BRIEFING NOTE SERIES

Freedom of Expression

Centre for Law and Democracy
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FREEDOM OF EXPRESSION BRIEFING NOTE SERIES

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Centre for Law and Democracy (CLD)
39 Chartwell Lane
Halifax, N.S.
B3M 3S7
Canada

Tel: +1 902 431-3688
Fax: +1 902 431-3689
Email: info@law-democracy.org
www.law-democracy.org

International Media Support (IMS)
Nørregade 18
1165 Copenhagen K
Denmark

Tel: +45 8832 7000
Fax: +45 3312 0099
Email: ims@i-m-s.dk
www.mediasupport.org

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Abbreviations

ACHR	American Convention on Human Rights
COE	Council of Europe
ECHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICT	Information and communications technology
IPC	Indonesia Press Council
OAS	Organization of American States
OSCE	Organization for Security and Co-operation in Europe
PKK	Kurdistan Workers' Party
PSB	Public service broadcaster
RTI	Right to information
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Committee
UNESCO	United Nations Educational, Scientific and Cultural Organization

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Introduction

This series of Briefing Notes is designed to give readers an understanding of the key international legal standards that apply in the context of freedom of expression. They are aimed at an audience which does not necessarily have a deep understanding of freedom of expression issues, but they also aim to be of interest and relevance to more sophisticated freedom of expression observers and practitioners. Thus, while the Briefing Notes are designed to be broadly accessible, they also provide readers with fairly in-depth knowledge about freedom of expression issues.

Each individual Briefing Note addresses a different thematic freedom of expression issue. The first, perhaps predictably, is titled Freedom of Expression as a Human Right, while the second looks at the permissible scope of restrictions on freedom of expression under international law. Several of the Briefing Notes focus on different areas of media regulation, including print, broadcast and public service media, journalists, media diversity and independent regulation. This reflects the central role media regulation plays both in terms of guaranteeing freedom of expression and in the legal frameworks found in democracies relating to freedom of expression. There are also Briefing Notes on both criminal and civil restrictions on freedom of expression, as well as on the right to information (or freedom of information) and digital rights.

In addition to providing substantive guidance in the relevant thematic area, the Briefing Notes contain a number of pithy quotes from leading sources. The idea is to provide readers with quick access to 'quotable quotes' for possible reuse in their work. Each Note also contains a section at the end on further resources, for readers who want to probe the subject more deeply.

The Briefing Notes are available in two different formats. They are available as a collection in physical print format as well as electronically at www.law-democracy.org and www.mediasupport.org. But they have also been designed as stand-alone products and are thus available as individual Briefing Notes. This is to provide easy accessibility to readers who want to focus on just one or two thematic areas, without feeling they need to read through masses of extraneous text.

The Centre for Law and Democracy (CLD) and International Media Support (IMS) hope you find these Briefing Notes accessible and useful and we also welcome feedback at info@law-democracy.org and ims@i-m-s.dk. Happy reading.

BRIEFING NOTE 1

Freedom of Expression as a Human Right

Freedom of expression is a core human right which is guaranteed under international law and by virtually every constitutional bill of rights in the world. It is key to human development, dignity, personal fulfilment and the search for truth, and a fundamental pre-requisite for democracy and good governance. It facilitates free debate about and between competing political parties, enables citizens to raise concerns with authorities and ensures that new policies and legislation may be the subject of careful scrutiny. The quality of government is enhanced by free speech because it helps to ensure that authorities are competent and honest and allows individuals to voice concerns about and debate government action. Put differently, democratic values are under threat when information and ideas are not permitted to flow freely.

The importance of freedom of expression has been emphasised by a vast array of different actors. A good example of this is the joint statement by United Nations Secretary-General Ban Ki-moon and UNESCO Director-General Irina Bokova on World Press Freedom Day, 3 May 2014:

> This year, the international community has a once-in-a-generation opportunity to prepare a long-term agenda for sustainable development to succeed the Millennium Development Goals when they end in 2015. Successfully implementing that agenda will require that all populations enjoy the fundamental rights of freedom of opinion and expression. These rights are essential to democracy, transparency, accountability and the rule of law. They are vital for human dignity, social progress and inclusive development.

The right to freedom of expression is recognised in all of the main international and regional human rights treaties. This includes, most notably, the *Universal Declaration of Human Rights* (UDHR), which was adopted unanimously by the United Nations General Assembly in 1948. While the UDHR is not formally legally binding on States, its guarantee of freedom of expression is widely regarded as having acquired legal force as customary international law. 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.

Similar language is included in Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), a formally legally binding treaty ratified by 168 States as of April 2014:

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

Freedom of expression is also protected in regional human rights treaties, including the *African Charter on Human and People's Rights*, the *American Convention on Human Rights* and the *European Convention on Human Rights.*

Although technically different from freedom of expression, Article 19 also protects the right to hold opinions. Importantly, while freedom of expression may be restricted, the right to hold opinions is absolute; the State may never legitimately limit this right.
The right to freedom of expression is broad and multifaceted in scope. First, as a human right, and as is clear from Article 19, freedom of expression belongs to everyone. No distinctions are permitted, among other things, on the basis of a person's race, colour, nationality, sex, language, social origin or property.

Second, it includes the right to impart information and ideas "of all kinds". The right to express oneself encompasses not only speech which is generally accepted or is respectful in tone but also controversial or offensive speech. Indeed, one of the most important aspects of the right to freedom of expression is the protection of unpopular speech. This was made clear by the European Court of Human Rights (ECHR) in the case of *Handyside v. United Kingdom*:

> [F]reedom of expression ... is applicable not only to "information" or "ideas" that are favourably received ... but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".

Third, the right applies to expressions regardless of the media through which they are made, including broadcasting and newspapers, the Internet, public debates, academic research and verbal expressions.

Fourth, the right to freedom of expression includes not only the right to 'impart' information and ideas (i.e. the right to speak) but also the right to 'seek' and 'receive' information from others. In other words, freedom of expression enables every citizen not only to contribute to the public sphere, but also to have access to a wide range of information and viewpoints. This is a very important aspect of the right, which serves as the underpinning of important freedom of expression concepts such as media diversity and the right to access information held by public authorities.

Fifth, another important aspect of the right to freedom of expression is that it imposes both negative and positive obligations on the State. In its negative aspect, the right places an obligation on States not to interfere with the exercise of the right to seek, receive and impart information and ideas, except as permitted under international law. The positive obligation is essentially to create an environment which supports a free flow of information and ideas in society, and includes elements such as the obligation to put in place a legal framework for accessing public information and to create an environment in which a free and independent media can flourish.

Sixth, the right to freedom of expression applies regardless of frontiers. This means that it protects the right to access information from abroad, whether in the form of broadcasting, newspapers, the Internet or speaking to someone in another country.

Unlike the right to hold opinions, the right to freedom of expression is not absolute. It is universally recognised that certain key public and private interests may justify the placing of restrictions on this right. However, international law sets out a strict three-part test which must be met in order for a restriction to be valid (see Briefing Note 2).

Most States recognise the importance of freedom of expression and proclaim their support for open public discourse but, at the same time, nearly every State has laws and practices which fail to conform to international human rights standards. This ranges from prior censorship regimes to harsh criminal penalties for disseminating prohibited speech to regulatory regimes which give the government undue control over the media, public or private, to overbroad content restrictions to failures to implement access to information laws properly. All States should review their legal frameworks and implementation practices to make sure that they conform to international and constitutional standards. This is a particular priority for transitional democracies, where a barrage of illegitimate legal rules often remain in place and can act as a serious impediment to the process of democratisation.

FURTHER READING

- Case Law databases:
  - African Commission on Human and Peoples' Rights: http://www.achpr.org/communications/
  - European Court of Human Rights: http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"documentcollectionid2":["CASELAW"]}
  - Inter-American Court of Human Rights: http://www.corteidh.or.cr
  - UN Human Rights Committee: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=17

- *International Covenant on Civil and Political Rights*, UN General Assembly Resolution 2200A(XXI) of 16 December 1966, in force 23 March 1976: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

- UN Human Rights Committee, *General Comment No. 34*, 12 September 2011, CCPR/C/GC/34: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en

- *Universal Declaration of Human Rights*, UN General Assembly Resolution 217A(III) of 10 December 1948: http://www.un.org/en/documents/udhr/

BRIEFING NOTE 2

Restrictions on Freedom of Expression

Although freedom of expression is a fundamental human right, it is recognised under international law that it is not an absolute right and that it may, in appropriate cases, be restricted. The test for whether or not a restriction on freedom of expression is justified is found in Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR):

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

This test is strict, with narrowly drawn conditions. In its September 2011 General Comment No. 34 on Article 19 of the ICCPR, the UN Human Rights Committee (UNHRC) stated:

> Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. [references omitted]

Article 19(3) of the ICCPR establishes a three-part test for the validity of restrictions on freedom of expression. First, a restriction must be in accordance with a law. This includes primary legislation, as well as regulations and other legally binding documents adopted pursuant to primary legislation. This would include, for example, a binding code of conduct for the media adopted by a broadcast regulator pursuant to broadcasting legislation. Under this part of the test, the power to authorise restrictions on freedom of expression is essentially vested in the legislative branch of government.

It is not enough simply to have a law; the law must also meet certain standards of clarity and accessibility. If restrictions are unduly vague, or otherwise grant excessively discretionary powers of application to the authorities, they fail to meet the main purpose of this part of the test, namely to limit the power to restrict freedom of expression to the legislature. Unduly vague rules may also be interpreted in a manner which gives them a wide range of different meanings. It would be inconsistent with democracy to give officials the power to make up the rules as they go and this would also not be fair to individuals, who should be given reasonable notice of exactly what is prohibited.

Not only do vague laws bypass democratic legislative control, they can also result in a 'chilling effect', whereby individuals steer far clear of controversial topics because there is uncertainty about what is permitted and what is not. The chilling effect can be exacerbated where penalties for breach of the law are unduly harsh. As the UNHRC stated in General Comment No. 34:

> For the purposes of paragraph 3, a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.

Second, the restriction must serve a legitimate aim. Article 19(3) of the ICCPR sets out a list of legitimate aims: respect for the rights and reputations of others, protection of national security, public order, public health or morals. The UNHRC has made clear that this list is exclusive, so that restrictions which do not serve one of the listed aims are not valid:

Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated (UNHRC, General Comment No. 34).

Furthermore, the restriction must be primarily directed at one of the legitimate aims and serve it in both purpose and effect. For example, a restriction that has a purpose directed at one of the legitimate aims listed but has a merely incidental effect on that aim cannot be justified.

Third, the restriction must be necessary for the protection or promotion of the legitimate aim. The necessity element of the test presents a high standard to be overcome by the State seeking to justify the interference, apparent from the following quotation, cited repeatedly by the European Court of Human Rights (ECHR):

> Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

To determine if a restriction is necessary, courts have identified four aspects of this part of the test. First, there must be a pressing or substantial need for the restriction; minor threats to legitimate aims do not pass a threshold test for restricting freedom of expression. Second, the approach taken must be the least intrusive manner of protecting the legitimate aim. If there is an alternative measure which would accomplish the same goal in a way which is less intrusive, the measure chosen is clearly not necessary. For example, licensing newspapers would be an effective way to prevent undue concentration of ownership, but this objective can be achieved in ways that are far less harmful to freedom of expression and so licensing cannot be justified on this basis.

Third, the restriction must impair the right as little as possible in the sense that it is not 'overbroad'. For example, while it is legitimate to prohibit defamatory statements, these rules should be limited to speech which illegitimately undermines reputations. Banning all speech which was critical would be overbroad since much critical speech is true or otherwise reasonable.

Fourth, a restriction must be proportionate. This part of the test involves weighing the likely effect on freedom of expression against the benefits of the restriction in terms of the legitimate aim which is sought to be protected. Where the harm to freedom of expression outweighs the benefits, a restriction cannot be justified, keeping in mind that the right to freedom of expression is a fundamental human right.

In General Comment No. 34, the UNHRC summarised these conditions as follows:

> Restrictions must not be overbroad. The Committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law". The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.
>
> When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat. [references omitted]

It is important to note that, in applying this test, courts and others should take into account all of the circumstances at the time the restriction is applied. For example, in the case of *Zana v. Turkey*, the ECHR noted, in evaluating a statement made in support of the PKK, a militant separatist group:

The statement cannot, however, be looked at in isolation. It had a special significance in the circumstances of the case, as the applicant must have realised… the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time.

An identical statement carried out in peacetime may not have met the threshold of necessity, but the specific conditions at that time, and in that area justified the imposition of the restriction in that case.

FURTHER READING

- Toby Mendel, Restricting Freedom of Expression: Standards and Principles, March 2010: http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf

- UN Human Rights Committee, *General Comment No. 34*, 12 September 2011, CCPR/C/GC/34: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en

BRIEFING NOTE 3
The Right to Information

In 1913, Louis Brandeis, a famous United States jurist, noted: "Sunlight is said to be the best of disinfectants." Although it has taken a bit of time for that sentiment to translate into legislative reforms to give individuals a right to access information held by public authorities or the right to information (RTI), the last 25 years have witnessed a virtual revolution in that respect. In 1989, there were just thirteen national RTI laws globally, today there are some one hundred. Over 5.5 billion people, 78% of the world's population, live in a State which has provided legal recognition to the right to information.

There are several reasons why the right to information is of fundamental importance in a democracy. The underlying principle is that officials hold information not for themselves but, rather, on behalf of the public. There are also strong practical reasons to give legal effect to RTI. In order to participate effectively in decision-making, citizens need to be able to access the information that governments have used to come up with proposed decisions. The right to information is also an important tool in combating corruption and facilitating oversight of public bodies. Even where specific information disclosures do not directly reveal instances of mismanagement, fostering a culture of openness and accountability encourages responsible use of public resources. The right to information also serves to build public trust in State institutions. Access to information can serve social goals, including through giving individuals greater control over their personal information. There is also an important commercial value to RTI, since it increases the competitive nature of tenders and businesses often find creative ways of monetising public information, either to increase the efficiency of their business models or to develop innovative new products.

The right to information is now firmly recognised as a human right under international law. Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) protects not only the right to communicate, but also the right to seek and receive information and ideas, which serves as the jurisprudential foundation for the human right to information under international law.

The earliest formal recognition of the right to information as a general human right was in a 2006 case decided by the Inter-American Court of Human Rights, *Claude Reyes v. Chile*, in which the Court stated:

> In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to "seek" and "receive" "information", protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can

> have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.

Both the European Court of Human Rights and the UN Human Rights Committee have subsequently recognised the right to information, with the latter stating in its 2011 General Comment on Article 19 of the ICCPR:

> Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.

The core principle underpinning the right to information is the principle of maximum disclosure with limited exceptions. Maximum disclosure essentially means that States should endeavour to make as much information as possible publicly available, and that provisions granting access should be interpreted as broadly as possible. There should be a general presumption that all types of information held by all public authorities should be accessible, and that the right should apply broadly, so that non-citizens and legal entities enjoy a right of access.

However, the right to information, like the right to freedom of expression from which it is derived, is not absolute and governments may legitimately withhold certain information. It would not, for example, be reasonable for citizens to obtain access to a list of the names of undercover police informants or private information belonging to third parties. However, exceptions to the right should be crafted and interpreted as narrowly as possible.

A three-part test applies to any exceptions to the right to information. First, the exception must relate to a legitimate aim which is set out clearly in the right to information law. Although there is no universally recognised list of legitimate exceptions, these are generally understood as being limited to national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs; privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice; legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities.

Second, any decision to withhold information should be based on a harm test. It is not legitimate to withhold information simply because it relates to a protected interest. Rather, there should be an onus on the public body to demonstrate that disclosure of the information will cause specific harm to one of the listed interests. Moreover, if it is reasonably possible to sever or redact the sensitive information, the remainder of the document should still be released. Finally, there should be a public interest override, whereby the information is withheld only if the harm to the listed interest outweighs the overall public interest in disclosure. For example, if the information exposes corruption or human rights abuses, there is

generally a very high public interest in favour of disclosure.

In addition to these basic principles, a strong RTI system will include a clear procedural framework designed to facilitate access in an efficient and affordable manner. This should include clear and user friendly procedures for making requests, along with quick timelines for responding to them (ideally between two and three weeks). It should be free to file requests, and public bodies should only be permitted to charge fees based on the reasonable cost of reproducing and delivering the information. If an information request is refused, the public body should be required to contact the requester and provide them with an explanation and information about their options for appealing the ruling.

A strong RTI system will also include a specialised oversight body, such as an information commission or commissioner, with the power to hear and determine appeals against refusals of access or other infringements of the law, as well as wider powers to support strong implementation of the law. The oversight body should have adequate resources and statutory powers to perform its functions, including the ability to order disclosure of information and to impose other structural remedies on public authorities which repeatedly fail to live up to their obligations under the law.

An effective RTI law will also include administrative rules aimed at facilitating effective implementation. These should include obligations to appoint specialised officials to receive and process requests, to provide training to their staff, to maintain their records in good condition, and to report annually on what they have done to implement the law.

Proactive publication is also a critical aspect of the right to information. In the digital age, there is an increasing emphasis on open government, and on providing as much information as possible on a proactive basis, mainly via the Internet. In addition to facilitating greater public access to information, proactive publication is an efficient use of public resources, particularly for information which is likely to be the subject of an access request. It is far easier to publish a document online than to respond to even one request for it. Information should be published in as user-friendly a manner as possible, in machine processible formats rather than scanned versions of a paper document, and with effective search facilities for finding the information.

FURTHER READING

- Andrew Puddephatt and Elizabeth McCall, "A Guide to Measuring the Impact of Right to Information Programmes", United Nations Development Programme, April 2006: http://omec.uab.cat/Documentos/ddhh_comunicacio/0083.pdf
- Right 2 Info, a resource with right to information legislation and policies: http://www.right2info.org
- RTI Rating, a comparative analysis of right to information legislation around the world: http://www.rti-rating.org
- Toby Mendel, *The Right to Information: A Comparative Legal Survey*, UNESCO, 2008: http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html

BRIEFING NOTE 4

Independent Regulation of the Media

A number of important public interest goals are achieved through regulation of the media, and especially the broadcast media. It has traditionally been necessary for regulation to serve as a gatekeeper regarding access to the airwaves, a limited public resource. Regulation can also promote important diversity goals, and prevent harmful content, for example for children, from being aired at inappropriate times. Good legislation can support these goals, but only where there is impartiality and fairness in the application of the rules. Without independent oversight, even the best regulatory rules can be turned into tools to suppress dissenting voices. Even if the laws are not overtly abused, the presence of conflicts of interest can lead to perverse regulatory decisions. In many countries, political interference in regulatory bodies has historically been the main concern but, in others, the greater threat is of regulatory capture by powerful commercial media players. Regulators which are properly insulated against both political and commercial influences are best able to perform their duties in the public interest.

In their 2003 Joint Declaration, the (then) three special international mandates on freedom of expression at the UN, the OAS and the OSCE noted the need for independence among media regulatory bodies:

> 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.

More recently, the UN Human Rights Committee (UNHRC) made the following statement (with specific reference to broadcast regulators) in its 2011 General Comment on Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR):

> It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses.

Independence is important for all bodies that exercise regulatory powers over the media. However, many democracies impose only very light-touch regulatory constraints on the print media sector and do not have any specialised regulatory bodies governing this sector. In these countries, self-regulatory models, such as a press council, are given preference over statutory bodies. However, independence is also an important value for self-regulatory bodies (see Briefing Note 6).

It is different in the broadcasting sector where, as noted, statutory regulators often

wield important powers, including licensing who may operate a media outlet. Independence is crucially important here, especially if the public interest in media diversity, a goal which should underlie broadcast licensing, is to prevail. Independence is also important in the development and application of codes of broadcasting conduct, which touch directly on media content. Independent oversight also encourages investment in the broadcasting sector, among other things by building confidence that regulatory decisions will be adjudicated fairly and that investments will be protected against arbitrary action.

One important measure to promote the independence of regulatory bodies is to stipulate clearly in the enabling legislation that they are independent. According to the Council of Europe's Recommendation No. R(2000)23:

> Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

The enabling legislation should also include structural measures to promote independence. A key aspect of this is how members of the governing board are appointed. At a minimum, the appointments procedure should be spelled out clearly in the enabling legislation. Involving a wide range of actors in the appointments process – including nominations, review of shortlisted candidates and the final selection – helps insulate the process from political and commercial interference. It is important to provide for a role for civil society and the wider public, and to leave important decisions to representative bodies, such as a committee of parliament, rather than an individual. This should be supported by rules on security of tenure for members which only allow for removal in exceptional circumstances, with clear procedural requirements and the possibility of judicial review.

The legislation should include safeguards against conflicts of interest, both political and commercial. For example, better practice is to prohibit individuals who are employed in government, the civil service or a political party, or who hold an elected office, from serving on the board. Individuals who hold significant financial interests in either the broadcasting or telecommunications sectors should also be prohibited from serving on the board. Financial security is also central to the independence of a regulatory body. The best way to achieve this is to set out the framework for funding clearly in the law, including the way annual budgets are approved, and in a manner which is insulated from political interference. Providing for regulators to be funded from the fees which are charged for issuing broadcast licences can be both a logical cost-recovery tool and a means of bolstering independence. At the same time, many regulators either need to have these fees supplemented from or to remit excess fees to the general budget, so that the budget approval process remains very important.

As important as it is to protect regulators from political and commercial interference, this does not mean they are free to operate as they wish, without being held accountable. Rather than reporting to

the executive, however, better practice is for regulators to report to a multi-party body, such as the legislature or a legislative committee. Providing for public participation in key decision-making processes, such as licensing, also helps to ensure accountability. Important decisions should also be subject to judicial review and regulators should be required to publish an annual report, along with audited accounts.

It is important to note that the principle of independence applies to regulatory decisions, and especially decisions which impact on individual broadcasters, such as licensing decisions and adjudicative decisions based on the code of conduct. Government retains, however, a policy role, especially in relation to more important policy decisions, such as the technology and timetable regarding the digital transition.

FURTHER READING

- Kristina Irion and Roxana Radu, "Delegation to independent regulatory authorities in the media sector: A paradigm shift through the lens of regulatory theory" in *The Independence of the Media and Its Regulatory Agencies: Shedding New Light on Formal and Actual Independence Against the National Context,* 2013: http://www.ivir.nl/publications/irion/Radu_2013.pdf

- Steve Buckley, Kreszentia Duer, Toby Mendel, Seán Ó Siochrú, *Broadcasting, Voice, and Accountability A Public Interest Approach to Policy, Law, and Regulation*, 2008: http://www.press.umich.edu/pdf/9780472032723-fm.pdf

BRIEFING NOTE 5
Regulation of Journalists

The power of the media to influence public discourse makes journalists an attractive target for illegitimate government control. Thomas Jefferson once famously remarked that if he had to choose between "a government without newspapers, or newspapers without a government, [he] should not hesitate a moment to prefer the latter". The media's core role as a mechanism for government accountability and as a primary source of news and other information necessitates a light regulatory touch. In democracies, journalists are not subject to any special form of regulation although they do enjoy certain benefits and privileges.

Licensing

Licensing schemes for journalists, whereby individuals are prohibited from practising journalism unless they are licensed, violate the right to freedom of expression. General conditions on who may practise journalism, such as a requirement to hold a university degree, to have attained a certain age or to belong to a particular professional association, are similarly illegitimate. This was spelled out clearly in a 1985 case decided by the Inter-American Court of Human Rights, which stated:

> It follows from what has been said that a law licensing journalists, which does not allow those who are not members of the "colegio" to practice journalism and limits access to the "colegio" to university graduates who have specialized in certain fields, is not compatible with the Convention. Such a law would … be in violation not only the right of each individual to seek and impart information and ideas through any means of his choice, but also the right of the public at large to receive information without any interference.

The underlying rationale for this stems from the fact that the right to express oneself through the mass media belongs to everyone, not simply to a selected group who meet certain requirements (see Briefing Note 1). In this respect, journalism is different from other professions – such as being a doctor, a lawyer or an engineer – inasmuch as engaging in the subject matter of what those other professions do, unlike journalism, is not a human right.

Licensing journalists is illegitimate because it is susceptible of abuse and the power to distribute licences can become a political tool. While the purpose of licensing schemes is ostensibly to ensure that the task of informing the public is reserved for competent persons of high moral integrity, the Inter-American Court of Human Rights rejected this argument, noting that other, less restrictive means were available for enhancing the professionalism of journalists. In practice, formal conditions on journalists have not been effective in promoting more professional journalism.

Registration schemes, which formally require journalists to register themselves as journalists, are not common and they would almost certainly fail to pass the test for restrictions on freedom of expression under international law. There is no reason

for imposing such a requirement and it represents a fetter on the freedom to practise journalism.

Licensing or registration requirements are even less legitimate in the digital age, as the proliferation of bloggers and other amateur newsgatherers has blurred the line between who is and is not a journalist. With the democratisation of online media, it would be highly problematic to try and restrict who can comment on events of public importance, or report on their experiences.
These standards are without prejudice to the right of private associations, including private journalists' associations, to set standards for their members.

Accreditation

Freedom of expression includes a right to be informed. As the eyes and ears of the public, journalists play a key role in making this aspect of the right a reality. As a result, it is legitimate to provide for special or privileged access for journalists to limited space venues where events of public interest are taking place, such as parliaments and courts. The rationale for this is not that journalists have special rights to freedom of expression or to access information but, rather, that such access is necessary to protect the right of the public as a whole to receive information, which is included in international guarantees of the right to freedom of expression.

The accepted method of ensuring that journalists can access these limited space venues is through accreditation. Under international law, certain principles apply to accreditation schemes. First, like all regulatory systems, and to ensure that they are not abused as a means to influence the work of journalists, accreditation schemes should be overseen by an independent body. Second, access to accreditation benefits should be based on fair and objective criteria, including the size and type of audience reached. The UN Human Rights Committee (UNHRC) has held, for example, that accreditation schemes which are biased against freelance journalists are not legitimate. Accreditation schemes should also be open to digital journalists, again based on fair and objective criteria. Finally, accreditation schemes should not be used to impose substantive reporting restrictions on journalists or be subject to withdrawal based on an assessment of the substance of a journalist's reporting.

The special international mandates on freedom of expression elaborated on these principles in their 2003 Joint Declaration, stating:

> Accreditation schemes for journalists are appropriate only where necessary to provide them with privileged access to certain places and/or events; such schemes should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non-discriminatory criteria published in advance.

Sources

The right of journalists to refuse to divulge their confidential sources of information is recognised in democracies around the world and in international law. This has been recognised by the UNHRC, which stated in its 2011 General Comment No. 34:

> States parties should recognize and respect that element of the right of freedom of expression that

> embraces the limited journalistic privilege not to disclose information sources.

The basic rationale for protection of sources was set out very clearly in a case before the European Court of Human Rights, *Goodwin v. United Kingdom*, as follows:

> 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.

Once again, the jurisprudential basis for this is the right of the general public to receive information rather than a special right of journalists to disseminate or access information. As a result, although the right to preserve the confidentiality of sources is often referred to as a right of journalists, it can be validly invoked by anyone who is "regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication" (see Council of Europe Recommendation No. R(2000)7).

Safety

Physical threats and attacks against media workers which are aimed at silencing them are an extremely serious interference with the right to freedom of expression. As the special international mandates on freedom of expression noted in their 2012 Joint Declaration:

> [V]iolence and other crimes against those exercising their right to freedom of expression … represent attacks not only on the victims but on freedom of expression itself, and on the right of everyone to seek and receive information and ideas.

States' obligations in this area can be grouped into three separate categories. First, officials should never take part in, sanction or condone attacks against the media or media facilities. This also encompasses a positive obligation on senior authorities to publicly condemn attacks when they do occur.

Second, States should take effective action to prevent the occurrence of violent attacks. In their 2012 Joint Declaration, the special international mandates on freedom of expression noted:

States have an obligation to take measures to prevent crimes against freedom of expression in countries where there is a risk of these occurring and in specific situations where the authorities know or should have known of the existence of a real and immediate risk of such crimes, and not only in cases where those at risk request State protection.

Finally, States have an obligation to launch independent, speedy and effective investigations when attacks do take place, with a view to bringing the guilty parties to justice and to providing an effective remedy for the victim. The UN Human Rights Committee, in its 1996 Concluding Observations to Guatemala, stated that these investigation should enable victims to discover the truth about the acts committed, to learn who committed the acts and to obtain suitable compensation.

FURTHER READING

- *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, 13 November 1985, Inter-American Court of Human Rights: http://www.corteidh.or.cr/docs/opiniones/seriea_05_ing.pdf

- Special international mandates on freedom of expression, *Joint Declaration on Crimes Against Freedom of Expression*, 2012: http://www.law-democracy.org/live/legal-work/standard-setting/

- UNESCO, *UN Plan of Action on the Safety of Journalists and the Issue of Impunity*, 2012: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/official_do

BRIEFING NOTE 6
Print Media

"A free press" Albert Camus once said, "can of course, be good or bad, but, mostly certainly without freedom, the press will never be anything but bad". In contrast to the broadcast media, where historically high entry barriers and limited spectrum availability demands a robust regulatory framework to ensure content diversity, a light regulatory touch is the best way to ensure an independent and diverse print media sector.

Licensing and Registration Requirements

Under international law, it is illegitimate to require newspapers, or other publications, to apply for a licence in order to operate. These schemes fail the 'necessity' component of the three-part test. Although licensing schemes will prevent certain potential problems, such as defamatory or obscene speech, the three-part test requires States to create a regulatory framework which is minimally harmful to freedom of expression. Refusing or cancelling a licence, a form of prior censorship, is an extreme interference with that right and far less intrusive means for addressing problematic content are available.

Registration schemes, which only require publishers to provide certain technical information, such as the names of a publication's owner(s), are less intrusive but should still be imposed with caution. It is important that the registering body does not have any discretion to deny or refuse registration. Rather than applying for permission, a registration scheme should work automatically once certain technical information has been provided.

Registration schemes should also not impose substantive conditions on the media, not be excessively onerous and be administered by an independent oversight body. In *Gaweda v. Poland*, the European Court of Human Rights (ECHR) found that refusing to register a publication on the basis that its name was "inconsistent with the real state of affairs" (a requirement in the Polish legislation) was an illegitimate interference with freedom of expression. The one exception to this might be where the proposed name of a publication was already being used by someone else.

Even with these conditions, there is disagreement as to whether or not registration schemes are necessary. As the special international mandates on freedom of expression stated in their 2003 Joint Declaration:

> 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.

Complaints Systems

Although a free and unfettered press is of core importance to a democratic system,

there is a legitimate need to promote professionalism in the media and to provide the public with some sort of redress when minimum standards are not met. The pressure surrounding competition for stories and audience share, for example, can promote unprofessional behaviour. The need for a system of redress against unprofessional media behaviour is of particular importance in emerging democracies or post-revolutionary contexts, where the media may be finding its footing after a prolonged period of repressive government. Moving from a system of near-total control to one which is largely free presents serious challenges. Media outlets may lack a proper editorial structure, or other institutional expertise, to responsibly guide their conduct.

Most systems of redress consist of an oversight body – such as a press council – and a set of minimum standards – such as a code of conduct. In terms of the oversight body, there is significant potential for abuse where the government plays a role in handling complaints against the press. In other words, as in other regulatory contexts, the need for independence is key. Ideally, the print media will come together to create its own, self-regulatory system. In order to avoid being too close or biased towards the press, better practice is for the press council to be composed of members of the media along with members of the public. Practice varies regarding the code, which may be produced exclusively by media experts – for example by editors – or which may be produced in a more broadly consultative fashion.

Another approach is a co-regulatory system, which involves a statutory body in which the media play a significant, though not necessarily dominant, role. For example, the Indonesia Press Council (IPC) is established by law but has its members appointed exclusively by media owners and journalists. As long as these bodies operate independently from government, and are staffed by persons with appropriate expertise in media issues, they are also a legitimate form of regulation. The imposition of purely statutory regulation on the print media, which does not count on the active involvement of media representatives, is problematical from a freedom of expression perspective.

Self-regulatory schemes are voluntary and so lack binding enforcement powers beyond requiring an offending media outlet to print the council's finding of a journalistic breach or to carry a right of reply. Even co-regulatory systems rarely have powers that go beyond this. Nonetheless, the fact that press councils are staffed by media experts and work in dialogue with the media accords them significant moral authority, generating strong professional pressure among the media to operate in line with their standards.

The mandate of press councils varies from country to country. In many countries, in addition to hearing and resolving complaints, these bodies play a positive role in promoting press freedom and professionalism, for example by making recommendations on draft legislation and other rules affecting the media and by producing guidelines on better journalistic practices.

Right of Reply/Correction

The benefits of a right of reply, whereby the claimant has a right to insert a reply in a media outlet in response to a story or report, have been the subject of some debate. Because freedom of expression includes a right not to speak, there is no

question that enforcing a right of reply represents an interference. While some see it as a legitimate mechanism that uses a 'more speech' approach to addressing problematical speech and that ensures the public will hear both sides of the story, others see it as an unjustifiable restriction on editorial freedom.

The right of reply is specifically recognised by Article 14 of the American Convention on Human Rights and by the Council of Europe in its Resolution (74)26. The ECHR, in *Kaperzyński v. Poland*, held that a right of reply was justifiable under the European human rights framework, although they ruled that the penal sanctions imposed in that case were overly harsh. In the United States, on the other hand, a mandatory right of reply for the print media has been struck down on the grounds that it is an unconstitutional interference with the First Amendment (see *Miami Herald Publishing Co. v. Tornillo*).

Further guidance on the appropriate application of this right is found in the Council of Europe Resolution (74)26 which recommends that while the right should be recognised, a request for a reply may be refused in the following cases:

i. If the request for publication of the reply is not addressed within a reasonably short time;
ii. If the length of the reply exceeds what is necessary to correct the information containing the allegedly inaccurate facts;
iii. If the reply is not limited to a correction of the challenged facts;
iv. If the reply constitutes a punishable offence;
v. If the reply is considered contrary to a third party's legally protected interests;
vi. If the individual concerned is unable to show the existence of a legitimate interest.

International law has not given much attention to the relationship between a right of reply and a right of correction. However, it is clear that a right of correction represents less of an intrusion into editorial freedom than a right of reply. Therefore, in situations where it can adequately address a problem, such as a direct factual error as opposed to more directed criticism, a right of correction should be the preferred remedy.

FURTHER READING

- Andrew Puddephatt, *The Importance of Self Regulation of the Media in Upholding freedom of expression*, 2011, UNESCO: http://unesdoc.unesco.org/images/0019/001916/191624e.pdf

- ARTICLE 19, *Statement on the Draft Slovak Act on Periodic Press and News Agencies*, 2008: http://www.article19.org/data/files/pdfs/analysis/slovakia-press-leg-st.pdf

- Centre for Law and Democracy and SEAPA, *Myanmar: Guidance for Journalists on Promoting an Empowering Press Law*, 2012: http://www.law-democracy.org/live/myanmar-guidance-on-an-empowering-press-law/

BRIEFING NOTE 7
Broadcast Regulation

Democracies impose more stringent regulatory regimes on broadcasting than on other forms of media. This is because, unlike print media, broadcast signals have traditionally been distributed through a limited public resource, the radio frequency spectrum, which limits the number of stations which can operate in any particular geographic location. Without regulatory intervention in assigning frequencies to broadcasters, chaos would reign and interference would render the entire system unworkable. The limited nature of the broadcast spectrum, and the resulting limits on the number of broadcasters, also justifies regulatory interventions to support diversity of content. Modern technologies are starting to change this. Cable, satellite and digital dissemination platforms have significantly reduced the pressure on the frequency spectrum, while not doing away entirely with limits. In due course, however, the Internet will essentially defeat scarcity. At the same time, there are other reasons to regulate broadcasters, including the intrusive and influential nature of broadcasting, as well as its accessibility, including to children.

Frequency planning is an important way of ensuring that the allocation of frequencies to broadcasters takes place on a planned basis and in a manner that allows for the promotion of a diverse range of programming in line with the public interest, rather than simply allocating frequencies to the first or highest bidder. Frequency planning requires coordination among different frequency users: broadcasters, telecommunications service providers, and safety and security services. In many countries, combined broadcast-telecommunications regulators are responsible for a wide range of frequency uses, while technological convergence has meant that more and more countries are moving to this model.

The two main areas of broadcast regulation are in relation to licensing and regulation of content.

Licensing

In democracies, the process of licensing broadcasters is overseen by a specialised, independent regulatory body. As discussed in Briefing Note 4, according to international standards this body should be independent of both government and commercial players. Licensing should promote the overall public interest rather than the interests of any particular government or private actor. Independence is particularly important if one of the primary goals of licence regulation, namely promoting diversity in the airwaves, is to be achieved. Independent regulation also promotes investment in the broadcasting sector since businesses can be confident that licences will be awarded based on merit.

The licensing process should also be carried out in a democratic manner and, in particular, it should be fair and transparent. The importance of achieving these goals has been outlined by the UN Human Rights Committee (UNHRC) in its General Comment No. 34:

> States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations. The criteria for the application of such conditions and licence fees should be reasonable and objective, clear, transparent, non-discriminatory and otherwise in compliance with the Covenant. Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters.

Part of this is to allow everyone to have an equal opportunity to obtain a licence. The process for making applications should be set out clearly and precisely in law. A framework of rules should be provided for in the primary legislation, with more detail specified in subordinate regulations, including specific calls for tenders or applications. The framework should at least include the following features:

- Straightforward timelines for each step of the process (such as deadlines for filing applications, and the length of time it will take for a decision to be made).
- A detailed explanation of the process and a requirement for the regulator to justify any refusals in writing.
- Applicants should have a right to a judicial appeal against any refusals to issue a licence.
- The rules should include a clear framework or schedule of any charges and fees.
- The criteria by which applications will be assessed, such as technical expertise, financial resources and making a contribution to diversity, should be spelled out clearly in the rules.

In most democracies, broadcasters are required to treat matters of public controversy with due balance and impartiality, which essentially makes it unrealistic for broadcasters to be owned by or even linked to a particular political party. However, although it is legitimate to prohibit political parties from holding broadcast licences, other blanket prohibitions on the form or nature of applicants generally represent a breach of the right to freedom of expression.

Broadcast licences are normally awarded subject to certain terms and conditions, including with a view to promoting diversity and fairness in the system. Because they represent restrictions on freedom of expression, these conditions need to be justified according to the three-part test outlined in Briefing Note 2. Conditions may be general or specific to the licensee. General conditions may include technical criteria (which would normally apply to a class of licences), rules on copyright and licence duration and positive obligations, such as to carry a minimum quota of domestic or regional programming. Specific conditions may apply to individual licences, and examples might be a requirement for a licensee to carry a minimum quota of news or children's programming.

Regulation of Content

Unlike the print media sector, content regulation for broadcasters is rarely undertaken on a purely self-regulatory basis and, instead, co-regulatory or statutory models are more common. Some countries relying on a co-regulatory model leave content regulation up to an industry

(or self-regulatory) body, but make it a licence condition that the broadcaster belongs to that body (so that it must obey the decisions of the body or risk losing its membership and hence licence). Regardless of which model is in place, the need for independence is particularly imperative in relation to content regulation, given the high risk of political interference.

To ensure that the public has access to a range of different types of programming, many countries impose certain positive content obligations on broadcasters. One common example is to require broadcasters to carry a certain amount of domestic programming. The rationale behind this is to counteract commercial incentives to purchase content from abroad, which is often cheaper and easier than producing original programmes. Absent such requirements, the overall presence of local voices in the all-important broadcasting sector might be limited. Local content requirements also help to ensure that local culture is protected and promoted through broadcasting.

In many countries, national broadcasters are also required to carry a certain minimum percentage of local programming. Once again, this is to counteract commercial imperatives, since it is more expensive to produce different local programmes for different areas than to provide unified national programming. There is clearly a public interest in ensuring that audiences have access to news about local, in addition to national, events.

Another requirement which is less common but still applied in many countries is to require broadcasters, especially public broadcasters but also often private broadcasters, to carry programming which produced by independent producers (i.e. producers who are not connected to any institutional broadcasting station). Requiring broadcasters to carry independent productions broadens the production base, leading to a more intense competition of ideas and innovation in the sector and, as a result, greater content diversity. This also helps to foster content producing industries. It is common for public broadcasters to be subject to higher independent production quotas.

In most democracies, broadcasters are also subject to certain negative or minimum professional requirements. As for the print sector, this normally means that they are required to respect the standards set out in a code of conduct developed through the co-regulatory or statutory regulation system. These codes address a range of programming issues, such as accuracy, privacy, protection of children and the treatment of sensitive themes such as sex and violence. Again as in the print media sector, these codes often form the basis of a complaints system. Unlike the print media sector, however, these codes are often also used as the basis of direct monitoring by an oversight body and the sanctions applied for breach of the rules range from light remedies (such as warnings or requirements to issue a correction) to more serious remedies (such as fines and even the possibility of licence revocation).

FURTHER READING

- ARTICLE 19, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, 2002: http://www.article19.org/data/files/pdfs/standards/accessairwaves.pdf

- Eve Salomon, *Guidelines for Broadcasting Regulation*, Commonwealth Broadcasting Association, 2008: http://www.cba.org.uk/wp-content/uploads/2012/04/RegulatoryGuidelines.pdf

- International Telecommunication Union, *Guidelines for the transition from analogue to digital broadcasting*, 2014: http://www.itu.int/en/ITU-D/Spectrum-Broadcasting/Documents/Guidelines%20final.pdf

- Toby Mendel and Eve Salomon, *The Regulatory Environment for Broadcasting: An International Best Practice Survey for Brazilian Stakeholders*, UNESCO, 2011: http://unesdoc.unesco.org/images/0019/001916/191622e.pdf

BRIEFING NOTE 8
Media Diversity

Although the right to freedom of expression operates primarily as a restriction on State action, the right also imposes positive obligations on States to establish an environment which promotes the free flow of information and ideas in society. A key element of this is the idea of media diversity, which broadly means that the media provides voice opportunities to and satisfies the information needs of all stakeholders. In *Informationsverein Lentia and Others v. Austria*, the European Court of Human Rights (ECHR) stressed the importance of media diversity:

> [T]he 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.

Diversity is complex and is often understood to encompass three different elements: diversity of outlet (meaning different types of media), diversity of source (meaning diverse ownership of the media), and diversity of content (which refers to media output).

Diversity of Outlet

International law requires States to guarantee freedom of expression "through any medium" (see Briefing Note 1). Part of States' positive obligation to promote diversity includes making sure that all different types of media, and in particular all three types of broadcaster – namely public, commercial and community broadcasters – are able to operate.

Commercial broadcasters, driven in part by a profit motive, contribute to diversity by bringing much needed resources as well as the innovation and choice that are driven by competitive impulses. For commercial broadcasters, in line with their competitive orientation, a key requirement is that the licensing process should be fair, transparent and competitive.

Public service broadcasters, by contrast, are not normally primarily driven only by competition, and especially not competition for resources, since they typically receive State-funding (see Briefing Note 9). They contribute to diversity through their public service mandates, which often include references to quality and satisfying voice and information needs of citizens that may be overlooked by commercial players. A key obligation in terms of public service broadcasters is to create them, in the first place, to respect their independence and to ensure that they have sufficient resources to be able to fulfil their public service mandates.

Community broadcasting is defined broadly as non-profit broadcasting that is provided by and for the members of a particularly community, whether a geographical community or a community of interest. These broadcasters also make an important contribution to diversity,

providing voice opportunities to communities which may be neglected or largely neglected by commercial and even public service broadcasters.

A number of conditions are necessary for the community broadcasting sector to be able to thrive. Community broadcasters cannot normally compete openly with commercial broadcasters in licensing processes because they have far fewer human, technical and financial resources. As a result, it is necessary to put in place special, light, licensing processes for community broadcasters, along with much lower, or even free, tariff schedules.

It is also necessary to make special arrangements to ensure that community broadcasters can disseminate their signals through existing broadcasting platforms. In the analogue broadcasting environment, this means protecting a part of the frequency spectrum, through a frequency plan (see Briefing Note 7), for community broadcasters. There are different ways to do this. Some countries, including France, Thailand and the United States, allocate a fixed percentage of certain frequency bands to community broadcasting; in each of those countries, 20 per cent of the FM band is allocated to community or non-profit broadcasting. In other countries, the allocation is left up to the broadcast regulator, sometimes with a legal requirement that the allocation of frequencies among the different types of broadcasters be equitable.

Diversity of Source

The concentration of media ownership in the hands of a small number of players is a threat not only to freedom of expression but to democracy itself. Undue media concentration reduces the diversity of viewpoints that citizens are exposed to and limits the ability of certain interests to express their opinions and be heard. By the same token, it gives large-scale owners disproportionate access to voice, allowing their views and perspectives to dominate. Undue concentration of ownership can also lead to free market or competitive problems, such as higher prices for consumers or reduced incentives to produce resource-intensive or small-scale programming, such as investigative or local reporting. Large media conglomerates may also be able to engage in anti-competitive practices in relation to advertising, further exacerbating the problem.

The importance of preventing excessive concentration of ownership in the media sector has been confirmed by a number of international actors. In their 2007 Joint Declaration, the special international mandates on freedom of expression stated:

> In recognition of the particular importance of media diversity to democracy, special measures, including anti-monopoly rules, should be put in place to prevent undue concentration of media or cross-media ownership, both horizontal and vertical.

The *Declaration of Principles on Freedom of Expression in Africa* states:

> States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole.

The specific rules will depend on the specific market to which they apply; clearly larger markets in larger countries will need

different solutions than tiny island States. While restrictions on undue concentration of media ownership are important, policy makers should also take into account the need to foster development in the broadcasting sector; the rules should not be so strict as to undermine the economic viability of the sector.

As an example of specific rules, in Canada, the regulator will not allow a transaction that gives a single entity control of more than 45 per cent of the television market and it will scrutinise very carefully transactions that result in a 35-45 per cent share, while in Italy, a newspaper publisher may not control more than 20 per cent of total circulation at the national level and no more than 50 per cent at the regional level. In the United States, there are very detailed and precise rules on concentration of ownership and cross-ownership within the media sector. Laws can also apply to cross-media ownership. In South Africa, no one may control, directly or indirectly, more than one television licence, or more than two FM or AM radio licences or two stations with substantially overlapping service areas. Similarly, no one who controls a newspaper may also control both a television and a radio licence.

Diversity of Content

There are a number of ways in which States can provide direct support for diverse content (i.e. in addition to the more indirect measures outlined above). These include setting up funds to support the production of public interest content, community broadcasters and/or other media sectors that are at risk. Systems to provide financial support for community broadcasters are common in democracies, and many countries also have funds to support newspapers which are struggling.

States can also impose direct, positive content obligations on broadcasters, for example to include a minimum percentage of domestic or local content among their programming (see Briefing Note 7).

FURTHER READING

- Centre for Law and Democracy, *Tuning into Development: International Comparative Survey of Community Broadcasting Regulation,* 2013: http://www.law-democracy.org/live/unesco-community-radio-book-published/
- Organization of American States, *Annual Report of the Special Rapporteur for Freedom of Expression*, 2004: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=459&lID=1
- UNESCO, *Media Development Indicators: A Framework for Assessing Media Development*, 2008: http://unesdoc.unesco.org/images/0016/001631/163102e.pdf

BRIEFING NOTE 9
Public Service Broadcasting

Public service broadcasters (PSBs) play a vital role in the media landscape. They can serve as a source of diverse and high-quality programming, particularly in ways which a pure market approach would not necessarily support. PSBs can also serve to foster national identity within a framework of respect for minorities, and to promote socially inclusive and human rights respecting values. In a rich media landscape, PSBs can often set the tone, spurring their counterparts in the commercial sector to produce higher quality and more sophisticated programming.

Mandate

PSBs serve the public interest by complementing and extending the programming offered by commercial broadcasters, thereby enhancing diversity in the media. To ensure that PSBs meet programming needs that are responsive to the public interest and to ensure accountability in terms of programming, it is important to set out a clear public service mandate in law and/or regulation for public broadcasters. This should be relatively detailed, without unduly binding the hands of public broadcasters.

The precise mandate will vary from country to country but a number of features are found in most countries. Comprehensive news and current affairs programming is a hallmark of PSB, and it is important that this be accurate, impartial and balanced. In most cases, PSBs cover the proceedings of key decision-making bodies, most importantly the legislature, and provide in-depth coverage of developments at the national but also the international and local levels.

PSBs are normally expected to provide programming both of broad appeal and of interest to specialised audiences, often with a focus on traditionally neglected areas such as educational programming and programming directed at minorities. It is also common for PSBs to be required to ensure that their signals reach as large a portion of the population as possible, which is natural given that they are publicly funded.

Independence

If PSBs are not protected against government interference, i.e. if they are not independent, they cannot effectively fulfil their public service mandates. The importance of this has been eloquently described by the Supreme Court of Ghana in *New Patriotic Party v. Ghana Broadcasting Corp.*:

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

The need for independence among PSBs also flows from international guarantees of the right to freedom of expression, as reflected in the following statement by the UN Human Rights Committee (UNHRC) in its General Comment No. 34:

> States parties should ensure that public broadcasting services operate

> in an independent manner. In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.

Numerous Declarations adopted under the guidance of UNESCO also note the importance of independent public service broadcasters, while the 2010 Joint Declaration of the special international mandates on freedom of expression expressed concern about public broadcasters being subject to political "influence or control" which results in them serving "as government mouthpieces instead of as independent bodies operating in the public interest".

In practical terms, protecting the independence of broadcasters can be achieved in many of the same ways as promoting the independence of broadcast regulators (see Briefing Note 7). In particular, it is very important to ensure that they are overseen by governing boards and that the way in which members are appointed to these bodies ensures their independence.

An additional level of protection is common for PSBs through what is known as editorial independence, which refers to the idea that editorial decisions should be made by professional staff (editors) instead of the governing board. This can be achieved by ensuring a clear separation between the governing body (which has overall responsibility for the organisation) and managers and editors (who are responsible for day-to-day decision-making). The governing body should oversee the work and report to the government, while the professional staff should manage the organisation's operations. This can operate as a sort of dual layer of protection against government interference, since those who would seek to influence the broadcaster must pass through both the board and then the editorial team.

Funding

To properly fulfil their mandate, which normally includes delivering outputs over and beyond what is expected from commercial broadcasters, PSBs need to benefit from some form of public funding. At the same time, this funding must be provided in a way that is insulated from government control, as part of the system of protecting the independence of PSBs.

Good practice in this area is to provide funding via an established licence or other fee, rather than directly from the government budget. In some countries, PSBs are funded through a mandatory levy paid by all households which have a radio or television set. While this has the benefit of providing consistent levels of funding over time and is relatively insulated from government interference, it can be difficult and/or expensive to collect these fees. An alternative is to levy the fee alongside some other centrally collected fee, such as the electricity bill, which minimises collection costs. There are also some innovative approaches here, such as Thailand, which funds PSB through a tax on liquor and tobacco.

In many countries, PSBs rely on a mixed funding model, whereby some of their funding is provided from public sources and some from commercial activities, including advertising. Recommendation 1878 (2009) of the Parliamentary Assembly of the Council of Europe refers to the following possible sources of funding:

> The funding of public service media may be ensured, through a flat broadcasting licence fee, taxation, state subsidies,

subscription fees, advertising and sponsoring revenue, specialised pay-per-view or on-demand services, the sale of related products such as books, videos or films, and the exploitation of their audiovisual archives.

While a mixed funding model provides more resources for PSBs and can also help enhance their independence, excessive reliance on commercial sources of funding can start to erode the lines between PSBs and commercial broadcasting. In the end, if the public wants PSBs to provide additional services to what is available via commercial broadcasting, an appropriate measure of public funding must be provided to achieve this.

Accountability

Independence from government does not mean that PSBs should not be accountable, ultimately to the people. This flows both from the fact that they receive public funding and from the fact that they perform a public service and are an important public resource.

Better practice here is for PSBs to be accountable to parliament, rather than directly to government. This is achieved, for example, by requiring PSBs to submit annual reports, along with externally audited accounts, to the legislature for its review. This can be supplemented by more direct forms of public accountability, such as an obligation to hold public meetings, conduct surveys and provide other means by which the public can provide direct feedback to the public broadcaster. PSBs should also be subject to the right to information law, so that members of the public can obtain information on request from PSBs, subject to legitimate exceptions (see Briefing Note 3). Another type of direct accountability is to require PSBs to adopt codes of conduct regarding their behaviour and programming, and to put in place systems whereby members of the public can complain about breaches of the code.

FURTHER READING

- ARTICLE 19, *A Model Public Service Broadcasting Law*, 2005: http://www.article19.org/data/files/pdfs/standards/modelpsblaw.pdf
- Democratic Governance Group of United Nations Development Programme Bureau for Development Policy, *Supporting Public Broadcasting: Learning from Bosnia and Herzegovina's Experience,* 2004: http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/oslo-governance-center/ogc-fellowship-papers/supporting-public-service-broadcasting-learning-from-bosnia-and-herzegovinas-experience/PublicServiceBroadcasting.pdf
- Toby Mendel, *Public Service Broadcasting: A Comparative Legal Survey*, UNESCO, 2011: http://unesdoc.unesco.org/images/0019/001924/192459e.pdf

BRIEFING NOTE 10
Criminal Content Restrictions

Freedom of expression is a foundational human right, but it is universally recognised that certain types of speech can be harmful and that some speech is so harmful that it should be criminally prohibited. Due to the severe nature of criminal prohibitions, however, extreme care must be taken to ensure that these restrictions are not applied in a manner which unduly restricts freedom of expression. Common problems with criminal restrictions on speech are that they are drafted in unduly vague terms or that they are overbroad in application.

National Security and Public Order

National security and public order are interests of the highest order and, when either is truly at risk, all human rights, and even democracy itself, may be at risk. It is thus accepted that, in appropriate circumstances, freedom of expression may be restricted to protect these two interests, and this is mentioned explicitly in Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR). However, it is easy to succumb to the temptation to unduly limit free speech in the name of security, a risk that has emerged all the more strongly in the aftermath of the attacks of 11 September 2001 and the subsequent growth in global terrorism and other national security threats. As Benjamin Franklin once famously said, "People willing to trade their freedom for temporary security deserve neither and will lose both".

A key problem with national security is the difficulty of defining it clearly, and the tendency of both laws and decision-makers in many countries to define it far too broadly. There is no clear definition of what constitutes 'national security' and even the *Global Principles on National Security and the Right to Information* (Tshwane Principles), the leading international statement in this area, eschewed definition. However, Principle 9 of the Tshwane Principles provides a list of categories of information that might legitimately be withheld on grounds of national security, giving a good indication of the scope of the concept. The list includes such items as "defence plans, operations, and capabilities", "production, capabilities, or use of weapons systems", "measures to safeguard the territory of the state, critical infrastructure, or critical national institutions", "the operations, sources, and methods of intelligence services", and national security information provided by a foreign State.

It is clear from this that restrictions based on localised violence or ordinary criminal activities are not justifiable on the basis of national security. Instead, the threat must relate to defence capabilities such as weapons or intelligence to qualify.

In order to prevent abuse of national security and public order rules, international courts have applied three main principles. First, they have insisted that these concepts be defined appropriately narrowly. For example, in its 2011 General Comment No. 34, the UN

Human Rights Committee (UNHRC) stated:

> Such offences as "encouragement of terrorism" and "extremist activity" as well as offences of "praising", "glorifying", or "justifying" terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities.

Second, they have insisted on a clear intent requirement for the threat to national security or public order. For example, the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, a precursor to the Tshwane Principles, state that expression may be punished as a threat to national security only if the State can demonstrate that "the expression is intended to incite imminent violence".

Third, they have insisted on a very close nexus between the expression and the risk of harm. This is illustrated in Principle XIII(2) of the *Declaration of Principles on Freedom of Expression in Africa*:

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

Together, these constraints help prevent States from abusing concerns about threats to national security to unduly restrict freedom of expression.

Hate Speech

Drawing the line between ideas and opinions that are offensive but protected under the right to freedom of expression and hate speech is difficult and often controversial. However, the dangers of hate speech are recognised in Article 20(2) of the ICCPR, which is the only provision in the ICCPR that actually requires States to prohibit certain speech, specifically, "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".

It is clear that restrictions pursuant to Article 20(2) must still meet the three-part test imposed by Article 19(3). As the UNHRC said in General Comment No. 34:

> The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.

Article 20(2) is understood to incorporate four key elements for speech to qualify as hate speech: intent, incitement, to the proscribed results, and based on the listed grounds. The first condition means that only speech which is intended to incite to one of the proscribed results should qualify as hate speech. This has been clearly reaffirmed by international courts, such as the European Court of Human Rights (ECHR) in the case of *Jersild v. Denmark*. In that case, the speech, by a journalist, was intended to expose the existence of a racist

subculture. It was, as a result, not considered to be hate speech and the restrictions imposed by Denmark were a breach of the applicant's right to freedom of expression.

The second condition, incitement, means that there has to be a close and direct causal relationship between a statement and the proscribed result before the statement may legitimately be prohibited. Where a statement actually leads to one of the proscribed results, this is obviously a clear indication, but it is always possible that other factors were responsible. Context is very important here. Statements which may be unlikely to create hatred in a peaceful context may do so in a more unstable environment.

Third, the statement must incite to one of the proscribed results. These include violence, which is normally covered by more general prohibitions on incitement to crime, and discrimination, which is itself prohibited in many countries, but also hatred, as a state of mind (i.e. an opinion, which is itself actually protected under international law). The rationale for this is that society should not have to wait until hatred actually manifests itself in action before providing protection to potential victims.

Fourth, the statement must incite to hatred on the basis of nationality, race or religion, although this has been extended to other similar grounds, based on the idea of historical disadvantage and immutability, such as ethnicity or sexual orientation, in some other contexts. However, speech attacking political opponents on policy grounds, for example, could never qualify as hate speech. This also means that speech which targets ideas (however harshly or unfairly) would normally be protected, while speech which attacks individuals based on their race or religion might cross the line.

A number of additional conditions for hate speech legislation were set out in a 2001 Joint Statement by the special international mandates on freedom of expression:

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

Obscenity

Obscenity is a relatively unclear area in terms of restrictions on freedom of expression under international law, in part because while statements which are offensive to some people are protected, States also have the power to limit freedom of expression in the interest of public morals, subject to the three-part test (see Briefing Note 2).

Obscenity is also very difficult to define and there is no universally applicable standard. At the same time, the UNHRC noted in General Comment No. 34 that this notion cannot be used to impose values derived from one tradition on others:

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

At the same time, both international and domestic courts have often recognised that questions of morality are closely tied to national and local cultures and traditions.

Blasphemy

The right to practice one's religion is a human right protected by Article 18 of the ICCPR and the UNHRC has made it clear that this applies to atheistic as well as theistic beliefs. The intersection of this right with Article 19 (which protects freedom of expression) and Article 20 (which requires States to prohibit hate speech) necessitates a careful balancing around speech which relates to religious matters.

Blasphemy laws which go beyond prohibiting the incitement to discrimination, hostility or violence against adherents to a particular religious belief and apply to the denigration of that religion's beliefs or symbols are no longer regarded as legitimate under international law. As the UNHRC stated in its 2011 General Comment No. 34:

> Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant.

Consistently with this, a number of established democracies have repealed their blasphemy laws entirely while those that have kept them rarely enforce them.

There are a number of problems with laws which protect religious tenets and beliefs, as opposed to individuals. In a democracy, differing ideas, including those relating to religion, should compete through open debate rather than fiat. This is particularly true where a religion has political influence, whether directly or indirectly. If a party's platform includes institutionalised religious ideas, it is clearly undemocratic to insulate these ideas from criticism or debate. Another problem with blasphemy laws is that they are unable to accommodate situations where religious beliefs are directly contradictory, such as belief systems which believe in a single deity or multiple deities or no deity. In addition, blasphemy laws are often discriminatory since they tend only to protect the majority religion or only to be applied in that way. Indeed, in practice blasphemy laws are often used to repress religious minorities, dissenting believers or atheists.

Administration of Justice

It is well established under international law that court hearings should be open to the public. Article 14(1) of the ICCPR states:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair

> and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

At the same time, it is of the greatest importance to safeguard the authority and particularly the impartiality of the administration of justice. This may include prohibiting certain kinds of expressions, such as lying to the court or intimidating witnesses. While the media generally have a right to report on legal cases, and indeed there is a strong public interest in ensuring that the public are informed about ongoing developments, as Article 14(1) makes clear, there may be circumstances where media reporting may be limited, for example to protect the identity of children or victims.

The question of whether freedom of expression may be restricted to safeguard the authority of the judicial system is more controversial. In their 2002 Joint Declaration, the special international mandates on freedom of expression stated: "Special restrictions on commenting on courts and judges cannot be justified; the judiciary play a key public role and, as such, must be subject to open public scrutiny." In *R.* v. *Koptyo*, the Ontario Court of Appeal noted eloquently the reasons for this:

> As a result of their importance the courts are bound to be the subject of comment and criticism. Not all will be sweetly reasoned. An unsuccessful litigant may well make comments after the decision is rendered that are not felicitously worded. Some criticism may be well founded, some suggestions for change worth adopting. But the courts are not fragile flowers that will wither in the hot heat of controversy…. The courts have functioned well and effectively in difficult times. They are well-regarded in the community because they merit respect. They need not fear criticism nor need to sustain unnecessary barriers to complaints about their operations or decisions.

Despite this, in many countries unreasonably strict limits are posed on the criticism that may be directed towards courts and judges. The only legitimate interest that could need protection here is the willingness of the public to continue to use the courts as the ultimate arbiters of disputes, which is very rarely at risk.

FURTHER READING

- ARTICLE 19, *The Camden Principles on Freedom of Expression and Equality*, 2009: http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf

- Amnesty International, *Written contribution to the thematic discussion on Racist Hate Speech and Freedom of Opinion and Expression organized by the United Nations Committee on Elimination of Racial Discrimination*, 2012: http://www.ohchr.org/Documents/HRBodies/CERD/Discussions/Racisthatespeech/AmnestyInternational.pdf

- Open Society Foundations, *Global Principles on National Security and the Right to Information*, 2013: http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles

- Toby Mendel, *Study on International Standards Relating to Incitement to Genocide or Racial Hatred*, 2006: http://www.concernedhistorians.org/content_files/file/TO/239.pdf

BRIEFING NOTE 11
Civil Content Restrictions

Freedom of expression is not absolute and, as Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) makes clear, it can legitimately be subject to restrictions. However, these restrictions must be carefully designed so as to meet the three-part test for such restrictions set out in Article 19(3) of the ICCPR (see Briefing Note 2). A number of civil law restrictions on freedom of expression are, if crafted narrowly and with appropriate exceptions, legitimate, of which the two most important are defamation law and privacy law.

Defamation

The proper purpose of defamation laws is to protect reputations, which is recognised under international law as a legitimate reason for restricting freedom of expression. Rules on defamation should strike an appropriate balance between safeguarding the public, and in particular political, discourse and providing adequate protection to individuals targeted by false allegations.

A first step here is to limit defamation laws to the civil as opposed to criminal law sphere. Inasmuch as civil laws have proven to be effective in protecting reputations, including in the many countries which no longer have criminal defamation laws on the books, the more intrusive approach represented by criminal laws cannot be justified. In their 2002 Joint Declaration, the special international mandates on freedom of expression stated:

> Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.

In addition to the fact that criminal defamation laws are unnecessary, in practice they are often abused through selective enforcement to protect the reputations of police, public officials and other powerful individuals who have close connections to the government.

In addition to being civil in nature, defamation laws should incorporate a number of safeguards against abuse. They should not be able to be invoked to protect abstract concepts, such as the State or religious symbols, which do not have reputations as such, and for similar reasons they should not protect abstract (i.e. non-legally enshrined) groups, although an individual member of a group should be able to sue if they can demonstrate harm to their own individual reputation. Corporations should be allowed to sue for defamation in order to protect their often valuable reputation, but public bodies should be prohibited from doing so due to the overriding importance of open criticism of public institutions in a democracy. Also, by virtue of the fact that they represent the public, it is problematical for public bodies to spend public funds bringing legal cases to defend themselves against criticism. Officials, as individuals, clearly have reputations which they should still be able to protect through defamation actions. However,

international courts have recognised that, as public figures, they must be prepared to tolerate a greater degree of criticism than ordinary citizens.

Better practice is to limit the scope of defamation laws to statements of fact, and not opinions, given the absolute protection under international law given to opinions and the fact that opinions are by definition not susceptible of proof. Procedurally, defendants should always be given an opportunity to prove the truth of their statements of fact, while they should never be required to prove truth in the context of an opinion, which is clearly impossible.

To ensure an appropriate balance between free speech and protecting reputations, defamation laws should incorporate a number of defences. Truth should always be an absolute defence to a claim for defamation, based on the idea that one should only be able to defend a reputation that one possesses (and if the statement is true, one should not be able to hide it). Even where defendants cannot prove the truth of their statements, they should still benefit from a defence of "reasonable publication", absolving the defendant of liability if they can demonstrate that dissemination of their statements was reasonable under all of the circumstances. This defence is particularly important for journalists, whose role of informing the public would be seriously undermined if they had to be absolutely certain of every fact before they published a story. Finally, the overriding importance of openness in certain contexts – such as legislative and judicial proceedings – means that statements made before these bodies, along with fair and accurate records of the proceedings before them, should be protected against defamation liability.

Excessive sanctions, on their own, represent a breach of the right to freedom of expression, and this is particularly relevant in the context of defamation, where there has been a tendency for damage awards to escalate in some countries. International law requires penalties for defamation to be proportionate to the harm done to the plaintiff, keeping in mind that the objective of damages is to redress this harm and not to punish the defendant. When imposing pecuniary damages, courts should consider the potential chilling effect that these may have on legitimate speech. Non-pecuniary remedies, such as a right of correction or reply, should generally be prioritised.

Privacy

Like freedom of expression, privacy is a human right, protected in Article 17(2) of the ICCPR. One of the main challenges with privacy is defining it clearly, a difficult task which has generally been avoided by courts. For example, in the case of *Niemietz v Germany*, the European Court of Human Rights (ECHR) stated: "The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of 'private life'."

It is generally agreed that privacy incorporates both objective and subjective elements. The former involves a determination of whether or not there exists a "reasonable expectation of privacy", while the latter depends on whether, in fact, the individual involved had an actual expectation of privacy, which may depend on their personal values, attitudes and, importantly, their behaviour.

Interpretation of these standards varies widely both between jurisdictions and in the context of different cases. Courts in the United States have identified four different

types of privacy interests worthy of protection:

1) Unreasonable intrusion upon the seclusion of another;
2) Appropriation of one's name or likeness;
3) Publicity which places one in a false light; and
4) Unreasonable publicity given to one's private life.

In many ways, privacy plays an important role in facilitating freedom of expression, particularly in the context of communications aimed at a limited audience. This is also true in the context of online communications, where a sense of anonymity in certain forums has been credited with encouraging a freer and franker discourse online. States should refrain from establishing blanket or untargeted surveillance programmes of Internet communications and from putting in place bulk data retention requirements for Internet or telecommunications service providers. States should also refrain from interfering with the functioning of online anonymisation software, such as Tor.

At the same time, and in perhaps more high profile ways, privacy can come into conflict with freedom of expression, for example where the media wish to publish stories which include references to private matters. In these contexts, and also where the right to information comes into conflict with privacy (i.e. where individuals make requests for information that is deemed to be private), the accepted approach is to undertake a public interest balancing, immunising the expression or providing access to the information where this is in the overall public interest. In applying this test, courts have generally favoured freedom of expression over privacy, although this has been considerably less true in the context of the right to information.

The leading ECHR case on this issue, the second case of *Von Hannover v. Germany*, involved a number of photos of Princess Caroline of Monaco, focused mostly on the illness of the reigning Prince of Monaco, Prince Rainier, and the way his family were looking after him during his illness. The Court set out a number of principles to be taken into account in balancing freedom of expression and the protection of privacy, including:

- the extent to which the publication contributed to a matter of public interest;
- the degree of fame of the person involved and the subject of the report;
- the prior conduct of the persons involved;
- the content, form and consequences of the publication; and
- the circumstances in which the photos were taken.

In general, the Court showed a wide degree of latitude to any expression, even photos, which made a contribution to debate on a matter of public interest.

More generally, the ECHR has identified a number of factors to be considered when determining the level of public interest in a particular matter. These include the prior conduct of the persons involved, the content, form and consequences of the publication, the circumstances in which the alleged invasion of privacy took place and the nature of the privacy interest at stake. Individuals, such as celebrities, who voluntarily open their private lives to public scrutiny with a view to increasing their public profile and ultimately their financial wealth are considered to have

voluntarily surrendered a measure of the privacy to which they would otherwise be entitled.

Data protection regimes, which aim to limit the collection and processing of large amounts of personal data, are related to but different from privacy protection. These rules originally arose in response to the increasingly large amounts of data that public bodies were holding on individuals, and the growing capacity of technology to allow for the manipulation of that data. Given their closely related subject matters, it is perhaps natural that data protection and privacy should be confused, but there are important differences between them. Data protection regimes apply to all personally identifying data, which is much broader than privacy. For example, one may post one's email online to facilitate people making contact, but this does not mean one wants that email to be sold and traded as a commodity, resulting in a barrage of unwanted email advertisements.

FURTHER READING

- ARTICLE 19, *Defining Defamation Principles on Freedom of Expression and Protection of Reputation*, 2000: http://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf

- *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 17 April 2013, UN Doc. A/HRC/23/40: http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx

- Toby Mendel, Andrew Puddephatt, Ben Wagner, Dixie Hawtin & Natalia Torres, *Global Survey on Internet Privacy and Freedom of Expression*, UNESCO, 2012: http://unesdoc.unesco.org/images/0021/002182/218273e.pdf

BRIEFING NOTE 12
Digital Rights

In the decades since its inception, the Internet and other digital technologies have revolutionised the global expressive landscape and become key delivery mechanisms for a range of other social benefits, including the protection of human rights. These benefits are so important that there is a growing opinion that access to the Internet should itself be considered a human right. It is clear that the use of the Internet as an expressive medium is protected as part of the right to freedom of expression. The importance of online communications has been repeatedly recognised, including in the 2011 Joint Declaration of the special international mandates for freedom of expression, which stressed "the transformative nature of the Internet in terms of giving voice to billions of people around the world, of significantly enhancing their ability to access information and of enhancing pluralism and reporting".

In their 2011 Joint Declaration, the special international mandates for freedom of expression made it clear that States should promote universal access to the Internet, stating: "Giving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet." Although access to the Internet has grown by leaps and bounds over the last twenty years, providing universal and equal access remains a challenge. According to the International Telecommunication Union (ITU), the developed world has an average Internet penetration rate of 77 per cent as of 2013, while Internet penetration in the developing world averages 31 per cent. In addition to this global digital divide, many States experience an internal divide between wealthy, urban residents and poorer, rural ones.

There are a number of ways in which States can and should promote greater Internet penetration, especially where markets cannot be expected to do this, including for poorer people and 'last mile' rural areas. Regulatory mechanisms – which could include pricing regimes, universal service requirements and licensing agreements – can help foster greater access to the Internet. For example, some countries require Internet access service providers to charge equal rates in rural and urban areas, effectively subsidising the rollout of rural broadband through the more profitable urban connections. This process can be further assisted through the provision of public financial support. Establishing ICT centres and public access points, and raising Internet awareness or literacy are other ways to expand access.

The rise of the Internet has been accompanied by legal challenges both in adapting existing legal regimes, such as defamation law, to the new communications environment and in developing new legal regimes to address the new class of digital crimes that has emerged, such as online fraud and cyberstalking, as well as to protect new opportunities, such as online commerce. It is important to note that many online crimes are not as new as they seem. Fraud, for example, is already prohibited in fairly

general terms in most countries. While enforcement techniques and definitions may need to be updated, States should avoid rushing to adopt new legislation absent clear evidence that the existing legal tools are insufficient.

While it is always important to consult on the development of legislation which affects the right to freedom of expression, this is perhaps particularly important in relation to the Internet, given its complexity, technical sophistication and rapidly evolving nature. Making sure that the concerns of a range of stakeholders are taken into account can avoid clumsy and technically ineffective rules, as well as laws which prohibit innocuous or benign behaviours along with harmful ones. Any restrictions which impact on freedom of expression on the Internet must, as with any communications medium, conform with general human rights standards, including the three-part test set out in Article 19(3) of the *International Covenant on Civil and Political Rights* (ICCPR) (see Briefing Note 2). Simply transferring regulatory regimes designed for other contexts to the Internet can be very problematical given how fundamentally differently it operates. As the special international mandates for freedom of expression noted in their 2011 Joint Declaration:

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

A unique aspect of online communications is the significant role that private intermediaries play, partly due to the sophisticated technical and infrastructural requirements involved in getting online and partly due to the enormous and varied potential for added communicative value that they can provide, for example by providing search facilities or social media tools (like Facebook). In the offline world, the limited range of intermediaries – such as publishers and broadcasters – were normally held to the same standards of liability as primary authors. This is simply not possible in the online world, due to the very different relationship between 'authors' and intermediaries (imagine if Google were legally responsible for every defamatory statement that its search engine pointed to in a search). To address this, international law mandates that intermediaries should be shielded from liability unless ordered to take material down.

Many jurisdictions have adopted notice and take-down rules which require intermediaries to take down material as soon as they are notified that it might be problematical. This provides insufficient protection for online speech since it essentially grants a power of censorship or veto to anyone who issues such a notice. Better practice is to require intermediaries to take material down only after being ordered to do so by an independent oversight body, such as a court or independent regulator and some democracies have adopted stronger "safe harbour" protections along these lines.

The Internet differs from earlier communication tools in its truly global nature, with material uploaded anywhere being instantaneously available to users anywhere. This gives rise to issues about jurisdiction in legal cases relating to Internet content. This has been a particular problem in relation to defamation, with plaintiffs engaging in what has come to be known as libel tourism, whereby they seek

a plaintiff friendly jurisdiction in which to bring cases. To address this, the special international mandates for freedom of expression called for the following approach in their 2011 Joint Declaration:

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

Another unique feature of the Internet is that it has enabled new, technologically based, control systems, such as filtering and blocking systems. While filtering systems can enhance the ability of end users to exercise control over the content that comes across their desks, filtering or blocking systems imposed by the State represent an unjustifiable form of prior censorship. In their most extreme forms – of which the most famous and pervasive is China's "Great Firewall" although similar systems are being explored or implemented in several States, including Russia, Ethiopia and Kazakhstan – these systems also pose a major structural threat to the nature of the Internet. China's Great Firewall not only limits the ability of Chinese people to use the Internet, it also undermines the ability of Internet users everywhere to communicate with people in China.

Another important Internet issue is the principle of net neutrality. At a minimum, this rules out discrimination in the treatment of Internet traffic. As the special international mandates noted in their 2011 Joint Declaration: "There should be no discrimination in the treatment of Internet data and traffic, based on the device, content, author, origin and/or destination of the content, service or application." The question of differential charges for carriage and receipt of material over the Internet is more controversial. While some advocates call for this to be prohibited, differential charging has already started to take root and it seems unlikely that it will disappear completely.

The rise of the Internet is posing a significant challenge to the established system of protection of copyright and intellectual property. The Internet has facilitated a tremendous flowering of creativity and the birth of new art forms. However, it has also led to unprecedented levels of copyright infringement, due to the ease with which digital files can be copied and shared. While the rights of artists to earn a living, including through digital sales, should be safeguarded, States should ensure that exceptions to copyright (such as fair use or fair dealing) are interpreted broadly and in a manner that is appropriately adapted to the digital era. They should also take care to avoid imposing overly harsh penalties for infringement, in particular cutting off access to the Internet.

FURTHER READING

- Centre for Law and Democracy, *A Truly World-Wide Web: Assessing the Internet from the Perspective of Human Rights*, 2012: http://www.law-democracy.org/wp-content/uploads/2010/07/final-Internet.pdf

- International Telecommunication Union, *ICT Facts and Figures*, 2013: http://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2013-e.pdf

- Special international mandates on freedom of expression, *Joint Declaration on Freedom of Expression and the Internet*, 2011: http://www.law-democracy.org/wp-content/uploads/2010/07/11.06.Joint-Declaration.Internet.pdf

International Organisations Active on Freedom of Expression

Access Info Europe (Spain)	www.access-info.org
Amnesty International (United Kingdom)	www.amnesty.org
Arabic Network for Human Rights Information (Egypt)	www.anhri.net/en
Article 19 (United Kingdom)	www.article19.org
Centre for Democracy and Technology (United States)	www.cdt.org
Centre for Law and Democracy (Canada)	www.law-democracy.org
Committee to Protect Journalists (United States)	www.cpj.org
Commonwealth Human Rights Initiative (India)	www.humanrightsinitiative.org
Free Press Unlimited (Holland)	www.freepressunlimited.org
Human Rights Watch (United States)	www.hrw.org
Index on Censorship (United Kingdom)	www.indexoncensorship.org
International Freedom of Expression Exchange (Canada)	www.ifex.org
International Federation of Journalists (Belgium)	www.ifj.org
International Media Support (Denmark)	www.mediasupport.org
Internews (United States)	www.internews.org
Media Legal Defence Initiative (United Kingdom)	www.mediadefence.org
Pen International (United Kingdom)	www.pen-international.org
Regional Alliance for Freedom of Expression and Information (Uruguay)	www.alianzaregional.net
Reporters Without Borders (France)	www.rsf.org
Transparency International (Germany)	www.transparency.org

Glossary

American Convention on Human Rights (ACHR): Also known as the Pact of San José, an international human rights treaty adopted in 1969 (in force 1978) by States in the Americas.

Broadcasting: Communication of audio or visual content in continuous blocks (programme schedules) intended for simultaneous or subsequent reception by the public, traditionally on a radio or television set (but now via a variety of digital devices as well).

Chilling effect: An action which inhibits a range of freedom of expression beyond what is strictly intended, most commonly as a result of the imposition of sanctions. The core of the effect is that speech beyond what is formally prohibited is affected, as people steer well clear of the line of prohibition in an effort to avoid any risk of a sanction.

Council of Europe: An intergovernmental organisation aimed at promoting cooperation among the wider community of European States (47 members as of June 2014) on key human rights issues.

Customary international law: A form of international law which arises from established State practice. The basic idea is that some principles are so universally recognised that, even in the absence of a formally binding treaty, they may be considered to be binding upon all States.

Data retention: The preservation of an archive of data, often of a personal nature, sometimes imposed as a legal requirement on Internet service providers.

Democracy: A form of government where citizens freely elect the political leadership through regular elections based on universal and equal suffrage (or participation) and which also includes a variety of mechanisms for direct citizen engagement in decision making processes.

European Court of Human Rights: An international court with responsibility for hearing and ruling on alleged violations of human rights among States which are members of the Council of Europe, all of which have ratified the *European Convention on Human Rights*.

Expression: Any act which involves seeking, receiving or imparting (communicating) information and/or ideas, regardless of the means (such as orally, via the Internet or even using Morse code).

Human right: Inalienable basic rights that apply universally and equally to every human being regardless of race, religion, ethnicity or any other status.

Inter-American Court of Human Rights: An independent international court with the responsibility to hear and rule on alleged violations of human rights among States which have ratified the *American Convention on Human Rights* and accepted the jurisdiction of the Court.

International Covenant on Civil and Political Rights (ICCPR): A legally binding treaty guaranteeing a range of civil and political human rights. It had been ratified by 168 States as of June 2014.

International law: A set of legal rules which are formally binding on States, both in relation to one another and in relation to their internal conduct. These laws can stem from treaties or conventions, or can arise from established State practice, known as customary international law.

International human rights standards: A set of binding or highly persuasive interpretations of international human rights. These standards are drawn from a variety of sources, including international jurisprudence and standard setting statements by authoritative actors such as the special international mandates or leading civil society groups.

Internet: A global system of interconnected computer networks which communicate with one another and thereby facilitate a number of applications, of which the most famous is the World Wide Web.

Joint Declarations of the Special Rapporteurs: Annual joint statements by the special international mandates on freedom of expression which focus each year on a different theme, such as freedom of expression on the Internet or safety of journalists. The statements are drafted with the assistance of Centre for Law and Democracy and Article 19 and are leading statements of international freedom of expression standards.

Net neutrality: A principle which rules out discrimination in the treatment of Internet data and traffic, based on the device, content, author, origin and/or destination of the content, service or application.

Prior censorship: Restrictions imposed on a particular form of expression, historically most commonly on newspapers, before it takes place. These systems are very difficult to justify as restrictions on freedom of expression. Also known as prior restraint.

Public interest: A complex and multi-faceted term which is very important in terms of the human rights discourse. Defining the public interest is a highly contextual exercise (i.e. it depends on all of the circumstances) but it can be understood broadly as a consideration of the range of benefits that are likely to accrue to society as a whole if a particular course of action is followed.

Security of tenure: Protection, sometimes for a fixed period of time, from being removed from a particular position or job unless certain limited conditions are met, usually requiring a showing of legitimate cause, such as incapacitation or corruption.

Special international mandates on freedom of expression: Currently there are four special mandates, namely the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information.

Telecommunications: Traditionally systems which allowed for point-to-point (or the connection of several points) communication at a distance through technical means, particularly electrical signals or electromagnetic waves. Technological convergence based on digital technologies is breaking down the barriers between broadcasting, telecommunications, the Internet and other digital forms of communication.

Tor: A computer program which uses encryption technologies to allow users to browse the web anonymously.

Transitional (or emerging) democracy: A political unit (generally a State) which is in the process of establishing and strengthening democratic institutions, particularly where the prior form of government was undemocratic.

Tshwane Principles: A set of principles developed by leading representatives of civil society, government and the security sectors on the appropriate limits of secrecy in the name of national security.

UN Human Rights Committee (UNHRC): A body of 18 independent experts from around the world with the responsibility of overseeing implementation of the *International Covenant on Civil and Political Rights* in various ways, including through deciding cases and by undertaking regular reviews of State compliance.

Universal Declaration of Human Rights (UDHR): The flagship United Nations statement of international human rights. Adopted in 1948 as a General Assembly Resolution, the UDHR is not formally legally binding on States, although many of the rights it proclaims are widely regarded as having acquired legal force as customary international law.