2. Legitimate aim

The list of aims in Article 19(3) – namely the rights and reputations of others, national security, public order, and public health and morals – is exclusive so that only restrictions which serve these aims are legitimate. It is not enough for the restriction to serve one of these aims tangentially; this must be a primary objective of the restriction. Aims which have been rejected by international courts as illegitimate include getting people to vote in elections, praising the enemy (which was not deemed to threaten national security) and promoting a strong economy.

## 3. Necessity

The majority of international decisions on freedom of expression are decided on the basis of the last part of the test, which requires restrictions to be necessary. Although it sounds obvious – why impose a restriction if it is not necessary – there are a number of elements to this part of the test.

First, the measure must respond to a pressing social need. Restrictions on freedom of expression, even if they serve one of the legitimate aims noted above, are not warranted if the harm to the aim is minor, insignificant or speculative. Thus, in the case above involving praise for the enemy, the UN Human Rights Committee rejected the State's claim this would undermine its own citizens resolve to fight as being speculative and likely to have at best a minor impact.

Second, the restriction must be the least intrusive measure possible. If a measure which is less harmful to freedom of expression would effectively secure the legitimate aim, it is not necessary to employ the more intrusive measure. For example, reputations can adequately be protected by civil defamation laws, so it is not legitimate to employ criminal defamation laws.

Third, the restriction should not be overbroad, in the sense of ruling out legitimate as well as harmful speech. Thus, a prohibition on criticising others to protect reputation would not pass muster, because much criticism is legitimate. The prohibition should be limited to criticism involving false statements of fact which harm another's reputation.

Fourth, the restriction must be proportionate, in the sense that the benefits of protecting the legitimate aim outweigh the harm to freedom of expression. For example, large damage awards for defamatory statements have been held to breach this rule, because they create a chilling effect on others, who may then not make perfectly legitimate statements out of fear of being required to pay such a large award.

# *Regulation of the Media*

## **General Issues**

### Independence of Regulatory Bodies

It is well established under international law that bodies which exercise regulatory powers over the media must be independent of government and of the media itself, in the sense that they are protected against political and commercial interference. The reasons for this are fairly obvious. If the government controls regulatory bodies, the decisions of these bodies will serve the interests of the government rather than the wider public interest. This will undermine the ability of the media to play its role as watchdog of government. This is even clearer in relation to the media, for how could a body regulate the media if it were under their influence or control.

If the general principle is clear, achieving it in practice is rather more challenging. A primary mechanism for bolstering independence is the manner in which members of the governing body are appointed. Where this process is controlled by the government, or where individuals with strong political connections are appointed, the body is unlikely to operate independently in practice. There is no formula for how to make independent appointments. The system should be designed to take into account the particular political and social environment in each country. However, as a rule of thumb, involving more stakeholders in the process – including civil society and multi-party bodies such as Parliamentary committees – helps ensure more robustly independent appointments.

### Different Approaches for Different Sectors

A second general principle is that different regulatory approaches are required for different media sectors, among other things to take into account the profound differences between each sector. Thus, under international law, some regulatory rules that are legitimate for broadcasters, such as licensing, are not legitimate if applied to the print media. It is particularly important that systems designed for broadcasting are not simply applied to the Internet, given the profound differences between them.

### Media Diversity

A third general principle is that an important goal of media regulation should be to promote media diversity. This flows from the right to seek and receive information and ideas, which implies access to as wide as possible a range of information and ideas. There are three primary types of media diversity: of outlet (different types of media), of source (different owners) and of content.

States should ensure that all three types of broadcaster – commercial, public and community – have equitable access to different dissemination platforms, including the airwaves. To ensure that the media are owned by different players, States should

put in place measures to prevent undue concentration of ownership, including cross-ownership. Finally, measures should be adopted to ensure that media content reflects all groups and perspectives in society. The public service broadcaster should be required, through its mandate, to contribute to achieving this goal, and other measures, such as targeted licensing of community broadcasters, may be necessary as well.

## **Regulation of Journalists**

### Conditions on the Practice of Journalism

Journalism is recognised everywhere as a profession, but it is different from other professions. Unlike doctors, lawyers and engineers, the practice of journalism is inextricably linked to the exercise of a fundamental human right, namely freedom of expression. As a result, international courts have recognised that it is not legitimate to place conditions on who may practise journalism, such as requiring individuals to be a certain minimum age or have a certain type of training. In any case, experience around the world demonstrates that these sorts of conditions do not contribute to professionalism in the media; this is instead promoted by having a free and competitive media sector, supported by training opportunities and good ethical systems.

For the same reasons, it is not legitimate to impose licensing or even registration requirements on journalists. States cannot license access to basic human rights, including freedom of expression. Even technical registration systems represent a barrier to entry into the profession and cannot be justified by reference to any legitimate aim recognised under international law. In particular, neither system can be shown to contribute to professionalism in the media; on the contrary, the imposition of these requirements often opens up the profession to external control, undermining both its professionalism and independence.

It is also not legitimate to require journalists to belong to a particular association or union, or, conversely, to prohibit them from forming associations of their own choice. Where mandatory associations have been imposed, they have served as a vehicle for controlling journalists instead of contributing to professionalism.

### Protection of Sources

Journalists often rely on external sources to provide them with information, sometimes of great public interest. Where the information they provide is sensitive, these sources may provide it on the condition that their identities remain confidential. If journalists are unable to guarantee them this confidentiality, the sources will not come forward in the first place, and the public will be denied access to the information. As a result, international courts have recognised that the right to freedom of expression includes a right of journalists to protect the confidentiality of their sources of information. Although journalists are the apparent beneficiaries of

this rule, in fact it seeks to protect the free flow of information to the public as a whole.

### Accreditation Systems

A similar rationale applies to systems for accreditation of journalists to limited space venues, such as the courts or parliament. For the vast majority of people, it is only through the media that they get to hear about the important events that take place at these venues. If journalists are not given privileged access to these venues, the right of the public to know about them will suffer. Accreditation should not, however, be used as a tool to control journalists, or to reward 'friendly' journalists. To prevent this from happening, accreditation systems should be applied using objective criteria – such as the circulation of a newspaper – should be overseen independently of the bodies to which the accreditation applies, and should only apply to limited space venues.

## **Regulation of the Print Media**

### Licensing and Registration

In many countries, the print media are not subject to any special form of regulation, over and above general rules which apply based on the legal form in which they are established (often as a corporation). It is well established under international law that requiring print media outlets to obtain a licence, as with licensing of journalists, whereby one must apply for prior permission to establish a print media outlet, cannot be justified.

Some countries do require the print media to register, although such systems may be abused and so whether or not they are needed should be carefully considered. Registration systems will only be legitimate where they meet certain conditions, namely:

- the registering body has no discretion to refuse registration, once the requisite information has been provided;
- the only substantive condition for registering is that the name being proposed is not already being used by another media outlet;
- the process for registration is not excessively onerous; and
- the system is administered by a body which is independent of government.

### Rights of Correction and Reply

Many countries have established legal rights to a correction or reply. Where these are carefully designed, they can provide a means for addressing wrongs – such as defamation and invasion of privacy – which is both less intrusive than going to court and at the same time more effective, as they provide a very direct form of redress (responding to wrong speech by more speech).

At the same time, the rights of correction and reply represent restrictions on freedom of expression and so they must be carefully designed. A right of correction,



which is a less intrusive remedy, should be used to address simple errors of fact. A right of reply should be available only where the claimant's legal rights have been breached in a way that cannot be addressed through a correction. Where available, self-regulatory systems for providing these rights are preferable, since these are less open to abuse.

### Self-Regulation

In many countries, the print media have come together to form self-regulatory systems for addressing complaints from members of the public that the media have acted in unprofessional and harmful ways. These systems normally involve the adoption of a code of conduct, setting out relevant standards for media behaviour, as well as the establishment of a body to receive and decide upon complaints. Where a media outlet is found to have breached the code, it will normally be required to publish a statement recognising the wrong.

Where an effective self-regulatory system exists, States should not impose a statutory system. However, in some cases, the print media are unable to come together to create a self-regulatory complaints system, and in this case a statutory system may be warranted. Where a statutory system is imposed, the complaints body should, as with all regulatory bodies, be independent. Complaints should be assessed against a pre-established code of conduct, which has been developed in consultation with all interested stakeholders. As with self-regulatory systems, the only sanction should be a requirement to print a statement acknowledging the wrong.

Complaints systems for the public should always apply to media outlets as opposed to individual journalists. The decision to publish an article or report is a collective one, made by the newspaper rather than any particular individual. Furthermore, any negative impact is caused by publication in the newspaper, and subsequent circulation to a wide audience, rather than just the writing of the piece by the journalist.

## **Broadcast Regulation**

### Licensing

Broadcast regulation is a very complex matter and this section provides only a brief overview of the key issues. Unlike the print media, it is widely recognised that it is legitimate, even necessary, to licence broadcasters. The key reason for this, at least historically, is that broadcasters depend on a limited public resource – the airwaves – and a failure to regulate will lead to: a) chaos and interference, with broadcasters claiming ownership over the same frequencies; and b) frequencies ending up in the hands of the most powerful, rather than being used in the public interest.

Two key principles apply to broadcast licensing. First, as always, the body which issues licences (and undertakes other regulatory functions) should be independent

of government and commercial interests. Second, the licensing process should be used to promote diversity in the airwaves, with a view to satisfying the public's right to receive a wide range of information and ideas through broadcasting. Key means to achieve this are ensuring that different types of broadcasters – commercial, public and community – all have access to the airwaves and allocating licences to broadcasters providing different types of content (such as news, children's programming, music, documentaries, dramas and so on).

### Content Regulation

There are also important differences between content regulation in the print and broadcast media sectors, at least in practice. Whereas in most countries the print media are self-regulating, it is more common to have a statutory scheme for broadcasters, although they are also self-regulating in some countries. There are a number of reasons for this, including the facts that broadcasters are already subject to regulation, through licensing, that broadcasting, and particularly television, is a very powerful medium, and that it is easier for children to access broadcasting.

Once again, it is essential that the oversight body, which receives and decides upon complaints, be independent. The main goal of the system should be to set standards in a context of rapid social change, rather than to punish. For example, what is considered acceptable in terms of violence on television has changed dramatically over the last 20-30 years, and an important role of the regulatory system is to ensure that broadcasters do not run ahead of public values in this regard. As a result, the primary response to a breach of the code of conduct in most countries is a warning aimed at clarifying what is appropriate. More weighty sanctions, such as a requirement to carry a message or pay a fine, should be reserved for more serious breaches.

### Public Service Broadcasting

Special considerations come into play in relation to public broadcasters. In some countries, the government treats these as their private mouthpieces, exercising strict control over editorial line and output. This is inappropriate. These are public bodies, funded by public funds and they should serve the public as a whole, not whoever happens to be in government. It is well established that these broadcasters should operate under strict obligations of balance and impartiality in their news and current affairs programming. Furthermore, their governing boards, like all bodies that exercise regulatory powers over the media, should be independent.

A key rationale for having public broadcasting is to contribute to diversity, in particular by supplementing and extending the programming provided by commercial broadcasters. To achieve this goal, two things are necessary. First, the mandate of public broadcasters should be set out in law and should explicitly require them to provide public interest programming, including more costly genres which tend to be neglected by commercial broadcasters, such as children's programming, dramas and investigative reporting. Second, and closely related, these

broadcasters should receive public funding to cover the additional costs of producing this programming. Broadcasters which reflect all three of these characteristics – independence, a public interest mandate and public funding – are often referred to as public service broadcasters.

### **The Internet**

Most democracies do not impose systemic regulation on the Internet, along the lines of broadcast licensing, and any attempt to do so would almost certainly fail to pass muster as a restriction on freedom of expression. It is also not legitimate to impose special measures of control over the Internet, such as requiring Internet cafes to obtain special forms of registration or monitoring users behaviour.

At the same time, laws of general application – for example against child pornography or defamation – apply to the Internet, although they may need to be adapted to take account of the special features of this medium (such as its inherently global reach). Many States have also passed legislation to facilitate the use of the Internet, such as laws protecting electronic commercial transactions or preventing spam.

It is increasingly being recognised that States are under a positive obligation to foster increased, and ultimately universal, access to the Internet. This is based on the increasingly fundamental role of Internet in facilitating freedom of expression, so that those without such access are becoming second-class citizens from an expressive point of view. A starting place could be to provide each village with at least one Internet access point.