



Inter-Parliamentary Union

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# Freedom of expression for parliaments and their members: Importance and scope of protection

**Handbook for Parliamentarians No. 28**

## **Acknowledgements**

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# Foreword

Freedom of expression is a cornerstone of any democratic dispensation. Democracy cannot be realized without a free flow of ideas and information, and the possibility for people to gather, to voice and discuss issues, criticize and make demands, and defend their interests and rights.

Although the right to freedom of expression is indispensable, it is not absolute. Indeed, certain speech, such as hate speech, incitement to violence and defamation, is not protected by freedom of expression. Under international law, however, the restrictions that may be placed on freedom of expression are limited and must be narrowly interpreted.

Freedom of expression takes on special significance for parliamentarians. It allows them to connect with citizens, raise their concerns and denounce possible abuses. It is crucial that parliamentarians can do this unhampered and without fear of reprisals. The case load of the IPU Committee on the Human Rights of Parliamentarians shows, however, that across the world many parliamentarians are at risk for exercising their freedom of expression. It is our collective responsibility to ensure that they, as well as others who rely on freedom of expression, such as the media and civil society, can conduct their work safely and unhindered.

Freedom of expression is not only relevant for parliamentarians because they make active use of it. Through their constitutional functions, parliamentarians have the responsibility to help create a legislative framework which protects everyone's freedom of expression in line with international standards. Parliaments play a critical role too in helping ensure that right-to-information legislation exists so that citizens can access information held by public authorities. Parliaments can also make an important contribution to the adoption of regulations that ensure media diversity and the independence of media-regulatory bodies. In each of these situations, parliaments must not only ensure that the necessary laws are in place but also that they are fully implemented. In the face of today's political and technological challenges to the protection of freedom of expression, there can be no complacency. Parliaments therefore need to make full use of the tools at their disposal to understand and defend this fundamental right.

I hope that you will find this handbook useful and can draw on it in your work as a parliamentarian, your work with parliaments, or simply because you want to acquire a better understanding of what the right to freedom of expression is all about.



*Martin Chungong*  
*Secretary General*  
*Inter-Parliamentary Union*

# Abbreviations

<b>ACHPR</b>	African Charter on Human and Peoples' Rights
<b>ACmHPR</b>	African Commission on Human and Peoples' Rights
<b>ACHR</b>	American Convention on Human Rights
<b>CNRP</b>	Cambodian National Rescue Party
<b>CEO</b>	Chief Executive Officer
<b>COE</b>	Council of Europe
<b>ECHR</b>	European Convention on Human Rights
<b>HDP</b>	People's Democratic Party of Turkey
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>IPU</b>	Inter-Parliamentary Union
<b>ISPs</b>	Internet Service Providers
<b>NGO</b>	Non-governmental organization
<b>OAS</b>	Organization of American States
<b>OSCE</b>	Organization for Security and Co-operation in Europe
<b>PACs</b>	Political Action Committees
<b>RTI</b>	Right to Information
<b>SDG</b>	Sustainable Development Goal(s)
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>UPR</b>	Universal Periodic Review

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# Introduction

History is replete with examples of famous politicians, thinkers and artists emphasizing the importance of freedom of expression to democracy, to discovering the truth, to development, to the liberal arts and, indeed, to almost every treasured social value and endeavour. On the other side of the ledger, although many States exert excessive control over speech in practice, and despite repeated warnings about the abuse of free speech, there is little disagreement with the general principle that freedom of expression is of foundational importance to almost every aspect of human life.

There is probably no group in society for whom free speech is more important than parliamentarians. Not only does it underpin the very essence of their work – most firmly represented in the public mind by their giving speeches in parliament – but that work is itself an absolute bedrock of democracy and the protection of human rights, including freedom of expression. Put differently, if parliamentarians' right to freedom of expression is not respected, democracy and indeed all human rights are very much at risk.

Despite near-universal acknowledgement of its importance, freedom of expression remains a highly contentious and debated right. At the heart of this dilemma is the fact that, while protection for free speech is essential in a democracy, at the same time abuse of this right can cause grave harm. Furthermore, that harm may be visited not only on individuals – for example if their private secrets are revealed or they are attacked in a way which undermines their status and position in society – but also on the public as a whole – for example if a battle is lost due to the provision of highly sensitive information to the enemy.

In recognition of this, international legal guarantees for freedom of expression, as reflected in both international and regional human rights treaties, try to strike a balance between providing strong protection the right while allowing for appropriate restrictions on it to protect other public and private interests. This is inevitably complex both as a jurisprudential matter and in practice as the rules are applied in different social and political contexts.

In essence, international guarantees start with a very strong presumption in favour of freedom of expression, and then allow States to restrict or limit the right in narrow and specifically justified circumstances where this is necessary to protect a limited and express list of interests. Such restrictions must be justified both generally (i.e. as legitimate in law) and in their specific application in any particular context (i.e. as legitimate, based on the facts of any case). Thus, States have in place defamation laws to protect individual reputations, and international law has established both general standards for these laws, as well as standards for applying them in the context of any specific case.

It would, however, be a grave mistake to view freedom of expression simply as a balancing between what may and what may not be said, as important as this is. Rather, a more profound analysis of this right understands it as protecting a robust free flow of information and ideas in society. While one part of this is shielding all but the most harmful expressions against sanction, it goes far beyond this. It requires, for example,

the creation of an environment in which the means of communication – traditionally the print and broadcast media – can flourish in diversity, in which expression is protected not only against formal sanction but also against criminal retribution, and in which the vast wealth of information held by public authorities is available to all citizens. These notions are found in international law guarantees for freedom of expression includes not only the right to speak but also to “seek” and “receive” information and ideas, as well as positive State obligations to protect these rights.

Historically, what has now become known as the “legacy” media – newspapers, radio and television – have provided the backbone communications system for wider social debate, supplemented by other means such as books, pamphlets, theatre, paintings and music. Although change is certainly taking place, the legacy media remain essential to robust democracy as actors which not only circulate (disseminate) news and current affairs content, but also discover (investigate, find), analyse and curate it. For the media to be able to do this successfully, certain conditions are necessary. They must be free and independent of other powerful social actors (about whom they report), they must be diverse, to maintain competition but, even more importantly, to give citizens access to a range of views and perspectives, and they must be professional, so as to maintain public trust but also so as to ensure that the information they disseminate is accurate.

Modern technological developments have brought about fundamental changes in the expressive environment and we remain in a situation of flux, which may continue for quite some time. The extensive spread and use of the Internet and other digital technologies, as well as the tools they have enabled, have truly transformed the way we communicate and interact.

For the most part, these changes have massively bolstered and even democratized freedom of expression. Whereas once access to information was the preserve of the wealthy, it is now possible, with an Internet connection and a digital device, to access a previously unimaginable wealth of information. Technology has also revolutionized the voice side of expression. A. J. Liebling wrote in 1960 that: “Freedom of the press is guaranteed only to those who own one”.<sup>1</sup> Today, anyone with an Internet connection and even a simple digital device can speak to the world. Facebook, with its over two billion active users,<sup>2</sup> is the most famous platform through which to do this, but a vast and ever-evolving array of social media and other communication options is available.

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

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1 “The wayward press: Do you belong in journalism?” *The New Yorker*, 14 May 1960, p. 105.

2 Defined as those who use it at least monthly. See [www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/](https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/).

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

Using the same approach, platforms can take advantage of our online profile to target advertising at us. More sinister is the recent use of this sort of profiling by politicians to try to convince, or manipulate, us to vote for them. The abuse of personal data by Cambridge Analytica in both the Brexit vote in the United Kingdom and the 2016 United States election has focused renewed attention on this issue.

Freedom of expression is, first and foremost, a legal right. This is hardwired into international guarantees, which require any restrictions to be “provided by law”. As the guardians of law-making processes, parliamentarians have a special responsibility to make sure that laws conform to international standards in this area. This applies to the rules both relating to restrictions and involving measures to create a positive enabling environment for freedom of expression. A key part of this, flowing from the “provided by law” requirement, is that legislation should neither be unduly vague nor allocate too much discretion to officials in deciding how to apply it. There are a number of substantive areas where, all too often, laws are deliberately vague, of which national security and the fight against terrorism stand out as leading culprits.

Part I of this handbook is designed to give parliamentarians an understanding of the main standards governing freedom of expression under international law. Chapter 1 starts by outlining “core standards”, including describing international guarantees, highlighting the reasons freedom of expression is important, presenting the main characteristics of this right, and outlining key principles for freedom of expression during elections.

Chapter 2 addresses the all-important issue of restrictions on freedom of expression. The first section focuses on general rules governing restrictions and, in particular, the three-part test for restrictions under international law. The second section focuses on a number of specific interests that restrictions seek to protect, such as national security, privacy, reputation, public order, equality (hate speech) and the administration of justice.

The handbook moves on, in Chapter 3, to address the issue of media regulation. Early sections focus on general issues such as ensuring that regulatory bodies are independent, and the need to foster diversity in the media, while the following sections focus on different media sectors: journalists, print media, broadcast media, public service media and online media.

Although ensuring that legislation is in line with international standards may stand out as the leading role for parliamentarians in terms of protecting freedom of expression, it is by no means the only one. Parliamentarians also exercise important oversight roles in relation to both the executive and other powerful social actors. Part of this is ensuring that

legislation is implemented properly, i.e. in the manner intended by parliament. In some cases, parliament is given a formal role here, such as to approve the budgets for freedom of expression oversight bodies, e.g. broadcast regulators or access-to-information commissions – or to participate in appointing their members.

As social leaders, parliamentarians have a duty to strike the right balance when exercising their own right to freedom of expression. This means, on the one hand, engaging in robust debate in parliament, and more widely to discharge their parliamentary mandates, including by holding others to account and by criticizing inappropriate behaviour. But it also brings with it certain responsibilities to respect freedom of expression. Just because parliamentarians enjoy special, almost unlimited, protection for freedom of expression within parliament does not mean that they should use that power irresponsibly. It is never appropriate, for example, to make explicitly racist comments or knowingly to tell lies. Parliament is also, under international law and often under national law, required to operate transparently, including by publishing information proactively and by responding to requests for information from individuals. The issues outlined in these last two paragraphs are the subject of Chapter 4, which focuses on the promotion and protection of freedom of expression.

A key issue for parliamentarians is precisely what special protections they enjoy in terms of freedom of expression. The doctrine of parliamentary non-accountability essentially protects parliamentarians against legal censure for what they say in parliament and sometimes beyond this, while the doctrine of inviolability grants parliamentarians certain additional protections. Chapter 5 focuses on these issues, analysing in some detail the precise scope of the protections for free speech under those doctrines. Despite these protections, parliaments retain the power to censure parliamentarians who abuse their right to freedom of expression to the detriment of parliament itself, as part of the broader doctrine of parliamentary immunity. Chapter 5 also looks at the power of parliaments to regulate free speech rights, in particular of its their members.

Chapter 6, the last in the handbook, looks at a number of practical issues on freedom of expression and parliamentarians. It is important for parliaments to ensure that systems are in place to ensure appropriate media access to parliament. Part of this is putting in place accreditation processes for the media which are fair and transparent. And part is about promoting live broadcasting and online streaming of parliament, including committee meetings as far as possible.

It is important for individual parliamentarians to cultivate good relations with the media so as to help them get their messages out to the public, even if this can sometimes be frustrating due to perceptions that the media tend to sensationalize events or only report negative news. The spread of social media is starting to change this relationship, and to give parliamentarians tools they can control directly to reach out to the wider public.

Parliamentarians also need to cultivate good relations with officials and political parties. In particular, they should respect the obligation of civil servants to remain politically impartial and to do their jobs in a professional, unbiased manner. Political parties have come to wield an enormous amount of power in parliaments. While this is to some extent inevitable, and has many positive aspects, if the law and practice goes too far it

can undermine the independence of parliamentarians and their ability to represent the electorate and remain true to their own consciences. This is a risk, for example, where the rules on the loss of the parliamentary mandate make it difficult or impossible for parliamentarians to change their party affiliations.

The overall aim of this handbook is to help parliamentarians better understand international standards on freedom of expression. There are two main thrusts. One is to help ensure that they can promote these standards in their work, in particular through their legislative activities. The second is to help ensure that they can themselves enjoy to the full the extensive freedom of expression rights that they enjoy in most countries. Both should help to improve democracy, and overall respect not only for freedom of expression but also for all other rights.

## **Part I: International and regional standards and systems**

# Chapter 1

## The core standards



Philipos Melaku-Bello has been sitting in front of the US White House for the last 37 years, quietly broadcasting his message of peace, freedom and tolerance. © AFP/Olivier Douliery, 2018

## Core international guarantees

The right to freedom of expression is a core human right, which is guaranteed in all of the key general human rights instruments. The *Universal Declaration of Human Rights* (UDHR),<sup>3</sup> adopted in 1948 as a United Nations (UN) General Assembly resolution, is generally viewed as the flagship international statement of human rights. The right to freedom of expression is protected in Article 19 of the UDHR as follows:

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

<sup>3</sup> UN General Assembly *Resolution 217A (III)*, 10 December 1948.



The UDHR is not as such formally binding on States. However, its pre-eminent status, and the fact that States rarely repudiate its principles, means that at least parts of it, including its guarantees of freedom of expression, have very likely acquired legal force as customary international law.<sup>4</sup>

The UDHR was given binding legal force through the adoption by the United Nations of two treaties, the *International Covenant on Civil and Political Rights* (ICCPR)<sup>5</sup> and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).<sup>6</sup> There are now 170 States Parties to the ICCPR,<sup>7</sup> and it guarantees the right to freedom of expression in very similar terms to the UDHR, also in Article 19, as follows:

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

There are three established regional systems for the protection of human rights – in Africa, the Americas and Europe. Each of those systems has its own general regional human rights treaty, and all three guarantee the right to freedom of expression. Specifically, this right is guaranteed at Article 9 of the *African Charter on Human and Peoples' Rights* (ACHPR),<sup>8</sup> Article 13 of the *American Convention on Human Rights* (ACHR)<sup>9</sup> and Article 10 of the *European Convention on Human Rights* (ECHR).<sup>10</sup>

The guarantees in the ACHR and ECHR are similar in approach to the UDHR and ICCPR, albeit with some differences when it comes to the precise wording, while the ACHPR guarantee takes a somewhat different form.

4 Customary international law is another way in which international law can be created. On the issue of the UDHR as customary law, see, for example, D'Amato, A., "Human Rights as part of customary international law: A plea for change of paradigms" (2010, Faculty Working Papers, 88), available at: [www.scholarlycommons.law.northwestern.edu/facultyworkingpapers/88](http://www.scholarlycommons.law.northwestern.edu/facultyworkingpapers/88) and Meron, T., *Human rights and humanitarian norms as customary law* (1989, Oxford, Clarendon Press).

5 UN General Assembly *Resolution 2200A (XXI)*, adopted 16 December 1966, in force 23 March 1976.

6 UN General Assembly *Resolution 2200A (XXI)*, adopted 16 December 1966, in force 3 January 1976.

7 As of April 2018. States Parties are States that have ratified the Covenant and for which, as a result, it is formally binding.

8 Adopted at Nairobi, Kenya, 26 June 1981, in force 21 October 1986.

9 Adopted at San José, Costa Rica, 22 November 1969, in force 18 July 1978.

10 Adopted 4 November 1950, in force 3 September 1953.

# Importance of freedom of expression

**“The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”**

---

John Stuart Mill, *On Liberty*

**“I disapprove of what you say, but I will defend to the death your right to say it.”**

---

S.G. Tallentyre, *The Friends of Voltaire*

**“[N]o democracy with a free press has ever experienced a major famine.”**

---

Amartya Sen

Freedom of expression is one of the most cherished and celebrated of all human rights. One of the reasons for this is that it is important both in its own right and as a means for securing respect for all other rights and, indeed, democracy itself. The UN General Assembly made this clear in *Resolution 59(II)*, adopted at its first session in 1946:

Freedom of information is a fundamental human right and ...  
the touchstone of all the freedoms to which the United Nations  
is consecrated.<sup>11</sup>

It is elemental that freedom of expression lies at the heart of democracy which, if it means anything, means being able to know about, debate and assess the positions of competing parties and candidates, as well as to hold them accountable (again based on transparency and open debate about what they do while in power). Beyond this, democratic participation at all levels is possible only where citizens can both access information about policies, programmes and plans, and discuss openly their respective strengths and weaknesses. Authoritative international bodies have repeatedly stressed that freedom of expression is essential for democracy.

A number of other benefits also flow from respect for freedom of expression. These include exposing, and thereby combating, corruption and, as the quotation from John Stuart Mill above highlights, discovering the truth.

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<sup>11</sup> Adopted 14 December 1946.

The modern world is witnessing a truly impressive and seemingly ongoing expansion in the range of means of or tools for communication. At the same time, the so-called “legacy media” – namely newspapers, radio and television – remain key vehicles for both obtaining reliable news and current affairs information and engaging in debate about matters of important public concern. As such, the legacy media remain a key means for ensuring the realization, in practice, of freedom of expression and, through it, democracy.

## Key characteristics of the right

### Scope

Under international law, “everyone” has the right to freedom of expression. This includes both citizens as well as non-citizens, children and prisoners, although a greater range of restrictions may be allowed in the last case. Thus, limits on the human rights of convicted prisoners are a key part of their very condition (which involves restrictions on movement) and this may, in appropriate cases, also extend to freedom of expression. The right also extends to legal entities (such as corporations), although there may be procedural barriers to the remedies they may seek.<sup>12</sup>

Articles 19 of both the UDHR and ICCPR protect both freedom of opinion (i.e. the right to hold views) and freedom of expression (i.e. the right to articulate or state either facts or opinions). The former is absolutely protected (i.e. States may not impose any restrictions on it), while the latter may be restricted (as described in Chapter 2: Restrictions).

Protection extends not only to popular or public interest statements, but also unpopular, indeed offensive, ideas. Arguably, the right is most important in such cases, since popular statements have less need of protection. The European Court articulated this clearly in one of its earliest freedom of expression cases:

Freedom 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”.<sup>13</sup>

In some respects, the right can be said to provide *prima facie* protection to anything which communicates meaning, while allowing States to limit certain expressive content. Thus, international courts hearing freedom of expression cases start by assessing whether there has been an “interference” with or limitation on expressive content and then, if there has been, they go on to assess whether that interference, or restriction, meets the test for such restrictions to be allowed.

<sup>12</sup> Thus legal entities cannot complain about breaches of rights before the UN Human Rights Committee but they can bring cases before the European Court of Human Rights.

<sup>13</sup> *Handyside v. the United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.

Human rights bind all State actors, which is defined broadly to cover all actors which are part of the State, wield State power, act on the State's behalf or instructions and, sometimes, even private actors which undertake State functions. The UN Human Rights Committee is the 18-member body of experts which monitors implementation by States of their ICCPR obligations.

In 2011, the Committee adopted General Comment No. 34 on freedom of expression, a kind of synopsis of its historic jurisprudence on this right, which notes:

All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities.<sup>14</sup>

This clearly covers parliament and the various institutions of parliament, as stated explicitly in the quotation above (referring to the legislative branch of government). Parliamentarians, as individuals, are not normally deemed to be bound, perhaps outside of exceptional circumstances, although it is possible that their offices, whether in parliament or constituency offices, where these exist, might be covered.

### Positive and negative aspects

A number of human rights, including freedom of expression, have what are called both positive and negative aspects. Despite a name, the negative aspect is what most people think of first in relation to freedom of expression: namely the obligation on States not to interfere with individuals' right to express themselves freely. Indeed, some earlier constitutional guarantees focus exclusively on this negative aspect of the right. Thus, the First Amendment to the United States Constitution states, in part:

Congress shall make no law ... abridging the freedom of speech, or of the press...

This is an exclusively negative formulation of the right (i.e. it prohibits the State from interfering).

Under international law, however, the right also has a positive aspect. This recognizes that true respect for freedom of expression, which can be understood as ensuring a free flow of information and ideas in society, sometimes needs the State not to refrain from acting but to take action to protect that flow. Action may be needed to protect speech against threats coming from private actors – for example where there are physical threats against a newspaper – to ensure proper structural regulation of the media – for example to prevent monopoly ownership – or to ensure a flow of public interest information from inside of government – for example by legislating to protect whistleblowers against reprisals.

In a general sense, these positive obligations flow from Article 2 of the ICCPR, which places an obligation on States to “adopt such legislative or other measures as may be

<sup>14</sup> General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para. 7.

necessary to give effect to the rights recognized by the Covenant”. But they have also been recognized in the specific context of the right to freedom of expression. For example, in General Comment No. 34, the UN Human Rights Committee stated:

The obligation [to respect freedom of expression] also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression to the extent that these Covenant rights are amenable to application between private persons or entities.<sup>15</sup>

These positive obligations may apply to relations between individuals and the State, the vertical application of rights – such as in the obligation on States to create an environment in which diverse media can flourish – or they may apply to relations between private actors, the horizontal application of rights – for example in the obligation on States to prevent one private actor from attacking another for what he or she has said.

Every year, the special international mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression and African Commission on Human and Peoples’ Rights (ACmHPR) Special Rapporteur on Freedom of Expression and Access to Information – adopt a Joint Declaration on a freedom of expression theme. These special international mandates have often referred to various positive obligations of States.<sup>16</sup>

### Box 1: Positive state obligations

In the case of *Özgür Gündem v. Turkey*, before the European Court of Human Rights, the applicant newspaper was subjected to such serious attacks and harassment that it was eventually forced to close. The newspaper had asked the authorities for protection on various occasions but it had been provided on only one occasion. The Court found that the State was directly responsible for certain acts. Importantly, however, it also recognized that under certain circumstances, States have a positive obligation to provide protection to those who are at risk simply for exercising their right to freedom of expression. In doing so, it stated:

Genuine, effective exercise of [freedom of expression] does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing

<sup>15</sup> Note 14, § 7.

<sup>16</sup> For example, in para. 3(a) of their 2017 *Joint declaration on freedom of expression and “fake news”, disinformation and propaganda*, adopted 3 March 2017, they called on States to promote media diversity. All of the Joint Declarations are available at: [www.osce.org/fom/66176](http://www.osce.org/fom/66176).

modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities. [references omitted]<sup>17</sup>

## Seek and receive as well as impart

The right to freedom of expression is mostly commonly associated with freedom of speech or the right to express oneself. While this is indeed a very important part of the right, under international law it goes well beyond that. Thus, Article 19 of the UDHR protects the rights to “seek, receive and impart”, of which only the last refers to the rights of the speaker.

The Inter-American Court of Human Rights has elaborated most clearly on the “seek” and “receive” aspects of the right. In a case where it had to assess the legitimacy of a mandatory licensing system for journalists, the Court recognized the important implications of the dual nature of the right to freedom of expression:

When an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to “receive” information and ideas. The right protected by Article 13<sup>18</sup> consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.... In its social dimension, freedom of expression is a means for the interchange of ideas and information among human beings and for mass communication.<sup>19</sup>

### Box 2: Cases on the right to receive information

In the case of *Mavlonov and Sa'di v. Uzbekistan*, the UN Human Rights Committee was faced with the closure of a minority Tajik language newspaper due to a refusal by the authorities to register it. The applicants included both the editor and a reader of the newspaper. The Committee held that the freedom of expression rights of both the editor and the reader had been breached, the latter in the sense of his right to receive information and ideas.<sup>20</sup>

The European Court has on several occasions found a breach of the right to receive information. In *Khurshid Mustafa and Tarzibachi v. Sweden*, the Court found an

17 *Özgür Gündem v. Turkey*, 16 March 2000, Application No. 23144/93, para. 43. See also *Appleby v. the United Kingdom*, 6 May 2003, Application No. 44306/98, para. 39 and *Fuentes Bobo v. Spain*, 29 February 2000, Application No. 39293/98, para. 38.

18 Article 13 on *Freedom of thought and expression in the American convention on human rights*, adopted at San José, Costa Rica, 22 November 1969, in force 18 July 1978.

19 *Compulsory membership in an association prescribed by law for the practice of journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 30-2.

20 *Communication No. 1334/2004*, 19 March 2009, para. 8.4.

interference with freedom of expression where a tenant had not been allowed to install a satellite dish outside of their apartment, on the basis that this obstructed their right to receive information.<sup>21</sup> In *Open Door Counselling Ltd and Dublin Well Woman Centre Ltd v. Ireland*, the issue was a ban on disseminating information about abortion facilities located outside of Ireland. The Court held that the right of two female applicants, Mrs X and Ms Geraghty, to receive information had been breached.<sup>22</sup>

## Special protection for public interest speech

The importance of free speech to democracy has already been noted. One of the corollaries of this is that political speech or, to put it more broadly, speech on matters of public concern, deserves special protection due to its overriding importance to democracy. Looked at from a legal point of view, what this represents is difficulty of justifying restrictions this form of speech (technically, it is harder to show that they are necessary, as required under international law; see Chapter 2: Restrictions).

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

### Box 3: The IPU Committee on the Human Rights of Parliamentarians

The IPU Committee on the Human Rights of Parliamentarians is a unique source of protection and redress for parliamentarians who have faced human rights abuses. This is, unfortunately, a serious problem for parliamentarians in many countries, whether due to their political views, the fact that they stand up for those who are oppressed or simply due to the political parties to which they belong. The Committee has 10 members from countries around the world who are independent and sit in their personal capacities rather than as representatives of their parties or countries. The Committee receives individual complaints and meets three times a year to examine both new and ongoing cases. In working to find satisfactory solutions that are in line with human rights standards, the Committee holds hearings, undertakes missions and observes trials. Although the Committee meets in confidence, it adopts public decisions containing calls for action, expressions of concern and requests for further information. During the IPU Assemblies, it is the IPU Membership as a whole, through the Governing Council, which approves the Committee's views, thereby underscoring the importance of parliamentary solidarity in obtaining protection and redress. The Committee and the IPU Membership do not give up on cases until there is a satisfactory solution.<sup>23</sup>

<sup>21</sup> 16 December 2008, Application No. 23883/06.

<sup>22</sup> 29 October 1992, Application Nos 14234/88 and 14235/88.

<sup>23</sup> More information about the Committee is available at: [www.ipu.org/about-us/structure/governing-council/committee-human-rights-parliamentarians](http://www.ipu.org/about-us/structure/governing-council/committee-human-rights-parliamentarians).

Another important consequence is that politicians, along with a range of other public figures, are required to tolerate a greater degree of criticism than ordinary citizens. The reason for this is, again, the overriding need for open debate about the actions of the powerful, and especially those wielding political power, in a democracy (see Chapter 2: Restrictions, Reputations).

### Positive obligation to ensure safety

The rights to life and security of the person impose an obligation on the State to protect everyone against physical attacks. However, where attacks are a response to what someone has said, known as “attacks on freedom of expression”, then this obligation becomes even more important from a human rights perspective, to prevent what has been termed “censorship by killing”.<sup>24</sup>

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

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

States have a special obligation to provide protection to those who are at demonstrable risk of being attacked (for example as shown by threats they have received). One of the most serious problems in these cases is the very high prevailing rate of impunity, which observers note is above 90 per cent globally.<sup>25</sup> This gives rise to a second State obligation – to conduct effective investigations – wherever possible leading to prosecutions, where such attacks do occur. The special international mandates on freedom of expression described the obligations of States in the area of safety in their 2012 Joint Declaration:

States should:

- ① put in place special measures of protection for individuals who are likely to be targeted for what they say where this is a recurring problem;
- ② ensure that crimes against freedom of expression are subject to independent, speedy and effective investigations and prosecutions; and
- ③ ensure that victims of crimes against freedom of expression have access to appropriate remedies.

<sup>24</sup> See the 30 November 2000 Joint Declaration of the special international mandates on freedom of expression.

<sup>25</sup> See, for example, UNESCO, *World trends in freedom of expression and media development: 2017/2018 Global Report* (2018, Paris, UNESCO and University of Oxford), p. 133.



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

Where there is an ongoing and serious risk of crimes against freedom of expression, one of the best ways to provide ongoing protection to those at risk is to establish a specialized safety mechanism, something UNESCO (the United Nations Educational, Scientific and Cultural Organization) has been supporting both generally and in various countries around the world.<sup>26</sup>

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

#### **Box 4: Statements on States' safety obligations**

The issue of attacks on freedom of expression is so serious that the UN Security Council has adopted two resolutions on it. The first, *Resolution 1738* of 3 December 2006, condemned “intentional attacks against journalists, media professionals and associated personnel, as such, in situations of armed conflict, and calls upon all parties to put an end to such practices”. It also called on States to take measures to end impunity for such crimes (see also *Resolution 2222* of 27 May 2015).

In General Comment No. 34, the UN Human Rights Committee stated: “States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression” (paragraph 23). In many ways, the Inter-American human rights system, and countries in that region, have been in the forefront in dealing with this issue. In October 2000, the Inter-American Commission on Human Rights adopted the *Inter-American Declaration of Principles on Freedom of Expression* (Inter-American Declaration), clause 9 of which states:

The murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression. It is the duty of the state to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation.<sup>27</sup>

As noted above, the European Court of Human Rights dealt with this in the *Özgür Gündem* case, where it made it clear that even though the respondent State,

<sup>26</sup> See, for example, Mendel, T., *Supporting Freedom of expression: A practical guide to developing specialised safety mechanisms* (2016, Paris, UNESCO). Available at: [www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/publications/Supporting-Freedom-of-Expression-Guide-Safety-Mechanisms.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/publications/Supporting-Freedom-of-Expression-Guide-Safety-Mechanisms.pdf).

<sup>27</sup> Adopted at the 108th Regular Session, 19 October 2000.

Turkey, alleged that the newspaper supported a (banned) terrorist organization, the Kurdistan Workers' Party (PKK), that did not absolve it of its protection and investigation obligations:

The Court has noted the Government's submissions concerning its strongly held conviction that *Özgür Gündem* and its staff supported the PKK and acted as its propaganda tool. This does not, even if true, provide a justification for failing to take steps effectively to investigate and, where necessary, provide protection against unlawful acts involving violence.<sup>28</sup>

## The right to information

As has already been noted, the right to freedom of expression protects the rights to "seek" and "receive" information and ideas, and the wider idea of the free flow of information and ideas in society. As part of this, and especially over the last 15 – 20 years, it has been recognized that the right also embraces a right to access information held by public authorities (right to information or RTI). The fundamental rationale for this is that these authorities do not hold information for themselves but, rather, hold it on behalf of the public which, as a result, and subject only to limited exceptions, has a right to access this information. Looked at from another point of view, public authorities hold a tremendous amount of information of high public interest. If this information is limited in circulation to officials, this will seriously undermine the free flow of information and ideas in society.

To give effect to RTI, States need to adopt comprehensive right-to-information legislation. Both the main rationale for this right and the need for legislation were stated clearly in Principle IV of the African Declaration:

Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

The right to information shall be guaranteed by law.

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

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

<sup>28</sup> *Özgür Gündem v. Turkey*, note 17, para. 45.

In practice, currently about 120 countries globally have adopted RTI laws, meaning that this is very widespread among democracies. Significantly, Sustainable Development Goal (SDG) indicator 16.10.2 focuses on the "[n]umber of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information", thus hardwiring RTI to the development agenda.

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

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

### **Box 5: Key features of a good right-to-information law**

#### **1. Right of access**

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

#### **2. Scope**

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

#### **3. Requesting procedures**

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

#### **4. Exceptions**

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

#### **5. Appeals**

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

appeals and to order appropriate remedies for requesters.

## 6. Sanctions and protections

The law should provide for sanctions for officials who wilfully obstruct access to information, along with protection for those who disclose information in good faith (without which officials, who have usually been accustomed to withhold information, may be reluctant to disclose it).

## 7. Promotional measures

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

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

## Whistleblowers

Whistleblowers are individuals who expose (blow the whistle on) wrongdoing, in particular within the public administration but also within the private sector. Even where the information they expose is legitimately confidential, this is overridden by the benefits of exposing the wrongdoing. Looked at from an international law perspective, punishing someone for exposing wrongdoing cannot be justified as a necessary restriction on freedom of expression, even if there is a secrecy interest in the information (see Chapter 2: Restrictions).

In their 2015 *Joint declaration on freedom of expression and responses to conflict situations*, the special international mandates on freedom of expression described the scope of whistleblower protection as follows:

Individuals who expose wrongdoing, serious maladministration, a breach of human rights, humanitarian law violations or other threats to the overall public interest, for example in terms of safety or the environment, should be protected against legal, administrative or employment-related sanction, even if they have otherwise acted in breach of a binding rule or contract, as long as at the time of the disclosure they had reasonable grounds to believe that the information disclosed was substantially true and exposed wrongdoing or the other threats noted above.<sup>29</sup>

This makes it clear that the scope of protection should be broad in three senses. First, it should cover the exposure of a wide range of types of wrongdoing, not just crimes

<sup>29</sup> Adopted 4 May 2015, para. 5(b).

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

## **Freedom of expression and elections**

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

Many countries have in place a number of different types of rules governing partisan political speech, mostly with a view to ensuring a level playing field, as well as preventing foreign interference. First, most democracies place some sorts of limits on spending. The aim of this is to create a level playing field by preventing those with deep pockets from essentially buying elections (or at least exerting far more sway over them than one individual should be able to do. The rules on spending vary widely. These often take the form of limits on how much any one individual can contribute to a particular party or candidate, limits on spending during a campaign, rules about public contributions to parties and/or candidates, and/or rules about transparency of public funding. There is wide variance among countries as to these rules and the constitutionality of different approaches (see Box 6).

### **Box 6: Constitutional decisions on third party funding for parties: Canada and the United States**

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

Unlimited third party advertising can undermine election fairness in several ways. First, it can lead to the dominance of the political discourse by the wealthy. Second, it may allow candidates and political parties to circumvent their own spending limits through the creation of third parties. Third, unlimited third party spending can have an unfair effect on the outcome of an election. Fourth, the absence of limits on third party advertising expenses can erode the confidence of the Canadian electorate who perceive the electoral process as being dominated by the wealthy. [references omitted]<sup>30</sup>

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

Six years later, in 2010, the United States Supreme Court came to the exact opposite decision in *Citizens United v. Federal Election Commission*.<sup>31</sup> In that case, the Court held that private third parties (including commercial corporations, non-profit groups, unions and individuals) can spend as much money as they wish during an election, including directly supporting one or another party or candidate, as long as they do it through independent third party political action committees (PACs), which they might establish themselves. According to reports, nearly 50 per cent of the spending during the 2016 United States presidential election was made by PACs.<sup>32</sup>

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

In May 2009, the special international mandates on freedom of expression issued a Joint Statement on the Media and Elections.<sup>33</sup> The Statement noted, among other things:

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

Some countries go even further and prohibit private advertising in broadcasting and/or on television, albeit in most cases these countries place a positive obligation on broadcasters to provide free advertising on an equitable basis to parties. In a series of cases on this issue, the European Court of Human Rights has come up with different conclusions, holding in two cases from Switzerland and Norway that this was not legitimate,<sup>34</sup> but upholding a similar ban in the United Kingdom.<sup>35</sup> Many countries place special obligations on the public media both to raise public awareness about elections and to give voice opportunities to parties and candidates.

31 558 U.S. 310 (2010). Available at: [www.supremecourt.gov/opinions/09pdf/08-205.pdf](http://www.supremecourt.gov/opinions/09pdf/08-205.pdf).

32 Madi Alexander, "PACs made up nearly half of 2016 election spending", 18 April 2017, *Bloomberg It*. Available at: [www.bna.com/pacs-made-nearly-n57982086803/](http://www.bna.com/pacs-made-nearly-n57982086803/).

33 15 May 2009. Available at: [www.osce.org/fom/37188](http://www.osce.org/fom/37188).

34 *VG T Verein gegen Tierfabriken v. Switzerland*, Application No. 24699/94, 28 June 2001.

Available at: [https://hudoc.echr.coe.int/eng#?{<itemid>:\[«001-90235»\]};](https://hudoc.echr.coe.int/eng#?{<fulltext>:[«Case%20of%20VG T%20Verein%20gegen%20Tierfabriken%20v.%20Switzerland»], «documentcollectionid2»:[«GRANDCHAMBER»], «CHAMBER»], «itemid»:[«001-59535»]}; TV Vest SA and Rogaland Pensjonistparti v. Norway, Application No. 21132/05, 11 December 2008. Available at: <a href=)

35 *Animal Defenders International v. the United Kingdom*, Application No. 48876/08, 22 April 2013.

Available at: [https://hudoc.echr.coe.int/eng#?{<itemid>:\[«001-119244»\]};](https://hudoc.echr.coe.int/eng#?{<itemid>:[«001-119244»]};)

Third, a large number of democracies prohibit foreign actors from contributing to elections, including via direct support for parties and/or candidates or via indirect support. In a survey of the countries of the Council of Europe in 2006, the European Commission for Democracy Through Law (Venice Commission) found that about 60 per cent prohibited foreign funding, 35 per cent did not and 5 per cent were indeterminate.<sup>36</sup>

Fourth, some democracies also impose a media blackout, or prohibit campaigning or the publication of opinion polls for a period – usually 24 or 48 hours – before actual elections so that people have a short period to collect their thoughts and decide who they want to vote for. An additional consideration is that such information from polls, often already dated by the time it is published, can have a disproportionate and hence distorting impact on the election. In other countries, however, these restrictions, especially those on campaigning until the day of the election, are considered to be too intrusive as restrictions on free speech.

New communications technologies are challenging all of these rules. As people turn to social media for their news and information, regulation of broadcasters has increasingly less impact. It is also much easier for third parties to engage in election speech, as well as to hide or route election spending in ways that cannot easily be regulated. The ongoing investigation into allegations of Russian interference in the 2016 United States presidential election clearly demonstrate some of these challenges. The issue of false news, generally but in particular around elections, has also attracted a lot of attention recently. More information on this is provided below in Chapter 3: Regulation of the media, Regulating online media.


The special protection that freedom of expression extends to public interest speech, noted above, is of course of particular importance during elections where the ability of parties and candidates to communicate freely with the electorate is of the greatest importance. Some of the attributes of this are highlighted in Box 7.

### **Box 7: Protecting public interest speech during elections**

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

The media should be free to report on election-related matters. They should also be exempted from liability for disseminating unlawful statements made directly by parties or candidates – whether in the context of live broadcasting or advertising – unless the statements have been ruled unlawful by a court or the statements constitute direct incitement to violence and the media outlet had an opportunity to prevent their dissemination.

<sup>36</sup> Opinion on the Prohibition of financial contributions to political parties from foreign sources, CDL-AD(2006)014, 17 – 18 March 2006. Available at: [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2006\)014-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)014-e).



The obligation of political figures, including candidates, to tolerate a greater degree of criticism than ordinary persons should be clearly reaffirmed during elections.

A party or candidate which has been illegally defamed or suffered another illegal injury by a statement in the media during an election period should be entitled to a rapid correction of that statement or have the right to seek redress in a court of law.



## Chapter 2

# Restrictions



A protester holds a puppet with a sign reading “freedom of expression ” during a protest in Madrid in February 2016, calling for charges to be dropped against two puppeteers.  
© AFP/CrowdSpark/Adolfo Lujan, 2016

Unlike some rights, like the right not to be tortured, the right to freedom of expression is not absolute. This is reflected in the restrictions on speech that one finds in the legal systems of every country, for example to protect the reputations or privacy of others, the administration of justice or national security. Put differently, while freedom of expression is a highly cherished right, there are circumstances where other interests, which can be either private or public in nature, override it.

The approach taken under international law is to start from a broad presumption that all expressive activity is protected, whatever form it may take, and then to allow States to limit or restrict it, but only under certain conditions. Those conditions are set out in Article 19(3) of the ICCPR:

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

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

## Restrictions: General part

### The three-part test

Article 19(3) has been understood as imposing a strict three-part test for assessing the legitimacy of any restriction on freedom of expression. This test was summarized by the UN Human Rights Committee in General Comment No. 34 as follows:

[Article 19(3) of the ICCPR] 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. (paragraph 22)

The first part of the test, which is drawn directly from the language of Article 19(3), is that restrictions must be “provided by law”. A key rationale for this is that only parliament, acting collectively pursuant to its formal law-making powers and procedures, should have the ability to decide what interests, in conformity with international law, warrant overriding freedom of expression. This rules out ad hoc or arbitrary action by elected officials or civil servants, no matter how senior, although it does not mean that parliament cannot delegate secondary law-making power (such as in the form of regulations under a law) to other actors. This part of the test also represents a huge responsibility for parliamentarians since it falls to them to determine the scope of restrictions on freedom of expression in a manner consistent with international law.

It is not enough simply for there to be a law; that law must meet certain quality control standards. It must, fairly obviously, be accessible, normally meaning that it should have been published in the official gazette or whatever official publication serves to bring notice of laws to the general public.

The law must also not be vague. When a restriction on freedom of expression is vague, it may be subject to a range of different interpretations, which may or may not reflect the proper intent of parliament in adopting the law. Put differently, vague rules effectively grant discretion to the authorities responsible for applying them – whether this is a regulatory body, the police or an administrator – to decide what they mean. This clearly undermines the very idea that it is parliament which should decide on restrictions.

The same is true where a law is clear, but allocates broad discretion to the authorities in terms of how it is to be applied. An example of this might be a law which allowed the police to stop a demonstration if they deemed it not to be in the public interest.

Vague provisions may also be applied in an inconsistent or unclear way. This fails to give individuals proper notice of what is and is not allowed, another key objective of the “provided by law” part of the test. In this case, especially where sanctions for breach of the rule are significant, individuals are likely to steer well clear of the potential zone of application of the rule to avoid any possibility of being censured, leading to what has been called a chilling effect on freedom of expression. In General Comment No. 34, the Human Rights Committee referred to the problem both of vagueness and granting too much discretion:

For the purposes of [Article 19(3) of the ICCPR], 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.<sup>37</sup>

This part of the test does not necessarily rule out subordinate legislation (such as rules or regulations under a statute) or other delegated powers to make laws (such as rules adopted by a regulator or even judge-made law which can be understood as being derived from the constitution in Common Law countries), as long as these powers derive from a primary legal rule (i.e. a law or the constitution). The European Court of Human Rights summed up its jurisprudence on this issue in *Sanoma Uitgevers B.V. v. the Netherlands*:

As regards the words “in accordance with the law” and “prescribed by law” which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term “law” in its “substantive” sense, not its “formal” one; it has included both “written law”, encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. “Law” must be understood to include both statutory law and judge-made “law”. In sum, the “law” is the provision in force as the competent courts have interpreted it.<sup>38</sup>

<sup>37</sup> Note 14, para. 25.

<sup>38</sup> 14 September 2010, Application No. 38224/03, para. 83.

The second part of the test is that the restriction must serve or protect one of the grounds or aims listed in Article 19(3). That article makes it quite clear that this list is exclusive and the UN Human Rights Committee has reiterated that point:

Restrictions are not allowed on grounds not specified in [Article 19(3) of the ICCPR], 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.<sup>39</sup>

Restrictions which do not serve one of the listed grounds are not legitimate. At the same time, it may be noted that the list of grounds – “respect of the rights and reputations of others” or “the protection of national security or of public order (ordre public), or of public health or morals” – is very broad indeed. Furthermore, courts have tended to interpret it widely. For example, the European Court of Human Rights has interpreted the scope of “public order” quite broadly:

The concept of “order” ... refers not only to public order or “ordre public” ... It also covers the order that must prevail within the confines of a specific social group. This is so, for example, when, as in the case of armed forces, disorder in that group can have repercussions on order in society as a whole.<sup>40</sup>

In practice, international courts rarely decide freedom of expression cases on the basis that the underlying rules did not serve a legitimate ground.

The third part of the test is that the restriction must be “necessary” to secure the ground. Most international cases are decided on the basis of this part of the test, which is extremely complex. A few key features can be drawn from the statements in Box 8:

- restrictions must not be overbroad in the sense that they do not affect speech beyond that which affects the relevant ground or aim;
- restrictions must be rationally connected to the ground they wish to protect in the sense of having been carefully designed to protect that ground, and representing the option for protecting the ground that impairs freedom of expression the least; and
- restrictions must be proportionate in the sense that the benefits outweigh the harm to freedom of expression.

39 Ibid., para. 22. See also *Mukong v. Cameroon*, 21 July 1994, *Communication No.458/1991*, para.9.7 (UN Human Rights Committee).

40 *Engel and others v. the Netherlands*, 8 June 1976, Application Nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, para. 98.

## Box 8: Statements by international courts on “necessity”

The UN Human Rights Committee has summarized the necessity part of the test 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.<sup>41</sup>

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

Lastly, the restrictions imposed must be necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest. If there are various options to achieve this objective, that which least restricts the right protected must be selected. In other words, the restriction must be proportionate to the interest that justifies it and must be appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right.<sup>42</sup>

Last, but not least, a statement on “necessity” by the European Court of Human Rights:

In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were “relevant and sufficient” and whether the measure taken was “proportionate to the legitimate aims pursued”.... In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10.<sup>43</sup>

41 General Comment No. 34, note 14, paras. 34 and 35.

42 *Claude Reyes and Others v. Chile*, 19 September 2006, Series C, No. 151, para. 91.

43 *Cumpănă and Mazăre v. Romania*, 17 December 2004, Application No. 33348/96, para. 90.

## The margin of appreciation

The margin of appreciation is a doctrine which recognizes the idea that States should be allocated some degree of latitude in how they choose to restrict freedom of expression, taking into account their culture, history and legal system. The European Court of Human Rights has described the rationale for this as follows:

The national authorities are in principle, by reason of their direct and continuous contact with the vital forces of their countries, in a better position than the international judge to give an opinion on the “necessity” of a “restriction” or “penalty” intended to fulfil the legitimate aims pursued thereby.<sup>44</sup>

However, the Court has also made it clear that the final decision as to the legitimacy of a restriction rests with it:

The Contracting States have a certain margin of appreciation in assessing whether such a need [to restrict freedom of expression] exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a “restriction” is reconcilable with freedom of expression as protected by Article 10.<sup>45</sup>

Furthermore, the Court has made it clear that the margin is much narrower when it comes to certain issues – such as protection of the authority of the judiciary – than others – such as morals.<sup>46</sup>

On the other hand, the UN Human Rights Committee has eschewed reliance on this idea, stating in paragraph 36 of General Comment No. 34:

The Committee recalls that the scope of this freedom is not to be assessed by reference to a “margin of appreciation”.

## Sanctions as a breach of the right to freedom of expression

One of the interesting consequences of the proportionality aspect of the necessity part of the test is the idea that, even where speech can legitimately be sanctioned, an excessively harsh sanction, on its own, could represent a breach of the right to freedom of expression. The idea here is that an unduly harsh sanction could exert a chilling effect on others, thereby preventing them from engaging even in legitimate speech, out of concern to avoid any risk of attracting the harsh sanction.

44 *Mouvement raëlien suisse v. Switzerland*, 13 July 2012, Application No. 16354/06, para. 63.

45 *Hertel v. Switzerland*, 25 August 1998, Application No. 25181/94, para. 46.

46 *Sunday Times (No. 1) v. the United Kingdom*, 26 April 1979, Application No. 6538/74, para. 59.

### Box 9: Disproportionate sanctions

In the case of *Tolstoy Miloslavsky v. the United Kingdom*, the applicant had been ordered to pay £1,500,000 in damages for having published a seriously defamatory statement. The European Court of Human Rights accepted that the statement warranted a harsh sanction. However, the damages in this case were three times as large as the highest previous award in the history of defamation law in the United Kingdom and vastly more than one could expect to get even for the most serious bodily injury caused by negligence.

In line with its established general jurisprudence on necessity, the Court held that sanctions, along with other aspects of the restriction, had to bear a “reasonable relationship of proportionality to the injury to reputation suffered”. The Court found that this standard was not met, despite the respondent State enjoying a wide margin of appreciation as to damages, due both to the enormous award and the absence of systems in the legal system to limit damage awards.<sup>47</sup>

## Restrictions: Specific issues

Article 19(3) of the ICCPR envisages the possibility of restrictions on freedom of expression to protect a number of public and private interests, including the rights and reputations of others, national security, public order, and public health and morals. The possible types of restrictions is very broad indeed and, in fact, is not closed in the sense that, at least potentially, new areas for restrictions may come up from time-to-time. For example, a number of jurisdictions are currently debating the idea of adopting new cyber-bullying legislation, in light of the particularly intrusive nature of bullying online, which can be far more harmful than its offline equivalent.

It is not feasible to cover every possible area of restriction in this handbook. Instead, it focuses on the more common areas for restriction, under six different headings, namely privacy; reputation; equality, hate speech and religion; national security and public order; morals; and the administration of justice. The first two relate to the rights and reputations of others and should be either exclusively or primarily civil law in nature, while the others refer more to public interests and are normally primarily criminal law in nature.

### Privacy

Privacy is, like freedom of expression, an internationally protected human right, guaranteed in Article 17 of the ICCPR. Although this section addresses privacy as a restriction on freedom of expression, it should be noted that a very important, and perhaps the primary, relationship between the two rights is one of support for each other. Freedom of expression allows for the exposure of and debate about violations of privacy, and hence the development of measures to prevent this. Similarly, privacy includes privacy of communications, which has always been an important aspect of the right.

<sup>47</sup> *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91, para. 49.

A failure to respect privacy also undermines freedom of expression. In his 2013 Report to the Human Rights Council, the UN Special Rapporteur on freedom of expression noted:

Inadequate national legal frameworks create a fertile ground for arbitrary and unlawful infringements of the right to privacy in communications and, consequently, also threaten the protection of the right to freedom of opinion and expression.<sup>48</sup>

Under international law, two standards are of particular relevance for privacy as a restriction on freedom of expression. First, like all restrictions on freedom of expression, the law should define privacy in an appropriately clear and precise manner. Defining privacy in general is not an easy task. As far back as 1890, Warren and Brandeis defined it as the “right to be left alone”,<sup>49</sup> but that definition clearly provides very little guidance as to its specific contours. The European Court of Human Rights, for its part, has refused to define it at all, stating: “The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of ‘private life’.”<sup>50</sup> However, this is not appropriate when privacy serves as the basis for restricting freedom of expression.

It is generally accepted that privacy involves both an objective and a subjective element. The first involves a reasonable expectation of privacy, whether due to the location (such as in one’s home or having a private meal in a restaurant) or the subject matter (such as one’s medical or banking information). The second involves the individual having in fact treated the matter as private, or at least not having treated it in a way that deprives it of its private quality. This is particularly relevant for public figures, including parliamentarians, who may publicize, indeed use for campaign purposes, material that is otherwise private. Thus, a politician may use their family status, where they live, their background or religion to create a public image for campaigning purposes. If they do, they cannot then claim that this is private, for example for purposes of trying to prevent the media from reporting on it. A key idea here is that one owns one’s own privacy and one may always consent, either explicitly or implicitly, to waiving one’s rights to privacy.

The second standard is that, when the right to freedom of expression comes into conflict with privacy, which right should prevail involves an assessment of where the greater overall public interest lies. Principle 10 of the Inter-American Declaration reflects this idea, stating:

Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest.

Similarly, Principle XII(2) of the African Declaration states:

Privacy laws shall not inhibit the dissemination of information of public interest.

48 17 April 2013, A/HRC/23/40.

49 “The right to privacy” (1890), *Harvard Law Review* vol. 4, No 193, p. 195.

50 *Niemietz v. Germany*, 16 December 1992, Application No. 13710/88, para. 29.



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

### Box 10: The Von Hannover cases: Privacy and freedom of expression

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

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

The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions.<sup>51</sup>

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

In the second case, which was decided by a Grand Chamber,<sup>52</sup> the photos focused on the way the family, including Princess Caroline, were looking after the reigning Prince of Monaco, Prince Rainier III, during his illness. In that case,<sup>53</sup> the Court set out a number of factors to be taken into account when assessing freedom of expression against privacy. In general, the dominant consideration was whether the publication contributed to a matter of public interest (para. 109). Other factors to be considered include:

<sup>51</sup> *Von Hannover v. Germany*, 24 June 2004, Application No. 59320/00, para. 63.

<sup>52</sup> A Grand Chamber involves a larger number of judges, normally 17, and its decisions carry far more weight.

<sup>53</sup> *Von Hannover v. Germany* (No. 2), 7 February 2012, Application Nos 40660/08 and 60641/08.

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

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

The case of *Éditions Plon v. France*, which involved the publication of sensitive medical details about former French President Mitterrand by his physician, provides an indication of how far the European Court, at least, is prepared to go to protect freedom of expression relating to politicians. Although it upheld a temporary injunction against the publication of the material, it held that a subsequent injunction less than a year later was not legitimate, on the basis that “the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand’s two terms of office prevailed over the requirements of protecting the President’s rights with regard to medical confidentiality”.<sup>54</sup>

## Reputation

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

Defamation is also a serious matter for parliamentarians, including in cases where they are charged with having committed defamation. An example of this is a series of 15 cases involving parliamentarians from Cambodia (case CMBD/27 and others before the IPU Committee on the Human Rights of Parliamentarians), some of which involve criminal convictions of the parliamentarians for defamation.<sup>55</sup> Another example is defamation charges against member of the Palestinian Legislative Council, Najat Abu Bakr which appear to be politically motivated (case PL/84 before the IPU Committee on the Human Rights of Parliamentarians).<sup>56</sup>

<sup>54</sup> *Éditions Plon v. France*, 18 May 2004, Application No. 58148/00, para. 53.

<sup>55</sup> Decision adopted by consensus by the IPU Governing Council at its 201st session (St. Petersburg, 18 October 2017). Available at: <http://archive.ipu.org/hr-e/201/cmbd27.pdf>

<sup>56</sup> Decision adopted by consensus by the IPU Governing Council at its 201st session (St. Petersburg, 18 October 2017). Available at: [archive.ipu.org/hr-e/201/pal88.pdf](http://archive.ipu.org/hr-e/201/pal88.pdf).

A key international standard on defamation relates to the question of whether it should be dealt with as a matter of criminal or civil law. Although it remains a criminal offence in most countries, a growing number of countries – such as Estonia, Ghana, Jamaica, Mexico, Sri Lanka and, recently, Zimbabwe – have done away with criminal defamation laws.

A number of international authorities have stated that criminal defamation as a whole represents a breach of the right to freedom of expression. For example, in their 2002 Joint Declaration, the special international mandates on freedom of expression stated: “Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”<sup>57</sup> Other statements have indicated that, at a minimum, penal sanctions for defamation are not legitimate.

For example, the UN Human Rights Committee stated in paragraph 47 of General Comment No. 34: “States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty.” Essentially, criminal defamation laws are not necessary since less intrusive measures, i.e. civil defamation laws, are adequate to protect reputations.

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

### **Box 11: Special protection for public interest speech**

In paragraph 47 of General Comment No. 34, focusing on defamation laws, the UN Human Rights Committee described the need for special protection for public interest speech: “In any event, a public interest in the subject matter of the criticism should be recognized as a defence.” The African Declaration placed the focus more on public figures, stating in Principle XII(1): “public figures shall be required to tolerate a greater degree of criticism”. This was also the approach taken in Principle 11 of the Inter-American Declaration: “Public officials are subject to greater scrutiny by society.”

<sup>57</sup> Adopted 10 December 2002.

The European Court of Human Rights has frequently made it clear that there is broad scope to criticize politicians, including in its first case on defamation:

The limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.<sup>58</sup>

The space for criticism of government is even wider:

The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.<sup>59</sup>

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

While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court.<sup>60</sup>

This also applies to officials:

Civil servants acting in an official capacity are, like politicians, subject to wider limits of acceptable criticism than private individuals.<sup>61</sup>

This is not limited to political debate but covers debate about any matter of public concern, with the Court making it clear that there is “no warrant” for distinguishing between politics and other matters of public concern.<sup>62</sup>

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

Large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies.<sup>63</sup>

<sup>58</sup> *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 42.

<sup>59</sup> *Castells v. Spain*, 23 April 1992, Application No. 11798/85, para. 46.

<sup>60</sup> *Ibid.*, para. 42.

<sup>61</sup> *Thoma v. Luxembourg*, 29 March 2001, Application No. 38432/97, para. 47.

<sup>62</sup> *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 64.

<sup>63</sup> *Steel and Morris v. the United Kingdom*, 15 February 2005, Application No. 68416/01, para. 94.

It is beyond the scope of this handbook to explore all aspects of defamation law in detail. However, two statements give a good sense of some of the key protections that should be built into these laws to ensure an appropriate balance between protecting reputations and respecting the right to freedom of expression. The first is paragraph 47 of General Comment No. 34, which states:

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

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

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

At a minimum, defamation laws should comply with the following standards:

- the repeal of criminal defamation laws in favour of civil laws should be considered, in accordance with relevant international standards;
- the State, objects such as flags or symbols, government bodies, and public authorities of all kinds should be prevented from bringing defamation actions;
- defamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens; in particular, laws which provide special protection for public figures, such as *desacato* laws, should be repealed;
- the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern;
- no one should be liable under defamation law for the expression of an opinion;

- it should be a defence, in relation to a statement on a matter of public concern, to show that publication was reasonable in all the circumstances; and
- civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant; in particular, pecuniary awards should be strictly proportionate to the actual harm caused and the law should prioritise the use of a range of non-pecuniary remedies.<sup>64</sup>

## Equality, hate speech and religion

In general, international law, and specifically Article 19 of the ICCPR, allows States to restrict freedom of expression to protect certain public or private interests, such as the rights and reputations of others and public order, but it does not require them to do this. There are two exceptions to this: the requirements, set out in section 20 of the ICCPR, to ban propaganda for war, and hate speech. The former is no doubt due to the ICCPR being adopted 21 years ago soon after the horrors of the Second World War. The latter, however, derives from the importance of respecting the equality and dignity of all human beings. Specifically, Article 20(2) of the ICCPR states:

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

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

1. The term “advocacy” is understood as requiring intent so that it is only where the speaker wishes to incite hatred that liability may be imposed.
2. The speech must incite to hatred based on one of the three listed grounds: nationality, race or religion. This is one area where national laws generally go much further, banning incitement to hatred on a number of other grounds, such as ethnicity, gender, sexual orientation and so on.
3. The speech must incite others to hatred. It is clear from the jurisprudence that this requires a very close nexus between the speech in question and the result. A mere tendency or general risk of promoting hatred is not enough. There must be a direct and high likelihood that hatred will result.
4. The speech must incite to one of three results: discrimination, hostility or violence. Two of these – discrimination and violence – are specific acts (with discrimination normally being defined in national law but generally involving the denial of services or benefits). The third – hostility – is a state of mind and so inherently harder to observe or monitor. However, it is clear that it is a very strong emotion, beyond mere prejudice or stereotyping. It seems likely that the word “hostility” was used to avoid repeating the word “hatred”, but that the intention was for this to represent a similar sort of emotion.

<sup>64</sup> Adopted 30 November 2000.

5. For the most part, “prohibited by law” has been understood as referring to a criminal law prohibition. However, civil and administrative law measures should also be considered in this area, such as codes of conduct for broadcasters and/or the right to bring a civil claim when someone has suffered losses due to hate speech.

More detailed standards on hate speech can be gleaned from the jurisprudence of various courts and other oversight bodies. However, a good summary of the standards which hate speech laws should respect can be found in the Joint Statement on Racism and the Media adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression:

- no one should be penalized for statements which are true;
- no one should be penalized 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.<sup>65</sup>

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

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

The implications of these standards are that racist speech, however morally reprehensible, should not necessarily engage the general legal responsibility of the speaker.

It is only where the speech meets the conditions outlined above that it should be prohibited as hate speech. This is, however, without prejudice to regulations such as codes of conduct for the media which often adopt stricter standards in this area.

Despite the narrow scope of hate speech restrictions under international law, this does not mean that racist speech is socially or morally acceptable. Furthermore, parliamentarians, as leaders in society, have a particular moral obligation not only to avoid making racist statements but also to promote intercultural understanding. The Camden Principles on

<sup>65</sup> Adopted 27 February 2001.

Freedom of Expression and Equality, adopted by Article 19 in 2009, indicate:

Politicians and other leadership figures in society should avoid making statements that might promote discrimination or undermine equality, and should take advantage of their positions to promote intercultural understanding, including by contesting, where appropriate, discriminatory statements or behaviour.<sup>66</sup>

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

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

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

The meaning of the first sentence here is that while it is legitimate to ban incitement to hatred against individuals on the basis of their religion (as provided for in Article 20(2) of the ICCPR), it is not legitimate to ban criticism of a religion, *per se*. In other words, there is a difference between criticism of an idea (religion) and attacks on people (adherents to a particular religion).

This point was set out even more clearly in the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, a document which was adopted in 2012 under the auspices of the United Nations and after a long and involved process of consultation with experts in different regions of the world.<sup>67</sup> Paragraph 25 of the Rabat Plan of Action states:

States that have blasphemy laws should repeal them, as such laws have a stifling impact on the enjoyment of freedom of religion or belief, and healthy dialogue and debate about religion.

<sup>66</sup> April 2009. Principle 10.1. Available at: [www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf](http://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf).

<sup>67</sup> Adopted 5 October 2012. UN Doc. A/HRC/22/17/Add.4.



## National security and public order

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

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

International human rights law has sought to keep national security and public order restrictions on freedom of expression within their proper bounds in three key ways. First, in line with the “provided for by law” part of the test for restrictions, they have called for relevant concepts to be defined clearly and narrowly (see Box 12).

### Box 12: Statements on defining national security

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

Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of [Article 19(3) of the ICCPR]. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress. The Committee has found in one case that a restriction on the issuing of a statement in support of a labour dispute, including for the convening of a national strike, was not permissible on the grounds of national security.

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

In their 2018 *Joint declaration on media independence and diversity in the digital age*, the special international mandates on freedom of expression stated:

Restrictions on freedom of expression which rely on notions such as “national security”, the “fight against terrorism”, “extremism” or “incitement to hatred” should be defined clearly and narrowly and be subject to judicial oversight, so as to limit the discretion of officials when applying those rules and to respect the standards set out in sub-paragraph (a), while inherently vague notions, such as “information security” and “cultural security”, should not be used as a basis for restricting freedom of expression.<sup>68</sup>

In their 2008 Joint Declaration, the mandates stated:

The definition of terrorism, at least as it applies in the context of restrictions on freedom of expression, should be restricted to violent crimes that are designed to advance an ideological, religious, political or organised criminal cause and to influence public authorities by inflicting terror on the public.<sup>69</sup>

Second, it is accepted that individuals may only be punished on grounds of national security where they acted with the intent to undermine security. This not only provides appropriate protection for freedom of expression, but it also accords with basic due process guarantees, which hold that one can only be punished for a crime where one acted with the requisite intent. In several decisions, the European Court of Human Rights has held that national security restrictions did not involve the requisite intent. One example of this involved a conviction in Turkey for publishing poems:

Even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.<sup>70</sup>

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

Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that:

- a the expression is intended to incite imminent violence.

<sup>68</sup> Adopted 2 May 2018, para. 3(f).

<sup>69</sup> Adopted 10 December 2008.

<sup>70</sup> *Karataş v. Turkey*, 8 July 1999, Application No. 23168/94, para. 52.

Third, and most importantly, there needs to be a very close nexus between the speech and the risk to national security or public order. Without this requirement, the risk of abuse of these sorts of provisions is very great, because authorities can claim there is a very general risk in relation to a wide swath of expression. Reflecting this, Principle XIII(2) of the African Declaration states:

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.

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

While it may be legitimate to ban incitement to terrorism or acts of terrorism, States should not employ vague terms such as “glorifying” or “promoting” terrorism when restricting expression. Incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.<sup>71</sup>

Lastly, Principle 6 of the Johannesburg Principles states:

Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that:

...

- b** it is likely to incite such violence; and
- c** there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

## Morals

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

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

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71 21 December 2005.

This significantly limits the scope of possible restrictions here.

## The administration of justice

A number of issues arise in relation to the administration of justice and freedom of expression. One is openness of the judicial process. International law makes it clear that court hearings should be open to the public, with Article 14(1) of the ICCPR stating, in part:

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 judgement 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.

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

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

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

It is therefore only in exceptional cases that restriction – even by way of a lenient criminal penalty – of defence counsel’s freedom of expression can be accepted as necessary in a democratic society.<sup>72</sup>

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

The threat of an ex post facto review of counsel’s criticism of another party to criminal proceedings – which the public prosecutor doubtless must be considered to be – is difficult to reconcile with defence counsel’s duty to defend their clients’ interests zealously. It follows that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by

<sup>72</sup> *Nikula v. Finland*, 21 March 2002, Application No. 31611/96, para. 55.

the potential “chilling effect” of even a relatively light criminal sanction or an obligation to pay compensation for harm suffered or costs incurred.<sup>73</sup>

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

Whilst the courts are the forum for the determination of a person’s guilt or innocence on a criminal charge, this does not mean that there can be no prior or contemporaneous discussion of the subject matter of criminal trials elsewhere, be it in specialised journals, in the general press or amongst the public at large.

Provided that it does not overstep the bounds imposed in the interests of the proper administration of justice, reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement ... that hearings be public. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.<sup>74</sup>

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

A different interest in this space is the need to protect the authority of the judicial system. This can involve protection against criticism for both courts as such or for individual judges. It is important to keep the true underlying interest here – which is maintaining the function of the courts as the forum for arbitration of social disputes (i.e. having individuals continue to take cases to court), rather than protecting the reputation of the courts per se – clearly in mind.

In many democracies, the authority of the judiciary is no longer accepted as a basis for restricting freedom of expression. One of the more eloquent statements about why this is so comes from a Canadian appeal case, which involved a conviction by the lower courts of a lawyer for very harsh criticism of the courts immediately after he had lost a case (indeed just as he left the courtroom), with the appeal court stating:

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

<sup>73</sup> Ibid., para. 54.

<sup>74</sup> *Worm v. Austria*, 29 August 1997, Application No. 22714/93, para. 50.

feliculously 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.<sup>75</sup>

In the case of *Kyprianou v. Cyprus*, a Grand Chamber of the European Court of Human Rights found a breach of the right to freedom of expression where a prison sentence had been imposed on a lawyer for contempt of court after he levelled various accusations against the judges hearing the case. In deciding the case, the Court noted:

The applicant's conduct could be regarded as showing a certain disrespect for the judges of the Assize Court. Nonetheless, albeit discourteous, his comments were aimed at and limited to the manner in which the judges were trying the case, in particular concerning the cross-examination of a witness he was carrying out in the course of defending his client against a charge of murder.<sup>76</sup>

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

### Box 13: Candidates for office and courts

The case of *Kudeshkina v. Russia* arose following the imposition of disciplinary measures on a candidate in an election for statements she had made previously when she was a judge. The Court noted that the statements in question bore on a matter of some public interest:

The Court observes that the applicant made the public criticism with regard to a highly sensitive matter, notably the conduct of various officials dealing with a large-scale corruption case in which she was sitting as a judge. Indeed, her interviews referred to a disconcerting state of affairs, and alleged that instances of pressure on judges were commonplace and that this problem had to be treated seriously if the judicial system was to maintain its independence and enjoy public confidence. There is no doubt that, in so doing, she raised a very important matter of public interest, which should be open to free debate in a democratic society.<sup>77</sup>

75 *R. v. Kopyto* (1987), 62 OR (2d) 449, p 469.

76 *Kyprianou v. Cyprus*, 15 December 2005, Application No. 73797/01, para. 179.

77 *Kudeshkina v. Russia*, 26 February 2009, Application No. 29492/05, para. 94.

The Court did note that the applicant's motivation for making the statements was personal in nature, thereby reducing the rationale for protecting them:

In so far as the applicant's motive for making the impugned statements may be relevant, the Court reiterates that an act motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection.<sup>78</sup>

However, the Court also noted that it was very problematical that the same court which was the subject of the applicant's criticism also heard the disciplinary matter against her:

The Court considers that the applicant's fears as regards the impartiality of the Moscow City Court were justified on account of her allegations against that Court's President. However, these arguments were not given consideration, and this failure constituted a grave procedural omission. Consequently, the Court finds that the manner in which the disciplinary sanction was imposed on the applicant fell short of securing important procedural guarantees.<sup>79</sup>

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<sup>78</sup> Ibid., para. 95.

<sup>79</sup> Ibid., para. 96.

## Chapter 3

### Regulation of the media



College students participate in a protest to defend press freedom in Manila in January 2018.  
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Although much public attention is focused on restrictions on freedom of expression, especially when these give rise to high-profile trials, the rules governing the regulation of the media are also incredibly important in as much as they create the overall environment in which key expressive actors – i.e. the media – operate. If the rules unduly limit the media or give the government control over the media, how restrictions on freedom of expression are cast may not matter that much, since the public will not, in any case, have access to quality, independent news reporting.

This chapter starts with two sections focusing on structural considerations regarding media regulation: the need for regulatory bodies to be independent and the overriding need for regulation to promote media diversity. This is followed by five sections focusing on different media sectors: journalists, print media, broadcast media, public service media and new media.



## Independent regulatory bodies

It is accepted that government, where relevant acting through parliament, sets law and policy governing the media. At the same time, it is very well established under international law that the bodies implementing such law and policy, i.e. bodies which regulate the media, need to be independent of the government. The reasons for this are reasonably obvious. It is not a problem for the government to set out the policy considerations that should go into deciding whether or not an aspirant broadcaster should get a licence, as long as those policy considerations themselves respect international standards, but it would clearly be very problematical for the government itself to decide whether an applicant should get a licence. This would lead to decisions made on political rather than objective grounds, undermining the independence of the media, and potentially leading to a situation where only media friendly to the government could get a licence.

Many of the authoritative statements about this issue refer specifically to the need for broadcast regulators to be independent, mostly because these are the types of regulators that almost every country has. But the same underlying principles apply to all regulators that have the power to make decisions which affect the media.

A key challenge here is guaranteeing independence in practice. Ultimately, this needs to be tailored to the specific context in each country. However, the international statements cited above do provide some indication of how this should be done. The manner of appointing the members of the governing boards of regulators is central to their independence. Principle VII(2) of the African Declaration states that the appointments process should be “open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.” Clauses 3 – 8 of Recommendation (2000) 23 of the Committee of Ministers of the Council of Europe (COE) to Member States on the independence and functions of regulatory authorities for the broadcasting sector address this issue in some detail, calling for: members to be “appointed in a democratic and transparent manner”; rules of “incompatibility” to prevent individuals with strong political connections or other conflicts of interest from being appointed; prohibitions on members receiving instructions or a mandate from anyone other than pursuant to law; and protection against dismissal except for “non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions”. The COE Recommendation also notes that funding needs to be arranged in a way which protects independence.

Accountability is the third side of the independent triangle and both the COE Recommendation and the African Declaration recognize that accountability should ultimately be to the general public, ideally through parliament, and that accountability systems should not undermine independence. Principle VII(3) of the African Declaration, for example, states:

Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body.

# Media diversity

The principle of media diversity concerns the range of information, ideas and perspectives that are available to citizens via the media. States' obligations to promote diversity derive from the right of everyone to seek and receive information and ideas. This has been understood as meaning that everyone has a right to benefit from an overall media environment which is as diverse as possible (i.e. be able to access a wide range of sources of news). The European Court of Human Rights has referred in a very general way to this interest:

Imparting information and ideas of general interest ... cannot be successfully accomplished unless it is grounded in the principle of pluralism.<sup>80</sup>

The Inter-American Court of Human Rights has described some of the features associated with diversity:

Freedom of expression requires that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media.<sup>81</sup>

A clear indication of general State obligations in this area is found in Principle III of the African Declaration:

Freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity.

Similarly, in paragraph 14 of General Comment No. 34, the UN Human Rights Committee stated:

As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.

## Box 14: The three types of diversity

In their 2007 Joint Declaration on Diversity in Broadcasting, the special international mandates on freedom of expression identified three different aspects of media diversity: content, outlet and source.<sup>82</sup> Diversity of content is ultimately the most important, referring as it does to the idea that content serving the needs and interests of all groups in society should be available through the media. This, in turn, depends on outlet diversity, or the existence of a range of different types of media. This is particularly relevant in terms of broadcasting, where courts and

<sup>80</sup> *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Application Nos 13914/88, 15041/89, 15717/89, 15779/89 and 17202/90, para. 38.

<sup>81</sup> *Compulsory membership in an association prescribed by law for the practice of journalism*, note 19, para. 34.

<sup>82</sup> See also: Thomas Gibbons, "Concentrations of ownership and control in a converging media industry", in Chris Marsden and Stefaan Verhulst, eds, *Convergence in European digital TV regulation* (London, Blackstone Press Ltd., 1999), pp. 155 – 173, at 157.

commentators refer to the need for public service, commercial and community broadcasters. Source diversity refers to the idea that the media are not controlled by one or a small number of owners.

In terms of content diversity, clause II of a 2007 Declaration of the COE<sup>83</sup> calls on States to “define and implement an active policy in this area” and to encourage media outlets to provide diverse content, for example by requiring broadcasters to produce a certain volume of original programmes.<sup>84</sup> Principle III of the African Declaration calls for the promotion of African voices, including through the media, and in local languages. The European Convention on Transfrontier Television requires all States Parties to ensure that at least 50 per cent of broadcast programming is of European origin.<sup>85</sup>

In terms of outlet diversity, Principles V and VI of the African Declaration call for an equitable allocation of frequencies among commercial and community broadcasters, the promotion of community broadcasting “given its potential to broaden access by poor and rural communities to the airwaves”, and the transformation of State broadcasters into public service broadcasters.

Lastly, in paragraph 40 of General Comment No. 34, the UN Human Rights Committee addresses diversity of source:

The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.

## Regulation of journalists

Two issues are addressed in this section: licensing and protection of confidential sources of information. A third issue regarding journalists, accreditation, is dealt with in Chapter 6: Parliaments and other social actors, The media.

### Licensing

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

<sup>83</sup> *Declaration of the Committee of Ministers of the Council of Europe on protecting the role of the media in democracy in the context of media concentration*, adopted 31 January 2007. See also *Recommendation No. R (2007)2* of the Council of Europe on media pluralism, adopted by the Committee of Ministers on 31 January 2007, clause I(2).

<sup>84</sup> Clause II.

<sup>85</sup> Adopted 5 May 1989, E.T.S. 132, entered into force 1 May 1993, as amended by the Protocol, adopted 1 October 1998, E.T.S. 171, entered into force 1 March 2002.

everyone who undertakes journalistic functions:

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

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

## Protection of sources

The right of journalists to protect the identity of their confidential sources of information has long been recognized by international courts. Confidential sources are an important way for journalists to access information, itself protected as part of the right to seek and receive information and ideas, part of the right to freedom of expression. Looked at differently, in many cases, sources are only prepared to provide the sensitive information they possess to journalists in return for a promise of confidentiality. If journalists cannot deliver on such a promise in practice, the source will not provide them with the information in the first place. That, in turn, will deprive the public of access to the information via the journalist. As a result, we can see that what looks like a privilege for journalists is actually designed to protect the right of the public as a whole to access information and ideas.

The rationale for protecting sources was described lucidly by the European Court of Human Rights in the case of *Goodwin v. United Kingdom*:

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.<sup>86</sup>

In practice, although protection of sources is almost always referred to as a right or privilege of journalists, better practice in this area is to ensure protection to a wide range of actors who are engaged in providing information to the public. Thus, in their 2015 *Joint declaration on freedom of expression and responses to conflict situations*, the special international mandates on freedom of expression stated:

<sup>86</sup> 27 March 1996, Application No. 17488/90, para. 39.

Natural and legal persons who are regularly or professionally engaged in the collection and dissemination of information to the public via any means of communication have the right to protect the identity of their confidential sources of information against direct and indirect exposure, including against exposure via surveillance.<sup>87</sup>

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

## Regulation of the print media

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

### Licensing/registration

Licensing systems are generally understood to be those which require an applicant to obtain permission from the regulator, while registration systems provide for registration upon the provision of the requisite information (and perhaps meeting some very simple conditions), although even these types of systems are often subject to abuse.

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

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

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

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

<sup>87</sup> Adopted 4 May 2015, para. 5(a).

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

Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.<sup>88</sup>

### Box 15: Some cases on newspaper registration

There have only been a few cases decided by international human rights bodies on registration, but they help give a sense of the standards which these systems should respect. In *Laptsevich v. Belarus*, the UN Human Rights Committee was faced with a requirement to register that extended even to a leaflet of which only 200 copies had been printed.<sup>89</sup> The Committee applied the three-part test for restrictions on freedom of expression and found that there was no justification for taking registration requirements that far.

In *Gaweda v. Poland*, the Polish authorities had refused to register two periodicals based on the claim that their titles were “in conflict with reality” (the titles in question were: *The Social and Political Monthly – A European Moral Tribune and Germany – a Thousand-year-old Enemy of Poland*). The European Court of Human Rights held that this was a breach of the right to freedom of expression, essentially on the basis that it was “inappropriate from the standpoint of freedom of the press” to impose a substantive condition like this on media outlets as part of a registration system, especially since non-registration was a form of prior censorship which is a very intrusive restriction on freedom of expression.<sup>90</sup>

## The rights of reply and correction

A right of reply gives an individual, and potentially a legal entity, who has been the subject of media reporting which meets certain conditions a right to have his or her reply carried in the same media outlet. There is little global consensus about the right of reply. As a prima facie interference with freedom of expression, it clearly needs to be justified according to the three-part test for restrictions.<sup>91</sup> In the United States, the Supreme Court has ruled that a legally mandated right of reply for the print media is unconstitutional.<sup>92</sup> Others see it as an appropriate “more speech” way of addressing problematical speech. It is, for example, provided for explicitly in Article 14 of the ACHR:

<sup>88</sup> Adopted 18 December 2003.

<sup>89</sup> 20 March 2000, *Communication No. 780/1997*.

<sup>90</sup> 14 March 2002, Application No. 26229/95, paras. 40 and 43.

<sup>91</sup> See, for example, *Enforceability of the right to reply or correction*, Advisory Opinion OC-7/86 of 29 August 1986, Series A, No.7 (Inter-American Court of Human Rights).

<sup>92</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

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

In Europe, as well, it has been recognized as a positive approach.<sup>93</sup>

Even those who support the right of reply recognize that there is a need to impose some limits on the circumstances in which it may be claimed and how it works, to ensure respect for freedom of expression. The Committee of Ministers of the Council of Europe adopted a resolution on the right of reply in 1974 to provide guidance in this regard, which limits the right to factually incorrect statements and provides for the following exceptions:

- i if the request for publication of the reply is not addressed to the medium within a reasonably short time;
- ii if the length of the reply exceeds what is necessary to correct the information containing the facts claimed to be inaccurate;
- iii if the reply is not limited to a correction of the facts challenged;
- iv if it constitutes a punishable offence;
- v if it is considered contrary to the legally protected interests of a third party;
- vi if the individual concerned cannot show the existence of a legitimate interest.<sup>94</sup>

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

- vii if the reply is in a language different from that in which the contested information was made public;
- viii if the contested information is a part of a truthful report on public sessions of the public authorities or the courts.<sup>95</sup>

93 See, for example, *Ediciones Tiempo S.A. v. Spain*, Commission decision (admissibility), 12 July 1989, Application No. 13010/87 (European Commission of Human Rights).

94 *Resolution (74)26* on the right of reply – position of the individual in relation to the press, 2 July 1974.

95 Committee of Ministers of the Council of Europe, *Recommendation No. Rec(2004)16* on the Right of Reply in the new media environment, adopted 15 December 2004, Principle 5.

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

The Special Rapporteur is of the view that if a right of reply system is to exist, it should ideally be part of the industry's self-regulated system, and in any case can only feasibly apply to facts and not to opinions.<sup>96</sup>

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

### Dealing with complaints/promoting professionalism

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

For the print media sector, two main approaches to complaints systems are used globally. The first is what is called self-regulation, which is where the industry sets up the system by itself, without the support of legislation or indeed any official involvement. The second is called co-regulation, which is where the system is established by law but where media representatives play a dominant or at least very significant role in the system.

Many freedom of expression experts have observed that, where they are effective, self-regulatory systems, holding media to the standards set out in a code of practice or conduct, are preferable.

## Regulation of the broadcast media

It may be noted that it is well established that States may impose more intrusive forms of regulation on broadcasting than on the print media, in part because the former are a more powerful and, at least historically, accessible form of media (they come right into our living rooms and are accessible merely by operating a few buttons). This is recognized directly in Article 10(1) of the ECHR, guaranteeing freedom of expression, which states, in part:

This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

<sup>96</sup> Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Report of the mission to Hungary, 29 January 1999, E/CN.4/1999/64/Add.2, para. 35.



The European Commission on Human Rights has noted that this mandates different types of regulation for the broadcasting and print media sectors:

Article 10 of the *[European Convention on Human Rights]* clearly distinguishes between the degree of control that the State may legitimately exert over broadcasting, television or cinema enterprises, precisely by regulating access to these commercial activities by licensing procedures in which a wider margin of discretion is left to the States, and control over forms of exercise of freedom of expression, including the press and other printed media, which are subject only to the limitations laid down in para. 2 of Article 10.<sup>97</sup>

This section addresses two issues: the rules governing the licensing of broadcasters and systems for addressing unprofessional content/behaviour by broadcasters.

### Rules governing licensing

Whereas licensing is not legitimate for the print media, it is accepted and practised by almost every country for broadcasters. A key difference is that, at least historically, broadcasting was distributed via a limited public resource, namely the airwaves. Regulation is needed to ensure the orderly use of this resource (i.e. to prevent interference between broadcasters) and it has also been justified on the basis that licensing is the proper way to provide an exclusive grant to use a public resource.

While licensing remains the dominant approach, modern technologies are challenging the rationales which justify it. In particular, new technologies – including cable, satellite, digital and Internet broadcasting – are starting to do away with both scarcity and the use of a public resource to distribute broadcasting.

Licensing can be done in a way that contributes to all three of the types of diversity which were described above. Content diversity can be promoted by making this an explicit licensing criterion, so that aspirant broadcasters that are proposing a greater degree of content diversity will be privileged in terms of being awarded a licence. Similarly, the need to allocate licences to all three types of broadcasters – public service, commercial and community – can be built directly into the licensing process, supporting outlet diversity. Lastly, source diversity can be promoted by licensing rules which prohibit the allocation of further licences to owners who already control too many broadcasters.

Beyond this, licensing should be conducted in a manner that respects basic democratic criteria such as fairness, non-discrimination and transparency. To give effect to these standards in practice, the law should set out clearly the process according to which licence applications will be assessed. This should at least include the following:

- Details about each step in the process, which allow both the applicant and interested members of the public to make representations. Clear written reasons should be required to be given for any refusal to issue a licence and, in such cases, applicants should be able to appeal the refusal to the courts.

<sup>97</sup> *Gaweda v. Poland*, 4 December 1998, Application No. 26229/95, para. 49 (European Commission of Human Rights). The Commission used to exist as a body to which complaints went before they were considered by the Court.

- Clear time limits should be provided for each step of the process, including the deadline for filing applications and the timeframe within which decisions are expected to be made.
- Details about the fee schedule, including both the fee for making an application and the annual fee for the actual licence. Both fees should normally be reduced for community broadcasters.
- The criteria which will be used to assess applications (i.e. the criteria which form the basis for assessing whether or not a licence will be granted).
- Relevant technical conditions.

Licences for broadcasters normally include a number of both conditions. It is quite common to include among these positive requirements relating to content, mostly in service of the goal of diversity. A first type of positive content obligation is for the broadcaster to carry a certain amount of domestic or sometimes regional programming. It is often cheaper to purchase foreign programming, so this type of condition forces broadcasters to produce or purchase content from within the country.

A second type of positive content obligation is to carry local programming, especially in the context of large countries. Local audiences are often hungry for local in addition to national and/or international news, but, once again, it is often costly to produce this, so introducing it as a formal requirement increases the likelihood that this need will be satisfied. A third area is to require broadcasters to purchase a certain percentage of their content from independent third party producers (independent of any broadcaster). Just because an entity obtained a licence does not mean that it needs to produce all of its content itself. Requiring it to carry programming produced by others can help foster creative talent and ensure that audiences are shown a wider diversity of programming.

### **Addressing problematical/unprofessional content**

The imperative for a complaints system to address problematical content and boost professionalism is the same for broadcasters as it is for the print media. However, whereas complaints systems for the print media are normally self- or co-regulatory, the range for broadcasters tends to be either co-regulatory or statutory in nature. Both are established by law but, whereas co-regulatory systems are dominated by the media, this is not the case for statutory systems.

Another difference between complaints systems for broadcasters and the print media is that for the latter sanctions tend to be very limited in nature, often just including a requirement to carry a statement acknowledging the breach, while in the case of broadcasters, while these lesser sanctions are also applied, heavier sanctions, including fines and often even the possibility of licence suspension or revocation, are normally also envisaged. This no doubt derives in part from broadcasting being a more powerful and intrusive form of media than the print sector, and subject to licensing and a generally heavier regulatory burden.

# Regulation of public service media

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

It is accepted that public service broadcasters are an important part of a robust media environment, and this was clear from the statements about diversity cited above. An issue which has not attracted very much attention, but which is important, is whether it is also necessary to have public service print media. In most cases where public print media do exist, they remain under the control of the government, and so do not qualify as public service media. That said, there is no reason why, in principle, print media could not also be independent, adequately funded and accountable to the public. Without these features, however, they will not qualify as public service media.

The main rationale for public service broadcasters is their contribution to media diversity, thereby enhancing the range of information and ideas which are available to the public. It is not only the ability of public service broadcasters to add to the sources of information. A key idea here is that these broadcasters will provide quality content rather than being driven only by considerations of audience share, and the advertising revenues that follow it, which can promote lowest common denominator values in programme content. Public service broadcasters can also help ensure that minority voices and perspectives, which may be ignored by commercial broadcasters, feature in their programming. The following quote from a case before the European Court of Human Rights gives a good idea of the reasons why public service broadcasting is seen as important:

Where a State does decide to create a public broadcasting system, it follows from the principles outlined above that domestic law and practice must guarantee that the system provides a pluralistic service. Particularly where private stations are still too weak to offer a genuine alternative and the public or State organisation is therefore the sole or the dominant broadcaster within a country or region, it is indispensable for the proper functioning of democracy that it transmits impartial, independent and balanced news, information and comment and in addition provides a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed.<sup>98</sup>

## Protecting independence

It is necessary to protect the independence of public service broadcasters so as to ensure that they provide public interest information rather than information which supports one or

<sup>98</sup> *Manole and others v. Moldova*, 17 September 2009, Application No. 13936/02, para. 101.

another political party or powerful individual. This seems fairly obvious and the core rationale behind this was set out very eloquently some 25 years ago by the Supreme Court of Ghana:

“The 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.”<sup>99</sup>

There are numerous statements to this effect under international law, as reflected in Box 16. In practice, two key means are used to ensure independence. First, the broadcaster should be overseen by an independent board of directors or governors, whose independence, in turn, should be protected via the way the appointment procedures, through strong guarantees and protection of tenure and through prohibitions both on political figures being appointed and requirements of expertise.

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

### Box 16: The need for independent public service broadcasting

In paragraph 16 of General Comment No. 34, the UN Human Rights Committee stated:

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.

Principle VI of the African Declaration also calls for public broadcasters to be independent, reflecting the two key means noted above:

- public broadcasters should be governed by a board which is protected against interference, particularly of a political or economic nature;
- the editorial independence of public service broadcasters should be guaranteed.

The most comprehensive statement about the need to be independent is the Council of Europe's Recommendation (1996)<sup>10</sup> on the *Guarantee of the independence of public*

<sup>99</sup> *New Patriotic Party v. Ghana Broadcasting Corp.*, 30 November 1993, Writ No. 1/93, p. 17.

service broadcasting,<sup>100</sup> which was followed by a declaration on the same issue 10 years later.<sup>101</sup> The very names of these documents highlight the importance of independence and they provide detailed suggestions for how to ensure this in practice.

Several declarations adopted under the auspices of UNESCO also highlight the need for public service broadcasters to be independent. The 1996 Declaration of Sana'a calls on States to guarantee the independence of public broadcasters and suggests that the international community should only provide assistance to them where this has been done.<sup>102</sup> The 1997 Declaration of Sofia calls for State-owned broadcasters to be transformed into public service broadcasters with editorial independence and overseen by independent supervisory bodies.<sup>103</sup>

## Funding public broadcasters

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

This is reflected in a number of international statements about funding. Thus, Principle VI of the African Declaration states: “[P]ublic broadcasters should be adequately funded in a manner that protects them from arbitrary interference with their budgets.” In their 2007 *Joint declaration on diversity in broadcasting*, the special international mandates on freedom of expression noted:

Special measures are needed to protect and preserve public service broadcasting in the new broadcasting environment. ... Innovative funding mechanisms for public service broadcasting should be explored which are sufficient to enable it to deliver its public service mandate, which are guaranteed in advance on a multi-year basis, and which are indexed against inflation.<sup>104</sup>

As with regulators, it is important that funding systems not be allowed to be abused to exert control over public broadcasters. Most public service broadcasters rely on a mixed funding model using both public and private sources, 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.<sup>105</sup>

<sup>100</sup> Adopted 11 September 1996.

<sup>101</sup> *Declaration of the Committee of Ministers of the Council of Europe on the guarantee of the independence of public service broadcasting in the member states*, 27 September 2006.

<sup>102</sup> *Resolution 34* adopted by the General Conference at its twenty-ninth session (1997).

<sup>103</sup> *Resolution 35* adopted by the General Conference at its twenty-ninth session (1997), clause 7.

<sup>104</sup> See also: Thomas Gibbons, “Concentrations of ownership and control in a converging media industry”, in Chris Marsden and Stefaan Verhulst, eds. *Convergence in European digital TV regulation* (London, Blackstone Press Ltd., 1999), pp. 155 – 173, at 157.

<sup>105</sup> Para. 14.

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

## Accountability

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

Several international statements recognize the importance of a clear mandate. For example, in their 2007 *Joint declaration on diversity in broadcasting*, the special international mandates on freedom of expression noted:

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

Principle VI of the African Declaration states:

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

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

## Regulating online media

A first point to note here is that the right to freedom of expression clearly applies to the Internet, as it does to any other form of communication. This flows directly from the language of Article 19 of the ICCPR, which protects expression through “any other media of his choice”.

### General regulatory standards

One aspect of this is that States cannot just apply regulatory systems designed for other means of communication, as discussed above, to the Internet, just as they cannot simply apply broadcasting systems to the print media, based on the profound differences between these types of media. Thus, in paragraph 39 of General Comment No 34, the

UN Human Rights Committee noted: “Regulatory systems should take into account the differences between the print and broadcast sectors and the internet”. Similarly, in their 2011 *Joint declaration on freedom of expression and the Internet*, the special international mandates on freedom of expression stated:

Approaches to regulation developed for other means of communication – such as telephony or broadcasting – cannot simply be transferred to the Internet but, rather, need to be specifically designed for it.<sup>106</sup>

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

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

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

No one should be required to register with or obtain permission from any public body to operate an Internet service provider, website, blog or other online information dissemination system, including Internet broadcasting. This does not apply to registration with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation.<sup>107</sup>

This is supported by the COE’s leading statement on this issue, the *Declaration on freedom of communication on the Internet*, which states:

The provision of services via the Internet should not be made subject to specific authorisation schemes on the sole grounds of the means of transmission used.<sup>108</sup>

## Regulating content

States should not impose general filtering, blocking or shut-downs of the Internet, something which is, unfortunately, becoming more of a problem in the modern world. Thus, in their 2015 *Joint declaration on freedom of expression and responses to conflict situations*, the special mandates stated:

Filtering of content on the Internet, using communications ‘kill switches’ (i.e. shutting down entire parts of communications systems) and the physical

<sup>106</sup> Adopted 1 June 2011, para. 1(c).

<sup>107</sup> Adopted 21 December 2005.

<sup>108</sup> Adopted by the Committee of Ministers on 28 May 2003, Principle 5. Available at: <https://rm.coe.int/16805dfbd5>.

takeover of broadcasting stations are measures which can never be justified under human rights law.<sup>109</sup>

A similar idea is expressed in Principle 3 of the Council of Europe's *Declaration on freedom of communication on the Internet*:

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

There is a major global debate taking place currently about how to address the problem of harmful speech online. It is accepted that (otherwise appropriate) rules relating to content, such as hate speech, obscenity and defamation laws, should also apply to online content. But an issue arises as to who should be held responsible for this content. It is clear that intermediaries cannot be responsible for the often vast numbers of statements made through their systems over which they have no influence. Thus, it is widely accepted that intermediaries should not be required to monitor content for illegality (i.e. they should not be required to inform themselves about what is available through their systems). This is reflected in Principle 6 of the Council of Europe's *Declaration on freedom of communication on the Internet*:

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

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

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

However, beyond that, there is less agreement. In their 2011 Joint Declaration, the special mandates included a statement along the lines of the above in paragraph 2(a) but then also included paragraph 2(b), as follows:

Consideration should be given to insulating fully other intermediaries, including those mentioned in the preamble, from liability for content generated by others under the same conditions as in paragraph 2(a). At a minimum, intermediaries should not be required to monitor user-generated content and should not be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression (which is the case with many of the 'notice and takedown' rules currently being applied).

<sup>109</sup> Adopted 4 May 2015, clause 4(c). See also the 2005 Joint Declaration, the 2011 Joint Declaration, clauses 3 and 6(b), and the 2017 Joint Declaration, clauses 1(f) and (g).



This reflects the idea that notice and takedown systems, which provide for liability where intermediaries are aware of illegal content, do not provide sufficient protection for freedom of expression because in most cases, intermediaries will immediately take down content when they are notified about a breach, even if the content is in fact not illegal. They do not have the means to assess every claim and they are not in any case willing to take on the potential risk of liability should a court subsequently disagree with their assessment. In contrast, the *Declaration on freedom of communication on the Internet* does envisage co-liability after notice has been provided.

A third option, sometimes referred to as “notice and notice”, would require intermediaries to notify authors of content which has been contested. The authors would then have the option either to defend their content directly (which might require them to emerge from behind a veil of anonymity) or let the intermediary deal with it. Presumably patently illegal content would then come down, while more contested content might be subject to a court or regulatory challenge. In practice, such systems have yet to be put in place.

Another issue is where jurisdiction should be asserted in relation to online content. This content is available in every country in the world but it is obviously not appropriate to make authors liable in every country, which would lead to a lowest common denominator approach (i.e. where everyone would be held to the standards of the most restrictive country). To address this, paragraph 4(a) of the 2011 Joint Declaration states:

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

Standards are also starting to emerge to address the tendency in many States to impose sweeping restrictions on digital content that essentially duplicate rules governing the same content disseminated offline. Rather than having two parallel sets of rules for the same content, better practice is just to tweak the offline rules so that they also cover digital content. Thus, in their 2018 *Joint declaration on media independence and diversity in the digital age*, the special international mandates on freedom of expression stated:

Restrictions which are designed specifically for digital communications should be limited in scope to activities which are either new or fundamentally different in their digital forms (such as spamming).<sup>110</sup>

<sup>110</sup> Adopted 2 May 2018, para. 3(c).

There is wide agreement that, regardless of the rules on liability and jurisdiction, self- and/or co-regulatory initiatives are important. Thus, Principle 2 of the *Declaration on freedom of communication on the Internet* states:

Member states should encourage self-regulation or co-regulation of content disseminated on the Internet.

Similarly, paragraph 1(e) of the 2011 Joint Declaration states: “Self-regulation can be an effective tool in redressing harmful speech, and should be promoted.”

## Encryption and anonymity

Tools allowing for encryption and anonymity are enormous facilitators of free speech online and, in general, international law supports the use of these tools, recognizing that any limits should be applied only on a case-by-case basis. Thus, clause 8(e) of the 2015 *Joint declaration on freedom of expression and responses to conflict situations* of the special mandates states:

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

An exception to this is targeted police actions against criminal suspects. This is reflected in Principle 7 of the *Declaration on freedom of communication on the Internet*:

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

At the same time, it has to be recognized that anonymity has been one of the factors prompting a flood of speech online ranging from objectionable to illegal. The notice and notice system, referred to above, is one way to address this (i.e. anonymous posters either have to stand up for their content or accept that whichever company is hosting it may take it down). Over time, no doubt other tools which are less harmful than prohibiting anonymity will emerge to help address this problem.

## Promoting access to the internet

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

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

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

Giving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet. Access to the Internet is also necessary to promote respect for other rights, such as the rights to education, health care and work, the right to assembly and association, and the right to free elections.<sup>111</sup>

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

## New challenges

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

A leading example of this is recent revelations about the abuse of personal data for purposes of influencing elections and/or referendums. In the past, the options for tailoring the targeting of advertisements was limited to adjusting the timing and/or placement of advertisements, for example in a particular television programme or type of magazine, so as to reach a certain audience. With social media, however, very precise psychological and political profiles on individuals can be constructed, based on the vast trail of data that most people leave behind them online, whether through Facebook, Google, Amazon or some other company. Furthermore, this can be done automatically, using artificial intelligence tools, and these same tools can be used to send out political messages which are carefully tailored to the individual in question. This ability to micro-target very precise messages aimed at a particular individual has sometimes been referred to as “weaponizing” our personal data. An important recent case of this is detailed in Box 17.

<sup>111</sup> See also the 2005 Joint Declaration, the 2014 *Joint declaration on universality and the right to freedom of expression*, 6 May 2014, clause 1(h)(iii), and Principle 4 of the Council of Europe's *Declaration on freedom of communication on the Internet*.

## Box 17: The case of Cambridge Analytica

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

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

Cambridge Analytica provided the Donald J. Trump for President campaign with the expertise and insights that helped win the White House.

Analyzing millions of data points, we consistently identified the most persuadable voters and the issues they cared about. We then sent targeted messages to them at key times in order to move them to action. All of this was achieved in a fraction of the time and at a much lower cost than was spent by our rivals.<sup>112</sup>

Another issue of increasing concern, especially in relation to the democratic process, is the growing prevalence of information silos or “filter bubbles” due to many of the social media platforms, including Facebook, prioritizing the provision to users of information they already want to hear or believe in, leading in the worst case scenario to situations where people live in confined information silos and hear the same information, whether true or false, and political or social attitudes continuing to reverberate around them. This may be contrasted with the situation in the past, where a large majority of citizens came together, at least in very large groups, around the main evening news on a small number of television channels. As one commentator put it:

In truth, social media is not a telescopic lens – as the telephone actually was – but an opinion-fracturing prism that shatters social cohesion by replacing a shared public sphere and its dynamically overlapping discourse with a wall of increasingly concentrated filter bubbles.<sup>113</sup>

<sup>112</sup> “Facebook Data Breach: How do firms like Cambridge Analytica influence public opinion?”, *Business Today*, 22 March 2018. Available at: [www.businesstoday.in/technology/news/facebook-data-breach-how-firms-like-cambridge-analytica-influence-public-opinion/story/273137.html](http://www.businesstoday.in/technology/news/facebook-data-breach-how-firms-like-cambridge-analytica-influence-public-opinion/story/273137.html).

<sup>113</sup> Natasha Lomas, “Social media is giving us trypphobia”, *TechCrunch*, 27 January 2018. Available at: <https://techcrunch.com/2018/01/27/social-media-is-giving-us-trypphobia/>.

Closely related to this is what has been termed “fake news” by some, but which really relates to a very old problem of “false news”. Although it is irresponsible of them to do so, politicians and others seeking influence in society have always been tempted to be economical with the truth. But in the modern, social media world, it is much easier to spread lies than before, a problem which is exacerbated by filter bubbles, which make it far more difficult to expose and thus defeat the lies. The problem is also exacerbated by the operation of bots, automated programs which interpret script and instructions and respond to them, which now account for over 50 per cent of Internet traffic. A lot of bots help make our online lives easier, by automating and simplifying tasks for us. But bots can also be used to create fake social media accounts which, automatically, distribute fake news, thereby massively amplifying fake posts by humans.

The preamble to the 2017 *Joint declaration on freedom of expression and “fake news”, disinformation and propaganda* of the special international mandates on freedom of expression recognized this problem:

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

The Joint Declaration noted that general prohibitions on “false news” were incompatible with the guarantee of freedom of expression, while recognizing that false statements in particular contexts, such as defamation, might give rise to a civil cause of action. It focused heavily on the idea of promoting an enabling environment for freedom of expression, in the hope that this would, over time, privilege the truth. It also called, in paragraph 2, on State actors both to avoid making false statements and to disseminate accurate information:

- c State actors should not make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda).
- d State actors should, in accordance with their domestic and international legal obligations and their public duties, take care to ensure that they disseminate reliable and trustworthy information, including about matters of public interest, such as the economy, public health, security and the environment.

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

Interacting with a lot of these problems is the fact that a small number of online companies have now become massively dominant market players with some, such as Facebook, effectively having monopolies in their distinctive markets. The power of these companies to effect changes in our behaviour simply by tweaking their algorithms, the programs which determine how information flows through their platforms and websites, is a growing subject of debate, and concern, around the world. That Facebook CEO Mark

Zuckerberg was questioned for nearly 10 hours by members of the United States Senate House of Representatives on 10 and 11 April 2018 demonstrates how seriously at least some parliamentarians are taking this issue.

At the same time, these algorithms lie at the heart of the business models of most of these companies, along with other online players. As a result, the algorithms themselves, as well as how they really function, is closely guarded as a commercial secret. Paragraph 4 of the 2017 Joint Declaration called for greater transparency on the part of intermediaries around both policies (including terms of service) and algorithms, while recognizing that there were commercial limits to this:

- Intermediaries should take effective measures to ensure that their users can both easily access and understand any policies and practices, including terms of service, they have in place for actions covered by paragraph 4(a), including detailed information about how they are enforced, where relevant by making available clear, concise and easy to understand summaries of or explanatory guides to those policies and practices.
- The standards outlined in paragraph 4(b) should, subject only to legitimate competitive or operational needs, also be applied to any automated processes (whether algorithmic or otherwise) run by intermediaries for taking action either in relation to third party content or their own content.

Despite this guidance from the special mandates, the features and implications of online possibilities, especially via social media platforms, are evolving rapidly. We are not yet at the point where the appropriate regulatory solutions are clear, and debate about this is likely to continue and develop over some time.

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# Part II: Freedom of expression and parliamentarians

This Part of the handbook looks at a number of specific issues on parliaments and their members and freedom of expression. It is divided into three chapters focusing, respectively, on the obligation of parliamentarians to promote and protect freedom of expression; the implications for parliamentarians, especially in terms of freedom of expression, of parliamentary immunity; and relationships between parliamentarians and other actors that may affect freedom of expression, in particular the media but also officials and political parties.

Unlike Part I, most of the issues addressed in this Part are not derived, at least not directly, from international law, although a few, such as the openness obligations of parliaments, are. As such, there is much wider scope for discretion in relation to these issues. In addition, and partly as a result, the law and practice of countries, even among established democracies, tends to vary more widely in relation to these issues. As such, in important ways this Part represents better practice suggestions as opposed to what might be termed “international obligations” for parliaments and their members.

The first chapter in this Part focuses on the role of parliamentarians in promoting freedom of expression. The important role played by parliaments and their members in society means that they can have a huge impact in terms of supporting the right to freedom of expression. Given how important freedom of expression is for parliamentarians, they should also recognize its wider legal and social relevance. It is of paramount importance that parliamentarians avoid the temptation to act in politically partisan ways where this will undermine protection of human rights. Human rights stand above partisan concerns and it is incumbent on parliamentarians to leave behind the partisan issues which may largely define their parliamentary roles in other areas where human rights may be threatened.

As with all human rights, a key issue here is the role of parliaments as guardians of the legislative process. International law specifically stipulates that only restrictions on freedom of expression which are provided by law may be legitimate. Parliamentarians obviously have a major role to play in ensuring that laws which affect freedom of expression meet the standards of international law. Parliamentarians should be conscious that this may, in certain cases, require them to push for the adoption of legislation – for example to protect whistleblowers, the right to information or those threatened for exercising their freedom of expression – as well as to limit the scope of restrictive legislation. It is perhaps particularly important for parliamentarians to resist the tendency of many countries to adopt unduly restrictive legislation, for example in areas such as national security, combating terrorism, cyber-security and the right to information generally.

Parliamentarians also have important oversight roles both in relation to the implementation of the legislation they have passed but also more generally, and especially over government. Parliamentarians can play a particularly important role in many countries in relation to the protection of the independence of freedom of expression oversight bodies, such as information commissions, broadcast regulators and the governing boards of public service broadcasters.

Parliamentarians should also use their positions as social leaders to help ensure respect for freedom of expression. Societies cannot rely only on good laws, even where the rule of law is strong, to protect freedom of expression, since there will always be

opportunities for abuse. As part of their general responsibility to oversee the actions not only of government but also other powerful social actors, such as large corporations, parliamentarians should keep an eye out for abuses, expose them and follow up at least in more serious cases.

Related to this, parliamentarians should be conscious of the impact that their own expressions may have. Even though, as noted just below, parliamentarians enjoy very strong protection for their right to free speech, this does not mean that they do not have a social and moral responsibility to exercise some care when speaking. As mentioned in Chapter 2: Restrictions, parliamentarians should always be careful to avoid, as far as possible, making statements that might promote discrimination or undermine equality. They should also, again as far as possible, try to avoid making statements which are defamatory, which invade privacy or which otherwise pose a risk of harm to a third party.

The second chapter under this Part focuses on the special freedom of expression rights of parliamentarians as part of the doctrine of parliamentary immunity. It is universally recognized that parliamentarians have special freedom of expression needs. This is based not so much on their special personal status but on the role that they play in society and the need for them to be able to debate openly in parliament, without fear of reprisals, especially of a legal nature, in order to serve the wider public interest. This has resulted in strong traditions, often legally enshrined in constitutions, of absolute or near absolute legal non-accountability of parliamentarians for their statements. This chapter outlines the legal and social roots of this protection, as well as its scope, in terms of persons, statements and legal consequences.

Parliamentarians have the right, in common with other citizens, to engage in very strong criticism of other parliamentarians, political parties, and even the head of State, as well as to voice their views on sensitive national issues. Indeed, parliamentarians have a duty to criticize whenever they believe it is warranted. Powerful actors do not always welcome such criticism, but it is actually the essence of a democratic form of government.

### **Box 18: The right to criticize heads of State**

In the case of *Kivenmaa v. Finland*, the UN Human Rights Committee upheld the right of an ordinary citizen to criticize not only her own head of State but also a visiting head of State.<sup>114</sup> In that case, the applicant had held up banners and distributed leaflets across from the presidential palace on the occasion of a visit by a foreign head of State. The banners and leaflets were critical of the human rights record of the visiting head of State. The Committee held that the applicant's conviction under a very old law regulating demonstrations represented a breach of her right to freedom of expression.

Similarly, the case of *Colombani and Others v. France*, before the European Court of Human Rights, involved highly critical articles about the King of Morocco published in *Le Monde* newspaper under the heading "Morocco, world's leading exporter of cannabis" and a sub-heading: "King Hassan II's entourage implicated by confidential

<sup>114</sup> *Communication No. 412/1990*, 31 March 1994. See, in particular, para. 9.3.

report". The French courts found the applicants guilty of insulting a foreign head of State, in part because their statements were "tainted with malicious intent".<sup>115</sup> The European Court disagreed, among other things because "the offence of insulting a foreign head of State is liable to inhibit freedom of expression without meeting any 'pressing social need' capable of justifying such a restriction".<sup>116</sup>

The IPU Committee on the Human Rights of Parliamentarians has also examined several cases involving criticism of heads of State. For example, parliamentarian Jean-Bertrand Ewanga had been convicted in the Democratic Republic of the Congo for insulting the head of State and other officials after accusing President Kabila of stealing the elections and calling on him to leave. In its unanimous decision, the IPU Governing Council noted that although Ewanga's language "was not conducive to promoting constructive and amicable political dialogue", it still fell within the bounds of protected speech.<sup>117</sup>

In a case involving Ecuador, José Cléver Jiménez, then a member of the National Assembly, was convicted of criminal defamation and sentenced to one and one half years in prison for filing a complaint with the public prosecutor alleging that President Rafael Correa was guilty of various crimes. Soon after the conviction, the Inter-American Commission on Human Rights called on Ecuador not to implement the decision. In a 2016 Decision, the IPU Committee on the Human Rights of Parliamentarians expressed deep concern about Jiménez's conviction for "what appears to be the legitimate exercise of his rights to freedom of expression".<sup>118</sup> The case not only represents a breach of the right to freedom of expression but is also likely to exert a chilling effect on reporting of crimes, normally a highly protected activity.

Despite the strong free speech protections parliamentarians enjoy vis-à-vis the courts, they may still be sanctioned for what they say in parliament by parliament itself. In many cases, this procedure involves the speaker proposing a measure or sanction and then the full parliament voting on it. In many cases, the procedure is used sparingly and for minor breaches – such as failing to respect the minimum requirements of civility that are deemed to be necessary to allow parliament to function effectively – only very minor sanctions, such as calling a member to order, are imposed. However, in all too many countries, these powers are abused by the often quite dominant ruling party to unduly restrict the free speech rights in particular of opposition parliamentarians.

Parliamentarians also need to be aware of the risks they may face simply for the political positions they take. The ability to operate anonymously online has led to a massive growth in what is sometimes rather euphemistically called "uncivil speech". A range of different actors, including parliamentarians, may be subject to online attacks, threats and intimidation. At a minimum, good digital security measures should be adopted and where the threats seem to represent a real risk of harm the police should be notified.<sup>119</sup>

<sup>115</sup> Application No. 51279/99, 25 June 2002, para. 18.

<sup>116</sup> *Ibid.*, para. 69.

<sup>117</sup> Case DRC/83, 16 October 2014.

<sup>118</sup> Case EC/68, 27 October 2016.

<sup>119</sup> However, in some cases the police are not independent of the party in power and so this may not be a recommended course of action.

## Chapter 4

# Promoting and protecting freedom of expression



US whistleblower Edward Snowden is seen live from Moscow at a Norwegian PEN event in Oslo in November 2016. © AFP/NTB Scanpix/Berit Roald, 2016

There are three functions common to parliaments in democracies: representation, law-making, and oversight. The first refers to the idea of representing the interests of citizens or constituents, the second to parliament's role in adopting legislation and the third, while broad in scope, focuses particularly on oversight of the executive and, in particular, oversight of the proper implementation of laws.

Parliaments and their members should factor respect for freedom of expression, and sometimes the explicit protection and promotion of free speech, into their work relating to all of these roles. While all parliamentarians should do this, the particular role of the human rights committees established by some parliaments is of particular importance. As Part I of this report clearly established, freedom of expression is a foundational human right and it is incumbent upon parliaments and their members, as extremely powerful

leadership institutions and players in society, both to respect and to promote this right. Indeed, this can be generalized to cover human rights in general. As stated in the joint IPU-UN Office of the High Commissioner for Human Rights' *Human rights: Handbook for parliamentarians* N° 26.

When it comes to human rights promotion and protection, parliaments and members of parliament are essential actors: parliamentary activity as a whole – legislating, adopting a State's budget and overseeing the executive branch – covers the entire spectrum of political, civil, economic, social and cultural rights and thus has an immediate impact on the enjoyment of these rights by the people. As the State institution which represents the people and through which they participate in the conduct of public affairs, parliament is indeed a guardian of human rights. Parliament must be aware of this role at all times because the country's peace, social harmony and development largely depend on the extent to which human rights permeate all parliamentary activity.<sup>120</sup>

It is quite clear, as noted earlier, that, under international law, parliaments are bound to respect human rights guarantees. Furthermore, they are at least in some cases bound to take positive steps to ensure respect for freedom of expression. Examples given of this were the need to ensure protection against attacks on freedom of expression, to ensure appropriate regulation of the media (for example to promote media diversity and prevent undue concentration of ownership) and to provide protection to whistleblowers (including through legislation)

## General points

Protection of freedom of expression, whether through legislation or by other means, is in some cases fairly closely circumscribed by international human rights guarantees and in some cases far less so. For example, international law defines both the need to prohibit hate speech and also, in fairly precise terms, the manner in which this should be done. For other issues, for example as to how best to foster a diverse media environment, there will be more space for local adaptation, albeit while remaining within the parameters set by international law.

Parliaments are, first and foremost, places of debate and the contestation of ideas, often based on party, ideological or policy orientations. This is not only legitimate but it is the essence of parliament's role in society. Modern parliaments tend to operate largely along party lines, with fierce competition between parties, and sometimes also individuals (party leaders, candidates for top leadership positions, including the presidency). Ideally, this competition will mostly be policy or programme driven but often it breaks down along personality lines and sometimes also moral or even populist ones.

It is of the utmost importance that, notwithstanding the above, human rights standards, in particular international law standards, inform parliamentary positions on human rights. When taking positions on human rights issues, parliamentarians must make an effort to respect human rights standards and, in particular, international law. This is especially

<sup>120</sup> 2016, p. 89. Available at: [www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf](http://www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf).

important for freedom of expression issues, given that the public often has very strong views on these issues. Parliamentarians should always keep this in mind when engaging in public debate about freedom of expression issues and especially when passing laws and exercising oversight over government. Taking a position in favour of blasphemy laws or blocking content from a hostile neighbouring country may in some cases win votes, but it can never be legitimate. Parliamentarians should never succumb to the temptation to put short-term personal or party gains above human rights. In other words, when the work of parliamentarians relates to human rights, partisan behaviour should give way to respect for rights whenever they come into conflict.

To be effective in promoting human rights, parliamentarians need to be informed about those rights. The main sources of human rights obligations for States are usually the human rights part of the constitution, which may be described as a charter or bill of rights or just as a regular chapter or part of the constitution, and the international human rights obligations of the State.

Every parliamentarian should make an effort to be generally aware of these two sets of obligations. Given the foundational importance of freedom of expression – to the work of parliamentarians, to democracy in its wider sense and to the protection of all other human rights – it is perhaps particularly important for parliamentarians to be aware of the main features of this right. Organizations like the IPU and the Office of the United Nations High Commissioner for Human Rights (OHCHR), as well as a number of civil society groups, run programmes to inform parliamentarians about human rights.<sup>121</sup>

At the same time, it is not realistic to expect every parliamentarian to be a deep expert on freedom of expression. As this report makes clear, it is a very complex right with a lot of both legal and social subtlety. Despite this, parliamentarians sitting on committees which focus on legislation and other issues that directly impact on freedom of expression should make an effort to be aware of the issues which are related to their work. They should also reach out, when specific issues are raised in their discussions, to those who are expert in the matter, for example among academics, national human rights institutions, parliamentary human rights committees and/or civil society organizations, so as to ensure that that expertise gets factored properly into parliamentary discussions.

Parliamentarians can also play a role in ensuring that their States ratify relevant treaties. In some cases, parliaments play a formal role in this process, while in others they can play a more supportive or promotional role. The main international treaty affecting freedom of expression is the ICCPR, but many treaties have provisions which are relevant to this right. For States in Africa, there is also the *African Charter on Human and Peoples' Rights*, the *American Convention on Human Rights* for States in the Americas and the *European Convention on Human Rights* for States in that region. Parliamentarians may also engage in oversight of whether the State has entered reservations or declarations affecting the two core provisions of the ICCPR on freedom of expression, Articles 19 and 20.

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<sup>121</sup> For more information about the work of the IPU in this area, see: [www.ipu.org/our-work](http://www.ipu.org/our-work).



Once treaties have been ratified, two main steps follow. First, many human rights treaties, including the ICCPR, have mechanisms to promote their effective implementation. Under the ICCPR, for example, States are required to report regularly (every five years) to the oversight body, the UN Human Rights Committee. Parliaments can collaborate with other State actors on the reporting process, and also play an oversight role in ensuring that the recommendations which come out of the process are properly acted upon. Running alongside this, with roughly analogous roles for parliamentarians, are non-treaty-based procedures, such as the Universal Periodic Review (UPR) that is overseen by the UN Human Rights Council. As with the ICCPR, States are reviewed by the Council on a regular basis (in principle every four and one half years) in relation to a wide range of human rights obligations, including freedom of expression. Unlike the ICCPR, all 193 UN Member States must go through the UPR process. The UPR process also leads to a set of recommendations to improve performance, again with a role for parliament.

Second, in some States, treaties, pursuant to the constitution, automatically become part of the law of the land, often having a superior status to ordinary legislation, in what is known as the monist approach towards international law. In other States, however, treaties only become locally effective through implementing legislation, in what is known as the dualist approach. In those States, parliaments clearly have a role to play in ensuring that implementing legislation which is effective and which reflects the human rights standards in the treaty is adopted. More detail on the general ways in which parliaments and their members can contribute to the treaty adoption process is available in *Human Rights: Handbook for Parliamentarians No 26*.<sup>122</sup>

## Parliaments and their members as legislators

One of the most important ways that parliaments and their members can help to promote respect for freedom of expression is through ensuring that legislation is not only minimally compatible with international, regional and constitutional human rights standards but goes beyond this to reflect better or even best practice.

Although most rights do depend at least to some extent on an underlying framework of legislative support, laws play a particularly important role when it comes to freedom of expression. The boundaries between what citizens may and may not say are determined almost exclusively by legislation (and its interpretation by the courts or, in common law countries, often also by judge-made common law rules). Although media regulation, particularly in relation to broadcasters, should be undertaken by independent administrative bodies, the creation of those bodies and the rules by which they regulate the sector need to be set out in legislation. What is not in the law is often as important as what is (for example not requiring newspapers to obtain a licence before they may operate and not imposing minimum conditions on who may practise journalism). Similarly, legislation provides the backbone for systems for access to information, protection of whistleblowers and, often, safety mechanisms for journalists and others who are at risk of attack, which may also include parliamentarians.

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<sup>122</sup> Ibid., pp. 95 – 100.

Parliamentarians should pay particular attention to certain areas where legislation is often proposed which fails to respect human rights standards. There has been a wave of anti-terrorism laws passed in countries around the world, many of which impose unduly restrictive limits on freedom of expression. Secrecy rules, again often adopted in the name of national security are another area where laws tend to fail to conform to international standards. The imposition of states of emergency, during which some rights, including freedom of expression, may be derogated, should also be mentioned here. International law, specifically Article 4 of the ICCPR, sets out clear standards governing states of emergency. These include the existence of a “public emergency which threatens the life of the nation”, which is officially proclaimed and about which other States have been informed through the UN Secretary General. Derogations may never be discriminatory or inconsistent with the other international law obligations of the State proclaiming the emergency, and are justified only to the extent that they are “strictly required by the exigencies of the situation”.

### **Box 19: Abuse of terrorism and other security-related charges against parliamentarians**

A case before the IPU Committee on the Human Rights of Parliamentarians involved 56 Turkish parliamentarians and former parliamentarians out of the then 58 members from the People’s Democratic Party (HDP) who, together, faced over 500 terrorism and other criminal charges. In its unanimous decision, the IPU Governing Council expressed deep concern that “the peaceful public statements and legal political activities of members of parliament that fall within the scope of their rights to freedom of expression, assembly and association may have been regarded as evidence of criminal and terrorist acts”.<sup>123</sup>

On 16 November 2017, the Supreme Court dissolved the Cambodian National Rescue Party (CNRP), leading to the loss of mandates held by 55 CNRP members in the National Assembly and two from the Senate. Before the dissolution of the party, Kem Sokha, then President of the CNRP, was charged under Article 443 of the Criminal Code, which states:

The acts of entering into secret agreement with a foreign state or with its agents in order to create hostilities or aggression against Cambodia is punishable by imprisonment from 15 (fifteen) years to 30 (thirty) years.<sup>124</sup>

Sokha’s crime appears to consist of having given a speech in Australia in 2013 explaining why he created a human rights organization, the Cambodian Human Rights Centre, to try to foster change from the bottom up. In its consensus decision on the case, the IPU Governing Council noted that Sokha’s speech contained “nothing whatsoever that could constitute a criminal offence” and that “his freedom of expression has clearly been violated in the present case”, expressing deep shock “that this video has been used as evidence of treason”.<sup>125</sup> On 5 March

<sup>123</sup> Various cases falling between TK69 and TK125, 18 October 2017.

<sup>124</sup> Available at: [www.unodc.org/res/cld/document/khm/criminal\\_code\\_of\\_the\\_kingdom\\_of\\_cambodia\\_html/Cambodia\\_Criminal-Code-of-the-Kingdom-of-Cambodia-30-Nov-2009-Eng.pdf](http://www.unodc.org/res/cld/document/khm/criminal_code_of_the_kingdom_of_cambodia_html/Cambodia_Criminal-Code-of-the-Kingdom-of-Cambodia-30-Nov-2009-Eng.pdf).

<sup>125</sup> Case CMBD/60, 18 October 2017.

2018, Sokha's pre-trial detention was extended for another six months,<sup>126</sup> until after elections to the National Assembly, due to be held in July 2018.

In another case brought before the IPU Committee on the Human Rights of Parliamentarians, from Malaysia in early 2017, three opposition parliamentarians, N. Surendran, Ng Wei Aik and Sivarasa Rasiah, were charged under sections 4(1) (a), (b) and (c) of the Sedition Act of 1948. Another opposition parliamentarian, Chua Tian Chang, was sentenced to three months' imprisonment under the same Act in September 2016 for calling for street demonstrations to protest the election results, which he deemed to be corrupt. Due to a further conviction for "insulting the modesty of a police officer", Tian Chua was prevented from contesting the May 2018 Malaysian elections.<sup>127</sup> The Sedition Act was amended in 2012 to remove criticism of the Government or the administration of justice from the list of seditious actions, but the Attorney General retains the discretion to decide whether or not to continue previous charges brought under this head. The IPU Committee has repeatedly expressed serious reservations about both the old and amended Sedition Act,<sup>128</sup> which remains notoriously vague and broad as a restriction on freedom of expression.<sup>129</sup>

Although primary legislation, passed by parliament, provides the framework in all of these cases, subordinate legislation (known variously as rules, regulations, by-laws and so on), normally passed by the executive, can also be of the greatest importance. Parliaments have two roles to play here. First, the primary legislation should define the scope for subordinate legislation in an appropriate manner, i.e. not too widely and not too narrowly. There is sometimes a tendency for legislation to leave unduly broad scope for issues to be dealt with by subordinate legislation (see Box 20 for a good example of this in the context of right-to-information legislation). Matters which change over time or from case to case – such as the appropriate fee for a broadcasting licence – need to be left to secondary rules because flexibility is needed and the legislation cannot be changed easily. It is also unnecessary for legislation to get into minutiae, which can create confusion and rigidity. At the same time, it is a specific requirement of international law that restrictions on freedom of expression be prescribed by law which, in turn, requires the rules to be clear and precise and not to grant too much discretion to officials in determining their exact scope.

Second, in most cases, parliament has some formal power of review over regulations which have been adopted. Broadly speaking, the power of review falls into two categories, sometimes referred to as the positive and negative review procedures. Under the positive review procedure, parliament is required to (positively) approve the regulations, while under the negative review procedure, the regulations will be valid unless parliament votes against them. Regardless of the procedure, parliamentarians

126 Niem Chheng and Ananth Baliga, "Kem Sokha's pre-trial detention extended by six months", *The Phnom Penh Post*, 5 March 2018. Available at: [www.phnompenhpost.com/national/kem-sokhas-pre-trial-detention-extended-six-months](http://www.phnompenhpost.com/national/kem-sokhas-pre-trial-detention-extended-six-months).

127 Tang Ruxyn, "Tian Chua backs 22-year-old independent candidate after KL High Court dismisses his suit", 4 May 2018, Says. Available at: [says.com/my/news/high-court-dismisses-tian-chua-suit-challenging-disqualification-from-contesting-in-batu](http://says.com/my/news/high-court-dismisses-tian-chua-suit-challenging-disqualification-from-contesting-in-batu).

128 Cases falling between MAL21-40, 23 January to 3 February 2017.

129 Malaysian Bar Association, "Why the Sedition Act stifles democracy in Malaysia", 29 April 2015.

Available at: [www.malaysianbar.org.my/legal/general\\_news/why\\_the\\_sedition\\_act\\_stifles\\_democracy\\_in\\_malaysia.html](http://www.malaysianbar.org.my/legal/general_news/why_the_sedition_act_stifles_democracy_in_malaysia.html).

should take seriously their role in reviewing regulations so as to make sure that they do not introduce elements which undercut human rights positive features in the legislation or further exacerbate problematic regimes.

### **Box 20: Leaving Access to Information Procedures to Regulation**

The RTI Rating ([www.RTI-Rating.org](http://www.RTI-Rating.org)) is a globally accepted methodology for assessing the strength of legal frameworks for the right to information. It assesses laws according to 61 discrete indicators, of which 15 are related to the procedures for making and processing requests and which represent 30 of the total of 150 points on the Rating. These cover issues such as how easy it is to lodge a request for information, what information needs to be provided, whether officials need to offer assistance to requesters, whether a receipt is provided for a request, what happens when the body does not hold the information, the formats in which information may be provided, time limits for responding to requests, and fees.

As of September 2018, Afghanistan was the top-scoring country on the RTI Rating following the adoption of a new RTI law in May 2018.<sup>130</sup> It earns fully 28 out of 30 points for procedure, all based directly on the primary legislation, losing two points because it fails to provide for fee waivers for impecunious requesters. Although detailing procedures is essential in any right-to-information law, the Afghan law is only 14 pages (in English translation and with reasonable font and spacing).

In contrast, Austria, the bottom scoring country, only earns eight out of a possible 30 points on procedures. Among other things, its two-page law is simply silent on many issues including key matters relating to how to make a request, assistance, receipts, what happens when the body does not hold the information, formats for provision of information and the question of fee waivers.

There is no reason whatsoever for these lacunae in the Austrian law and it must be presumed that in most cases they are simply oversights. Even if Austria does not wish to provide a certain feature in its law, that should be made clear in the text of the law.

So far, the focus in this section has been on the adoption of new legislation. But in many States, a key problem with legislation governing freedom of expression is the existence of unduly restrictive rules adopted in the past, sometimes a very long time ago. For example, many former British colonies still have in place Official Secrets Acts dating from the colonial period, which are often similar if not identical to each other, and which take a highly secretive position on official documents which is fundamentally at odds with the human rights based right to information. Sedition laws are another example of laws which have been left in place after the end of the colonial period and which unduly restrict freedom of expression. It is, therefore, important to review laws which have an impact on freedom of expression with a view to revising and updating them to bring them into line with international human rights standards.

<sup>130</sup> It should be emphasized that the Rating only assesses the legal framework for the right to information and not the strength of implementation of that framework.

# The oversight role of parliaments and their members

A key role of parliament is to monitor and oversee powerful actors in society, and especially the executive. While this is a general role, it is perhaps particularly important for parliament to ensure that legislation is being properly implemented, given that it is somehow the custodian of that legislation, having passed it in the first place.

There are a number of general ways in which parliaments can oversee the way in which legislation is being implemented, including putting questions about this to ministers, officials and oversight bodies, engaging in fact-finding exercises, and conducting formal reviews, for example through committees. The most appropriate approach will depend on the type of oversight needed. In some cases, it will be appropriate to review legislation on a regular basis, such as the right-to-information legislation, given how rapidly information systems change. In other cases, the presence of problems around the way a law or set of legal rules is being applied may spark a review.

The appropriate way to resolve problems will depend on all of the circumstances. In some cases, there will be a need to amend the law, which can be recommended or even undertaken by parliament. In other cases, administrative solutions, perhaps including the provision of training to relevant officials, may be needed. Again, parliament can recommend this.

A number of roles exist for parliament where oversight bodies are involved, which is usually the case with the right to information, broadcast regulation and the public broadcaster, if one exists. First, it is normal for these bodies to be required to report on a regular, usually annual, basis to parliament (whether directly or through a minister). This provides an opportunity to review their work and the wider systems which they oversee (the annual reports will often include general recommendations for reform). Parliament should take these oversight responsibilities seriously. Whenever possible, for example, a hearing should be held, normally in the committee which is generally responsible for the issue, and the head or a senior representative of the body should be brought in to give evidence and answer questions.

Second, in some cases parliament is, through the legislation establishing it, given a formal role in relation to appointments to regulatory or oversight bodies. In this case, parliament should engage seriously in this role, keeping in mind the overarching need, as noted in Part I, for bodies with regulatory powers over the media or indeed any freedom of expression issue to be independent of government and to be led by credible, competent people with experience and expertise which is relevant to the issue in question.

Lastly, in many cases parliament will play a role in terms of allocating the budget to these bodies.<sup>131</sup> This is a crucial matter since bodies that are underfunded will not be able to discharge their duties effectively. Where this is a problem, it is fairly easy to identify, for example in poor media reporting by a public service broadcaster, decisions based on inadequate information and research by a broadcast regulator, and delays in the processing of complaints by an information commission or a failure to undertake promotional activities.

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<sup>131</sup> A wider budget issue is overall spending on the promotion and protection of human rights, for example to support national human rights institutions, training for officials and so on, which can also impact positively on freedom of expression

The way the budget comes before parliament will depend on the nature of the relevant law as well as on the overall budget process. Best practice in this area is for budgets allocated to oversight bodies to be agreed separately by parliament, so as to ensure appropriate attention is given to them. At a minimum, parliament should demand that a separate budget line be devoted to these bodies in the budget, and interested parliamentarians should pose questions about this – for example as to the trend over time and any recommendations on the budget by the body – at the time the budget is being presented.

## **Parliaments and their members as social leaders**

While legislation is at the core of parliamentarians' responsibilities in relation to freedom of expression, they should also be sure to exercise their roles as social leaders to promote and protect this right as well. The exact needs here will vary depending on the local situation. In countries with good laws and solid respect for the rule of law, abuses of the law are likely to be less of a problem, although even in such contexts there are many ways that laws can be abused to limit freedom of expression. For example, powerful social actors can bring abusive defamation cases simply as a way of avoiding criticism. Even if they know that ultimately they will lose these cases, the high cost of defending against a defamation action will exert a serious chilling effect on those – whether they are media outlets, civil society actors or others – who would otherwise bring to light wrongdoing by the powerful. Where the courts are not independent and where defamation laws do not conform to international standards, including because they provide for imprisonment for defamation, the chilling effect of abusive defamation cases can be even more severe. Having parliamentarians expose these sorts of practices publicly can be a very important way of limiting this sort of abuse.

Even good laws often leave a wide scope of discretion to officials. For example, broadcast regulators may be subject to influence from the government. As a result, they may act in ways that are biased towards media which are more friendly towards the government or against media which are more critical of it. In almost every country, officials have a tendency to interpret the exceptions in right-to-information laws in an overbroad way, keeping documents secret that are not in any way sensitive. Parliamentary oversight can limit these abuses.

More generally, parliamentarians can do an enormous amount to raise general awareness about the importance of freedom of expression, as well as its key features. This helps build support for core guarantees, and decreases the risk of abuse by government or other powerful actors. Parliamentarians can act in concert with official human rights bodies, civil society, academics and others to magnify each other's voices and influence.

Similarly parliamentarians should also be vigilant in defending the freedom of expression rights of other parliamentarians, regardless of political or party affiliation. Attacks on the right to freedom of expression of members can often be emblematic of a wider attack on freedom of expression, and often democracy more generally. It is thus crucial that parliamentarians use their power and social leadership roles to fight back against this.

# Parliaments and transparency

Just as parliaments and their members should respect freedom of expression generally, so should they respect better practice standards on transparency. The Commonwealth Parliamentary Association and the World Bank Institute, in partnership with the Parliament of Ghana, brought together the Study Group on Access to Information in Accra, Ghana, from 5 to 9 July 2004. The report from this meeting, *Parliament and Access to Information: Working for Transparent Governance*, noted the following:

The Study Group highlighted the particular role of Parliament, not only as the body that passes legislation, but also in terms of the need for it to be transparent itself, its role in promoting broader transparency in society and its oversight role in relation to the legislation.<sup>132</sup>

The roles of parliament in passing and overseeing the implementation of legislation have already been covered above. This section focuses on the need for parliament to be transparent itself. The Declaration on parliamentary openness states the reasons parliamentary transparency is important as follows:

Parliamentary openness enables citizens to be informed about the work of parliament, empowers citizens to engage in the legislative process, allows citizens to hold parliamentarians to account and ensures that citizens' interests are represented.<sup>133</sup>

According to international standards, right-to-information legislation should also cover the legislative branch of government. Where this is the case, parliaments should adopt the necessary measures to implement this legislation. This involves a number of issues, but some of the key steps include:

- Appointing individuals – information officers – within parliament with dedicated responsibilities to lead on implementation of the legislation, including by acting as a central point for the receipt and processing of requests for information;
- Adopting internal protocols for the processing of requests, including an obligation on all parliamentary officers to cooperate, as needed, with the information officer, so the latter can process requests within the time limits set out in the legislation;
- Ensuring that appropriate records management systems are in place so that information which has been requested can be located and provided promptly;
- Ensuring the necessary training is provided to information officers, as well as raising awareness more widely about this right among officers and members;
- Preparing an annual report on what has been done to implement this legislation.

<sup>132</sup> Toby Mendel, *Parliament and Access to information: Working for transparent governance* (2005: Washington D.C., World Bank), p. 7. Available at: [documents.worldbank.org/curated/en/704531468139797130/Parliament-and-access-to-information-working-for-transparent-governance](https://documents.worldbank.org/curated/en/704531468139797130/Parliament-and-access-to-information-working-for-transparent-governance).

<sup>133</sup> The Declaration was adopted by civil society parliamentary monitoring groups in 2012. Available at: [www.opengovpartnership.org/stories/introducing-declaration-on-parliamentary-openness](http://www.opengovpartnership.org/stories/introducing-declaration-on-parliamentary-openness).

Although the larger part of right-to-information laws is normally devoted to the issue of requests for information, many such laws also require public authorities, including parliament, to publish certain key information on a proactive basis. This is not only far more efficient – it takes a lot less time to post a document online, after which everyone who has an Internet connection can access it, than to process even one request for it – but it also fosters interest in parliament and its work, to the benefit of all.

Due to the power and importance of proactive publication, and to their leadership roles in society in general, parliaments should aim to be model actors in this area. This suggests that full use should be made of technology to drive proactive publication and that documents and other information should go online as soon as possible. The Accra Study Group adopted the following recommendation on proactive publication:

(8.4) Parliaments should provide the media with as much information as possible. Attendance and voting records, registers of Members' interests and other similar documents should be made readily available. Members have an obligation to update their entries in the register of interests and registers should be kept in such a way as to give a clear and current picture of both a Member's full interests and changes to those interests.

However, the *Declaration on parliamentary openness* goes much further, setting out a long list of types of information which should be disclosed proactively.<sup>134</sup>

This information should be available through different means, including online in open formats which individuals are free to reuse. Ideally, as much historical information as possible should also be provided, such as voting records of individual members, results of previous elections, versions of bills as they passed through parliament at various stages, all legal rules which are currently in force, regardless of when they were adopted, and so on.

As part of their broader commitment to transparency and operating generally in a democratic fashion, parliaments should ensure that draft legislation (bills) are made public, including online, as soon as they are formally submitted to parliament for consideration. Updated versions should be made available at each stage of the legislative process. Beyond that parliaments should, at least for legislation of general public interest, including any legislation that affects freedom of expression or the right to information, ensure that they engage in a process of genuine consultation whereby members of the public can provide inputs and comments on draft legislation before it is passed.

As part of its proactive transparency efforts, parliaments should either televise or be working to televise all of their debates, ideally live (see below, under Chapter 6: Parliaments and Other Social Actors, The media). These should be available both live and historically as podcasts over the Internet and this should also apply to committee meetings. All of these meetings should be open to the public. It may, in certain circumstances, be necessary to close a meeting for overriding confidentiality reasons, such as security or privacy, but in such cases better practice is to vote to close meetings and for such votes to be held publicly.

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<sup>134</sup> See clauses 13 – 26 of the *Declaration on parliamentary openness*, note 133.



Given the power that parliamentarians exercise, and the temptation for third parties to want to influence the exercise of that power, many parliaments impose special openness obligations on their members to help prevent or at least expose situations of conflicts of interest. These obligations may be imposed through legislation, standing orders or, increasingly, through codes of conduct. The specific codes vary considerably. Some focus only on financial transparency or conflict-of-interest issues, while others claim to establish wider frameworks of ethics, including general principles of behaviour and more specific rules.

### **Box 21: Core elements of the South African code of conduct**

The Parliament of the Republic of South Africa has adopted a Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members.<sup>135</sup> As the title suggests, it applies only to parliamentarians and is a wider framework of ethical rules for members. Clause 2.1, its first substantive provision, sets out the "minimum ethical standards of behaviour that South Africans expect of public representatives". Clause 2.3 describes the purpose as being to "create public trust and confidence in public representatives and to protect the integrity of Parliament".

The next clause, 2.4, sets out six general qualities which are expected of parliamentarians: selflessness, integrity, objectivity, openness, honesty and leadership, providing a few line description of each quality. Clause 4, titled Standards of Ethical Conduct, provides six further requirements, restated as follows:

- To abide by the Code;
- To uphold the law;
- To act at all times in accordance with the public trust placed in them;
- To discharge their obligations by placing the public interest above their own interests;
- To maintain public confidence, respect and trust in parliament;
- To be committed, in the performance of their duties, to the eradication of all forms of discrimination.

In terms of financial conflicts of interest, each member must resolve them in favour of the public interest, always declare them, where appropriate recuse him- or herself from any forum considering the matter, not accept any gift or reward that would create such a conflict, not use his or her influence to gain improper advantage, and not use non-public information gained through his or her position for personal advantage. In addition, no benefit may be received from an organ of State, and remunerated employment outside of parliament is permitted only where it is compatible with his or her functions, and when sanctioned by his or her party and where that sanction has been communicated to the Registrar of Members' Interests.

<sup>135</sup> Available at: [www.parliament.gov.za/code-conduct](http://www.parliament.gov.za/code-conduct).

Clause 9 includes a very extensive list of 13 types of interests that must be disclosed, which are elaborated upon in some detail. Some of these are confidential, while others are public. Among the confidential items are the amount of remuneration for employment outside of parliament, including directorships and partnerships, details about private residences and the value of any pensions. Anything that is not specifically listed as being confidential is made available to the public.

Fully one half of the Code is devoted to clause 10 on breaches and investigations. A complex process is set out for investigating and assessing breaches, which generally includes strong protections for the due process rights of the member concerned. Sanctions for breach of the disclosure parts of the Code range from being ordered to rectify the breach to a reprimand or to a fine of up to 30 days' salary. For breach of many of the other provisions, including the Standards of Ethical Conduct in clause 4 and the conflict-of-interest rules, the Committee shall not recommend one of the lower sanctions available for disclosure but may recommend "any greater sanction it deems appropriate" to the House, which shall decide on the matter.

All of the codes include an important focus on financial and conflict-of-interest disclosure issues. A CESifo Group report titled *Codes of conduct in national parliaments: Transparency* describes the purposes of the financial disclosure parts of these codes as follows:

Most codes aim to provide a clear view of all outside financial interests of officials. To this end, parliamentarians in some countries have to provide information on their income situation (e.g., Ireland, Denmark), on their professional activities (e.g., Luxembourg, Germany), on any property owned (e.g., Belgium and Portugal) and on any company stock owned (e.g., United Kingdom).<sup>136</sup>

Some of the key variants in terms of these codes, and in particular in relation to transparency, include:

- To whom they are applicable, such as parliamentarians only or also others, such as parliamentary officials;
- In terms of the conflict-of-interest rules, whether they simply require disclosure of a potential conflict or also the recusal of the person involved from any debate and decision-making on the matter concerned;
- Whether the financial disclosures are public or just made to an internal actor;
- What sorts of sanctions are available for breach of the code (noting that other sanctions are always available under other regimes, such as for breach of parliamentary privilege).

<sup>136</sup> In the CESifo DICE Report 3/2012 (Autumn), Ifo Institute, Munich, 2012, p. 84.

Available at: [www.cesifo-group.de/DocDL/CESifoDICEreport312.pdf](http://www.cesifo-group.de/DocDL/CESifoDICEreport312.pdf).

## Chapter 5

# Parliamentary immunity



Ciudadanos (Citizens) member of the Catalan Parliament Inés Arrimadas speaks in Parliament to debate on the jailed separatist leaders' right to be inaugurated in March 2018. © AFP/Lluís Gene, 2018

The core idea behind the doctrine of parliamentary immunity is that, to be able to function successfully as an institution, including to be able to represent the electorate, parliament needs to be independent from the executive and judicial branches of government. This usually takes the form of immunizing parliament and its members from legal suit and recognizing the power of parliament to run its own affair. Although this doctrine is often cast as a “privilege” of parliament, in fact the goal is to protect the rights of the public as a whole, rather than the immediate beneficiaries of the doctrine, through the effective functioning of their parliament and their representatives in it. Special protection for the free speech rights of parliamentarians, at least in parliament, is a central element of the doctrine of immunity but it goes well beyond this.

The notion of parliamentary privilege under the British or Westminster system of government has been described as follows:

Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively... and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law.<sup>137</sup>

This is an area where the practice of States varies, with a particularly clear fault line between the practice of countries following the British (Westminster) model and those following a civil law model (i.e. closer to the French approach). In the former, the doctrine was first given clear and concrete expression in Article IX of the 1689 Bill of Rights.<sup>138</sup>

In France, in contrast, the rights of citizens in general were established through a revolution, including the adoption of the *Declaration of the rights of man and of the citizen* on 26 August 1789.<sup>139</sup> Earlier, on 23 June 1789, the National Assembly declared that the person of each representative was inviolable, setting out the basis for immunity under the French system of government.

International courts have also recognized the importance of special protection for freedom of expression for parliamentarians. The European Court of Human Rights, for example, has stated:

An underlying aim of the immunity accorded to members of the lower house of the Irish legislature [is] to allow such members to engage in meaningful debate and to represent their constituents on matters of public interest without having to restrict their observations or edit their opinions because of the danger of being amenable to a court or other such authority.<sup>140</sup>

Flowing from these two traditions, two core ideas lie at the heart of parliamentary immunity, namely the concept of non-accountability and inviolability. The contours of these ideas, or doctrines, vary from country-to-country, sometimes considerably. There is a core protection for parliamentary free speech which is common to all systems but, beyond that, there is a range of approaches in both law and practice.

### **Box 22: The work of the IPU Committee on the Human Rights of Parliamentarians involving sanctions for speech**

In 2017 the IPU Committee examined cases involving attacks on the human rights of 507 parliamentarians from 41 different countries. Violations of freedom of expression were the third most common form of abuse after lack of a fair trial and undue suspension of the parliamentary mandate. Opposition party members of parliament accounted for the

<sup>137</sup> See Robert Marleau and Camille Montpetit, eds, *House of Commons procedure and practice, 2000 edition*, Chapter 3, quoting Erskine May, *A treatise on the law, privileges, proceedings and usage of Parliament*.

Available at: [www.ourcommons.ca/MarleauMontpetit/DocumentViewer.aspx?Language=E&Sec=Ch03&Seq=2](http://www.ourcommons.ca/MarleauMontpetit/DocumentViewer.aspx?Language=E&Sec=Ch03&Seq=2).

<sup>138</sup> Available at: [www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction](http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction).

<sup>139</sup> Available at: [www.historyguide.org/intellect/declaration.html](http://www.historyguide.org/intellect/declaration.html).

<sup>140</sup> See *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97, para. 75.

vast majority of these cases – 383 or 76 per cent – along with 10 independents and 114 members of the majority parties.<sup>141</sup> These figures are similar to those from 2015 and 2016.

## Inviolability

The concept of inviolability essentially derives from the idea that parliament cannot be subjected to scrutiny and oversight by the other branches of government, including the judicial branch, and, as a particular aspect of this, the idea that parliament has a right to secure the attendance of its members. As such, it provides protection for parliament from any civil, criminal or administrative law proceedings, and certain protection for members of parliament from the same, whether engaged in acts relating to their parliamentary mandates or not, unless prior consent to do otherwise is obtained from parliament. The essence of this doctrine is that neither the judiciary nor the executive (under which the police normally operate) can hold parliament to account.

The way inviolability works varies considerably from country to country. In countries following the Westminster model, where its equivalent is known as “exclusive cognizance”,<sup>142</sup> it is limited to the idea that parliamentary supremacy prohibits the courts from interfering directly in the affairs of parliament (or that parliaments have the right to regulate their own affairs). According to this idea, courts should tread very carefully when their actions may affect the “core functions” of parliament. Apart from the rule on non-accountability (or free speech), however, parliament and members of parliament are subject to the law.

Three privileges of individual parliamentarians are derived from the “core functions” theory: not to be arrested in civil actions (such as civil contempt of court actions or, in earlier times, actions for non-payment of a debt), not to be forced to appear in court as a witness, and not to be forced to serve as a juror (the latter two of which also apply to officers of parliament). These derive, in essence, from the idea that parliamentarians should be free to attend and participate in affairs at parliament. It may be noted that parliamentarians often waive their right not to appear as witnesses in criminal matters, so as not to obstruct the course of justice. Otherwise, parliamentarians may be subjected to criminal law procedures as accused persons, much as any other citizen, subject only to limited procedural rules (such as a requirement to inform the Speaker in case of arrest for a period of time or imprisonment upon conviction).

It may be noted that this represents relatively weak protection against possible interference in the work of parliament since parliament has little power in this system to prevent intrusion, for example by the police, into the work and activities of its members.

<sup>141</sup> An infographic showing this information is available at: [www.ipu.org/resources/publications/infographics/2017-12/violations-human-rights-mps-2017](http://www.ipu.org/resources/publications/infographics/2017-12/violations-human-rights-mps-2017).

<sup>142</sup> See Government of the United Kingdom, *Parliamentary Privilege*, April 2012, p. 10. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/79390/consultation.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/79390/consultation.pdf).

In many civil law countries, inviolability takes a much stronger form in relation to individual parliamentarians: that they cannot be arrested, prosecuted or, indeed, subjected to binding legal process, especially of a criminal nature, without the prior consent of parliament. Parliament should verify the legitimacy of the accusations and assess whether or not sufficient supporting evidence is present to warrant the legal proceedings. It should be stressed that this is not intended to create a form of impunity but, rather, to protect parliamentarians against interference with their rights by other branches of government. This gives parliament the power to assess whether the charges are fair and well founded. But, where they are, parliament should accept them and justice should then be done in the normal way. It also allows parliament to ensure that the member is able to fulfil his or her parliamentary duties as far as possible during the judicial proceeding.

This protection applies only to parliamentarians and only while the individual is a parliamentarian. It also often does not apply when the person is caught committing a crime *in flagrante delicto*, based on the idea that in this case there is no question about the veracity of the facts, although this can be abused.<sup>143</sup> Otherwise, there are numerous variations in the scope of this protection.

### **Box 23: Cases involving the lifting of parliamentary immunity**

Amadou Hama, former Speaker of the National Assembly of Niger and the leader of the opposition, had his parliamentary immunity lifted in August 2014 by the Bureau of the National Assembly, when parliament was in recess and without being given a preliminary hearing. Despite being held in detention at the time, Hama came second in the first round of the 2016 presidential elections. In March 2017, Hama was convicted in absentia and sentenced to one year in prison for aiding and abetting the concealment of newborns, together with about 30 other people. In March 2018, in a consensus decision, the IPU Governing Council expressed general concerns that Hama's defence rights were not respected in the lifting of his parliamentary immunity and held that his case had an "undeniable political dimension". Hama's conviction became final in April 2018 as a result of which he lost his mandate in June 2018.

The IPU Governing Council has also been very critical about the wholesale lifting of the parliamentary immunity of over one-quarter of all Turkish parliamentarians following an amendment to the Constitution of the Republic of Turkey to this effect in May 2016. As a result, instead of the earlier procedure, the cases were sent to the executive for immediate implementation, without it being necessary for them to be approved by parliament. Previously, parliament would hear each case separately, hear the concerned members, before either allowing the case to move forward or rejecting it.

In December 2012, the immunity of Chan Cheng, a member of the National Assembly of Cambodia, was lifted following a vote by parliamentarians. However, no debate was allowed and Cheng himself was absent from the Chamber. The IPU Committee on the Human Rights of Parliamentarians expressed concern that

<sup>143</sup> See Inter-Parliamentary Union, "Parliamentary immunity", September 2006, p. 16. Available at: [www.agora-parl.org/sites/default/files/UNDP-IPU%20-%20Parliamentary%20Immunity%20-%202006%20-%20EN%20-%20Parliamentary%20Institution.pdf](http://www.agora-parl.org/sites/default/files/UNDP-IPU%20-%20Parliamentary%20Immunity%20-%202006%20-%20EN%20-%20Parliamentary%20Institution.pdf).

“Cheng’s immunity was lifted, during his absence from Parliament, without any serious public examination of, or debate on, whether or not it was appropriate to lift his immunity”.<sup>144</sup>

In what could be seen as a victory for parliamentary immunity, proceedings against a number of parliamentarians from Chad – Mr. Saleh Kebzabo, Mr. Mahamat Saleh Makki, Mr. Mahamat Malloum Kadre, Mr. Routouang Yoma Gola and Mr. Gali Ngothé Gatta – were ultimately dismissed after parliament stood up for their immunity. The authorities had instituted proceedings against the parliamentarians in May 2013 after a coup attempt, including on the grounds that the crime had been committed *in flagrante delicto*. All parties in parliament came together to denounce the violation of parliamentary immunity, including a failure to respect the rules relating to *flagrante delicto*, the conditions for which had not been demonstrated. In February 2014, the investigating magistrate finally dismissed all of the proceedings against them.<sup>145</sup>

## The Key characteristics of non-accountability

The essence of non-accountability, which is primarily a free speech right, is that parliamentarians enjoy special protection for their right to freedom of expression in relation to their parliamentary mandates (“proceedings in parliament”, as per the 1689 Bill of Rights). This is virtually universal in scope, although the precise parameters of it vary from jurisdiction to jurisdiction.<sup>146</sup> The protection is absolute in two senses of that word: by covering any statement that a parliamentarian might make, and by providing protection against any sort of legal liability. It is, thus, an immunity in the proper sense of that word. However, there are a number of features, as well as variants, in the application of this doctrine.

### Scope of protection in terms of persons

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

In many countries, protection is also extended to bodies which officially, or mandatorily (i.e. at the behest of parliament), publish full reports of parliamentary debates. This has now in many countries been extended to broadcasts, whether radio or television, and also to direct Internet feeds from parliament. It may be noted that video reporting, at least, raises more difficult questions than documentary or oral reports, inasmuch as there is a lot more scope to introduce non-impartial coverage in this case. Parliamentarians may be shown in unflattering poses or with telling facial expressions, and it is even possible

<sup>144</sup> Case CMBD/27, 31 March – 4 April 2012.

<sup>145</sup> Cases CHD/06-10, 20 March 2014.

<sup>146</sup> For an overview of some statements about this right in different European jurisdictions, see *A. v. the United Kingdom*, note 140, paras. 37 – 57 (European Court of Human Rights).

to focus the camera elsewhere than on the person who is speaking. To address this, in many countries strict rules apply to the recording of live video content within parliament. In other cases, parliament does the recording itself and then makes it available to all interested broadcasters.

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

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

Where protection is based on the status of a person as a parliamentarian, that protection obviously falls once the person is no longer a parliamentarian. Therefore, the scope of protection in terms of statements only covers matters relating to the parliamentary mandate, and would not normally apply to former parliamentarians.

Countries vary considerably on the conditions under which the parliamentary mandate may be revoked, and which body enforces it. Parliaments normally have the power to take various measures against parliamentarians which may include expelling the member (i.e. relieving him or her of his or her parliamentary duties in such a manner that his or her seat or elected position becomes vacant, usually leading to a by-election). In some countries, another body regulates the issue of parliamentary incompatibilities (for example, in France, it is the Conseil d'Etat).<sup>147</sup> In some countries, imprisonment for a period of time, say for a year or more, or certain other actions which are deemed to be fundamentally incompatible with the office, such as holding an office in another branch of government, will lead either automatically or by convention to expulsion.<sup>148</sup> A number of countries also have rules on expulsion based on a parliamentarian's relationship with his or her party (see below under Political Parties). The IPU Committee on the Human Rights of Parliamentarians has always held that the revocation of a parliamentarian's mandate is a serious measure because it deprives a member of the possibility of carrying out the mandate entrusted to him or her, and that any decision to revoke a parliamentary mandate should only be made in full compliance with the law and on the basis of serious grounds.

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<sup>147</sup> The Conseil d'Etat is essentially the Supreme Court for administrative branch of the court system but it also advises the government on certain legal matters.

<sup>148</sup> Thus, in the United Kingdom, members are automatically expelled, pursuant to the Representation of the People Act 1981, if they are imprisoned for a year or more, if they are found guilty of illegal or corrupt electoral practices, pursuant to the Representation of the People Act 1983, where they have been found to be guilty of treason, pursuant to the Forfeiture Act 1870, and for holding certain incompatible offices, pursuant to the House of Commons Disqualification Act 1975.



## Scope of protection based on the nature of the statements

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

Therefore, some countries have restricted the scope of the non-liability so as not to cover insults, defamation, hate speech and racist remarks, threats or incitement to violence or crimes. Some countries also exclude from the scope of protection insulting the head of state, criticism of judges, disclosure of state secrets or remarks that are considered as treason.<sup>149</sup>

The validity of some of these limitations can be questioned. Thus, it seems absolutely central to the whole idea of non-accountability that defamatory statements, statements about the head of State and criticism of judges should be covered. The arguments in favour of protecting hate speech and incitement to violence may seem less persuasive, although even in this case parliament itself should retain the prerogative to sanction its members (see below under *Parliamentary powers to regulate speech*).

The European Court of Human Rights examined this issue in the context of an elected representative of the Vienna Municipal Council making statements before the Council. Because the body was sitting as the local council and not as the Land Parliament, the statements happened not to be protected by absolute privilege. The Court noted that protection for such statements had to be extremely robust:

Irrespective of whether the applicant's statements were covered by parliamentary immunity, the Court finds that they were made in a forum which was at least comparable to Parliament as concerns the public interest in protecting the participants' freedom of public expression. In a democracy, parliament and such comparable bodies are the essential forums for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein.<sup>150</sup>

In this case, the European Court held that the decisions of the domestic courts, which had imposed an injunction against further repetition of the statements by the applicant, represented a breach of her right to freedom of expression.

Many countries generally respect what is known as a *sub judice* convention, although there is normally no legal obligation to do so.<sup>151</sup> The substance of this is that care should

149 Parliamentary Assembly of the Council of Europe, *Parliamentary immunity: Challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly*, 23 May 2016, para. 11. Available at: [website-pace.net/documents/19895/2436341/20160524-ParliamentaryImmunity-EN.pdf/27e50a5a-5295-4b04-979d-75f4ebc03a91](https://www.pace.coe.int/documents/19895/2436341/20160524-ParliamentaryImmunity-EN.pdf/27e50a5a-5295-4b04-979d-75f4ebc03a91). See also Inter-Parliamentary Union, *Parliamentary immunity*, note 143, p. 11.

150 *Jerusalem v. Austria*, 21 February 2001, Application No. 26958/95, para. 40.

151 However, Article 138(3) of the 1982 *Constitution of the Republic of Turkey* states: "No questions shall be asked, debates held, or statements made in the Legislative Assembly relating to the exercise of judicial power concerning a case under trial." Available at: [https://global.tbmm.gov.tr/docs/constitution\\_en.pdf](https://global.tbmm.gov.tr/docs/constitution_en.pdf).

be exercised when discussing matters that are awaiting judicial decision and that they should not be the subject of motions or questions in parliament. The goal of this is twofold, namely to protect the rights of interested parties before the courts and to maintain respect for the separation of powers between parliaments and the judiciary, just as parliament expects the courts to do in respect of its work. Outside of parliament, such issues would normally be dealt with via contempt of court proceedings. The precise scope of this convention is not defined but is, in general, left to be determined by the Speaker. It is generally applied with discretion and on the understanding that, if there is a doubt as to where the balance of interests lies, a presumption should favour free speech.

For statements not made in parliament or a committee, the scope of protection is generally narrower in countries following the Westminster model. For example, under this model, the repetition of statements made in parliament outside of parliament is generally not deemed to be protected.<sup>152</sup> Communications with constituents are also generally not protected, although they may benefit from other forms of protection, such as qualified privilege in the context of defamation law.

Civil law countries have tended to interpret the scope of statements which fall within the parliamentary mandate more broadly, traditionally to include all expressive activity which is closely related to the political work of a parliamentarian. In some countries, the protection extends to meetings of political groups within the premises of parliament, on the basis that this relates to their ability to conduct their parliamentary business. In a small number of countries this even extends to statements by parliamentarians in the media. According to the report by the Parliamentary Assembly of the Council of Europe noted above, covering 32 Member States of the Council of Europe, 13 limit protection to the floor of parliament, committees or questions, while 19 provide for wider protection.<sup>153</sup>

#### **Box 24: Limits on protection: The UK expenses scandal**

In 2009, what has become known as the United Kingdom parliamentary expenses scandal emerged after records of expenses spending by parliamentarians were disclosed, revealing widespread wrongdoing. The scandal led to a number of criminal cases, as well as a large number of resignations, sackings and retirement announcements, along with a much larger number of public apologies and repayments of expenses.

Criminal cases were, among others, brought against four parliamentarians, three from the House of Commons – David Chaytor, Elliot Morley and Jim Devine – and one from the House of Lords – Lord Hanningfield – for false accounting on the basis that they had lied on the claims they had filed relating to their expenses. In turn, they challenged the jurisdiction of the courts in the cases on the basis of parliamentary privilege, both as derived from Article 9 of the 1689 Bill of Rights and from the doctrine of exclusive cognizance, arguing that oversight of the expenses was a core function of parliament.

<sup>152</sup> See, for example, *Buchanan v Jennings* [2005] 1 AC 115.

<sup>153</sup> Parliamentary Assembly of the Council of Europe, *Parliamentary immunity: Challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly*, note 149, para. 19

The case eventually went before the Supreme Court, which ruled that “neither article 9 nor the exclusive cognisance of the House of Commons poses any bar to the jurisdiction of the Crown Court to try these defendants.”<sup>154</sup> Among other things, the Court held that:

- It was up to the courts and not parliament to determine the scope of parliamentary privilege (paragraph 15).
- Submitting expense claims did not fall within the scope of “proceedings in Parliament” for purposes of article 9 (paragraph 62).
- Pursuing the criminal cases would not impact on the core business of parliament; it would only deter criminal behaviour (paragraph 48).

Despite the (generally) absolute nature of non-accountability, there may be cases where it is not possible in practice for parliamentarians to broach certain themes or issues, even within parliament. Where one party is particularly dominant, various forms of abuse of power may undermine the rules on non-accountability to the detriment of opposition parties and/or candidates. It may be difficult for opposition parties to engage in criticism or strong criticism of the governing party and its representatives and officials, or of other power structures, such as the military, even though this is technically perfectly legal. This is very problematic since the whole point of non-accountability is that parliamentarians should feel free to discuss any issue at all.

In other countries, there may be subjects which are simply taboo, such that social or other forms of pressure prevent parliamentarians from addressing them, even when this is otherwise legitimate. Some common themes falling within the scope of this include religious issues, ethnic conflicts, territorial conflicts, conflicts with neighbouring or other States, and/or separatist movements. While each individual parliamentarian needs to decide for him- or herself how best to deal with these situations, in general, engaging in censorship, particularly within parliament, regardless of how it transpires, is unlikely to be a productive way of addressing even a very difficult social problem. Instead, respectful debate about issues is likely to cause underlying problems to surface, which opens the door to resolving them.

## Legal scope of protection

In general, the legal scope of protection for statements which are covered by non-accountability, as described above, is absolute. This rules out civil, administrative or legal proceedings in respect of those statements. Thus, one may not be subject to civil suit for defamation, criminally prosecuted for hate speech or held administratively responsible for broadcasting content which breaches an established code of conduct for broadcasters.

When the scope of protection has been challenged, even in the context of statements causing grave harm and manifesting little public interest value, courts have almost always protected the speech in question. A high water mark of this is perhaps the case

<sup>154</sup> *R v. Chaytor and others* [2010] UKSC 52, paragraph 93.

of *A. v. the United Kingdom*, before the European Court of Human Rights. In that case a parliamentarian had, in parliament, accused the applicant, naming her specifically, of being a “neighbour from hell” and of a range of grossly anti-social behaviour, allegations of which he apparently never attempted to verify the accuracy. Despite recognizing this, the Court upheld the sanctity of non-accountability, stating:

The Court agrees with the applicant’s submissions to the effect that the allegations made about her in the MP’s speech were extremely serious and clearly unnecessary in the context of a debate about municipal housing policy. The MP’s repeated reference to the applicant’s name and address was particularly regrettable. The Court considers that the unfortunate consequences of the MP’s comments for the lives of the applicant and her children were entirely foreseeable. However, these factors cannot alter the Court’s conclusion as to the proportionality of the parliamentary immunity at issue, since the creation of exceptions to that immunity, the application of which depended upon the individual facts of any particular case, would seriously undermine the legitimate aims pursued.<sup>155</sup>

### **Box 25: Redressing the imbalance caused by non-accountability**

That parliamentarians benefit from an absolute right to say whatever they wish in parliament can lead to injustice. In particular, it allows a parliamentarian to make any allegation whatsoever about an individual, without that person having any formal right of redress, whereas otherwise individuals would have various forms of redress for statements made by others about them, most notably to sue in defamation (but also often for complaints systems against the media, commercial remedies and so on).

To address this, on 27 August 1997 the Australian House of Representatives adopted a motion<sup>156</sup> which allows citizens or residents of Australia to apply for a right to have their responses included in the parliamentary record (normally via publication in the record of parliament or Hansard). The substantive conditions for making such an application are that the person has been named or is readily identifiable from a statement made in the main legislative chamber and that his or her reputation, privacy, dealings with others, or occupation or trade have been adversely affected.

A number of procedural rules apply, including:

- The application must be made in writing to the Speaker, normally within three months of the original statement, by a natural person (i.e. not a legal person such as a corporation).
- The Speaker may reject an application on the basis that it is too trivial, frivolous, vexatious or offensive to warrant further consideration. Otherwise, the Speaker must refer it to the Committee of Privileges and Members’ Interests, which deals with issues of privilege.

<sup>155</sup> Note 140, para 88.

<sup>156</sup> The original motion, which was amended on 13 February 2008, along with the Guidelines adopted there under, are available at: [www.aph.gov.au/Parliamentary\\_Business/Committees/House/Privileges\\_and\\_Members\\_Interests/Right\\_of\\_Reply](http://www.aph.gov.au/Parliamentary_Business/Committees/House/Privileges_and_Members_Interests/Right_of_Reply)

- The Committee may decide not to consider an application on the basis that it is not sufficiently serious or on the basis that it is frivolous, vexatious or offensive, and report this to the House.
- The Committee may confer with the claimant and the member concerned, but may not judge the truth of either the application or the statements giving rise to it.
- The Committee may recommend to the House only either that no further action be taken or that a response by the applicant be published.
- Any other remedies that may be available – for example the power of a member of a state parliament to respond within that parliament – will be taken into account.<sup>157</sup>

Non-accountability also generally allows parliamentarians to avoid responsibility for exposing confidential information, whether this is protected by law (for example under an Official Secrets Act, such as apply in many former British colonies) or a court injunction (for example, related to reporting on an ongoing case).<sup>158</sup>

## Parliamentary powers to regulate speech

That parliamentarians benefit from absolute protection against legal suit for what they say inside parliament does not mean that they may say whatever they wish. To this extent, the term “non-accountability” may be misleading. It simply means that parliamentarians may not be held accountable in a court of law.

Parliament itself, however, normally retains the ability to regulate its own proceedings, and this extends to the matter of disciplining members for statements which fail to meet the standards expected of them. The precise scope of this varies considerably from country to country, including the nature of the sanctions that may be imposed. These may include calling a member to order, censuring a member, requiring a member to stop speaking, requiring a member to apologize, requiring a member to leave the legislative chamber or the premises of parliament altogether, either for the rest of the day or for a specified period of time (suspension, during which time the salary may also be suspended), or expelling them from parliament. Under the Westminster approach, parliaments even have the power to imprison individuals.<sup>159</sup>

A range of speech-related actions may be deemed to undermine the ability of parliament to function. It should be noted that, in the approach of most parliaments, the rights of the collective, i.e. parliament itself, trump the rights of individual members, i.e. parliamentarians. Where a true conflict exists, this makes sense. However, there can be instances where the party(ies) which control parliament claim there is a conflict when in fact none exists and the situation is just one of harsh criticism by opposition parties.

<sup>157</sup> See Factsheet 17 – “Citizen’s right of reply”. Available at: [www.aph.gov.au/About\\_Parliament/House\\_of\\_Representatives/Powers\\_practice\\_and\\_procedure/00\\_-\\_Infosheets/Infosheet\\_17\\_-\\_Citizens\\_right\\_of\\_reply](http://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_17_-_Citizens_right_of_reply).

<sup>158</sup> As a high water mark of this see *Denis O’Brien v. Clerk of Dáil Éireann*, 31 March 2017,

Record No: 2015/4888P (Irish High Court). Available at: <https://static.raset.ie/documents/news/brien-v-clerk-of-dail-eireann-ors.pdf>.

<sup>159</sup> This power normally only pertains until the end of the session. In other words, parliament can only imprison someone until the period demarcating the end of the session. See Robert Marleau and Camille Montpetit, note 137, under Power to discipline.

It is clear that disruptive behaviour in parliament, including disruptive speech-related behaviour (such as shouting or unduly heckling) falls within the scope of breach of privilege and, as a result, opens up the person responsible to the range of disciplinary actions that happen to be available. In practice, warnings are often enough to control this sort of behaviour and are always the only measure applied. It is also common for parliaments, normally via the Speaker, to control irrelevant or unduly lengthy speeches by members, so as to allow the legislature as a whole to get on with its business.

The premature disclosure of official parliamentary (or committee) reports and other documents is another breach of privilege which may be punished, although often in such cases the individual responsible leaks the document confidentially and so cannot be identified. However, an issue arises as to whether only the parliamentarian who was responsible for the primary leak should be held responsible or also any third parties who publish the information. According to the *Recommendations for Transparent Governance* adopted by the Study Group on Access to Information which met in Accra, Ghana, from 5 to 9 July 2004, only the parliamentarian should be held responsible:

(6.4) Where confidential parliamentary documents are leaked in breach of Standing Orders, the Group believes it is a matter for Parliament to deal with Members who commit the breach but not journalists who are recipients of the information. However, it noted that leaks would become less relevant if parliamentary procedures, especially committee proceedings, were more open to the media.

Claims by parliamentarians that statements either by other members or outside speakers, such as the media, have undermined their ability to function effectively as parliamentarians are rarely entertained in democracies today, although history is replete with examples of this. As the *Recommendations for Transparent Governance* adopted by the Accra Study Group stated:

(6.3) Inaccurate reporting by the media should not be considered as a contempt of Parliament. Contempt should be reserved for serious cases of interference with Parliament's ability to perform its functions.<sup>160</sup>

In essence, parliamentarians are expected to have thick skins and to tolerate the free speech of others, just as their own right to free speech is specially protected. Where tempers flare and statements on the floor of the legislative chamber become unduly heated, the best approach is often for the Speaker to issue either a general warning, in an attempt to cool down the discussion generally, or to caution one or more individual members, if they need to rein in their rhetoric. Thus, mild measures to address speech which fails to show due respect for other members, is sexist or racist or is otherwise unduly rude and disrespectful, are common (see Box 26).

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<sup>160</sup> Note 132.

## Box 26: Dealing with offensive speech: The Table

*The Table: The Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments*<sup>161</sup> is an annual publication devoted to parliamentary matters. In each edition, it has a section on Unparliamentary Expressions from around the Commonwealth – phrases which Speakers objected to in those jurisdictions.

Some of the expressions which were reported as being “unparliamentary” in the 2017 edition of *The Table* include:

- “Female members from the opposition always talk the loudest while a female member of the government is on her feet.” (New Zealand House of Representatives)
- “Neither male, nor female. The situation falling between the two – that has become the fate of hon’ble Parliamentary Affairs Minister.” (Rajasthan Legislative Assembly)
- “You have put headphones on ears, just remove them and listen to us.” [aspersion on the chair] (Indian Lok Sabha)
- “Members opposite do not have a hot, frigging clue what they’re talking about.” (Canada, Manitoba Legislative Assembly)
- “Treated us all like mushrooms – kept us all in the dark and fed us crap.” (Australia, Queensland Legislative Assembly)

In an effort to concretize the obligations of parliamentarians, a number of parliaments have adopted codes of conduct for their members, although this remains relatively rare.<sup>162</sup> As mentioned earlier, an important focus of these documents is on conflicts of interest, including financial probity and transparency.<sup>163</sup> At the same time, some of the references in these codes could be taken to refer to obligations on parliamentarians to avoid engaging in speech that would otherwise be illegal, for example because it constituted hate speech, was gratuitously defamatory or unnecessarily invaded the privacy of an individual. For example, the first clause of the *Irish Code of Conduct for Members of Dáil Éireann other than Office Holders*, which is aimed at parliamentarians, refers to the need for members to “maintain the public trust placed in them” while the second is intended to ensure that their conduct does not “bring the integrity of their office or the Dáil into serious disrepute”.<sup>164</sup>

<sup>161</sup> Nicolas Besly, ed., 2017. Available at: [www.societyofclerks.org/SCAT\\_Publish.asp](http://www.societyofclerks.org/SCAT_Publish.asp).

<sup>162</sup> For example, in 2013, the Association of Accredited Public Policy Advocates to the European Union reported that only eight European Union countries had codes for parliamentarians. See Codes of Conduct for Parliamentarians. Available at: [www.aalep.eu/codes-conduct-parliamentarians](http://www.aalep.eu/codes-conduct-parliamentarians).

<sup>163</sup> For example, the 2011 report *Parliamentary ethics: A question of trust*, by the European Union Office for Promotion of Parliamentary Democracy, focuses heavily on these issues to the detriment of other ethical issues which might be addressed. Available at: [www.parliament.cat/document/intrade/59368](http://www.parliament.cat/document/intrade/59368).

<sup>164</sup> 2011. Available at: [https://webarchive.oireachtas.ie/parliament/media/committees/membersinterests/non-office-holding-deputies\\_code-of-conduct.pdf](https://webarchive.oireachtas.ie/parliament/media/committees/membersinterests/non-office-holding-deputies_code-of-conduct.pdf).

To reduce partisanship in the application of the Code of Conduct for Members of Parliament, the UK House of Commons Committee on Standards is comprised not only of representatives from different parties, as is common for all committees, but it also counts seven lay members (i.e. individuals who are not parliamentarians) among its 14 members.<sup>165</sup> This helps ensure that, when ethical issues are raised, perspectives other than just those of parliamentarians are brought to bear.

A serious problem with the application of disciplinary powers from a free speech point of view is the lack of control over the way that they are applied, both procedurally and institutionally. Given the nature of the sanctions applied in these cases, they fail to meet basic human rights standards, both as regards criminal cases and procedural requirements when restricting freedom of expression (see Box 27). At a minimum, they fail to guarantee the right of an appeal, as mandated in criminal cases by Article 14(5) of the ICCPR. The IPU Governing Council has held that where parliaments retain the power to sit as courts, the right of appeal to a “higher tribunal” must be respected.<sup>166</sup>

### **Box 27: Excessive parliamentary sanctions against parliamentarians**

In a case from Fiji, parliamentarian Tupou Draunidalo was subjected to a long-term suspension of her mandate for accusing the Minister of Education of being a fool for “calling us ‘dumb natives, you idiot’”. Although the matter was not addressed by the Speaker at the time, it was later determined that these statements represented both a breach of the privileges of parliament and a contempt of parliament. Draunidalo was ordered to apologize and had her mandate suspended until the end of the term of that parliament. A consensus decision by the IPU Governing Council held that the suspension was “wholly disproportionate” and that “although Ms. Draunidalo could have responded differently to the situation at hand, her words fall squarely within her right to freedom of expression”.<sup>167</sup>

The case of Malalai Joya, a female parliamentarian from Afghanistan, raises not only freedom of expression issues but also that of gender discrimination. Joya was suspended for the remaining three years of her mandate for refusing to apologize for making disparaging remarks about parliament on a television show. The Supreme Court refused to act on her complaint about the suspension, while parliament subsequently brought a legal case against her for insulting public institutions, based on the same statements. In contrast, male parliamentarians who made highly offensive comments about her were merely reprimanded. The IPU Governing Council unanimously condemned the failure of parliament to redress the injustice done to Joya by expelling her without any legal basis and by discriminating against her.<sup>168</sup>

<sup>165</sup> See [www.parliament.uk/business/committees/committees-a-z/commons-select/standards/membership/](http://www.parliament.uk/business/committees/committees-a-z/commons-select/standards/membership/).

<sup>166</sup> See the “Resolution of the IPU Governing Council on the case of Mr. Roy Bennett and others”, October 2004. Referenced in Inter-Parliamentary Union, *Parliamentary Immunity*, note 143, p. 12.

<sup>167</sup> Case FJI/02, 27 October 2016.

<sup>168</sup> Case AFG/01, 6 October 2010.



Haneen Zoabi, a parliamentarian from Israel, had her right to make statements in parliament suspended for six months, the maximum allowed under the law, for stating on radio that, while she did not agree with them, she could understand why people living in the West Bank had abducted three Israeli teenagers. It subsequently emerged that the teenagers had been killed, but Zoabi did not know that when she made the statements. The Attorney General refused to investigate whether the statements represented the crime of incitement to kidnapping, on the basis that they clearly did not qualify as such. On the other hand, the High Court of Justice refused to strike down the suspension, despite its “unusually severe” nature, based on the statements, the timing, the fact that much of the suspension was during recess time and the broad discretion of the Ethics Committee which had imposed it. In its Decision, the IPU Committee on the Human Rights of Parliamentarians expressed regret about Zoabi’s suspension for “having exercised her right to freedom of speech by expressing a political position”.<sup>169</sup>

Depending on the circumstances, there may also be serious questions about whether the Speaker represents a “competent, independent and impartial tribunal”, as required by Article 14(1) of the ICCPR. While many Speakers certainly have an admirable set of qualities, knowledge of the intricacies of criminal procedure and rights are often not among them. Furthermore, even the most independent Speaker still (normally) belongs to one or another political party and is a player in the process of parliament, and hence lacks the characteristics of independence which we expect of courts. Other elements which may be lacking, depending on the exact procedures, are a robust presumption of innocence (Article 14(2) of the ICCPR); adequate time to prepare one’s defence (Article 14(3)(b) of the ICCPR); the right to examine witnesses (both for and against the defendant) (Article 14(3)(e) of the ICCPR); and the right of an accused person not to be compelled to testify against him- or herself (Article 14(3)(g) of the ICCPR).

These features are perhaps particularly troubling where parliaments use their powers to censure Speakers from outside of parliament, given the abuse to which this obviously lends itself and, in particular, the natural tendency of parliaments to wish to insulate themselves against criticism. At a Seminar in 2005 on freedom of expression, parliament and the promotion of tolerance, organized by the IPU and the NGO Article 19, the concluding recommendations of the Rapporteur of the Seminar stated:

As public figures, we must show greater tolerance to criticism and show restraint. A public response to criticism is most appropriate, rather than resorting to the justice system.<sup>170</sup>

There is clearly merit to this suggestion.

<sup>169</sup> Case IL/05, 24 – 27 January 2015.

<sup>170</sup> Seminar for Chairpersons and Members of Parliamentary Human Rights Bodies on Freedom of Expression, Parliament and the Promotion of Tolerant Societies, 25 – 27 May 2005. Available at: [archive.ipu.org/splz-e/sfe/conclusions.pdf](http://archive.ipu.org/splz-e/sfe/conclusions.pdf).

## Box 28: Procedural protection for free speech of parliamentarians

The case of *Karácsony and Others v. Hungary*,<sup>171</sup> before the European Court of Human Rights, demonstrates the very strong procedural protection for freedom of expression of parliamentarians, even vis-à-vis sanctions imposed by parliament. In that case, the applicant – members of the national parliament – had all been fined by parliament, after a proposal to this effect by the Speaker, for placing, respectively, a placard and banner with political messages in the centre of the chamber, while one applicant had used a megaphone in parliament. The fines were relatively modest, with the largest being about 600 euros, representing one third of the individual's monthly salary.

The Hungarian Constitutional Court upheld both the procedure, despite this offering no opportunity to appeal against the original decision, and the sanction, even though it represented one of the more severe sanctions available under the rules.

A Grand Chamber of the European Court noted that a survey of COE Member States suggested that 24 did not provide for any remedy in case of disciplinary measures being imposed on parliamentarians, while 14 did, mostly involving an internal objection procedure (para. 61). It recognized the difference between the substance of speech and the way in which it was communicated and, in particular, the disruptive impact of the megaphone (para. 149). However, freedom of expression demands that restrictions on free speech be accompanied by safeguards against abuse, which were missing in this case. The nature of these safeguards may depend on the situation and be less onerous in a context where immediate measures were needed, for example to prevent an ongoing disruption. In a case such as this, however, where the measures were applied ex post facto, at a minimum the parliamentarians should have been afforded a right to be heard (para. 156) and given reasons for the imposition of disciplinary measures (para. 158). Since neither was present in this case, it was a breach of the right to freedom of expression.

## Political parties

Political parties play an extremely important, indeed dominant, role in most modern parliaments. They serve to aggregate opinion, creating the possibility of coherent electoral platforms and indeed governing programmes. They also enhance the engagement of citizens in elections by providing clear and centralized policy programmes spearheaded by visible and relatively better-known leaders. It is fair to say that it is parties rather than individual candidates (from the same parties) which dominate electoral choices on the part of members of the public, even in first-past-the-post voting systems, let alone those based on proportional representation.

The relationship between parties and their elected representatives (members of their caucus) is in most cases set out primarily in the internal rules and workings of each party. It is key to the whole idea of a party that it be able to command the loyalty of its membership, and so every party has rules to ensure that. There will normally be

<sup>171</sup> Applications Nos 42461/13 and 44357/13, 17 May 2016

provision for various disciplinary measures for members who breach the rules, as well as procedures for applying these measures. The measures will normally include the power to suspend a member, for example pending determination of an allegation of wrongdoing, such as sexual impropriety, and, in extreme cases, to expel a member, for example where the member has not sided with the party on an important vote.

All of this is perfectly normal and is also a protected exercise of the right to freedom of association. At the same time, there are important arguments in favour of protecting the freedom of parliamentarians vis-à-vis their parties, including the idea that parliamentarians should ultimately be free to represent their constituents in accordance with their own appreciation of what is the best policy and decision at any particular time. This idea, which derives in part from the notion of a free parliamentary mandate, also has strong human rights roots, including in the freedoms of expression and association.

In some countries, legislation sets important rules governing the relationship between parties and members of their caucuses. A 2011 study by the IPU, *The Impact of Political Party Control over the Exercise of the Parliamentary Mandate*,<sup>172</sup> focused on the rules on termination of the parliamentary mandate based on relations between a parliamentarian and his or her party in 162 countries. Forty-two of the countries, or roughly 25 per cent, have legal rules that create implications for retention of the parliamentary mandate based on relations with the party.

The most common rule, applicable in 33 of the countries, is that a change of party membership following the election – whether due to the choice of the parliamentarian or of the party – leads to loss of the parliamentary mandate. This can also include cases where someone elected as an independent joins a party. However, in five countries, merely voting against the party's directives can lead to the loss of the mandate while, in three, even abstaining against the party's directives has this effect.

It may be noted that the last two cases can be seen not only as a denial of the rights of the parliamentarian but also of the party, since it has no control over the issue of whether or not a member of its caucus is removed from parliament. In particular, in these cases, the individual would be removed from parliament regardless of whether or not the party chose to expel him or her. In other words, in these cases (removal simply for voting or abstaining against party directives), both the individual parliamentarian and the party can be said to have been disempowered. As a result, this approach hardly makes any sense.

The more difficult case is where either the individual leaves the party or the party expels him or her. The IPU Committee on the Human Rights of Parliamentarians has taken a clear position on this, stating:

It cannot accept, in the light of the provisions of Article 19 of the ICCPR, that mere expression of a political view can lead to such a serious sanction as loss of the parliamentary mandate.<sup>173</sup>

172 Zdzisław Kędzia and Agata Hauser, "The impact of political party control over the exercise of the parliamentary mandate", 2011.

Available at: [archive.ipu.org/conf-e/129/control-study.pdf](https://archive.ipu.org/conf-e/129/control-study.pdf).

173 Ibid., p. 21.

The resolution of any particular case on this issue may require a closer examination of all of the circumstances, including the electoral system as a whole and, in particular, the way that seats are allocated in the first place. Certainly the idea of terminating the parliamentary mandate based on relations with a political party in a first-past-the-post system seems hard to justify.

Another consideration is the possibility of abuse of these sorts of rules, as illustrated in the case outlined in Box 29.

### **Box 29: Termination of the parliamentary mandate in the Maldives**

One of the issues raised in Case MDV16-78 from the Maldives before the IPU Committee on the Human Rights of Parliamentarians was the question of whether the termination in 2017 of the mandates of 12 parliamentarians who had defected from the ruling Progressive Party of Maldives (PPM) was legitimate. There were a number of suspicious circumstances surrounding the termination. Despite a number of floor crossings since 2014, only these 12 parliamentarians had their mandates terminated. The termination was effected just as a no confidence vote which depended on the votes of these members was before parliament, and the Supreme Court ruling ratifying the terminations was adopted just three days after the matter had been presented to the Court.

An IPU delegation mandated by the Committee on the Human Rights of Parliamentarians carried out a mission to the Maldives from 19 to 21 March 2018. In its preliminary observations, the delegation stated that there were clear indications that the termination was “arbitrary” and called on the authorities to allow the 12 members to take their seats in parliament as soon as possible.<sup>174</sup>

An interesting case from Togo, emanating from events following the 2010 elections, illustrates another way this can play out. Twenty parliamentarians, elected under the banner of the Union of Forces for Change (UFC) opposition party, left that party and formed a new political party called the National Alliance for Change (ANC). In accordance with established practice at the time, the members had given their original party undated blank letters of resignation as a condition of being included in its electoral rolls. Following their resignations, these letters were forwarded by the Speaker to the Constitutional Court, which vacated their seats, without the members concerned ever having been given a chance to be heard. In due course, and after discussions involving the IPU Committee on the Human Rights of Parliamentarians, the members were compensated and the Standing Orders were amended to provide explicitly that a resignation letter of a member could only be relied upon if it emanated from and was handed in by the resigning member.<sup>175</sup> This should go some way to preventing abuse of this practice in future.

<sup>174</sup> As reported in the Decision adopted unanimously by the IPU Governing Council at its 202nd session, Geneva, 28 March 2018, note, pp. 7 – 8.

<sup>175</sup> Cases TG05-13, 24 – 27 January 2015.

## Chapter 6

### Parliaments and other social actors



Members of the press hold images of colleagues during a protest in Mexico City in June 2018 against the murder or disappearance of journalists in Mexico. © AFP/Yuri Cortez, 2018

This chapter looks at some of the specific aspects of relationships between parliaments and their members and three other sets of social actors: the media, officials and political parties. In each case, there are certain expectations on both sides, and some established better practice as well as, in some cases, legal requirements flowing from the guarantee of freedom of expression under international law.

# The media

In most countries the legacy media – i.e. newspapers, radio and television – remain the most important sources of news for most citizens, although this is certainly starting to change with the steady growth in access to and use of social media. This section addresses two main issues. The first is the question of media access to parliament, including the all-important question of accreditation. The second looks at wider relationship issues such as tolerating criticism and the love-hate relationship (parliamentarians love the access media gives them to citizens but hate the fickle nature of that access and the control the media exercise in relation to it, as well, sometimes, as media criticism).

## Access and accreditation

Media access to parliament, including the issue of accreditation, is crucially important given that the media provide something of a two-way communication channel between parliament and its members and the public. For parliament and its members, and of course for candidates in elections, the media is an essential tool for getting messages out to citizens. For citizens, the media are equally essential as a means for ensuring they know what parliament is doing, the role of individual members, and of course the specific positions of parties and candidates during elections.

The parliamentary Study Group on Access to Information, which met in Accra, Ghana, in July 2004, placed some emphasis on the importance of media access in its report, *Parliament and access to information: Working for transparent governance*, as follows:

Media access to Parliament is also of the greatest importance. Parliamentary sessions and committee meetings should be open to the media, including the broadcast media. In addition, active efforts should be made to promote greater and smoother interaction between the media and Parliament. Facilities should be provided in or near Parliament for the media, so that they have the support they need to report effectively. Many Parliaments have special committees, such as Nigeria's Media and Public Affairs Committee, to promote good relations with the media. In India, Parliament conducts a 10-day special media interaction each year, where special efforts are made to promote two-way flows of information and better understanding between Parliament and the media. These allow for more profound interaction than one might expect during a press conference. Media efforts should not be restricted to outlets based in the capital; efforts should be made to promote access for the local media as well.<sup>176</sup>

A similar idea is reflected in the Group's *Recommendations for transparent governance*:

(8.1) Parliaments should provide as a matter of administrative routine all necessary access and services to the media to facilitate their coverage of proceedings. Parliament should not use lack of resources as an excuse to limit media access and should use its best endeavours to provide the best facilities possible.

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<sup>176</sup> Note 132, p. 33.

And again in Principle 29 of the *Declaration on parliamentary openness*:

### **29. Guaranteeing Access by the Media**

Parliament shall ensure that the media and independent observers are given full access to parliamentary proceedings; the criteria and process for providing media access shall be clearly defined and publicly available.

Beyond the core idea of ensuring media access to parliament, Recommendation 8.1 refers to two further ideas. First, a lack of resources should not be used as an excuse to limit media access. The core idea here is that parliament needs to have the necessary physical facilities to allow for reasonable access, i.e. it needs to have sufficiently large public galleries, including for committee meetings, to enable appropriate public access. Of course there may be some cases where heightened public interest in a matter being debated means that not everyone will be able to attend. This is why it is necessary to provide for special accreditation for media representatives, so that they will always have access even in such situations.

The second idea goes beyond the mere notion of access and calls on parliament to provide the “best facilities possible” for media representatives. Although technology has started to overcome this, journalists need more than just access to be able to report effectively from parliament. At a minimum they need Internet access, but other facilities, like office space and furniture, can also facilitate their reporting work. Access to sessions is important, but in many cases they are also given access to parliamentarians in general, obviously subject to the willingness of those members to speak to them. This may require physical access to parts of parliament beyond just the main chamber and committee rooms.

Special rules on media access to parliament, and especially access which is privileged over ordinary citizens, including where parliament provides the media with access to special facilities, may look like a form of bias towards the media. However, here, as in the case of protection of sources (see under *Regulation of Journalists, Protection of Sources*), what is really being protected is the public right of access. If the media do not have special (protected) access to parliament and, as a result, are unable to report from there, the real consequence will be that all of their readers, listeners and viewers – i.e. ultimately the public as a whole – will be deprived of access.

As has already been noted, there is a strong trend towards ensuring that the proceedings of both the full parliament and its committees are normally broadcast, ideally live as well as over the Internet. The Accra Study Group on Access to Information included detailed standards about this in its *Recommendations for transparent governance*:

#### **(8.8) Electronic media in Parliament**

(8.8.i) Given the importance of broadcast and other electronic access to the proceedings of Parliament both in Chambers and committees, Parliament should either provide an uninterrupted feed or access for broadcasters to originate their own feed, if appropriate on a pool basis. Guidelines for electronic coverage should be as flexible as possible.

- (8.8.ii) Guidelines for electronic coverage should ordinarily be put in place in consultation with broadcasters. Terms of availability should not be discriminatory between different media outlets and access to such feeds should not be used for censorship or sanctioning.
- (8.8.iii) Parliaments should be encouraged to provide live coverage of their proceedings on a dedicated channel and/or online.

There are a number of key elements here. First, access may be provided either by allowing broadcasters to create their own feeds or by providing access to a feed prepared by parliament. However the system works, access to feeds should be non-discriminatory. In many cases, parliament either provides its own feed or contracts a private operator to provide a feed, and then makes this available on equal terms to all broadcasters. As technology develops, it is increasingly easier to let individual broadcasters create their own feed. Second, better practice is to create a dedicated channel, which in some countries is operated by the public broadcaster, to cover parliament. This should be accompanied by making this feed available online. Third, this should cover both the main chamber of parliament and committees.

Fourth, while it is appropriate to have guidelines for this coverage, for example to ensure that the coverage is politically balanced, the guidelines should be relatively light-touch in nature and should be developed in consultation with broadcasters. The guidelines should, in particular, focus specifically on issues relating to broadcast, and particularly television, coverage of parliament. Wider issues of media standards should not be included in these sorts of guidelines. As the Group's Recommendations noted:

- (8.6) The development of professional and ethical standards for journalists is a matter for the media. Integral to this is the media's responsibility to ensure that a journalist's private interests do not influence reporting.

So far, the comments on media access have focused on granting access to those media that are specially engaged in covering parliament. The Accra Group went beyond this, to suggest that parliaments should actively reach out to the media and try to stimulate interest from a wider range of media outlets, and even more generally to the public:

- (8.3) Parliaments should employ public relations officers to publicize their activities, especially to the media which do not cover Parliament, and education staff to run outreach programmes to stimulate interest in parliamentary democracy. Both services should operate in an apolitical way under guidelines set by the House.



To provide privileged access to parliament for journalists, including access to facilities to support reporting, parliaments need to have some sort of system for accrediting journalists, i.e. for deciding who will have access to those privileges. Although it is not legitimate to license journalists, this does not apply to accreditation systems which aim to ensure journalistic access to limited space venues, of which parliament is a leading example. In paragraph 44 of its 2011 General Comment No. 34, the UN Human Rights Committee stated:

Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.

The special international mandates on freedom of expression made a very similar point in their 2003 Joint Declaration:

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

Accreditation should never be subject to withdrawal based only on the content of an individual journalist's work.

These statements variously make reference to the need for accreditation systems to be non-discriminatory, fair, based on objective criteria and overseen by an independent body. Box 30 highlights the stringent nature of these standards, as illustrated by a case before the UN Human Rights Committee in which even an accreditation system in Canada, overseen by a private body, was not deemed to pass muster.

The last statement in the quotation from the 2003 Joint Declaration, above, highlights the need to avoid linking accreditation to the work of an individual journalist, with a view to avoiding accreditation systems being used as levers of control. This has also been highlighted by the OSCE:

Recalling that the legitimate pursuit of journalists' professional activity will neither render them liable to expulsion nor otherwise penalize them, [member States] will refrain from taking restrictive measures such as withdrawing a journalist's accreditation or expelling him because of the content of the reporting of the journalist or of his information media.<sup>177</sup>

<sup>177</sup> Conference on Security and Co-operation in Europe, Follow-up Meeting 1986 – 1989, Vienna, 4 November 1986 to 19 January 1989, Concluding document, para. 39. Available at: [www.osce.org/mc/40881](http://www.osce.org/mc/40881).

### Box 30: The need for accreditation systems to be scrupulously fair

A case decided by the UN Human Rights Committee in 1999 held that the system for accrediting journalists to Parliament in Canada represented a restriction on freedom of expression which did not meet the standards required under Article 19(3) of the ICCPR. The system was overseen by a private association, the Parliamentary Press Gallery. The Speaker had recognized the Gallery for the purpose of accrediting media representatives to parliament, and had pursued a policy of strict non-interference in its work.

The applicant had been refused full membership of the Gallery, and as a result full accreditation status, in part due to a lack of clarity about the regularity with which his newspaper was published, a condition for full Gallery membership. He had never been prevented from accessing parliament, but did not have access to the same rights and facilities as full members of the Gallery.

The Committee recognized that a system of accreditation was needed in these circumstances but held that the existing system breached the applicant's right to freedom of expression, noting:

The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. In the instant case, the State party has allowed a private organization to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there will be no arbitrary exclusion from access to the Parliamentary media facilities. In the circumstances, the Committee is of the opinion that the accreditation system has not been shown to be a necessary and proportionate restriction of rights within the meaning of article 19, paragraph 3, of the Covenant, in order to ensure the effective operation of Parliament and the safety of its members.<sup>178</sup>

The Committee also noted that the system did not provide any possibility of recourse, either to the courts or parliament itself, for an individual to complain about a denial of media privileges.

### Tolerating criticism and the wider relationship

It can be difficult for sectors and individuals in society who rely on the media to manage successfully their relationships with the media. A key reason for this is that media independence means that the media exert a large measure of control over the terms of the relationship. In particular, they decide whether and to what extent to carry statements made by parliamentarians and parliamentary officials. All parliamentarians can do is keep providing relevant and accessible information and hope the media carry it. Furthermore, the media may at any time disseminate a critical report about a parliamentarian, which may have serious implications. Often, parliamentarians feel that the media distort what they have said or do not represent their points of view fairly or fully. In many cases,

<sup>178</sup> *Gauthier v. Canada, Communication No. 633/1995*, views adopted 5 May 1999, para. 13.6.

parliamentarians feel that the media specifically seek to present a biased version of the facts, whether for political reasons or to sensationalize matters. This leads to what some have called the “love-hate” relationship between parliamentarians (and others) and the media.

There are, however, strong reasons for parliamentarians to cultivate positive relations with the media, even if they sometimes feel that they do not have the same degree of control over those relationships as they do in other parts of their work. If the relationships are good, they can significantly bolster the ability of parliamentarians to represent their constituents. The media can, among other things, help build better dialogue loops, ensuring that parliamentarians receive feedback and viewpoints which they may not otherwise encounter. Although media content needs to be interpreted – including with an understanding that the media needs to sell its output, which may introduce certain styles and biases – it still represents a unique system of dialogue with constituents, which can supplement the other ways that parliamentarians communicate.

As noted above, under Restrictions: Specific issues, Reputation (page 42), international law requires defamation laws to recognize that the limits of acceptable criticism of officials, and particularly parliamentarians are wider, than for ordinary citizens. Similarly, the scope of privacy for these individuals is narrower. There are good reasons for this, including the fact that parliamentarians wield a lot of power in society and so have to be open to criticism. Good media outlets should always be open to correcting factual errors but, beyond this, there may be limited remedies for reports that, at least from the perspective of the target of the report, do not seem very fair or balanced.

At the same time, there are ways to promote a relationship with the media that is based on mutual respect and understanding. Journalists will generally show greater respect for those who demonstrate that they understand that their position in society means that they need to be more open to criticism (and show less respect for those who are thin-skinned). They will almost always show greater respect for people who communicate regularly and reliably with them, and generally represent good sources for them. This may require parliamentarians to communicate with the media not only when it is in the parliamentarian’s own interests but whenever he or she has information which may be of interest to the media. Showing respect when interacting directly with journalists also helps.

The advent of social media is in the process of radically transforming the whole media environment, depending on how deeply rooted it is in a particular country. The way President Trump of the United States uses Twitter to communicate directly with millions of constituents, thereby cutting out the legacy media and controlling the conversation directly, is well known. But, according to the 2017 *Digital news report*, many politicians are doing that:

Donald Trump is just one of a number of prominent politicians looking to use Twitter and other networks to talk directly to supporters, as well as to control the media agenda.<sup>179</sup>

<sup>179</sup> Reuters Institute and University of Oxford, 2017 *Digital news report: Overview and key findings of the 2017 report*. Available at: [www.digitalnewsreport.org/survey/2017/overview-key-findings-2017/](http://www.digitalnewsreport.org/survey/2017/overview-key-findings-2017/).

A perhaps amusing example of this is an exchange of accusations between Cambodian Prime Minister, Hun Sen, and Sam Rainsy, exiled former leader of the (now banned) opposition Cambodian National Rescue Party (CNRP). Rainsy accused Hun Sen of purchasing Facebook likes to appear popular on the leading social media site. Hun Sen only joined Facebook in 2016 but had three million likes within months and his page was recently ranked third in global engagement among world leaders. However, 80 per cent of the accounts that liked Hun Sen's page came from countries like India, Mexico and the Philippines, where click farms – companies that sell fake social media popularity – are known to operate. Rainsy has been charged with defamation in Cambodia and has applied to Facebook to provide evidence to support his case.<sup>180</sup>

Regardless of one's views on this whole phenomenon, the social media and other platforms, Twitter and Facebook in particular but also YouTube, Instagram, WhatsApp and others, represent an enormous opportunity for parliamentarians. It is beyond the scope of this handbook to provide direct guidance on how to make effective use of social media. However, some of its benefits to parliamentarians and, indeed, parliaments (which can use these tools to communicate as institutions) are as follows:

- It maintains communications with the growing percentage of the population that either no longer or has never subscribed to the legacy media. While it requires access to the Internet, which in some countries is reserved for relative elites, who also have greater access to the legacy media, access rates are increasing dramatically in many countries around the world and access costs are also dropping considerably in many countries.
- It provides for uniquely interactive possibilities. For example, parliamentarians may engage in Twitter town hall meetings, collect feedback on specific proposals or ideas via the many tools available through Facebook or simply allow for open feedback loops for constituents.
- It allows for direct (non-mediated) communication with vastly larger numbers of constituents that would be possible via any other means of communication.

At the same time, parliamentarians should be aware of some of the risks and drawbacks of these communications tools:

- The character limit on Twitter and the overall social environment on Facebook mean that these sorts of communications tend to be somewhat superficial, which can be a drawback if you want to discuss a more complicated idea.
- There is a profound and growing phenomenon of information silos on social media so that, as the 2017 *Digital news report* notes; "We follow politicians we agree with on social media and avoid those we don't".<sup>181</sup> This is creating a growing problem of increasing factionalism and partisanship in society.
- There is a risk that our social media activities may be hacked and even used for illegitimate purposes (such as spreading fake news), although this risk applies to all of our online activities and is not a reason not to go online.

<sup>180</sup> See Sam Levin, "Cambodian leader Hun Sen's Facebook 'likes' become subject of lawsuit", *The Guardian*, 9 February 2018. Available at: [www.theguardian.com/world/2018/feb/09/cambodian-leader-hun-sen-facebook-likes-subject-lawsuit-sam-rainsy](http://www.theguardian.com/world/2018/feb/09/cambodian-leader-hun-sen-facebook-likes-subject-lawsuit-sam-rainsy).

<sup>181</sup> Ibid.

## Civil servants and parliamentary staff

Parliamentarians may interact with officials in a range of capacities, from officials working for parliament to senior bureaucrats, who may be called before parliament to provide information or evidence, potentially to whistleblowers who leak information to parliamentarians. While these relationships are, overall, far simpler than the relationships with the media, there are still some important considerations to keep in mind.

First, although this is sometimes not fully observed, officials' primary duties are supposed to be to the public as a whole (which is why we often refer to them as "civil servants"), and although they also serve the government of the day, they are supposed to avoid acting in a manner which is politically partisan. The lines between professional and partisan activity can become blurry, especially to outside observers, because the party in power (however that is defined in a particular political system) runs the executive, which includes setting priorities and policies (of course subject, ultimately, to parliament's power to approve the budget and laws), and, at least at the top level, overseeing the specific management of the service.

Civil servants are supposed to provide independent advice to government and to implement government decisions, but to avoid political activities of any sort when acting as civil servants. They should, for example, avoid distortions of the truth when communicating publicly (or, for that matter, internally) and not allow public resources to be used for partisan ends. Thus, advertising of government services should never contain any party symbols or references (i.e. it should be clear that this is a government service, not a service provide by a particular party). Civil servants are still allowed to participate politically as private individuals, subject to certain constraints which usually become more onerous as the rank of the official increases.

While this is always the case, it becomes particularly sensitive during election periods. Better practice here is for government to perform only the necessary day-to-day functions during an election or the most sensitive election period, known as operating in caretaker mode. In some countries, oversight of the executive is handed over to a caretaker government, to prevent any abuse by the outgoing party in power.

### Box 31: Caretaker governments in Pakistan

Pakistan has for some time had a system of appointing a caretaker government during elections. The most recent such government took power on 1 June, after the parliament was dissolved on 31 May 2018, and ran the government until the elections on 25 July 2018. Pakistan Chief Justice, Nasirul Mulk, was Pakistan's seventh caretaker Prime Minister

The caretaker is chosen jointly by the outgoing Prime Minister and the Leader of the Opposition, with detailed rules governing situations where they cannot agree on an appointee (with the matter first going to a special parliamentary committee with an equal number of government and opposition members and then, if they also cannot agree, to the Election Commission of Pakistan).

Members of the caretaker government, along with senior civil servants, are not only barred from contesting the election but also from participating in it in any way. Chapter XIV of the Elections Act 2017 defines in some detail what a caretaker government shall and shall not do. The latter, for example, includes taking any major policy decisions, entering into a major international negotiation unless exceptional circumstances require this, or making major appointments of officials (although short-term appointments may be made as needed). A caretaker government shall, on the other hand, run day-to-day matters, restricting itself to activities that are “routine, non-controversial and urgent, in the public interest and reversible by the future Government elected after the elections”.<sup>182</sup>

Second, there is the issue of confidentiality of information which may be shared between parliamentarians and officials. In many countries, the staff hired by parliamentarians owe them a strong obligation of confidentiality, which essentially extends to all information they receive during the course of their employment which is not otherwise required by law to be disclosed. Certain information – such as private information or information rendered secret by parliamentary privilege – remains confidential forever, while other information, for example relating to general employment matters, may be confidential for a shorter period of time, such as five years.<sup>183</sup>

In countries where the offices of parliamentarians are covered by the right-to-information law, this may override these rules and, in particular, impose its own regime for the confidentiality of information. These laws normally incorporate developed regimes of exceptions to the presumption in favour of openness that they create, and only information that falls within the scope of that regime of exceptions may be refused should an individual make a request for it. As noted above, better practice in this area is for exceptions to apply only where disclosure of the information poses a concrete risk of harm to a protected interest, such as privacy or national security.

There are also often bans on any officials, including the staff of parliamentarians, using information obtained while in office for lobbying purposes. One way to enforce this is to impose a ban of a period of time (such as one or two years) on engaging in any lobbying after an official leaves his or her position. It is also common for officials to be subject to bans on using non-public information obtained as part of their work for personal benefit.

182 See Hurmat Majid, “The caretaker government: Why do we have one and what purpose does it fulfil?”, *Dawn*, 1 June 2018. Available at: [www.dawn.com/news/1409090](http://www.dawn.com/news/1409090).

183 This is the case in Canada, for example. See *Backgrounder: “Confidentiality and conflicts of interest”*, p. 3. Available at: [www.ourcommons.ca/content/boie/pdf/Backgrounder-26-02-2014-E.pdf](http://www.ourcommons.ca/content/boie/pdf/Backgrounder-26-02-2014-E.pdf).

Another aspect of this is the provision of information by officials from the government to parliamentarians. In many countries, parliament can summon anyone to appear before it, or one of its committees, as a witness. Under the Westminster approach to government, ministers are responsible to parliament for everything that they do. As part of this responsibility, ministers often call upon civil servants who are well informed about a particular matter to provide information or evidence to parliament. But, in this capacity, the official appears not as an independent citizen but in support of their minister, to assist him or her discharge his or her responsibility towards parliament. Subject, as always, to the law, an official should not, without authorization from his or her minister, disclose confidential information to parliament. Furthermore, the convention of collective cabinet, or ministerial, responsibility not only allows but actually requires ministers, again subject to the law, to refuse to disclose information about the deliberative process within cabinet to anyone, including parliament. Ministers may also be privy to other types of confidential information – say relating to national security issues – that they are again authorized to refuse to provide to parliament.

On the other hand, in other constitutional systems, different rules may apply. For example, in the United States, Congress has very broad powers to compel the production of evidence and documents. As a leading piece published by the law firm Mayer Brown noted: “Put simply, Congress can compel the production of documents and sworn testimony from almost anyone at almost any time.”<sup>184</sup>

To avoid problems in this area, it is important for parliamentarians to be aware of the rules which pertain under their system of government.

Parliamentarians also have confidentiality obligations. The obligation not to release parliamentary reports prematurely, which is part of parliamentary privilege, has already been noted. But parliamentarians may also have wider confidentiality obligations. Although they are protected through non-accountability for the disclosure of otherwise secret information originating from outside of parliament, they may have obligations to protect the confidentiality of certain parliamentary information. For example, where a committee meeting is closed due to the sensitive nature of the information being discussed, members of the committee would normally be expected not to disclose confidential information discussed during that part of the meeting. This may flow from the doctrine of privilege, from internal rules (such as standing orders) or from legislation.

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184 Hon. David M. McIntosh, Hon. Mark Gitenstein and Sean P. McDonnell, “Understanding your rights in response to a congressional subpoena”, 2014, p. 1. Available at: [www.mayerbrown.com/files/Publication/ec1203b2-a787-44ac-8344-5d5fab374ffa/Presentation/PublicationAttachment/11509b8b-df81-4db6-9e89-1d1b16c20856/White-Paper-Congressional-Subpoena.pdf](http://www.mayerbrown.com/files/Publication/ec1203b2-a787-44ac-8344-5d5fab374ffa/Presentation/PublicationAttachment/11509b8b-df81-4db6-9e89-1d1b16c20856/White-Paper-Congressional-Subpoena.pdf).

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# Conclusion

It is universally recognized that freedom of expression is a foundational human right, important in itself and as an underpinning for all other rights, as well as for democracy. Freedom of expression is particularly important for parliamentarians, since without it they would not be able to represent the citizens who elected them and hold those in power to account. This is recognized in the special protection for parliamentarians' free speech, which goes further than for any other sector or group in society. This protection can often be abused, as the caseload of the IPU Committee on the Human Rights of Parliamentarians demonstrates. In all too many countries, parliamentarians are at risk merely for doing their work and expressing their views.

Freedom of expression is a complicated right. This flows in part from the fact that, unlike many rights, it is not absolute in nature but may, in appropriate circumstances, be restricted. The rationale for this is that certain exceptional forms of expression – such as dishonest attacks on reputation, the exposure of sensitive national security or public order information, or incitement to hatred on the basis of race or religion – can cause serious harm to either individuals or society as a whole and may, therefore, be prohibited.

International law establishes a clear test for assessing the legitimacy of a restriction on freedom of expression. Although jurisprudentially simple, the application of this test in practice is anything but. This is in part because a key part of the test is that restrictions should be “necessary”, which is not an easy concept to unpack. Furthermore, in at least some cases, freedom of expression clashes with other human rights, such as the rights to privacy or reputation, which then calls for a delicate balancing exercise.

Freedom of expression is also a complicated right for another reason. Although most people view this right primarily through the lens of the right of the speaker, it also protects the rights to seek and receive information and ideas. As such, it really seeks to protect the free flow of information and ideas in society. This, along with the fact that it is understood to impose positive obligations on States (i.e. to take action to protect the free flow of information and ideas), gives the right its profound essence as a foundation of democracy and other rights. It also adds considerably to the complexity of the right and the difficulty of understanding its precise implications.

Fortunately, there is a large and growing body of jurisprudence from international and regional human rights courts, as well as national courts, interpreting this right. This body of law, along with authoritative interpretations offered by soft law actors, has established a number of standards for restrictions in different areas – such as defamation, protection of privacy and national security, and hate speech – as well as positive obligations – such as protecting against private attacks on freedom of expression, guaranteeing the right to access information held by public authorities and regulating the media – both legacy and new – so as to ensure that it is diverse, free and independent.

In their role as legislators, parliamentarians can play an important role in terms of supporting freedom of expression. In this role, they should avoid the party and populist pressures that sometimes call for the adoption of unduly restrictive or controlling laws and always strive to ensure that legislation is fully in line with international standards. This role should not simply be passive in nature, in the sense of responding to government legislative proposals. Where the legislative framework is problematic, because either restrictive laws are on the books or enabling laws are not, parliamentarians should play an active role in addressing the problem.

Important as it is, the parliamentary role in supporting freedom of expression does not end with adopting appropriate legislation. A first next step is to ensure that (good) legislation is implemented appropriately. There are many ways that the underlying intent behind legislation can be subverted. A common one is powerful actors, most often the government, bringing abusive cases based on laws restricting freedom of expression, of which unwarranted defamation cases are the most common globally, closely followed by cases relating to security (terrorism) and those based on cybercrimes laws. Another very common problem is the government trying to control, or sometimes undermine the operation of bodies which regulate freedom of expression issues, such as broadcast regulators or access to information oversight commissions. A third is government simply failing to implement properly legislation calling for positive State action to protect freedom of expression, such as in the area of protecting expression against attacks or providing information held by public authorities to citizens. Parliamentarians can play a role in all of these cases, whether it is by denouncing abuses or participating directly in processes for appointing members to oversight bodies.

Parliamentarians should not only defend the free speech rights of third parties; they also need to understand and protect their own rights in this respect. International law and most national legal systems recognize very strong, nearly absolute, protection for free speech in parliament and sometimes beyond. The main thrust of these rules is that parliamentarians need to enjoy protection against legal suit for the statements they make in the course of their work. This always covers statements made within the precincts of parliament, whether in chamber or a committee, and sometimes extends beyond this.

In addition, in many systems parliamentarians cannot be prosecuted, including for speech-related crimes, without parliament's authorization. This is not intended to create immunity for crimes but, rather, to prevent unwarranted interference by the executive in the work of parliament.

There are three main ways that these protections can be undermined. First, parliament can itself sanction members for their speech either within or outside of parliament. While this is legitimate, indeed necessary, for parliament to be able to control its own affairs (in the most extreme case to prevent members from disrupting the work of parliament), it can also be abused, in particular by the governing or majority party(ies). Parliamentarians should speak out when this happens, regardless of the party affiliation of the member who has been targeted.

Second, parliamentarians can be targeted for abuse of their rights to free speech through the criminal law, which happens all too frequently. Even where they are formally protected by the need for parliament to approve criminal actions in law, this may prove elusive where the attacks ultimately emanate from the majority party (which, in addition to prompting the charges, can also vote in parliament to allow them to proceed). Once again, parliamentarians should vigorously oppose such behaviour, through both the exercise of their own vote in parliament and by denouncing it.

Third, in some countries, the rules make it almost impossible for parliamentarians to oppose, let alone to leave, their parties in case of a fundamental disagreement of views and yet retain their parliamentary mandates. Where this is the case, parliamentarians may not be able to speak freely about issues even where they have made promises to their electors or where this engages their own consciences. Where this is the case, efforts should be made to change the rules so as to more effectively protect the freedom of choice of parliamentarians.

Freedom of expression is among the most cherished rights for parliamentarians as well as for all citizens. Enjoyment of this right can flourish only in the context of both an enabling legal framework – including those elements which provide for special protection for the free speech rights of parliamentarians – and proper respect for that framework in practice. While many actors play a role in achieving these goals, the particularly important role of parliamentarians is clear to everyone who supports respect for human rights. Hopefully this handbook will help parliamentarians support freedom of expression by providing them with a better understanding of the detailed standards it entails and of the various ways they can help enshrine them in law and practice.

## Checklist for parliamentarians

### **What steps can parliamentarians take to improve respect for freedom of expression?**

- ✔ Parliamentarians should place the promotion of respect for freedom of expression above partisan or political interests whenever they come into conflict.
- ✔ Parliamentarians should inform themselves about general freedom of expression standards and become more specifically informed about issues that come up as policy matters in the parliamentary committees they sit on. As part of this, they should be aware of the three-part test for restrictions on freedom of expression which requires restrictions to:
  - be provided for by law;
  - serve to protect one of the interests recognized by international law; and
  - be necessary to protect that interest.
- ✔ Parliamentarians should promote the ratification of relevant international human rights treaties guaranteeing freedom of expression (such as the ICCPR and regional treaties) and then take steps to ensure that the law and practice in their State is brought into line with the standards in those treaties. This may include:
  - participating in mechanisms put in place under the treaties to promote respect for them; and
  - adopting relevant legislation to incorporate the treaty into national law.

## Checklist for parliamentarians

- ✔ Parliamentarians should review their legal frameworks for compliance with international standards on freedom of expression (looking both for gaps in the positive framework and for unduly limiting legislation). Following such a review, they should take steps to ensure that the framework is amended, as necessary, to bring it more fully into line with international standards.
  - Particular care should be given to ensuring that proposed legislation does not encroach on the right to freedom of expression.
  - While it is essential for States to protect national security and combat terrorism, this does not justify broad or unduly vague restrictions on freedom of expression or restrictions which are not necessary in all of the circumstances.
  - When adopting laws affecting freedom of expression, care should be taken to ensure that the scope for regulations (secondary legislation) under the law does not grant too much discretion to government to restrict freedom of expression.
- ✔ Parliamentarians should take full advantage of their various powers to promote effective implementation of legislation which supports freedom of expression.
  - This should include general efforts to ensure implementation.
  - It should also include specific efforts to ensure that oversight bodies are independent and appropriately funded, and that there is effective review of the work of these bodies, including of any recommendations they may make to improve the systems for which they are responsible.
- ✔ Parliamentarians should be aware of and respond to instances where laws are abused (or simply used, in the case of repressive laws) to limit freedom of expression, and should use their role as social leaders to speak out against such abuses. They should be particularly attentive about doing this where the victims of the abuse are themselves parliamentarians, regardless of their political affiliations, given the cardinal importance of free speech to parliamentarians.

## Checklist for parliamentarians

- ✔ Parliamentarians should support institutional efforts to make parliament a leader among public authorities in terms of transparency both in responding to requests for information and in publishing information on a proactive basis.
  - Parliamentarians should, if this is not already the case, consider whether it would be useful for them to adopt a code of conduct governing transparency, asset and conflict-of-interest disclosures and other professional issues.
  - Parliamentarians should ensure that the process for adopting legislation is transparent and consultative.
  - Parliamentarians should promote the live broadcasting and online video streaming of parliamentary sessions, both plenary and committee.
- ✔ Parliamentarians should make sure that they understand, in detail, the rights and duties which accrue to them through parliamentary immunity and then take full advantage of those rights.
  - At the same time, parliamentarians should be aware of the impact that their statements can have, and be careful not to abuse their free speech rights, for example by making statements which may promote discrimination or harm individuals.
- ✔ Parliamentarians should also seek to improve, as needed, systems relating to parliamentary immunity in their countries. This might involve:
  - seeking to address any limitations in terms of protection against legal suit for statements made as part of parliamentary proceedings;
  - combating in appropriate ways social barriers to open debate about matters of public importance;
  - considering putting in place appropriate systems which afford individuals who have been harmed by statements made in parliament some sort of redress, such as a right of reply;
  - establishing appropriate procedural safeguards and, in particular, due process rights, including a right of appeal before parliament, which may impose sanctions for abusing freedom of expression, whether of parliamentarians or ordinary citizens;
  - establishing proper mechanisms and appropriate procedural safeguards in countries where the parliament's authorization, required first before criminal action against its members can take place; and
  - speaking out against cases where parliaments unduly limit freedom of expression, especially of parliamentarians.



## Checklist for parliamentarians

- ✔ Parliamentarians should participate in and support the work of international human rights bodies, including the IPU Committee on the Human Rights of Parliamentarians.
- ✔ Parliamentarians should promote best practice within their parliaments in terms of ensuring media access through appropriate systems of accreditation, and adequate physical access spaces and support facilities.
- ✔ Parliamentarians should seek to foster positive relations with relevant media and/or journalists, recognizing the important positive impact that the media can have in terms of helping them discharge their responsibilities, whether in terms of representing constituents, passing good legislation or overseeing government. They should also inform themselves about the most effective ways to take advantage of social media to communicate directly with their constituents.
- ✔ Parliamentarians should inform themselves about the extent of their right to access otherwise confidential information, if necessary through in-camera proceedings, and take advantage of those rights. They should also inform themselves about and respect their own confidentiality obligations.
- ✔ Parliamentarians should review and where necessary amend the legal rules governing the relationship between parliamentarians, parties and the parliamentary mandate. In particular, where automatic loss of the mandate is triggered by certain aspects of the relationship between parliamentarians and parties, such as leaving a party, the appropriateness of this should be reviewed and, where necessary, the law should be amended.

# A few words about...

## The Inter-Parliamentary Union (the IPU)

The Inter-Parliamentary Union (the IPU) is a unique organization made up of national parliaments from around the world. We protect and build democracy through political dialogue and concrete action. As at July 2018, the IPU has **178 Member Parliaments** and 12 Associate Members. We work closely with the United Nations and other partner organizations whose goals we share.

We are committed to an **ever-growing field of work** with peace, justice, democracy and development at its heart. We tackle issues as diverse as HIV/AIDS, human rights, gender equality, climate change and the political participation of young people. We help countries as they emerge from conflict or develop as democracies.

We also work to bring the views of the world's citizens into global decision-making, through our increasingly important work on **international governance**.

Today, we are the organization that most closely reflects world public opinion. More than 6.5 billion of the world's seven billion people live in states whose parliaments are members of the IPU – and it is their elected representatives who engage in and steer our policies. By bringing parliaments together, we bring people together.

The world's oldest multi-lateral political organization, the IPU was **founded in 1889** with the aim of using inter-parliamentary dialogue to settle disputes between nations peacefully. That vision remains as true and relevant today as it was in 1889. We are financed primarily by our Members out of public funds. Our headquarters are in Geneva, Switzerland.





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