ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

Central Asian Pocketbook on Freedom of Expression

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OSCE

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ARTICLE 19
6-8 Amwell Street ·
London EC1R 1UQ
United Kingdom
Tel +44 20 7278 9292
Fax +44 20 7278 7660
info@article19.org
http://www.article19.org

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ARTICLE 19 welcomes any comments, questions or suggestions related to this Pocketbook.

ARTICLE 19
6-8 Amwell Street
London, EC1R 1UQ
United Kingdom
Tel: +44 20 7278 9292
Fax: +44 20 7278 7660
E-mail: law@article19.org

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LIST OF ABBREVIATIONS AND TERMS

ACHPR – African Commission on Human and Peoples' Rights

AChHPR – African Charter on Human and Peoples' Rights

ACHR – American Convention on Human Rights

CHR – UN Commission on Human Rights

CIS – Commonwealth of Independent States

CoE – Council of Europe

ECHR – European Court of Human Rights

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

HRC – UN Human Rights Committee

HRCl – UN Human Rights Council

OAS – Organization of American States

NGO – Non-governmental organisation

OSCE – Organization for Security and Co-operation in Europe

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNESCO – United Nations Educational, Scientific and Cultural Organization

Final Act – Final Act of the Conference on Security and Co-operation in Europe

Special Mandates – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression

PREFACE

The republics of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, as members of the international community, are obliged to respect universal human rights, including the right to freedom of expression. All have formally committed themselves to translate the OSCE principles and values that guarantee freedom of expression and of the media into their national legislation, and to live up to the implementation of those commitments in everyday practice.

The legacy of the Soviet media environment remains problematic for today's journalists in the region. The remnants and consequences of the old structures that formerly served to hinder or restrict independent journalism are still observed in some areas of Central Asia. This legacy remains relevant when analysing the level of media freedom in Central Asia today.

OSCE and ARTICLE 19 have a long history of cooperation in promoting legislative reform throughout the OSCE region. The Central Asian Pocketbook provides a useful human rights context for this reform process, which remains a key need in all countries in the region.

I am very pleased to support the Central Asian Pocketbook, which brings together in one volume extensive expertise on both freedom of expression and the region. Issues of Internet regulation, transformation of state into public service broadcasting and its independent regulation and decriminalisation of defamation are all of everyday concern to my Office. It is encouraging that a whole chapter is dedicated to commercial constraints, an issue of particular relevance in Central Asia, where transformation from State to pluralistic and public ownership of the media has yet to take place.

This comparative analysis will be an invaluable resource to media professionals throughout the OSCE region. Published in English and Russian, I am convinced of its usefulness to researchers and practitioners alike.

By Mr. Miklós Haraszti,
OSCE Representative on Freedom of the Media
Vienna, 12 October 2006

INTRODUCTION

Upon the dissolution of the Soviet Union in 1991, the newly independent republics of Central Asia – Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan – embarked on an uncertain experiment with democracy. All five sought to establish themselves as law-abiding members of the international community, joining organisations such as the UN and the OSCE and ratifying international treaties on the protection of human rights.

Fifteen years on, the Central Asia republics, like much of the rest of the CIS, are still struggling to shake off the legacy of communist rule and to meet the international obligations they have assumed. There has yet to be an orderly transfer of power through democratic elections, and respect for human rights is erratic across the region. Underlying these problems is an incomplete understanding of the functioning of democracy and the meaning of human rights, not just amongst public officials, but amongst the population as a whole.

This Pocketbook is premised on the idea that implementation of one human right – the right to freedom of expression – is a necessary prerequisite for progress both on democracy and on the realisation of other human rights. Unless the State allows an open and fair competition between different ideas on how to govern, there is no guarantee that the strongest ones, supported by a democratic majority, will prevail; so long as the flow of information is restricted, human rights abuses can thrive in secrecy.

Freedom of expression is not merely an ideological concept or a figure of speech: it is a concrete, legal entitlement, both under the constitutions of the Central Asian republics and under international treaties to which they have committed themselves. This Pocketbook is intended as an accessible and reliable resource for anyone with an interest in promoting realisation of the right to freedom of expression, such as journalists, public officials, judges, lawyers and civil society campaigners. To this

end, the Pocketbook gives an overview of the exact meaning of the right to freedom of expression in international law, of best practice in other countries and regions, and of the recommendations of leading international bodies, experts and NGOs. Recognising that domestic advocacy and litigation will not always succeed in ensuring respect for freedom of expression, the Pocketbook also extensively discusses the international mechanisms through which citizens of the Central Asian republics can promote this right.

The Pocketbook consists of two parts; Part I is concerned with the general character of the right to freedom of expression and enforcement mechanisms; Part II examines the practical ramifications of the right for the domestic law and policies of States in various thematic areas, such as media regulation, restrictions on the contents of publications and access to information legislation. The authors have attempted throughout to present the subject in a way that is accessible to all, although the Pocketbook's broad audience makes it inevitable that some sections will be too technical for some readers and yet too superficial for others.

A word on what this Pocketbook is not. The authors are experienced lawyers in the area of international human rights law, but not experts on the domestic legislation and practices of the Central Asian nations. The frequent references to the laws in the five republics in the Pocketbook are intended as an illustration of certain general trends; they are not meant as authoritative statements on the state of the law in the country concerned. The number of references to any particular country reflects the amount of data available to the authors, not their opinion on that country's performance compared to its neighbours. Although the authors have made an effort to check the accuracy of every country reference, it cannot be excluded that some of them are outdated or incorrect.

Part One

Chapter 1

THE IDEA OF FREEDOM OF EXPRESSION

The right to freedom of expression is enshrined in the basic laws and constitutions of virtually all of today's States, including those of the Central Asian republics. The fact that censorship remains prevalent in many places shows, however, that formal guarantees have not always been accompanied by an appreciation of the meaning or importance of freedom of expression. This introductory chapter provides an outline of the meaning on human rights and why the right to freedom of expression is considered to be one of the central underpinnings of a modern democracy.

1.1. The concept of human rights

The modern idea of human rights evolved in the wake of the Second World War. Up until that time, the way in which a State treated its own inhabitants had been considered largely an internal matter, of no legitimate concern to the outside world. Outrage at the atrocities committed by the defeated Nazi regime, both against foreign nations and its own population, prompted calls for international standards for the protection of human dignity, which would henceforth bind States in their relations with any individual subject to their rule.

When the victorious Allies convened in San Francisco in 1945 to adopt a charter for the United Nations, human rights concerns were high on their agenda. A proposal to incorporate a comprehensive international bill

of rights in the UN Charter was rejected as too ambitious, but the final document refers to human rights five times, and Article 68 mandates the UN Economic and Social Council to set up a commission "for the promotion of human rights."

Soon after its establishment, the UN Commission on Human Rights embarked on the task of elaborating a set of human rights standards which would reflect, as far as possible, the shared values of all the world's nations and cultures. One major problem the drafters faced was the legal nature of the document they were preparing. Some countries favoured a legally binding treaty, to be ratified by all the UN's members; others preferred a morally persuasive declaration without the force of law. In the end, pragmatism prevailed and it was decided to do both, starting with the latter. The initial result was the *Universal Declaration on Human Rights* (UDHR),[1] adopted without an opposing vote by the UN General Assembly in 1948. Two treaties were subsequently elaborated on the basis of the UDHR: the *International Covenant on Civil and Political Rights* (ICCPR)[2] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[3] Both were adopted in 1966 and had, by 8 May 2006, been ratified by 156 and 153 States respectively, including all of the States of Central Asia. Collectively, the UDHR, ICCPR and ICESCR are often called the 'International Bill of Human Rights'.

The values enshrined in the International Bill of Human Rights are not novel – its purpose was, after all, to define a consensus standard of conduct for governments which would reflect the common aspirations of all humankind. The importance of the Bill lies in its legal character. It enumerates, in concrete terms, the obligations owed by States to every human over whom it exercises jurisdiction. Moreover, it establishes the principle that any violation of these rights is not an internal affair, but of legitimate concern to the international community as a whole.

[1] UN General Assembly Resolution 217A(III), 10 December 1948.

[2] UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

[3] UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

The *Universal Declaration* remains the flagship statement of international human rights. It has served as inspiration not only for the ICCPR and ICESCR, but also for numerous other international and regional human rights instruments, as well as parts of many domestic constitutions.

1.2. Freedom of expression as a key human right

The UDHR and the ICCPR guarantee the right to freedom of expression, both in Article 19. It is widely recognised that freedom of expression is not only of fundamental importance in its own right, but also essential to the realisation of other rights.

At an individual level, freedom of expression is key to the development, dignity and fulfilment of every person. By exchanging ideas and information freely with others, people can gain an understanding of their surroundings and the wider world, enabling them better to plan their lives and practise their trades. Moreover, being able to speak their minds makes citizens feel more secure and respected by the State.

At the national level, freedom of expression is a necessary precondition for good government, and thus also for economic and social progress.

Free speech contributes to the quality of government in various ways. In the first place, it helps ensure that the State is administered by competent and honest persons. In a democracy, free debate about and between the various political parties exposes their strengths and weaknesses, enabling voters to form an opinion about who is best qualified to run the country, and to cast their ballot accordingly. Media scrutiny of the government and the opposition helps expose instances of corruption or other improprieties, and prevents a culture of dishonesty from taking root.

Freedom of expression also promotes good government by enabling citizens to raise their concerns with the authorities. If people can speak their minds without fear, and the media are permitted to report what is being said, the government will have the opportunity to become aware of their problems, and can take the necessary measures to address them.

In the third place, free speech ensures that new policies and legislation are carefully considered. Through public debate, members of the public with helpful opinions on a subject can make them known, presenting the government with a "marketplace of ideas" from which to choose the best suggestions. Free debate about new legislation also helps ensure that the law eventually adopted enjoys the support of the population, making it more likely to be respected.

Finally, freedom of expression promotes the implementation of other human rights. Not only does it help improve government policy in all areas, including on human rights; it also enables journalists and activists to draw attention to existing human rights problems and abuses and persuade the government to take action on them.

For all these reasons, the international community has recognised freedom of expression as one of the most important human rights. At its very first session, in 1946, the UN 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."[4]

[4] 14 December 1946.

Chapter 2

FREEDOM OF EXPRESSION UNDER INTERNATIONAL LAW

In the previous chapter, it was stated that the modern concept of human rights evolved not merely as a persuasive moral doctrine, but also as a binding legal regime. This chapter will look in more depth at human rights from a legal point of view. The first section begins by discussing what the sources of international law are; these are also the sources of international human rights law, which forms part of the wider body of international law. The second section goes on to discuss how exactly the right to freedom of expression is defined in international instruments.

2.1. Sources of international law

International law, or the law of nations, is the body of rules that regulates the conduct of States and other international actors (such as international organisations, and to an extent, private individuals) and relations among them. There are three basic sources of international law: treaties, custom, and general principles of law.

2.1.1. Treaties

A treaty is any written, binding international agreement between two or more States or intergovernmental organisations. International agreements are given various names, such as 'treaty', 'convention', 'covenant' or 'protocol'. Regardless of its name, a document is a treaty if it is intended as a binding instrument. On the other hand, if a document

is intended as a statement of principle or a recommendation, rather than a set of enforceable obligations (that is, as a gentlemen's agreement), it is not a treaty. In the human rights field, both types of documents can be found; as discussed above, the ICCPR and the ICESCR are treaties, while the UDHR is not formally binding.

2.1.2. Custom

Customary international law is the body of unwritten legal rules recognised by the international community. Although it sometimes appears to the casual observer that international relations are a lawless affair and that self-interest is the only rule, in practice States usually treat each other with a high degree of cordiality and consistency. In most cases, courtesy is the sole motive; but in others, where States have a long-standing tradition of dealing with each other in a certain way, they may begin to feel that perpetuating the existing practice is not just a matter of politeness, but a mutual duty. In this way, a new rule of customary international law is formed.

While customary international law is a somewhat elusive concept, its existence is universally acknowledged by States. Debates tend to focus on whether a particular rule has been recognised or not, rather than on the validity of custom as a source of law.

Sometimes States will agree to clarify the state of customary international law on a particular topic (such as the law of the sea) by codifying it in a multilateral treaty. The reverse process is also possible; particular provisions of international instruments (whether treaties or non-binding instruments) may gain such wide acceptance that they become part of customary international law. The *Universal Declaration of Human Rights* is an example of this process: it has enjoyed such general recognition that many of its provisions – including Article 19, on freedom of expression – are nowadays considered to reflect 'new' customary international law.

2.1.3. General principles of international law

Because international relations are highly decentralised and there is not really a 'world government' with the responsibility to develop a coherent set of laws, treaties and custom have evolved as a loose patchwork of mainly substantive rules, with little eye for procedure or for filling the gaps. The third source of international law, the so-called 'general principles of international law', is the mortar that holds together the bricks of treaties and custom. General principles of international law are principles common to all the world's major legal systems. When asked to settle a concrete legal dispute, international courts and tribunals may resort to general principles to fill the gaps left by custom and treaties. An example of a general principle is the rule that a plaintiff is entitled to receive compensation for proven injury.

2.2. The international guarantee of the right to freedom of expression

The right to freedom of expression is guaranteed not by one single source, but by a number of global and regional human rights treaties, as well as under customary international law. As will be seen in the following sections, this diversity of sources does not reflect a diversity of ideas on what the right entails; freedom of expression is a universal right, so its formulation is largely the same in every instrument. The differences between regimes relate mostly to their mechanisms of enforcement (for an extensive discussion of enforcement, see Chapter 4).

2.2.1. Formulation of the right in international instruments

The *Universal Declaration of Human Rights* contains the first and most widely recognised statement of the right to freedom of expression, in Article 19:

> 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.

As was noted above, the UDHR is not a binding treaty but a recommendatory resolution of the UN General Assembly. Through universal acceptance, however, Article 19 is widely recognised to have become binding on all States as a rule of customary international law.

As the treaty intended to elaborate the UDHR, the *International Covenant on Civil and Political Rights* contains a very similar statement of the right to freedom of expression (again in Article 19) but with added detail:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

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

    (a) For respect of the rights or reputations of others;

    (b) For the protection of national security or of public order (ordre public), or of public health or morals.

All of the States of the Central Asian region are parties to the ICCPR; Kazakhstan was the last to ratify the Covenant, on 24 January 2006.

Another document of particular importance for the Central Asian region is the *Final Act of the Conference on Security and Co-Operation in Europe* (Final Act).[5] The Final Act led to the establishment of the Organization for Co-operation and Security in Europe (OSCE), of which all five Central Asian States are Members. In the Final Act, the participating States declare that they will:

[5] Adopted at Helsinki, Finland, 1 August 1975, 14 I.L.M. 1292.

> …promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development."[6]

Moreover, they will "act in conformity with the purposes and principles" of the UDHR.[7]

Kyrgyzstan and Tajikistan are also parties to the CIS *Convention on Human Rights and Fundamental Freedoms*.[8] Article 11 is a slightly altered version of the ICCPR's Article 19:

1. Everyone shall have the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas by any legal means without interference by a public authority and regardless of frontiers.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions and restrictions as are prescribed by law and are necessary in a democratic society, in the interests of national security, public safety or public order or for the protection of the rights and freedoms of others.

In addition to these instruments, there are three major regional treaties which guarantee the right to freedom of expression, in very similar terms to the ICCPR: the *European Convention on Human Rights* (Article 10),[9] the *African Charter on Human and Peoples' Rights* (Article 9)[10] and the *American Convention on Human Rights* (Article 13).[11]

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[6] *Id.*, Principle VII.

[7] *Id.*

[8] Adopted at Minsk, Belarus, 26 May 1995, entered into force 11 August 1998.

[9] Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953.

[10] Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

[11] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.

2.2.2. Authorities clarifying the scope of the right

The UDHR, ICCPR, OSCE Final Act and CIS Convention cover a wide range of subjects and are therefore succinct in their discussion of freedom of expression. They do not provide clear answers to many of the concrete questions encountered by those who wish to invoke the right, or those who are required to apply it. Fortunately, a large body of authority has developed on the meaning of the right in various contexts, consisting of decisions of international and domestic courts, recommendations and statements by international bodies, and opinions of experts.[12] The majority of these authorities are of a persuasive nature, although some of them may have partly or wholly become binding as customary international law. The following is an overview of the most important sources, which will be referred to throughout this Pocketbook. For more information on the mechanisms described below, see section 5.2.

- Within the UN system, the **Human Rights Committee** is responsible for overseeing compliance with the ICCPR and has elaborated on the meaning of Article 19 in various ways.[13] Until recently, a similarly named body, the **Commission on Human Rights**, issued an annual resolution on freedom of expression.[14] In 1993, the Commission on Human Rights (CHR) also appointed a **Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression**, whose annual reports[15] identify new trends and attempt to clarify the scope and meaning of the right. On 15 March 2006, the UN General Assembly voted to replace the CHR with a new body, the **Human Rights Council** (HRCl). The HRCl will continue to sponsor the work of the Special Rapporteur for at least one year, pending a review process. Finally, **UNESCO**'s mandate includes promoting "mutual knowledge and understanding

[12] A large library of international materials in Russian can be found on the website of the University of Minnesota, at http://www1.umn.edu/humanrts/russian/Rindex.html.

[13] Documentation relating to the Human Rights Committee in English can be found at http://www.unhchr.ch/tbs/doc.nsf.

[14] See, for a collection of UN documents on freedom of expression in Russian, http://www.un.org/russian/documen/hr/expression/.

[15] Available in Russian at the link in note 14.

of peoples" and as such it has sponsored several conferences which have adopted declarations which, in turn, have been approved by UNESCO's governing body of States.[16]

- Following the Helsinki Final Act, the **OSCE** has gone on to play an active role in the area of freedom of the media. Under its auspices, several international instruments touching on this subject have been agreed to by the Member States,[17] notably the Final Document of the Copenhagen meeting of the human dimension of the OSCE,[18] the Charter of Paris agreed in 1990,[19] the final document of the 1994 Budapest CSCE Summit,[20] and the Istanbul Summit Declaration.[21] Importantly, the OSCE has appointed a **Representative on Freedom of the Media**, who frequently provides recommendations to Member States on how to bring their media legislation into compliance with international standards on freedom of expression.[22]

- Special bodies have been established to receive complaints from individuals on alleged violations of each of the regional human rights treaties noted above. They are the **European Court of Human Rights** (ECHR),[23] the **African Commission on Human and Peoples' Rights**[24] and the **Inter-American**

[16] See, for an overview of these documents in English, http://www.unesco.org/webworld/com_media/communication_democracy/fed.htm.

[17] The OSCE's documents library can be found online at http://www.osce.org/documents/. Key documents are available in Russian.

[18] Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990. See in particular paragraphs 9.1 and 10.1.

[19] Charter of Paris for a new Europe, CSCE Summit, November 1990.

[20] Towards a Genuine Partnership in a New Era, CSCE Summit, Budapest, 1994, paragraphs 36-38.

[21] OSCE Istanbul Summit, 1999, paragraph 27. See also paragraph 26 of the Charter for European Security adopted at the same meeting.

[22] Documents issued by the OSCE Representative are available in English at http://www.osce.org/fom/documents.html.

[23] The European Court maintains a database of its jurisprudence in English and French at http://cmiskp.echr.coe.int/.

[24] The Commission's decisions are expected to be made officially available in the near future at http://www.achpr.org/english/_info/decisions_en.html. They can already be accessed at http://www1.umn.edu/humanrts/africa/comcases/comcases.html.

Court of Human Rights.[25] None of the three treaties or the decisions of their enforcing bodies are directly applicable to the Central Asian republics but, given the universal nature of human rights, they provide persuasive evidence of the meaning and scope of the right to freedom of expression. The jurisprudence of the European Court is particularly extensive and influential, and is frequently cited by domestic courts, not only in Europe but around the world.

- The **Council of Europe** (of which the ECHR forms part) is the continent's broadest organisation with 46 Member States, including the post-communist republics of Central and Eastern Europe. Its principal mandate is the promotion of human rights, parliamentary democracy and the rule of law. In recent years the Council of Europe has been very active in elaborating international standards on freedom of the media, mainly through recommendations of its Committee of Ministers.[26]

- In 1997, the Organization of American States established the position of **Special Rapporteur for Freedom of Expression**. The Special Rapporteur has prepared several reports [27] on topics ranging from the Internet and freedom of expression to media ethics. A similar post for the African continent, the **Special Rapporteur on Freedom of Expression in Africa** was created at the end of 2004 by the African Commission on Human and Peoples' Rights (ACHPR).[28] The ACHPR itself has adopted a *Declaration of Principles on Freedom of Expression in Africa*.[29]

- Every year since 1999, the UN, OSCE and OAS **special mandates** on the right to freedom of expression (described

[25] The Inter-American Court's jurisprudence is accessible at http://www.corteidh.or.cr/juris_ing.

[26] For an overview of these documents in English, see http://www.coe.int/T/E/human_rights/media/4_Documentary_Resources.

[27] Available online at http://www.cidh.org/Relatoria/showarticle.asp?artID=159&lID=1.

[28] See http://www.achpr.org/english/_info/index_free_exp_en.html.

[29] Adopted at the 32nd Session, October 2002. Available in English at http://www.achpr.org/english/_doc_target/documentation.html?../declarations/declaration_freedom_exp_en.html.

above) have issued a Joint Declaration on various topics within their field.[30] In 2005, the new ACHPR Special Rapporteur issued a similar declaration with his OAS counterpart.[31]

- Non-governmental organisations have produced several authoritative standard-setting documents. The publications of **ARTICLE 19**, Global Campaign for Free Expression, include *A Model Law on Freedom of Information, A Model Public Service Broadcasting Law* and various sets of principles on important freedom of expression topics.[32]

Together, the sources listed above constitute a detailed body of international standards guiding governments in the formulation of laws, and courts in their application. Part 2 of this Pocketbook provides an overview of the main themes covered by this body of standards. By way of introduction, the following section begins by highlighting the most fundamental aspects of the legal definition of the right.

2.2.3. Key aspects of the right to freedom of expression

As its formulation in Articles 19 of the UDHR and ICCPR shows, the right to freedom of expression is very broad in scope. It could be said to have six main aspects.

1) "Everyone shall have the right…"

The right to freedom of expression belongs to everyone; no distinctions are permitted on the basis of a person's level of education, or his or her race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status. Save in exceptional circumstances (see for a partial discussion section 6.1.3), restrictions on the right of prisoners and convicted criminals to express themselves violate international law.

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[30] All of the Joint Declarations can be found at http://www.cidh.org/Relatoria/docListCat.asp?catID=16&lID=1.

[31] See the previous note.

[32] See http://www.article19.org/publications/law/standard-setting.html. A number of these documents have been translated into Russian; see http://www.article19.org/pdfs/languages/russian.html.

2) "…to seek, receive and impart…"

The right to "impart information and ideas" is the most obvious aspect of freedom of expression. It is the right to tell others what one thinks or knows, whether in a private meeting or through a means of mass communication. But freedom of expression serves a larger purpose: to enable every citizen not just to contribute but also to have access to as wide a range of information and the viewpoints of others as possible. Hence Article 19 states that freedom of expression also includes the right to seek and to receive information and ideas, for example by obtaining and reading newspapers, listening to broadcasts, surfing the Internet, participating in public debates as a listener, and significantly, undertaking journalistic or academic research.

Furthermore, it is increasingly being recognised that the right to 'freedom of information' also includes the right to access records held by public authorities. Governments must publish important information and respond to requests from individuals to access their records (see further Chapter 9).

3) "…information and ideas of any kind…"

The right to freedom of expression applies not only to information and ideas generally considered to be useful or correct, but to any kind of fact or opinion which can be communicated. The UN Human Rights Committee (the body that oversees implementation of the ICCPR – see section 5.2.1.3 below) has stressed this point:

> Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression.[33]

[33] *Ballantyne and Davidson v. Canada,* Communication No. 359/1989, and *McIntyre v. Canada*, Communication No. 385/1989, UN Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev. 1, 5 May 1993, Annex, para. 11.3.

Moreover, the right to freedom of expression also extends to controversial, false or even shocking material; the mere fact that an idea is disliked or thought to be incorrect cannot justify preventing a person from expressing it.

As observers have pointed out, legal protection only for accepted information and ideas would be a hollow gesture. The English philosopher John Stuart Mill (1806-1873) advanced four arguments as to why it is important to permit controversial speech:

a. If an opinion is silenced, we will never know whether or not it was correct; to deny the possibility that another's opinion is correct assumes one's own infallibility.

b. Opinions are rarely entirely wrong or entirely correct. If an opinion is silenced, the 'correct' part will be lost.

c. Even if an accepted idea is indeed the correct one, it can only fully convince the public if it survives an open and fair contest with an opposing idea.

d. Why a particular idea is correct might easily be forgotten, if that idea is not periodically challenged and its strengths so exposed.[34]

International courts have repeatedly stressed that freedom of expression under international law extends to controversial subject matter. The European Court of Human Rights stated:

> Freedom of expression … is applicable not only to 'information and ideas' that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broad mindedness without which there is no 'democratic society'.[35]

In another case, the Court underscored that it is immaterial whether a particular opinion is considered correct: "It matters little that [an] opinion

[34] *On Liberty*, 1859.

[35] *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

is a minority one and may appear to be devoid of merit since … it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas."[36]

4) "…regardless of frontiers…"

As the words "regardless of frontiers" in both the UDHR and ICCPR make clear, the right to freedom of expression is not limited by national boundaries; States must allow their citizens to seek, receive and impart information to and from other countries.

5) "…through any media…"

Citizens should be permitted to express themselves through any media, whether modern or traditional. This includes, but is not limited to, newspapers, magazines, books, pamphlets, radio, television, the Internet, works of art and public meetings.

6) "…to respect and to ensure…"

Finally, and importantly, the right to freedom of expression has not only 'negative' implications, but also 'positive' ones; that is to say, States are not just required to refrain from interfering in the right but must also take active steps to remove obstacles to free expression. This is made clear by Article 2 of the ICCPR, which provides that all States Parties to the Covenant undertake to "respect and to ensure to all individuals … the rights recognized in the present Covenant" (emphasis added).

Examples of proactive measures which States should take are preventing the monopolisation of media outlets by the government or private entrepreneurs (see also section 10.2.3); proactively disseminating information; ensuring that minority groups are able to make themselves heard through the media (section 6.3.1); and, in transitional countries, making the abolition or amendment of laws from previous regimes which limit freedom of expression a priority.

[36] *Hertel v. Switzerland*, 25 August 1998, Application No. 25181/94, para. 50.

Chapter 3

FREEDOM OF EXPRESSION UNDER DOMESTIC CONSTITUTIONS

Having established that the right to freedom of expression is guaranteed by international law, an important question is what the status of the right is at the national level. As detailed in Chapter 5, some of the Central Asian republics have recognised international law as an integral part of the domestic legal system, meaning that the right is (at least in theory) directly enforceable through the courts. In addition, each of the five republics has opted to provide a separate guarantee of freedom of expression in its domestic constitution. The following sections provide an overview of the relevant provisions. When reading these provisions, it should be borne in mind that all States are required to meet fully their human rights obligations under international law, even if domestic law provides lower levels of protection or is in direct contradiction with international standards.

3.1. Kazakhstan

Freedom of expression is protected, subject to certain restrictions, by Article 20 of the Constitution of Kazakhstan, which states:

1. The freedom of speech and creative activities shall be guaranteed. Censorship shall be prohibited.

2. Everyone shall have the right to freely receive and disseminate information by any means not prohibited by law. The list of items constituting state secrets of the Republic of Kazakhstan shall be determined by law.

3. Propaganda of or agitation for the forcible change of the constitutional system, violation of the integrity of the Republic, undermining of state security, and advocating war, social, racial, national, religious, class and clannish superiority as well as the cult of cruelty and violence shall not be allowed.

Article 18(3) of the Constitution provides a right to access information:

> State bodies, public associations, officials and the mass media must provide every citizen with the possibility to obtain access to documents, decisions and other sources of information concerning his rights and interests.

In addition to Articles 20(2) and (3), Article 39 stipulates a number of further restrictions on the exercise of the right:

1. Rights and freedoms of an individual and citizen may be limited only by laws and only to the extent necessary for protection of the constitutional system, defence of the public order, human rights and freedoms, health and morality of the population.

2. Any actions capable of upsetting interethnic concord shall be deemed unconstitutional.

3. Any form of restrictions to the rights and freedoms of the citizens on political grounds shall not be permitted [….]

3.2. Kyrgyzstan

The right to freedom of expression in Kyrgyzstan is guaranteed by Articles 16(9) and 16(10) of the constitution:

9. Everyone has the right to freedom of thought, speech, as well as to the free expression of these thoughts and beliefs. No one may be compelled to express his opinions and beliefs. Everyone has freedom to gather, store, use, and communicate information by word, in writing or otherwise. No propaganda or advocacy that constitutes incitement to social, racial, ethnic or religious hatred or hostility shall be permitted. Any propaganda for the superiority on social, racial, ethnic, religious, or linguistic distinction shall be prohibited.

10. Censorship is prohibited in the Kyrgyz Republic

Article 36(1) provides an additional explicit guarantee, stating that the "mass media are free."

The issue of limitations on individual rights is dealt with in Article 17(2):

> Restrictions to the exercise of rights and freedoms is allowed by the Constitution and laws of the Kyrgyz Republic only for the purposes of ensuring the rights and freedoms of other persons, public safety and order, territorial integrity and protection of the constitutional order.. But in doing so, the essence of constitutional rights and freedoms shall not be affected.

Article 65(8) appears to contradict or overrule Article 17(2), stating that "no laws that restrict the freedom of speech and press shall be adopted."

3.3. Tajikistan

The Tajik guarantee of freedom of expression is found in Article 30 of the constitution:

> Each person is guaranteed the freedoms of speech and the press, as well as the right to use information media. Governmental censorship and prosecution for criticism are forbidden. A list of information considered secrets of the state is determined by law.

3.4. Turkmenistan

In Turkmenistan, freedom of expression is guaranteed under Article 26 of the constitution:

> Citizens of Turkmenistan have the right to freedom of conviction and the free expression of those convictions. They also have the right to receive information unless such information is a governmental, official, or commercial secret.

Limitations on the right are imposed by Article 19, which states that the exercise of rights "should not violate the rights and freedoms of other people, moral demands, social order, or harm national security."

3.5. Uzbekistan

The constitution of Uzbekistan contains a number of protections for freedom of expression. Article 29, for example, provides:

> Everyone shall be guaranteed freedom of thought, speech and convictions. Everyone shall have the right to seek, obtain and disseminate any information, except that which is directed against the existing constitutional system and in some other instances specified by law.

Additionally, Article 30 obligates State bodies, public officials and public associations to "allow any citizen access to documents, resolutions and other materials, relating to their rights and interests". Finally, Article 67 expressly prohibits, among other things, censorship of the mass media.

It may be noted that, in general, these provisions fall below the level set by international guarantees of freedom of expression. In particular, they do not require restrictions to be *necessary* or in the service of a limited list of *pre-established public and private interests* which are considered sufficiently important to override the right to freedom of expression. Instead, they generally permit any restrictions that are established by law.

Chapter 4

PERMISSIBLE LIMITATIONS ON THE RIGHT

In principle, the right to freedom of expression protects any activity involving the exchange of information or ideas between individuals against interference by the State (see section 2.2.3). The great majority of such activities are completely harmless but it is clear that the notion of 'seeking, receiving and imparting information or ideas' also encompasses activities which few societies could tolerate, such as incitement to murder, unauthorised graffiti on public walls or the sale of pornography to children. While the right to freedom of expression is universally recognised as one of fundamental importance, it is therefore also accepted that the right is not absolute. Certain important public and private interests may justify action by the authorities which interferes with or limits the exercise of the right. A key question, then, is exactly when and under which circumstances international law permits States to impose such restrictions.

4.1. The three-part test

Because interference with freedom of expression is an extremely serious matter, it is permissible only under certain very narrowly drawn conditions. Freedom of expression should be the rule, and limitations the exception; limitations should always leave the essence of the right intact. Article 19(3) of the *International Covenant on Civil and Political Rights* sets out the test for assessing the legitimacy of restrictions on freedom of expression:

> 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 test, which is found in a similar form in all the major human rights instruments, includes three parts: first, the interference must be in accordance with a law; second, the legally sanctioned restriction must protect or promote an aim deemed legitimate in international law; and third, the restriction must be *necessary* for the protection or promotion of the legitimate aim. These three conditions are discussed in detail in the following sections.

4.2. First part of the test: 'provided by law'

The first condition means, first and foremost, that an interference with the right to freedom of expression cannot be merely the result of the whim of a public official. There must be an enacted law or regulation which the official is applying. In other words, only restrictions which have been officially and formally recognised by those entrusted with law-making capacity can be legitimate.

The condition of 'provided by law' requires more, however, than the mere existence of a written piece of legislation. The legislation must also meet certain standards of clarity and precision, enabling citizens to foresee the consequences of their conduct on the basis of the law. Vaguely worded edicts, whose scope of application is unclear, will not meet this standard and are thus illegitimate restrictions on freedom of expression. For instance, a prohibition on "sowing discord in society" or "painting a false image of the State" would fail the test on account of vagueness.

There are several rationales for this part of the test. In the first place, it is a matter of fairness that citizens are given a reasonable opportunity to know what is prohibited, so that they can act accordingly. Furthermore, a situation in which officials could make up the rules as they go would be

undemocratic: restrictions on freedom of expression ought to be decided on by bodies which broadly represent the will of the people. And there will always be a temptation to abuse vague laws, for example for political reasons. Vague laws also can have what is often called a 'chilling effect': because they create uncertainty about what is permitted and what is not, they encourage citizens to steer far clear of any controversial topic, for fear that what they wish to say is illegal, even if in fact it is not. In this way, vague laws can inhibit discussion about important matters of public concern.

Vagueness is most often a problem in legislation which imposes restrictions on the content of what may be broadcast or published (for more on this topic, see Chapter 7). But it can also be an issue in laws which give the authorities discretionary powers in the area of freedom of expression. For example, many countries have laws requiring broadcasters of radio and TV stations to obtain a licence from a public body. Such laws must clearly specify exactly how, and on the basis of which considerations, the public body will take its decision whether to issue a licence; else, the law leaves to much room for arbitrary decision-making.[37]

4.3. Second part of the test: legitimate aim

The second requirement for restrictions on freedom of expression is that they must serve a legitimate aim. This requirement is *not* open-ended; the list of legitimate aims provided in Article 19(3) of the *International Covenant on Civil and Political Rights* is exclusive and governments may not add to these. It includes only the following legitimate aims: respect for the rights and reputations of others, and protection of national security, public order *(ordre public)*, public health or morals.

The rationale of this part of the test is to make it clear that not all of the motives underlying governments' decisions to restrict freedom

[37] In *Wingrove v. United Kingdom* (25 November 1996, Application No. 17419/90 (European Court of Human Rights), para. 40), the ECHR held: "A law that confers a discretion is not in itself inconsistent with [the foreseeability] requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference."

of expression are compatible with a democratic form of government. For example, a desire to shield a government from criticism can never justify limitations on free speech.In order to satisfy this second part of the test, a legal provision which limits freedom of expression must serve a legitimate aim both in purpose and in effect. It is not sufficient if the provision has an incidental effect on one of the legitimate aims; if the purpose of enacting it was to serve another aim, it will not pass this part of the test.

4.4. Third part of the test: necessity

The final part of the test holds that even if a restriction is in accordance with an acceptably clear law and if it is in the service of a legitimate aim, it will still breach the right to freedom of expression unless it is truly necessary for the protection of that legitimate aim. This part of the test may seem self-evident: if a restriction on a right is not needed, why impose it? Nevertheless, in the great majority of cases where international human rights courts have ruled domestic laws to be impermissible restrictions the right to freedom of expression, it was because the legislation in question was not deemed to be necessary. An important reason for this is that international courts read the word 'necessary' as imposing several quality requirements on any law and/or practice which abridges freedom of expression.

In the first place, to justify a measure which interferes with free speech, a government must be acting in response to a pressing social need, not merely out of convenience. On the continuum between 'useful' and 'indispensable', the meaning of 'necessary' should not be placed in the middle, but close to the 'indispensable' end.

Second, if there exists an alternative measure which would accomplish the same goal in a way is less intrusive to the right to free expression, the chosen measure is not in fact 'necessary'. For example, shutting down a newspaper for defamation is excessive; a retraction, or perhaps a combination of a retraction and a warning or a modest fine, would adequately protect the defamed person's reputation.

Third, the measure must impair the right as little as possible and, in particular, not restrict speech in a broad or untargeted way, or go beyond the zone of harmful speech to rule out legitimate speech. In protecting national security, for example, it is not acceptable to ban all discussion about a country's military forces. Courts have recognised that there are practical limits to how precise a legal measure can be without becoming ineffective. But subject only to such practical limits, restrictions must not be overbroad.

Fourth, the impact of restrictions must be proportionate, meaning that the harm to freedom of expression caused by a restriction must not outweigh its benefits to the interest it is directed at. A restriction which provides limited protection to a person's reputation but which seriously undermines freedom of expression does not meet this standard. A democratic society depends on the free flow of information and ideas; it is only when the overall public interest is served by limiting that flow that such a limitation can be justified. In other words, the benefits of any restriction must outweigh its costs.

Finally, in applying this test, courts and others should take into account all of the circumstances at the time the restriction is applied. A restriction in favour of national security which is justifiable in time of war, for example, may not be legitimate in peacetime.

The *European Convention on Human Rights* contains a slightly different, and arguably preferable, formulation of the necessity test. Under Article 10(2), restrictions on freedom of expression must be "necessary *in a democratic society*" (emphasis added). This wording makes it plain that the purpose of a restriction may never be to shield the incumbent government from criticism and peaceful opposition to its policies. Although Article 19(3) of the ICCPR does not expressly require restrictions to be compatible with a democratic form of government, the Human Rights Committee routinely refers the role of freedom of expression in free and democratic societies when applying the necessity test under the ICCPR.[38]

[38] For example., Application Nos. 422-424/1990, para. 7.4; 628/1995, para. 10.3; 633/1995, paras. 13.4-13.5.

4.5. Meaning of 'restriction'

An important question which remains to be answered is what exactly is meant by 'restriction on freedom of expression'. In other words, what kinds of measures are subject to the three-part test described in the previous sections?

International courts have taken a very flexible approach to this question, and generally held that any action by any public body which has a tangible effect on the exercise of the right constitutes a restriction. Three observations are relevant here.

First, the nature of the action is immaterial; a restriction on freedom of expression can consist in anything ranging from a law to a court order to an internal disciplinary measure by a public body, whether or not it is legal under domestic law.

Second, the nature of the public body concerned is also irrelevant. Restrictions on freedom of expression can be made by any legislative, executive or judicial body, including publicly owned or controlled enterprises.[39]

Lastly, any action by a public body which has a discernable effect on the ability of one or more persons to express themselves is a restriction on freedom of expression. It does not matter whether the action merely causes inconvenience or makes the exercise of the right completely impossible; in either case, there is a restriction which must conform to the three-part test. It is clear, however, that a minor inconvenience is more likely to meet the necessity test (see section 4.4) than a wholesale denial of the right.

The *European Convention on Human Rights* is more specific than the ICCPR in its description of the kind of State action that is subject to the three-part test. Under Article 10(2) of the Convention, the test applies

[39] In *Hertzberg v. Finland* (Communication No. 61/1979, 2 April 1982, U.N. Doc. CCPR/C/15/D/61/1979, paras. 9.1 and 10.2), for example, the UN Human Rights Committee took the view that programme restrictions imposed by the Finnish Broadcasting Company, a 90% publicly owned TV station placed under specific government control, constituted restrictions on freedom of expression.

to any "formalities, conditions, restrictions or penalties" imposed on the exercise of the right. In practice, the ICCPR is interpreted in the same way.

The case of *Ross v. Canada*,[40] decided by the UN Human Rights Committee (this body is discussed further in section 5.2.1.3 below), provides a good illustration of how international human rights bodies interpret the meaning of 'restriction', as well as how they apply the three-part test.

Ross was a Canadian school teacher. Between 1976 and 1991, he also authored several publications and made public statements, including on TV, in which he presented controversial opinions on conflicts between Judaism and Christianity and related topics. A Jewish parent whose children attended another school within the same school district filed a complaint with the authorities, alleging that the School Board, by failing to take action against Ross, had not met its obligation to combat discrimination against Jews and that this had contributed to the growth of an atmosphere of intimidation of Jewish students in the district. Ross was subsequently transferred to a non-classroom teaching position in the school district, and submitted a complaint against Canada to the UN Human Rights Committee (HRC), alleging a violation of the right to freedom of expression, as protected under Article 19 of the ICCPR.

The HRC rejected Canada's claim that because Ross remained free to express his controversial opinions and retained his job, there was no restriction on his right:

> The loss of a teaching position was a significant detriment, even if no or only insignificant pecuniary damage is suffered. This detriment was imposed on the author because of the expression of his views, and in the view of the Committee this is a restriction which has to be justified under article 19, paragraph 3, in order to be in compliance with the Covenant.[41]

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[40] *Ross v. Canada*, Communication No. 736/1997, 1 May 1996, UN Doc. CCPR/C/70/D/736/1997.

[41] *Id.*, para. 11.1.

The HRC then went on to evaluate the restriction under the three-part test. It found that there was an acceptably clear legal basis for the restriction. It also served an aim recognised as legitimate under the Covenant, namely the protection of the rights of others, in this case the right of Jewish students "to have an education in the public school system free from bias, prejudice and intolerance."[42] Finally, the restriction had met the necessity test:

> [T]he Committee takes note of the fact that ... it was reasonable to anticipate that there was a causal link between the expressions of the author and the "poisoned school environment" experienced by Jewish children in the School district. In that context, the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance. Furthermore, the Committee notes that the author was appointed to a non-teaching position after only a minimal period on leave without pay and that the restriction thus did not go any further than that which was necessary to achieve its protective functions.[43]

In conclusion, the HRC found that Canada had not violated Ross' right to freedom of expression.

[42] *Id.*, para. 11.5.

[43] *Id.*, para. 11.6.

Chapter 5

ENFORCING THE RIGHT

The previous chapters focused on the nature and meaning of the right to freedom of expression. A traditional legal maxim says that "where there is a right, there is a remedy." This chapter explores ways in which international guarantees of the right to freedom of expression can be enforced, both in domestic courts and through international mechanisms.

5.1. Enforcement in domestic courts

Under Article 2(3) of the ICCPR, States Parties must ensure that persons whose rights under the Covenant have been violated have an effective remedy. This means that every State which has ratified the ICCPR must have some sort of mechanism in place through which an individual can enforce his or her human rights, including the right to freedom of expression. Because the legal system of each State is different, the Covenant does not specify exactly how this mechanism should work; a State may craft its laws and institutions in any way it sees fit, as long as the end result is effective in protecting individuals' human rights.[44]

[44] General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Article 2), 21 April 2004, UN Doc. CCPR/C/74/CRP.4/Rev.6, para. 4.

A rough distinction can be drawn between two approaches that countries worldwide have taken to implementing international law, including international human rights, at the national level.

Under the first approach, often called the 'dualist approach', international and domestic law are seen as separate spheres. It is not possible to invoke international norms directly before a court; the only way in which international rules can find their way into the national legal system is through a legislative act 'transforming' a particular treaty or rule of customary international law into domestic law. One peculiar consequence of the dualist approach is that if the government fails to translate international law properly, some things which are illegal under international law may still be legal under domestic law.

The second approach, the 'monist' approach, regards international and domestic law as a single body. The courts are authorised to apply treaties (and sometimes customary law) in the same way as any law adopted by the national government. In most monist countries, international law is considered to be hierarchically superior to law of domestic origin, with the exception of the constitution; this means that if there is a conflict between national and international law, the international rule will prevail.

In practice, many States take an intermediate approach and are preponderantly, rather than strictly, monist or dualist. It is also not uncommon for courts in a country that is supposedly monist simply to ignore international law, usually because the judges are unfamiliar with or hostile to it. The following sections examine the constitutional arrangements of the Central Asian republics. As will be seen, all of them have adopted the monist approach, yet international law is rarely applied by the courts.

5.1.1. Kazakhstan

The status of international law in the Kazakh legal system is defined by Article 4 of the Constitution:

1. The provisions of the Constitution, the laws corresponding to it, other regulatory legal acts, international treaty and other commitments of the Republic as well as regulatory

> resolutions of Constitutional Council and the Supreme Court of the Republic shall be the functioning law in the Republic of Kazakhstan.
>
> 3. International treaties ratified by the Republic shall have priority over its laws and be directly implemented except in cases when the application of an international treaty shall require the promulgation of a law.
>
> 4. All laws, international treaties of which the Republic is a party shall be published. Official publication of regulatory legal acts dealing with the rights, freedoms and responsibilities of citizens shall be a necessary condition for their application.

Paragraph 1 provides that individuals may invoke not only international treaties, but also "other commitments" of Kazakhstan, presumably customary international law (see Chapter 3), before domestic courts. Paragraph 4 states that treaties entered into by Kazakhstan must be published; presumably treaties fall within the category of "regulatory acts", in which case publication is a precondition for their applicability.

Paragraph 3 states that in the event of a clash between domestic law and a treaty, the treaty will prevail, unless it requires "the promulgation of a law". Since the ICCPR is quite absolute in nature and does for the most part not require implementing legislation, the guarantee of free speech in Article 19 should be directly enforceable in the courts of Kazakhstan. This point is reinforced by Article 4(2) of the *Law on Mass Media*, which states:

> If an international treaty sets other rules than contained in the present Law, then the rules of international treaty are used.

Despite the superior status accorded to international law in Kazakhstan, a UN body expressed concern in 2003 that, in practice, treaties were not being applied in domestic legal proceedings.[45]

[45] Committee on the Rights of the Child, *Concluding Observations on Kazakhstan*, 10 July 2003, UN Doc. CRC/C/15/Add.213, para 8.

5.1.2. Kyrgyzstan

The relationship between international and domestic law in Kyrgyzstan is similar to that pertaining in Kazakhstan. According to Article 12(3) of the Constitution, treaties and other "generally accepted principles and norms of international law" (presumably including customary international law) are an integral part of domestic law:

> International treaties and agreements, which shall have taken effect in accordance with a procedure prescribed by law, to which the Kyrgyz Republic is a party and generally accepted principles and norms of international law shall be a constituent part of the legislation of the Kyrgyz Republic.

The Constitution does not elaborate on the hierarchy between domestic and international sources of law. It does, however, confirm that Kyrgyzstan guarantees human rights in accordance with international treaties to which it is a party, and other sources of international law (Article 16(1)):

> In the Kyrgyz Republic, fundamental human rights and freedoms shall be recognized and guaranteed pursuant to universally accepted principles and norms of international law, as well as international treaties and agreements concerning human rights provided that they have taken legal effect.

Kyrgyzstan's 'Law on Normative Acts' goes on to state explicity that international law prevails over conflicting domestic provisions, in Article 8. Moreover, Article 21 of the *Law on Mass Media* reaffirms the priority of international treaties in matters concerning the media:

> If an inter-state agreement concluded by the Kyrgyz Republic provides the rules different from those established by the present Law, the rules of the inter-state agreement shall be applicable.

In 2000, the Kyrgyz government reported to the UN that, even though citizens have the right to invoke international human rights before any court, no such case had yet been heard in the Constitutional Court.[46]

[46] UN Committee on Human Rights, Summary record of the 1842nd meeting, 18 July 2000, UN Doc. CCPR/C/SR.1842, paras. 52 and 64.

5.1.3. Tajikistan

The status of international law in the Tajik legal system is defined by Article 10 of the Constitution, which stipulates that "international legal acts" are part of the domestic legal system and prevail over inconsistent domestic law:

> […] International legal acts recognized by Tajikistan are a constituent part of the legal system of the republic. In the case of a discrepancy between the laws of the republic and recognized international legal acts, the norms of the international legal acts are applied. Laws and international legal acts recognized by Tajikistan enter into force after their official publication.

The Constitutional Court of Tajikistan has made occasional references to the ICCPR, but lower level courts tend to give precedence to domestic law when a conflict arises. In July 2005, the government reported to the UN that it was addressing this problem by conducting training activities for judges, aimed at enhancing their awareness of international law.[47]

As in Kazakhstan and Kyrgyzstan, the Tajik *Law on the Press and Other Mass Media* reiterates the superior status of international law. Article 39 states:

> Should an international treaty or agreement stipulate other rules than the ones envisaged by this Law, the rules of international treaty or agreement shall be applicable.

5.1.4. Turkmenistan

The Constitution of Turkmenistan contains only a very general statement on the significance of international law, in Article 6:

> Turkmenistan recognizes the primacy of generally recognized norms of international law […].

[47] UN Committee on Human Rights, Summary record of the 2286th meeting, 13 July 2005, UN Doc. CCPR/C/SR.2286, para. 32.

It is not clear whether Article 6 means that international law is hierarchically superior to domestic law, or merely that Turkmenistan intends to uphold international law in its dealings with other States.

5.1.5. Uzbekistan

The Uzbek constitution does not explicitly refer to the status of international law in the domestic legal order. In similar fashion to the Turkmen Constitution, the preamble recognises the "the primacy of generally recognized norms of international law." Article 15 affirms the "unconditional supremacy of the Constitution and laws of the Republic of Uzbekistan". It is not clear whether this provision renders these superior to international law or is instead a guarantee against arbitrary acts by the government.

Nevertheless, many limitations on freedom of expression in Uzbekistan could be challenged pursuant to Article 30 of the *Law on Mass Media*, which grants precedence to international treaties:

> If an international treaty of the Republic of Uzbekistan establishes rules other than those envisaged in this law, the rules of that international treaty shall be applied.

In 2002, the Uzbek government reported to the UN that the ICCPR had not yet been invoked in any proceedings before a domestic court.[48]

5.2. Enforcement at the international level

International law has traditionally favoured domestic courts as the place to resolve disputes between States and individuals. Although a number of international bodies are willing to hear claims that an individual's human rights have been violated, they will normally entertain such complaints only if the individual in question can show that he or she has exhausted all local remedies or that no such remedies exist (known as the 'rule on exhaustion of domestic remedies'). The main reason for

[48] *Comments by the Government of Uzbekistan on the Concluding Observations*, 17 October 2002, UN Doc. CCPR/CO/71/UZB/Add.1, answer to question 2.

this is that a State should not be held to be in breach of its international obligations if a remedy for such breach exists at the national level. More pragmatically, national remedies are a good way for the authorities to discover problems with the implementation of human rights without the need for external involvement.

Although the constitutions of the Central Asian republics either explicitly incorporate international law into the domestic legal system, or are silent on the matter, in practice the courts are often unfamiliar with international human rights instruments and reluctant to refer to them in their decisions. Until the domestic courts fully assume their role of 'mouthpiece of international law', individuals and NGOs the region may feel compelled to submit their problems to international mechanisms for the protection of human rights.

5.2.1. International mechanisms for the protection of human rights

There are a number of bodies within inter-governmental organisations (IGOs) whose function is to monitor and address human rights problems, including violations of the right to freedom of expression. Although few of them are formally binding, in the sense of being able to force States to take a particular action, this does not mean they are without significance. Indeed, most States are eager to avoid being criticised or condemned over human rights issues, particularly by an international body whose decision is authoritative and unequivocal evidence of a breach of rights. A determination by an international mechanism that a State has committed a violation of human rights is cause for embarrassment, and makes it difficult for the State in question to deny or ignore the existence of the problem. It may also strengthen the campaigns of domestic organisations and persuade foreign States to exercise pressure over the issue.

This section provides an overview of these mechanisms and explains how they can be used.

5.2.1.1. UN Human Rights Council

The system of human rights protection within the United Nations has recently undergone an important change, with the abolition of the old

Commission on Human Rights (CHR) and the establishment of a new Human Rights Council (HRCl), which met for the first time in June 2006. The CHR was established in 1946 as an organ of the UN Economic and Social Council (ECOSOC), and in the early years of the UN it was responsible amongst others for the drafting of the *Universal Declaration of Human Rights* (see also section 1.1). More recently, the Commission had become controversial because its membership included several States with a poor human rights record, and the resulting internal divisions had undermined the body's effectiveness. On 15 March 2006, the UN General Assembly overwhelmingly voted in favour of replacing the Commission by the Council.[49]

The old Commission comprised of 53 State representatives and met annually for six weeks in March-April to discuss a wide variety of human rights problems and issues. Over the course of these annual sessions, the Commission would adopt several thematic resolutions on human rights issues, including an annual resolution on freedom of expression, which identified current trends and made recommendations of a general nature. The Commission also adopted resolutions on specific country situations, whose purpose was to condemn publicly human rights abuses and to exert political pressure on the violating State.

Although the Commission was a political body, with States often pursuing political as opposed to purely human rights objectives, it was nevertheless a significant forum for addressing human rights concerns and setting standards. NGOs registered with ECOSOC were able to attend the annual session and make statements about matters of concern to them, even though they were not permitted to vote on resolutions. The session provided an opportunity to lobby States on human rights issues, as well as to network with the hundreds of human rights NGOs that attended.

Little is yet known about the working procedures the new Human Rights Council will adopt, and in which ways it will contribute to ensuring

[49] Established by General Assembly Resolution 60/251, UN Doc. A/RES/60/251.

implementation of the right to freedom of expression. There are, in any case, a number of notable structural differences between the two bodies.

First, as discussed above, the Council was established by the General Assembly, and is an organ of that body, while the Commission was a subsidiary organ of ECOSOC. NGOs which were formerly authorised by ECOSOC to observe the Commission's sessions will nevertheless be permitted to continue their involvement with the Council.[50] The Council further consists of 47 members, a slight reduction from the Commission's 53. While membership is still allocated proportionally amongst regions, countries seeking appointment to the Council must secure a majority vote of the full General Assembly in a secret ballot. The Council will meet three times a year, instead of the single annual meeting held by the Commission. Additionally, the Council is supposed to conduct reviews of the human rights records of all States; this replaces the controversial system of the Commission, which in the opinion of many resulted in selective finger-pointing. It is hoped these changes will result in a less politicised body that is more attuned to identifying and addressing human rights violations in a balanced way. One legacy of the Commission are the mechanisms, known as 'special procedures', it established to monitor States' compliance with international human rights law and to address abuses. These mechanisms consist of working groups or individual experts, responsible for addressing either specific country situations or thematic human rights issues. The thematic mandates appointed by the Commission include the UN Special Rapporteur on Freedom of Opinion and Expression (discussed in more detail below). As of July 2006, there were thirteen country mandates, including an Independent Expert on the situation of human rights in Uzbekistan (Mr. Latif Huseynov of Azerbaijan).

The General Assembly has charged the new Council with reviewing the role of the special procedures and deciding on their future within one year of its first session.[51]

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[50] *Id.*, para. 11.

[51] *Id.*, para. 6.

5.2.1.2. UN Special Rapporteur on Freedom of Opinion and Expression

The UN Commission on Human Rights established the office of the Special Rapporteur on Freedom of Opinion and Expression in 1993. The Rapporteur's mandate is to promote and protect the right to freedom of opinion and expression as guaranteed under international law. To this end, the Rapporteur (currently Mr. Ambeyi Ligabo of Kenya) undertakes a number of different activities, including visiting countries, investigating individual cases and raising them with governments, attending conferences and meetings in furtherance of the right, and issuing press releases on both individual cases and thematic issues.

The Special Rapporteur reports to the Commission annually, and also compiles separate detailed reports on each country he visits. All of these reports are available on the Internet in English and many have also been translated into Russian.[52] The purpose of the annual reports is, among other things, to clarify the precise meaning of the right to freedom of expression by discussing its implications in key areas, such as defamation, freedom of information and broadcasting. The country reports aim to provide information about the freedom of expression situation in different parts of the world, highlight problems, suggest solutions and assist individuals whose rights to freedom of opinion and/or expression have been abused. The Rapporteur tries to visit varied countries in different regions, rather than going only to places where there are believed to be particular problems. He can only visit a country at the invitation of the government, but is entitled to request such an invitation. As of May 2006, the Rapporteur had not yet visited any of the Central Asian republics.

A further important function of the Special Rapporteur is to issue 'communications', urgent appeals and press releases on human rights situations. A communication is an inquiry into a human rights abuse, usually in the form of a letter to the government in question. This letter is not of an accusatory nature, but simply raises the issue at a senior level and requests clarification. The goal of urgent appeals is to prevent the ongoing occurrence of serious human rights abuse, for example where

[52] See http://ap.ohchr.org/documents/dpage_e.aspx?m=85. For documents in Russian, see http://www.un.org/russian/documen/hr/expression/hrcomrep.htm.

a journalist has been wrongly imprisoned. A press release is a public statement noting concern with a given human rights situation. Both communications and urgent actions are often in response to information the Special Rapporteur has received from individuals and NGOs.

For example, in 2005 the Special Rapporteur sent communications to the governments of Kazakhstan, Turkmenistan and Uzbekistan,[53] requesting clarification about a number of alleged abuses ranging from the imprisonment of human rights activists to the intimidation of journalists. Any individual, and any NGO, can submit a report to the Special Rapporteur about a problem or concern regarding freedom of expression. In his 1999 Report, the Special Rapporteur provided guidelines for the submission of information,[54] as follows:

Guidelines for the submission of information to the Special Rapporteur

In order for the Special Rapporteur to be able to take action regarding a communication on a case or incident, the following information, as a minimum, must be received.

1. Allegation regarding a person or persons:

- As detailed a description of the alleged violation as possible, including date, location and circumstances of the event;
- Name, age, gender, ethnic background (if relevant), profession;
- Views, affiliations, past or present participation in political, social, ethnic or labour group/activity;
- Information on other specific activities relating to the alleged violation.

[53] Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 29 March 2005, UN Doc. E/CN.4/2005/64/Add.1, paras. 501-504, 946-951, 972-90.

[54] Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 29 January 1999, E/CN.4/1999/64, Appendix.

2. Allegation regarding a medium of communication:

- As detailed a description of the alleged infringement on the right as possible, including date, location and circumstances of the event;
- The nature of the medium affected (e.g. newspapers, independent radio); including circulation and frequency of publication or broadcasting, public performances, etc.;
- Political orientation of the medium (if relevant).

3. Information regarding the alleged perpetrators:

- Name, State affiliation (e.g. military, police) and reasons why they are considered responsible;
- For non-State actors, description of how they relate to the State (e.g. cooperation with or support by State security forces);
- If applicable, State encouragement or tolerance of activities of non-State actors, whether groups or individuals, including threats or use of violence and harassment against individuals exercising their right to freedom of opinion and expression, including the right to seek, receive and impart information.

4. Information related to State actions:

- If the incident involves restrictions on a medium (e.g. censorship, closure of a news organ, banning of a book, etc.); the identity of the authority involved (individual and/or ministry and/or department), the legal statute invoked, and steps taken to seek domestic remedy;
- If the incident involves arrest of an individual or individuals, the identity of the authority involved (individual and/or ministry and/or department), the legal statute invoked, location of detention if known, information on provision of access to legal counsel and family members, steps taken to seek domestic remedy or clarification of person's situation and status;

- If applicable, information on whether or not an investigation has taken place and, if so, by what ministry or department of the Government and the status of the investigation at the time of submission of the allegation, including whether or not the investigation has resulted in indictments.

5. Information on the source of the communications:

- Name and full address;
- Telephone and fax numbers and e-mail address (if possible);
- Name, address, phone/fax numbers and e-mail address (if applicable) of person or organization submitting the allegation.

Note: In addition to the information requested above, the Special Rapporteur welcomes any additional comments or background notes that are considered relevant to the case or incident.

Follow-up

The Special Rapporteur attaches great importance to being kept informed of the current status of cases and thus very much welcomes updates of previously reported cases and information. This includes both negative and positive developments, including the release of persons detained for exercising their rights to freedom of opinion and expression and to seek, receive and impart information, or the adoption of new laws or policies or changes to existing ones that have a positive impact on the realization of the rights to freedom of opinion and ex-pression and information.

Root causes

In order to carry out his work regarding the root causes of violations, which is of particular importance to the Special Rapporteur, he is very much interested in receiving information on and/or texts of draft laws relating to or affecting the rights to freedom of opinion and expression and to seek, receive and impart information. The

Special Rapporteur is also interested in laws or government policies relating to electronic media, including the Internet, as well as the impact of the availability of new information technologies on the right to freedom of opinion and expression.

Communications

Where requested or considered necessary by the Special Rapporteur, information on the source of the allegations will be treated as confidential.

Any information falling within this description of the mandate of the Special Rapporteur should be sent to:

Special Rapporteur on the promotion and protection
of the right to freedom of opinion and expression
c/o Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10, Switzerland
Fax: +41 22 917 9003

5.2.1.3. UN Human Rights Committee (HRC)

In addition to the UN Human Rights Council, there is also a UN Human Rights Committee, which, despite its similar name, has an entirely distinct mandate. For the avoidance of confusion, the Committee will be referred to as the HRC. The HRC was established under the ICCPR; it is comprised of 18 independent experts and is responsible for monitoring compliance with States' obligations under the Covenant. It does so by examining reports submitted to it by States Parties and, in some cases, by examining petitions from individuals.

State party reports

Article 40 of the ICCPR requires States Parties to submit a report every five years to the HRC on the "measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights". Kyrgyzstan submitted its first report in 1999,[55] and Tajikistan in 2004.[56] Uzbekistan submitted reports in 2000 and 2005,[57] while Turkmenistan has so far failed to submit its initial report. At the time of writing, Kazakhstan had only recently ratified the ICCPR and was therefore not yet required to submit its first report.

The HRC receives and reviews these reports, meets with State representatives to discuss any issues, and provides feedback in the form of "Observations", noting areas of progress, as well as areas of concern where the State Party needs to make more effort to bring its law and practice into conformity with the Covenant.[58]

NGOs often play a significant role in the State reporting process. In the run-up to the deadline for reporting, they can attempt to put pressure on the government to make sure the report is completed on time, or

[55] Initial report of Kyrgyzstan, 3 December 1999, UN Doc. CCPR/C/113/Add.1.

[56] Initial report of Tajikistan, 19 July 2004, UN Doc. CCPR/C/TJK/2004/1.

[57] Initial and second reports of Uzbekistan, 2 June 1999 and 10 January 2005, UN Docs CCPR/C/UZB/99/1 and CCPR/C/UZB/2004/2.

[58] A record of the State Reports as well as the Committee's Observations can be found at: http://www.unhchr.ch/html/menu2/6/hrc/hrcs.htm.

even offer advice and assistance in its preparation. Once the report has been submitted, NGOs are key to enabling the HRC to form its opinions. Because the HRC's 18 experts have no opportunity to conduct investigations on the ground or to verify claims contained in reports, they rely on information provided by NGOs for an alternative perspective on the human rights situation in the country. The HRC therefore encourages NGOs based in countries under review to submit written information. There is no prescribed form in which such information should be presented, although a useful format is a 'shadow report' which gives article-by-article comments on the State report. Information submitted to the HRC should describe the human rights situation as objectively as possible, citing relevant laws, incidents and other evidence. It should also be organised so that it is clear to which article of the ICCPR the information relates. A number of international NGOs, such as ARTICLE 19, Freedom House and the International League for Human Rights, have in the past assisted local NGOs from the Central Asian republics with the preparation and delivery of shadow reports.

NGOs are permitted to attend the HRC's review sessions in Geneva and New York, where they can brief Committee members and suggest questions to put to the State about its report. They may also arrange their own briefings for individual members of the Committee, including in cooperation with other NGOs.

Once the HRC has adopted its concluding observations, NGOs can help ensure proper follow-up by translating and publishing them in the country, and by pressuring the government to tackle the problems identified by the Committee.

If information is submitted to the HRC six weeks in advance of the relevant session, it will be circulated to all members prior to the meeting. Information should be sent to the following address:

Eric Tistounet, Secretary Human Rights Committee
Room D-204
Support Services Branch
Office of the High Commissioner for Human Rights
Palais des Nations
1211 Geneva 10
Switzerland
Tel: +41 22 917 3965
Fax: +41 22 917 0099
E-mail: etistounet.hchr@unog.ch

Individual complaints

For those States which have ratified both the ICCPR and its *First Optional Protocol,* the HRC can also examine communications from individuals who believe their rights under the Covenant have been violated. At present, this is the case for all of the Central Asian republics except Kazakhstan. Up until 10 August 2006, the Committee had received 11 complaints against Kyrgyzstan, 25 against Tajikistan, 3 against Turkmenistan and 73 against Uzbekistan.[59] These numbers are probably more reflective of people's awareness of the HRC and their ability to use the procedure than of a country's compliance with the Covenant. Canada, a country generally considered to have an excellent human rights record, is one of the countries with the largest volume of complaints against it, 123 in total.

While the HRC is not a court, its procedure for considering communications partly resembles domestic legal proceedings and consists of two main phases. Initially, the communication's admissibility is examined; that is to say, the HRC assesses whether the petition meets the minimum conditions for it to consider it fully, known as admissibility conditions.

[59] Statistical survey on the HRC's website, at http://www.ohchr.org/english/bodies/hrc/stat2.htm.

If the petition is found admissible, it is then examined in substance and the HRC issues its final conclusion. In practice, consideration of the admissibility and the merits often takes place at the same session.

Admissibility

The main conditions for the admissibility of a communication are the following:

In writing under a real name. The petition must be in writing; the HRC ordinarily doesn't consider oral, audio or audiovisual petitions. It should also not be anonymous, although the HRC may grant a request from the author to suppress his or her name in its final decision if it discusses matters of a private or personal nature.

Specifically affected complainant. The petition should be submitted by a person who believes his or her own rights have been violated, in a way that distinguishes the person from the rest of the population. It is not possible to protest against the existence of a law, policy or situation in the abstract; the author needs to show how he or she has been specifically affected by it.

It is however permitted to submit a petition on behalf of someone else, if that person has provided written authorisation. The HRC will accept written authorisation from a close relative instead if the victim of the violation is unable to give it (for example because he or she has disappeared, is in prison without access to the outside world, or is a young child).

Exhaustion of domestic remedies. The author of the communication must have exhausted all available domestic remedies, unless he or she can demonstrate that doing so would be impossible or futile, or would take an unreasonably long time.

No parallel proceedings. The same matter should not be under investigation by another international human rights mechanism.

Date of violation after entry into force of the Protocol. The communication should relate to a violation which occurred *after* the date on which the *First Optional Protocol* entered into force for the State in question.[60] This requirement is satisfied, however, if the violation began before the date of entry into force but continued beyond it, and was affirmed by a further act or statement by the State[61] (for example if the government has illegitimately shut down a publication and turned down a request to reopen it after becoming a party to the Protocol).

Violation occurring on the territory of the State. The communication should relate to a violation which occurred "within [the] territory and subject to [the] jurisdiction" of the State against which it is directed.[62] The nationality of the communication's author is not relevant, however: a Kazakh citizen could, for example, lodge a complaint against Tajikistan, provided that the alleged violation of his or her rights took place on (unoccupied) Tajik territory.

No abuse of the right to submit a communication. The HRC may refuse to consider a communication if it considers that the author is abusing his or her right to submit a communication, for example by wasting the Committee's time with a frivolous complaint or grossly failing to comply with procedural rules.

Language of the complaint. The complaint should be presented in one of the HRC's working languages (Russian, English, French, Arabic and Spanish).

Because it does not have the power to conduct its own investigation, the HRC urges authors of communications to submit as much information as possible explaining the admissibility of their petition, and stating all the relevant facts of the case in a chronological overview. The

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[60] The dates of entry into force for the Central Asian republics are as follows: Kyrgyzstan: 7 January 1995; Tajikistan: 4 April 1999; Turkmenistan: 1 August 1997; and Uzbekistan: 28 December 1995.

[61] *Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic*, Communication No. 516/1992, 16 June 1995, U.N. Doc. CCPR/C/54/D/516/1992, para. 4.5.

[62] Article 2(1) ICCPR, see note 2.

communication should also state which Covenant right(s) the author claims have been violated, although it is not necessary to cite specifically to articles from the ICCPR. The procedure is free of charge, and authors of communications do not have to be assisted by a lawyer, although this may be a good idea.

Consideration of a petition and follow-up measures

Whenever the HRC receives a petition, the case is brought to the attention of the State in question, which has six months to provide its comments on the admissibility and merits of the petition. Once the State has replied, the individual may present additional views within two months. If the State does not reply within six months, however, the HRC sends two reminders, after which it proceeds with its deliberations even if a response has still not been received.

The consideration of petitions takes place in closed sessions and neither side is usually permitted to make oral representations. Written statements from third parties (known as *amicus curiae* briefs) are also not taken into consideration. The HRC decisions, known as 'views', are transmitted to the State and the individual concerned, and published on the Internet. There is no appeal from the HRC's original decision.

If the HRC finds there has been a violation of the Covenant, it indicates in its views which measures it believes the State should take to rectify the situation, such as releasing a prisoner from detention or paying compensation. The HRC's views are not binding (that is to say, the State is not legally obliged to implement its recommendations), but they are nevertheless followed up in many cases. For example, in June 2001, the government of Cameroon agreed to pay US$137,000 in compensation to a journalist who had been jailed in violation of his right to freedom of expression.[63] In other cases, the respondent State has ultimately changed its laws or administrative practices in response to a finding by the HRC.[64]

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[63] *Mukong v. Cameroon*, Communication No. 458/1991, 21 July 1994, UN Doc. CCPR/C/51/D/458/1991.

[64] For example, *Toonen v. Australia*, Communication No. 488/1992, 31 March 1994, UN Doc. CCPR/C/50/D/488/1992; *Broeks v. the Netherlands*, Communication No. 172/1984, 9 April 1987, UN Doc. CCPR/C/46/D/426/1990.

To improve implementation of its recommendations, the HRC has developed a follow-up process. Within three months of the date of its views, the HRC will invite the State to provide information on steps it has taken to provide redress; any response by the State is transmitted to the individual for comment. If the HRC considers the steps taken to be insufficient, the case is referred to one member of the HRC, the 'Special Rapporteur on Follow-up of Views.' This Special Rapporteur may then issue requests to the State or meet with its representatives. The HRC publishes details of its follow-up activities in an annual report.

Communications can be submitted to the HRC at the following address:

Petitions Team
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10, Switzerland
Fax: + 41 22 917 9022 (particularly for urgent matters)
E-mail: tb-petitions@ohchr.org

A model complaint form (in English) is available on the Internet at http://www.unhchr.ch/html/menu6/2/annex1.pdf.

Other useful resources for the preparation of communications to the HRC are its views in previous cases, its concluding observations on States' periodic reports, and its so-called 'General Comments' on the meaning of various articles in the Covenant; General Comment No. 10 deals with Article 19 and the guarantee of freedom of opinion and expression. All these documents can be found in English, and sometimes in Russian, on the Office of the High Commissioner for Human Rights' website.[65]

[65] For documents in English, see http://www.unhchr.ch/tbs/doc.nsf. For resources on freedom of expression in Russian, see http://www.un.org/russian/documen/hr/expression/. More information on individual complaints procedures in Russian can be found at http://www.un.org/russian/hr/complaints/procedures1.htm.

5.2.1.4. The OSCE Representative on Freedom of the Media

In 1997, the Permanent Council of the OSCE established a Representative on Freedom of the Media, a post currently held by Mr Miklos Haraszti.[66] The role of the Representative is to observe media developments in OSCE countries, including the Central Asian republics, and to provide early warnings of violations of freedom of expression. When serious problems emerge, such as the obstruction of media activities, the Representative may seek direct contacts with the State in question and other parties involved, and attempt to broker a solution. He also reports regularly to the Permanent Council and recommends further action if appropriate.

The position of the OSCE Representative is different from that of the UN Special Rapporteur, described above. On the one hand, his mandate is narrower, as it encompasses only freedom of the media, which is only one aspect of the wider field of freedom of expression. On the other hand, the OSCE is a much smaller organisation, most of whose participating States are wealthy, established democracies. This means that the OSCE Representative generally enjoys more access to funds and political backing than the UN Special Rapporteur, and is able to take stronger positions and mobilise more support for pressure on a particular State.

The Representative may gather information from any useful source. He encourages any interested party, including the media and their representatives and relevant NGOs, to submit requests, suggestions and comments relating to the implementation of the OSCE principles and commitments in the area of freedom of the media.

The Representative regularly undertakes activities in the Central Asian republics. For example, in the first half of 2005, he raised the following issues with governments in the region:[67] the liquidation of the newspaper *Respublika - Delovoe obozrenie,* and the partial seizure of print runs of *Soz* and *Set.kz* (former *Respublika*) in Kazakhstan; the prosecution of a journalist and an editor in Tajikistan; and the suspension of the local chapter of

[66] PC DEC No. 193, OSCE, 5 November 1997, para. 1.

[67] Reports to the Permanent Council of 10 March 2005 and 14 July 2005, available online in English at http://www.osce.org/fom/documents.html.

Internyus in Uzbekistan. The Representative also issued a report on the coverage of the events and governmental handling of the press during the Andijan Crisis in Uzbekistan in May 2005, and announced he was organising the Seventh Central Asian Media Conference from 13 - 14 October of that year.

The office of the OSCE Representative on Freedom of the Media can be contacted at the following address:

Office of the OSCE Representative on Freedom of the Media
Kaerntner Ring 5-7, Top 14, 2. DG
1010 Vienna
Austria
Tel: +43 1 514 36 6205
Fax: +43 1 514 36 6260
E-mail: pm-fom@osce.org

Part Two

The discussion in the preceding chapters focused on the basic meaning of the internationally protected right to freedom of expression and ways in which it can be enforced. This second part of the Pocketbook takes a closer look at the ramifications of the right in certain thematic areas, such as the regulation of media workers and companies, the law of defamation and the right to access information held by public bodies.

Chapter 6

REGULATION OF THE MEDIA

In a modern society, almost all individuals rely on the mass media to learn about events and developments outside their immediate surroundings, including about the government and political affairs. Due to their considerable ability to influence people's political opinions and confront officials, the media are often described as the "public watchdog" or even as the "fourth branch of government" (keeping the legislative, executive and judicial branches in check).

Regulation of the media by the government presents special problems. On the one hand, it is the government's duty to ensure that citizens have access to diverse and reliable sources of information on topics of interest to them. A certain amount of regulation of the media, in particular the broadcast media, is usually necessary to accomplish this goal. On the other hand, the power of the media to influence public opinion – for example by reporting critically on government policies and exposing corruption, dishonesty and mismanagement – makes them an attractive target for illegitimate control. Governments often seek to transform the media from watchdog to lapdog, by making the work of independent or opposition journalists and publications illegal or impossible.

This chapter gives an overview of the international standards that have been developed to ensure that the media are open to all and can carry out their functions without unwarranted interference. The first section deals with regulation of individual media workers; the second and third sections discuss, respectively, regulation of the print and broadcast media.

6.1. Regulation of media workers

6.1.1. Licensing of journalists

Some countries require individuals who wish to work in the media, in particular journalists, to obtain official permission before commencing their activities. Sometimes, an actual licence or permit is needed. In other cases, journalists can effectively be prohibited from practising their profession due to a requirement to join a professional organisation, for which membership may be denied. Because their practical effect is the same, we will refer to such requirements collectively as "licensing schemes."

The ostensible purpose of licensing schemes is usually to ensure that the task of informing the public is reserved for competent persons of high moral integrity. In practice, however, the power to distribute licences can become a political tool, used to prevent critical or independent journalists from publishing. For this reason, and simply because the right to express oneself through the mass media belongs to *everyone* (see section 2.2.3), irrespective of qualifications or moral standing, licensing schemes for media workers are considered to be in breach of the right to freedom of expression.

An important source of legal authority on the subject of licensing schemes is an opinion of the Inter-American Court of Human Rights rendered in 1985.[68] It was recognised in the case that licensing was a restriction on freedom of expression. Costa Rica and its supporters argued that a requirement for journalists to become members of a *colegio* (association) was legitimate for three different reasons: first, because it was necessary for public order and the 'normal' way to regulate the profession in many countries; second, because it sought to promote higher professional and ethical standards, which would benefit society at large and ensure the right of the public to receive full and truthful information; and third,

[68] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A. No. 5, available online in English at http://www.corteidh.or.cr/serieapdf_ing/seriea_05_ing.pdf.

because the licensing scheme would guarantee the independence of journalists in relation to their employers.

Examining the first argument, the Court remarked that the organisation of professions, including journalism, through associations could facilitate the development of a coherent system of values and principles, and so contribute to public order, if that term was understood widely. However, it also observed that the same concept of public order would benefit much more from scrupulous respect for freedom of expression:

> Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard … It is … in the interest of the democratic public order … that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected.[69]

The Court found that licensing, by restricting access to the journalistic profession, was therefore harmful to, rather than supportive of, public order.[70]

Responding to the argument that a licensing regime is simply the 'normal' way to regulate certain professions, the Court distinguished between journalism and, for example, the practice of law or medicine. In contrast to lawyers and physicians, the activities of journalists – the seeking, receiving and imparting of information and ideas – are specifically protected as a human right, namely the right to freedom of expression.[71]

The Court also dismissed the argument that licensing schemes are necessary to ensure the public's right to be informed, by screening out poor journalists. The Court felt such a system would ultimately prove counterproductive:

> [G]eneral welfare requires the greatest possible amount of information, and it is the full exercise of the right of

[69] *Id.*, para. 69.

[70] *Id.*, para. 76.

[71] *Id.*, paras. 71-72.

> expression that benefits this general welfare … A system that controls the right of expression in the name of a supposed guarantee of the correctness and truthfulness of the information that society receives can be the source of great abuse and, ultimately, violates the right to information that this same society has.[72]

Turning, finally, to the argument that a licensing scheme would strengthen the profession and thereby help protect media workers against their employers, the Court found that this goal could be accomplished through less intrusive means, without the need to restrict the practice of journalism to a limited group. As such, the licensing scheme failed to meet the necessity test (see section 4.4).[73]

Having rejected the three principal arguments for permitting a licensing scheme for individual journalists, the Court concluded, unanimously, that such schemes constitute a violation of the right to freedom of expression.

Other courts, national as well as international, have taken a similar point of view. For example, in August 1997, the High Court of Zambia invalidated an attempt to establish a statutory body to regulate journalists, stating that any effort to license journalists would breach the right to freedom of expression, regardless of the form that effort took.[74]

The three special mandates for protecting freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – adopt a Joint Declaration each year setting out standards relating to important freedom of expression issues. In their 2004 Declaration, they stated:

> Individual journalists should not be required to be licensed or to register.[75]

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[72] *Id.*, para. 77.

[73] *Id.*, para. 79.

[74] *Kasoma v. Attorney General*, 22 August 1997, 95/HP/29/59.

[75] Joint Declaration of 18 December 2003. To access this document, see the link in note 30.

It is thus clear that, under international law, licensing and even registration of media workers is prohibited. In practice, licensing schemes for journalists are virtually unheard of in established democracies.

6.1.2. Other professional entry requirements

Other entry requirements on the exercise of professions in the media, such as a requirement to have attained a certain age, to possess particular academic qualifications, or to have a clean criminal record, are imposed in some countries. Entry requirements are distinct from licensing schemes, insofar as they do not involve an official body making a case-by-case decision about who may and who may not practise journalism. Nevertheless, entry requirements are inconsistent with international law for the same reasons: they fail to recognise that the right to express oneself through the mass media belongs to *everyone* (see section 2.2.3), not only persons who the government considers particularly qualified or suitable. They also deprive the general public of the right to receive information and ideas from diverse sources of their own choice.

Furthermore, the practical effectiveness of entry requirements as a means of ensuring quality journalism is questionable. They may prevent talented young people who have not yet reached the age threshold from developing their research and writing skills, or drive out competent journalists with no degree in favour of unskilled academics.

The Inter-American Commission on Human Rights has issued a Declaration condemning one specific type of entry requirement:

> Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirement of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression.[76]

[76] Inter-American Declaration of Principles on Freedom of Expression, approved by the Inter-American Commission on Human Rights during its 108th regular session, 19 October 2000, available online in English at http://www.cidh.oas.org/declaration.htm.

The three special mandates on freedom of expression at the OAS, UN and OSCE have stated:

> There should be no legal restrictions on who may practise journalism.[77]

6.1.3. Barring from practice

In a small number of countries, the law provides for the possibility of temporarily, or even permanently, stripping an individual of the right to practise journalism or other media professions. If this power is exercised by the government, it is equivalent in effect to a licensing scheme, and therefore similarly impermissible (see section 6.1.1). More often, however, the power is exercised by courts as a sanction in criminal proceedings. This has happened in some Central Asian republics; in 1997, for example, a number of Kyrgyz journalists were barred from practicing journalism for 18 months, as part of a conviction for libelling the director of a State-owned gold-mining company.[78] In 2003, a court in Kazakhstan imposed a five-year ban on the editor-in-chief of an independent newspaper for tax evasion and other financial crimes.[79]

International courts have rarely addressed the question of whether an embargo on a journalist, imposed as a criminal sanction, can ever be a justifiable restriction on freedom of expression. The case of *De Becker v. Belgium*,[80] decided by the European Commission of Human Rights,[81] suggests that a penalty of this type may only be applied in highly exceptional circumstances, if ever.

De Becker, a Belgian journalist and writer, had been sentenced to death for collaborating with the German authorities during the Second World War. The sentence was commuted and de Becker was released, but he was

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[77] See note 75.

[78] http://www.ifex.org/en/content/view/full/5190/.

[79] http://www.rferl.org/features/2003/11/19112003154247.asp.

[80] *De Becker v. Belgium*, 8 January 1960, Application No. 214/56 (European Commission on Human Rights).

[81] The Commission no longer exists but it used to act as the initial complaints body within the ECHR system for protecting human rights.

prohibited for life from participating in the publication of a newspaper. The Commission ruled that Belgium had breached the right to freedom of expression, because the ban was imposed inflexibly, without any provision for its relaxation at a later time when public morals and public order would have been re-established. It was therefore not "necessary in a democratic society", as required by the three-part test for restrictions on freedom of expression (see section 4.4).

Although the Commission did not rule out the possibility of prohibiting an individual from publishing, it clearly attached importance to the extreme circumstances of that particular case – Belgium was just emerging from five years of war and enemy occupation, during which De Becker had committed treason – and felt the ban should be discontinued as soon as a degree of normalcy had been re-established. In today's more peaceful world, it is highly unlikely that an international court would uphold a ban on practising as a journalist, particularly for less serious offences such as libel or tax evasion. It should be presumed that, at least in the current Central Asian context, prohibiting journalists from publishing violates international law.

6.1.4. Freedom of association

Section 6.1.1 above stressed the impermissibility of compelling journalists to become members of a professional association. In practice, many journalists may actually be keen to join such an organisation on a voluntary basis, or found new groups amongst themselves. The right to form associations and trade unions is recognised as a separate human right under the main international human rights instruments, including the UDHR and the ICCPR, which guarantees freedom of association in Article 22:

> Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

The right to freedom of association is subject to similar restrictions as the right to freedom of expression. Any interference with the right, therefore, has to pass the strict three-part test outlined in Chapter 4. A government policy which prohibits the establishment of independent journalists' organisations will virtually always fail to pass muster under this test.

Journalists' associations may play a useful role in improving the working conditions of media professionals. They can also help their members raise professional and ethical standards, for example by organising training and developing voluntary codes of conduct (for more on self-regulation, see section 6.2.5).

6.1.5. The right to gather news and accreditation schemes

Section 2.2.3 emphasised that the right to freedom of expression includes a right to "seek and receive" information and ideas. Gathering information is clearly essential to the media, and national courts have often confirmed that the activity of newsgathering is protected under the right to freedom of expression. For example, the Japanese Supreme Court has stated:

> [I]t goes without saying that the freedom to report facts, along with the freedom to express ideas, is grounded in the guarantees of Article 21 [of the Constitution] ..., which provides for freedom of expression. Moreover, in order that the contents of the reports of such mass media may be correct, the freedom to gather news for informational purposes, as well as the freedom to report, must be accorded due respect …[82]

States usually impose some limits on the right of journalists to gather information, such as a prohibition to enter sensitive military or civilian installations, or to attend certain court hearings (for more on this topic, see section 7.7 below). Like all restrictions on freedom of expression, restrictions on newsgathering must comply with the three-part test (Chapter 4): they must be provided by law, serve a legitimate aim, and be necessary for the accomplishment of that aim.

A common source of conflict in respect of newsgathering is the right of journalists to gain physical access to government buildings. On the one hand, the media must be permitted to attend meetings of parliament and other public bodies, so that they can report accurately on political developments and perform their vital role of public watchdog. On the

[82] *Kaneko v. Japan*, 23 Keishu 1490, SC (Grand Bench), 26 Nov. 1969 (translated in H. Itoh & L. Beer, The Constitutional Case Law of Japan (1978), 248).

other hand, some buildings may simply lack the capacity to accommodate every interested journalist, or there may be legitimate concerns that a large media presence would get in the way of effective government.

To prevent overcrowding in the press gallery, large institutions such as the national parliament often regulate access through an accreditation scheme. Usually, this means that journalists can apply for a press card, which must be produced upon entry on days when the audience exceeds the number of seats available. Smaller bodies either rely on the same system, or impose restrictions on a case-by-case basis. Holders of press cards are sometimes granted certain privileges, such as access to communication facilities and front row seats. In the United Kingdom, for example, so-called 'Lobby Correspondents' have access to a full office, with a computer and Internet access.

While accreditation schemes can be genuinely necessary, they are also a common source of abuse. Governments often refuse to grant press cards to critical journalists, or require possession of such cards in situations where there are no authentic space or other constraints. To address these problems, various international bodies have developed standards which States' accreditation schemes must meet.

The Human Rights Committee has stated that the "necessity test" (section 4.4) means that an accreditation procedure should not be susceptible to political interference and should impair the right to gather news as little as possible. Furthermore, the number of accredited journalists permitted to attend an event may be limited only when there are demonstrable problems in accommodating all those interested. In particular, the Human Rights Committee stated:

> [I]ts operation and application must be shown as necessary and proportionate to the goal in question and not arbitrary … The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. [83]

[83] *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995, UN Doc. CCPR/C/65/D/633/1995, para. 13.6.

The UN, OSCE and OAS Special Mandates have echoed these points and elaborated on them further:

> 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 only on the content of an individual journalist's work.[84]

The OSCE has similarly stressed that journalists should not lose their accreditation based on the contents of their writings:

> 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.[85]

To summarise these points, in order to comply with international standards, an accreditation scheme must, at a minimum:

1. be administered by a body which is independent from the government and follows a transparent procedure;
2. be based on specific, non-discriminatory, and reasonable criteria published in advance;
3. only be applied to the extent justifiable by genuine space constraints; and
4. not permit accreditation to be withdrawn based on the work of the journalist or media outlet concerned.

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[84] See note 75.

[85] 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.

The accreditation schemes maintained in the Central Asian republics tend to fall far short of these requirements. For example, Turkmenistan's *Law on the Press and Other Mass Media* simply states that "Mass media can agree with state bodies and bodies of public associations to accredit journalists to them."[86] There is no independent oversight of accreditation, no criteria are defined for allocating press cards, no guarantee of receiving accreditation when space is available and no prohibition on withdrawing accreditation for political reasons.

6.1.6. Protection of sources

The media depend to a large extent on members of the public for the supply of information of public interest. Most of the time, these sources are more than happy to be quoted in the newspaper or on the television. But occasionally, citizens come forward with information of a secret or highly sensitive nature – relating for example to corruption, misgovernment or the activities of organised criminals – which they believe should be made known to the general public, to expose wrongdoing or to stimulate public debate on the subject. When this happens, anonymity is often a precondition for the source's willingness to speak, out of fear for retaliation if his or her name were made public.

There is little dispute that named sources are on the whole preferable to anonymous ones. If the source is known, it is easier to assess his or her credibility, motives and, indeed, existence. It is also less difficult for those affected by a wrongful disclosure (such as a malicious attack on a person's reputation or the publication of a business secret) to clear their name or to seek compensation. Nevertheless, international courts and mechanisms have been mindful that much important information would never reach the public if journalists were unable to guarantee confidentiality to their sources. This has led to the development of a right, based on the right to free expression, commonly referred to as "the protection of sources."

[86] Article 31. See also Article 10 the *Law on the Professional Activity of Journalists* and Article 22 of the *Law on Mass Media* of Kazakhstan; Article 33 of Tajikistan's *Law on the Press and Other Mass Media*; and Article 11 of the *Law on the Professional Activity of Journalists* of Uzbekistan.

It may be noted that although it is normally journalists who claim the right, it is really the right of everyone to receive information and ideas that is being protected. Indeed, this is at the heart of the right.

6.1.6.1. International standards on the protection of sources

In the seminal case of *Goodwin v. United Kingdom,*[87] the European Court of Human Rights ruled that an attempt to force a journalist to reveal his source for a news story violated his right to receive and impart information, and hence the right to freedom of expression. It considered that orders to disclose sources reduce the flow of information, to the detriment of democracy and are, therefore, only justifiable in very exceptional cases:

> Protection of journalistic sources is one of the basic conditions for press freedom.... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.[88]

The right of journalists to protect the confidentiality of their sources has also been widely recognised by other international bodies, including the European Parliament,[89] the Committee of Ministers of the Council

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[87] *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90 (European Court of Human Rights), available through the link in note 23.

[88] *Id.*, para. 39.

[89] Report No. A3-0434/93, published 18 January 1994, OJ C 44, p. 34.

[90] Recommendation No. R (2000)7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information, adopted 8 March 2000. To access this document, see the link at note 26.

[91] Inter-American Declaration of Principles on Freedom of Expression, Principle 8; see note 76.

of Europe,[90] the Inter-American Commission on Human Rights[91] and the African Commission on Human and Peoples' Rights.[92] The OSCE Member States stated, in the Concluding Document of their 1986-1989 Vienna Follow-Up Meeting:

> [J]ournalists … are free to seek access to and maintain contacts with, public and private sources of information and that their need for professional confidentiality is respected.[93]

In sum, the basic principle that journalists have a right to protect their sources is well-established in international law. Many States, including Kazakhstan[94] and Uzbekistan,[95] have adopted legislation with the purpose of implementing the right. Often, however, such legislation falls short of international standards in this area, because it is either too narrow in its understanding of who is a "journalist" or too broad in its definition of exceptions to the right.

6.1.6.2. Persons entitled to invoke the right

The right to preserve the confidentiality of sources is usually referred to, both in international and domestic law, as a right of journalists. Nevertheless, it can sometimes be validly invoked by persons who would not normally identify themselves, or be identified by the general public, as journalists.

As the ruling in the *Goodwin* case (discussed above) illustrates, the purpose of the right is to ensure that sources are not deterred from conveying important information to the public through a 'middleman'. It is the middleman who is entitled to invoke the right to protect his or her sources. In most cases, this role is played by a 'traditional' journalist

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[92] See note 29, Principle XV.

[93] Conference for Security and Co-operation in Europe, Follow-up Meeting 1986-1989, Vienna, 4 November 1986 to 19 January 1989, Concluding Document, para. 40.

[94] *Law on Mass Media*, Article 20(10).

[95] *Law on the Protection of the Professional Work of Journalists*, Article 5.

in the service of a mass media outlet; but there is no reason to apply a different rule when the middleman is someone else whose profession involves collecting and disseminating information, such as an NGO activist or academic commentator.

In their efforts to define the right to protect sources, some international bodies have opted to entirely avoid the term 'journalist'. The Declaration of Principles on Freedom of Expression adopted by the Inter-American Commission on Human Rights states:

> Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.[96]

Other bodies have instead been careful to formulate a very wide definition of 'journalist', covering anyone who serves as a conduit of information to the public, regardless of whether they would normally be perceived as journalists. The Recommendation adopted by the CoE's Committee of Ministers provides:

> The term "journalist" means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.[97]

By contrast, domestic laws sometimes adopt a more limited definition, covering only 'traditional' journalists. The Uzbek journalism law provides an example: "A journalist is a natural person who works for the mass media…"[98] Such narrow definitions are at odds with international law, because of their potential to constrict the flow of important information to the public.

Finally, in addition to 'non-traditional' journalists, international law recognises one further class of persons who should be entitled to invoke the right. Principle 2 of the above-cited CoE Recommendation states:

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[96] See note 76.

[97] See note 90.

[98] *Law on the Protection of the Professional Work of Journalists*, Article 3.

> Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established herein.

In other words, the right to withhold a source's identity belongs not only to the 'middleman,' but also to others collaborating with him or her. This purpose of this rule is, of course, to prevent the protection of sources from being simply side-stepped by going around the 'middleman'.

6.1.6.3. Exceptions to the right

Like the right to freedom of expression it is derived from, the right to maintain confidentiality of sources is not an absolute one: in certain narrowly defined circumstances, it may be subject to some limitations. As always, such restrictions must be justifiable under the three-part test (Chapter 4).

Principles 3-5 of the 2000 CoE Recommendation[99] elaborate extensively on the application of the three-part test to the protection of sources, in particular the necessity-leg of the test. The 2002 Declaration of Principles on Freedom of Expression in Africa echoes the main points of the CoE Recommendation.[100]

The most important points in these documents are the following:

- A journalist should only be ordered to disclose the identity of a source if there is an overriding requirement in the public interest, and the circumstances are of a vital nature. The CoE Recommendation states that this could be the case only if disclosure was necessary to protect human life, to prevent major crime or for the defence of a person accused of having committed a major crime.[101]

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[99] See note 90.

[100] *Declaration of Principles on Freedom of Expression in Africa*, note 29 above, Principle XV.

[101] As quoted in the Explanatory Memorandum, note 90, paras. 37-41.

- The interest in disclosure should always be balanced against the harm of ordering disclosure to freedom of expression.
- Disclosure should only be ordered at the request of an individual or body with a direct, legitimate interest, and who has demonstrably exhausted all reasonable alternative measures to protect that interest.
- The power to order disclosure of a source's identity should be exercised exclusively by courts of law.
- Courts should never order disclosure of a source's identity in the context of a defamation case.
- The extent of a disclosure should be limited as far as possible, for example just being provided to the persons seeking disclosure instead of general public.
- Any sanctions against a journalist who refuses to disclose the identity of a source should only be applied by an impartial court after a fair trial, and should be subject to appeal to a higher court.

Perhaps the most crucial of these principles is the requirement to balance interests: even when there is a strong public interest in uncovering the identity of a source, the vital function of the protection of sources in a democracy should not be overlooked. In fact, as the Norwegian Supreme Court has pointed out, the arguments against disclosure often are strongest precisely when those in favour are also strong:

> In some cases ... the more important the interest violated, the more important it will be to protect the sources. ... It must be assumed that a broad protection of sources will lead to more revelations of hidden matters than if the protection is limited or not given at all.[102]

6.1.7. Search and seizure of journalistic material

International law increasingly recognises that information collected or created for journalistic purposes enjoys a special degree of protection

[102] *Edderkopp* case, 15 January 1992, LNR 10/1992, JNR 34/1991, p. 39.

from search and seizure by the authorities. There are various justifications for according journalists stronger immunity against search and seizure than others.

In the first place, there is an obvious risk that the police will use the power to search premises as a means to circumvent the protection of sources (see the previous section). A search and seizure operation whose purpose is to uncover the identity of an anonymous source is particularly objectionable. Not only does it prejudge a question which should normally be ruled on by a court, after carefully weighing both sides of the argument; it is also far more intrusive than a court order to disclose a source's identity. This point was underscored by the European Court of Human Rights in the case of *Roemen and Schmit v. Luxembourg*:

> The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist's source is a more drastic measure than an order to divulge the source's identity. This is because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. The Court … thus considers that the searches of the first applicant's home and workplace undermined the protection of sources to an even greater extent than the measures in issue in Goodwin. [103]

A second reason why courts have held that journalistic material should be given greater immunity from search and seizure is the 'chilling effect' exerted by such operations. The storming of someone's house or office by armed police is clearly an alarming and intimidating experience; it can have the effect of discouraging the person concerned, or others in the same profession, from continuing their activities, even if those activities are in fact legal. This is highly problematic, especially if the activity in question is one guaranteed by international law – such as the practice of journalism. To prevent unnecessary intimidation of journalists, whether

[103] *Roemen Schmit v. Luxembourg*, 25 February 2003, Application No. 51772/99 (European Court of Human Rights), para. 57. For the *Goodwin* case, see section 6.1.6.1.

deliberate or not, courts in several countries have required a stronger justification for, and stricter judicial oversight over, the issuing of search warrants affecting journalists. For example, the US Supreme Court stated, in a case where police had seized books suspected to be obscene:

> The authority to the police officers under the warrants issued in this case, broadly to seize "obscene . . . publications," poses problems not raised by the warrants to seize "gambling implements" and "all intoxicating liquors" … the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications.[104]

An English court noted that particular caution is necessary when the media outlet targeted by the warrant has been investigating alleged wrongdoing by the authorities:

> Legal proceedings directed towards the seizure of the working papers of an individual journalist, or the premises of the newspaper or television programme publishing his or her reports, or the threat of such proceedings, tend to inhibit discussion. When a genuine investigation into possible corrupt or reprehensible activities by a public authority is being investigated by the media, compelling evidence is normally needed to demonstrate that the public interest would be served by such proceedings. Otherwise, to the public disadvantage, legitimate inquiry and discussion, and 'the safety valve of effective investigative journalism' ... would be discouraged, perhaps stifled (reference omitted).[105]

Concerns like these have led several countries to specify a separate procedure in their code of criminal procedure for the search and seizure of journalistic premises and materials. This procedure usually has most or all of the following characteristics:

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[104] *Marcus v. Search Warrant*, 367 U.S. 717 (1961), p. 730 -731.

[105] *Ex parte the Guardian, the Observer and Martin Bright*, [2001] 2 All ER 244, 262.

- Search warrants may only be issued by a judge, who must balance the importance of the search against the importance of preventing harm to the right to gather news.
- No warrants may be issued if the same goal can be achieved in a way less detrimental to freedom of expression.
- No warrants may be issued for the seizure of material covered by the protection of sources, except in very exceptional circumstances.
- The police must be accompanied on their search by a judge or prosecutor.

For example, the French Criminal Procedure Code provides:

> Searches of the premises of a press or broadcasting company may be conducted only by a judge or a State prosecutor, who must ensure that the investigations do not endanger the free exercise of the profession of journalism and do not obstruct or cause an unjustified delay to the distribution of information.[106]

The key point is that searches and seizures of journalistic material and premises are, in almost all cases, an interference with the right to freedom of expression. As such, they may only be conducted in accordance with the three-part test (Chapter 4).

6.1.8. Violence against media workers

Physical threats and attacks against media workers aimed at 'shutting them up' are arguably the most egregious interference with the right to freedom of expression possible. Unfortunately, however, incidents of this kind are increasingly common in Central Asia; one respected organisation reported eight instances of violence against journalists in the region during the first nine months of 2005.[107]

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[106] Article 56-2, Criminal Procedure Code. See also, for example, Sections 97-98 of the German Criminal Procedure Code, Article 18.01(e) of the Texas Code of Criminal Procedure.

[107] The International Freedom of Expression Exchange, see http://www.ifex.org/en/content/view/archivealerts/177/offset/50.

When attacks occur, they are usually ostensibly committed by private persons; the government's involvement ranges from none at all to tacit approval to active instigation. A government which consents to media workers being attacked is clearly in breach not only of the right to freedom of expression, but also of the right to liberty and security of the person, and even to life. But the duty imposed on States under international law goes further: media workers must be actively protected, and threats and attacks against them must be investigated carefully.

6.1.8.1. Duty to prevent attacks

States are under not only a so-called 'negative obligation' to refrain from violating human rights but also a 'positive obligation' to ensure enjoyment of those rights (see section 2.2.3). Article 2 of the ICCPR, for example, requires States to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant."[108] Several international courts and bodies have confirmed that this entails a duty to offer sufficient protection from violent attacks to citizens in general, and media workers in particular.

The African Commission's Declaration of Principles on Freedom of Expression states:

> 1. Attacks such as the murder, kidnapping, intimidation of and threats to media practitioners and others exercising their right to freedom of expression, as well as the material destruction of communications facilities, undermines independent journalism, freedom of expression and the free flow of information to the public.
>
> 2. States are under an obligation to take effective measures to prevent such attacks […][109]

[108] ICCPR, Article 2. All regional human rights treaties contain a similar provision: see Article 1 of the ECHR; Article 2 of the ACHR; and Article 1 of the AChHPR. See also Article 13 of the ECHR and Article 25 of the ACHR, which require States to provide an 'effective remedy' for alleged violations and a right to judicial protection against violations.

[109] Declaration of Principles on Freedom of Expression in Africa, note 29 above, Principle XI.

The UN, OSCE and OAS special mandates on freedom of expression have declared that the worldwide problem of violence against media workers has reached a crisis point and have called on States to:

> take adequate measures to end the climate of impunity and such measures should include devoting sufficient resources and attention to preventing attacks on journalists and others exercising their right to freedom of expression ….[110]

An important question is exactly how far the duty to protect reaches. On the one hand, the protection should at least markedly reduce the risk of violence occurring; on the other hand, it should not go so far as to impose an extreme burden on the State or provide an excuse for constantly shadowing a journalist. In the case of *Osman v. the United Kingdom,* the European Court of Human Rights provided some guidelines on this subject. The case concerned the question whether British police should have acted to prevent violent attacks against a child. The Court noted that it was beyond dispute that Article 2 of the ECHR, protecting the right to life, "may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."[111] On the other hand, the duty to protect should not be such as to place an "an impossible or disproportionate burden on the authorities." Not every claimed threat would automatically give rise to a right to protection. The Court found that the deciding factor should be whether "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party." [112]

6.1.8.2. Duty to investigate attacks

If the authorities have been unable to prevent an attack against a media worker, they are obliged to investigate its circumstances and prosecute

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[110] Joint Declaration of 29-30 November 2000. To access this document, see the link in note 30.

[111] *Osman v. the United Kingdom*, 28 October 1998, Application No. 23452/94 (European Court of Human Rights), para. 115.

[112] *Id.*, para. 116.

[113] United Nations Committee on Human Rights, Observations and Recommendations to the State of Guatemala, doc. CCPR/C/79/Add.63, para. 25.

those responsible. The purpose of such an investigation should be, in the words of the HRC, to enable victims "to discover the truth about the acts committed, to learn who are the authors thereof and to obtain suitable compensation."[113] The Inter-American Court of Human Rights has stressed the importance to society as a whole of investigating attacks against the media. If this is not done, media workers may be deterred from performing their important task of informing the public, and ordinary citizens may also become more reluctant to denounce criminals or criticise public officials. In sum, an insufficient investigation "constitutes an incentive for all violators of human rights."[114]

To combat the risk that the authorities will conduct a sham investigation, the Inter-American Court has also specified criteria by which it will measure their sufficiency. Quoting jurisprudence from the ECHR, it has held that the investigation must be concluded within a reasonable time; three factors are crucial for deciding what is 'reasonable': a) the complexity of the matter; b) the judicial activity of the interested party; and c) the behaviour of the judicial authorities.[115] State authorities must take the initiative: the investigation "must … be assumed by the State as its own legal duty, not as a step taken by private interests which depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government."[116]

The Inter-American Commission on Human Rights has applied these principles in two similar cases before it involving violence against media workers. In *Miranda v. Mexico*, the Commission found that the authorities had made very little effort to investigate the murder of a journalist known for his criticism of the government. While the investigation remained technically open, little concrete action was being taken. The Commission

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[114] *Miranda v. Mexico*, Case 11.739, Report Nº 5/99, OEA/Ser.L/V/II.95 Doc. 7 rev., p. 755 (1998), para. 52.

[115] *Genie Lacayo v. Nicaragua*, 29 January 1997, Series C No. 30, para. 77. See also *König v. Germany*, 28 June 1978, Application No. 6232/73 (European Court of Human Rights), para. 99.

[116] *Velásquez Rodriguez v. Honduras*, 29 July 1988, Series C No. 4, para. 177.

[117] *Miranda v. Mexico*, note 114, para. 65. The Commission made a similar finding in the case of *Oropeza v. Mexico*, concerning a writer who had been murdered for his denunciations of links between police and drug traffickers: Case 11.740, Report Nº 130/99, OEA/Ser.L/V/II.106 Doc. 3 rev., p. 1058 (1999).

found that this constituted a violation of the State's duty to investigate: "such an investigation lacks any meaning and is irremediably doomed to failure."[117]

6.2. Regulation of the print media

The previous sections surveyed various areas in which international standards have been developed to ensure that media workers are able to practice their profession free from undue interference. One can detect two principal recurrent themes in these standards: first, the need to assure that the authorities do not try to muzzle critical voices or to give unfair benefits to favoured media workers; and, second, a concern that the right to freedom of expression will too easily be pushed aside when it comes into conflict with other legitimate interests. As will be seen in the following sections, these two themes are also central to the international standards on regulation of the print media.

6.2.1. Is there a need for statutory regulation?

At the outset, it is useful to ask whether there is any need *at all* for specific statutory regulation of the print media. Governments in many countries see it as their task to develop complex regulation for every aspect of a society's life, including the mass media. But even when its goal is to safeguard the right to freedom of expression, legislation affecting the media often creates bureaucratic obstacles and loopholes for abuse by those implementing it. Part of the purpose of the necessity test (section 4.4) is to prevent governments from following their 'legislative instinct', and to make sure that the amount of regulation concerning the media is kept to a minimum.

It is notable that most established democracies do not have a law which imposes specific regulatory measures on the print media. This is due to a deliberate policy to prevent unnecessary regulation and to distinguish the press from the broadcast media, where different considerations apply (see section 6.3).

Clearly, the print media cannot operate in a legal vacuum. A newspaper's employees must be guaranteed acceptable working conditions, publishers

must be prevented from pirating others' works, individuals affected by a defamatory news story should be able to sue for compensation, and so on. But none of these matters raises concerns unique to the print media: employer-employee relationships exist in every company, not only printed works are pirated, and defamatory remarks can also be made through other media or in public. In contrast to the broadcast media – where there are technical constraints on the number of channels – the print media present very few distinctive features which demand a regulatory response.

As a result, many democracies have chosen to abolish their press laws and treat print media companies like any other enterprise, regulating them through laws of general application, such as the civil code and labour law. If there is no press law, the reasoning goes, there will also not be legal means available for restricting press freedom. Some countries, most recently Georgia, have even opted to adopt a 'Law on Freedom of Expression' instead of a press law.[118] This is not to say that a press law can never be consistent with international law; in practice, however, such laws almost always contain some illegitimate restrictions on who may publish and what may be published, or duplicate provisions in laws of general application, sending a chilling 'double warning' to the press. The following sections discuss problematic types of provisions often found in press laws, and then discuss an alternative model: self-regulation by the media.

6.2.2. Licensing and registration requirements

Similarly to the licensing of individual media workers discussed in section 6.1.1, several States, including all of the Central Asian republics,[119] require individuals or companies who wish to establish a newspaper, magazine or other publication to obtain prior official permission, usually

[118] For a discussion of this law in English, see http://www.article19.org/pdfs/analysis/georgia-foe-guide-april-2005.pdf.

[119] See Kazakhstan's *Law on Mass Media*, Arts. 10-13; Kyrgyzstan's *Law on Mass Media*, Article 6; Tajikistan's *Law on the Press and Other Mass Media*, Arts. 9-11; Turkmenistan's *Law on the Press and Other Mass Media*, Arts. 8-14; Uzbekistan's *Law on Mass Media*, Arts. 12-17.

in the form of a licence. For the same reasons as apply in the context of licensing of individual media workers, a licensing scheme for the print media which allows for permission to publish to be refused is a breach of international guarantees of the right to freedom of expression.

The establishment of a publication is clearly an important way of "imparting information and ideas" and so an exercise of the right to freedom of expression. A licensing scheme presents an obstacle to this activity, which may range from a minor bureaucratic hurdle to an impassable barrier (if the licence application is rejected). Such a scheme is, therefore, an interference with the right to freedom of expression, and must therefore meet the three-part test in order to be justifiable.

Licensing schemes may address some legitimate goals, such as preventing publications which are defamatory. Nevertheless, as discussed in section 4.4, the requirement of 'necessity' means, amongst other things, that the government should choose those means to achieve its goals which are least harmful to freedom of expression. A decision to deny someone a licence amounts to a blanket prior ban on all of the articles that person would otherwise have published. It is, almost by definition, not the least restrictive means available to the government: offensive articles can also be dealt with on a case-by-case basis, after publication, and be responded to with a fine or some other sanction (see section 7.1 below). Moreover, licensing schemes are problematic because they may easily be abused, for example to prevent opponents of the government from voicing their opinions. This is particularly true if the scheme is administered by a non-independent body and there are no clear criteria for the awarding of licences. Even an independently administered licensing scheme can induce media outlet to practice self-censorship, for fear of losing their licence.

The UN Human Rights Committee has repeatedly expressed its concerns at licensing requirements for the print media, holding that they constitute a violation of the right to freedom of expression. In 1999, for example, the Committee noted, in respect of Lesotho's regular report:

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[120] *Concluding observations of the Human Rights Committee: Lesotho*, 8 April 1999, UN Doc. No. CCPR/C/79/Add.106, para 23.

> The Committee is concerned that the relevant authority under the Printing and Publishing Act has unfettered discretionary power to grant or to refuse registration to a newspaper, in contravention of article 19 of the Covenant.[120]

The UN Committee on the Rights of the Child, a body similar to the HRC which oversees the *UN Convention on the Rights of the Child,* has criticised Uzbekistan's stringent licensing requirements:

> In the light of article 13 (the child's right to seek, receive and impart information) … the Committee is concerned that stringent registration and licensing requirements for the media and publications, as well as restrictions on Internet access, do not comply with article 13, paragraph 2, of the Convention.[121]

Distinct from licensing regimes are technical registration schemes, which still exist in some established democracies. A technical registration scheme is a purely administrative requirement for publications to provide basic information about themselves to the authorities, such as the location of their offices, and the names of their owners, with no discretion on the part of the government to refuse registration. The purpose of a registration scheme is usually to ensure that individuals who intend to sue a publication for defamation can easily determine where to send their complaint.

Registration schemes ostensibly pose less of a threat to freedom of expression than licensing schemes, because they do not allow the government to deny registration on the right to publish. Nevertheless, they can and have been abused, leading international bodies to express reservations about their legality. A case which came before the HRC from Belarus provides a good example. The applicant complained about a legal requirement for newspapers with a circulation of just 200 copies to register; he had been prosecuted for the distribution of unregistered pamphlets, which had been confiscated. In its analysis of the complaint, the HRC first clarified that the registration requirement in itself

[121] *Concluding Observations of the Committee on the Rights of the Child: Uzbekistan*, 7 November 2001, UN Doc. No. CRC/C/15/Add.167, para. 37.

constituted a clear interference with the right to freedom of expression, which therefore needed to be justified:

> The Committee notes that … publishers of periodicals … are required to include certain publication data, including index and registration numbers which, according to the author, can only be obtained from the administrative authorities. In the view of the Committee, by imposing these requirements on a leaflet with a print run as low as 200, the State party has established such obstacles as to restrict the author's freedom to impart information.[122]

The Committee was very sceptical of Belarus' claim that the registration requirement was necessary to protect public order or the rights of others, stating:

> In the absence of any explanation justifying the registration requirements and the measures taken, it is the view of the Committee that these cannot be deemed necessary for the protection of public order (ordre public) or for respect of the rights or reputations of others.[123]

Finally, the Committee was highly critical of the fact that the applicant's failure to register had resulted in a fine as well as confiscation of the remaining copies of the publication.[124]

Other bodies have expressed themselves in similar terms. The UN, OAS and OSCE special mandates on freedom of expression have declared: "Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided."[125] The European Court of Human Rights has criticised a Polish registration requirement

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[122] *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997, UN Doc. CCPR/C/68/D/780/1997, para. 8.1.

[123] *Id.*, para. 8.5.

[124] *Id.*

[125] Adopted 18 December 2003. Available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/93442AABD81C5C84C1256E000056B89C?opendocument

[126] *Gaweda v. Poland*, 14 March 2002, Application No. 26229/95 (European Court of Human Rights), para. 43.

which allowed the authorities to refuse registration if the proposed name was "inconsistent with the real state of affairs." It stated that such a requirement is "inappropriate from the standpoint of freedom of the press."[126]

To summarize, licensing schemes for the print media are inconsistent with international law because they fail to meet the 'necessity' test. Registration schemes are not illegitimate per se, but it is clear from the authorities cited above that any such scheme must minimally restrict freedom of expression and consist of a simple, automatic procedure.

Finally, it is important to note that the terminological distinction adopted here between 'licensing' and 'registration' is not followed by the Central Asian republics. For example, Article 9 of the Tajik *Law on the Press and Other Mass Media* is entitled "Mass Media Registration". Article 12, however, permits the relevant authority to refuse registration, in which case it is forbidden for the applicant to commence publication. The Tajik registration scheme is, therefore, in effect a licensing scheme.

The dangers of such a scheme are borne out by the case of *Oina,* the only non-government Tajik-language newspaper in the Samarkand region, in neighbouring Uzbekistan. The paper covered a number of topics, most regarding the education of ethnic Tajik children in Uzbekistan. Relying on a law similar to Tajikistan's,[127] the region's Press Department utilised its discretion in registering the paper to close it down, a decision apparently motivated by the paper's criticism of local government officials.[128]

6.2.3. Suspensions and bans

Permanently banning or temporarily suspending a print media outlet is a highly intrusive interference with the right to freedom of expression, similar to depriving an individual of the right to practise journalism (see section 6.1.3). If the right to suspend or ban rests with an administrative

[127] *Law on Mass Media*, Arts. 12-17.

[128] Reporters Sans Frontières, Uzbekistan - Annual Report 2002, at http://www.rsf.org/article.php3?id_article=1780.

body, this amounts to a licensing power, and is accordingly a violation of international law (see the previous section). But even when ordered by a court, it is doubtful whether a ban or suspension can be justifiable. It amounts to the wholesale abrogation of the concerned publication's right to free expression, when less extreme measures are likely to be available, such as the imposition of a fine, seizure of an individual issue or criminal measures against those responsible.

Legislative measures which deprive media outlets of the possibility to distribute their publication are, for all intents and purposes, equivalent to a publication ban, and so on similarly unstable legal ground. The US Supreme Court has remarked: "Liberty of circulating is as essential to the freedom of speech as liberty of publishing; indeed without the circulation the publication would be of little value."[129] Similar considerations led the European Court of Human Rights to condemn a ban on distribution of a magazine in Austrian army barracks in the case of *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria.*[130] The Court found no evidence for the Austrian government's allegation that the magazine in question posed a threat to national security; in particular, it did not recommend disobedience or violence. Despite its polemical tone, the magazine did not overstep the bounds of what should be permitted in the context of discussion of ideas within the army of a democratic State.[131]

6.2.4. Mandatory provision of copies

A common feature in media laws in Central Asia[132] is a requirement for print media companies to deposit a number of copies of each of their publications with one or more public bodies, usually the national library and a government agency or ministry.

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[129] *Ex parte Jackson*, 96 US 727 (1877).

[130] *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria,* 19 December 1994, Application No. 15153/89 (European Court of Human Rights).

[131] *Id.*, para. 38.

[132] Kazakhstan's *Law on Mass Media*, Article 16; Kyrgyzstan's *Law on Mass Media*, Article 11; Tajikistan's *Law on the Press and Other Mass Media*, Article 21; Turkmenistan's *Law on the Press and Other Mass Media*, Article 19; Uzbekistan's *Law on Mass Media*, Article 22.

There can be little justification for a duty to provide copies to a ministry or other governmental body. The danger that such a requirement will be used as a vehicle for censorship is obvious, and it is hard conceive of any other reason why the government would find it necessary to have copies of every publication in the land. A deposit requirement can also have a chilling effect, since commentators may be more reluctant to speak their mind about the government if they know it is keeping a close watch on their words.

Deposit requirements relating to the national library serve a more easily identifiable legitimate goal, namely to ensure the availability of diverse sources of information to the public. As such they could be said to promote the right to freedom of expression, and are arguably consistent with international law.[133]

6.2.5. An alternative model: self-regulation

The discussion in the previous sections underscored the dangers of government regulation of the press; all too often, legislation which ostensibly serves a legitimate goal becomes a tool for suppressing critical voices. This section explores the alternative: self-regulation by the print media.

Countries in transition to democracy, such as the Central Asian republics, tend to face a similar pattern of problems in relation to professional and ethical standards in the media. On the one hand, some journalists make very liberal use of the right to freedom of expression, by publishing sensationalist, highly unbalanced, poorly researched or outright defamatory articles. On the other hand, the government and the judiciary often overreact to or even exploit these weaknesses, failing to distinguish in their response between speech that falls within the international protection of the right to freedom of expression, and that which can legitimately be restricted (see Chapter 4).

[133] Broadcasters are often required to keep copies of the material they broadcast, for example for 30 days, in case someone complains about it. This is, of course, quite a different matter.

The passage of time can help address these problems. If the general public is initially intrigued by sensationalist or provocative reporting, this interest will likely wear off over time as people start to distinguish between quality news outlets and the "gutter press". In all of the established democracies there is a residual market for such publications, but since they are seen more as a source of entertainment than of reliable information, the threat posed by them is too minor to justify restricting free speech.

On the other hand, no publication is immune from unethical or unprofessional reporting, and some form of oversight over journalistic activities may well serve the public good. Section 6.2.1 argued that specific print media laws are in tension with international law, but clearly this does not mean that one of their principal goals – to promote professional and ethical journalism – is an improper one. The problem is that governments lack the ability to act as impartial enforcers of professional standards, given their frequently adversarial relationship with the media.

To resolve this conundrum, journalists and publications in many democracies have taken it upon *themselves* to regulate the print media sector. They have established private mechanisms, usually called 'press councils', with a mandate to raise journalistic standards and to provide redress against unprofessional or simply inaccurate reporting, thus forestalling the need for government regulation. The activities of press councils usually consist of standard-setting through the adoption of a code of conduct or code of practice, education of media workers and the general public about this code, and adjudication of complaints submitted by members of the public.

In most cases, the only 'sanction' available to press councils is to require the offending media outlet to print their decision finding a breach of the code. Press councils lack the enforcement powers of statutory bodies and therefore rely on voluntary compliance with their decisions. But as

they are composed of individuals with special expertise on the media, and apply rules which have been established after a dialogue within the sector, most media practitioners take the decisions of press councils seriously and are willing to publish a reply, correction or statement when such action is recommended. Furthermore, the peer pressure to improve and embarrassment that a contrary holding can produce can be very effective in promoting greater professionalism. The success of self-regulatory mechanisms in several countries has prompted the African Commission on Human and Peoples' Rights to declare that:

> [e]ffective self-regulation is the best system for promoting high standards in the media.[134]

Paradoxically, a number of governments have attempted to embrace this recommendation by mandating the establishment of self-regulatory bodies, and threatening media workers with criminal prosecution if they violate the ethical rules adopted by these bodies. Clearly, any kind of regulation coerced by the government is not *self*-regulation, but at best statutory regulation by the profession itself, and therefore vulnerable to many of the same abuses as other forms of statutory regulation.

Nevertheless, there are prudent ways in which the State can encourage self-regulation. For example, courts can be required to take the findings of a press council into account when ruling in a defamation case. If the media outlet in question has previously complied with a recommendation to publish a correction or statement, any defamation award should be suitably reduced. A press council can also be given the right to comment on any legislative proposals affecting the print media.

It is beyond the scope of this Pocketbook to provide an overview of all the different self-regulatory mechanisms adopted by print media groups around the world. Instead, we present some general recommendations. While there is probably no perfect model of self-regulation, these observations appear to hold true based on the comparative experience of several countries.

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[134] Declaration of Principles on Freedom of Expression in Africa, note 29 above, Principle IX.

- A self-regulatory mechanism should cover the print media sector as widely as possible. The power of the sector as a whole to exert positive pressure for professionalism is greater than that of a club of like-minded publications.
- The self-regulatory body should strive to develop a single national code of conduct, in consultation with a wide range of stakeholders, and, in particular, other representative media bodies, such as journalists' unions or associations.
- At a minimum, a code of conduct/ethics should address the following:
    - respect for the public's right to know;
    - accuracy in news gathering and reporting;
    - fairness in methods to obtain news, photographs and documents;
    - sensitivity in reporting on vulnerable groups such as children and victims of crime;
    - non-discrimination in relation to race, ethnicity, religion, sex and sexual orientation;
    - respect for the presumption of innocence in reporting on criminal procedures;
    - protection of confidential sources of information;
    - duty to rectify published information found to be inaccurate of harmful.
- Careful consideration should be given to who should sit on the complaints body. Some of the more successful councils have broad membership, including members of the public as well as media owners and journalists.
- The complaints body should provide quick, free resolution of complaints through an open process. While both sides should be allowed a sufficient and equal opportunity to present their views, the procedure should not be complex and legalistic.

- The self-regulatory mechanism should ideally be funded by the print media sector itself and, on an annual basis, fully disclose its operational budget.

6.3. Regulation of the broadcast media

By far the most important source of information, as well as of entertainment, for most people around the world is the broadcast media. Radio and television are delivered straight into the living room for free, making them the most easily accessible media, particularly for the poor and those in rural areas.

Due to its centrality as a source of news and information, and therefore its ability to influence the opinions of the public, broadcasting is often the target of illegitimate control. In many countries, the State-funded broadcaster operates as a mouthpiece of government rather than presenting diverse sources of information of public interest, while private broadcasting is either prohibited or its independence is curtailed through a variety of mechanisms.

In contrast to the 'hands off' approach most suited to the print media, an effective broadcasting system which serves the public interest cannot survive without official regulation. The electromagnetic spectrum is a limited resource, and while new technologies are beginning to increase the number of channels that can be carried, demand for spectrum still outstrips supply. Since States are required under international law to guarantee their citizens freedom of expression "through any medium" (see section 2.2.3), the available spectrum must be rationed in a way which maximises the ability of different voices in society to speak and be heard over radio and television. The US Supreme Court explained the need for regulation in simple terms in *Red Lion Broadcasting Co. v. FCC*:

> If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the [guarantee of freedom of expression], aimed at protecting and furthering communications, prevented the Government from making radio communication possible by

> requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.
>
> By the same token … the licensee has no constitutional right to … monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing … which prevents the Government from requiring a licensee to share his frequency with others and … present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.[135]

In most democratic countries, broadcast regulators undertake two key functions: allocating broadcast frequencies through the award of licences and developing and applying codes of broadcasting conduct, which normally deal with a range of content and broadcast practice issues.

These regulatory functions presents two basic dilemmas: how to promote independent broadcasting yet ensure that it serves all regions and groups in society, and how to regulate without the regulation becoming an instrument of improper government control.[136] The following sections describe the international standards which have been developed to ensure that these dilemmas are overcome.

6.3.1. Pluralism and frequency planning

Pluralism – the availability of a wide range of content serving the needs and interests of all different groups in society – is a fundamental concept both to democracy and to the protection of free expression. A State in which only a privileged few can effectively express their opinions cannot be said to be a free society. Such a situation breaches not only the rights of those who are unable to make themselves heard, but also the right of each individual citizen to be well-informed and to receive information from a variety of sources. For these reasons, international law requires States to take steps to safeguard pluralism. The European Court of Human Rights has frequently stressed:

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[135] *Red Lion Broadcasting Co., Inc., et al. v. Federal Communications Commission, et al. No.* 2, 395 U.S. 367, 389 (1969).

[136] ARTICLE 19's publication *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* provides guidance on these issues. To access this document, see the link in note 32.

> … the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor.[137]

The protection of pluralism should be the principal goal of State regulation of the broadcast media, which might otherwise easily be monopolised by the government or a small section of the population. Promoting pluralism means ensuring a diversity of broadcasting organisations, of ownership of those organisations, and of viewpoints and languages represented in the programmes they carry.

The starting point of a good broadcasting policy is usually the formulation of a frequency plan, which stipulates how that part of the spectrum available for broadcasting[138] will be utilised. The idea is to ensure that frequency allocation takes place on a planned basis, not just to the highest bidder. In established democracies, this task is entrusted to an independent broadcast regulator (see the next section), which is required by law to promote a number of values, such as freedom of expression, accuracy, impartiality and, of course, pluralism. Frequency plans normally reserve separate 'slices' of spectrum for national, regional and local broadcasting. These are then divided up amongst radio and television, and divided once more amongst public, commercial and community broadcasting. Finally, criteria are set for the awarding of licences for each of the resulting broadcasting 'blocks'. These criteria should be carefully designed to promote pluralism, including by promoting the availability, in the different regions and languages represented in the country, of programming that caters to their needs.

A frequency plan which has come about through consultation with all those with a stake in it – in particular broadcasters and representatives

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[137] *Informationsverein Lentia and others v. Austria*, 28 October 1993, Application No. 13914/88 (European Court of Human Rights).

[138] Usually there will be a 'higher level' frequency plan which allocates the spectrum amongst various uses, such as mobile telephony, radar, emergency service radio and, of course, broadcasting.

of their audiences – stands the best chance of serving the public interest effectively.

6.3.2. Protecting the independence of the regulator

When the task of rationing the broadcast spectrum is left to the government, government and its allies tend to end up as the greatest beneficiaries. The Central Asian region is no exception; in Kazakhstan, for instance, associates and family members of the president control the lion's share of broadcasting. But even when a government approaches this task in good faith, fear of losing a licence can induce broadcasters to practice self-censorship and toe the official line. As one observer noted wryly, "So long as the [government] can determine which individuals shall be endowed with larynxes, it does not need additional power to determine what shall be said."[139]

The logical solution to this problem, which has been adopted in most democracies, is to allocate the power to regulate broadcasting to an administrative body which is independent of government. Further protection for freedom of expression can be achieved by circumscribing the powers of this body very carefully and guaranteeing the possibility of a judicial appeal against its decisions.

Perfect independence is difficult to achieve, but a number of measures can help prevent political or other interference in the work of the regulatory body. The following is a summary of the key recommendations on this subject made by the Council of Europe[140] and ARTICLE 19:[141]

- The regulatory body should not be part of or affiliated to any ministry or other government institution. Its independence should be explicitly guaranteed by law and, if possible, also in the constitution.

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[139] Morris Ernst, 1926.

[140] Recommendation (2000)23 of the Committee of Ministers to Member States on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector, 20 December 2000. See also note 26.

[141] See note 136.

- The body should be overseen by a governing board, which should be appointed according to a procedure which is clearly defined in law, is not dominated by any particular political party or commercial interest, and allows for public participation and consultation, including the nomination of candidates by civil society. Appointments should not be left to a single person or political party; in many countries, this is done by an all-party committee of parliament. Regardless, the government should not be able to control the appointments process.

- The law should define a number of exclusions or 'rules of incompatibility' which apply to candidates for membership in the board. At a minimum, no one should be appointed who: 1) is employed in government, the civil service, a political party, or is an elected representative; or 2) holds a position or has a significant financial stake in broadcasting or the telecommunications sector.

- Once appointed, members of the governing board should be protected against removal outside of exceptional circumstances. Their term of office (tenure) should be fixed and the possible grounds for removal should be clearly defined by law. The power to remove should rest with the same body as the power to appoint, and be subject to judicial review.

- The regulatory body should be accountable to the public through a multi-party body, such as parliament or a parliamentary committee. It should publish an annual report providing an overview of its activities and finances, and be required to provide annual audited accounts of its expenditures.

- The body should be adequately funded in a way which protects it against political interference. The framework for funding should be set out in law and define clear criteria for periodic readjustment. One good way of ensuring the body's

financial independence is to allow it to use the fees charged for broadcast licences to sustain itself, supplemented by a grant from the general budget if necessary.

6.3.3. Administration of broadcast licences

6.3.3.1. Allocation of licences

In most countries, periodic calls for licence applications are issued, in accordance with the frequency plan, discussed in section 6.3.1, so that interested parties may compete for the licences being offered.

In order to ensure transparency, the process for assessing licence applications should be set out clearly and precisely in law. Time limits within which decisions must be made should be specified, in such a way that each of the applicants has an opportunity to be heard and the general public is able to submit comments. The criteria by which applications are judged should be announced in advance, and preferably set out in the primary legislation. Examples of common criteria are whether the applicant possesses the necessary technical expertise and financial resources to provide the proposed broadcasting programme. In line with the importance of promoting diversity, an important licence criterion is the extent to which the proposed broadcasting is likely to contribute to meeting the needs of diverse groups in society, taking into account existing content availability.

Blanket prohibitions on the basis of applicants' form or nature normally represent a breach of the right to freedom of expression. Licensing decisions should be made on a case-by-case basis, taking into account all of the circumstances, rather than being subject to rigid *a priori* rules. One exception is a ban on political parties holding licences, common in democracies, given the obvious potential that party-aligned stations will unfairly skew the political process. Applicants for a licence should not be required to pay a deposit, although a small fee to defray the costs of processing the application is justifiable.

Once the regulator has taken its decision, it should be communicated to the applicants, accompanied by written reasons. Anyone who has been refused a licence should be able to apply to the courts for judicial review.

6.3.3.2. Licence terms

Licences usually come with several terms and conditions. These are of two types: general conditions – normally set out in primary or secondary legislation – and specific conditions, which are set individually for the licensee. All such terms and conditions should be relevant and consistent with the broadcasting policy, and this is particularly important for specific conditions, to prevent this being abused for political reasons. They should not intend to, or have the effect of making use of the licence unreasonably difficult or financially unattractive. In particular, the duration of the licence should be sufficiently long to allow broadcasters to recoup their investment. Once the term has expired, the licence should normally be renewed, unless doing so would be against the public interest, a concept which should be elaborated in the broadcasting law.

If a licence fee is charged, it should be reasonable and certainly not be so large as to undermine the commercial viability of the sector as a whole. A fee schedule should be published in advance, and arbitrary distinctions – such as charging higher fees for broadcasters who carry news – should not be allowed.

6.3.4. Regulating broadcast content

Licensing is relevant to broadcasting content inasmuch as the provision of diversity of programme content is a licence criterion. At the same time, in most countries, broadcast regulators also have a mandate to develop administrative codes of conduct to which broadcasters must adhere. Such codes can be legitimate, so long as they do not impose criminal or civil liability for programme content and are developed in close consultation with broadcasters and other stakeholders. No code should be imposed if an effective system of self-regulation is in place.

Broadcasting codes normally deal with a wide range of programming issues such as accuracy, privacy, and the treatment of sensitive themes like bereavement, sex and violence. A common and important rule is the requirement of balance and impartiality in the coverage of news and current affairs. Codes may also address questions of professional ethics, including the use of subterfuge to obtain information, the conduct of

interviews and payment for information. An important area in which codes can serve a useful role is in ensuring balanced and impartial election coverage. Finally, such codes may deal with issues relating to advertisements (for more on this topic, see section 10.1).

The primary goal of a broadcasting code should be to set standards rather than to punish broadcasters for breaches. Sanctions should in the first instance aim at reforming behaviour, and so consist of a warning or requirement to broadcast a message recognising the breach. More serious measures, such as fines or suspensions, should be applied only after repeated and serious breaches, when warnings and milder sanctions have failed to redress the problem.

6.3.5. Public service broadcasting

Most countries around the world have one or more national, State-funded broadcasters. These broadcasting organisations can make an important contribution to pluralism, by producing programmes in areas that are unprofitable and therefore ignored by the private channels, such as children's or minority language programmes. They can also promote the general public's right to know, by presenting a credible platform of balanced and accessible news and current affairs, both through traditional and modern formats, such as TV news, documentaries, current affairs programmes and entertainment programmes. The often significant and stable sources of funds available to public service broadcasters enable them to attract respected journalists and conduct in-depth research for programmes. A key challenge is to ensure the independence of these broadcasters, and a terminological distinction is sometimes made between 'State broadcasters', which serve as a mouthpiece of government, and 'public service broadcasters' (PSBs), which genuinely serve the public interest. Another concern that may warrant attention is the potential of State-funded broadcasting to compete unfairly with private stations, threatening their commercial viability.

The regulation of PSBs presents four main questions: how to ensure independence from the government and business; what types of

programming will be provided; how to fund it; and how to make it accountable to the public.[142] These are addressed briefly in turn below.

Guaranteeing the independence of PSBs raises similar problems as those discussed in relation to the broadcast regulator (see section 6.3.2).[143] The system's governing body – usually a board of directors – can be appointed under a comparable procedure, ensuring that those elected to the body are independent, competent and free of political connections or financial interests in broadcasting.

The central considerations in the programming of the PSB should be how to serve the interest of the public as a *whole*.[144] In this respect, PSBs are distinct from commercial broadcasters, whose main concern is to maximise their profits, and whose programming decisions therefore tend to be guided by the preferences of 'mainstream' viewers. PSBs should cater to all audiences, with special attention to minorities who are not served by commercial stations. Their programmes should offer impartial and balanced information, allowing viewers to form their own opinions on important topics based on the most accurate facts available. This is true especially of the news, which should cover both international and national developments, including the proceedings of key decision-making bodies such as parliament. Finally, an important function of PSBs is to increase social cohesion and respect for minorities while fostering a sense of national identity, by reporting on the country's history and cultural diversity in a non-discriminatory manner.

Funding for PSBs can come from various sources, each with its own pros and cons. In some countries, the PSB is financed by a mandatory contribution paid by all owners of a radio or television set. Such an arrangement has the benefit of being relatively insulated from

[142] ARTICLE 19's *Model Public Service Broadcasting Law* provides a practical example of how these questions can be dealt with. To access this document, see the link in note 32.

[143] The Council of Europe's Committee of Ministers has issued a recommendation, No. R(96)10 (11 September 1996), on how to guarantee the independence of public service broadcasting. To access this document, see the link in note 26.

[144] This goal is endorsed by *Resolution No. 1: The Future of Public Service Broadcasting* of the 4th Council of Europe Ministerial Conference on Mass Media Policy, Prague 1994. See also the link in note 26.

government interference and provides consistent levels of funding over time. On the other hand, it can also make owning a set unattractive for those with a small income, and the contribution can be difficult or expensive to collect. A PSB financed from the general government budget is a more simple solution which exempts the poor, but carries the risk of political interference in the service's programming decisions. A recent development is the increasing use of commercial activities as an alternative to full public funding, mainly advertisements but also spin-off industries such as videos and books. Advertising can improve the financial situation of a PSB, but also carries a number of risks. More time for advertising means less time for quality programmes, and if advertising becomes a dominant source of income, PSBs risk starting to mimic the private sector, basing their programming choices on revenue generation rather than the public interest. At that point, the rationale for having a PSB ceases to exist. Moreover, PSBs may draw advertising away from private broadcasting, harming its viability or endangering its quality.

As organisations which spend large amounts of public money, it is important that PSBs are properly accountable. The public should be able to verify in which way the PSB has utilised public funds. One common and logical way of ensuring financial accountability is a duty for the PSB's governing board to submit a public annual report, including an overview of its expenditures, as well as annually audited accounts, to parliament. Accountability for programming decisions and the content of broadcasts can be achieved by the adoption of a code of broadcasting practice, in consultation with journalists and civil society. The code should be accompanied by a procedure whereby members of the public can lodge complaints against programmes, which must then be assessed against the code.

Chapter 7

CONTENT RESTRICTIONS

The previous Chapter looked at ways in which States *indirectly* limit freedom of expression, by regulating the main channels through which the right is exercised, the mass media. In this Chapter, we discuss *direct* regulation of expression – the prohibition of categories of statements based on their content or social impact, such as hate speech, defamation or obscenity.

The three-part test described in Chapter 4 provides the standards by which to assess whether or not a content restriction is compatible with international law. To briefly recapitulate, limitations on freedom of expression must: 1) be provided by law, in sufficiently clear terms to make it foreseeable whether or not statements are permissible; 2) be directed at one of the following goals: ensuring respect of the rights or reputations of others, or protecting national security, public order, public health or public morals; and 3) be strictly necessary for the achievement of that goal, including that no suitable alternative measure exists which would be less harmful to freedom of expression.

These criteria are not always easy to apply. Especially when the exercise of free expression clashes with the rights of others or threatens the safety of the nation, legislators face a difficult exercise of drawing lines; is a restriction necessary and how far should it go? As James Madison, who framed the US Constitution's protection of freedom of expression, wrote, it is often prudent to permit some abuse of freedom of expression in order to ensure that legitimate use of the right is not discouraged:

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It … is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits.[145]

This Chapter provides an overview of the international standards which have been developed to guide the balancing act between free speech and other important social interests. We begin, however, by looking at the question of prior, as opposed to subsequent, application of restrictions, as well as the question of what type of law – for example, criminal, civil or administrative – is most appropriate for restrictions.

7.1. Prior censorship

Earlier in this Pocketbook (see sections 6.1.1 and 6.2.2), one of the main arguments advanced against licensing of journalists and publications was its indiscriminate nature: denial of a licence is tantamount to a ban on all future articles, without regard to their content. But what about a statement, whether written or audiovisual, which has already been completed but not yet made public? Should the authorities only impose sanctions after publication, where justified, or should they, in appropriate circumstances, be able to prevent its release?

Prior censorship poses special dangers to freedom of expression. If the authorities are able to suppress publications which nobody has seen, it becomes impossible for others to verify whether the suppression was indeed justified; it is a question of time before such an unchecked power is abused to prevent criticism of government. One partial solution is to make the authorities' decision subject to court appeal. But this creates a different problem; control by the authorities of the timing of the flow of information is a considerable power. Challenging a decision to censor information will be an expensive and slow process, which many may not even use. Furthermore, news is a perishable commodity, so that success in court after lengthy proceedings will often prove a pyrrhic victory.

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[145] Quoted in *Near v. Minnesota*, 283 U.S. 697, p. 718 (1931).

Because of the risk of abuse compared to sanctions after the fact, the *American Convention on Human Rights* prohibits prior censorship altogether, except to protect children. Article 13(2) of the ACHR states:

> The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship …

Nevertheless, some courts have been reluctant to rule prior restraints out categorically, mainly because the damage done by a publication may not in all cases be reparable through subsequent sanctions. This dilemma was posed starkly in one American case, after a magazine, *The Progressive,* had attempted to publish an article explaining in some detail how to construct a hydrogen bomb. The author and publisher argued that they were merely synthesising publicly available documents, with the purpose of raising awareness of the threat of nuclear weapons. The District Judge held:

> A mistake in ruling against The Progressive [will] curtail defendants' [right to freedom of expression] in a drastic and substantial fashion. [But a] mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.[146]

The case did not reach the US Supreme Court. In other disputes, however, the Supreme Court has repeatedly stated the following position: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[147] International bodies have echoed this point of view. In a report on the Republic of Korea, the UN Special Rapporteur on Freedom of Opinion and Expression stated that "any system of prior restraint on freedom of expression carries with it a heavy presumption of invalidity under international human rights

[146] *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

[147] For example, *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963).

law."[148] The European Court of Human Rights ruled that "the dangers inherent in prior restraints are such that they call for the most careful scrutiny".[149]

This last case involved the *ad hoc* application of prior restraint to a specific harmful expression – the authorities had gotten wind of the upcoming publication, and had applied to a court to prevent it. Systems of prior restraint whereby publications must be submitted to censors for clearance before being distributed can never be justified for the media, and have for some time now been unknown among democracies.[150]

The position in international law can be summarised as follows. Although the right to freedom of expression does not require an absolute ban on prior censorship, this should be a highly exceptional measure, taken only when a publication threatens grave harm, such as loss of life or serious harm to health, safety or the environment. An article deemed defamatory, blasphemous, obscene or overly critical of the government would rarely if ever meet this threshold. Moreover, a system whereby media content must be officially cleared before it can be released would be unacceptable; its harm to freedom of expression would plainly far outweigh the benefit to its goals.

7.2. Type of law used for content restrictions

Different States organise their laws in different ways, and content restrictions may be found in all sorts of laws, such as criminal, civil, administrative and so on. In principle, international law does not prescribe any particular type of law for content restrictions in the domestic legal system, although the first part of the three-part test (see section 4.2) does require such restrictions to be sufficiently accessible and clear.

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[148] *Report on the mission to the Republic of Korea of the Special Rapporteur on Freedom of Opinion and Expression*, UN Doc. E/CN.4/1996/39/Add.1, p. 8.

[149] *Observer and Guardian v. the United Kingdom*, 24 October 1991, Application No. 13585/88 (European Court of Human Rights), para. 60.

[150] Prior censorship of films and videos, however, is still practised in many countries. See, for example, *Wingrove v. United Kingdom*, 25 November 1996, Application No. 17419/90, in which prior restraints on videos in the UK were upheld by the European Court of Human Rights.

Furthermore, the right to freedom of expression requires that the least intrusive effective remedy be employed when restricting speech to protect overriding public or private interests. As a result, where a less intrusive type of law – for example the civil instead of the criminal law – will serve the desired interest effectively, it should be used.

While it is not necessarily prohibited, imposing content restrictions through media-specific laws is not a good practice. This is because content restrictions in media-specific laws usually overlap with, duplicate or even contradict provisions in laws of general application such as the civil code or the criminal code. The result is a confusing patchwork of laws which leaves journalists in doubt about their rights, or sends them an intimidating 'double warning'.

7.3. Defamation

All countries offer their subjects protection against defamatory statements – that is, unwarranted written or spoken attacks on an individual's reputation. There is little dispute that defamation laws can serve a legitimate purpose; indeed, the three-part test under international law recognises protecting "respect of the rights or reputations of others" as a valid grounds for restricting freedom of expression.

At the same time, in many countries, and notably in the Central Asian republics, defamation laws are so broad and are used so aggressively as to pose a serious obstacle to the open debate which underpins democracy.[151] Public figures and political bodies frequently launch criminal and civil defamation suits against critical journalists and opposition politicians, aiming to silence them through ostensibly legal means. Even when such suits are unsuccessful, the financial and emotional costs they exact can persuade the defendants and others to withdraw from their openly critical positions. As a result, instances of misgovernment and corruption

[151] The UN Human Rights Committee has criticised Kyrgyzstan's government for its "use of libel suits against journalists who criticize the Government," stating: "Such harassment is incompatible with the freedom of expression and of the press stipulated in Article 19 of the Covenant." See *Concluding observations of the Human Rights Committee: Kyrgyzstan*, 24 July 2000, UN Doc. CCPR/CO/69/KGZ, para. 20.

are no longer challenged and corrected, leading to a less prosperous, contented and internationally respected society.

A number of international standards relating to defamation law have been developed[152] which aim to ensure that reputations can be adequately protected without causing undue harm to freedom of expression. These are discussed below.

7.3.1. Criminal defamation

In the laws of all of the Central Asian republics,[153] defamation is defined both as a civil tort and a criminal offence. In other words, a person can either be sued for compensation by the affected person or be criminally prosecuted by the State for making an allegedly defamatory statement.[154]

Criminal defamation laws are especially problematic from the point of view of free expression. They can lead to the imposition of harsh sanctions, such as a prison sentence, suspension of the right to practise journalism (see section 6.1.3) or a hefty fine. Even if they are applied with moderation, criminal defamation laws still cast a long shadow: the possibility of being arrested by the police, held in detention and subjected to a criminal trial will be in the back of the mind of a journalist when he or she is deciding whether to expose, for example, a case of high-level corruption. This is not to say that defamation should not be discouraged; but in accordance with the necessity test, the means used to discourage it should be carefully targeted, to prevent the dampening of legitimate criticism.

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[152] ARTICLE 19 has synthesised the key standards into one publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London, 2000), which has received significant endorsement, including from the OAS, UN and OSCE Special Mandates. To access this document, see the link in note 30.

[153] See, for example, Arts. 127-128 of Kyrgyzstan's criminal code and Arts. 135-137 of Tajikistan's criminal code.

[154] The laws of some Central Asian republics, such as Kyrgyzstan, allow so called 'private prosecutions' to take place – individuals can launch a defamation suit without the assistance of the State prosecutor. This is nevertheless a form of criminal, rather than civil defamation.

International bodies such as the UN and the OSCE have recognised the threat posed by criminal defamation laws and have recommended that they should be abolished. For example, the OSCE Parliamentary Assembly has called for the abolition of all laws that provide criminal penalties for the defamation of public figures or which penalise defamation of the State or State organs.[155] The UN, OSCE and OAS Special Mandates have gone even further, stating: "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."[156] The UN Human Rights Committee has several times expressed its concern over the misuse of criminal defamation laws in concrete cases, recommending a thorough reform in countries as wide-ranging as Azerbaijan,[157] Norway[158] and Cameroon.[159]

By contrast, the European Court of Human Rights has declined to rule that criminal defamation laws are by definition a violation of the right to freedom of expression. At the same time, it has never upheld a prison sentence or other serious sanctions applied under such a law. In *Castells v. Spain,* the Court held:

> [T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.[160]

An important factor in the Court's decision was the volatile situation obtaining in Spain at the time of the applicant's conviction for libel.

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[155] Warsaw Declaration of the OSCE Parliamentary Assembly, 8 July 1997, para. 140.

[156] Joint Declaration of 10 December 2002. To access this document, see the link in note 30.

[157] *Concluding observations of the Human Rights Committee: Azerbaijan*, UN Doc. CCPR/CO/73/AZE, 12 November 2001.

[158] *Concluding Observations of the Human Rights Committee: Norway,* UN Doc. CCPR/C/79/Add.112, 1 November 1999.

[159] *Concluding observations of the Human Rights Committee: Cameroon*, UN Doc. CPR/C/79/Add.116, 4 November 1999.

[160] *Castells v. Spain*, 23 April 1992, Application No. 11798 (European Court of Human Rights), para. 46.

Castells had published an article suggesting that the government was behind the killings of separatist Basque dissident; the purpose of his conviction had been to safeguard public order as much as to protect the government's reputation. The Court found that States are permitted "to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith."[161] It may be noted that the Court stressed the role of the criminal law in guaranteeing public order; this is quite a different interest than protecting reputations.

ARTICLE 19 argues that all criminal defamation laws breach the guarantee of freedom of expression.[162] However, in recognition of the fact that many countries do have criminal defamation laws which are unlikely to be repealed in the very near future, it has suggested interim measures to attenuate their impact until they are abolished:

i. no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;

ii. the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;

iii. public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;

iv. prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form

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[161] *Id*.

[162] See note 152, Principle 4(a).

> of media, or to practise journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.[163]

7.3.2. Civil defamation

Because they do not involve the State's criminal justice machinery, civil defamation laws may exert less of a chilling effect on freedom of expression than their criminal counterparts. This will only be the case, however, if the law is formulated in a way which insulates it against abuse by the government, ensures that those sued for defamation are able to mount a proper defence, and sets reasonable limits to the amount of compensation that may be awarded.

7.3.2.1. Public bodies and public officials

Vigorous debate about the functioning of public officials and the government lies at the heart of democracy. To ensure that this debate is pursued freely, uninhibited by fear of litigation, international courts have consistently held that public bodies and officials should tolerate a wider degree of criticism than ordinary citizens.

Public bodies

Several established democracies do not allow public bodies to sue for defamation under any circumstances, both because of the danger to freedom of expression and because public bodies are not seen as having a "reputation" entitled to protection. As abstract entities without a profit motive, they lack an emotional or financial interest in preventing damage to their good name. Moreover, it is improper for government to spend public money on defamation suits to defend its own reputation.

In the United States, "no court of last resort … has ever held, or even suggested, that prosecutions for libel on government have any place in

[163] *Id.*, Principle 4(b).

the American system of jurisprudence."[164] The Indian Supreme Court has held that "the Government, local authority and other organs and institutions exercising power" are not entitled to sue for defamation.[165] Other countries have extended this prohibition to State-owned companies. The Zimbabwean Supreme Court threw out a claim by the Post and Telecommunications Company,[166] following an example set by the South African Supreme Court of Appeal, *Die Spoorbond v. South African Railways*,[167] in which that Court ruled that the national railway could not sue a newspaper for defamation.

The European Court of Human Rights has not imposed a blanket ban on defamation claims by public bodies, but has held; "The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician."[168] The UN Human Rights Committee and the OSCE Parliamentary Assembly have recommended the abolition of laws criminalising defamation of the State.[169]

Public officials

Public officials occupy an intermediary position: they are subject to a wider margin of criticism than ordinary members of the public but, in contrast to public bodies, they are entitled to sue when defamed in their private capacity. In general, the more senior the public servant, the more criticism he or she may be expected to tolerate, with politicians at the top of the scale.

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[164] *New York Times v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964), quoting *City of Chicago v. Tribune Co.*, 307 Ill. 595, 601, 139 N. E. 86, 88 (1923).

[165] *Rajagopal v. State of Tamil Nadu*, 6 S.C.C. 632 (1994).

[166] *Posts and Telecommunications Corporation v. Modus Publications (Private) Ltd.* (1997), Judgment No S.C. 199/97.

[167] *Die Spoorbond v South African Railways*, 1946 AD 999.

[168] See, for example, *Incal v. Turkey*, 9 June 1998, Application No. 22678/93 (European Court of Human Rights), para 54.

[169] See, for example, *Concluding observations of the Human Rights Committee: Mexico*, 27 July 1999, UN Doc. No. CCPR/C/79/Add.109, para. 14; Warsaw Declaration of the OSCE Parliamentary Assembly, 8 July 1997, para. 140.

In the leading case of *Lingens v. Austria,* the European Court of Human Rights explained the rationale for permitting harsh criticism of public officials. The case revolved around the conviction for criminal defamation of a journalist who had published two articles in which he accused the Austrian Chancellor, Bruno Kreisky, of protecting former Nazi SS officers for political reasons. Observing that it is detrimental to democracy to allow politicians to sue the media in defamation as a way of suppressing criticism, the Court held:

> 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 he must consequently display a greater degree of tolerance.[170]

This reasoning has been followed by other human rights bodies.[171]

In a case with a comparable fact pattern, the European Court confirmed that politicians must tolerate harsh words as well as harsh criticism. After Jörg Heider, leader of the Austrian Freedom Party, had delivered a speech praising Austrian soldiers who had fought in the Wehrmacht and SS during the Second World War, a newspaper ran an article under the title "P.S.: 'idiot,' not 'Nazi'." The Court found that the use of the word 'idiot' to describe Heider did not overstep the boundaries of what should be permissible in a democracy.[172]

In other cases, the Court made it clear that the wider margin of criticism applies to all public officials, not only politicians.[173]

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[170] *Lingens v. Austria*, 24 June 1986, Application No. 9815/82 (European Court of Human Rights), para. 42.

[171] See, for example, *Canese v. Paraguay*, 31 August 2004, Series C 111 (Inter-American Court of Human Rights) and *Bodrožić v. Serbia and Montenegro*, 23 January 2006, Communication No. 1180/2003, UN Doc. CCPR/C/85/D/1180/2003, para. 7.2 (UN Human Rights Committee).

[172] See, for example, *Oberschlick v. Austria (No.2)*, 1 July 1997, Application No. 20834/92, para. 35. See also *Dichand and others v. Austria*, 25 February 2002, Application No. 29271/95 (European Court of Human Rights).

[173] See, for example, *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, para. 47.

7.3.2.2. Defences

A strong system of legal defences which can be invoked against a defamation claim is essential if defamation laws are not unreasonably to restrict the free flow of information and ideas. The five defences noted below – drawn from international and comparative jurisprudence – are of particular importance.

Defence of the truth - burden of proof

Proof of truth should be a complete defence to an allegation of defamation.[174] The law of defamation should serve to protect individuals against *unwarranted* attacks on their reputation, rather than to protect their honour regardless of whether their good reputation is deserved. At the same time, an individual confronted with truthful revelations about his or her private life may have a separate claim for invasion of privacy (see section 7.6 below).

In ordinary cases, it is reasonable to expect the defendant to demonstrate the truthfulness of the statement. However, in cases involving matters of public interest, such as a claim by a public official, the burden of proof should be reversed and the plaintiff required to demonstrate the falsehood of the statement. The importance of enabling debate on matters of public interest justifies placing a heavier burden on the plaintiff. As the US Supreme Court stated: "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[175] Instead, it should be sufficient to show that the statement was correct in its essential elements.

Statements of opinion vs. statements of fact

No one should be found liable for a statement of opinion, that is, a statement which cannot be shown to be true or false or which is clearly not intended as a statement of fact (for example because it is rhetoric, satire or

[174] *Castells v. Spain*, note 160.

[175] *New York Times Co. v. Sullivan*, 376 US 254, 279 (1964).

simply a joke).[176] An opinion cannot be considered an *unwarranted* attack on someone's reputation, since it can by definition not be proven true or false.[177] Furthermore, it may be noted that international law provides absolute protection to the holding of opinions. It is not for the authorities to determine whether or not a subjective viewpoint should be deemed appropriate.

Defence of 'reasonable publication'

Even where a statement of fact on a matter of public concern has been shown to be false, defamation defendants should benefit from a defence of 'reasonable publication'. This defence applies, as its name suggests, if it was reasonable for a person in the position of the defendant to have disseminated the material in the manner and form he or she did. A rule of this type is necessary to protect the ability of the media to carry out their task of informing the public effectively. When an important news story is developing, journalists cannot always wait until they are completely sure that every fact made available to them is correct before publishing or broadcasting the story. Even the best journalists make honest mistakes; to leave them open to punishment for every false allegation would make their work very risky and so discourage them from providing the public with timely information. A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably and taken whatever steps were reasonably possible to check their facts, while allowing plaintiffs to sue those who have not. For the media, acting in accordance with accepted professional standards (for example, those defined in a code of conduct) should normally satisfy the reasonableness test.[178]

[176] See, for example, *Oberschlick v. Austria (No. 1)*, 23 May 1991, Application No. 11662/85 (European Court of Human Rights), para. 63.

[177] *Unabhängige Initiative Informationsvielfalt v. Austria*, 26 February 2002, Application No. 28525/95 (European Court of Human Rights), para. 39.

[178] For example, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93 (European Court of Human Rights), para. 65.

Absolute and qualified privileges

There are certain forums in which the ability to speak freely is so vital that statements made there should never lead to liability for defamation. Such an absolute privilege should apply, for example, to statements made during judicial proceedings, statements before elected bodies and fair and accurate reports on such statements.[179] Certain other types of statements should enjoy a qualified privilege; that is, they should be exempt from liability unless they can be shown to have been made with malice. This latter category should include statements which the speaker is under a legal, moral or social duty to make, such as reporting a suspected crime to the police. In such cases, the public interest in the statements being made is deemed to outweigh any private reputation interest in suppressing the statements.

Words of others

Finally, journalists should not be held liable for reporting or reproducing the statements of others, so long as these statements have news value and the journalist refrains from endorsing them. The European Court has underlined the need for such an exemption:

> Punishment of a journalist for assisting in the dissemination of statements made by another person … would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.
>
> …
>
> A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press' role of providing information on current events, opinions and ideas.[180]

[179] See, for example, *A v. the United Kingdom*, 17 December 2002, Application No. 35373/97 (European Court of Human Rights).

[180] See note 173, paras. 62-64.

The applicant in this case was a radio journalist who had been found liable after quoting from a newspaper article which alleged that of all the forestry officials in Luxembourg only one was not corrupt. The Court, in finding that the applicant's right to free expression had been unjustly infringed, also took into account that the applicant had consistently taken the precaution of mentioning that he was beginning a quotation and of citing the author, and that in addition he had described the entire article as "strongly worded". He had also asked a third party, a woodlands owner, whether he thought that the allegations were true.

7.3.2.3. Remedies

Like any restriction on freedom of expression, sanctions for defamatory statements must be 'necessary', that is, they should be proportionate so that their footprint on the right does not go beyond what is needed. It is the responsibility of the authorities to establish a regime of remedies for defamatory statements which, while redressing the harm to reputation, does not exert a chilling effect on legitimate statements. Traditionally, the ordinary remedy for defamation has been financial compensation, but in several countries a culture of excessive awards has had a negative effect on the free flow of information. A variety of less intrusive but still effective alternative remedies exist, such as a court order to issue an apology or correction, or to publish the judgment finding the statements to be defamatory. Such alternative remedies are more speech-friendly and should be prioritised. Where monetary awards are necessary to redress financial harm, the law should specify clear criteria for determining the size of awards.

As noted in section 7.3.1 above, international bodies have taken a very dim view of imprisonment as a sanction for defamation. The European Court of Human Rights has never upheld a sentence of imprisonment, while in its 1994 annual report the Human Rights Committee criticised Iceland for maintaining the possibility of custodial sanctions for defamation, even though this had apparently not been applied in practice. The HRC similarly noted its concerns in this regard in relation to Norway and

Jordan.[181] In relation to Kyrgyzstan, the Committee commented, in 2000: "Journalists and human rights activists subjected to imprisonment in contravention of articles 9 and 19 of the Covenant should be released, rehabilitated and given compensation."[182] In its 1998 annual resolution, the UN Commission on Human Rights expressed its concern at "the extensive occurrence of detention, long-term detention ... persecution and harassment, including through the abuse of legal provisions on criminal libel … directed at persons who exercise the right to freedom of opinion and expression."[183]

7.4. National security

Under international law, the State is burdened with the duty to serve as the guarantor of human rights; indeed, one could see this as on aspect of States' *raison d'être*. It is only logical that when a situation arises which threatens the continued existence of the State, and thereby of the human rights of the entire population, international law permits certain proportionate measures to counter that threat. This includes restrictions on freedom of expression, such as a prohibition on divulging troop movements, revealing military encryption codes or inciting desertion. All the international instruments which guarantee the right to freedom of expression also recognise national security as a legitimate ground for limiting that right.

National security has, however, along with defamation, long been one of the preferred legal tools by which governments around the world, including democratic ones, illegitimately suppress the free flow of information and ideas. Very often, national security restrictions are impermissibly vague or respond to statements which pose only a hypothetical risk of harm, making them ideal instruments of abuse to

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[181] Annual General Assembly Report of the Human Rights Committee, 21 September 1994, Volume I, UN Doc. A/49/40, paras. 78, 91 and 236.

[182] *Concluding observations of the Human Rights Committee: Kyrgyzstan*, 24 July 2000, UN Doc. CCPR/CO/69/KGZ.

[183] UN Commission on Human Rights, Resolution 1998/42, 17 April 1998, UN Doc. E/CN.4/RES/1998/42. See also Resolution 2005/38, 19April 2005, UN Doc. E/CN.4/2005/L.10/Add.11.

prevent the airing of unpopular ideas or criticism of government. Such problematic restrictions are found in several laws in the Central Asian republics. Kazakhstan's *Law on Mass Media,* for example, prohibits using the mass media for "infringement of the integrity of the Republic of Kazakhstan [and] detriment to national security."[184]

The shroud of secrecy that – sometimes justifiably – surrounds national security matters allows government to exaggerate risks and stoke fear amongst the population, leading to a situation where security claims are accepted even though they are completely unwarranted. As one observer put it: "History is replete with examples of government efforts to suppress speech on the grounds that emergency measures are necessary for survival that in retrospect appear panicky, disingenuous, or silly."[185]

To combat these problems, increasingly rigorous international standards have been developed to judge whether restrictions based on national security comply with the three-part test.

7.4.1. Defining 'national security'

No clear definition of what constitutes 'national security' has emerged from international jurisprudence. The Human Rights Committee has at least made it clear that suppression of democratic discourse and human rights cannot be justified on the grounds of national security:

> [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.[186]

International courts have however generally quickly accepted governments' claims that restrictions on freedom of expression were

[184] Article 2(3).

[185] Rodney Smolla, *Free Speech in an Open Society* (New York: Knopf, 1992), p. 319.

[186] *Mukong v. Cameroon*, note 63, para. 9.7.

in fact directed at the protection of national security. Instead, they have focused their attention on whether the restrictions at issue were necessary. In the *Observer and Guardian v. United Kingdom,* for example, the European Court of Human Rights did not question whether a British ban on the memoirs of a former secret agent served a national security goal, even though the book had already been published and widely circulated in Australia and the USA. Instead, the Court found that the ban failed the necessity test since any possible harm to national security had already become irreversible due to prior publication.[187]

The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities has attempted to fill this analytical void in its *Siracusa Principles*.[188] Principle B(iv) defines when a restriction can be said to serve national security:

> National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.
>
> National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.
>
> National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse….

According to this definition, restrictions on the basis of national security are only justifiable if they address a threat to the "existence of the nation or its territorial integrity or political independence," as distinct from localised violence and ordinary criminal activities.

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[187] *Observer and Guardian v. United Kingdom*, 26 November 1991, Application No. 13585/88 (European Court of Human Rights), paras. 56-71.

[188] *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984). Available for download at http://www1.umn.edu/humanrts/instree/siracusaprinciples.html.

7.4.2. Necessity of restrictions

As noted above, international courts have tended to examine national security claims under the 'necessity' test (see section 4.4). Two key principles that follow from their decisions, as well as from other international sources, are that statements may only be prohibited if 1) they were made with *intent* to cause harm to national security, and 2) there is a *clear nexus* between the statement and the likelihood of this harm occurring.

7.4.2.1. Intent requirement

The requirement of intent seeks to draw a line between legitimate political debate on matters of national security and incitement to illegal action. The right to freedom of expression covers all kinds of ideas, including separatist or revolutionary sentiments (see section 2.2.3). Citizens should be permitted to introduce any views they hold into the marketplace of ideas and promote them through peaceful means, so that others can form their own opinion about them. On the other hand, when the speaker intends to spur others on to concrete acts against national security, it might be considered 'necessary in a democratic society' to limit his or her freedom of expression.

The European Court of Human Rights has consistently emphasised that intent is a crucial factor to be taken into consideration in judging the legitimacy of a restriction on the grounds of national security. For example, in *Sener v. Turkey,* the applicant had published a critical article about Turkey's policy towards its Kurdish minority, and referred to the South-eastern part of the country as "Kurdistan". The Court observed that:

> [A]lthough certain phrases seem aggressive in tone … the article taken as a whole does not glorify violence. Nor does it incite people to hatred, revenge, recrimination or armed resistance. … In the Court's view these are the essential factors which should be considered. … Furthermore, the Court observes that the applicant was convicted … for disseminating separatist propaganda by referring to a particular region of Turkey as "Kurdistan" and alleging that the population of Kurdish origin living in that region

> was subjected to oppression. In this regard, the Court considers that the domestic authorities … failed to give sufficient weight to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them.[189]

Domestic courts have also imposed a requirement of intent. In India, the Supreme Court set aside a detention order for an individual who had called for a "Gujarat type of agitation," by which he referred to a protest against price increases in the west of India that had turned violent, and eventually caused the dissolution of the State legislature. The Court emphasised the need to not confuse "what happened in fact and what was *intended* to happen" (emphasis added), concluding that the various interpretations could be given to Bahadur's statement, and that he had not necessarily intended for violence to occur.[190] The US Supreme Court similarly held that the State could prohibit advocacy of the use of force only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[191]

The intent requirement further serves to shield speakers from responsibility for unintended responses on the part of their listeners. A speaker who makes comments with grossly reckless disregard for their consequences can, however, be considered to possess the requisite intent.

7.4.2.2. Nexus requirement

The second requirement – that there be a clear nexus between the statement and the likelihood of harm occurring – serves to emphasise that States should not take a 'better safe than sorry'-approach to restricting freedom of expression. Granting governments the discretion to restrict expression based on an unsure or remote risk of harm would create a

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[189] *Sener v. Turkey*, 18 July 2000, Application No. 26680/95 (European Court of Human Rights), paras. 45-46.

[190] *Ram Bahadur v. State of Bihar*, [1975] AIR 223; [1975] SCR (2) 732, 738.

[191] *Brandenburg v.* Ohio, 395 U.S. 444 at 447 (1969).

great opportunity for abuse, and endanger democratic debate about some of the most important and contentious political issues. Moreover, national security can benefit from a situation where individuals with controversial and radical opinions are permitted to express themselves within the framework of the law. This point was stressed by the Israeli Supreme Court:

> A democracy must sometimes fight with one arm tied behind her back. Even so, democracy has the upper hand. The rule of law and individual liberties constitute an important aspect of her security stance. At the end of the day, they strengthen her spirit, and this strength allows her to overcome her difficulties.[192]

The nexus requirement is a consistent feature of the decisions rendered by the ECHR and other international courts in national security cases. Whether a clear nexus exists between the prohibited expression and the occurrence of violence depends, necessarily, on the specific circumstances of each case. For example, in *Karataş v. Turkey,*[193] the European Court took note of the "the sensitivity of the security situation in south-east Turkey" and the "need for the authorities to be alert to acts capable of fuelling additional violence." Nevertheless, it found that poetry which was arguably intended to incite violent acts should have been permitted, because it was unlikely to have that effect in practice:

> The work in issue contained poems which, through the frequent use of pathos and metaphors, called for self-sacrifice for "Kurdistan" and included some particularly aggressive passages directed at the Turkish authorities. Taken literally, the poems might be construed as inciting readers to hatred, revolt and the use of violence. In deciding whether they in fact did so, it must nevertheless be borne in mind that the medium used by the applicant was poetry, a form of artistic expression that appeals to only a minority of readers.
>
> …

[192] *Beit Sourik Village Council v. The Government of Israel*, 30 June 2004, HCJ 2056/04 (Supreme Court of Israel).

[193] 8 July 1999, Application No. 23168/94 (European Court of Human Rights).

> [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.[194]

By contrast, after the former mayor of Diyarbakır had stated in a daily national newspaper interview: "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake," the Court ruled in favour of the Turkish authorities. In the context in which the remark was made, the Court found there was a great likelihood of further violence resulting:

> The statement cannot … be looked at in isolation. It had a special significance in the circumstances of the case, as the applicant must have realised. … [T]he interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time.
>
> In those circumstances the support given to the PKK – described as a "national liberation movement" – by the former mayor of Diyarbakır, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region.[195]

The UN Human Rights Committee also requires a close nexus between a prohibited expression and the occurrence of actual harm. The case of *Keun-Tae Kim v. Republic of Korea* concerned a founding member of the National Coalition for Democratic Movement, who had distributed and read out documents to an audience of 4000, criticising the government and its foreign allies and appealing for reunification with North Korea (the DPRK). He was found guilty of offences under the National Security

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[194] *Id.,* paras. 49-52.

[195] *Zana v. Turkey*, 25 November 1997, Application No. 18954/91 (European Court of Human Rights), paras. 59-60.

Law for having distributed materials which coincided with the views of an 'anti-State organization,' namely the DPRK. The HRC found it was,

> not clear how the (undefined) 'benefit' that might arise for the DPRK from the publication of views similar to their own created a risk to national security, nor is it clear what was the nature and extent of any such risk. There is no indication that the courts, at any level, addressed those questions or considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten public security, the protection of which would justify restriction within the terms of the Covenant as being necessary.[196]

The *Johannesburg Principles,* developed in 1995 by a group of around 36 experts in an effort to provide helpful standards in the area of national security, summarise the 'intent' and 'nexus' requirements as follows:

> Subject to Principles 15 and 16 [which further limit restrictions], 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;
>
> (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.[197]

The Johannesburg Principles have no formal legal force but they have frequently been cited by the UN Commission on Human Rights and domestic courts.

7.4.3. Emergency derogations

It is recognised in international law that during acute emergencies, States

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[196] *Keun-Tae Kim v. Korea*, Communication No 574/1994, UN Doc. CCPR/C/64/D/574/1994 (4 January 1999), para 12.4.

[197] *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1 October 1995, UN Doc. E/CN.4/1996/39 (1996), Principle 6. To access the Principles online, see the link in note 32.

may be unable to perform the careful balancing act normally required to justify a restriction on freedom of expression. Article 4 of the ICCPR allows States Parties to temporarily suspend some of their obligations under the Covenant, including Article 19:

> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
>
> …
>
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 4 places a number of conditions on the imposition of emergency derogations. To summarise the main points:

- Derogations may only be made in times of emergency which "threaten the life of the nation";
- Derogations must be officially proclaimed;
- Derogations may only limit rights to the extent strictly required and may never be applied in a discriminatory way;
- States imposing derogations must inform other States Parties through the UN Secretary-General of the rights to be limited and the reasons for such limitation; and

- Derogating States must inform other States Parties of the termination of any derogations.

The case-law of the Human Rights Committee indicates a great reluctance to recognise the legitimacy of states of emergency which are declared in peacetime.[198] As the HRC noted in its General Comment on Article 4:

> If States parties consider invoking Article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.[199]

The HRC also stressed that the application of emergency laws derogating from rights must be of an exceptional nature and limited in time.[200]

7.5. Hate speech

Hate speech – the advocacy of hatred based on nationality, race or religion – occupies an exceptional position in international law. Generally speaking, the right to freedom of expression extends to unpopular ideas and statements which "shock, offend or disturb."[201] Nevertheless, a number of human rights treaties, including the ICCPR, not only permit States to prohibit hate speech but actually require them to do so. In addition, one particular form of hate speech – incitement to genocide – is one of only a few types of acts recognised as a crime under international law, akin to war crimes and crimes against humanity.

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[198] See, for example, *Ramirez v. Uruguay*, Communication No. R. 1/4, UN Doc. Supp. No. 40 (A/34/40) at 121, UN Doc. CCPR/C/OP/1 at 49 (13 February 1977), *Silva v. Uruguay*, Communication No. 4/1977, UN Doc. CCPR/C/.12/D/34/1978 (23 July 1980) and *Montejo v. Colombia*, Communication No. 64/1979, UN Doc. CCPR/C/OP/1 at 127 (24 March 1982).

[199] General Comment No. 29: States of Emergency (Article 4), 24 July 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, para. 3.

[200] *Id.*, para. 2.

[201] See, for example, *Otto-Preminger-Institut v. Austria*, 20 September 1994, Application No. 13470/87 (European Court of Human Rights), para. 49.

7.5.1. Incitement to genocide

In the wake of the Second World War, the Nuremberg Tribunal was established to try those most responsible for the atrocities committed by the Nazi regime. In its judgment in the case against Julius Streicher, the Tribunal effectively held that incitement to genocide is a crime under international law, punishable even if the act in question was at the relevant time and place not illegal under the local law. Streicher had been the publisher of the viciously anti-Semitic newspaper *Der Stürmer,* which had energetically encouraged the German people to persecute and exterminate Jews. Although the legitimacy of the Nuremberg Tribunal has often been debated on the grounds that it applied 'new' law retrospectively, the principles it established are today generally recognised both in customary law and in a number of international instruments.[202]

More recently, the crime of "direct and public incitement to genocide" has been one of the key charges laid against defendants in the International Criminal Tribunal for Rwanda, established by the UN in 1994 in response to the genocide of the country's Tutsi minority. In its jurisprudence, the Tribunal has elaborated somewhat on the definition of the crime. In *The Prosecutor v. Nahimana, Barayagwiza, & Ngeze,*[203] it stated that the defendant's intent must be established, and that "[t]he actual language used in the media has often been cited as an indicator of intent." However, it is not necessary to show "any specific causation … linking the expression at issue with the demonstration of a direct effect."[204]

Incitement to genocide is also a crime under the Statute of the newly-established International Criminal Court.[205]

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[202] For example, the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, UN GA Res. 260A (III), which defines the crime of "direct and public incitement to genocide" in Article 3(c).

[203] *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgment of 3 December 2003.

[204] *Id.*, paras. 86-90.

[205] Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002, UN Doc. A/CONF.183/9 (1998), Article 25(3)(e).

7.5.2. Duty to prohibit hate speech in domestic law

The inherent dignity and equality of every individual is the foundational axiom of international human rights. It is, therefore, perhaps not surprising that international law condemns statements which deny the equality of all human beings. Article 20(2) of the ICCPR requires States to prohibit hate speech:

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

There is little debate internationally that restrictions on hate speech can be justified. Nevertheless, Article 20(2) has proven highly controversial and is variously criticised as being overly restrictive of free speech or as not going far enough in the categories of hatred it covers. Article 20(2) does not require States to prohibit all negative statements towards national groups, races or religions but, as soon as a statement "constitutes incitement to discrimination, hostility or violence," it must be banned. Some States, notably the USA, have taken the view that only incitement which is intended to cause *imminent violence* justifies restricting such a fundamental right. One important motivation underlying this position is the fear that a broader ban on inciting "discrimination or hostility" will be abused by governments or will discourage citizens from engaging in legitimate democratic debate, for example on questions regarding religion and minorities. Owing to such concerns, several established democracies, including Belgium, Denmark, Finland, Iceland and the USA, have entered reservations to Article 20(2).

The UN Human Rights Committee has stated that there is no contradiction between that the duty to adopt domestic legislation under Article 20(2) and the right to freedom of expression:

> In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities.[206]

[206] General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Article 20), 29 July 1983, U.N. Doc. HRI/GEN/1/Rev.6 at 133, para. 2.

At the same time, the HRC has stressed that "restrictions on expression which may fall within the scope of article 20 must also be permissible under article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible."[207] In other words, domestic laws adopted pursuant to Article 20(2) must, like all restrictions on freedom of expression, meet the three-part test.

The HRC has dealt with a number of cases in the area of hate speech. In *J.R.T. and the W.G. Party v. Canada,*[208] the applicant complained that a Canadian court order forbidding him from operating an anti-Semitic telephone service violated his right to freedom of expression. The service allowed members of the public to dial in and listen to tape-recorded messages warning them, for example, of "the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles." The HRC found the application inadmissible, principally because "the opinions which [the applicant] seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the Covenant to prohibit."[209]

The *case of Faurisson v. France*[210] concerned a historian who had been convicted and fined under France's *Gayssot Act,* which, briefly put, makes it an offence to challenge the conclusions and the verdict of the Nuremberg Tribunal. Faurisson's conviction was based on his statement in a magazine interview that: "I have excellent reasons not to believe in the policy of extermination of Jews or in the magic gas chambers ... I wish to see that 100 per cent of the French citizens realize that the myth of the gas chambers is a dishonest fabrication." The Committee did not analyse whether the *Gayssot Act* as such was justified on the basis of Article 20(2)

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[207] *Ross v. Canada*, Communication No. 736/1997, 1 May 1996, UN Doc. CCPR/C/70/D/736/1997, para 10.6.

[208] *J.R.T. and the W.G. Party v. Canada*, Communication No. 104/1981, 6 April 1983, UN Doc. CCPR/C/OP/1.

[209] *Id.*, para. 8(b).

[210] *Faurisson v. France*, Communication No. 550/1993, 8 November 1986, UN Doc. CCPR/C/58/D/550/1993.

but, in line with its mandate, examined only whether the conviction of Mr. Faurisson had been consistent with the three-part test of Article 19(3). It considered that the conviction was based on a sufficiently clear law – the *Gayssot Act* – which served a legitimate purpose, namely to protect the rights of others, in this case the right of the Jewish community to live free from an atmosphere of anti-Semitism. The Committee also accepted that the conviction had been 'necessary', since information made available to the HRC indicated that denial of the existence of the Holocaust had become a principal vehicle for anti-Semitism in France. Faurisson's right to freedom of expression had consequently not been violated. The HRC did note, however, that application of the *Gayssot Act* "may lead, under different conditions than the facts of the instant case" to a violation of Article 19.[211] Indeed, free speech advocates have often criticised the *Gayssot Act* and other 'holocaust denial' laws as being illegitimate or counterproductive.

The Human Rights Committee has so far never dealt with a communication complaining of a failure to implement the domestic hate speech legislation required by Article 20(2).

Besides the ICCPR, a number of other international instruments have a bearing on hate speech. Of particular relevance is the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), to which all of the Central Asian republics are parties. Article 4 of CERD goes substantially further than Article 20(2) of the ICCPR and requires States Parties, among other things, to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred [and] incitement to racial discrimination." In contrast to the ICCPR, CERD requires the prohibition of racist speech even if it does not constitute incitement to discrimination, hostility or violence.

The effect of Article 4 appears to be tempered a bit by its opening paragraph, which states that in adopting measures to implement its provisions, States should have "due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly

[211] *Id.*, para. 9.3.

set forth in article 5 of this Convention," which include freedom of expression. Inevitably, however, these two requirements – to prohibit all racist speech and to respect the right to freedom of expression as recognised under international law – are considered by many to be in direct contradiction with one another. The international community is divided on the issue: several States Parties to CERD – including Australia, Austria, Belgium, France, Italy, Malta, Monaco, Switzerland, the United Kingdom and the United States – have entered reservations to Article 4 or declared that they will interpret it in a particular way.

Even members of the UN Committee on the Elimination of Racial Discrimination, which supervises the implementation of CERD in a similar manner as the HRC oversees the ICCPR, have trouble agreeing on the meaning of Article 4. In a report to the Committee, the Danish government described a case where a journalist had been convicted of hate speech by a Danish court after he included racist statements made by disaffected youths in a television programme. Whilst some members welcomed it as "the clearest statement yet, in any country, that the right to protection against racial discrimination took precedence over the right to freedom of expression", other members considered that "in such cases the facts needed to be considered in relation to both rights."[212] The journalist concerned subsequently appealed to the European Court of Human Rights.[213] The ECHR held that his conviction constituted an infringement of the right to freedom of expression, on the basis that the broadcast had clearly been designed to expose and analyse the attitude of racist youths, not to promote their point of view. It was a serious programme, intended for a well-informed audience, and made a valuable contribution to public debate.[214]

In a 2001 Joint Statement, the UN, OSCE and OAS Special Mandates on the right to freedom of expression set out a number of conditions which hate speech laws should respect:

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[212] Report of the Committee on the Elimination of Racial Discrimination to the General Assembly, Official Records, Forty-Fifth Session, Supplement No. 18 (A/45/18), p. 21, para. 56.

[213] *Jersild v. Denmark*, 23 September 1994, Application No. 15890/89 (European Court of Human Rights).

[214] *Id.*, paras. 33-35.

- 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.[215]

These provide a good basis for assessing the legitimacy of any particular hate speech law.

7.6. Privacy

It is well recognised in international law that every individual is entitled to a certain amount of immunity from invasion of his or her private space. Article 17(1) of the ICCPR states:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

The right to privacy is primarily directed at the authorities: absent a weighty justification, they may not, for example, undertake a house search, intercept someone's communications or disclose private facts. But it is not only the State which presents a danger to the privacy of citizens: particularly in countries where the media are free and must continually compete with one another for market share, increasingly unscrupulous means are often employed in the hunt for a best-selling story, and celebrities and others thrust into the public eye find themselves under constant surveillance by photographers armed with telezoom lens cameras.

[215] Joint Statement of 27 February 2001. This document can be downloaded at http://tinyurl.com/alg7l.

Defamation laws provide only partial protection against aggressive reporting techniques. As will be recalled from section 7.3, the purpose of a well-crafted defamation law is to provide a remedy against false statements which cause damage to a *reputation.* News stories gained through intrusion into someone's private life may of course be true, and even when they are fabrications, they need not necessarily be harmful to the subject's reputation. The European Court of Human Rights has hinted that States may be required to adopt legislation specifically protecting individuals from invasion of their privacy by fellow citizens:

> The Court reiterates that although the object of Article 8 [on the right to privacy] is essentially that of protecting the individual against arbitrary interference by the public authorities … there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.[216]

The applicant in that case was Princess Caroline of Monaco, who complained that she was constantly harassed by the tabloid press, which published photos of her going about her ordinary daily activities. The domestic courts in Germany had only allowed the Princess to prevent the publication of photos taken in secluded places, out of the public eye. The ECHR held that in the age of telezoom lenses, "the criterion of spatial isolation … is in reality too vague and difficult for the person concerned to determine in advance".

Privacy laws signal, by definition, a decision to limit the right to freedom of expression in favour of another human right, the right to a private life. Neither of the two rights is hierarchically superior to the other, and which one will prevail in a given situation should depend on the circumstances of the case. In *Von Hannover v. Germany,* the ECHR identified a number of factors to be taken into account. It attached the greatest weight to whether the material in dispute related to a matter of legitimate public concern:

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[216] *Von Hannover v. Germany,* 24 June 2004, Application No. 59320/00 (European Court of Human Rights), para. 57.

> [T]he decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest.[217]

Permitting governments to decide what matters fall within the "general interest" is clearly not without risks. On one view, any subject which is capable of drawing the attention of a large section of the public should be considered a "debate of general interest." But the ECHR rejects the theory that 'everything of interest to the public is in the public interest':

> [T]he Court considers that the publication of the photos and articles … of which the sole purpose [is] to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public.[218]

The private life of public figures may sometimes be off-limits to the media. Politicians, however, occupy a special position: facts which have a significant bearing on their ability to govern the country or suitability for public office, such as their physical or mental health, are clearly of legitimate concern to voters, even if they would normally fall within the private sphere. Moreover, by choosing a profession where success depends on public opinion, they have knowingly and willing laid themselves open to scrutiny by the media. The European Court of Human Rights confirmed that, as with defamatory statements (see section 7.3.2.1), politicians must display more tolerance towards media intrusion in their private lives than ordinary citizens:

> 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 … does not exercise official functions. While in the former case the press exercises its vital role of

[217] *Id.*, para. 76.

[218] *Id.*, para. 64.

> "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest" … it does not do so in the latter case…
>
> [T]he public has a right to be informed, which is an essential right in a democratic society that, in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned…[219]

Another source of authority on the proper delineation of the right to privacy and the right to freedom of expression is Resolution (74) 26 of the Committee of Ministers of the Council of Europe.[220] The Resolution states that an individual should have an effective remedy against an interference in his or her privacy:

> …except where this is justified by an overriding, legitimate public interest, where the individual has expressly or tacitly consented to the publication or where publication is in the circumstances a generally accepted practice and not inconsistent with law.

The reference to the public interest echoes the European Court of Human Rights' position. Importantly, the Resolution also makes it clear that privacy laws should prohibit only the publication of material which breaches a generally accepted practice; in other words, restrictions on freedom of expression should be based on objective considerations rather than the specific sensitivities of the affected individual. Journalists' associations can make an important contribution to establishing consensus about acceptable practices by adopting a code of conduct and a complaints mechanism for members of the public.

The laws of several of the Central Asian republics impose an impermissible blanket ban on media discussion of individuals' private life, regardless of whether such discussion contributes to a debate of general interest.

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[219] *Id.*, paras. 63-64.

[220] Resolution (74)26 on the right of reply – position of the individual in relation to the press, 2 July 1974. To access this document, see the link at note 26.

Article 6 of Tajikistan's *Law on the Press and Other Media,* for example, simply prohibits any "use of the mass media for interference into private life of citizens."[221]

7.7. Content restrictions related to the justice system

Public scrutiny of the functioning of the judicial authorities and the police is the best guarantee for a fair justice system, and therefore an important safeguard against an authoritarian form of government. The press plays a central role in facilitating such scrutiny. In the words of the US Supreme Court:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, particularly in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism.[222]

Consequently, the scope for restrictions on the right to freedom of expression related to the administration of justice is small; both individual citizens and the media should normally be permitted to scrutinise and discuss police actions and judicial proceedings without interference. The following subsections discuss those rare cases in which an exception to this principle may be justified.

7.7.1. Covering ongoing criminal investigations

Media coverage of ongoing criminal investigations can present problems to the police, by revealing the investigative techniques being employed or by giving notice to those being pursued. Nevertheless, courts in established democracies are reluctant to grant orders for media silence (see also section 7.1 on prior censorship), mindful of the important

[221] See also Article 145 of Kazakhstan's Civil Code.

[222] *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

watchdog role the media fulfil. Mere inconvenience to an investigation will never warrant a ban on media coverage. The Canadian Supreme Court has ruled that any order to refrain from publication of information related to a criminal investigation can only be justified if the harm caused by publication would outweigh the harm caused by non-publication:

> Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. … Public access will be barred only when the appropriate court … concludes that disclosure would subvert the ends of justice or unduly impair its proper administration.[223]

In *Weber v. Switzerland,*[224] the European Court of Human Rights adopted similar reasoning. The case concerned a complaint by a Franz Weber, a journalist and well-known ecologist in Switzerland, against his conviction under a law that made it an offence to make public "any documents or information about a judicial investigation" until the investigation had been "finally completed". Weber had been prosecuted in relation to a press conference in which he revealed certain facts about an ongoing criminal investigation and criticised the way it was being conducted. The European Court ruled that the conviction failed the necessity test (see section 4.4) and therefore violated the right to free expression. The public had an interest in the case because of Mr Weber's renown and his claim that the investigation had been unfair; by contrast, the Swiss government had no legitimate interest in maintaining the confidentiality of information which had already been disclosed at an earlier press conference. Moreover, the press conference had not had a meaningful impact on the investigation, which had been virtually complete at the time Weber made the impugned statements.[225]

In practice, of course, police are usually eager to stimulate rather than prevent media coverage of their investigations, in order to reassure the public or encourage its cooperation. Because crime news can draw large

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[223] *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, paras. 3-4.

[224] *Weber v.* Switzerland, 22 May 1990, Application No. 11034/84 (European Court of Human Rights).

[225] *Id.,* paras. 48-52.

audiences, it is important that the police share information with the media in a non-discriminatory way and refrain from favouring certain outlets for political or other reasons. The Council of Europe has adopted a Recommendation on principles which Member States should observe when providing information about police and judicial matters to the media:

> Principle 4 - Access to information
>
> When journalists have lawfully obtained information in the context of on-going criminal proceedings from judicial authorities or police services, those authorities and services should make available such information, without discrimination, to all journalists who make or have made the same request.
>
> Principle 5 - Ways of providing information to the media
>
> When judicial authorities and police services themselves have decided to provide information to the media in the context of on-going criminal proceedings, such information should be provided on a non-discriminatory basis and, wherever possible, through press releases, press conferences by authorised officers or similar authorised means.[226]
>
> Principle 6 - Regular information during criminal proceedings
>
> In the context of criminal proceedings of public interest or other criminal proceedings which have gained the particular attention of the public, judicial authorities and police services should inform the media about their essential acts, so long as this does not prejudice the secrecy of investigations and police inquiries or delay or impede the outcome of the proceedings. In cases of criminal proceedings which continue for a long period, this information should be provided regularly.

As Principle 6 makes clear, when a case is of special interest to the public, the police and judicial authorities should not just respond favourably to

[226] Committee of Ministers, Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings, 10 July 2003. To access this document, see the link at note 26.

media requests for information but should make information available proactively, insofar as this can be done without causing undue harm to the investigation.

7.7.2. Access to the courtroom

Article 14(1) of the ICCPR guarantees the right of every individual involved in court proceedings to receive a "public" trial, that is, a trial which can be attended by anyone, regardless of any personal interest in the outcome, including representatives of the media. This right is not confined to criminal trials; the UN Human Rights Committee has indicated that, in principle, any procedure where oral hearings are held before a court should be open to the public, whatever the subject-matter of the case.[227]

The openness of court proceedings serves several purposes. In the first place, publicity puts pressure on the judiciary to do its work properly. In the words of the philosopher Jeremy Bentham, it "keeps the judge himself, while trying, under trial."[228] It also helps inform the public about the working and contents of the law, helps bring new witnesses forward and deters perjury. So, while individuals involved in a trial are the most immediate beneficiaries of the right to an open hearing, the principle is based on considerations of the wider public interest.

International courts have confirmed that the right to a public trial aims to benefit society as a whole, not just the accused or the litigants. The European Court of Human Rights has ruled that the opposing parties in legal proceedings are not at liberty to agree to hold the trial behind closed doors. Courts should only grant a request to exclude the public if doing so would not "run counter to any important public interest."[229] The UN Human Rights Committee has moreover stated that opening trials to

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[227] *Van Meurs v. The Netherlands,* Communication No. 215/1986, 23 July 1990, UN Doc. CCPR/C/39/D/215/1986, para. 6.1.

[228] 'Draught of a New Plan for the Organization of the Judicial Establishment in France.' *The Works of Jeremy Bentham, published under the superintendence of ... John Bowring*, 11 vols., (Edinburgh: Tait, 1843) vol. iv, p. 316.

[229] *Håkansson and Sturesson v. Sweden*, 21 February 1990, Application No. 11855/85 (European Court of Human Rights), para. 66.

the public is "a duty upon the State that is not dependent on any request, by the interested party, that the hearing be held in public."[230] The fact that court procedures are open should be made clear to the public, both in the relevant legislation and through practical measures:

> Both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the public so wish…
>
> The Committee observes that courts must make information on time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, e.g., the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made.[231]

The Council of Europe recommends in addition that journalists should be admitted to the courtroom without a need for accreditation (see also section 6.1.5), and that sufficient seats should be reserved for representatives of the media:

> Principle 12 - Admission of journalists
>
> Journalists should be admitted to public court hearings and public pronouncements of judgments without discrimination and without prior accreditation requirements. They should not be excluded from court hearings, unless and as far as the public is excluded in accordance with Article 6 of the Convention [analogous to Article 14(1) of the ICCPR; see below].
>
> Principle 13 - Access of journalists to courtrooms
>
> The competent authorities should, unless it is clearly impracticable, provide in courtrooms a number of seats for journalists which is sufficient in accordance with the demand, without excluding the presence of the public as such.[232]

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[230] *Van Meurs v. The Netherlands,* note 227, paras. 6.1-6.2.

[231] *Id.*

[232] Recommendation Rec(2003)13, see note 226.

It is apparent from the above that the interest of the public in defending the quality of the justice system normally trumps the interest of those involved in a trial in preserving their privacy. The Supreme Court of Canada has stated explicitly: "As a rule, the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings."[233]

But like the right to freedom of expression itself, the right to attend court hearings is not absolute. Certain fundamental interests – such as preventing a grave risk to the safety of a witness or to the emotional development of a minor – can justify holding a trial partially or even wholly behind closed doors. The relevant exceptions are spelt out in Article 14(1) of the ICCPR:

> …The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Article 14(1) is somewhat flexible and allows courts a measure of discretion in deciding whether closing the courtroom doors is necessary. The UN Human Rights Committee has however stressed that the exceptions in Article 14(1) are exhaustive and that in all cases where they do not apply, hearings should be open to all members of the public, without distinction between members of the press and other citizens. When a trial has taken place behind closed doors, the judgment should nevertheless be made public, subject to the narrow exceptions mentioned in Article 14(1).[234]

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[233] *Nova Scotia (A-G) v. MacIntyre*, [1982] 1 SCR 175.

[234] General Comment No. 13, Article 14, 12 April 1983, U.N. Doc. HRI/GEN/1/Rev.6 at 135, para. 6.

The burden of proof to show that holding the trial *in camera* is necessary lies on the State.[235]

The Federal Constitutional Court of Germany has ruled that an expectation that a media outlet will report in a defamatory way on the court's operation does not by itself justify excluding that outlet from the courtroom.[236]

7.7.3. Covering trials

7.7.3.1. Preserving the presumption of innocence

In addition to being conducted in public, Article 14(1) of the ICCPR requires that all trials be 'fair'. The responsibility to ensure fairness lies, of course, with the judicial authorities. But it is also of importance to journalists, since the strong influence that the media can have on the opinions of members of the public – including, potentially, judges, jurors and witnesses – can sometimes justify restraints on the way trials are covered.

In criminal cases, one of the most important aspects of a fair trial is the right of the accused to be presumed innocent until guilt has been lawfully proven. The Council of Europe has stated that the media have a responsibility to refrain from presenting opinions or information which would undermine the presumption of innocence:

> Principle 2 - Presumption of innocence
>
> Respect for the principle of the presumption of innocence is an integral part of the right to a fair trial. Accordingly, opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused.[237]

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[235] *Miguel Angel Estrella v. Uruguay*, Communication No. 74/1980, 17 July 1980, UN Doc. Supp. No. 40 (A/38/40), para. 10 (UN HRC).

[236] *Koeler v. Volksblatt,* 50 FCC 234 (1979).

[237] Recommendation Rec(2003)13, see note 226.

States are permitted to enact legislation in order to prevent 'trial by the media'. However, the duty to respect the presumption of innocence should not mean that the media are prevented from commenting on ongoing criminal trials. Such an outcome would be inconsistent with the principle that trials should take place in public (see the previous section). The European Court of Human Rights has emphasised this aspect:

> 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 (references omitted).[238]

In balancing the defendant's right to a fair trial against the public's right to receive information and opinions on court proceedings, international courts will take any pertinent circumstances into account. The European Court recognises, for example, that lay juries may be more susceptible to media influence than professional judges. As a result, if the determination of the defendant's guilt lies in the hands of non-professional judges (as is the case in some Central Asian republics), the State may require a greater degree of neutrality in media reporting on the trial, especially before the selection of jurors has taken place.[239] On the other hand, if the case concerns matters of public interest, States should be very reluctant to interfere with media coverage. In *Worm v. Austria,* the Court emphasised that the right of the public to receive different opinions on ongoing trials applies with particular force when the defendant is a politician:

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[238] *Worm v. Austria*, 29 August 1997, Application No. 22714/93, para. 50.

[239] See *id.*, para. 54 and *Tourancheau and July v. France*, 24 November 2005, Application No. 53886/00 (European Court of Human Rights), para. 75.

> Such persons inevitably and knowingly lay themselves open to close scrutiny by both journalists and the public at large. Accordingly, the limits of acceptable comment are wider as regards a politician as such than as regards a private individual (references omitted).[240]

This statement echoes the lower level of protection that politicians are entitled to against defamatory statements or invasions of their privacy (see sections 7.3.2.1 and 7.6). At the same time, the European Court stresses that public figures are entitled to a fair trial, too, and that media coverage "may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial."[241]

Courts in many established democracies are disinclined to any interference with the way their work is reported on. The U.S. Supreme Court, for example, refused to uphold a ban on publishing or broadcasting accounts of confessions made by the accused in a multiple murder case. It considered that the protection such a ban would offer to the defendant's rights was insufficient to justify a measure as grave as prior censorship. The Court observed that rumour of the confessions would anyway spread by word of mouth, a ban on reporting it would not be enforceable against media outside the court's territorial jurisdiction and it could not be known in any event whether knowledge of the confession would undermine jurors' impartiality.[242]

In several countries, self-regulation by journalists is largely successful in preventing trial coverage which jeopardises the presumption of innocence.

7.7.3.2. Preserving the privacy of suspects, victims and witnesses

Preservation of the presumption of innocence is not the only grounds upon which States moderate the tone of trial coverage. In several

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[240] *Worm v. Austria*, note 238, para. 50.

[241] *Id.*

[242] *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 565-67 (1976).

countries, the media can be prevented from revealing the identity or publishing photographs of suspects, victims and witnesses, in order to protect their right to privacy.

It will be recalled from section 7.6 that the European Court of Human Rights considers that "the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest."[243] The Court's ruling in News *Verlag v. Austria*[244] illustrates how this principle applies to judicial proceedings. The case revolved around B., a right-wing extremist who had been arrested on the suspicion of involvement in a letter-bomb campaign against prominent Austrians. A magazine called *News* was fined for printing several photographs of the suspect, with subtitles which appeared to presume his guilt, such as "The Mad World of Perpetrators." *News* thereupon complained to the European Court of Human Rights, alleging that its right to freedom of expression had been violated by the Austrian authorities.

The Court identified several factors justifying the publication of the pictures. It reasoned that the prosecution of B., relating as it did to a series of spectacular and politically motivated letter-bombings, was a matter of major public interest. Moreover, B., being a right-wing extremist, had entered the public scene well before the attacks occurred.[245] With the possible exception of one wedding picture, none of the photographs published by *News* disclosed details of B.'s private life.

On the other hand, the Court acknowledged that there may in principle be good reasons for prohibiting the publication of a suspect's picture, depending on the nature of the offence and the circumstances of the case. In this case, however, the domestic court of last instance had not balanced B.'s interest in the protection of his picture against the public interest in its publication, and other media had been permitted to publish B.'s picture

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[243] See note 217.

[244] *News Verlags GmbH & Co.KG v. Austria*, 11 January 2000, Application No. 31457/96 (European Court of Human Rights).

[245] *Id.*, para. 54.

throughout the criminal proceedings. The Court therefore concluded that the fine imposed on *News* had not been "necessary in a democratic society" and that, accordingly, the right to freedom of expression had been violated.[246]

7.7.4. Criticism of the judiciary

Through their reporting on trials, journalists enable the general public to verify that judges are properly discharging their responsibilities. By exposing and criticising instances of judicial misconduct or miscarriages of justice, the media can help ensure the overall health of the justice system and contribute to the public's confidence in it. For these reasons, governments should only exceptionally, if ever, inhibit media criticism of the judiciary.

As was discussed in section 7.3, many established democracies do not allow public bodies to sue for defamation, while it is well-established that public figures must tolerate a wider margin of criticism than ordinary citizens. The same principles should apply to the judiciary; courts are after all public bodies, and the judges that staff them have chosen to exercise a profession that places them in the public eye.

The European Court of Human Rights has struggled with the question under which circumstances the media may be held liable for defamation of individual judges. Ironically, its first decision on this issue, *Barfod v. Denmark,*[247] attracted a fair deal of criticism. Barfod, a journalist in Greenland, had been convicted after publishing an article in which he stated that two lay members of a court who were hearing a case against the local government – of which they were also employees – had "done their duty" in finding in favour of the government. The implication of this phrase was that the two had acted partially and unprofessionally. The ECHR accepted that the lay members should not have been selected for a court case involving their employer, but also found that Barfod's statement was "not a criticism of the reasoning in the judgment ... but

[246] *Id.*, paras. 57-60.

[247] 22 February 1989, Application No. 11508/85.

rather ... defamatory accusations against the lay judges personally, which was likely to lower them in public esteem and was put forward without any supporting evidence."[248] The Court found no violation of the right to freedom of expression, despite the obvious grounds for public concern raised by Barfod's article.

A later case, *Prager and Oberschlick*,[249] concerned a journalist who had been convicted by an Austrian court of defaming a judge, after accusing him of "arrogant bullying" and treating "each accused at the outset as if he had already been convicted," among other things. The European Court recognised that criticism of the judiciary fulfils a vital function in a democracy and that journalistic freedom permits "a degree of exaggeration, or even provocation."[250] However, it also stated that judges must enjoy the confidence of the public and that it may therefore "prove necessary to protect such confidence against destructive attacks that are essentially unfounded."[251] In a narrow 5-4 decision, the Court found no violation. The deciding factor was that the article's author had failed adequately to substantiate his allegations against the judge.

In *De Haes & Gijsels v. Belgium*,[252] the Court took a stronger stance in favour of freedom of expression. The applicants had forcefully criticised judges of the Antwerp Court of Appeal for having, in a divorce suit, awarded custody of the children to the father, a notary. The applicants' criticism stemmed from the fact that the notary's wife and parents-in-law had previously lodged a criminal complaint accusing him of incest and of abusing the children, a charge of which he had been acquitted.

In what can only be described as a specious distinction, the European Court noted that in contrast to the *Prager and Oberschlick* case, the accusations in question amount to "an opinion, whose truth, by

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[248] *Ibid*, para. 35.

[249] 22 March 1995, Application No. 15974/90 (European Court of Human Rights).

[250] *Id.*, para. 38.

[251] *Id.*, para. 34.

[252] 27 January 1997, Application No. 19983/92 (European Court of Human Rights).

[253] *Id.*, para. 47.

definition, is not susceptible of proof."[253] This opinion, moreover, was supported by a wealth of detailed information and based on thorough research, including, apparently, an inspection of the children's medical records. Although the Court did not approve of the tone of the applicants' article, it recalled that free expression "protects not only the substance of the ideas and information expressed but also the form in which they are conveyed."[254] The Court therefore concluded that the defamation award against De Haes and Gijsels had violated their right to freedom of expression.

7.8. False news

A number of countries around the world prohibit the dissemination of false information, even if it is not defamatory in nature. Sometimes, the ban is formulated as a specific duty for journalists to report truthfully or to avoid one-sided, distorted or alarmist stories. Such 'false news' provisions are found in the laws of some Central Asian republics[255] but are rare in the more established democracies and have been ruled unconstitutional in some.

No international court has yet considered the legitimacy of false news provisions under international law. However, statements by some UN bodies concerned with human rights make it clear that false news provisions are inconsistent with the guarantee of freedom of expression, particularly if they are enforced through the criminal law. Commenting on the domestic legal system of Cameroon, the Human Rights Committee stated that "the prosecution and punishment of journalists for the crime

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[254] *Id.*, para. 48.

[255] See Kazakhstan's *Law on Mass Media*, Articles 21(c) and 31(1)(2); Tajikistan's *Law on the Press and Other Mass Media*, Article 34.

Article 31(1)(2) of Kazakhstan's Mass Media Law prohibits journalists from "disseminat[ing] information on misrepresented facts." Uzbekistan's Law on 'Principles of and Guarantees for Freedom of Information' states in Article 7 that "mass media outlets … shall be liable for untruthfulness in accordance with the procedure established by the legislation."

[256] *Concluding Observations of the Human Rights Committee: Cameroon*, CCPR/C/79/Add.116, 4 November 1999, para. 24.

of publication of false news merely on the ground, without more, that the news was false, [is a] clear violation of Article 19 of the Covenant."[256]

On other occasions, the Committee has reiterated that false news provisions "unduly limit the exercise of freedom of opinion and expression."[257] It has taken this position even with respect to laws which only prohibit the dissemination of false news which causes a threat of public unrest. In 2000, the UN Special Rapporteur made a statement on the unacceptability of imprisonment under false news provisions, saying:

> In the case of offences such as … publishing or broadcasting "false" or "alarmist" information, prison terms are both reprehensible and out of proportion to the harm suffered by the victim. In all such cases, imprisonment as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights.[258]

What is the objection to false news provisions? Reporting in a truthful and balanced way is, of course, an important professional goal for journalists, especially those that work for public service broadcasters and are expected to serve the interests of society as a whole. But writing this goal into law presents several unacceptable dangers.

First, false news laws can have a serious chilling effect on the work of reporters. In situations of rapidly developing news, or where different sources contradict each other, facts may be difficult to check. Given that reporters' reputations depend on the quality of the information they provide, they naturally have a strong incentive only to share news which they are fairly confident is correct, and to warn their audience if a certain fact cannot be verified. If, however, journalists have the sword of a false news law hanging over their head, they might simply decide not to report news that they are not completely certain of at all, for fear of ending up in jail. As a result, citizens will be deprived of potentially vital information on current developments.

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[257] See, for example, *Annual General Assembly Report of the Human Rights Committee*, UN Doc. A/50/40, 3 October 1995, para. 89*; Concluding Observations of the Human Rights Committee: Mauritius*, UN Doc. CCPR/C/79/Add.60, 4 April 1996, para. 19.

[258] *Annual Report to the UN Commission on Human Rights, Promotion and protection of the right to freedom of opinion and expression*, 18 January 2000, UN Doc. E/CN.4/2000/63, para. 205.

Second, facts and opinions are not always easily separated. In many cases, opinions are expressed through superficially false statements, such as sarcastic, satirical, hyperbolic or comical remarks. For example, someone who describes someone else as a 'gangster' is not necessarily accusing the other of being involved in unlawful activities. A ban on false news can thus easily become a ban on opinions not favoured by the authorities, endangering the free confrontation between different points of view which lies at the heart of democracy. This concern was highlighted by Canada's Supreme Court in a case in which it struck down a false news provision as contrary to the constitutional guarantee of freedom of expression. The Court stated: "The reality is that when the matter is one on which the majority of the public has settled views, opinions may, for all practical purposes, be treated as an expression of a 'false fact.'"[259]

Third, false news provisions fail to recognise that it is often far from clear what the 'truth' on a particular matter is. As such, false news provisions are almost by definition impermissibly vague and, therefore, violate the first part of the three-part test for restrictions on freedom of expression (see section 4.2). Moreover, even if a particular truth is well-established, it may not always remain that way. As G.B. Shaw wrote: "New opinions often appear first as jokes and fancies, then as blasphemies and treason, then as questions open to discussion, and finally as established truths." This historic observation should give governments cause to reflect before penalising certain information or ideas as 'false'.

Lastly, the practice of States which still have false news provisions on the books shows the great potential for their abuse. A cogent example is the case of Lim Guan Eng, deputy leader of the opposition DAP party in Malaysia. In 1995, Lim raised concerns about the statutory rape of a 15-year old girl allegedly committed by the Chief Minister of the State of Malacca. The girl had been sentenced to 3 years 'protective custody' in a home for wayward girls, while the Chief Minister himself was not prosecuted. Lim questioned why the girl had been 'imprisoned'. The

[259] *R. v. Zündel* , [1992] 2 SCR 731, p. 749.

Malaysian courts found that this inaccurate description of the legal nature of the girl's detention, which was protective custody rather than imprisonment, constituted false news, and Lim was sentenced to 18 months in jail.[260]

Mindful of the risks of false news provisions, several domestic courts have ruled such provisions to be unconstitutional, including in Antigua and Barbuda, Canada, Uganda and Zimbabwe.[261]

7.9. Obscenity

Extending as it does to information and ideas which "shock, offend or disturb the state or any sector of the population,"[262] the right to freedom of expression in principle protects sexually explicit materials which some might find offensive. At the same time, international law recognises the right of States to limit freedom of expression in the interest of public morals, subject as always to the three-part test.

The concept of 'obscenity' does not lend itself easily to definition. Justice Potter Stewart of the U.S. Supreme Court, despairing of the task of defining pornography, once famously wrote: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it."[263] International law however does not allow States to rely on their gut feeling in identifying impermissible material: under the three-part test, content restrictions must be clearly defined in law, including those relating to obscenity.

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[260] *See* 'Malaysia: The trial of opposition parliamentarian Lim Guan Eng', Amnesty International (3 March 1997), http://web.amnesty.org/library/index/ENGASA280031997

[261] *Hector v. Attorney-General of Antigua and Barbuda*, [1990] 2 AC 312 (Judicial Committee of the Privy Council); *R. v. Zündel*, note 259; *Onyango-Obbo and Mwenda v. the Attorney General of Uganda*, Constitutional Appeal No. 2 of 2002 (11 February 2004); *Chavunduka and Choto v. Minister of Home Affairs & Attorney General of Zimbabwe*, 22 May 2000, Judgment No. S.C. 36/2000 (Supreme Court of Zimbabwe).

[262] See note 201.

[263] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart Concurrence).

In practice, however, international courts have been fairly lenient in applying the test. The European Court of Human Rights admitted "the impossibility of attaining absolute precision in the framing of laws" and found that the meaning of a Swiss law banning 'obscene' materials was sufficiently foreseeable.[264] The Court attached importance to the fact the law in question had been applied in a consistent manner by the Swiss courts.

In discussing what types of materials may be banned as harmful to public morals, international and domestic courts have likewise taken a fairly broad view, and recognised that questions of morality are closely tied to national and local cultures and traditions. The European Court of Human Rights stated that,

> it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject.[265]

The Human Rights Committee likewise noted that "public morals differ widely. There is no universally applicable common standard."[266]

However, States' discretion in the area of the protection of morals is by no means unlimited.[267] Restrictions based on this ground must still meet the necessity-test. This means, for example, that States should be considerably more reluctant to prohibit materials deemed obscene if they are directed at and available only to a mature audience. In the *Handyside* case, the ECHR permitted the British authorities to impose a ban on a publication called 'The Little Red Schoolbook' which, among other things, encouraged 12-18 year-old children not to feel guilty about using

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[264] *Müller v. Switzerland*, 28 April 1988, Application No. 10737/84, para. 29.

[265] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 48.

[266] *Hertzberg v. Finland*, Communication No. 61/1979, 2 April 1982, UN Doc. CCPR/C/15/D/61/1979.

[267] See, for example, *Dublin Well Woman v. Ireland*, 23 September 1992, Application No. 14234/88 (European Court of Human Rights), para. 68.

marijuana and engaging in sexual acts, even if their parents disapproved. The Court attached great significance to the fact that the booklet was clearly addressed to a young audience and contained "sentences or paragraphs that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them …"[268] In a later case, by contrast, the European Commission on Human Rights condemned the conviction of the vendor of erotic films for a gay audience as violation of the right to freedom of expression.[269] An important factor was that the films were sold from an unmarked sex-shop and in practice available only to an adult, consenting audience. Prosecuting the vendor was therefore not necessary for the protection of public morals.

7.10. Blasphemy

The discussion in section 7.5.2 showed that international law permits, or even requires, States to prohibit hate speech, including hate speech directed against followers of a religion. In some countries, however, the law goes much further than the duty to shield believers against "incitement to discrimination, hostility or violence" (as hate speech is defined) and prohibits denigration of their religion or religious symbols, irrespective of whether this constitutes hatred towards the religion's adherents. Laws of this kind are commonly known as 'blasphemy laws'.

Few would dispute that public debate should in practice take place in a respectful manner, particularly where it concerns beliefs held dearly by others. But many free expression advocates consider blasphemy laws to be antiquated and unjustifiable in a democracy. Religions, like political ideologies, make claims about how the life of societies should be organised. Open debate between competing ideas about public issues is the hallmark of democracy; critics of blasphemy laws contend that there is no justification to give certain ideas or beliefs special immunity from harsh criticism or ridicule simply because they happen to be grounded

[268] Note 265, para. 52.

[269] *Scherer v. Switzerland*, 14 January 1993, Application No. 17116/90.

in religion rather than in secular beliefs. Proponents of blasphemy laws often counter that the purpose of such laws is to prohibit denigration, not to prohibit discussion. However, laws which prescribe a 'respectful' tone for debate about religions are highly prone to abuse, both because of the subjective nature of 'respectfulness' and because of the likelihood that political opinions will take refuge under the blasphemy law by cloaking themselves as religion ones.

Despite these criticisms, several established democracies still have blasphemy provisions on the books, although most of these are rarely, if ever, used. In the United Kingdom, for example, the blasphemy law has been applied only twice since 1923, both instances leading to complaints to the European Court and Commission of Human Rights (see discussion of the *Wingrove* case below); Norway saw its last case in 1936 and Denmark in 1938. Other countries, including Sweden and Spain, have repealed their blasphemy laws. In the United States, the Supreme Court steadfastly strikes down any legislation prohibiting blasphemy, on the grounds that even well-meaning censors would be tempted to favour one religion over another, as well as because it "is not the business of government … to suppress real or imagined attacks upon a particular religious doctrine …"[270]

The European Court of Human Rights has taken a different position and permitted States to enforce blasphemy provisions, subject of course to their meeting the conditions of the three-part test.

Otto-Preminger-Institut v. Austria[271] concerned the seizure of a film by the Austrian authorities, undertaken at the request of the Roman Catholic Church. The film was based on an 1894 play by Oskar Panizza – who was himself jailed for 'crimes against religion' by a German court in 1895 – and depicted the God of Christianity as a senile old man, the Virgin Mary as a lascivious woman and Jesus Christ as mentally deranged, with all three displaying sympathy for the Devil. The European Commission on Human Rights[272] noted that the film had been shown only late at night

[270] *Joseph Burstyn, Inc v. Wilson*, 343 U.S. 495, 504-05 (1952).

[271] 20 September 1994, Application No. 13470/87.

[272] This body, which no longer exists, was formerly responsible for pre-screening applications to the European Court of Human Rights.

to an interested, paying audience which had been provided with prior warning about the film's content. It went on to conclude that the seizure had been disproportionate, since there was no risk that children or others who might be offended by its content would be accidentally confronted with the film.

The European Court of Human Rights disagreed, however. Its reasoning centred on the right to freedom of religion, which, like all human rights, is principally a right against the State rather than against other private persons. The Court noted that believers "must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith,"[273] but at the same time found that States may be justified, even required, to protect religions against the harshest attacks:

> [T]he manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right [to freedom of religion].
>
> …
>
> The respect for the religious feelings of believers … can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.[274]

The Court concluded, by six votes to three, that the Austrian authorities could reasonably have considered the seizure of the film "necessary in a democratic society" in order to protect the rights of others.

The decision in the *Otto-Preminger* case came in for heavy criticism amongst scholars, many of whom questioned how the Court had been able to conclude that the showing of the film had impaired the right of

[273] Note 271, para. 47.

[274] *Id.*

believers to practice their faith. Others noted that in a religious society like Austria, dissenting voices need the protection of the law more than the dominant Catholic Church, and that a right to freedom of expression which protects only views which are already accepted is of little use.

Nevertheless, the Court adopted a similar line of reasoning in its subsequent judgment in *Wingrove v. United Kingdom*.[275] This case again concerned a film, *Visions of Ecstasy*, which was loosely based on the life and writings of St. Teresa of Avila, a sixteenth-century nun. Among other things, the film depicted St. Teresa in the erotic embrace of another woman, interlaced with images of her "moving in a motion reflecting intense erotic arousal" besides the crucified body of Christ. As required by British law, the director submitted the film to the British Board of Film Classification for a classification certificate, a procedure designed mainly to rate films on their suitability for viewing by children, but under which films can be banned for all audiences. The certificate was denied on the grounds that the film's mixing of sexual and religious imagery constituted blasphemy, as prohibited under the criminal law.

Wingrove argued before the European Court that blasphemy laws were "incompatible with the European idea of freedom of expression." The Court rejected this point, noting the lack of agreement between European States as to whether blasphemy laws are necessary in a democratic society.[276] It went on to find that, as with 'obscenity' (see section 7.9), there was no uniform European conception of what was required for the protection of the rights of others against attacks on their religious convictions. States consequently have a certain margin of discretion to decide whether to act against blasphemy, although the court warned of "the breadth and open-endedness of the notion of blasphemy and the risks of arbitrary or excessive interferences with freedom of expression under the guise of action taken against allegedly blasphemous material."[277]

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[275] *Wingrove v. United Kingdom*, 25 November 1996, Application No. 17419/90 (European Court of Human Rights).

[276] *Id.*, para 57.

[277] *Id.*, para. 58.

British law, however, provided sufficient guarantees that only material of a high degree of offensiveness, such as *Visions of Ecstasy,* would be banned. Accordingly, Wingrove's right to freedom of expression had not been violated.

Individuals protesting against a *failure* by the domestic authorities to take action against blasphemy have had less success at the European human rights bodies. In *Choudhury v. United Kingdom,*[278] the applicant had unsuccessfully urged the prosecution of Salman Rushdie and his publisher for The *Satanic Verses,* which he considered offensive against Islam. The European Commission of Human Rights ruled that the right to freedom of religion does not entail a guaranteed "right to bring any specific form of proceedings against those who, by authorship or publication, offend the sensitivities of an individual or of a group of individuals"[279] and rejected the application. In *Dubowska & Skup v Poland,*[280] which concerned the publication in a newspaper of a picture of Jesus and Mary with a gas mask over their faces, the authorities had opened an investigation and examined all sorts of evidence, but decided not to take any further action. The Commission found that, in contrast to the situation in the *Otto-Preminger,* the publication in question had not prevented anyone from exercising their freedom of religion and that the decision not to prosecute did not, in itself, amount to a failure to protect the applicants' rights.[281]

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[278] *Choudhury v. United Kingdom*, 5 March 1991, Application No. 17439/90 (European Commission of Human Rights).

[279] *Id.*, para. 2.

[280] *Dubowska & Skup v Poland*, 18 April 1997, Application No. 33490/96 (European Commission of Human Rights).

[281] *Id.*, para. 2.

Chapter 8

THE RIGHT NOT TO SPEAK

Underlying the right to freedom of expression is the idea that every individual should be able to decide for him or herself which opinions and information are of value and worth sharing with others. It stands to reason, therefore, that the right to freedom of expression includes a right *not* to speak: in principle, a State should not impose on its citizens a duty to express information or opinions which they do not support or consider false or useless. This principle has won the support of domestic courts; in *Wooley v. Maynard;*[282] for example, a group of Jehovah's Witnesses persuaded the US Supreme Court to strike down a New Hampshire law, which required cars to carry a licence plate inscribed with the state's motto, "Live Free or Die".

Like the right to speak, the right not to speak cannot be absolute: citizens must still fill in their tax forms, pharmaceutical companies must disclose the side-effects of the medicines they market, and witnesses must testify in court. While no international court has pronounced itself on the issue, it seems reasonable to assume that the three-part test for restrictions on freedom of expression (see Chapter 4) applies equally to State-imposed duties to disseminate information or ideas.

In practice, most limitations imposed on the right not to speak are perfectly logical and justifiable; the following sections consider some more contentious areas.

[282] 430 US 705 (1977).

8.1. The right of reply

In several countries, persons who believe they have been portrayed in a false light by a media report are entitled by law to have a reply published by the same outlet. Such provisions are common in Central Asia; Article 27 of Uzbekistan's *Law on Mass Media,* for example, grants a right to any legal or natural person to make a demand to the editorial body of a mass media outlet to "issue a denial of the untrue and defamatory information which has been issued by it."[283]

There are two basic categories of the right to reply. The first, which could more exactly be called a 'right of correction', is limited to a right to point out erroneous information; the media outlet's editors are required to correct the mistake, but may do so in their own words. The second is a right for the aggrieved individual to demand newspaper space or broadcast time from the media outlet in order to 'set the record straight'. This second manifestation of the right of reply clearly constitutes a far greater interference with the 'right not to speak'.

8.1.1. Should there be a general right of reply?

The right of reply is a highly contentious area of media law. It is not disputed that the right represents an interference with freedom of expression.[284] However, some see it as justifiable measure which in fact improves the free flow of information, by ensuring that the public will hear both sides of the story and by preventing costly defamation

[283] Similar language can be found in Kazakhstan in Article 143 of the civil code and Article 19 of the *Law on Mass Media*, in Kyrgyzstan in Article 18 of the civil code and Article 17 of the *Law on Mass Media*, in Tajikistan in Article 174 of the civil code, Articles 24 and 26 of the *Law on the Press and Other Mass Media* and Article 45 of the *Law on Television and Radio*, in Turkmenistan in Article 26 of the *Law on the Press and Other Mass Media* and in Uzbekistan in Article 27 of the *Law on Mass Media.*

[284] International courts have treated the right of reply as an interference with the right to freedom of expression. See, for example, *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights) and *Enforceability of the Right to Reply or Correction*, Advisory Opinion to the Government of Costa Rica, 29 August 1986, OC-7/86, Inter-American Court of Human Rights, Ser. A, No.7.

suits which drain the resources of media outlets. Others regard it as an impermissible restriction on editorial freedom.

The *American Convention on Human Rights* requires its State parties to introduce either a right of reply or a right of correction. Article 14 states:

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 European human rights system, too, recognises the virtue of the right of reply. In a case before it in 1989, the European Commission of Human Rights stated that "in a democratic society, the right of reply constitutes a guarantee of the pluralism of information which must be respected."[285] On the other hand, the UN Special Rapporteur on Freedom of Opinion and Expression has cautioned against a government-mandated right of reply, and stated that the right should in any case be limited to allegedly false facts:

> The Special Rapporteur is of the view that if a right of reply system is to exist, it should ideally be part of the industry's self-regulated system, and in any case can only feasibly apply to facts and not to opinions.[286]

At the domestic level, the US Supreme Court ruled that a mandatory right to reply with regard to the print media is unconstitutional, because it presents an unwarranted interference in editorial matters:

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[285] *Ediciones Tiempo S.A. v. Spain*, Commission Decision (Admissibility), 12 July 1989, Application No. 13010/87. See also European Union Directive 89/552/EEC of 3 October 1989, OJ L 298, 17 October 1989, pp. 23-30, Article 23, prescribing a right of reply in the broadcast sector for all EU Member States.

[286] 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, E/CN.4/1999/64/Add.2, para. 35.

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment.[287]

In an attempt to guide its Member States through this minefield, the Council of Europe's Committee of Ministers has adopted a Resolution[288] on the right of reply. It recommends that the right should be recognised, but suggests that exceptions be made in the following cases:

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.

In a later Recommendation, the Committee of Ministers suggested applying similar principles to Internet-based news services, and recognised two additional permissible exceptions to the right of reply in this context:

- if the reply is in a language different from that in which the contested information was made public;

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[287] *Miami Herald Publishing Co. v Tornillo*, 418 U.S. 241, 258 (1974).

[288] See note 220, in the Annex.

- if the contested information is a part of a truthful report on public sessions of the public authorities or the courts.[289]

8.1.2. Right of reply in relation to publicly owned media

Publicly owned media, which are financed with taxpayers' money, should not be an instrument of one political bloc but should be independent and represent all different views in society fairly (see section 6.3.5 on public service broadcasting). But, in practice, even in well-established democracies the government may succeed in influencing the coverage of publicly owned media in its favour. The right of reply guarantees that opposition parties are not drowned out and are able to represent themselves to voters in their own words.

A number of national courts have enforced the right of reply as a means of ensuring that the public has access to opposition points of view. In India, a public sector undertaking, the Life Insurance Corporation of India (LIC), republished an article in its house journal that was favourable to itself, but refused to republish a rejoinder that had accompanied the original article. The Supreme Court held that LIC's refusal was unlawful on the ground that, as an instrument of government, LIC had a duty of fairness to its readers. Moreover, "fairness demanded that both viewpoints were placed before its readers, however limited be their number, to enable them to draw their own conclusions."[290]

Similarly, the Court of Appeal in Belize ordered the national television station to broadcast a series of programmes by a senior opposition politician replying to government statements on the economy. The Court held that political parties must be given the opportunity to reply on television to statements made by the government which "provide information or explanation of events of prime national or international importance or ... seek the co-operation of the public in connection with

[289] Committee of Ministers of the Council of Europe, Recommendation No. Rec(2004)16 on the Right of Reply in the New Media Environment, adopted 15 December 2004, Principle 5. To access this document, see the link at note 26.

[290] *Manubhai Shah v. Life Insurance Corp. of India* [1992] 3 SCC 637.

such events." Only where there was a "general consensus of opinion" would the opposition not have a right of reply.[291]

The US Supreme Court[292] and the High Court of Trinidad and Tobago[293] have also upheld as constitutional a 'political' right to reply through the broadcast media.

8.2. Duty to transmit official messages

Another limitation on the 'right not to speak' are provisions, found in the laws of the Central Asian republics, which require mass media outlets to transmit messages from the authorities. Article 18 of Kazakhstan's *Mass Media Law,* for example, provides: "Official communications from state authorities are placed in mass media in accordance with the legislation of Kazakhstan."[294]

There is no doubt that the media, as part of their general responsibility to inform the public, should carry news on important government policies and decisions. Experience in countries all over the world shows that both public and private media in fact provide ample coverage of government activities, even when they are not legally required to do so. Public broadcasters cover the government as part of their public service mandate, while private broadcasters and newspapers do so because important political news attracts viewers, who in turn bring in advertising revenues.

For this reason, provisions which require media outlets to transmit official messages are unnecessary. They are also open to abuse, because officials may use them to advertise on behalf of themselves ahead of elections

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[291] *Belize Broadcasting Authority v. Courtenay and Hoare*, Court of Appeal, 20 June 1986; (1988) LRC (Const.) 276; 13 Common L Bull (1987), 1238

[292] *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 US 367, p. 390.

[293] *Rambachan v. Trinidad and Tobago Television Co. Ltd and Attorney-General of Trinidad and Tobago*, decision of 17 July 1985 (unreported).

[294] Article 18. See also Kyrgyzstan's *Law on Mass Media*, Article 14; Tajikistan's *Law on the Press and Other Mass Media*, Article 25; Turkmenistan's *Law on the Press and Other Mass Media*, Article 23; and Uzbekistan's *Law on Mass Media*, Article 25.

or for other purposes of questionable propriety. If the requirement is vaguely formulated, there is also a risk that it will be exploited to harass, or even close, independent media outlets for allegedly failing to comply with the law.

The Committee of Ministers of the Council of Europe has voiced concern over requirements to transmit official messages, even if they apply only to public service broadcasters, stating:

> The cases in which public service broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or decisions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations.[295]

A duty to broadcast official messages is distinct from 'direct access programming', that is, free airtime for political parties to present their message to voters ahead of elections. So long as such airtime is divided amongst the contending parties in an equitable manner, direct access programming can make a positive contribution to democracy and the public's right to be informed.

8.3. 'Must-carry' channel requirements

Traditional terrestrial broadcasting is increasingly being supplemented by other ways of delivering radio and television to end-users, such as satellite and cable. In contrast to the electromagnetic spectrum, which in virtually all countries is a public resource managed by a public body, cable and satellite infrastructure is often owned and exploited by private companies.

In homes where television is connected to a cable or satellite receiver, people will tend not to tune into terrestrial channels anymore, because doing so is technically impossible or inconvenient. There is a danger that

[295] Committee of Ministers of the Council of Europe, Recommendation No. R (96)10 on the Guarantee of the Independence of Public Service Broadcasting, 11 September 1996. To access this document, see the link at note 26.

cable and satellite providers would be able to present their customers with a very one-sided stream of information, by carrying channels which represent one particular point of view or are owned by a small number of people. In addition, in countries where cable and/or satellite is widespread, they can pose a threat to the viability of privately owned terrestrial stations. For these reason, some States impose 'must-carry' requirements on operators of cable, satellite and similar audiovisual services, under which they are obliged to carry some or all of the terrestrial stations licensed to broadcast in the country or relevant area, usually including the public service broadcaster.

Critics of must-carry requirements contend that they constitute an interference with the 'editorial freedom' of cable and satellite operators, by requiring them to carry expressions of others against their own will. It is also sometimes argued that free market principles will ensure that viewers have access to all the channels they want, rendering must-carry requirements unnecessary. Supporters point out that in practice, in many countries the free market does not achieve media diversity; if there is a diverse terrestrial broadcasting system, it should therefore be protected and made available to cable and satellite viewers.

An example of a country where must-carry requirements are imposed is the United States. Under the 1992 *Cable Television Consumer Protection and Competition Act*, cable operators are required to make up to one-third of their capacity available for the retransmission of local or national terrestrial stations. A number of cable companies challenged the Act before the Supreme Court, claiming that it violated the right to freedom of expression. In a narrow 5-4 decision, the Court ruled that the act was constitutional.[296]

The Council of Europe's Committee of Ministers has recommended that Member States should at least ensure that cable and satellite operators carry public service broadcasting channels:

Universality is fundamental for the development of public service broadcasting in the digital era. Member states should therefore make

[296] *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994).

sure that the legal, economic and technical conditions are created to enable public service broadcasters to be present on the different digital platforms (cable, satellite, terrestrial) with diverse quality programmes and services that are capable of uniting society, particularly given the risk of fragmentation of the audience as a result of the diversification and specialisation of the programmes on offer.

> In this connection, given the diversification of digital platforms, the must-carry rule should be applied for the benefit of public service broadcasters as far as reasonably possible in order to guarantee the accessibility of their services and programmes via these platforms.[297]

[297] Committee of Ministers of the Council of Europe, Recommendation No. R (2003)9 to Member States on Measures to Promote the Democratic and Social Contribution of Digital Broadcasting, 28 May 2003, Annex, Principles 20-21. To access this document, see the link at note 26.

Chapter 9

ACCESS TO INFORMATION

It is increasingly being recognised that governments hold information not for themselves but, rather, on behalf of the public and that, as a result, public bodies should provide access to that information. This recognition is reflected in the explosive growth in the number of access to information laws that have been adopted around the world, as well as the numerous authoritative international statements on the issue.

Today, nearly 70 countries have laws on the books granting individuals a general right to access information held by public bodies, and imposing an obligation on public bodies to proactively disclose key types of information. In 1990, only 13 countries had such laws. Furthermore, most of the international financial institutions, including the World Bank and all of the regional development banks, as well as a growing number of other inter-governmental organisations, have adopted information disclosure policies. Within the Central Asian region, only two countries have so far adopted access to information laws; Kyrgyzstan[298] and Uzbekistan.[299] Both laws fail in important ways to conform to international standards.

Access to information laws reflect the fundamental premise that government is supposed to serve the people. There are, however, a

[298] The 1997 *Law of the Kyrgyz Republic on Guarantees and Free Access to Information*.

[299] The 2002 *Law of the Republic of Uzbekistan on "Principles of and Guarantees for Freedom of Information"* An analysis of this law in Russian is available at http://www.article19.org/pdfs/analysis/uzbekistan-freedom-of-information-law-june-200.pdf.

number of more practical ideas underlying the recent widespread recognition of the right to information. ARTICLE 19 has described information as "the oxygen of democracy";[300] information is essential to democracy at a number of levels. The ability of individuals to participate effectively in decision-making that affects them depends, in obvious ways, on information. Elections can never meet their goal – described under international law as ensuring that "[t]he will of the people shall be the basis of the authority of government"[301] – if the electorate lacks access to information which enables it to form an opinion.

Democracy is also about accountability and good governance. The public has a right to scrutinise the actions of its leaders and to engage in full and open debate about those actions. It must be able to assess the performance of the government and this depends on access to information about the state of the economy, social systems and other matters of public concern. One of the most effective ways of addressing poor governance, particularly over time, is through open, informed debate.

Access to information is also a key tool in combating corruption and wrongdoing. Investigative journalists and watchdog NGOs can use the right to access information to expose wrongdoing and help root it out. As U.S. Supreme Court Justice Louis Brandeis famously noted, "A little sunlight is the best disinfectant."

Access to information laws also serve a number of important social goals. The right to access one's personal information, for example, is part of respect for basic human dignity, but it can also be central to effective personal decision-making. Access to medical records, for example, can help individuals make decisions about treatment, financial planning and so on.

Finally, access to information laws can help facilitate effective business practices. Commercial requesters are, in many countries, one of the most

[300] *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: June 1999), Preface. Available online in Russian at http://www.article19.org/pdfs/standards/foi-the-right-to-know-russian.pdf.

[301] *Universal Declaration of Human Rights*, Note 1, Article 21.

significant user groups of such laws. Public bodies hold a vast amount of information of all kinds, much of which relates to economic matters and which can be very useful for enterprises. The potential for increasing the effectiveness of business is an important benefit of access to information laws, and helps answer the concerns of some governments about the cost of implementing such legislation.

9.1. The right of access: international standards

A number of international bodies have authoritatively recognised the fundamental and legal nature of the right to freedom of information, as well as the need for effective legislation to secure respect for that right in practice. These include the UN, the Organisation of American States, the Council of Europe and the African Union.

9.1.1. The United Nations

The UN Special Rapporteur on Freedom of Opinion and Expression has addressed the issue of freedom of information in each of his annual reports since 1997. After receiving his commentary on the subject in 1997, the Commission on Human Rights called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications."[302] Significantly, in his 1998 Annual Report, the Special Rapporteur stated clearly that the right to access information held by the State is included in the right to freedom of expression: "[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems. …"[303] His views were welcomed by the CHR.[304]

The UN Special Rapporteur significantly expanded his commentary on freedom of information in his 2000 Annual Report to the CHR, noting its

[302] Resolution 1997/27, 11 April 1997, para. 12(d).

[303] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.

[304] Resolution 1998/42, 17 April 1998, para. 2.

fundamental importance not only to democracy and freedom, but also to the right to participate and to realisation of the right to development.[305] He also reiterated his "concern about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs".[306] Importantly, at the same time, the Special Rapporteur elaborated in detail on the specific content of the right to information.[307]

In their 2004 Joint Declaration, the three special mandates on freedom of expression at the UN, OSCE and OAS stated:

> The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.[308]

9.1.2. Regional standards

All three main regional systems of human rights – within the Americas, Europe and Africa – have formally recognised the importance of freedom of information as a human right. The following section describes the development of these standards.

9.1.2.1. Organization of American States

The OAS Special Rapporteur on Freedom of Expression has frequently recognised that freedom of information is a fundamental right, which includes the right to access information held by public bodies. In his 1999 Annual Report to the Inter-American Commission on Human Rights, he stated:

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[305] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 42.

[306] *Id.*, para. 43.

[307] *Id.*, para. 44. See section 9.2.

[308] Joint Declaration of 6 December 2004. To access this document, see the link in note 30.

> The right to access to official information is one of the cornerstones of representative democracy. In a representative system of government, the representatives should respond to the people who entrusted them with their representation and the authority to make decisions on public matters. It is to the individual who delegated the administration of public affairs to his or her representatives that belongs the right to information. Information that the State uses and produces with taxpayer money.[309]

In October 2000, the Inter-American Commission on Human Rights approved the *Inter-American Declaration of Principles on Freedom of Expression,*[310] which reaffirms the right to information in the Preamble:

> CONVINCED that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of government activities and the strengthening of democratic institutions; …

The Principles unequivocally recognise the right to access information:

3. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.

4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

In a case decided in 2005, the Inter-American Commission on Human Rights held that the right to freedom of expression included a right to

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[309] *Annual Report of the Inter-American Commission on Human Rights 1998, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression*, 16 April 1999, OEA/Ser.L/V/II.102, Doc. 6 rev., Chapter III., p. 24.

[310] Note 76.

access information held by public bodies.[311] The case is presently on appeal to the Inter-American Court of Human Rights.

9.1.2.2. Council of Europe

In 1981, the Committee of Ministers, the political decision-making body of the Council of Europe (composed of Member States' Ministers of Foreign Affairs) adopted Recommendation No. R(81)19 on Access to Information Held by Public Authorities, which stated:

> I. Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities. …[312]

This was followed up by another Recommendation on Access to Official Documents, which includes the following provision:

> III
>
> General principle on access to official documents
>
> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin.[313]

The Council of Europe's Group of Specialists on Access to Official Documents is currently preparing a binding treaty on this topic.

9.1.2.3. African Union

In 2002, the African Commission on Human and Peoples' Rights adopted a *Declaration of Principles on Freedom of Expression in Africa*.[314]

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[311] *Marcel Claude Reyes and Others v. Chile*, 7 March 2005, Case No. 12.108.

[312] 25 November 1981, p. 2.

[313] Recommendation R(2002)2 of the Committee of Ministers to Member States on Access to Official Documents, adopted on 21 February 2002.

[314] Note 29.

The Declaration clearly endorses the right to access information held by public bodies, stating:

IV

Freedom of Information

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

2. The right to information shall be guaranteed by law in accordance with the following principles:

    - everyone has the right to access information held by public bodies;
    - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
    - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
    - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
    - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
    - secrecy laws shall be amended as necessary to comply with freedom of information principles.

3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

9.2. Features of an FOI regime

A number of the international standards and statements noted above provide valuable insight into the precise content of the right to freedom of information, over and above simply affirming its existence. In his 2000 Annual Report, the UN Special Rapporteur on Freedom of Opinion and Expression set out in detail the standards to which freedom of information legislation should conform (UN Standards).[315] The 2002 Recommendation of the Committee of Ministers of the Council of Europe (CoE Recommendation) is even more detailed, providing, for example, a list of the legitimate aims which might justify exceptions to the right of access.[316]

These standards find some support in the various freedom of information laws and policies around the world. Although these vary considerably as to their content and approach, the more progressive laws do have a number of common features which reflect these international standards.

ARTICLE 19 has published a set of principles, *The Public's Right To Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles),[317] setting out best practice standards on freedom of information legislation. These Principles are based on international and regional law and standards, and evolving State practice. They therefore provide a useful framework in which to discuss the features of access to information legislation.

9.2.1. Principle 1. Maximum Disclosure

"Freedom of information legislation should by guided by the principle of maximum disclosure."

The principle of maximum disclosure holds that all information held by public bodies should presumptively be accessible, and that this presumption may be overcome only in very limited circumstances.

[315] Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

[316] Note 313, Principle IV.

[317] Note 300.

The principle of maximum disclosure encapsulates the basic rationale of freedom of information legislation, and is explicitly stated as an objective in a number of national laws. An important aspect of this principle, widely reflected in national laws, is that the body seeking to deny access to information bears the burden of proving that it may legitimately be withheld.[318]

Another aspect of this principle is that the scope of the law should be very broad.[319] Everyone, not just citizens, should benefit from the right and an individual requesting access should not have to demonstrate any particular interest in the information or explain the reasons for the request. Information should be defined broadly to include all information held by the body in question, regardless of form, date of creation, who created it and whether or not it has been classified.

The scope of the obligation to disclose in terms of the bodies covered should also be broad. All three branches of government should be covered and no public bodies should be excluded from the ambit of the law. Public corporations should also be covered and many argue that even private bodies which are substantially publicly funded or carry out public functions should be included within the ambit of the law. In South Africa, even private bodies are required to disclose information which is needed for the protection or exercise of any right.

9.2.2. Principle 2. Obligation to Publish

"Public bodies should be under an obligation to publish key information."

Freedom of information implies not only that public bodies should accede to requests for information, but also that they should publish and

[318] *Commonwealth Freedom of Information Principles*, agreed by the 11th Commonwealth Law Ministers Meeting, Trinidad and Tobago, May 1999, Principle 2.

[319] See the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus Convention), UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the "Environment for Europe" process, 25 June 1998, entered into force 30 October 2001, Articles 2(2)-(3).

disseminate widely documents of significant public interest.[320] Otherwise, such information would be available only to those specifically requesting it, when it is of importance to everyone.

Moreover, publishing information will often be more economical than responding to multiple requests for the same information.

The scope of the obligation to publish proactively depends to some extent on resource limitations, but the amount of information covered should increase over time, particularly as new technologies make it easier to publish and disseminate information.

9.2.3. Principle 3. Promotion of Open Government

"Public bodies must actively promote open government."

Informing the public of their rights and promoting a culture of openness within government are essential if the goals of freedom of information legislation are to be realised. In most countries, particularly those which have not yet or have just recently adopted freedom of information laws, there is a deep-rooted culture of secrecy within government, based on long-standing practices and attitudes. Ultimately, the success of a freedom of information law depends on changing this culture since it is virtually impossible to force openness, even with the most progressive legislation.[321]

The best approach to addressing this problem will vary from country to country but, at a minimum, there will be a need to train public officials. A number of other means of promoting openness within government have been tried in different countries, including, for example, providing incentives for good performers and exposing poor performers, and ensuring oversight through annual reports which provide relevant statistics on the functioning of the FOI regime. Another useful tool to tackle the culture of secrecy is to provide for criminal penalties for those

[320] See the African Principles, note 29, Principle IV(2).

[321] See the UN Standards, note 305.

who wilfully obstruct access to information in any way, including by destroying records or inhibiting the work of the administrative body overseeing implementation of the law.

The general public also need to be made aware of their rights under the new legislation, and how to exercise them. Public education campaigns are needed, including through the media. Another useful tool, provided for in many laws, is the publication of a simple, accessible guide on how to lodge an information request.

A third important aspect of promoting open government is promoting better record maintenance by public bodies.[322] In many countries, one of the biggest obstacles to accessing information is the poor state in which records are kept. Officials often do not know what information they have or, even if they do know, cannot locate records they are looking for. Good record maintenance is not only important for freedom of information. Handling information is one of the key functions of modern government and doing this well is crucial to effective public management.

9.2.4. Principle 4. Limited Scope of Exceptions

"Exceptions to the right to access information should be clearly and narrowly drawn and subject to strict "harm" and "public interest" tests."

The regime of exceptions is one of the most difficult issues facing those drafting a freedom of information law and one of the most problematic parts of many existing laws. In many cases, otherwise very effective laws are undermined by an excessively broad or open regime of exceptions. On the other hand, it is obviously important that all legitimate secrecy interests are adequately catered to in the law, otherwise public bodies will legally be required to disclose information even though this may cause unwarranted harm.

The presumption in favour of disclosure means that the onus should be on the public body seeking to deny access to certain information to show

[322] See the Commonwealth Principles, note 318, Principle 4.

that it may legitimately be withheld. The ARTICLE 19 Principles set out a three-part test for exceptions as follows:

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.

The first part of this test means that a complete list of all aims which may justify withholding information should be set out in the law. Which aims are legitimate is a subject of some controversy. Exceptions should at least be drafted clearly and narrowly.[323] The Council of Europe Recommendation lists the following possible grounds for restricting disclosure:

IV

Possible limitations to access to official documents

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

i) national security, defence and international relations;

ii) public safety;

iii) the prevention, investigation and prosecution of criminal activities;

iv) privacy and other legitimate private interests;

v) commercial and other economic interests, be they private or public;

vi) the equality of parties concerning court proceedings;

[323] See the Commonwealth Principles, note 318, Principle 3.

vii) nature;

viii) inspection, control and supervision by public authorities;

ix) the economic, monetary and exchange rate policies of the state;

x) the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

It is not, however, legitimate to refuse to disclose information simply because it relates to one of these interests. According to the second part of the test, the disclosure must pose an actual *risk of serious harm* to that interest.[324]

The third part of the test states the need for a *public interest override,*[325] which requires that even if disclosure of a piece of information would lead to harm, the information should still be disclosed if withholding it would lead to a greater harm. An example of this would be information which exposed corruption in the armed forces. Although this may at first sight appear to weaken national defence, eliminating corruption in the armed forces will, over time, actually strengthen it. The need for a public interest override is recognised in Principle IV(2) of the CoE Recommendation, which states:

> Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.[326]

9.2.5. Principle 5. Processes to Facilitate Access

"Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available."

Effective access to information requires both that the law stipulate clear

[324] See the UN Standards, note 305.

[325] See the Aarhus Convention, note 319, Article 4(4).

[326] Note 313.

processes for deciding upon requests by public bodies, as well as a system for independent review of their decisions.[327] Requests are normally required to be in writing, although the law should also make provision for those who are unable meet this requirement, such as the blind or the illiterate – for example, by requiring the public body to assist them by reducing their request to writing. The law should set out clear timelines for responding to requests, which should be reasonably short. The response to a request should take the form of a written notice stating any fee and, where access to all or part of the information is denied, reasons for that denial along with information about any right of appeal. It is also desirable and practical for the law to allow requesters to specify what form of access they would like, for example inspection of the record, or a copy or transcript of it.[328]

It is essential that the law provide for various opportunities to appeal the processes noted above. Many national laws provide for an internal appeal to a higher authority within the same public body to which the request was made. This is a useful approach, which can help address mistakes and ensure internal consistency.

It is, however, crucial that requesters have the right to appeal to an independent body to review decisions made by public authorities, which is reflected in most international standards.[329] Otherwise, individuals cannot really be said to have a right to access information held by public bodies and much information, for example revealing corruption or incompetence, will never be disclosed. Given the importance of rapid, cost-effective access to information, it is highly desirable that appeals should go first to an independent administrative body, and this is provided for in most of the more progressive national laws.[330]

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[327] *Id.*, Recommendation V.

[328] *Id.*, Recommendation VII.

[329] See the Aarhus Convention, note 319, Article 9; African Principles, note 29, Principle IV(2); Commonwealth Principles, note 318, Principle 5; COE Recommendations, note 313, Recommendation IX; and the UN Standards, note 305.

[330] South Africa is a notable exception here. Some countries fear the costs of establishing yet another administrative body. However, these costs are arguably low compared to the benefits of a good freedom of information regime, for example in terms of rooting out incompetence and corruption or in promoting more effective decision-making.

Finally, the law should provide for the right to appeal from the administrative body to the courts. Only the courts really have the authority to set standards of disclosure in controversial areas and to ensure the possibility of a full, well-reasoned approach to difficult disclosure issues.

9.2.6. Principle 6. Costs

"Individuals should not be deterred from making requests for information by excessive costs."

Fees are a controversial issue in freedom of information laws. It is widely accepted that fees should not be so high as to deter requests,[331] but practically every law does allow for some charges for access. Different laws take different approaches to fees. Some limit charges to the cost of reproducing documents, perhaps along with a set application fee. Others group requests into different categories, charging less for public interest or personal requests. Still others provide for the provision of a certain amount of information, for example 100 pages, for free and then start to charge after that. Regardless of the approach, it is desirable for fee structures and schedules to be set by some central authority, rather than be each public body separately, to ensure consistency and accessibility.

9.2.7. Principle 7. Open Meetings

"Meetings of public bodies should be open to the public."

The ARTICLE 19 Principles include the idea of open meetings, although in practice it is extremely rare for this to be dealt with in a freedom of information law. Some countries have separate laws on this. The reason it was included in the Principles is that the underlying rationale for freedom of information applies not only to information in documentary form, but also to meetings of public bodies.

[331] See COE Recommendations, note 313, Recommendation VIII.

9.2.8. Principle 8. Disclosure Takes Precedence

"Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed."

Most countries have a range of secrecy laws on their books, many of which are not legitimate or which include illegitimate provisions which are inconsistent with the access to information law. If the principle of maximum disclosure is to be respected, the access to information law must take precedence over these laws.[332] This should, where possible, be achieved by interpreting these laws in a manner which is consistent with the access to information law. However, where potential conflicts cannot be resolved through interpretation, the provisions of the access to information law should overrule those of conflicting secrecy laws. This is not as controversial as it sounds, at least in substance. A good freedom of information law will include a comprehensive set of exceptions which ensure that information will not be disclosed if doing so would cause unjustifiable harm; so there should be no need for this to be extended by secrecy laws.

Over time, a commitment should be made to review all laws which restrict the disclosure of information, with a view to bringing them into line with the freedom of information law.[333] This is particularly important in legal systems where it is not possible to provide for the dominance of one law over others.

9.2.9. Principle 9. Protection for Whistleblowers

"Individuals who release information on wrongdoing – whistleblowers – must be protected."

A freedom of information law should protect individuals against any legal, administrative or employment-related sanctions for releasing information on wrongdoing.[334] Protection of so-called whistleblowers

[332] UN Standards, note 305.

[333] See African Principles, note 29, Principle IV(2).

[334] See African Principle IV(2).

provides an important information safety valve, ensuring that key information does indeed reach the public. Such protection should apply even where disclosure would otherwise be in breach of a legal or employment requirement. In some countries, this protection is set out in a separate law rather than being included in the freedom of information law.

Protection from liability should also be provided to individuals who, reasonably and in good faith, disclose information in the exercise of any power or duty under freedom of information legislation. This effectively protects civil servants who have mistakenly, but in good faith, released information. This protection is important to change the culture of secrecy; civil servants should not have to fear sanctions for disclosing information or they will tend to err in favour of secrecy.

Chapter 10

COMMERCIAL ISSUES

Although the duty to respect freedom of expression lies with the State, it is private companies which transform the right into a reality – they produce and distribute the books, newspapers, television programmes, Internet access points and other tools through which citizens make themselves heard and gain knowledge of what others are saying. Moreover, many businesses are also direct users of the right to freedom of expression, for example through the advertising they commission.

In this Chapter, we consider ways in which State interference in the private sector can harm or alternatively promote the right to freedom of expression.

10.1. Advertising

10.1.1. Private-sector advertising

The right to freedom of expression covers any kind of information or ideas, not only contributions to political, cultural or artistic debate but also mundane and commercially motivated expressions. The UN Human Rights Committee has confirmed that advertising is protected by the right:

> In the Committee's opinion, the commercial element in an expression taking the form of outdoor advertising cannot

> have the effect of removing this expression from the scope of protected freedom. [335]

The case concerned a law in Canada's majority French-speaking province, Quebec, which forbade advertising in English. The Committee decided that the law failed the necessity test, because the goal of protecting the French-speaking minority could have been achieved by less restrictive means, such as requiring advertising to be in both English and French. It explicitly rejected the Canadian government's contention that "freedom of expression in commercial advertising requires lesser protection than that afforded to the expression of political ideas":

> The Committee does not agree either that any of the above forms of expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others.[336]

The European Court of Human Rights takes a different approach on this point. In principle, it accepts that "where commercial speech is concerned, the standards of scrutiny may be less severe." [337] However, when commercial expression goes beyond the normal purpose of encouraging consumers to buy a product and makes a contribution to a debate of public interest, it will revert to the same level of protection as other forms of speech.

The European Court has confronted a number of situations where commercial expressions related to topics of public interest. In *Barthold v. Germany,*[338] a newspaper in Hamburg had run an article about the poor availability of veterinary surgeons during the night, illustrating the problems this situation caused through the case of a cat called Shalen, which had nearly died while its owners telephoned various clinics in vain. The animal was eventually saved by a Dr. Barthold, whose photo

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[335] *Ballantyne and Davidson v. Canada,* note 33, para. 11.3

[336] *Id.*

[337] *Demuth v. Switzerland*, 5 November 2002, Application No. 38743/97, para. 42.

[338] *Barthold v. Germany*, 25 March 1985, Applciation No. 00008734/79.

accompanied the article. The article also mentioned that Barthold was the director of a clinic and quoted his opinion on the poor availability of vets at night. Shortly after, a number of Barthold's fellow practitioners successfully applied for a court order prohibiting Barthold from making further statements to the media on the matter, on the basis that he had advertised himself in a manner contrary to the Rules of Professional Conduct for the profession.

The European Court of Human Rights agreed with Barthold that the court order had violated his right to freedom of expression, because it gave too much weight to the importance of preventing unfair competition between veterinary practitioners over the importance of free expression:

> The injunction issued on 24 January 1980 does not achieve a fair balance between the two interests at stake. … A criterion as strict as this in approaching the matter of advertising and publicity in the liberal professions is not consonant with freedom of expression. Its application risks discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community if ever there is the slightest likelihood of their utterances being treated as entailing, to some degree, an advertising effect. By the same token, application of a criterion such as this is liable to hamper the press in the performance of its task of purveyor of information and public watchdog.[339]

The Court concluded that the order had been disproportionate and therefore not 'necessary in a democratic society'.

The case *Hertel v. Switzerland*[340] involved a comparable situation, in which an association of manufacturers and vendors of electrical appliances secured a court order preventing Hertel from making statements in a journal warning against possible risks posed by food cooked in microwaves. The Court stressed that although the statements could have the effect of lowering sales of microwave ovens, they should not be treated as ordinary commercial expression:

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[339] *Id.*, para. 58.

[340] See note 36

> It is however necessary to reduce the extent of the margin of appreciation when what is at stake is not a given individual's purely "commercial" statements, but his participation in a debate affecting the general interest, for example, over public health; in the instant case, it cannot be denied that such a debate existed.[341]

In *Tierfabriken v. Switzerland,*[342] an animal protection agency was denied the right to broadcast an advertisement which called on viewers to "eat less meat, for the sake of your health, the animals and the environment." Under Swiss law, the broadcasting of political advertising is not allowed; the spot was refused because it was considered to have a "clear political character". The Court determined that the commercial sought to make a contribution to a debate of public interest:

> [T]he applicant association's film fell outside the regular commercial context inciting the public to purchase a particular product. Rather, it reflected controversial opinions pertaining to modern society. … As a result, in the present case the extent of the margin of appreciation is reduced, since what is at stake is not a given individual's purely "commercial" interests, but his participation in a debate affecting the general interest."[343]

The Court held that the animal protection agency's arguments for freedom of expression outweighed the Swiss authorities' reasons for the prohibition of political advertising. The purposes of the prohibition were, essentially, to prevent TV advertising from being monopolised by the richest political movements. The Court reasoned that a prohibition of political advertising which applied only to certain media, in this case the broadcast media, was not "particularly pressing" in nature and that the reasons adduced by the Swiss authorities were not convincing, given that the association was not using its financial weight to skew the electoral

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[341] *Id.*, para. 47.

[342] *Vgt Verein Gegen Tierfabriken v. Switzerland*, 28 June 2001, Application No. 24699/94 (European Court of Human Rights).

[343] *Id.*, paras. 70-71.

process but was participating in an ongoing general debate on animal protection and the rearing of animals.[344]

10.1.2. Advertising by public bodies and companies

States, in particular those which maintain large, State-owned corporations, often spend considerable sums on advertising through the media. Because many media outlets depend for a large share of their income on advertising, the State's decision on where to spend its money can have a significant impact on the viability of a publication or broadcasting network. Inescapably, there is a risk of political considerations coming into play in this decision. On at least one occasion, in relation to Lesotho, the UN Human Rights Committee expressed its concern over discriminatory advertising policies:

> [T]he refusal of advertisement by the State and parastatal companies to newspapers which adopt a negative attitude against the Government … [is] inconsistent with a respect for freedom of the press.[345]

A number of international instruments in the area of freedom of expression explicitly oblige governments to avoid or even prohibit discrimination on the basis of political orientation in public bodies' decisions where to advertise. The African Commission's *Declaration of Principles on Freedom of Expression in Africa* states, categorically:

> States shall not use their power over the placement of public advertising as a means to interfere with media content.[346]

The *Inter-American Declaration of Principles on Freedom of Expression* provides:

> [T]he arbitrary and discriminatory placement of official advertising and government loans … with the intent to put pressure on and punish or reward and provide privileges to

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[344] *Id.*

[345] See note 120, para 23.

[346] Note 92, Principle XIV.

> social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law.[347]

The UN, OAS and OSCE special mandates on freedom of expression have stated:

> Governments and public bodies should never abuse their custody over public finances to try to influence the content of media reporting; the placement of public advertising should be based on market considerations.[348]

In some countries, the domestic courts have obliged public bodies to allocate advertising in a non-discriminatory way. In Botswana, the High Court found that a government directive requiring public bodies and private companies in which the State had a majority shareholding to refrain from advertising in two specified publications was unconstitutional. The Botswana government had imposed the ban on the newspapers because, it was charged, they were too critical of the country's leaders and it hoped to demonstrate its displeasure about "irresponsible reporting and the exceeding of editorial freedom."[349]

In India, the High Court of Andhra ruled that while the government could not be compelled to enter into an advertising contract with any newspaper, it was obliged to allocate its advertisements even-handedly:

> It is not expected of the Government to exercise this power in order to favour one set of newspapers or to show its displeasure against another section of the press. It should not use the power over such large funds in its hands to muzzle the press or as a weapon to punish newspapers which criticize its policies and actions.[350]

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[347] Note 92, Principle 13.

[348] Joint Declaration of 10 December 2002. To access this document, see the link in note 30.

[349] *Media Publishing v Attorney General of Botswana*, [2001] High Court of Botswana 229/2001, unreported.

[350] *Ushodaya Publications Pvt Ltd v. Government of Andhra Pradesh*, AIR [1981] AP 109, 117.

10.2. Financial regulation of the media

Like any company, media enterprises are required under the law of virtually every State to pay taxes on their profits, to make their books available for inspection by the tax authority, and to meet all sorts of other financial requirements. Although such burdens on the media can be seen as an interference with free expression, their necessity is usually obvious and, in most cases, they are justifiable under the three-part test (Chapter 4). On the other hand, legislation which makes the establishment or operation of a media outlet financially more burdensome than an ordinary company, or appears to favour certain media outlets over others, is highly suspect as a restriction on freedom of expression. The following sections discuss some types of financial regulation which are in tension with international law.

10.2.1. Incorporation requirements

Under the law of certain countries, only incorporated companies are permitted to produce and distribute printed matter, or apply for a broadcasting licence. The explanation most often given for such requirements is that they ensure that the legal structure governing such corporations, including protections for the public, such as a minimal reserve of capital, is in place for media outlets.

Although incorporation requirements do not directly limit freedom of expression, they are a formality which must be observed before the right can be exercised, and are consequently an interference with the right which is subject to the three-part test (see section 4.3). There is little doubt that incorporation requirements serve a recognised legitimate purpose, namely protection of the rights of others. Assuming that such a requirement is clearly defined in law, its permissibility will depend on whether the measure is truly 'necessary' for the achievement of its ends.

No international court has so far had the opportunity to apply the necessity test to an incorporation requirement. It is reasonable to assume, however, that a distinction would be drawn on the basis of the size of the outlet. Leading newspapers and television stations enter into contracts involving significant amounts of money, and can cause substantial harm

to the rights of others by carrying stories which wrongfully infringe on someone's privacy or reputation. It would seem that imposing a duty to incorporate on such companies is not necessarily a disproportionate measure, assuming that the procedure for incorporation is straightforward and contains adequate safeguards against refusal on political grounds. By contrast, small media outlets have limited contractual obligations and, due to their limited reach, are less likely to cause significant damage to the rights of others. Moreover, an incorporation requirement – which involves certain costs – will be far more burdensome to a small media business.

Therefore, the smaller the publication, the smaller the need for an incorporation requirement, but the greater the burden such a requirement represents. A law which imposes a blanket incorporation requirement on all media outlets is, then, likely to breach the right to freedom of expression; an incorporation requirement which applies only to the largest outlets may be justifiable, if it is applied fairly and not more complex or costly than necessary.

10.2.2. Capital deposit requirements

Instead of (or in addition to) a duty to incorporate, some States require the proprietors of a media outlet to make a deposit of capital into a bank account before commencing their activities. Again, a principal purpose of a capital deposit requirement is to ensure that the outlet possesses sufficient liquidity to cover its liabilities towards third parties.

It is highly doubtful whether a capital deposit requirement, particularly one specifically directed at the media, can ever be consistent with international law. A capital deposit requirement comes at a high cost to freedom of expression and it is not accompanied by the benefits that incorporation brings to an enterprise, such as limited liability and, in many cases, a lower tax rate. It is also more prone to abuse; a government intent on suppressing the media can simply raise the level of the required capital deposit, while exempting friendly publications. The availability of a less restrictive alternative which achieves the same goal – incorporation requirements – means that capital deposit requirements almost certainly fail the 'necessity test' and are contrary to international law.

10.2.3. Taxation and subsidies

Taxes can contribute to the public good but, when their purpose or main effect is to prevent free expression, they are clearly unnecessary and contrary to international law. In the 1991 *Windhoek Declaration*, the international community expressed its concern over the use of tax legislation as a means of repression of media freedom:

> As a matter of urgency, the United Nations and UNESCO … should initiate detailed research … into … identification of economic barriers to the establishment of news media outlets, including restrictive import duties, tariffs and quotas for such things as newsprint, printing equipment, and typesetting and word processing machinery, and taxes on the sale of newspapers, as a prelude to their removal.[351]

Domestic courts have refused to apply taxation schemes which brought unjustifiable harm to the media. In a 1936 case, the US Supreme Court found a tax on newspapers with a circulation of over 20,000 copies per week to be unconstitutional, regarding it as "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled."[352] In another case, the same Court clarified that the effect of a measure, rather than its intent, would be deciding for its constitutionality: "We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of the [right to freedom of expression] … A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action."[353]

The Indian Supreme Court has reasoned along similar lines. Examining the constitutionality of an import duty on newsprint which had been progressively increased over time and which had a crippling effect on many newspapers, it stated that taxes would be unconstitutional if they

[351] 3 May 1991, endorsed by UNESCO's General Conference at its 26th session, p. 16. See also note 16.

[352] *Grosjean v. American Press Co.*, 297 US 233, 250 (1936).

[353] *Minneapolis Star v. Minneapolis Commissioner of Revenue*, 460 US 575, 593 (1983).

caused "a distinct and noticeable burdensomeness, clearly and directly attributable to the tax."[354] The Court ordered the government to study the tax's impact on the newspaper industry and reconsider its necessity within six months, while refraining from further collection until the results had been considered.

In contrast to "censorship through taxes", some governments have tried to stimulate the development of the media sector by granting tax exemptions or subsidies. Such schemes can bring benefits, as long as they are based on objective criteria and do not just favour government-friendly outlets or already well-established outlets. The Council of Europe has issued a recommendation on measures to promote media pluralism:

> [A]ny … support measures should be granted on the basis of objective and non-partisan criteria, within the framework of transparent procedures and subject to independent control. The conditions for granting support should be reconsidered periodically to avoid accidental encouragement for any media concentration process or the undue enrichment of enterprises benefiting from support.[355]

Tax exemption schemes for the benefit of the media can take several forms, such as the reduction of VAT taxes on publications, the abolition of import taxes on printing and audiovisual equipment or a lower postal rate for printed matter. Schemes of this sort have been adopted in various countries, including the Ukraine[356] and Russia.[357]

10.2.4. Accounting supervision

If print media companies are required to pay tax in the same way as other businesses, it is logical that they should also be subject to the same means of enforcing this requirement. Nevertheless, the media laws of

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[354] *Indian Express Newspapers (Bombay) v. Union of India*, AIR [1986] SC 515, p. 540.

[355] Committee of Ministers of the Council of Europe, Recommendation No. R(99)1 on Measures to Promote Media Pluralism, adopted 19 January 1999, Principle VI. To access this document, see the link at note 26.

[356] *Law on State Support for Mass Media and Social Protection of Journalists*, Article 5.

[357] Federal Law No. 191-FZ *on State Support of the Mass Media and Book-Publishing*, 1 December 1995.

some States grant the government special powers to inspect the budgets and books of print media enterprises. The risk that such powers will be used to intimidate critical publications is obvious, while there is no justification for subjecting the press to such differential treatment. Special supervisory powers are, therefore, inconsistent with the right to freedom of expression.

10.3. Concentration of ownership

Like most industries, the media is susceptible to the formation of monopolies and other anti-competitive structures. The concentration of economic power in the hands of a small number of players always poses hazards to consumers and, in the case of the media, the dangers to freedom of expression are particularly pronounced.

10.3.1. Risks posed by excessive concentration

Media concentration can undermine the right to freedom of expression in the following ways:

- A reduced number of media owners can result in a reduced diversity of viewpoints being permitted to express themselves through the media.
- If several media outlets are acquired by the same corporation, that corporation may decide to save money by simply using the same stories in each of its outlets. As a result, the news on the television will become identical to that in the newspaper and on the radio, and there will be little news of specific local or regional interest.
- The economies of scale achieved by large media conglomerates also mean that competing smaller publications have to reduce their expenditures, and are no longer able to create carefully investigated news items or items.
- Advertisers will choose to go with the largest media conglomerates, further adding to the predicament of smaller competitors.
- Lack of competition may lead to a reduced level of innovation and, in the long run, higher prices for consumers.

On the other hand, an excessively fragmented media sector can also be highly detrimental to the interests of freedom of expression, for example because no outlet can muster sufficient staff and capital to undertake thorough journalistic research. The authorities therefore face the ongoing and complex task of ensuring that the number of competing media businesses is small enough to support quality outlets, but large enough to ensure that a wide range of viewpoints is represented.

10.3.2. International law on concentration

A number of international bodies have confirmed that the right to freedom of expression implies a duty for States to prevent excessive concentration in the media sector. The UN Commission on Human Rights has called on all States to:

> … encourage a diversity of ownership of media and of sources of information, including through transparent licensing systems and effective regulations on undue concentration of ownership of the media in the private sector.[358]

In a Joint Declaration in 2002, the UN, OSCE and OAS special mandates on freedom of expression noted "the threat posed by increasing concentration of ownership of the media and the means of communication, in particular to diversity and editorial independence."[359]

The duty of States to prevent media concentration is further underlined by a number of international instruments. The *African Declaration of Principles on Freedom of Expression* states:

> States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole.[360]

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[358] Commission on Human Rights, resolution 2003/42.

[359] Joint Declaration of 10 December 2002. To access this document, see the link in note 30.

[360] Note 29, Principle XIV.

The Inter-American Declaration of Principles on Freedom of Expression[361] and the Declaration on Freedom of Expression and Information,[362] the latter adopted by the Committee of Ministers of the Council of Europe, contain similar language.

10.3.3. Domestic anti-trust measures

The Council of Europe has suggested a number of practical measures which its Member States may take to tackle the problem of media concentration:

> Member States should examine the possibility of defining thresholds — in their law or authorisation, licensing or similar procedures — to limit the influence which a single commercial company or group may have in one or more media sectors. Such thresholds may for example take the form of a maximum audience share or be based on the revenue/turnover of commercial media companies. Capital share limits in commercial media enterprises may also be considered. If thresholds are introduced, member States should take into consideration the size of the media market and the level of resources available in it. Companies which have reached the permissible thresholds in a relevant market should not be awarded additional broadcasting licences for that market.[363]

Several democratic States have enacted specific legislation with a view to combating media concentration. Such legislation typically addresses one or more of the following situations:

- *Concentration of ownership within a specific type of media.* In France, for example, nobody is permitted to control more than 30% of the national distribution of political and general information daily newspapers;[364] in Italy no publisher may

[361] Note 76, Principle 12.

[362] Committee of Ministers of the Council of Europe, *Declaration on the Freedom of Expression and Information*, 29 April 1982, reprinted in Council of Europe DH-MM (91) 1.

[363] See note 355, Appendix, Section I.

[364] *Freedom of Communication Law* No. 86-1067, Article 41.

control more than 20% of circulation at the national level and 50% at the regional level.[365]

- *'Cross-ownership' concentration.* 'Cross-ownership' is a situation in which one company has stakes in different types of media, such as television and newspapers. The law of many democratic countries prohibits companies which already have a strong presence in one media sector from crossing over to others. In the Netherlands, for example, no company which controls more than 25% of the newspaper market can obtain a licence for broadcasting.[366]

- *Foreign ownership.* Democracies sometimes limit foreign ownership of the media, usually in order to protect their national culture and identity. In South Africa, "foreign persons" are barred from exercising direct or indirect control over a private broadcasting licensee, from owning more than 20% of the financial or voting interests in a licensee or from holding more than 20% of the directorships.[367] Kazakhstan's law imposes virtually the same limit, which applies also to other types of media outlets.[368] In Poland, companies with foreign shareholders may only be granted licences if the foreign share of the opening capital or stock of the company amounts to no more than 49% and the agreement or the statutes of the company specify that Polish citizens resident in Poland constitute a majority of the Board of Directors and the Board of Management.[369] According to ARTICLE 19, restrictions on foreign ownership of broadcast outlets can be legitimate, so long as they do not undermine the economic viability of the sector:

  Restrictions may be imposed on the extent of foreign ownership and control over broadcasters but these restrictions should take into account the need for the

[365] *Press Law* No. 416 of 1981, Article 4.

[366] Media Act, Article 71b(b).

[367] Independent Broadcasting Authority Act, section 48.

[368] *Law on Mass Media*, Article 5(2).

[369] Broadcasting Act of 1992, Article 35(2).

> broadcasting sector as a whole to develop and for broadcasting services to be economically viable.[370]

Self-regulation can play a useful role in preventing media monopolies and making government intervention unnecessary. In the Netherlands, for instance, the main press companies agreed in 1993 to limit their ownership of publications to one-third of the national newspaper market, thereby forestalling government plans to impose ownership limits through the Media Act.

Where self-regulation is not possible and the adoption of legislation to control media concentration proves necessary, the task of enforcing this legislation is usually entrusted to the national competition regulator. Like all bodies which exercise supervisory powers over the media, the body charged with preventing concentration should be strictly independent from the government, so as to avoid selective or politically motivated enforcement of the law.

10.3.4. State ownership of media

The duty to avoid excessive media concentration applies with equal force to ownership of media outlets by the State.

The European Court of Human Rights has confirmed in a series of judgments, starting with *Informationsverein Lentia v. Austria,*[371] that State broadcasting monopolies are an unjustifiable restriction on freedom of expression. In the *Lentia* case, the Austrian government argued that the monopoly of the Austrian Broadcasting Corporation, the country's public service broadcaster, was necessary "to guarantee the objectivity and impartiality of reporting, the diversity of opinions, balanced programming and the independence of persons and bodies responsible for programmes." The Court rejected this argument, finding that the same goals could be achieved through means less restrictive of freedom of expression:

[370] Note 136, Principle 20.2.

[371] 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90.

> Of all the means of ensuring that [pluralism is] respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station … It cannot be argued that there are no equivalent less restrictive solutions; it is sufficient by way of example to cite the practice of certain countries which either issue licences subject to specified conditions of variable content or make provision for forms of private participation in the activities of the national corporation.[372]

Consequently, the State's broadcasting monopoly was not "necessary in a democratic society."[373] *The Declaration of Principles on Freedom of Expression in Africa* supports this conclusion; it provides that a "State monopoly over broadcasting is not compatible with the right to freedom of expression."[374]

The State's duties to refrain from monopolisation may extend beyond the sphere of traditional media outlets. On at least one occasion, the UN Human Rights Committee has criticised a virtual State monopoly in respect of printing and distribution of newspapers.[375]

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[372] *Id.*, para. 39.

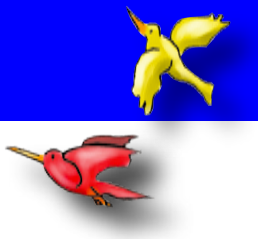
[373] *Id.*, para. 43.

[374] *Declaration of Principles on Freedom of Expression in Africa*, note 29 above, Principle V.

[375] *Concluding observations of the Human Rights Committee: Armenia*, 19 November 1998, UN Doc. CCPR/C/79/Add.100, para. 20.

‘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 all frontiers.’

Article 19 of the Universal Declaration of Human Rights



Central Asian Pocketbook on Freedom of Expression

This Pocketbook is a resource for anyone with an interest in promoting freedom of expression in the Central Asian republics, such as journalists, public officials, judges, lawyers and civil society campaigners. It provides a concise overview of the meaning of the right to freedom of expression in international law, of international best practice, and of the recommendations of leading international bodies, experts and NGOs.

ARTICLE 19
6-8 Amwell Street
London EC1R 1UQ
United Kingdom
Tel: +44 20 7278 9292
Fax: +44 20 7278 7660
Email: info@article19.org
Web: www.article19.org

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