BACKGROUND PAPER 1

on

FREEDOM OF EXPRESSION GUARANTEES AND REGULATION OF THE MEDIA

December 2007

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

Federation of Nepali Journalists (FNJ)
Media Village, Sinamangal, Kathmandu, Nepal
Tel +977 1 4490063 · Fax +977 1 4490085 · info@fnjnepal.org · http://www.fnjnepal.org

FREEDOM FORUM
Post Box No. 24292 Thapathali, Kathmandu. Tel +977 1 4102030 · Fax +977 1 4102022·
freedomforum@enet.com.np, · http://www.freedomforum.org.np

TABLE OF CONTENTS

1. INTERNATIONAL GUARANTEES OF FREEDOM OF EXPRESSION

1.1. Freedom of expression as a human right

The right to freedom of expression is a fundamental human right; fundamental both in the sense of its central importance to human life and dignity but also because it is an essential underpinning of all human rights, including the right to participate in political life.

The right to freedom of expression is recognised in all of the main international and regional human rights treaties. It was universally declared to be a right of the highest importance in the *Universal Declaration of Human Rights* (UDHR), adopted unanimously by the United Nations General Assembly in 1948, just three years after the United Nations was first created. Article 19 of the UDHR states:

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

This right has also been enshrined in the *International Covenant on Civil and Political Rights* (ICCPR), which Nepal committed itself to respect through accession on the 14th of May 1991. All three regional human rights treaties – in Africa, Europe and the Americas – also protect this basic human right. Guarantees of freedom of expression are found in the vast majority of national constitutions, including Nepal's Interim Consitution (Article 12(3)(a)).

1.2. 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 applies, in essence, to any situation in which a person communicates with another. This does not mean that there can be no restrictions on freedom of expression; the circumstances in which the right may be legitimately limited are discussed in the next section. Before considering restrictions, however, it is necessary to establish exactly which persons and activities may invoke the right in the first place. In this section, we devote further attention to that question, based on the definition of freedom of expression in the UDHR and ICCPR.

1.2.1. "Everyone shall have the right…"

The right to freedom of expression belongs to everyone; it is enjoyed regardless of a person's level of education, his or her race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status.

One important consequence of this is that the State should recognise freedom of expression not only in respect of its own citizens, but in respect of anyone present on its territory, including foreign and stateless persons.

1.2.2. "…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 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. This matter is discussed further in Background Paper 3.

1.2.3. "…information and ideas of any kind…"

The right to freedom of expression applies to any kind of fact or opinion which can be communicated, regardless of its contents or purpose. The UN Human Rights Committee (HRC), the body that oversees implementation of the ICCPR, 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 … 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.[1]

Moreover, the right to freedom of expression also extends in principle 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 legal philosophers have frequently pointed out, legal protection only for accepted information and ideas would be a hollow gesture. It is precisely persons who have something to say that others disagree with that require the protection. The European Court of Human Rights stated that it "matters little that [an] opinion 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."[2] The Court has also frequently stressed that:

> 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'.[3]

1.2.4. "…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 own citizens and foreign nationals to seek, receive and impart information to and from other countries, for example by importing foreign publications, exporting domestic publications or working for foreign media.

1.2.5. "…through any media…"

An important part of freedom of expression is the freedom to choose the means through which one expresses oneself. As the European Court of Human Rights frequently states, "it must be remembered that [freedom of expression] protects not only the substance of the ideas and information expressed but also the form in which they are conveyed."[4] Therefore, if a State prohibits a particular form of expression, such as wearing a certain type of clothing, burning a flag, speaking a particular language or using certain words, the State is restricting freedom of

[1] *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.
[2] *Hertel v. Switzerland*, 25 August 1998, Application No. 25181/94, para. 50.
[3] *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
[4] *See,* for example, *Karatas v. Turkey*, 8 July 1999, Application No. 23168/94 (European Court of Human Rights), para. 49.

expression, even if the same information or idea could also be communicated in another form permitted by law. Such a restriction must then meet the conditions set by international law for limitations on freedom of expression (to be discussed in the next section).

1.2.6. The duty to proactively safeguard freedom of expression

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 Background Paper 4); proactively disseminating information; ensuring that minority groups are able to make themselves heard through the media (section 5.1); and, in transitional countries, making the abolition or amendment of laws from previous regimes which limit freedom of expression a priority.

1.3. Permissible restrictions on freedom of expression

As the previous section showed, the right to freedom of expression in principle protects any activity involving the exchange of information or ideas between individuals against interference by the State. 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. International law therefore recognises that the right to freedom of expression is not absolute. In this section we discuss exactly when and under which circumstances international law permits States to impose restrictions.

1.3.1. The three part test

Because interference with freedom of expression is a serious matter, it is permissible only of certain strict conditions are met. 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. Any law or measure which restricts freedom of expression, whether directly or indirectly, must meet each part of the test.

1.3.2. 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.

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.

1.3.3. 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), paragraphs (a) and (b) of the ICCPR 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. Thus, a desire to shield a government official from criticism can never justify limitations on free speech.

1.3.4. 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 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.

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 the public interest caused by a restriction must not outweigh its benefits to the interest it is directed at. For example, a ban on reporting the discovery of a new infectious disease may serve a legitimate purpose – preventing panic amongst the public – but it is probably not 'necessary', because the disadvantages of such a ban for public health are more serious.

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.

2. REGULATION OF THE MEDIA: GENERAL PRINCIPLES

2.1. The importance of media freedom

It is recognised everywhere that the media play a vital role in protecting democracy and its institutions. The media are in the best position to investigate and report on issues of public importance and interest, particularly relating to the political process, the conduct of public officials, the positions taken by government with respect to international issues, corruption, mismanagement or dishonesty in government, and human rights issues, among other things. Indeed, it is fair to say that the vast majority of individuals gain almost all of their knowledge about matters outside of their own day-to-day lives from the media.

It is, therefore, of paramount importance that the freedom of expression of the media be ensured and protected. Media actors, such as journalists and editors, should be able to exercise their own right to freedom of expression. This is an essential precondition for the realisation of the right of every member of society to seek and receive information from a wide range of sources, another aspect of the right to freedom of expression (see section 1.2.2 above).

The importance of freedom of the media has been stressed by international courts. The UN Human Rights Committee (HRC) stated:

> [T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.[5]

The European Court of Human Rights has noted that the media as a whole merit special protection, in part because of their role in making public "information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."[6]

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 necessary to accomplish this goal. On the other hand, the

[5] General Comment 25, issued 12 July 1996.
[6] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

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.

This chapter gives an overview of the general principles which have been developed in international law to guide media regulation at the domestic level. The following chapters will look more specifically at regulation of individual media workers, print and broadcast media, cinemas and the Internet, respectively.

2.2. Pluralism

The concept of pluralism is fundamental to both democracy and to the protection of media freedom. A society where only a privileged few can exercise their right to freedom of expression through the media effectively is not a free society. Such a situation breaches not only the rights of those who are denied the ability to exercise their right to freedom of expression through the media but also the right of society as a whole to be well-informed and to receive information from a variety of sources.

For these reasons, international human rights law strongly not only promotes the idea of pluralism in relation to the right to freedom of expression but also requires States to take positive steps to safeguard it. In an often-repeated statement, the European Court of Human Rights has stated:

> The Court has frequently stressed 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.[7]

The protection of pluralism provides one of the main justifications for media regulation, particularly in relationship to the broadcast media. It is internationally accepted that States should regulate the airwaves to provide for a plurality of voices. State monopolies are incompatible with the right of the public to receive information from a variety of sources. Simply allowing private broadcasters, however, is not enough. States should take steps to ensure that broadcasting licences are awarded to operators who collectively present a wide and balanced range of views and information which serves the needs of the population as a whole.

With regard to the print media, it is internationally accepted that the best way to encourage pluralism is by abolishing legal and administrative obstacles to the establishment of newspapers and magazines, and enable free and genuine competition between them. In contrast to broadcasting, the print media do not rely on a limited resource (the broadcasting spectrum). It is therefore not necessary to allocate licences and decide who has the right to publish; anyone who wishes to should be permitted to start their own publication.

Regulatory measures may not be sufficient to ensure pluralism in the media and, where this is the case, States should also consider providing support measures. These may include general measures aimed at the media sector as a whole, such as the abolition of taxes on print paper and other materials necessary for operating media outlets, as well as direct support for certain

[7] *Informationsverein Lentia and others v. Austria*, 28 October 1993, Application No. 13914/88, para. 38.

types of media outlets, for example those that serve small or minority sections of the audience. If direct support measures are provided, States should take care to ensure that this takes place on the basis of objective and non-partisan criteria, within a framework of transparent procedures and subject to independent control.

2.3. Independence of regulatory bodies

The task of regulating some types of media necessitates the establishment of a special body, which can take decisions on a regular basis and develop special expertise in its field. The media regulatory bodies found in many democracies include the following:

- A broadcast regulator, which awards licences for the use of frequencies by private broadcasters;
- A board which manages the publicly owned radio and television stations;
- A telecommunications regulator, which amongst others awards licences to mobile phone operators (this body is sometimes merged with the broadcast regulator);
- A domain name authority, which awards the use of internet domain names (such as http://www.google.com.np/);
- A film board tasked with reviewing new films and making recommendations on their suitability for minors.

Each of these bodies takes important decisions which may impact on the kind of information that reaches the public or the ability of the public to use a particular medium. If such decisions are taken by the government, there is an inevitable risk that the government and its allies will end up as the greatest beneficiaries. In many countries where the government awards broadcasting licences, for example, the majority of stations are controlled by businesses close to the government or by family members of senior officials, and opposition parties have little limited to the broadcast media and thus to potential voters.

Even if a government approaches the task of regulating the media in good faith, however, the very fact that important decisions are made by the government can have the effect of restricting freedom of expression. For example, a television station whose broadcasting licence is up for renewal may refrain from criticising the authorities, out of fear that the renewal will not be granted, even if this fear is not justified. If the government directly regulates the media, self-censorship is likely to be the result.

By the same token, control of a media regulatory body by an interest group other than the government can be equally harmful to freedom of expression and pluralism. Major corporations, family clans or other groups may try to gain control of such bodies in order to strengthen their overall control of the media.

The logical solution to this problem, which has been adopted in most democracies, is to allocate the responsibility to regulate the media to administrative bodies which are independent of government and other interests, and shielded from interference. 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 2003 Declaration, they stated:

On the Regulation of the Media

- All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.[8]

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 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.
- 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 the sector in which the regulatory body will operate.
- 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.

3. REGULATION OF MEDIA WORKERS

This Chapter considers the safeguard that have been developed in international law to ensure that individual media workers are able to utilise the right to freedom of expression to inform the public.

[8] Joint Declaration of the Special Rapporteur on Freedom of Opinion and Expression of the United Nations, the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States of 18 December 2003, available online at http://www.article19.org/publications/law/intergovernmental-materials.html.

3.1. 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 1.2.1 above), 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.[9] It was recognised in this 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, 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.[10]

The Court found that licensing, by restricting access to the journalistic profession, was therefore harmful to, rather than supportive of, public order.[11]

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

[9] *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.
[10] *Id.*, para. 69.
[11] *Id.*, para. 76.

seeking, receiving and imparting of information and ideas – are specifically protected as a human right, namely the right to freedom of expression.[12]

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 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.[13]

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 1.3.4).[14]

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.[15]

In their 2004 Declaration, the special mandates on freedom of expression of the UN, OAS and OSCE stated:

> Individual journalists should not be required to be licensed or to register.[16]

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.

3.2. The right to gather news and accreditation schemes

Section 1.2.2 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

[12] *Id.*, paras. 71-72.
[13] *Id.*, para. 77.
[14] *Id.*, para. 79.
[15] *Kasoma v. Attorney General*, 22 August 1997, 95/HP/29/59.
[16] Joint Declaration of 18 December 2003. Available through the link in note 8.

> may be correct, the freedom to gather news for informational purposes, as well as the freedom to report, must be accorded due respect …[17]

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. Like all restrictions on freedom of expression, restrictions on newsgathering must comply with the three-part test (see section 1.3.1): 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 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 1.3.4) 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. [18]

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

[17] *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).
[18] *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995, UN Doc. CCPR/C/65/D/633/1995, para. 13.6.

> 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.[19]

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.[20]

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.

3.3. 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."

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

[19] See note 8.
[20] 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.

3.3.1. International standards on the protection of sources

In the seminal case of *Goodwin v. United Kingdom*,[21] 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.[22]

The right of journalists to protect the confidentiality of their sources has also been widely recognised by other international bodies, including the European Parliament,[23] the Committee of Ministers of the Council of Europe,[24] the Inter-American Commission on Human Rights[25] and the African Commission on Human and Peoples' Rights.[26] In sum, the basic principle that journalists have a right to protect their sources is well-established in international law.

3.3.2. 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 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.

3.3.3. 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 (section 1.3.1).

---

[21] *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90 (European Court of Human Rights).
[22] *Id.*, para. 39.
[23] Report No. A3-0434/93, published 18 January 1994, OJ C 44, p. 34.
[24] 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, available online at http://www.coe.int/T/E/human_rights/media/4_Documentary_Resources/CM/Rec(2000)007&ExpMem_en.asp.
[25] *Inter-American Declaration of Principles on Freedom of Expression*, Principle 8, 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.
[26] *Declaration of Principles on Freedom of Expression in Africa*, adopted at the 32nd Session, October 2002, Principle XV.

Principles 3-5 of the 2000 CoE Recommendation[27] 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.[28]

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.[29]
- 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.

3.4. Search and seizure of journalistic material

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

[27] See note 24.
[28] See note 26.
[29] As quoted in the Explanatory Memorandum, note 24, paras. 37-41.

> 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*.[30]

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. Legal measures are necessary to prevent the authorities from conducting searches in order to intimidate their critics. An English court stated:

> 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).[31]

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:

- 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.

3.5. 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. 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.

3.5.1. 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 1.2.6).

[30] *Roemen and Schmit v. Luxembourg*, 25 February 2003, Application No. 51772/99 (European Court of Human Rights), para. 57.
[31] *Ex parte the Guardian, the Observer and Martin Bright*, [2001] 2 All ER 244, 262.

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."[32] 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 […][33]

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 ….[34]

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 stated that the duty to protect should not place an "an impossible or disproportionate burden on the authorities." Not every claimed threat will 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."[35]

3.5.2. 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 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."[36] 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

[32] 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.
[33] *Declaration of Principles on Freedom of Expression in Africa*, note 26 above, Principle XI.
[34] Joint Declaration of 29-30 November 2000. To access this document, see the link in note 8.
[35] *Osman v. the United Kingdom*, 28 October 1998, Application No. 23452/94 (European Court of Human Rights), para. 116.
[36] United Nations Committee on Human Rights, Observations and Recommendations to the State of Guatemala, doc. CCPR/C/79/Add.63, para. 25.

officials. In sum, an insufficient investigation "constitutes an incentive for all violators of human rights."[37]

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.[38] 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."[39]

4. REGULATION OF THE PRINT MEDIA

The previous chapter 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. In this chapter, we consider regulation of the print media.

4.1. 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. It is notable that most established democracies have chosen not to enact 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 the next chapter).

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.

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 be less 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.[40]

[37] *Miranda v. Mexico*, Case 11.739, Report Nº 5/99, OEA/Ser.L/V/II.95 Doc. 7 rev., p. 755 (1998), para. 52.
[38] *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.
[39] *Velásquez Rodriguez v. Honduras*, 29 July 1988, Series C No. 4, para. 177.
[40] For a discussion of this law in English, see http://www.article19.org/pdfs/analysis/georgia-foe-guide-april-

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.

4.2. Licensing and registration requirements

Similarly to the licensing of individual media workers discussed in section 3.1, several States require individuals or companies who wish to establish a newspaper, magazine or other publication to obtain prior official permission, usually in the form of a licence. While international law allows the licensing of broadcast media on the grounds that these media utilise the radio spectrum, which is a scarce public resource that must be used equitably and in the public interest, it does not allow a licensing regime for the print media. There is no pressing social or democratic need to require publications to seek approval by a State body before engaging in publication. On the contrary, licensing regimes actively work against the public interest in the free flow of information: they raise high barriers to entrance and effectively place publication under State control, greatly limiting the number of publications available to the public.

There is substantial authority in international law for the position that any type of *licensing* requirement for the print media is incompatible with the right to freedom of expression.[41] A licence requirement may be distinguished from a technical registration requirement, which simply involves the provision of information about a publication to the authorities, who enjoy no discretion to refuse registration. Even the legitimacy of simple registration requirements is increasingly being questioned. For example, in their Joint Declaration of 2003, the special mandates on freedom of expression of the UN, OAS and the OSCE stated:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.[42]

Most democracies have abolished registration for the print media, let alone licensing rules, without suffering any negative consequences. The dangers to democracy and human rights inherent in licensing schemes are apparent: not only do they present a bureaucratic hurdle to be overcome, they also empower the body overseeing the scheme the ability to deny or withdraw licences and prevent the emergence of a critical press. This is inimical to the very concept of freedom of expression. As the US Supreme Court has held:

> The power of the licensor . . . is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.[43]

2005.pdf.

[41] *See*, for example, *Vladimir Petrovich Laptsevich v. Belarus*, Communication No. 780/1997, U.N. Doc. CCPR/C/68/D/780/1997 (13 April 2000); see also Article 13(2) of the American Convention on Human Rights.

[42] See note 8.

[43] *Thornhill v. State of Alabama*, 310 US 88 at 97 (1940).[US Supreme Court]

4.3. Suspensions and bans

Permanently banning or temporarily suspending a print media outlet is a highly intrusive interference with the right to freedom of expression. If the right to suspend or ban rests with an administrative 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."[44]

4.4. 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 Nepal, tend to face a similar pattern of problems in relation to professional and ethical standards in the media. Journalists will start to explore and test the limits of their newly-won freedom of expression, in good ways, but also in bad ones; some of them will publish sensationalist, highly unbalanced, poorly researched or outright defamatory articles. 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.

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 4.1 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.

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

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, often 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.[45]

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 paper 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 based on the comparative experience of several countries.

- A self-regulatory mechanism should involve 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;

[45] Declaration of Principles on Freedom of Expression in Africa, note 26 above, Principle IX.

  - 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.

5. REGULATION OF THE BROADCAST MEDIA

By far the most important source of information, as well as of entertainment, for most people around the world are 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 1.2.5), 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.

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.[46] The following sections describe the international standards which have been developed to ensure that these dilemmas are overcome.

[46] ARTICLE 19's publication *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* provides guidance on these issues. Available online at http://www.article19.org/pdfs/standards/accessairwaves.pdf.

5.1. Frequency planning

As was discussed in section 2.2, the promotion of pluralism should be the principal goal of State regulation of the broadcast media, and indeed of media regulation in general. Promoting pluralism in broadcasting 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[47] 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 (we refer to section 2.3, which describes how to safeguard the independence of regulatory bodies), 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; each region should have access to a range of broadcasting that has local relevance and caters to different types of audiences within the region.

A frequency plan which has come about through consultation with all those with a stake in it – in particular broadcasters and representatives of their audiences – stands the best chance of serving the public interest effectively.

5.2. Administration of broadcast licences

5.2.1. Allocation of licences

In most countries, periodic calls for licence applications are issued, in accordance with the frequency plan, 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. An important licence criterion will always be the extent to which the proposed broadcasting is likely to contribute to realisation of the goals of the frequency plan.

Blanket prohibitions on the basis of applicants' form or nature, such as a ban on unincorporated businesses, 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

[47] 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.

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.

5.2.2. 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.

5.2.3. 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.

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.

5.3. 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. A publicly funded station can only be said to be a "public service broadcaster" if its loyalty is to the public as a whole, not just to the government, the opposition, the business community or any other interest group.

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.[48] These are addressed briefly in turn below.

Guaranteeing the independence of PSBs raises similar problems as those discussed in relation to media regulatory bodies in general (see section 2.3).[49] The system's governing body – usually a board of directors – should be elected by a body which represents society as a whole, such as parliament voting by a two-thirds majority, ensuring that those elected to the body are independent, competent, free of financial interests in broadcasting and enjoy the confidence of a wide range of political parties.

The central considerations in the programming of the PSB should be how to serve the interest of the public as a *whole*.[50] 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 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

[48] ARTICLE 19's *Model Public Service Broadcasting Law* provides a practical example of how these questions can be dealt with. Available online at http://www.article19.org/pdfs/standards/modelpsblaw.pdf.
[49] 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. Available online at http://www.coe.int/T/E/Human_Rights/Media/4_Documentary_Resources/CM/Rec(1996)010&ExpMem_en.asp
[50] 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.

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.

6. REGULATION OF THE INTERNET

The Internet has rapidly emerged as a new vehicle for freedom of expression. It brings together in one medium three elements of the right to freedom of expression as it is defined in international law (see section 1.2.2), enabling users to "seek, receive and impart" information and ideas with previously unimaginable ease and speed. Some have termed the Internet the most democratic medium yet invented, both because it enables any user to broadcast to an audience of a billion at modest cost, and because it challenges the informational monopoly which dictatorships rely upon to sustain themselves. The reverse side of this coin is the gap of opportunities, often termed the "digital divide", which has opened up between those with access to a connection and those without. In addition to the lack of universal access, efforts to regulate the Internet pose a further threat to its potential as a fulcrum of free expression.

6.1. Ensuring access to the Internet for all

The growing importance of the Internet means that access has become a significant public issue. Those who are able to go online can reap significant benefits, while those who lack access, for example due to poverty, illiteracy, a handicap, a lack of computer training or geographical isolation, risk falling further behind in their development. The 'digital divide' is a problem faced in varying degrees by all societies, rich and poor; in the United Kingdom, for example, the government has attempted to provide low-income families with computers to prevent their exclusion from the 'information society'. Lack of access to the Internet disproportionately affects countries which are already poor, however, causing a "global digital divide" between developing and developed countries.

A large number of smaller and larger projects have been initiated worldwide to reduce the digital divide within and between countries. From the standpoint of international law, the most important of these is the World Summit on the Information Society (WSIS). WSIS was a pair of two major conferences sponsored by the UN, in Geneva in 2003 and Tunis in 2005, which sought amongst others to reach agreement between governments and civil society on a strategy to tackle the digital divide.

The 2003 Geneva meeting resulted in the adoption of a Declaration of Principles, which sets out the international community's common vision of how the information society should develop. The Declaration of Principles reaffirms that the right to freedom of expression through any media belongs to everyone (see also sections 1.2.1 and 1.2.5 above), and that consequently:

> Everyone, everywhere should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers.[51]

The Declaration of Principles is accompanied by a Plan of Action,[52] which sets out a number of concrete goals to be achieved by 2015, including Internet access for half of the world's population.[53] It also recommends an extensive range of measures which governments and civil society groups should take to realise these goals, including:

- Developing national e-strategies;[54]
- Taking action to support an enabling and competitive environment for the necessary investment in information and communication technology (ICT) infrastructure and for the development of new services;[55]
- Providing and improving ICT connectivity for all schools, universities, health institutions, libraries, post offices, community centres, museums and other institutions accessible to the public, in line with the indicative targets;[56]
- Encourage the use of unused wireless capacity, including satellite, in developed countries and in particular in developing countries, to provide access in remote areas and to improve low-cost connectivity;[57]
- Providing adequate access through various communication resources, notably the Internet, to public official information.[58]

The Plan of Action is of a recommendatory nature, and does not create binding obligations for either governments or NGOs.

At the Tunis meeting in 2005, the recommendations resulting from the Geneva meeting were reaffirmed, and States which had not yet done so were called upon to adopt an e-strategy no later than 2010.[59]

---

[51] World Summit on the Information Society, *Geneva Declaration of Principles*, Document WSIS-03/GENEVA/DOC/4-E, adopted 12 December 2003, para. 4.
[52] World Summit on the Information Society, *Geneva Plan of Action*, Document WSIS-03/GENEVA/DOC/5-E, adopted 12 December 2003.
[53] *Id.*, para. 6(j).
[54] *Id.*, para. 8(a).
[55] *Id.*, para. 9(a).
[56] *Id.*, para. 9(c).
[57] *Id.*, para. 9(i).
[58] *Id.*, para. 10(b).
[59] *Tunis Agenda for the Information Society*, Document WSIS-05/TUNIS/DOC/6(Rev. 1)-E, adopted 18 November 2005, para. 85.

6.2. State regulation of the Internet

While the international community is working to address the 'digital divide', in a number of countries public policy actually has the effect of limiting Internet access, for example by requiring authors of websites or Internet service providers (ISPs) to obtain a license or to register, filtering Internet content or making ISPs liable for what their users publish.

6.2.1. Licensing and registration of websites and ISPs

As was discussed above in section 4.2, licensing of the print media is considered illegitimate in international law, as it imposes a barrier to the exercise of freedom of expression which is not justified by a strict necessity. Even a registration requirement, that is, a duty to notify the authorities of the establishment of a new publication, is increasingly viewed as unjustified. By contrast, as discussed in section 4.2, international law permits, even requires, governments to licence broadcasters, recognising that the supply of broadcasting frequencies is limited and a mechanism is necessary to allocate the use of them to different operators, in order to create a pluralistic broadcasting landscape.

The Internet may be seen as occupying an intermediate position between the print media and broadcasting. In common with broadcasting, every operator on the Internet requires the use of one or more unique addresses, similar to the frequencies of a radio or television station. But in common with the print media, there are no limits to the numbers of Internet websites that can exist alongside each other – the supply of potential website addresses is infinite, while the number of potential broadcasting frequencies is not.

An analogy with the principles applicable to the print and broadcast media suggests that States may, or even should, regulate the use of internet addresses, in order to ensure the proper functioning of the Internet and the emergence of pluralism online. On the other hand, given the unlimited availability of addresses, there is no justification for denying anyone the use of the Internet by refusing to grant a permit or an address. The UN, OAS and OSCE special mandates on freedom of expression confirmed this position in their 2005 Joint Declaration:

> No one should be required to register with or obtain permission from any public body to operate an Internet service provider, website, blog or other online information dissemination system, including Internet broadcasting. This does not apply to registration with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation.[60]

The same Statement stresses that, like all media regulatory bodies, the body responsible for allocating website addresses should be independent of government and other interests (see section 2.3):

> The Internet, at both the global and national levels, should be overseen only by bodies which are protected against government, political and commercial interference, just as freedom from such interference is already universally acknowledged in the area of the print and broadcast media. National regulation of Internet domain names should never be used as a means to control content.[61]

[60] Joint Declaration of 21 December 2005. Available online at the link in note 8.
[61] *Id.*

6.2.2. Content restrictions

Given that it is still a fairly new medium, many countries have sought to apply their existing laws concerning the content of publications – such as defamation, privacy and obscenity laws – to the Internet, in an analogous fashion to the print or broadcast media.

Legislation which fails to take into account the special nature of the Internet can however lead to unjustifiable results. A good example of this are materials which are deemed unsuitable for minors. Because the Internet is not like a bookstore, where the top shelf can be designated for certain titles, or like television, where certain material can be broadcast only after 9pm in the evenings, it cannot be regulated in the same way as those media. Some governments have sought to simply block access to such materials, with the consequence that they are no longer available to adults, either. Moreover, because the filtering software is not very accurate and over-inclusive, sites which are perfectly suited for all ages sometimes end up being blocked too. As a result, the government-mandated use of filters has led to a public backlash in a number of countries. In the US, the Supreme Court struck down various legislative proposals to restrict the availability of 'obscene' or 'indecent' material, because of their effect on legitimate forms of freedom of expression.[62] There is now growing support in international law for the position that access to Internet content should be self-regulated, and that any filtering should be done voluntarily by the end-user. The UN, OAS and OSCE mandates on freedom of expression stated:

> Filtering systems which are not end-user controlled – whether imposed by a government or commercial service provider – are a form of prior-censorship and cannot be justified. The distribution of filtering system products designed for end-users should be allowed only where these products provide clear information to end-users about how they work and their potential pitfalls in terms of over-inclusive filtering.[63]

Another problem with nationally-imposed content regulation is that different countries all attempt to enforce their own national laws over the global Internet. Crudely put, this means that anyone publishing on the Internet must count with the possibility of being dragged into the courts of any one of the 190 or so countries which are connected to the web. The potential of this situation to discourage freedom of expression on the Internet is apparent. The number of cases involving questionable claims of jurisdiction over the Internet has fortunately been limited to date. A well-known instance is the case of *LICRA v. Yahoo!*. The American Internet company Yahoo! was successfully sued by French anti-racism groups in a French court to remove Nazi memorabilia from the auctions section of its site. A Californian court eventually ruled that the French court order could not be enforced as it was incompatible with the guarantee of freedom of expression in the US Constitution.[64]

A further problem with regard to regulation of Internet content is the question who can be regarded as 'publisher', and thus considered legally responsible for online content. The Internet's closest analogy to a newspaper or book publisher are ISPs. In contrast to print media publishers, however, ISPs have little control over what their clients upload. Holding them responsible for online content would therefore seem unjust, and could force ISPs to engage in rigorous prior censorship of their users' websites. The Joint Statement of the UN, OAS and OSCE special mechanisms recommends:

---

[62] See, for example, Reno v. ACLU, 521 US 844, 26 June 1997, No. 96-511 (United States Supreme Court).
[63] See note 60.
[64] See *Yahoo!, Inc. v. La Ligue Contra Le Racisme et L'Antisemitisme (LICRA)*, 145 F. Supp. 2d 1168 (N.D.Cal. 2001).

> No one should be liable for content on the Internet of which they are not the author, unless they have either adopted that content as their own or refused to obey a court order to remove that content. Jurisdiction in legal cases relating to Internet content should be restricted to States in which the author is established or to which the content is specifically directed; jurisdiction should not be established simply because the content has been downloaded in a certain State.[65]

7. REGULATION OF FILM

In many countries, new films must be submitted to a public body before they can be released in the cinemas or made available for sale and rental. (Films which are broadcast on television are usually subject to the same rules applicable to other TV content – see section 5.2.3). In some countries, the film review body has the power to prohibit films or cut scenes; in others, it may only classify films based on their suitability for minors.

Prior censorship, whereby official bodies preview material before it is allowed to be released to the public, has always been regarded with great suspicion by international courts because of the enormous potential for abuse. It is prohibited altogether under the *Inter-American Convention on Human Rights*.[66] Even where international instruments have not go so far as to forbid prior censorship outright, it is clear that it may be legitimate only in extremely limited circumstances, where an overwhelming public interest is at stake. The European Court of Human Rights, for example, has held that prior restraints "call for the most careful scrutiny on the part of the Court."[67]

Licensing of films and videos is one area where the practice of prior censorship is still considered legitimate as a restriction on freedom of expression in some countries, although this is increasingly being questioned. For example, the Inter-American Court of Human Rights has clearly held that a system of prior authorisation for films is a breach of the Inter-American guarantee of freedom of expression.[68]

The European Court of Human Rights has, however, upheld film and video licensing systems, but only where they meet strict standards of scrutiny. In *Wingrove v. United Kingdom*, for example, the Court upheld a refusal to allow a video to be released commercially. However, the Court noted that the authorities had reasonably concluded that the video would breach the criminal law and that the author had refused to cut the offensive scenes.[69]

Regardless of the above, as with other forms of communication, such as the print media and broadcasters, it is essential that any regulation is undertaken by a body that is independent of government and protected against political or other forms of interference (see section 2.3).

To strike a balance between respect for freedom of expression and the right of viewers to decide what they want to watch, many countries require films and videos to display a classification rating. These ratings are normally expressed in terms of the appropriate

[65] See note 60.
[66] Adopted on 22 November 1969, in force 18 July 1978, Article 13(2).
[67] *The Observer and Guardian v. United Kingdom*, (Spycatcher case), 26 November 1991, 14 EHRR 153, para. 60.
[68] *"The Last Temptation of Christ" Case (Olmedo Bustos et al. v. Chile)*, Judgment of 5 February 2001, Series C, No. 73, especially para. 71.
[69] 25 November 1996, Application No. 17419/90, especially para. 64.

minimum viewer age, for example "U" (suitable for all ages); "PG" (parental guidance – suitable for all ages but you may wish to exercise parental guidance), "12" (only suitable for those aged 12 and over) and so on. Showing of "R" rated films and display of "R" rated videos may be restricted to protect children.

Restrictions on the content of audio-visual works must meet the same strict three-part test as all restrictions on freedom of expression (see section 1.3). While some such restrictions may be justifiable, including for moral reasons – such as obscenity – restrictions that are designed to promote or support a particular political viewpoint or ideology can never be justified. For this reason, the European Court of Human Rights has consistently held that the margin of appreciation – the discretion that each State enjoys in deciding when and how to limit freedom of expression - is extremely limited in relation to political issues.[70]

Furthermore, as discussed in section 1.2.3, it is not legitimate to censor material simply because some people may find it offensive. Rather, there must be harm to a legitimate interest, such as protection of children. As regards religion, individuals must be free to articulate any views they hold, including through audio-visual media.

[70] See, for example, *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, para. 40.