

SALC Litigation Manual Series

Freedom of Expression: Litigating Cases of Limitations to the Exercise of Freedom of Speech and Opinion



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Freedom of Expression: Litigating Cases of Limitations to the Exercise of Freedom of Speech and Opinion

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Southern Africa Litigation Centre
and Media Legal Defence Initiative

**SOUTHERN AFRICA
LITIGATION CENTRE**

MLDI
Media Legal
Defence Initiative

SALC Litigation Manual Series

Freedom of Expression: Litigating Cases of Limitations to the Exercise of Freedom of Speech and Opinion

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About the Southern Africa Litigation Centre

The Southern Africa Litigation Centre, established in 2005, aims to provide support – both technical and financial – to human rights and public interest initiatives undertaken by domestic lawyers in southern Africa. Its model is to work in conjunction with domestic lawyers and organisations in southern African jurisdictions who are litigating public interest cases involving human rights or the rule of law. SALC supports this litigation in a variety of ways, including, as appropriate, providing legal research and drafting, training and mentoring, and monetary support.

About the Media Legal Defence Initiative

The Media Legal Defence Initiative originated from a programme of work by the Open Society Initiative. Faced with an ever-growing demand for media legal defence services which neither they nor others could respond to, the OSI Media Program and the Open Society Justice Initiative decided to set up a new entity which would have the capacity to defend not just headline-grabbing media freedom cases, but to respond to the constant barrage of law suits many independent media are faced with.

Since its inception MLDI has funded the defence of hundreds of journalists and secured ‘wins’ in the vast majority of cases. It has also won strategically important judgments on issues such as the protection of journalists’ sources and the ‘balance’ between privacy and the right of freedom of expression. It has also helped build a number of legal defence units in national organisations.

Authorship and Acknowledgement

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For hardcopies of the manual please contact the Southern Africa Litigation Centre. An electronic copy is available at www.southernafricalitigationcentre.org.

List of Acronyms and Abbreviations

African Court	African Court on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
American Convention	American Convention on Human Rights
AU	African Union
CERD	Committee on the Elimination of Racial Discrimination
EACJ	East African Court of Justice
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
European Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
Inter-American Court	Inter-American Court of Human Rights
Johannesburg Principles	Johannesburg Principles on National Security, Freedom of Expression and Access to Information
MP	Member of Parliament
Siracusa Principles	Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights
UN	United Nations
UDHR	Universal Declaration of Human Rights

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Purpose and Scope of this Manual

This publication focuses on litigation relating to limitations of the right to freedom of expression. It is primarily designed to assist lawyers in southern Africa who are litigating cases involving freedom of expression before domestic courts. However, it may also be used by lawyers with cases before regional fora such as the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court), and for civil society groups engaged in advocacy around human rights.

The emphasis in this manual is on describing international norms and principles of the right to freedom of expression, and on using international, regional and comparative jurisprudence as a way to bolster arguments before domestic courts. It draws on standards for protecting freedom of expression set out in international and regional human rights law, as well as the interpretations courts in various jurisdictions have given to the content of those rights and their limitations. Comparative jurisprudence is often not used in domestic litigation – whether due to a lack of awareness of the international, regional and comparative law or due to a misconception that it is not useful in domestic litigation. The manual therefore seeks to provide guidance on how comparative jurisprudence can be incorporated into arguments before national courts, as well as to provide lawyers with relevant and useful case law from foreign and international jurisdictions.

The manual presupposes an understanding on the part of lawyers of their local domestic jurisdiction and therefore does not discuss in detail domestic constitutional and legislative frameworks in southern Africa.

The manual starts by outlining arguments a lawyer can make for why domestic courts should look to international, regional and comparative law. It then looks at the importance of the right to freedom of expression, and its interrelationship with the achievement of democracy and the enjoyment of other rights, and then undertakes an assessment of the limitations analysis. The bulk of the manual is dedicated to discussing specific contexts in which the right has been limited, and the courts' approach to those contexts.

Cases are often discussed in detail and significant quotes have been included in full in the manual. In addition, each section is extensively referenced. This is to provide lawyers with access to the sources that can be used in their domestic litigation.

PART ONE:
GENERAL PRINCIPLES OF FREEDOM OF EXPRESSION



Utilising International, Regional and Comparative Law

As the main focus of this manual is on international standards on the right to freedom of expression and the approach various fora have taken in interpreting the right and its limitations, Chapter One looks at the international treaties that address the right, and the use of international and foreign law in domestic courts.

International and Regional Law

Globally, the key treaty protecting freedom of expression is the *International Covenant on Civil and Political Rights* (ICCPR). The ICCPR requires:

“Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”¹

The body that monitors states’ compliance with the ICCPR is the United Nations (UN) Human Rights Committee, a body of independent experts that gives interpretative guidance on how the Covenant is to be implemented. It also periodically reviews each State Party’s progress in implementing its ICCPR obligations. And, if a state has also ratified the first Optional Protocol to the ICCPR, the Human Rights Committee may consider individual complaints from individuals who allege that their rights have been violated provided that they have first exhausted all domestic remedies.

The ICCPR and regional treaties create binding obligations on the state to comply with the obligations these treaties create. Regional human rights standards may be particularly influential, with almost universal ratification of the relevant treaties in Africa, Europe, and Latin America. The African Commission has noted that “international treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on State Parties”.² The African Commission on Human and People’s Rights (African Commission) noted, in *Zimbabwe Human Rights*

¹ Article 2(2), ICCPR.

² African Commission: *Legal Resources Foundation v Zambia* Communication No 211/98 (2001) at para 60.

NGO Forum v Zimbabwe,³ that:

“Human rights standards do not contain merely limitations on [the] State’s authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation.”⁴

However, the exact way in which international law obligations are implemented domestically is a matter of great variation.

Theoretically, states are said to fall into one of two categories: *monist* and *dualist*.

Monist states are those where international law is automatically part of the domestic legal framework. This means that it is possible to invoke a state’s treaty obligations in domestic litigation (such as a defamation trial). States with civil law systems are more likely to be monist, but some are not (for example the Scandinavian states).

Dualist states are those where international treaty obligations only become domestic law once they have been enacted by the legislature. Until this has happened, courts could not be expected to comply with these obligations in a domestic case. States with common law systems are invariably dualist.

That is the theory. The practice is more complicated

In monist states, although ratified treaties are automatically a part of domestic law, their exact status varies. Do they stand above the constitution? On a par with it? Above national statutes? On a par with them? The answer varies from country to country.

In dualist states, some parts of international law may be automatically applicable. In states such as the United Kingdom and the United States, customary international law may be directly invoked, provided that it is not in conflict with national statute law.

The United States Constitution also says that “all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land.” In Kenya, the Court of Appeal noted that “the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation”.⁵

It is always important to have regard to the legislative framework of the country in which you are litigating – and so lawyers seeking to make arguments relating to international

³ African Commission: *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication No. 245/2002 (2006).

⁴ *Id* at para 143.

⁵ Kenya Court of Appeal: *Rono v Rono* (2005) AHRLR 107 at para 21.

law in court must examine the constitution and interpretation legislation of that country.

However, even where treaties have not been incorporated in dualist states, courts are likely to consider them as interpretive guidance in deciding cases, and many courts in dualist states have acknowledged that they should take note of international treaties which have been ratified by their country. After all, most national constitutions protect freedom of expression, and the limitations on freedom of expression permitted in national law often echo closely the terms of the limitations allowed in international and regional standards. Various courts in different countries have pronounced on how to use international law in domestic adjudication.

Zambia

In *Sara Longwe v International Hotels*⁶ the Zambian High Court held that the Convention on the Elimination of All Forms of Discrimination against Women was relevant to the applicant's gender discrimination:

“Ratification of such instruments by a national state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such [instruments]. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that treaty convention in my resolution of the dispute.”⁷

The Zambian courts have also commented on the fact that international law is of persuasive value only in *Attorney General v Clarke*:⁸

“We agree that in applying and construing our statutes we can take into consideration international instruments to which Zambia is a signatory. However, these international instruments are only of persuasive value unless they are domesticated in our laws.”⁹

Kenya

The Kenya Court of Appeal in the case of *Rono v Rono*¹⁰ held that, despite being a dualist country, international law was relevant in consideration of a case dealing with discrimination:

“Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms states: it is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common

⁶ Zambian High Court: *Sara Longwe v International Hotels* 1992/HP/765.

⁷ *Id.*, J19.

⁸ Supreme Court of Zambia: *Attorney General v Clarke* 2008 (1) ZR 38 (SC).

⁹ *Id.* at para 69.

¹⁰ Kenya Court of Appeal: *Rono v Rono* *supra* note 5.

law... That principle, amongst others, has been reaffirmed, amplified, reinforced and confirmed in various other international fora as reflecting the universality of human rights inherent in men and women.”¹¹

Nigeria

The Nigerian Supreme Court held in *Abacha v Fawehinmi*¹² that the African Charter, which had been ratified and incorporated into domestic law, is superior to all domestic laws except the Constitution. The Nigerian High Court, went further in *Odafe v Attorney General*,¹³ and held that the refusal to provide pre-trial prisoners who were HIV-positive with access to antiretroviral treatment violated their right to enjoy the best attainable state of physical and mental health as guaranteed under the African Charter. Though there is no right to health care in the Nigerian Constitution, the High Court held that Nigeria was obligated to provide for adequate medical treatment under the African Charter.

Swaziland

In Swaziland, in *Masinga v Director of Public Prosecutions and Others*,¹⁴ the High Court held that international law can be used as a guide only:

“It cannot be controverted that a convention that is ratified by the Kingdom of Swaziland, but not yet enacted locally as an Act of Parliament, is not part of the laws of the Kingdom. An example of such a convention is the Convention of the Rights of the Child, which was acceded to by the Kingdom on the 6th October 1995, but is yet to be incorporated into the domestic law. It is however an accepted rule of judicial interpretation, one of universal and hallowed application, that regard must be had to international conventions and norms in construing domestic law, when there is no inconsistency between them and there is a lacuna in the domestic law.”¹⁵

In *Sithole NO and Others v Prime Minister of the Kingdom of Swaziland and Others*¹⁶ the High Court confirmed the role of international treaties in interpretation:

“It is to be observed that it was held in the Gwebu case (Ray Gwebu and Lucky Nhlanhla Bhembe, Case No. 19/20 of 2002, Supreme Court of Appeal) that unincorporated international agreements and treaties may be used as aids to interpretation but may not be treated as part of municipal law for purposes of adjudication in a municipal court.”¹⁷

¹¹ Kenya Court of Appeal: *Rono v Rono supra* note 5 at para 21.

¹² Nigeria Supreme Court: *Abacha v Fawehinmi* [2000] 6 NWLR 228.

¹³ Nigeria High Court: *Odafe v Attorney General* (2004) AHRLR 205.

¹⁴ Swaziland High Court: *Masinga v Director of Public Prosecutions* [2001] SZHC 58.

¹⁵ *Id.*

¹⁶ Swaziland High Court: *Sithole NO v Prime Minister of the Kingdom of Swaziland* [2007] SZHC 123.

¹⁷ *Id* at para 37.

Botswana

The Court of Appeal, in *Attorney General v Dow*,¹⁸ held that domestic legislation should be interpreted so as not to conflict with international obligations:

“Botswana is a signatory to this [African] Charter. Indeed it would appear that Botswana is one of the credible prime movers behind the promotion and supervision of the Charter. The learned judge a quo made reference to Botswana’s obligations under such treaties and conventions. Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the State until Parliament has legislated its provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution ... [W]e should so far as is possible so interpret domestic legislation so as not to conflict with Botswana’s obligations under the Charter or other international obligations ... Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.”¹⁹

Zimbabwe

The Supreme Court, in *Mildred Mapingure v Minister of Home Affairs and Two Others*,²⁰ held that courts should have regard to international obligations – irrespective of whether or not they have been incorporated into domestic law:

“A further aspect that arises for consideration in the present context is the normative role of international instruments that specifically address the rights of women. In strict constitutional terms, the prescriptions of such instruments cannot operate to override or modify domestic law unless and until they are internalised and transformed into rules of domestic law. (This principle of the common law was expressly codified in s111B(1) of the former Constitution and is now reaffirmed in s327(2)(b) of the new Constitution). Nevertheless, it is proper and necessary for national courts, as a part of the judicial process, to have regard to the country’s international obligations, whether or not they have been incorporated into domestic law. By the same token, it is perfectly proper in the construction of municipal statutes to take into account the prevailing international human rights jurisprudence.”²¹

¹⁸ Botswana Court of Appeal: *Attorney General v Dow* 1992 BLR 119 (CA).

¹⁹ *Id.*, 153-154.

²⁰ Zimbabwe Supreme Court: *Mildred Mapingure v Minister of Home Affairs* SC22/14.

²¹ *Id.*, 14.

Comparative Case Law from other Jurisdictions

Domestic courts are not bound by case law from outside their own jurisdictions, but courts do increasingly refer to jurisprudence from comparative jurisdictions as a guide to interpreting constitutional rights. The Ugandan Supreme Court acknowledged this when it stated:

“It is a universally acceptable practice that decided cases decided by the highest courts in jurisdictions with similar legal systems, which bear on a particular case under consideration may not be binding but are of persuasive value, and are usually followed unless there are special reasons for not doing so.”²²

The Zambian High Court also recognised the benefit of considering decisions from other courts:

“This court is at large to consider and take into account provisions of international instruments and decided cases in other courts. Zambian courts are not operating in isolation and any decision made by other courts on any aspect of the law is worth considering.”²³

²² Uganda Supreme Court: *Obbo v Attorney General* [2004] 1 EA 265 (SCU), 270.

²³ Zambia High Court: *Kingaipe and Another v Attorney General* 2009/HL/86 (HC).



The Importance of Freedom of Expression

“There can be no doubt that the freedom of expression, coupled with the corollary right to receive and impart information, is a core value of any democratic society deserving of the utmost legal protection. As such, it is prominently recognised and entrenched in virtually every international and regional human rights instrument.”²⁴

Madanhire and another v Attorney General

As the Zimbabwe Constitutional Court recognised in the quote above, the right to freedom of expression is a fundamental right, recognised in all the important international instruments.

Article 19 of the 1948 *Universal Declaration of Human Rights* (UDHR) states:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”²⁵

The UDHR is not binding on states, but subsequently, this right was enshrined in binding treaty law in Article 19 of the ICCPR.²⁶ This was adopted by the UN General Assembly in 1966 and came into force a decade later. Article 19 echoes the wording of the UDHR, but adds some explicit grounds on which the right may be limited.

Article 19 states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a. For the respect of the rights or reputations of others;

²⁴ Zimbabwe Constitutional Court: *Madanhire v Attorney General* [2005] ZACC 02, 7.

²⁵ Article 19, UDHR.

²⁶ Article 19, ICCPR.

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

The African Charter guarantees the right to freedom of expression in Article 9:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

While Article 9 does not contain the itemised grounds for limitation as contained in the other regional and international instruments, it does stipulate that the right to express and disseminate opinions is to be “within the law.”

What Does “Within the Law” Mean?

African tribunals have defined “within the law” as referring to international norms on human rights rather than domestic law promulgated by the political authority of the state. In *Malawi African Association v Mauritania*²⁷ the African Commission held that “[t]he expression “within the law” must be interpreted as reference to the international norms”,²⁸ and the African Court, in *Konaté v Burkina Faso*²⁹ made an identical comment.³⁰

The right to freedom of expression is protected in other regional human rights systems.

Article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the European Convention) protects freedom of expression in the following terms:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”³¹

As with Article 19 of the ICCPR, however, Article 10 also details a number of grounds on which the right to freedom of expression may be limited.

The *American Convention on Human Rights* (the American Convention) guarantees the right to freedom of expression in terms very similar to the UDHR and ICCPR, allowing limitations identical to those in the latter. It also provides some additional explicit protections, ruling out the use of prior censorship or the use of indirect methods “such as the abuse of government or private controls over newsprint, radio broadcasting

²⁷ African Commission: *Malawi African Association v Mauritania* Communication Nos 54/91, 61/91, 98/93, 164-196/97 and 210/98 (2000).

²⁸ *Id* at para 102

²⁹ African Court: *Konaté v Burkina Faso* Application No 004/2013 (2014).

³⁰ *Id* at para 129. See also African Commission: *Jawara v The Gambia* Communication Nos 147/95 and 149/96 (2000).

³¹ Article 10, European Convention.

frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.”³²

While freedom of expression is clearly protected by a considerable body of treaty law, it can also be regarded as a principle of customary international law, so frequently is the principle enunciated in treaties, as well as other soft law instruments. Most human rights treaties, including those dedicated to the protection of the rights of specific groups – such as women, children and people with disabilities – make explicit mention of freedom of expression.

In addition, freedom of expression is protected in almost every national constitution. This obviously means that it will have supremacy within the law of the land, but also suggests that it should be seen as a general principle of law, applicable in all circumstances. For Americans, the First Amendment to their Constitution stipulates that “Congress shall make no law ... abridging the freedom of speech, or of the press”, and, although courts have interpreted limitations, this protection of free expression is often regarded as one of the most absolute in domestic legal systems.

Recently, there has been considerable development in the African regional human rights system on freedom of expression, which was initiated by the African Commission which adopted a Declaration of Principles on Freedom of Expression in Africa (the Declaration) in 2002. The preamble to the Declaration is a stirring endorsement of the need for respect of the right in Africa:

- It highlights the importance of promoting the free flow of information and ideas;
- It links respect for freedom of expression and access to information with greater public transparency, accountability and good governance;
- It recognises that freedom of expression can strengthen democracy;
- It recognises the key role the media plays in ensuring full respect for freedom of expression, the free flow of information and ideas, and in assisting people to make informed decisions; and
- It acknowledges that broadcast media is particularly important because of its capacity to reach wide audiences and its ability to overcome barriers to illiteracy.

Why is Freedom of Expression so Important?

There is an intrinsic link between freedom of expression and democracy; a link which was recognised by the Ugandan Supreme Court in *Charles Onyango-Obbo and Another v Attorney General*.³³

“Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the

³² Art 13(3) of the American Convention.

³³ Uganda Supreme Court: *Obbo v Attorney General supra* note 22.

hallmark of democracy, is only assured through optimal exercise of the freedom of expression.”³⁴

In *Constitutional Rights Project and others v Nigeria*,³⁵ the African Commission recognised the importance of the right when it held that “freedom of expression is a basic human right, vital to an individual’s personal development and political consciousness, and participation in the conduct of the public affairs of his country.”³⁶ In addition, in *Ghazi Suleiman v Sudan*³⁷ the Commission said that it was “a cornerstone of democracy and ... a means of ensuring respect for all human rights and freedoms.”³⁸

The South African High Court commented that freedom of expression “is the freedom upon which all others depend; it is the freedom without which the others would not long endure”.³⁹

These quotes hint at the varied reasons why freedom of expression is so important. A Zimbabwean Supreme Court decision provided more detail to the different roles free expression has in a democracy:

“Furthermore, what has been emphasized is that freedom of expression has four broad special objectives to serve:

- (i) It helps an individual to obtain self-fulfilment,
- (ii) It assists in the discovery of truth and in promoting political and social participation,
- (iii) It strengthens the capacity of an individual to participate in decision making, and
- (iv) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and change.”⁴⁰

The first aspect is that freedom of expression is an *individual* right. It is closely connected to the individual’s freedom of conscience and opinion (see the wording of Article 19 in both the UDHR and the ICCPR, and Article 10 of the European Convention). But the list very quickly broadens out into issues where freedom of expression is thought to have a general social benefit. In particular, this is a right that is seen to be crucial for the functioning of democracy as a whole. It is a means of ensuring an open flow of ideas and holding authorities to account.

In South Africa, Judge Cameron (then in the Johannesburg High Court) emphasised the links between freedom to criticise those in power and the success of a constitutional democracy:

³⁴ Uganda Supreme Court: *Obbo v Attorney General supra* note 22.

³⁵ African Commission: *Constitutional Rights Project v Nigeria* Communication Nos 140/94, 141/94 and 145/95 (1999).

³⁶ *Id* at para 36.

³⁷ African Commission *Law Offices of Ghazi Suleiman v Sudan* Communication No 228/99 (2003).

³⁸ *Id* at para 40.

³⁹ South Africa High Court: *Mandela v Falati* 1994 (4) BCLR 1 (W), 8.

⁴⁰ Zimbabwe Supreme Court: *Chavunduka v Minister of Home Affairs* 2000 (1) ZLR 552 (S).

“The success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens.”⁴¹

The Supreme Court of Appeal in South Africa also commented on why the right is so intrinsic to democracy and development:

“The importance of the right to freedom of expression has often been stressed by our courts. Suppression of available information and of ideas can only be detrimental to the decision-making process of individuals, corporations and governments. It may lead to the wrong government being elected, the wrong policies being adopted, the wrong people being appointed, corruption, dishonesty and incompetence not being exposed, wrong investments being made and a multitude of other undesirable consequences. It is for this reason that it has been said ‘that freedom of expression constitutes one of the essential foundations of a democratic society and is one of the basic conditions for its progress and the development of man’.”⁴²

The Supreme Court of India, in *Ghandi v Union of India*,⁴³ provided a concise summary of the inter-relationship between freedom of expression and democracy:

“Democracy is based essentially on a free debate and open discussion for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential.”⁴⁴

The European Court of Human Rights (ECtHR) has also made this point repeatedly:

“Freedom of expression constitutes one of the essential foundations of such [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”⁴⁵

The benefits of freedom of expression are not only in the sphere of democratisation and politics. The Nobel prize-winning economist Amartya Sen even went as far as to say that countries with a free press do not suffer famines.⁴⁶ Whether or not that claim is literally true, the general point is that freedom of expression – encompassing media freedom – is a precondition for the enjoyment of other rights.

⁴¹ South Africa High Court: *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W), 609.

⁴² South Africa Supreme Court of Appeal: *Hoho v The State* 2009 (1) SACR 276 (SCA) at para 29.

⁴³ India Supreme Court: *Ghandi v Union of India* [1978] 2 SCR 621.

⁴⁴ *Id.*

⁴⁵ ECtHR: *Handyside v United Kingdom* Application No 5493/72 (1976), 18.

⁴⁶ A Sen “Democracy as a Universal Value” *Journal of Democracy* (1999) 10.3, 3-17.

Two Facets of Freedom of Expression

It has been recognised that freedom of expression goes further than just protecting the right of someone to express an opinion or a fact: it also protects the right of others to hear that opinion or fact. The Inter-American Court of Human Rights has repeatedly addressed this dual aspect:

“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.”⁴⁷

In a famous judgment on press freedom, the Court said:

“When freedom of expression is violated ... it is not only the right of that individual [journalist] that is being violated, but also the right of all others to ‘receive’ information and ideas.”⁴⁸

The African Commission cited the Inter-American Court of Human Rights jurisprudence in *Law Office of Ghazi Suleiman v Sudan (II)*⁴⁹ where the Commission acknowledged that “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.”⁵⁰

The French *Conseil constitutionnel* has said that this right is enjoyed not only by those who write, edit and publish, but also by those who read.⁵¹

Press Freedom

In order for individuals to receive information and ideas, a free press is fundamental. The role of the mass media is therefore central in allowing the right to freedom of expression to contribute fully to democracy, transparency, and accountability. The South African Constitutional Court commented that:

“In considering the comprehensive quality of the right, one also cannot neglect the vital role of a healthy press in the functioning of a democratic society. One might even consider the press to be a public sentinel, and to the extent that laws encroach upon press freedom, so too do they deal a comparable blow to the public’s right to a healthy, unimpeded media.”⁵²

The East African Court of Justice has held that “the principles of democracy must of

⁴⁷ Inter-American Court: *Herrera-Ulloa v Costa Rica* Series C No 107 (2004).

⁴⁸ Inter-American Court: *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* Series A No 5 (1986).

⁴⁹ African Commission: *Law Offices of Ghazi Suleiman v Sudan supra* note 37.

⁵⁰ *Id* at para 50.

⁵¹ France Constitutional Court: Decision No 86-210 (1986), 100.

⁵² South Africa Constitutional Court: *Print Media South Africa and Another v Minister of Home Affairs and Another (Justice Alliance of South Africa and another as amici curiae)* 2012 (12) BCLR 1346 (CC) at para 54.

necessity include adherence to press freedom ... [A] free press goes hand in hand with the principles of accountability and transparency.”⁵³

The Press as Public Watchdog

Various courts have emphasised the important role the media plays in a democracy. This is why the press has often been termed the “public watchdog”:

“Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”⁵⁴

The South African High Court also remarked on the role of the press as a “watchdog”:

“The role of the press in a democratic society cannot be understated. The press is in the front line of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal and inept administration. It must also contribute to the exchange of ideas already alluded to. It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed.”⁵⁵

This notion of “public interest” has now become widely used in case law on freedom of expression. This judgment of the South African Supreme Court of Appeal articulates the concept particularly well:

“[W]e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion. The press and the rest of the media provide the means by which useful, and sometimes vital information about the daily affairs of the nation is conveyed to its citizens—from the highest to the lowest ranks. Conversely, the press often becomes the voice of the people—their means to convey their concerns to their fellow citizens, to officialdom and to government.”⁵⁶

The South African Constitutional Court put it thus:

“In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility.

⁵³ East Africa Court of Justice: *Burundian Journalists Union v Attorney-General of the Republic of Burundi*, Reference No 7 of 2013 (2015) at paras 82-88.

⁵⁴ ECtHR: *Thorgeirson v Iceland*, No 13778/88 (1992).

⁵⁵ South Africa High Court: *Government of the Republic of South Africa v Sunday Times Newspaper and Another* 1995 (2) SA 221 (T) at 227H - 228A.

⁵⁶ South Africa Supreme Court of Appeal: *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at para 24.

The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperiled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society”.⁵⁷

The ECtHR, in *Thorgeirson v Iceland*, developed a doctrine which spoke of the important role the media played on all matters of importance – not only politics, but also other matters of public concern.

“Whilst the press must not overstep the bounds set, inter alia, for “the protection of the reputation of ... others”, it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”⁵⁸

And in *Castells v Spain*:⁵⁹

“Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.”⁶⁰

In *McCarton Turkington Breen (a firm) v Times Newspapers Ltd*⁶¹ the United Kingdom House of Lords noted that “[i]n a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of their society... It is very largely through the media... that they will be so alerted and informed.”⁶²

What this means is that the right to freedom of the press does not only benefit individual journalists. As we have seen, it is an important aspect of the right that the public receive the messages that journalists communicate.

The Human Rights Committee in its General Comment 34, which offers an interpretation of Article 19, said:

“The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information

⁵⁷ South Africa Constitutional Court: *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at para 24.

⁵⁸ ECtHR: *Thorgeirson v Iceland* *supra* note 54 at para 63.

⁵⁹ ECtHR: *Castells v Spain* Application No 11798/85 (1992).

⁶⁰ *Id* at para 43.

⁶¹ United Kingdom House of Lords: *McCarton Turkington Breen (a firm) v Times Newspapers Ltd* [2000] UKHL 57.

⁶² *Id*.

and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output (references omitted).⁶³

And further:

“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.”⁶⁴

Right to Information

Freedom of information is understood here to be an inseparable part of freedom of expression, because access to information is seen as essential in achieving other social benefits, such as combatting corruption or reducing adverse environmental impact.

The UN and the African Union (AU) have conventions that address the right of the public to obtain information about public officials:

- The UN Convention Against Corruption requires that the public has “effective access to information” (Article 13), as well as requiring states to adopt procedures or regulations to allow the public to obtain information about the “organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public” (Article 10).⁶⁵
- The UN Sustainable Development Summit in 2015 adopted a series of Sustainable Development Goals (SDGs), including SDG 16 on Peace, Justice and Strong Institutions which emphasises the need to strengthen the rule of law and promote human rights.⁶⁶
- The UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters requires both that states respond to public requests for information about environmental issues (Article 4) and that they publish information (Article 5).⁶⁷
- The AU’s 2003 Convention on Preventing and Combating Corruption requires states to “adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences,” (Article 9) and states are required to “[c]reate an enabling environment that will enable civil society and the media to hold governments to the highest levels of

⁶³ Human Rights Committee: General Comment 34.

⁶⁴ Human Rights Committee: General Comment 34 at para 14.

⁶⁵ UN Convention Against Corruption, General Assembly Resolution 58/4 (2003).

⁶⁶ For more information, see <http://www.undp.org/content/undp/en/home/sdgoverview/post-2015-development-agenda.html>.

⁶⁷ UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Affairs (1998).

- transparency and accountability in the management of public affairs...” (Article 12).⁶⁸
- The African Commission’s Declaration of Principles on Freedom of Expression in Africa affirms the right to access to information (Principle IV).⁶⁹

Additionally, the African Commission has drafted a Model Law on Access to Information for Africa. As Pansy Tlakulua, the Special Rapporteur on Freedom of Expression and Access to Information, explains in her forward to the Model Law, this is a non-binding document which can act as a guide for legislators seeking to adopt access to information laws in African countries.⁷⁰

Various bodies within these international organisations have given content to this right.

The Human Rights Committee commented that included in this right is the right of the media to access information on public affairs and of the public to receive media output.⁷¹ Individuals should also be able to “ascertain which public authorities or private individuals or bodies control or may control his or her files,”⁷² and be able to have any incorrect personal information corrected. It also remarked that prisoners do not lose entitlements to access medical records. In essence, the Human Rights Committee said, all people should have access to information regarding their rights in general, and asserted that states should proactively put information into the public domain that may be of public interest and facilitate easy access to that information.

In *Gauthier v Canada*⁷³ the Human Rights Committee said that the ICCPR’s protection of freedom of expression “implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.”⁷⁴ This was in reference to its General Comment 25 on the right of all people to take part in the conduct of public affairs, the right to vote, and the right to have access to public service. The Human Rights Committee held that “the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential ... implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.”⁷⁵ It went on to say that this includes “freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.”⁷⁶

⁶⁸ AU Convention on Preventing and Combatting Corruption (2003). As of October 2007, the Convention had been ratified by 24 countries.

⁶⁹ The Declaration of Principles on Freedom of Expression in Africa can be found here: <http://www.achpr.org/sessions/32nd/resolutions/62/>.

⁷⁰ The Model Law can be found here: http://www.achpr.org/files/news/2013/04/d84/model_law.pdf.

⁷¹ Human Rights Committee: General Comment 34 at para 18.

⁷² *Id.*

⁷³ Human Rights Committee: *Robert W. Gauthier v Canada*, Communication No 633/1995 (1999).

⁷⁴ *Id.* at para 13.4.

⁷⁵ Human Rights Committee: General Comment 25 at para 26.

⁷⁶ *Id.*

In *Toktakunov v Krgyzstan*⁷⁷ the Human Rights Committee looked at whether the right of individuals to access state-held information imposed a corollary obligation on the state to provide that information:

“In this regard, the Committee recalls its position in relation to press and media freedom that the right of access to information includes a right of the media to have access to information on public affairs and the right of the general public to receive media output. The Committee considers that the realisation of these functions is not limited to the media or professional journalists, and that they can also be exercised by public associations or private individuals.”⁷⁸

In 2006, the Inter-American Court of Human Rights handed down a landmark judgment in which it held that the American Convention’s protection of freedom of thought and expression (in Article 13) protects the right of access to state-held information. This was the first time an international court recognised this element of the right.⁷⁹

⁷⁷ Human Rights Committee: *Toktakunov v. Kyrgyzstan* Communication No 1470/2006 (2011).

⁷⁸ *Id* at para 6.3.

⁷⁹ Inter-American Court: *Claude Reyes v Chile* Series C No 151 (2006).



Justifiable Limitations to the Right to Freedom of Expression

The Limitations Analysis

Despite its importance, freedom of expression is not an absolute right, and there are a number of situations in which the right can be justifiably limited. However, the process of limiting freedom of expression (or any other human right) cannot be done without proper justification.

There is authority from around the world that stipulates that rights cannot be limited in such a way that would make the right itself nugatory. For example, in *Chimakure v Attorney-General of Zimbabwe*⁸⁰ the Zimbabwe Constitutional Court remarked that “[t]o control the manner of exercising a right should not signify its denial or invalidation.”⁸¹ The Human Rights Committee also noted that “when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.”⁸²

In addition, in most jurisdictions there is a *three-part test* to determine whether the right to freedom of expression may be justifiably limited.

Step 1: Any restriction on a right must be prescribed by law.

Step 2: The restriction must serve one of the prescribed purposes listed in the text of the human rights instrument.

Step 3: The restriction must be necessary to achieve the prescribed purpose.

Step 1: Prescribed by law

This is simply a statement of the *principle of legality*, which underlies the concept of the rule of law and requires that laws should be clear and non-retrospective. In order for a law limiting freedom of expression to pass this test it must be unambiguously established by pre-existing law that the right may be limited.

⁸⁰ Zimbabwe Constitutional Court: *Chimakure v Attorney-General of Zimbabwe*, Constitutional Application No SC 247/09 (2014).

⁸¹ *Id.*, 17.

⁸² Human Rights Committee: General Comment 34 at para 21.

What is a law?

A law restricting the right to freedom of expression will usually be a written statute, although common law restrictions are also allowed. The Human Rights Committee says that laws may include laws of parliamentary privilege or laws of contempt of court. Given the serious implications of limiting free expression, it is not compatible with the ICCPR for a restriction “to be enshrined in traditional, religious or other such customary law.”⁸³

It is not enough for the limitation to exist in domestic law alone; it must also reach a qualitative threshold for it to fulfil the principle of legality. The ECtHR has held that “prescribed by law” requires that the law have a basis in domestic law, be adequately accessible, and be formulated with sufficient precision.⁸⁴

In Zimbabwe, the Constitutional Court in *Chimakure* held that for a limitation to satisfy the principle of legality it must “specify clearly and concretely in the law the actual limitations to the exercise of freedom of expression.”⁸⁵ This is to “enable a person of ordinary intelligence to know in advance what he or she must not do and the consequences of disobedience.”⁸⁶

Courts have also required laws to create a sense of “foreseeability” – that is, enable citizens and law enforcement officials to know how to regulate their conduct. The Human Rights Committee said that “[a] law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”⁸⁷

Example

In *Chavunduka and Choto v Minister of Home Affairs & Attorney General*,⁸⁸ the Zimbabwean Supreme Court held that the offence of publishing “false news” in the Zimbabwean criminal code was vague and over-inclusive. The offence included statements that “might be likely” to cause “fear, alarm or despondency,” without any requirement to demonstrate that they actually did so. In any event, as the Court pointed out: “[A]lmost anything that is newsworthy is likely to cause, to some degree at least, in a section of the public or a single person, one or other of these subjective emotions.”⁸⁹

⁸³ Human Rights Committee: General Comment 34 at para 24.

⁸⁴ ECtHR: *Sunday Times v the United Kingdom*, No 6538/74 (1979).

⁸⁵ Zimbabwe Constitutional Court: *Chimakure v Attorney-General of Zimbabwe supra* note 80, 24.

⁸⁶ *Id.*, 26.

⁸⁷ Human Rights Committee: General Comment 34 at para 25.

⁸⁸ Zimbabwe Supreme Court: *Mark Giva Chavunduka and Another v The Minister of Home Affairs supra* note 40.

⁸⁹ *Id.*, 14.

Step 2: Serving a legitimate purpose

Most national constitutions and international and regional instruments include a list of legitimate purposes for limiting the right to freedom of expression within the text of the right. As long as the law limiting the right was enacted to serve one of the interests listed in the instrument, it will pass this stage of the limitations analysis.

Article 19(3) of the ICCPR provides for two possible types of restriction:

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

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

The African Court and the African Commission have stated that the only legitimate reasons that can be relied on to limit the right to freedom of expression under Article 9 of the African Charter are those set out in Article 27(2) of the African Charter, namely that rights “shall be exercised in respect of the rights of others, collective security, morality and common interest.”⁹⁰

Many national constitutions include similar lists, but some go further and include more possible purposes for which the right can be limited. The right in section 20 of the Zambian Constitution is one example, and is similar to many other constitutions in the southern Africa region. The right is protected in the first subsection, and then limited in the third:

3. “Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision --
 - a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
 - b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or
 - c) that imposes restrictions on public officers;
and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.”

⁹⁰ African Court: *Konaté v Burkina Faso supra* note 29, 35. African Commission: *Media Rights Agenda v Nigeria* Communication Nos 105/93, 128/94, 130/94 and 152/9 (1998). at para 68.

Note

It is interesting that courts have recognised that sometimes protecting rather than limiting free speech is more beneficial to the safety of a state. In *Free Press of Namibia v The Cabinet for the Interim Government of South Africa*⁹¹ the Namibia High Court held:

“Because people (or a section thereof) may hold their government in contempt does not mean that a situation exists which constitutes a danger to the security of the state or to the maintenance of public order. In fact to stifle just criticism could as likely lead to those undesirable situations.”⁹²

The United Kingdom House of Lords has also recognised this:

“The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.”⁹³

Step 3: Necessary in a democratic society

Most limitations to the right to freedom of expression require that the limitation be “necessary”, “reasonably justifiable in a democratic society”, or another similar formulation.

To determine whether a limitation meets this standard courts have adopted a proportionality test. The Human Rights Committee, in *Marques de Morais v Angola*,⁹⁴ said that the “requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect.”⁹⁵

Various forms of the proportionality test have been adopted by courts, but they all are designed to ensure that a limitation does not unduly restrict a fundamental right. The most oft-quoted test is from a Canadian case, *R v Oakes*:⁹⁶

“Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objective or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second,

⁹¹ Namibia High Court: *Free Press of Namibia v The Cabinet for the Interim Government of South Africa* 1987 (1).

⁹² *Id.*, 624.

⁹³ United Kingdom House of Lords: *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115, 126.

⁹⁴ Human Rights Committee: *Marques de Morais v Angola* Communication No. 1128/2002 (2005).

⁹⁵ *Id.* at para 6.8.

⁹⁶ Canada Supreme Court: *R v Oakes* [1986] 1 SCR 103.

the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective – the more severe the deleterious effects of a measure, the more important the objective must be.”⁹⁷

The Human Rights Committee has also emphasised the importance of the proportionality of restrictions:

“[R]estrictive 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.”⁹⁸

In General Comment 34, the Human Rights Committee additionally noted the factors that should be taken into account:

“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.”⁹⁹

The African Commission said that “the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.”¹⁰⁰

The East African Court of Justice has also emphasised the proportionality argument:

“[A] government should not determine what ideas or information should be placed in the market place [of] information and we dare add, if it restricts that right, the restriction must be proportionate and reasonable.”¹⁰¹

In Europe the ECtHR has said that they will look at whether the reasons adduced by the state are “relevant and sufficient” to justify interference with the right.¹⁰²

This test often involves a balancing exercise between the rights of an individual and the rights of a community. The Zimbabwe Constitutional Court in *Chimakure* stated that “[t]he purpose of the proportionality test is to strike a balance between the interests of the public and the rights of the individual in the exercise of freedom of expression.”¹⁰³

⁹⁷ Canada Supreme Court: *R v Oakes* *supra* note 96, 105-106.

⁹⁸ Human Rights Committee: General Comment 27.

⁹⁹ Human Rights Committee: General Comment 34 at para 35.

¹⁰⁰ African Commission: *Constitutional Rights Project v Nigeria* *supra* note 35 at para 69.

¹⁰¹ East African Court of Justice: *Burundi Journalists Union v Attorney General of Burundi* *supra* note 53.

¹⁰² ECtHR: *VgT Verein gegen Tierfabriken v Switzerland* Application No 24699/94 (2001), 75.

¹⁰³ Zimbabwe Constitutional Court: *Chimakure v Attorney General of Zimbabwe* *supra* note 80, 21.

The ECtHR explained that the purpose of the right, and the relationship the right has to a functioning democracy is also relevant in assessing the permissibility of the limitation:

“The Court’s supervisory functions oblige it to pay the utmost attention to the principles characterising a “democratic society”. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”. This means, amongst other things, that every “formality”, “condition”, “restriction” or “penalty” imposed in this sphere must be proportionate to the legitimate aim pursued.”¹⁰⁴

Courts have also looked at whether there are less restrictive means in which the purpose of the limitation can be achieved.

- The Inter-American Court has stated that “it must be shown that a [legitimate aim] cannot reasonably be achieved through a means less restrictive of a right protected by the Convention.”¹⁰⁵
- The United States Supreme Court has stated that “[e]ven though the Government’s purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”¹⁰⁶

The fact that the exercise of the right may cause some form of harm is not sufficient, on its own, to justify the limitation. In *Chimakure* there is an acknowledgement that the free expression of ideas may cause harm – but that only serious harm can lead to a limitation of the right. Malaba DCJ stated that “[t]he exercise of the right to freedom of expression is not protected because it is harmless ... It is protected despite the harm it may cause.”¹⁰⁷ It is therefore not an adequate response when explaining that a limitation is justified that it may cause some form of harm. The Constitutional Court emphasised that “[t]he Constitution forbids the imposition of a restriction on the exercise of freedom of expression when it poses no danger of direct, obvious, serious and proximate harm to a public interest listed in section 20(2)(a) of the Constitution.”¹⁰⁸

Expression should also be allowed to offend, shock, and disturb. Although referring specifically to criticism of judges, English Judge Mumby of the Family Division of the High Court said that language used should not overrule the content of a statement:

¹⁰⁴ ECtHR: *Handyside v United Kingdom* *supra* note 45, 18.

¹⁰⁵ Inter-American Court of Human Rights: *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* *supra* note 48 at para 30.

¹⁰⁶ United States Supreme Court: *Shelton v Tucker*, 364 US 479, 488 (1960).

¹⁰⁷ Zimbabwe Constitutional Court: *Chimakure v Attorney-General of Zimbabwe* *supra* note 80, 57.

¹⁰⁸ *Id.*, 56.

“[T]hat which is lawful if expressed in the temperate or scholarly language of a legal periodical or the broadsheet press does not become unlawful simply because expressed in the more robust, colourful or intemperate language of the tabloid press or even in language which is crude, insulting and vulgar.”¹⁰⁹

And a South African judge memorably explained it as such:

“Although conscious of the fact that I am venturing on what may be new ground I think that the courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that the public and readers of newspapers that debate political matters, are aware of this. How soon the audiences of political speakers would dwindle if the speakers were to use the tones, terms and expressions that one could expect from a lecturer at a meeting of the Ladies Agricultural Union on the subject of pruning roses!”¹¹⁰

Examples

In *Konaté v Burkina Faso*¹¹¹ the African Court said that custodial sentences for criminal defamation were a disproportionate punishment:

“Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the above provisions.”¹¹²

In *Law Offices of Ghazi Suleiman v Sudan*,¹¹³ the African Commission said that security officials preventing a lawyer from making a public speech was a disproportionate approach:

“The disproportionate actions of the government of Sudan against Mr Ghazi Suleiman is evidenced by the fact that the government has not offered Mr Ghazi Suleiman an alternative means of expressing his support for human rights in each instance. Instead the Respondent State has either prohibited Mr Ghazi Suleiman from exercising his human rights by issuing threats, or punished him after summary trial, without considering the value of his actions for the protection and promotion of human rights.”¹¹⁴

¹⁰⁹ United Kingdom Family Division: *Harris v Harris: Attorney-General v Harris* [2001] 2 FLR 395.

¹¹⁰ South Africa High Court: *Pienaar v Argus Printing and Publishing Company Ltd* 1956 (4) SA 310 (W), 318

¹¹¹ African Court: *Konaté v Burkina Faso supra* note 29.

¹¹² *Id* at para 165.

¹¹³ African Commission: *Law Offices of Ghazi Suleiman v Sudan supra* note 37.

¹¹⁴ *Id* at para 63.



Defamation

Defamation is defined as the “action of damaging the good reputation of someone.”¹¹⁵ In terms of modern human rights law, defamation can be understood as the protection against “unlawful attacks” on a person’s “honour and reputation” contained in human rights instruments. Defamation can be a criminal offence or a civil wrong.

The offence of criminal defamation is clearly a limitation of the right to freedom of expression, but one which seeks to give effect to the need to protect others’ reputations. However, that does not automatically make the limitation permissible. In the Zimbabwean case of *Madanhire v Attorney General*¹¹⁶ the Court pointed out that the key question is whether the limitation is justifiable:

“It certainly cannot be gainsaid that the offence of criminal defamation operates to encumber and restrict the freedom of expression enshrined in s 20(1) of the former Constitution. On the other hand, it is also not in doubt that the offence of criminal defamation falls into the category of permissible derogations contemplated in s 20(2)(b)(i), as being a provision designed to protect the reputations, rights and freedoms of other persons. What is in issue for determination by this Court is whether or not it is a limitation that is reasonably justifiable in a democratic society.”¹¹⁷

Criminal Defamation

Many defamation laws originated as part of the criminal law of the state. This suggests that there is perceived to be a public interest in the state initiating criminal prosecutions against journalists or others – something that goes beyond the right of the individual to protect his or her reputation. It is closely related to the concept of sedition (“seditious libel” in the common law), which penalises speech and other expression that is critical of government or the state. Yet increasingly the whole notion of criminal defamation is seen as antiquated and anachronistic.

Calls for Decriminalisation

The African Commission, in Resolution 169, called on all states to “repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments”.¹¹⁸

¹¹⁵ Oxford English Dictionary.

¹¹⁶ Zimbabwe Constitutional Court: *Madanhire and Another v Attorney General supra* note 24.

¹¹⁷ *Id.*, 8.

¹¹⁸ African Commission: “Resolution 169 on Repealing Criminal Defamation Laws in Africa” 48th Ordinary Session (2010).

The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has argued that “criminal defamation laws should be repealed in favour of civil laws as the latter are able to provide sufficient protection for reputations...”, and because “[c]riminal defamation laws represent a potentially serious threat to freedom of expression because of the very sanctions that often accompany conviction.”¹¹⁹

The Human Rights Committee has recommended that “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.”¹²⁰

Why is Criminal Defamation so Problematic?

The danger with criminal defamation – and one of the many reasons why defamation should be a purely civil matter – is that the involvement of the state in prosecuting alleged defamers shifts the matter very quickly into the punishment of dissent.

The consequences of being charged with criminal defamation, rather than sued in terms of civil law, are significant. First, the accused person has to go through the rigors of a criminal prosecution, which may include arrest and detention and a harrowing criminal trial. The experiences of a criminal prosecution will occur even if the accused is found not guilty. Second, a criminal conviction has far-reaching effects, and because a criminal conviction remains on an individual’s record, those effects are felt even after a sentence has been served.

Another danger with the existence of the criminal defamation offence is the “chilling effect” it places on the practice of journalism; journalists fear reporting on sensitive or controversial stories out of concern that they may be charged with defamation and face a criminal trial. This was recognised by the ECtHR in *Dilipak v Turkey*¹²¹ where the Court remarked that damages awarded against two journalists placed a heavy burden on the journalists themselves (one had had his house seized) but also had a chilling effect on all journalists.

This was also recognised by the Zimbabwean Court in *Madanhire*:

“It is inconceivable that a newspaper could perform its investigative and informative functions without defaming one person or another. The overhanging effect of the offence of criminal defamation is to stifle and silence the free flow of information in the public domain. This, in turn, may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices.”¹²²

¹¹⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression E/CN.4/2000/63 (2000).

¹²⁰ Human Rights Committee: General Comment 34 at para 47.

¹²¹ ECtHR: *Dilipak and Karakaya v Turkey*, Application Nos 7942/05 and 24838/05 (2014).

¹²² Zimbabwe Constitutional Court: *Madanhire v Attorney General supra* note 24, 11.

As a result of these deleterious effects, many courts have said that criminal law should only be used in the context of defamation in extreme circumstances. The Inter-American Court has argued that the use of criminal law to protect fundamental rights must be a last resort, as “[i]n a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them”.¹²³

A number of courts have also held that even if criminal defamation is permissible in principle, the punishment for the crime must not be overly severe. The African Court, in *Konaté*, found Burkina Faso in violation of the African Charter, the ICCPR, and the Economic Community of West African States (ECOWAS) Treaty because of the existence of custodial sentences for defamation in its laws – in addition to the fact that it was imposed on Konaté. The Court made the same finding in relation to excessive fines and costs imposed upon him:

“The Court further notes that other criminal sanctions, be they (fines), civil or administrative, are subject to the criteria of necessity and proportionality; which therefore implies that if such sanctions are disproportionate, or excessive, they are incompatible with the Charter and other relevant human rights instruments.”¹²⁴

Therefore, there are a number of very strict protections that should apply when a criminal defamation law remains on the statute book:

- If defamation is part of the criminal law, the criminal standard of proof – beyond a reasonable doubt – should be fully satisfied.¹²⁵
- Convictions for criminal defamation should only be secured when the allegedly defamatory statements are false – and when the mental element of the crime is satisfied, that is when they are made with the knowledge that the statements were false or with reckless disregard as to whether they were true or false.
- Penalties should not include imprisonment – nor should they entail other suspensions of the right to freedom of expression or the right to practice journalism.¹²⁶
- States should not resort to criminal law when a civil law alternative is readily available.¹²⁷

¹²³ Inter-American Court: *Vélez Loor v Panama* Report No 95/06 (2007) at para 170.

¹²⁴ African Court: *Konaté v Burkina Faso supra* note 29 at para 166.

¹²⁵ Inter-American Court: *Kimel v Argentina* Series C No 177 (2008).

¹²⁶ African Court: *Konaté v Burkina Faso supra* note 29.

¹²⁷ See for example ECtHR: *Amorim Giestas and Jesus Costa Bordalo v Portugal* Application No 37840/10 (2014) at para 36.

What is reputation?

The concept of “reputation” is unclear, perhaps dangerously so, given that it can be used as the basis for limiting human rights. For example, what does it have to do with public profile or celebrity? Does a public figure have a greater reputation than an ordinary member of the public? Is reputation connected with how many people have heard of you? If the answer is yes, then presumably the damage to reputation will be much greater for such people. This opens up the possibility of abuse of defamation law by public figures. Perhaps a better approach is to tie the concept of “reputation” to human dignity. Human rights law has as its purpose the equal protection of dignity for all people, whether they are celebrities or not. This would mean that the ordinary person, whose first appearance in the media occurred when their reputation was attacked, would be as worthy of protection as the public figure whose activities are reported every day.

Is there a right to reputation?

Article 12 of the Universal Declaration of Human Rights provides that:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, *nor to attacks upon his honour and reputation*. Everyone has the right to the protection of the law against such interference or attacks.

This is echoed in identical words in Article 17 of the ICCPR (and hence is binding law upon states that are party to that treaty), and there is also a separate reference in Article 19 of the ICCPR to protection of “the rights and reputation” of others as a legitimate grounds for restricting freedom of expression.

Defences to Defamation

Truth

Most courts have held there is no defamation if the statement is true, and so proving the truth of an allegation should always be an absolute defence to a defamation suit.

In a 1919 case, the United States Supreme Court remarked that freedom of expression services “the search for truth”.¹²⁸

This is the position taken by the African Commission in the Declaration of Principles on Freedom of Expression in Africa:

“no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances”¹²⁹

¹²⁸ United States Supreme Court: *Abrams v United States* 250 US 616, 639 (1919).

¹²⁹ African Commission: “Declaration of Principles of Freedom of Expression in Africa” 32nd Ordinary Session (2002).

Note

In many (but not all) legal systems, the burden of proof lies not with the claimant – the person who says that they were defamed – but with the defendant. If the claimant can demonstrate that the defendant made the statement – usually fairly straightforward – it then becomes a matter for the defendant to show that the statement was true, and therefore not defamatory.

Reasonable Publication

If a statement is untrue, and it is damaging to a person’s reputation, the jurisprudence indicates that this does not automatically mean that it is defamatory.

The past half century has seen a developing trend in which *reasonable publication* is not penalised, even if it is not completely accurate. The term “reasonable publication” encompasses the idea that the author took reasonable steps to ensure the accuracy of the content of the publication – and also that the publication was on a matter of public interest.

In *Trustco Group International Ltd and Others v Shikongo*,¹³⁰ the Namibian Supreme Court looked at the defence of reasonable publication:

“The defence of reasonable publication holds those publishing defamatory statements accountable while not preventing them from publishing statements that are in the public interest. It will result in responsible journalistic practices that avoid reckless and careless damage to the reputations of individuals. In so doing, the defence creates a balance between the important constitutional rights of freedom of speech and the media and the constitutional precept of dignity.”¹³¹

There are some factors that a court will take into account in determining whether the conduct was reasonable:

- The journalist made good faith efforts to prove the truth of the statement and believed it to be true.
- The defamatory statements were contained in an official report – with the journalist not being required to verify the accuracy of all statements in the report.
- The topic was a matter of public concern and interest.

The South African Supreme Court of Appeal ruled on the question of whether strict liability in defamation was compatible with the constitutional protection of the right to freedom of expression – concluding that it was not. In its place the Court considered an alternative approach of allowing a defence in defamation cases of “reasonable publication”:

¹³⁰ Namibia Supreme Court: *Trustco Group International Ltd and Others v Shikongo* [2010] NASC 6.

¹³¹ *Id* at para 56.

“[W]e must adopt this approach by stating that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.”¹³²

Various factors should be considered to determine whether any given publication is reasonable:

“In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion, and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper ... I have mentioned some of the relevant matters; others, such as the opportunity given to the person concerned to respond, and the need to publish before establishing the truth in a positive manner, also come to mind. The list is not intended to be exhaustive or definitive.”¹³³

Opinion

In some situations a statement may not be a statement of fact (which can be determined to be true), but rather an expression of opinion.

The ECtHR has a long established doctrine that distinguishes between facts and value judgments:

“[A] careful distinction needs to be made between facts and value-judgements. The existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof. ... As regards value judgements this requirement [to prove their truth] is impossible of fulfilment and it infringes freedom of opinion itself”.¹³⁴

The ECtHR has taken a very robust view of this: no one can be restricted from expressing opinions. An opinion is exactly that: it is the journalist or writer’s view, based upon her understanding of the facts. It is something different from the facts themselves.

However, countries with “insult” laws may penalise these expressions of opinion. When a political campaigner called the French President a “sad prick,” he was found guilty of insult in France, and the ECtHR found that his right to freedom of expression had been violated.¹³⁵

Alternatively, in the case of satire and other humorous expression, it could be argued that a

¹³² South Africa Supreme Court of Appeal: *National Media Ltd v Bogoshi* supra note 56 at para 30.

¹³³ *Id* para 31.

¹³⁴ ECtHR: *Lingens v Austria* Application No 9815/82 (1986).

¹³⁵ ECtHR: *Eon v France* Application No 26118/10 (2013).

statement was not intended seriously and no reasonable person would understand it thus.

Absolute privilege

If the defamatory statement was reported from parliament or judicial proceedings, it would normally be absolutely privileged. That is, neither the original author of the statement nor the media reporting it could be found to have defamed. This rule may also apply to other legislative bodies and other quasi-judicial institutions (such as human rights investigations).

Parliamentary Privilege

Almost all legal systems encompass the concept of privilege for statements made in the legislature, and usually in other similar bodies (such as regional parliaments or local government councils). The purpose, clearly, is to protect freedom of political debate.

This privilege extends to reporting of what is said in parliament (or other bodies covered by the same privilege). Hence, as a general principle, not only would a member of parliament not be liable for a defamatory statement made in parliament, neither would a journalist who reported that statement.

The ECtHR has generally been very firm in upholding the principle of parliamentary privilege in defamation cases. In one case from the United Kingdom, a Member of Parliament (MP) had made a series of repeated statements that were highly critical of one of his own constituents. The MP gave both the name and address of the constituent, following which she was subject to hate mail, as well as extremely critical media coverage. The Court refused to find a violation of the right to have a civil claim adjudicated by a judge, since the protection of parliamentary privilege was “necessary in a democratic society.”¹³⁶

“In light of the above, the Court believes that a rule of parliamentary immunity, which is consistent with and reflects generally recognised rules within signatory States, the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1.”¹³⁷

In the *Jerusalem* case from Austria, the ECtHR deemed the applicant to have privilege, even though the alleged defamatory statements were made at a meeting of the Vienna Municipal Council and not parliament. This was justified in the following terms:

“In this respect the Court recalls that while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the 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.”¹³⁸

¹³⁶ ECtHR: *A v United Kingdom* Application No 35373/97 (2002).

¹³⁷ *Id* at para 83.

¹³⁸ ECtHR: *Jerusalem v Austria* Application No 26958/95 (2001) at para 36.

In the European Court of Justice (now the Court of Justice of the European Union), the Court stated that, in order to benefit from the immunity, the “connection between the opinion expressed and parliamentary duties must be direct and obvious”.¹³⁹

Qualified privilege

There is a degree of protection for media reporting other types of statement, even if they do not enjoy the privilege accorded to parliament or the courts. This might apply to, for example, public meetings, documents and other material in the public domain.

The *Reynolds* Defence

The Courts of England and Wales developed a strand of the qualified privilege defence in relation to the media’s publication of information on matters of public interest. This defence is frequently referred to as the “*Reynolds* defence”, which allowed the courts to give appropriate weight to the importance of freedom of expression by the media on all matters of public concern. In the House of Lords judgment in *Reynolds v Times Newspapers*,¹⁴⁰ Lord Nicholls set out a non-exhaustive list of matters that should be taken into account when determining whether a publication was subject to qualified privilege:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff’s side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.¹⁴¹

Following this judgment, a number of courts had applied the above criteria as “hurdles” to be overcome by anyone wanting to rely on the defence.¹⁴² The House of Lords clarified, in

¹³⁹ European Court of Justice: *Criminal Proceedings Against Aldo Patriciello* Case C-163/10 (2011).

¹⁴⁰ United Kingdom House of Lords: *Reynolds v Times Newspapers* [2001] 2 AC 127.

¹⁴¹ *Id.*, 205.

¹⁴² United Kingdom House of Lords: *Jameel v Wall Street Journal* [2006] UKHL 44.

Jameel v Wall Street Journal,¹⁴³ that this approach was not sufficient and that there needed to be a more realistic approach to how the media covered stories. The House of Lords clarified that the “non-exhaustive” list of matters set out by Lord Nicholls in *Reynolds* should not be treated as “hurdles”, but rather as factors to be taken into account and, as necessary, balanced against each other.¹⁴⁴

On 1 January 2014, the United Kingdom Defamation Act 2013 came into force, which abolished the “*Reynolds* defence”¹⁴⁵ and replaced it with the defence of “publication on a matter of public interest”.¹⁴⁶ This provides for a defence to claims of defamation where a defendant can show (i) the statement was, or formed part of, a statement on a matter of public interest,¹⁴⁷ and (ii) the defendant reasonably believed that publishing the statement was in the public interest.¹⁴⁸ In determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest, the courts have to “make such allowance for editorial judgement as it considers appropriate”.¹⁴⁹ Furthermore, in determining whether the defendant has met the criteria to rely on the defence, the court is to have regard to “all the circumstances of the case”.¹⁵⁰ In light of the above, it is possible that the Courts of England and Wales will continue to make reference to similar matters as those set out by Lord Nicholls in *Reynolds v Times Newspapers* when applying the defence.

Statements of others

Journalists cannot be responsible for the statements of others, provided that they have not themselves endorsed them.¹⁵¹ This would apply, for example, in the case of a live interview broadcast.

Remedies and Penalties

One reason why defamation suits – whether criminal or civil – are so feared is the impact of the penalties or awards often made against the media in such cases because of the “chilling effect” of heavy penalties or large defamation awards. The concern is not only for the journalist involved in any particular case, but also the deterrent that defamation law and the sanctions imposed can pose to vigorous, inquiring journalism.

No international human rights court has ever upheld a custodial sentence on a journalist for a “regular” defamation case. The leading case in Africa, the African Court case of

¹⁴³ *Id.*, 44.

¹⁴⁴ *Id.* at paras 33 and 56.

¹⁴⁵ United Kingdom Parliament: The Defamation Act 2013 (c 26), section 4(6).

¹⁴⁶ *Id.*, section 4(1).

¹⁴⁷ *Id.*, section 4(1)(a).

¹⁴⁸ *Id.*, section 4(1)(b).

¹⁴⁹ *Id.*, section 4(4).

¹⁵⁰ *Id.*, section 4(2).

¹⁵¹ ECtHR: *Jersild v Denmark*, Application No 15890/89 (1994) at para 35; ECtHR: *Thoma v Luxembourg* Application No 38432/97 (2001) at para 62.

*Konaté*¹⁵² provides a useful explanation of why custodial sentences should not be used in defamation cases except in exceptional circumstances:

“Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences.”¹⁵³

The ECtHR will not rule out criminal defamation in principle, but it has commented several times on the penalties imposed, as in this Romanian case:

“The circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest – present no justification whatsoever for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect, and the fact that the applicants did not serve their prison sentence does not alter that conclusion, seeing that the individual pardons they received are measures subject to the discretionary power of the President of Romania; furthermore, while such an act of clemency dispenses convicted persons from having to serve their sentence, it does not expunge their conviction.”¹⁵⁴

In civil defamation cases, the principal cause of the “chilling effect” is large monetary awards against the media in favour of defamation claimants. In a civil suit, the purpose of the award is not to punish the defendant (the defamer), but to compensate the person who was defamed, for any loss or damage caused by the defamation. It follows that the claimant should be able to prove that there was actual loss or damage as part of their suit. If this cannot be demonstrated, then it is unclear why there should be any monetary award, and so, wherever possible, redress in defamation cases should be non-pecuniary and aimed directly at remedying the wrong caused by the defamatory statement. Most obviously, this could be through publishing an apology or correction. Monetary awards – the payment of damages – should only be considered, therefore, when other lesser means are insufficient to redress the harm caused. Compensation for harm caused (known as pecuniary damages) should be based on evidence quantifying the harm and demonstrating a causal relationship with the allegedly defamatory statement.

In any event, courts should take into account not only the damage to reputation, but also the potential impact of large monetary awards on the defendant – and also more broadly on freedom of expression and the media in society. Applying a remedy can be considered as part of the “necessity” consideration in the three-part test for limiting freedom of expression. A proportional limitation – which can be justified when defamation has been proved – is one that is the least restrictive to achieve the aim of repairing a damaged reputation.

Problems often arise when calculating non-pecuniary damages. This refers to monetary

¹⁵² African Court: *Konaté v Burkina Faso supra* note 29.

¹⁵³ *Id* at para 155.

¹⁵⁴ ECtHR: *Cumpana and Mazare v Romania* Application No 33348/96, (2004) at para 116.

awards made to compensate losses that cannot be accurately calculated in monetary terms – such as loss of reputation, anxiety and emotional distress. The ECtHR has been critical of large non-pecuniary monetary awards, even on occasions finding them to be “violations of the right in themselves”. The landmark case was that of Tolstoy Miloslavsky, who was the author of a defamatory pamphlet confronted with damages of £1.5 million (in 1989) awarded by a British libel jury. The ECtHR found the award grossly disproportionate and that Tolstoy Miloslavsky’s right to freedom of expression had thereby been violated, even though the fact that he had committed libel was not in dispute. The ECtHR repeated these comments in *Steel and Morris v United Kingdom* (the “McLibel” case). It should also be noted that the ECtHR itself very rarely awards non-pecuniary damages. It normally concludes that the finding that a right has been violated is sufficient – a principle that domestic courts might be advised to follow where possible. A similar approach has been taken by the African Court¹⁵⁵ and the Inter-American Court:

“[T]he issuance of this Judgment, the extent of revoking the domestic decisions in their entirety, and the publication of this Ruling in various media streams, private means as well as those with wide circulation of social and official means, which includes the judiciary, are sufficient and appropriate measures of reparation to remedy the violations inflicted on the victims.”¹⁵⁶

Courts have also recognised that injunctions – the restraining of publication – as a remedy can, in themselves, amount to a disproportionate interference with freedom of expression. In *News Verlags GmbH & CoKG v Austria*¹⁵⁷ the ECtHR held that there was no proportionality between injunctions against a magazine and the aims of protecting the rights and reputations of others, and that the injunctions were therefore not necessary in a democratic society.¹⁵⁸

Humour

The ECtHR has maintained a consistent position of allowing greater latitude for humorous and satirical comment. However, the mere fact of an alleged defamation being published in a satirical magazine would not be enough to protect it. In a Romanian case, a politician named Petrina applied successfully to the ECtHR, claiming that his right to respect for his private and family life had been violated by the false allegation that he was a former member of the notorious Communist secret police. The fact that the publication was in a satirical magazine was irrelevant. The message of the article was “clear and direct, devoid of any ironic or humorous element.”¹⁵⁹

The protection of satire has also been emphasised by courts elsewhere. For example, the Malaysian Court of Appeal has stated:

¹⁵⁵ African Court: *Mtikila v Tanzania* Application No 011/2011 (2013).

¹⁵⁶ Inter-American Court: *Fontevicchia & D’Amico v Argentina* Case No 12.524 (2011) at para 110.

¹⁵⁷ ECtHR: *News Verlags GmbH & CoKG v Austria* Application No 31457/96 (2000).

¹⁵⁸ *Id.*: ECtHR: *Jerusalem v Austria* supra note 138.

¹⁵⁹ ECtHR: *Petrina v Romania*, Application No 78060/01 (2008), translated from the French, “clair et direct, dépourvu de tout élément ironique ou humoristique.”

“No reasonable person will read a cartoon with the same concentration, contemplation and seriousness as one would when reading a work of literature. Cartoons exaggerate, satirize and parody life, including political life. ... The political cartoonist, unlike the serious political pamphleteer, seeks to ridicule persons and institutions with humour to deliver a message. It will be most exceptional if a political cartoon will have the effect of disrupting public order, security or the safety of the nation.”¹⁶⁰

Protection of Political Speech

Historically, the law has offered great protection to public officials from criticism – whether in the form of “insult” laws, defamation, sedition laws or other means of preventing unruly subjects from criticising their superiors. But, this protection does not square with the social and political benefit of openness, free debate and accountability that is such a crucial component of free expression. And so, in a modern age of democracy and human rights, the principle has been reversed, with special emphasis being laid on the importance of protecting the right of political criticism. Courts are encouraged to follow the example of the Ugandan Constitutional Court which said that public figures need “harder skins”.¹⁶¹

Courts around the world have emphasised the need to protect political speech:

- The Nigerian High Court in *The State v The Ivory Trumpet Publishing Co*:¹⁶² “Freedom of speech is, no doubt, the very foundation of every democratic society, for without free discussion, particularly on political issues, no public education or enlightenment, so essential for the proper functioning and execution of the processes of responsible government, is possible.”¹⁶³
- The Supreme Court in Sri Lanka in *M Joseph Perera v Attorney-General*:¹⁶⁴ “Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read what it needs ... The basic assumption in a democratic polity is that government shall be based on the consent of the governed. The consent of the governed implies not only that consent shall be free but also that it shall be grounded on adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources... There must be untrammelled publication of news and views and of the opinions of political parties which are critical of the actions of government and expose its weakness. Government must be prevented from assuming the guardianship of the public mind.”¹⁶⁵
- The Constitutional Court in Spain in *Tribunal Constitucional, Sala Segunda. Recurso*

¹⁶⁰ Malaysia Court of Appeal: *Zulkiflee Bin SM Anwar Ulhaque v Arikrishna Apparau* 21NCVC-146-2011.

¹⁶¹ Uganda Constitutional Court: *Mwenda v Attorney General* [2010] UGCC 5.

¹⁶² Nigeria High Court: *The State v The Ivory Trumpet Publishing Co* [1984] 5 NCLR 736.

¹⁶³ *Id.*

¹⁶⁴ Sri Lanka Supreme Court: *M Joseph Perera v Attorney-General*, App. Nos 107-109/86 (SC).

¹⁶⁵ *Id.*

de amparo n^o. 211/80:¹⁶⁶ “Article 20 of the Constitution [on freedom of expression] ... guarantees the maintenance of free political communication, without which other rights guaranteed by the Constitution would have no content, the representative institutions would be reduced to empty shells, and the principle of democratic legitimacy ... which is the basis for all our juridical and political order would be completely false.”¹⁶⁷

- The ECtHR in *Feldek v Slovakia*:¹⁶⁸ “The Court emphasises that the promotion of free political debate is a very important feature of a democratic society. It attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned.”¹⁶⁹
- The ECtHR in *Lingens v Austria*:¹⁷⁰ “Freedom of political debate is at the very core of the concept of a democratic society.”¹⁷¹
- The African Commission in *Media Rights Agenda v Nigeria*:¹⁷² Freedom of expression is “vital to an individual’s personal development, his political consciousness, and participation in the conduct of public affairs in his country.”¹⁷³
- The Human Rights Committee, in General Comment 34: “Concerning the content of political discourse, the Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high”.¹⁷⁴

Criticism of Public Officials

Regional and domestic courts have increasingly argued that public officials should enjoy less protection from criticism than others and have higher legal standards to meet in order to be successful.

- The African Court in *Konaté*:¹⁷⁵ “[F]reedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures. Consequently, as stated by the [African] Commission, ‘people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether’.”¹⁷⁶

¹⁶⁶ Spain Constitutional Court: *Tribunal Constitucional, Sala Segunda. Recurso de amparo* No 211/80 (1981).

¹⁶⁷ *Id.*

¹⁶⁸ ECtHR: *Feldek v Slovakia* Application No 29032/95 (2001).

¹⁶⁹ *Id* at para 42.

¹⁷⁰ ECtHR: *Lingens v Austria* *supra* note 134.

¹⁷¹ *Id* at para 42.

¹⁷² African Commission: *Media Rights Agenda v Nigeria* *supra* note 90.

¹⁷³ *Id* at para 54.

¹⁷⁴ Human Rights Committee, General Comment 34 at para 38.

¹⁷⁵ African Court: *Konaté v Burkina Faso* *supra* note 29.

¹⁷⁶ *Id* at para 155.

- The ECtHR in *Lingens v Austria*:¹⁷⁷ “Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society ... The limits of acceptable criticism are, accordingly, 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 ... and he must consequently display a greater degree of tolerance.”¹⁷⁸
- The ECtHR in *Oberschlick v Austria*:¹⁷⁹ “The [politician] inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.”¹⁸⁰
- The Nigerian Federal Court of Appeal in *Chief Arthur Nwankwo v The State*:¹⁸¹ “The whole idea of sedition is the protection of the person of the sovereign ... The present President is a politician and was elected after canvassing for universal votes of the electorate; so is the present State Governor. They are not wearing constitutional protective cloaks of their predecessors in 1963 Constitution ... There is no ban in the Constitution 1979 against publication of truth except for the provisos and security necessities embodied in those sections.”¹⁸²
- The United States Supreme Court in *New York Times v Sullivan*:¹⁸³ “[P]ublic officials, in order to sustain an action for defamation, must prove the falsity of the allegedly defamatory statement as well as ‘actual malice’, i.e., that the defendant published a falsehood with knowledge that it was false or with reckless disregard of its truth or falsity.” The Court said that if the regular standards were applied “would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.”¹⁸⁴

Three main principles emerge from this jurisprudence:

- Freedom of political debate is a core and indispensable democratic value;
- The limits of criticism of a politician must hence be wider than for a private individual;
- The politician deliberately puts himself in this position and must hence be more tolerant of criticism.

The reasoning of the United States Supreme Court in *Sullivan* has also had far reaching consequences. In a later case, the Supreme Court extended the *Sullivan* rule to apply to

¹⁷⁷ ECtHR: *Lingens v Austria* *supra* note 134.

¹⁷⁸ *Id* at para 42.

¹⁷⁹ ECtHR: *Oberschlick v Austria* Application No 11662/85 (1991).

¹⁸⁰ *Id* at para 29.

¹⁸¹ Nigerian Federal Court of Appeal: *Chief Arthur Nwankwo v The State* (1983).

¹⁸² *Id* at para 237.

¹⁸³ United States Supreme Court: *New York Times v Sullivan* 376 US 254 (1964).

¹⁸⁴ *Id*.

all “public figures”, on the basis that public figures have access to the media to counteract false statements.¹⁸⁵

The *Sullivan* reasoning has been influential in common law jurisdictions such as England, India and South Africa, but also in the Philippines and in Europe. The argument in the American courts about the burden of proof lying with the plaintiff has *not* generally been accepted.¹⁸⁶ But the argument about greater latitude in criticising public figures has.

The ECtHR has been influenced by American free speech jurisprudence, although it seldom follows its reasoning fully. Where there is clearly common ground, however, is in the additional latitude given to criticism not only of public officials or politicians, but of the government specifically:

“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. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.”¹⁸⁷

There is significant concern over whether the state should be able to sue in defamation. The Human Rights Committee called for the abolition of the offence of “defamation of the state”. While the ECtHR has not entirely ruled out defamation suits by Governments, it appears to have limited such suits to situations which threaten public order, implying that Governments cannot sue in defamation simply to protect their honour. A number of national courts (for example, in India, South Africa, the United Kingdom, the United States, Zimbabwe) have also refused to allow elected and other public authorities to sue for defamation.¹⁸⁸

A South African Appellate Division case, in 1946, held that organs of the state could not sue individuals for defamation:

“The normal means by which the Crown protects itself against attacks upon its management of the country’s affairs is political action, not litigation, and it would, I think, be unfortunate if that practice were altered. ... I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State’s subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country.”¹⁸⁹

¹⁸⁵ United States Supreme Court: *Gertz v Robert Welch Inc* 418 US 323 (1974).

¹⁸⁶ See note on burden of proof under ‘Defences to Defamation’ on page 31.

¹⁸⁷ ECtHR: *Castells v Spain supra* note 59.

¹⁸⁸ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression *supra* note 119.

¹⁸⁹ South Africa Appellate Division: *Die Spoorbond v South African Railways* [1946] SA 999 (AD).

This reasoning was followed in a landmark British case in the House of Lords, *Derbyshire County Council v Times Newspapers Ltd*¹⁹⁰ where the Court held that public bodies could not sue in defamation:

“It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.... What has been described as “the chilling effect” induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.”¹⁹¹

Although the ECtHR has admitted the possibility of corporate bodies suing for defamation, the Court has held that associations must have high tolerance for criticism. In *Jerusalem v Austria*, two associations sued a local government councilor for defamation for describing them as “sects.” The Court found that there had been a violation of the councilor’s rights under Article 10:

“In the present case the Court observes that the IPM and the VPM were associations active in a field of public concern, namely drug policy. They participated in public discussions on this matter and, as the Government conceded, cooperated with a political party. Since the associations were active in this manner in the public domain, they ought to have shown a higher degree of tolerance to criticism when opponents considered their aims as well as to the means employed in that debate.”¹⁹²

However, despite this movement towards greater respect for freedom of expression, public officials can often rely on their status to try to curtail the right informally: they have almost automatic access to the media to put their point of view; they may use their office to prosecute critics under national security laws; and they may influence courts to impose harsher penalties for those who are found to “insult” public officials.¹⁹³

¹⁹⁰ United Kingdom House of Lords: *Derbyshire County Council v Times Newspapers Ltd* [1992] 3 All ER 65 (CA).

¹⁹¹ *Id.* Similar reasoning was adopted by the Supreme Court of New South Wales in Australia in *Ballina Shire Council v Ringland* [1999] NSWSC 11.

¹⁹² ECtHR: *Jerusalem v Austria supra* note 138.

¹⁹³ There is also an interesting observation made in United Kingdom House of Lords: *AG v Guardian (No 2)* [1988] 3 All ER 545, where the Court said, albeit in the context of breach of confidence, that the Crown has no private life or personal feelings capable of being hurt.

Insult to Institutions

The principle that political speech should be protected is well-established, both at the European level and in many national jurisdictions. It is curious, then, that it should continue to co-exist with the notion that it is possible to defame or insult offices, institutions or even symbols.

Example: *Eon v France*

In 2008, French farmer and political activist Hervé Eon waved a small placard at a group including the President, Nicolas Sarkozy, approached. The placard read: “Casse-toi pauvre con” (“Get lost you sad prick”). The words had been previously spoken by Sarkozy to a farmer at an agricultural show who had refused to shake his hand.

Eon was charged and convicted under a 1881 law, which provided protection of the presidency as a symbol, and a suspended fine was imposed. After appealing unsuccessfully through the national courts, the case went to the ECtHR.

The question was whether, in this day and age, the President of France should be understood as a politician (and hence required to be tolerant of greater criticism than an ordinary person) or as a national symbol or office (hence meriting greater protection)?

The Court found in Eon’s favour:

“The Court considers that criminal penalties for conduct such as that of the applicant in the present case are likely to have a chilling effect on satirical forms of expression relating to topical issues. Such forms of expression can themselves play a very important role in open discussion of matters of public concern, an indispensable feature of a democratic society”.¹⁹⁴

The ECtHR in the Eon case did not go quite as far as it had in the earlier French case of *Colombani v France*.¹⁹⁵ In this case the issue was the section of the Press Law criminalising insult of a foreign head of state. A journalist on *Le Monde* newspaper had been convicted of insulting the King of Morocco in an article about the drugs trade in that country, which relied upon an official report. The Court concluded that the offence of insult to foreign leaders “amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions.”¹⁹⁶

¹⁹⁴ ECtHR: *Eon v France* *supra* note 135 at paras 60-61.

¹⁹⁵ ECtHR: *Colombani v France* Application 51279/99 (2002).

¹⁹⁶ *Id* at paras 66-68.

CHAPTER
5

Privacy

The relationship between privacy and freedom of expression has become one of the most important issues of our time, for three particular reasons:

- Technological advances in the past quarter of a century have enabled mass state surveillance to a previously unimagined degree. Where once interception of correspondence would have entailed a steam kettle in the back room of the post office, it is now the work of a few keystrokes on immensely powerful computers.
- The advance of technology also means that both governments and private companies hold much more data on private individuals than ever before.
- The media (and public) appetite for disclosures about the private lives of public figures has reached unprecedented proportions. The issue has grown from concern about the activities of *paparazzi* to a much more systematic scrutiny of the lives of “celebrities,” including a tolerance in some news organisations of blatantly illegal methods of intrusion.

We might add a third ingredient to the mix: many people today reveal private aspects of their life on a social media to an extent that previous generations would have found bewildering (and not only because they had not heard of Facebook). In other words, the conceptual boundaries between public and private have changed in the minds of many people.

Yet, just at the moment when interference with privacy becomes much easier (and, for some, more acceptable) the legal protections of privacy have developed rapidly. The organisation Privacy International claims that there are more than 130 countries with constitutional protections regarding the right to privacy, while over 100 countries have privacy and data protection laws.

Privacy in International Instruments

International human rights treaties offer fairly robust protections against intrusions into privacy – however, the African Charter does not make mention of the right to privacy.

Article 17 of the ICCPR states:

- 1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- 2) Everyone has the right to the protection of the law against such interference or attacks.

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms addresses the right to respect for family and private life:

- 1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 11 of the American Convention protects the right to privacy in identical terms to the ICCPR.

Developments of Privacy in National Law

Despite the claim that privacy is constitutionally protected in a large majority of countries, the actual experience of national legal systems has been varied. At one end of the spectrum, France, in Article 9 of its Civil Code, guarantees the right to privacy. This reflects a media culture that has historically been much less intrusive on the private lives of public figures and even, in the nineteenth century, criminalised the publication of facts about private life. By contrast, in the United States there is no constitutional protection of privacy and any residual common law privacy rights are likely always to be trumped by the First Amendment and its protection of free speech.

This is not a matter of legal systems. Germany and Italy, both civil law jurisdictions, recognise a privacy right (at least a qualified one). The United Kingdom has imported an explicit privacy protection derived from Article 8 of the European Convention. Previously, protection of privacy under the common law would be through causes of action for breach of confidence (if the person could prove ownership of the material disclosed), malicious falsehood or trespass.¹⁹⁷

The common law in the United States evolved in a slightly different direction. A law review article of 1890, written by Samuel Warren and his friend and colleague Louis Brandeis – later a Supreme Court justice and one of the country’s most renowned jurists – proposes a “right to privacy” within the common law. Also taking the starting point as the sanctity of the home, Warren and Brandeis’ concern was that the development of intrusive technologies (such as small cameras) and the aggressive approach of the press were posing new threats to privacy. The Fourth Amendment to the United States Constitution provides protection against arbitrary intrusion by the authorities (although it never uses the word privacy). Warren and Brandeis argued that such protection should be extended:

“The common law has always recognized a man’s house as his castle, impregnable, often, even to his own officers engaged in the execution of its command. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?”¹⁹⁸

¹⁹⁷ See United Kingdom Court of Appeal: *Kaye v Robertson* [1991] FSR 62.

¹⁹⁸ Samuel D Warren and Louis D Brandeis, “The Right to Privacy,” *Harvard Law Review*, Vol IV, No 5, 1890.

This right is not an unlimited one. Indeed, Brandeis as a Supreme Court justice was famous as a defender of freedom of speech and the First Amendment. This article – justifiably described as the “most influential law review article of all” – argues that “[t]he right to privacy does not prohibit any publication of matter which is of public or general interest.” This is precisely the principle that continues to inform United States privacy jurisprudence to this day. Justice Brandeis called it “the right to be let alone.”

The right to privacy would not cover matters that were revealed legitimately in the course of official proceedings, such as a court case. It would not apply if the individual themselves revealed the information – so, once it is posted on your Facebook page it is no longer private.

Truth would not be a defence to a suit claiming a breach of privacy. Unlike in a defamation case, where truth would be an absolute defence, the right to privacy “implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all.”

Finally, according to Warren and Brandeis, “absence of malice” would not be a defence either. This is a point where later United States jurisprudence has moved on considerably.

A Supreme Court judgment of the 1970s spelled out four aspects to the right:

- The right not to be put in a “false light” by the publication of true facts;
- The right not to have one’s name or likeness appropriated for commercial value;
- The “right of publicity” on the part of a person whose name has a commercial value;
- The right to avoid the publicising of “private details.”¹⁹⁹

The Supreme Court has also found that the same “actual malice” standard laid down in the well-known *Sullivan* case for defamation cases would apply to public officials in privacy cases.²⁰⁰ In other words, public officials and other public figures have a lesser protection of their privacy than others.

There is a trend towards recognising the international human right to privacy within national legal systems. The consequence of this is that increasingly national courts will consider privacy not as a potential exceptional *limitation* to the right to freedom of expression, but as another equal and substantive right to be balanced against it. Not surprisingly, the jurisprudence of the ECtHR is once again particularly useful, since the Court has a long history of balancing the substantive Article 8 and Article 10 rights.

Breaching Privacy by Covert Means

At first sight, a media organisation would seem to be on the weakest ground when it used illegal means to violate the privacy of individuals. This was what happened in a series of British cases in which mobile phone accounts were hacked. The hacking scandal initially appeared confined to newspapers in the News International stable, owned by Rupert Murdoch. Indeed, it led to the closure of one of these papers, the *News of the World*. Later

¹⁹⁹ United States Supreme Court: *Zacchini v Scripps-Howard Broadcasting Co*, 433 US 562 (1977).

²⁰⁰ United States Supreme Court: *Time Inc v Hill*, 385 US 374 (1967).

it emerged that other companies, such as Mirror Group Newspapers, were also involved.

Most of the targets of phone-hacking were “celebrities”, although public concern about the issue was triggered by the revelation that a private investigator employed by one of the newspapers had hacked the voicemail of a disappeared child (later found to have been murdered), deleting messages and giving rise to the hope that she was in fact alive. Several of those involved were prosecuted and convicted under existing criminal law.

Beyond this, however, the phone-hacking cases prompted widespread revulsion about media intrusion into privacy and a judge-led inquiry that proposed a new system of media regulation.

However, in a case before the ECtHR involving the unlawful recording of a telephone conversation, the Court reached a rather different conclusion. The Court felt that the overriding concern was the public interest in the matters discussed. And, given the subject of the conversation, the privacy claim was not convincing:

“The context and content of the conversation were thus clearly political and the Court is unable to discern any private-life dimension in the impugned events... Equally, the Court finds that questions concerning the management and privatisation of State-owned enterprises undoubtedly and by definition represent a matter of general interest.”²⁰¹

There were two crucial distinctions with the British phone-hacking cases. First, the media organisation had not itself illegally recorded a conversation or message. Secondly, the matter reported was of clear public interest.

In *Haldimann v Switzerland*,²⁰² the ECtHR addressed the issue from the angle of when covert recordings are made by the journalists themselves. The target was an insurance broker. He was not named or otherwise identified, but the recording was broadcast as part of an investigation into the advice brokers give to customers. Importantly, however – and this was a crucial difference from the British phone-hacking cases – the personal privacy of the broker was not at issue. The matter under investigation was one of broad public interest.²⁰³

What are the Limits of Privacy?

We have seen that there is an unambiguous right to privacy in international law and also that privacy is protected, at least to some extent, in many national legal systems. It is also apparent that privacy, like the right to a reputation, may be legitimately limited in the public interest. In other words, if the public interest so demands, the balance between freedom of expression and privacy will tilt in the direction of the former. Often, as is the case with defamation cases, the public status of the person whose privacy is infringed may affect the Court’s balancing exercise.²⁰⁴

²⁰¹ ECtHR: *Radio Twist v Slovakia*, Application No 62202/00 (2006) at para 58.

²⁰² ECtHR: *Haldimann and Others v. Switzerland*, Application No 21830/09 (2015).

²⁰³ *Id.*

²⁰⁴ See ECtHR: *Fressoz and Roire v France*, Application No 29183/95 (1999).

Example: Publication of Photographs

The ECtHR considered a case of an Austrian newspaper that had been penalised for breaching the privacy of a politician. It had published a picture of him to accompany an article alleging that some of his earnings had been gained illegally. The national courts had found that although he was a member of parliament he was not well known to the public. The paper was breaching his privacy by publishing a picture of him *in the context of critical allegations*. The Court found that the newspaper's freedom of expression rights had been violated.²⁰⁵

In another case involving pictures the ECtHR reached a different conclusion. A man who had been captured carrying a knife on closed circuit television cameras argued that his privacy had been breached when the footage was broadcast on a crime prevention programme. Although he had used the knife in a suicide attempt, the broadcast claimed that his detection on CCTV had been a triumph of crime prevention resulting in the apprehension of a "dangerous" individual.²⁰⁶ The ECtHR found that although the interference with his privacy was legal and pursued a legitimate aim – the preservation of public order and prevention of crime – it was disproportionate and was thus an interference with the applicant's privacy rights.

Recently, the ECtHR has become increasingly protective of privacy rights. In the case of *MGN v United Kingdom*,²⁰⁷ the model Naomi Campbell had sued the *Daily Mirror* over a story entitled: "Naomi: I am a drug addict". The newspaper detailed Campbell's treatment for narcotics addiction, despite her previous public denials of drug use. The story included pictures of her near the Narcotics Anonymous centre she was attending.

In her case, a British High Court found in Campbell's favour. This decision was overturned on appeal, before being restored by the House of Lords. Mirror Group Newspapers took the case to the ECtHR which held that although the article itself was in the public interest, the publication of secretly taken photographs was an intrusion into Campbell's privacy. However, the Court did find a breach of the freedom of expression right in the size of the costs award.

In the area of privacy, to an even greater extent than other media law issues, the European Court has generated the greatest amount of case law out of all the regional human rights courts (not least because one other regional system, the African system, has no such protection of privacy).

The Inter-American Court has offered a particularly robust defence of the right of journalists to intrude on the privacy of public figures in certain instances when this may be in the public interest.

In *Fontevicchia and Another v Argentina*,²⁰⁸ the applicants had published an article about a personal relationship of former President Carlos Menem, including the financial arrangements between him and the mother of his illegitimate child. The Court found that

²⁰⁵ ECtHR: *Krone Verlag GmbH & Co. KG v Austria*, Application No 35373/97 (2002).

²⁰⁶ ECtHR: *Peck v United Kingdom*, Application No 44647/98 (2003).

²⁰⁷ ECtHR: *MGN v United Kingdom*, Application No 39401/04 (2011).

²⁰⁸ Inter-American Court: *Fontevicchia & D'Amico v Argentina supra* note 156.

while the state should take action to protect privacy, including against media intrusion, it must also take into account:

- “a) the different threshold of protection for public officials, especially those who are popularly elected, for public figures and individuals, and b) the public interest in the actions taken.”²⁰⁹

The Court saw a clear public interest in the disclosure of these facts:

“This information relates to the integrity of political leaders, and without the need to determine the possible use of public funds for personal purposes, the existence of large sums and costly gifts on behalf of the President of the Nation, as well as the possible existence of negotiations or interference in a judicial investigation, are issues that involve a legitimate social interest.”²¹⁰

Another interesting aspect of ECtHR case law on privacy is that the Court is increasingly willing to see the public interest in disclosing the “personality traits” of public figures. For instance, a politician’s approach to a romantic relationship can “[raise] the question of whether he had been dishonest and lacked judgment in that regard.”²¹¹

Privacy and Medical Confidentiality

The Naomi Campbell case skirts round the edge of an issue where the definition of privacy is at first sight very clear: information about medical conditions. While the confidentiality of medical records would generally be regarded as a completely valid application of the right to privacy, in the Campbell case the fact of her drug dependency was regarded as a matter of public interest.

In a case involving medical records, however, the ECtHR found a legitimate public interest in their exposure. *Le Grand Secret* was a book co-written by the personal physician to President Francois Mitterrand of France and published a few days after the President’s death. It detailed the progress of the cancer that Mitterrand was diagnosed to have shortly after he became President in 1981. The French courts had issued a temporary injunction against the circulation of the book, which was then made permanent some months later.

The Court made a distinction between the temporary injunction and the permanent ban on publication.²¹² The former did not constitute an interference with Article 10, since it was imposed within days of Mitterrand’s death out of respect for his family. By the time of the second decision, nine months later, the Court determined that two factors had changed. One, following the reasoning in earlier cases, such as *Spycatcher*,²¹³ was that the content of the book was already public knowledge and so medical confidentiality could no longer be maintained. Secondly, the passage of time meant that the hurt to the family was lessened.²¹⁴

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ ECtHR: *Ruusunen v Finland* Application No 73579/10 (2014) at paras 49-50; ECtHR: *Couderc v France* Application No 40454/07 (2015) at para 99.

²¹² ECtHR: *Éditions Plon v France* Application No 58148/00 (2004).

²¹³ ECtHR: *Observer and Guardian v UK*, Application No 13585/88 (1991).

²¹⁴ Note, however, that the judgment related to the right of the publisher to circulate the book, not the author’s breach of medical confidentiality, for which he received a criminal conviction that was not appealed.



National Security

“Freedom of expression” and “national security” are very often seen as principles or interests that are inevitably opposed to each other. “National security” is one of the most common justifications offered by states for limiting freedom of expression by journalists and media organs. Unlike the ICCPR, the European Convention, and the American Convention, the African Charter does not contain this explicit limitation within the protection of freedom of expression.

Yet national security remains a genuine public good – and without it, media freedom would be scarcely possible. On the other hand, governments are seldom inclined to recognise that media freedom may actually be a means to ensure better national security by exposing abuses in the security sector. Examples might include the Pentagon Papers case in the United States, the Wikileaks exposure of abuses by US troops in Iraq and Afghanistan, as well as Edward Snowden’s revelations of mass electronic surveillance, all of which are instances where media revelations of abuse in the national security sector may lead to reforms and, ultimately, greater security.

National security is one of the most problematic areas of interference with media freedom. One particular difficulty is the tendency on the part of many governments to assume that it is legitimate to curb *all* public discussion of national security issues. Yet, according to international standards, expression may only be lawfully restricted if it *threatens actual damage* to national security. There may be many instances where reporting of national security issues – for example exposure of corruption or indiscipline within security institutions – may actually help to promote national security. Unfortunately, governments seldom tend to understand the issue that way.

In 1995, a group of international experts drew up the Johannesburg Principles on National Security, Freedom of Expression and Access to Information and National Security (Johannesburg Principles).²¹⁵ Although not binding law, these principles are frequently cited (notably by the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression) as a progressive summary of standards in this area. The Johannesburg Principles address the circumstances in which the right to freedom of expression might legitimately be limited on national security grounds, at the same time as underlining the importance of the media, and freedom of expression and access to information, in ensuring accountability in the realm of national security.

²¹⁵ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1996).

Definitions of National Security

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) define a legitimate national security interest as one that aims “to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.”²¹⁶ Subsequent articles indicate that a national security limitation “cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.”²¹⁷

The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has repeatedly limited the scope of a national security limitation in similar terms. For example:

“For the purpose of protecting national security, the right to freedom of expression and information can be restricted only in the most serious cases of a direct political or military threat to the entire nation.”²¹⁸

In a similar vein, the Johannesburg Principles define a national security interest as being:

“to protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.”²¹⁹

(Note that the Johannesburg Principles prefer the word “country” to “nation,” on the grounds that the latter is often invoked to defend the interests of a majority ideology or ethnic group.)

Like the Siracusa Principles, the Johannesburg Principles also offer a non-exhaustive list of reasons that cannot be used in invoking a national security interest to restrict freedom of expression, for example:

“to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.”²²⁰

Interestingly, the Kenyan Constitution provides a definition of “national security”:

“National security is the protection against internal and external threats to Kenya’s territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.”²²¹

National security interests must be carefully balanced so as not to unjustifiably limit rights. In a recent High Court decision in Kenya, the Court confirmed that “protecting

²¹⁶ Principle 29, Siracusa Principles.

²¹⁷ Principle 30, Siracusa Principles.

²¹⁸ Report of the Special Rapporteur on the nature and scope of the right to freedom of opinion and expression, and restrictions and limitations to the right to freedom of expression CN.4/1995/32 (1995).

²¹⁹ Principle 2(a), Johannesburg Principles.

²²⁰ Principle 2(b), Johannesburg Principles.

²²¹ Article 238(1) of the Kenya Constitution (2010).

national security carries with it the obligation on the State not to derogate from the rights and fundamental freedoms guaranteed in the Constitution.”²²²

The Court of Appeal in Kenya, in an appeal to an interlocutory application in the litigation mentioned above, reiterated the need to ensure that national security is not used in such a way that fundamental human rights are disregarded:

“However, national security is subject to the authority of the Constitution and Parliament and must be pursued in compliance with the law and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms. Article 238(2) of the Constitution. That implies that in enacting or amending any law that touches on national security (or any other law for that matter), Parliament (i.e. the National Assembly and the Senate) must ensure that there is no violation of the people’s rights and freedoms that are spelt out in the Bill of Rights and which are, moreover, part and parcel of what national security entails as per the Constitutional definition.”²²³

The Court eloquently explained the fundamental nature of human rights, and that they are not to be regarded as transitory:

“It must always be borne in mind that the rights and fundamental freedoms in the Bill of Rights are not granted by the State and therefore the State and/or any of its organs cannot purport to make any law or policy that deliberately or otherwise takes away any of them or limits their enjoyment, except as permitted by the Constitution. They are not low-value optional extras to be easily trumped or shunted aside at the altar of interests perceived to be of greater moment in moments such as this.”²²⁴

Terrorism

In the past decade or so – since the attacks in the United States on 11 September 2001 – much of the focus of security legislation has been on countering terrorism. In part this reflects a genuine change in understanding the nature of the threat to national security – seen also in the notion that terrorism or terrorist organisations are the object of a “war”. More generally, it serves as a rhetorical device whereby dissent – including critical media coverage – may be characterised as giving succour to terrorists.

The UN Security Council has required member states to take a number of steps to combat terrorism. One measure of particular relevance to the media is contained in Resolution 1624 of 2005, which was the first international instrument to address the issue of incitement to terrorism. The preamble to Resolution 1624 condemns “incitement to terrorist acts” and repudiates “attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts.”

²²² Kenya High Court: *Coalition for Reform and Democracy and Others v Republic of Kenya and Attorney General* Petition 628 of 2014 (2015) at para 1.

²²³ Kenya Court of Appeal: *Attorney General v Coalition for Reform and Democracy* Petition 628 of 2014 (2015), 31.

²²⁴ *Id.*, 31-32.

The operative section of Resolution 1624:

1. *Calls upon* all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:
 - (a) Prohibit by law incitement to commit a terrorist act or acts;
 - (b) Prevent such conduct;
 - (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct;

This may at first sight be seen as overly restrictive of media expression. However, in the event that Resolution 1624 is used as a rationale for censoring media, a number of points should be borne in mind:

- Resolution 1624, unlike other counter-terrorism resolutions of the Security Council, is not binding on member states. It is not issued under the Council's powers in Chapter VII of the UN Charter (preserving peace and security).
- Although the preamble mentions “glorification” or apology for terrorism, this is explicitly when such glorification may have the effect of inciting terrorist acts.
- The preamble also makes explicit reference to the guarantee of the right to freedom of expression in Article 19 of the ICCPR and the limited circumstances and conditions under which this right may be restricted. In other words, Resolution 1624 confers no additional basis for curbing free expression, beyond the criteria and process already set out in international law.

One serious problem with legal restrictions on glorification (or even incitement) of terrorism is the lack of any commonly accepted definition of terrorism in international law. Early counter-terrorism treaties focused on criminalisation of particular acts, such as hijacking aircraft, without using the term terrorism. Later treaties, such as that addressing financing of terrorism do offer a definition, although this has no binding character beyond the treaty itself.

Many states, as well as entities such as the European Union, additionally define terrorism with reference to certain organisations “listed” as terrorist. This may hold particular dangers for the media in reporting the opinions and activities of such organisations. In Swaziland, the People’s United Democratic Movement (PUDEMO), a group advocating for democratic change in the kingdom, has been declared a terrorist organisation in terms of the Suppression of Terrorism Act, 2008. Under that legislation, any support for a proscribed organisation is an offence in itself, and carries heavy jail terms.

The UN Special Rapporteur on protecting human rights while countering terrorism has offered a definition of terrorism, based upon best practices worldwide, which focuses on the act of terror rather than the perpetrator:

“Terrorism means an action or attempted action where:

1. The action:

- (a) Constituted the intentional taking of hostages; or
- (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
- (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and

2. The action is done or attempted with the intention of:

- (a) Provoking a state of terror in the general public or a segment of it; or
- (b) Compelling a Government or international organization to do or abstain from doing something; and

3. The action corresponds to:

- (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
- (b) All elements of a serious crime defined by national law.”²²⁵

The advantage of the Special Rapporteur’s definition is that it clearly sets out both the subjective and objective elements of the crime: the coercive political objective and the serious crime. This excludes the possibility of labelling political opinions alone as terrorist.

Sometimes expression on its own is deemed a threat to national security – and these situations are addressed under incitement. The Johannesburg Principles discuss the circumstances in which expression may be regarded as a threat to national security:

“Expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence;
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”²²⁶

²²⁵ Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism A/HRC/15/51 (2010).

²²⁶ Principle 6, Johannesburg Principles.

Example

The United Kingdom case of *DPP v Chambers*²²⁷ is an interesting case study. Here, a man due to fly out of Robin Hood Airport in Yorkshire at a time when flights were being cancelled due to bad weather tweeted “Robin Hood airport is closed. You’ve got a week and a bit to get your shit together otherwise I’m blowing the airport sky high!”. He was charged under the Communications Act of 2003, and fined £385. In an appeal, the man was acquitted, and the High Court, Queen’s Bench Division made some interesting observations on the nature of a terrorist threat.

“[T]he more one reflects on it, the clearer it becomes that this message did not represent a terrorist threat, or indeed any other form of threat. It was posted on ‘Twitter’ for widespread reading, a conversation piece for the appellant’s followers, drawing attention to himself and his predicament. Much more significantly, although it purports to address ‘you’, meaning those responsible for the airport, it was not sent to anyone at the airport or anyone responsible for airport security, or indeed any form of public security. The grievance addressed by the message is that the airport is closed when the writer wants it to be open. The language and punctuation are inconsistent with the writer intending it to be or to be taken as a serious warning. Moreover... it is unusual for a threat of a terrorist nature to invite the person making it to [be readily] identified, as this message did. Finally, although we are accustomed to very brief messages by terrorists to indicate that a bomb or explosive device has been put in place and will detonate shortly, it is difficult to [imagine] a serious threat in which warning of it is given to a large number of tweet ‘followers’ in ample time for the threat to be reported and extinguished.”²²⁸

Necessary in a Democratic Society

Most cases involving national security restrictions tend to be decided on the necessity leg of the three-part test. In a 2015 Federal District Court decision from the United States, Judge James Boasberg warned that “[i]ncantation of the magic words ‘national security’ without further substantiation is simply not enough to justify significant deprivations of liberty.”²²⁹ He accepted that the Executive branch of government has the expertise to make policy decisions based on national security, but stated that “when its chosen vehicle demands significant deprivation of liberty, it cannot be justified by mere lip service.”²³⁰

In the Human Rights Committee case of *Mukong v Cameroon*,²³¹ the Committee ruled that laws which had been used against Albert Mukong, a journalist and author who had spoken publicly criticising the President and Government, and criminalised statements “intoxicat[ing] national or international public opinion,” were not necessary. The government justified the arrests to the Committee on national security grounds, but the Committee held that laws of this breadth “muzzled advocacy of multi-party democracy,

²²⁷ United Kingdom High Court: *Chambers v DPP* [2012] EWHC 2157.

²²⁸ *Id.*

²²⁹ United States Federal District Court: *R. I. L-R v Johnson* Civil Action No 15-11 (JEB), 37.

²³⁰ *Id.*, 38.

²³¹ Human Rights Committee: *Womah Mukong v Cameroon* Communication No 458/1991 (1994).

democratic tenets and human rights” and so could not be necessary.

The African Commission has taken similar positions. In *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*,²³² opponents of the annulment of the 1993 presidential elections, including journalists, had been arrested and publications were seized and banned. The Commission said that no situation could justify such a wholesale interference with freedom of expression.

Various bodies have found that the burden is on the government to show that a restriction on freedom of expression was necessary. In *Jong-Kyu v Republic of Korea*,²³³ the Human Rights Committee found against the state for failing to explain the specific threat to national security behind Jong-Kyu’s statement, which was in support of striking workers. It made a similar argument in the case of *Vladimir Petrovich Laptsevich v Belarus*.²³⁴

Courts have also insisted that there must be a close nexus between the restricted expression and an actual damage to national security or public order. Courts will tend to look closely at the exact words used and the context of publication.

The African Commission’s Declaration of Principles of Freedom of Expression in Africa also links the acceptability of limitations to expression with the potential harm that expression may cause. Principle XIII explicitly calls on African states to ensure that criminal restrictions “serve a legitimate interest in a democratic society,”²³⁵ and states that “[f]reedom 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.”²³⁶

Examples

This approach can be seen very clearly in the many national security cases from Turkey before the ECtHR. In *Başkaya and Okçuoğlu v Turkey*,²³⁷ an academic published an article entitled “The past and present of the Kurdish problem.” He was imprisoned for these comments and later required to pay a fine, under a law protecting national security and preventing public disorder.²³⁸ To determine if the restrictions were necessary, the Court looked at the words used and the context. It noted the “sensitivity of the security situation in south-east Turkey” and the government’s fear that the comments would “exacerbate the serious disturbances.” Yet the negative terms of some of the comments did “not amount to incitement to engage in violence, armed resistance, or an uprising” because the comments were published in a “periodical whose circulation was low, thereby significantly reducing their potential impact on ‘national security’, ‘public order’, or ‘territorial integrity.’”

²³² African Commission: *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*, Communication No 102/93 (1998).

²³³ Human Rights Committee: *Jong-Kyu Sohn v Republic of Korea*, Communication No 518/1992 (1995).

²³⁴ Human Rights Committee: *Laptsevich v Belarus* Communication No 780/1997 (2000).

²³⁵ Principle XIII Section 1, Declaration of Principles of Freedom of Expression in Africa.

²³⁶ Principle XII Section 2, Declaration of Principles of Freedom of Expression in Africa.

²³⁷ ECtHR: *Başkaya and Okçuoğlu v Turkey*, Application No 24246/94 (1999).

²³⁸ *Id.*

On the other hand, in another Turkish case, *Zana v Turkey*,²³⁹ a mayor had expressed support for the Kurdistan Workers Party (PKK), engaged in armed struggle against the Turkish authorities. Incidents of terrorism had increased in response to the mayor's comments. The Court held:

“[T]he support given to the PKK ... by the former mayor of Diyarbakir, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region.”²⁴⁰

In some cases the necessity of restrictions has been denied because material said to damage national security has already been published elsewhere. The most famous example of this was the “*Spycatcher*” case – actually two cases before the ECtHR, *The Observer and Guardian v United Kingdom*²⁴¹ and *The Sunday Times v United Kingdom*.²⁴² The government succeeded in gaining injunctions against the newspapers in question to prevent publication of passages from unauthorised memoirs of a former member of the security service. The injunctions remained in place even after the book had been published in the United States, which made the material widely available in the United Kingdom too. The ECtHR held that that there was a violation of the right to freedom of expression, since there could be no necessity to prohibit the circulation of material that was already widely available. Of course, this consideration is likely to be even more frequent in the days of internet publication.

In a 2006 Report to the United Nations General Assembly, the Special Rapporteur on the promotion and protection of human rights while countering terrorism warned that infringing citizens' fundamental human rights can actually harm national security:

“The systematic violation of human rights undermines true national security and may jeopardize international peace and security; therefore, a State shall not invoke national security as a justification for measures aimed at suppressing opposition or to justify repressive practices against its population.”²⁴³

Prior Restraint in National Security Cases

There is a general presumption against prior restraint – the judicial suppression of material before its publication. In fact, the American Convention explicitly precludes prior restraint in its protection of freedom of thought and religion. Article 13(2) states that:

“The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which

²³⁹ ECtHR: *Zana v Turkey* No 18954/91 (1997).

²⁴⁰ *Id.*

²⁴¹ ECtHR: *The Observer and Guardian v United Kingdom* *supra* note 213.

²⁴² ECtHR: *The Sunday Times v United Kingdom* Application No 13166/87 (1991).

²⁴³ Report of Special Rapporteur on the promotion and protection of human rights while countering terrorism A/61/267 (2006).

shall be expressly established by law to the extent necessary to ensure:

- a) Respect for the rights or reputations of others; or
- b) The protection of national security, public order, or public health or morals.”

However, many argue that national security interests are precisely the type of issue where it may be necessary to step in and prevent publication. There is little point (as in *Spycatcher*) in stepping in to stop publication of material that is already in the public domain. (Though the other lesson from *Spycatcher*, of course, was that the publication did no harm anyway.)

This was precisely the question that the United States Supreme Court confronted in *New York Times Co v United States* – better known as the “Pentagon Papers” case. The government sought prior restraint on publication of a large stash of documents – 47 volumes of them – labelled “top secret” and leaked from the Department of Defense. The documents detailed the decision-making leading to its involvement in the Vietnam war and the government sought to prevent publication because of alleged damage to national security and relations with other countries.

In a brief judgment rejecting the request for prior restraint, the Court drew on earlier judgments to note that prior restraint can only be allowed in extreme circumstances: “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity” ... The Government “thus carries a heavy burden of showing justification for the imposition of such a restraint.”²⁴⁴

Individual opinions by the judges elaborated on this reasoning. Justice Hugo Black argued:

“To find that the President has ‘inherent power’ to halt the publication of news ... would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make ‘secure’ ... The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security.”

While less categorical than Justice Black’s reasoning, the ECtHR has also consistently warned of the danger in prior restraint, including in national security cases:

“The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.”²⁴⁵

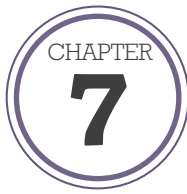
²⁴⁴ United States Supreme Court: *New York Times Co v United States (Pentagon Papers case)* 403 US 713 (1971).

²⁴⁵ ECtHR: *The Observer and Guardian v United Kingdom* *supra* note 213.

Some of the same issues arose in the case of *Vereniging Weekblad Bluf! v Netherlands*.²⁴⁶ The magazine in question had got hold of an internal report by the internal security service which showed the extent of the security service's monitoring of the Communist Party and the anti-nuclear movement. The special issue of the magazine containing details of the report was seized. However, the offset plates were not and the magazine simply reprinted its issue. Later a court order was obtained banning the issue from circulation.

The ECtHR in this case found – as with *Spycatcher* – that the court order withdrawing the magazine from circulation was not a necessary interference with freedom of expression, since the information in the issue was already publicly known. (The Court also questioned whether the contents were genuinely secret.) However, it rejected the argument from the magazine that freedom of expression rights would in all instances prevent a state from seizing and withdrawing material from circulation: national authorities have to be able to take necessary steps to prevent disclosure of secrets when this is truly necessary for national security.

²⁴⁶ ECtHR: *Vereniging Weekblad Bluf! v Netherlands* Application No 16616/90 (1995).



Contempt of Court - Judicial Proceedings and Media Freedom

The right to a fair trial and the right to freedom of expression often seem to be in conflict. In different jurisdictions around the world there have been many cases in which media freedoms have been limited in order to facilitate the impartial administration of justice. Some instruments, such as the European Convention, even make “maintaining the authority and impartiality of the judiciary” a legitimate ground for limiting the right to freedom of expression.

The right to a fair trial – or to a fair hearing on any matter, such as a violation of rights – is a central and fundamental human right. It is guaranteed in Article 14 of the ICCPR, in Article 7 of the African Charter, and in most national constitutions. However, a *fair* hearing is understood to mean a *public* hearing, encompassed in the old adage that justice must not only be done, but be seen to be done. In the modern age, a public hearing does not only mean that the doors of the courtroom are open to the family and friends of the participants but also that media reporting is generally understood to be a crucial part of making a trial public.

The United States Supreme Court, in *Sheppard v Maxwell*,²⁴⁷ discussed why publicity is good for the administration of justice:

“A responsible press has always been regarded as the handmaiden of effective judicial administration, particularly in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism.”²⁴⁸

In some jurisdictions courts have introduced live broadcasts of trials – such as the OJ Simpson trial in the United States and the Oscar Pistorius trial in South Africa. In the case brought to determine whether the Pistorius case could be broadcast, the High Court in Pretoria explained the value of broadcasting a criminal trial:

²⁴⁷ United States Supreme Court: *Sheppard v Maxwell* 384 US 333, 350 (1966).

²⁴⁸ *Id.*

“My view is that it is in the public interest that, within allowable limits, the goings on during the trial be covered as I have come to decide to ensure that a greater number of persons in the community who have an interest in the matter but who are unable to attend these proceedings due to geographical constraints to name just one, are able to follow the proceedings wherever they may be. Moreover, in a country like ours where democracy is still somewhat young and the perceptions that continue to persist in the larger section of South African society, particularly those who are poor and who have found it difficult to access the justice system, that they should have a first-hand account of the proceedings involving a local and international icon. ... Enabling a larger South African society to follow first-hand the criminal proceedings which involve a celebrity, so to speak, will go a long way into dispelling these negative and unfounded perceptions about the justice system, and will inform and educate society regarding the conduct of criminal proceedings.”²⁴⁹

The presumption is that the right to freedom of expression will prevail unless it is necessary to limit it for the purpose of ensuring the right to a fair hearing. This will be determined, as ever, by the three-part test: legitimate aim, prescribed by law, necessary in a democratic society.

Various Courts have made pronouncements on when they will limit public accessibility to watch legal proceedings.

- In Canada, in *Attorney General of Nova Scotia v MacIntyre*,²⁵⁰ the Canadian Supreme Court said that “curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance ... One of these is the protection of the innocent.”²⁵¹
- In New Zealand, the Supreme Court said that the primary position is that there should be public access, and then reasons should be given for why that is diverted from:

“There will of course be cases when a sufficient reason for withholding information is made out. If that is so, the public will or should understand why access has been denied. But unless the case for denial is clear, individual interests must give way to the public interest in maintaining confidence in the administration of justice through the principle of openness.”²⁵²

- In the United States, courts have interpreted the common law to mean that there is a presumption of access to court documents (including those gathered in the investigation and not necessarily presented in evidence), and have held that “[t]he presumption of access is based on the need for federal courts, although independent – indeed, particularly because they are independent – to have a measure of accountability and for the public to have confidence in the administration of justice.”²⁵³

²⁴⁹ South Africa High Court: *MultiChoice (Pty) Ltd v The National Prosecuting Authority* 2014 (1) SACR 589 (GP) at para 27.

²⁵⁰ Canada Supreme Court: *Attorney General of Nova Scotia v MacIntyre* [1982] 1 SCR 175.

²⁵¹ *Id* at para 187.

²⁵² New Zealand Supreme Court: *Rogers v Television New Zealand Limited* [2007] NZSC 91 at para 74.

²⁵³ United States Court of Appeals: *United States v Amodeo* 71 F 3d 1044 (1995).

- In South Africa, the Constitutional Court has held that “[f]rom the right to open justice flows the media’s right to gain access to, observe and report on, the administration of justice and the right to have access to papers and written arguments which are an integral part of court proceedings subject to such limitations as may be warranted on a case-by-case basis in order to ensure a fair trial.”²⁵⁴

From these cases we can see that courts often accept that although “the default position” should be “one of openness”, a balancing exercise is required to ensure that the interests of justice were served.²⁵⁵

Reporting Ongoing Criminal Investigations

There is an obvious potential danger in reporting on investigations that are current and continuing. Aside from the risk that media comment and revelations may prejudice future court proceedings there may be a risk that reporting will interfere with the investigation. Media coverage may tip off those being investigated, or it may reveal the techniques that the police are using.

Yet courts have become increasingly reluctant to apply blanket restrictions to reporting of investigations.

The ECtHR reached this conclusion in the case of *Weber v Switzerland*.²⁵⁶ Franz Weber, a journalist and ecologist, had held a press conference criticising (and thereby revealing) details of a continuing investigation. The Swiss law prohibited making public “any documents or information about a judicial investigation” until the investigation had been completed. The Court found that because the proceedings under investigation had already been made public, there was no interest in maintaining their confidentiality. Hence it was not “necessary in a democratic society” to impose a penalty on Weber. In addition, the statements could not be seen as an attempt to pressure the investigating judge and therefore prejudicial to the proper conduct of the investigation, because the investigation was already practically complete.²⁵⁷

Reporting Court Proceedings – The Sub Judice Rule

The general rule is that court proceedings are open to the public – which includes the media. Fundamentally the argument in favour of public trials is that opening the proceedings to scrutiny will guarantee fairness. Hence “a fair and public hearing” is a phrase that cannot be taken apart – the fairness is dependent (in part) on the publicity. Although often the public is interested in the proceedings for cheap sensationalist reasons, having a public trial plays an important role in informing and educating the public about the workings of the justice system. It is for this reason that parties cannot decided unilaterally to exclude

²⁵⁴ South Africa Constitutional Court: *Independent Newspapers v Minister for Intelligence Services* 2008 (5) 31 (CC) at para 41.

²⁵⁵ *Id* at para 43.

²⁵⁶ ECtHR: *Weber v Switzerland*, Application No 11034/84 (1990).

²⁵⁷ *Id*.

the public, and courts may only do so if it “would not run counter to any public interest.”²⁵⁸

Nevertheless, Article 14(1) of the ICCPR does provide:

“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.”

This means that a court should retain some discretion in deciding whether to restrict public access. The Human Rights Committee has said that the grounds for excluding the public listed in Article 14(1) constitute an exhaustive list – there may be no other grounds for not allowing the public access to a trial. This applies equally to media access.²⁵⁹ The burden of proof for showing that the public should be excluded lies with the state.²⁶⁰

The Human Rights Committee has observed that making trials public is “a duty upon the State that is not dependent on any request, by the interested party, that the hearing be held in public.”²⁶¹ This means that the courts must make publicly available information about the location and time of hearings and make adequate provision to accommodate the public (and the media).

There are, of course, intermediate steps that can be taken to fulfil the same interests, such as excluding the public for limited parts of a trial or imposing restrictions so that the media do not report certain names or facts.

The Canadian Supreme Court has emphasised that access to legal proceedings will only be prohibited in strict circumstances:

“Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. ... Public access will be barred only when the appropriate court ... concludes that disclosure would subvert the ends of justice or unduly impair its proper administration.”²⁶²

²⁵⁸ ECtHR: *Håkansson and Sturesson v Sweden*, Application No 11855/85 (1990) at para 66.

²⁵⁹ Human Rights Committee: General Comment 13 at para 6.

²⁶⁰ Human Rights Committee: *Miguel Angel Estrella v Uruguay*, Communication No 74/1980 (1980) at para 10.

²⁶¹ Human Rights Committee: *Van Meurs v The Netherlands*, Communication No 215/1986 (1990) at paras 6.1-6.2.

²⁶² Canada Supreme Court: *Toronto Star Newspapers Ltd. v Ontario* [2005] 2 SCR 188 at paras 3-4.

“Trial by media”

One of the greatest concerns about media coverage of court proceedings is the danger of “trial by media” – in other words, that biased or ill-informed coverage will affect the outcome of a court case. This concern is particularly acute in criminal cases where an essential element of a fair trial is the presumption of innocence – the principle that no one is to be regarded as guilty of a crime until the prosecution has proved its case.

This places a considerable ethical burden on journalists to report accurately and responsibly. It also places a burden on the courts to ensure that media coverage does not prejudice the fairness of proceedings. Ultimately, of course, the courts may feel it necessary to intervene to restrain irresponsible reporting.

However, this does not mean that all reporting and media comment is prohibited, beyond a stenographic reproduction of what happens in court. As the ECtHR has observed:

“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.”²⁶³

The ECtHR also recognises that the possibility of the media influencing a court decision will vary depending on whether that decision is made by a jury (or lay judges) or professional judges. In the former situation, it may be more legitimate to require neutrality in the reporting of a case.²⁶⁴

If the case concerns a matter of particular public interest, however – for example if the defendant is a politician as in *Worm v Austria*²⁶⁵ – the public have a particular right to receive different views on the matter:

“Such persons inevitably and knowingly lay themselves open to close scrutiny by both journalists and the public at large. Accordingly, the limits of acceptable comment are wider as regards a politician as such than as regards a private individual (references omitted).”²⁶⁶

In other words, the general principle about greater scrutiny of the actions of politicians applies in legal cases, just as it does in relation to privacy. But politicians are still entitled to a fair trial and media are not entitled to make “statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial.”²⁶⁷

The public interest applies more broadly than just to politicians. One of the first such

²⁶³ ECtHR: *Worm v Austria*, Application No 22714/93 (1997) at para 50.

²⁶⁴ *Id* at para 54; ECtHR: *Tourancheau and July v France* Application No 53886/00 (2005) at para 75.

²⁶⁵ ECtHR: *Worm v Austria supra* note 263 at para 50.

²⁶⁶ *Id.*

²⁶⁷ *Id* at para 50.

cases considered by the ECtHR was that of *The Sunday Times v United Kingdom*.²⁶⁸ In that case, the newspaper was challenging a court injunction restraining it from commenting on the responsibility of the company responsible for the drug Thalidomide, which had caused birth deformations, because there were continuing settlement negotiations. The Court applied its three-part test and explicitly ruled out the state's contention that it was "balancing" the right to freedom of expression and the right to a fair trial:

"The Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted."²⁶⁹

In this case, the Court concluded that reporting was clearly in the public interest:

"In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared that its diffusion would have presented a threat to the 'authority of the judiciary'."

Another factor to consider is the degree of prejudice that would result with publication. In South Africa, the Supreme Court of Appeal held that this degree of prejudice is central to this issue:

"In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice may occur if the publication takes place."²⁷⁰

Nevertheless, courts have been generally disinclined to interfere with media reporting. In an American case, the Supreme Court refused to uphold a ban on reporting confessions said to have been made by a defendant in a murder case. It reasoned that the protection such a ban might offer would not justify prior censorship. Word of the confessions would probably spread anyway – and who is to say what influence this would have on jurors.²⁷¹ The point holds even more strongly in the age of the Internet.

Interestingly, the former South African Deputy Chief Justice, Dikgang Moseneke has said that the *sub judice* rule in South Africa is virtually extinct:

"But how, you might ask, can a statement outside of court affect the outcome of a case in South Africa, where we have no jury system? The answer must surely be that it rarely could, and that the *sub judice* rule, and its relevance in South Africa, is, at the very least, on the verge of extinction.

There is also the realistic point that not everyone wants to come to court to find out what is happening. Instead, they rely on the media to tell them. And we do not want

²⁶⁸ ECtHR: *Sunday Times v United Kingdom* *supra* note 84.

²⁶⁹ *Id* at para 65.

²⁷⁰ South Africa Supreme Court of Appeal: *Midi Television v Director of Public Prosecutions (Western Cape)* 2007 (3) SA 318 (SCA) at para 19.

²⁷¹ United States Supreme Court: *Nebraska Press Association v Stuart* 27 US J39 567-67 (1976).

a system in which the judicial system is 'shrouded in mystique and protected at all times from the prying eye of the camera or the invasive ear of the microphone'. We want a system in which the public trusts that the judiciary is acting according to the 'time-honoured standards of independence, integrity, impartiality and fairness.' For that to happen, we must, as far as reasonably practicable, create means for the media to access, observe and report on the administration of justice."²⁷²

Protection of Participants' Privacy

There are a number of other grounds on which courts may limit reporting of proceedings. Most obviously – and uncontroversially – courts may limit the naming of children or the victims of certain types of crime (notably those of a sexual nature).

However, although the media will generally accept the validity of such restrictions and comply with them, there may nevertheless be exceptional cases. One such arose in New Zealand, where a court ordered the suppression of the name of a witness in a trial, as well as the substance of the evidence, on the basis that the evidence was hearsay. There was considerable media speculation on the nature and content of the suppressed evidence. The Court of Appeal took as its starting point that "in the absence of compelling reasons to the contrary, criminal justice is to be public justice"²⁷³. However, when the privacy of the victims of crime was concerned – as in this case – they can be protected against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.

The original court order had become counter-productive in that it had promoted speculation on the content of what had been suppressed:

"The suppression might itself 'promote distrust and discontent'. That speculation is not in the interests of the administration of justice and is itself a reason supporting the revoking of the prohibition order."²⁷⁴

So, although the Court of Appeal concluded that the ban was mistaken, this was only because it had potentially discredited the justice process, not because freedom of expression took precedence.

What about the privacy of an accused person?

Bear in mind that a person who is accused of a crime is still regarded as innocent. Bear in mind also the danger of prejudicing a fair trial. However, in a case regarding an alleged breach of a defendant's privacy, the ECtHR ruled for the newspaper that had been fined by a domestic court for publishing a photograph of the accused.

B was a right-wing extremist, publicly known before his prosecution for a series of letter-

²⁷² The speech can be found here: <http://www.constitutionalcourt.org.za/site/judges/justicedikgangmoseneke/The-Media-CourtsandTechnology-Speech-by-DCJ%20Moseneke-on-15-May-2015.pdf>.

²⁷³ New Zealand Court of Appeal: *Television New Zealand v R* (1997) LRC 391.

²⁷⁴ *Id.*, 396.

bombings. *News* magazine published several photographs of B, under the headline “The Mad World of Perpetrators” – which seemed to imply B’s guilt. The magazine was fined.

The ECtHR found that there were reasons justifying the publication of the photographs. The case was a matter of major public interest, while B was already a public figure before the bombings case. Only one of the published pictures, of B’s wedding, arguably disclosed details of his private life.²⁷⁵

It is important to underline that restrictions on reporting, when justified, are *exceptions* to the fundamental principle of openness in court proceedings. The South African Supreme Court of Appeal has ruled:

“[C]ourt records are, by default, public documents that are open to public scrutiny at all times. While there may be situations justifying a departure from that default position – the interests of children, State security or even commercial confidentiality – any departure is an exception and must be justified.”²⁷⁶

In the United Kingdom, the guardian of a child applied for an injunction to prohibit the publication of the child’s mother’s surname in her murder trial as well of other information that would enable the child to be identified and so cause harm. The Court highlighted that “the importance of the freedom of the press to report criminal trials has often been emphasised in concrete terms”,²⁷⁷ and ruled that the injunction would not be permissible:

“[I]t is important to bear in mind that from a newspaper’s point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer.”²⁷⁸

Criticism of Judges

The narrow interpretation of protecting the dignity of the court has often been understood to mean that it is contempt of court to criticise the judge. However, as early as 1877 in South African courts have recognised that legitimate criticism of the judiciary should be allowed:

“Although no scandalous or improper reflection on the administration of justice can be allowed, everyone is undoubtedly at liberty to criticise the conduct of Judges on the Bench in a fair and legitimate manner. It is only when the bounds of moderation and of fair and legitimate criticism have been exceeded, that the Court has power to interfere.”²⁷⁹

²⁷⁵ ECtHR: *News Verlags GmbH & CoKG v Austria*, Application No 31457/96 (2000).

²⁷⁶ South Africa Supreme Court of Appeal: *City of Cape Town v South African National Roads Authority Limited* 2015 (3) SA 386 (SCA) at para 47.

²⁷⁷ United Kingdom House of Lords: *In re S* [2004] UKHL 47 at para 29.

²⁷⁸ *Id* at para 34.

²⁷⁹ South Africa High Court: *In re Phelan* 1877, 9.

In one Australian case, a newspaper attacked the integrity and independence of the Australian Industrial Relations Commission, describing its members as “corrupt labour judges.” The newspaper’s publisher was charged with “bring[ing] a member of the Commission into disrepute.”

The Federal Court of Australia found that truthful and fair criticism of a court or judge is not contempt, even if it impairs public confidence:

“[I]t is no contempt of court to criticize court decisions when the criticism is fair and not distorted by malice and the basis of the criticism is accurately stated. To the contrary, a public comment fairly made on judicial conduct that is truly disreputable (in the sense that it would impair the confidence of the public in the competence or integrity of the court) is for the public benefit. It is not necessary, even if it be possible, to chart the limits of contempt scandalizing the court. It is sufficient to say that the revelation of truth - at all events when its revelation is for the public benefit - and the making of a fair criticism based on fact do not amount to a contempt of court though the truth revealed or the criticism made is such as to deprive the court or judge of public confidence.”²⁸⁰

Although many jurisdictions have recognised the need for the criticism to be fair, this does not automatically require that the manner in which the criticism is expression must be moderate. In Zimbabwe, in *In Re Chinamasa*,²⁸¹ the Supreme Court stated that:

“The use of colourful, forceful and even disrespectful language may be necessary to capture the attention, interest and concerns of the public to the need to rectify the situation protested against or prevent its recurrence. People should not have to worry about the manner in which they impart their ideas and information.”²⁸²

A Kenyan example involves criticism of a judge in a particular case – albeit not by the media but a lawyer outside court. Pheroze Nowrojee, an advocate, wrote to the registrar of the High Court protesting at the delay of the judge in deciding a motion in an important case amounting, he argued, to a refusal to adjudicate. The Attorney-General applied to the High Court for an order against Nowrojee for contempt.

The Court found in the advocate’s favour. The judge should only be protected against “scurrilous abuse,” whereas there was substance to the concern expressed in Nowrojee’s letter:

“Such abuse must be distinguished from healthy comment and criticism, and the court must scrupulously balance the need to maintain its authority with the right to freedom of speech. The offence must be proved beyond reasonable doubt and it is a jurisdiction to be exercised only in the clearest cases of necessity in the interests of the administration of justice and the protection of the public from the result of undermining the authority of the court.”²⁸³

²⁸⁰ Australia Federal Court: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at para 5.

²⁸¹ Zimbabwe Supreme Court: *In Re Chinamasa* 2000 (2) ZLR 322 (S).

²⁸² *Id.* This case was cited recently by the Swazi Supreme Court in *Swaziland Independent Publishers (Pty) Ltd and Editor of the Nation v the King* (73/13) [2014] SZSC 25.

²⁸³ Kenya High Court: *Republic v Nowrojee* Miscellaneous Criminal Application No 461 of 1990 at para 6.

Scandalising the Court

In the Indian case of *EMS Namboodivipad v TN Nambiar*,²⁸⁴ the Chief Minister of Kerala made a general statement accusing judges of class bias, unconnected to any specific case. The Supreme Court of India upheld his conviction on the basis that “the likely effects of his words must be seen and they have clearly the effect of lowering the prestige of Judges and Courts in the eyes of the people.”²⁸⁵ The Indian Supreme Court reached a similar conclusion in the case of *Sanjiv Datta*, who filed an affidavit critical of the court in a broadcasting case: “there is a danger of the erosion of the deference to and confidence in the judicial system...and an invitation to anarchy.”²⁸⁶

However, the South African Constitutional Court has evaluated the offence of scandalising the court against the provisions of that country’s Bill of Rights. In *S v Mamabolo*,²⁸⁷ the Court concluded that there was a very narrow scope for a conviction for scandalising the court, weighed against the Constitutional values of accountability and openness.

In the same case, the Constitutional Court held that the threshold for conviction is extremely high:

“The threshold for a conviction on a charge of scandalising the court is now even higher than before the superimposition of constitutional values on common law principles; and prosecutions are likely to be instituted only in clear cases of impeachment of judicial integrity. It is a public injury, not a private delict; and its sole aim is to preserve the capacity of the judiciary to fulfil its role under the Constitution. Scandalising the court is not concerned with the self-esteem, or even the reputation, of judges as individuals, although that does not mean that conduct or language targeting specific individual judicial officers is immune. Ultimately the test is whether the offending conduct, viewed contextually, really was likely to damage the administration of justice.”²⁸⁸

In an important decision on a case from Mauritius, the Privy Council quashed the conviction and sentence of a newspaper editor who had criticised the Chief Justice. In doing so it narrowed the scope of the offence of scandalising the court. If judges were unfairly criticised “they have to shrug their shoulders and get on with it.” Although the Privy Council said that there was a strong case for abolishing the offence it was a matter for the Mauritian legislature. However, it would no longer be necessary for the journalist to demonstrate that he or she had acted in good faith. Rather, the prosecution will be required to prove beyond a reasonable doubt the bad faith behind the publication.²⁸⁹

As might be expected, the United States offers particularly strong protections of freedom of expression in criticism of judges. The Supreme Court has enunciated a “clear and present

²⁸⁴ India Supreme Court: *EMS Namboodivipad v TN Nambiar* (1970) 2 SCC 325.

²⁸⁵ *Id*, 2024.

²⁸⁶ India Supreme Court: *In Re: Sanjiv Datta and Others* [1995] 3 SCR at para 460.

²⁸⁷ South Africa Constitutional Court: *State v Mamabolo* 2001 (3) SA 409 (CC).

²⁸⁸ *Id* at para 45.

²⁸⁹ United Kingdom/Mauritius Privy Council: *Dhooharika v The Director of Public Prosecutions* (Mauritius), Privy Council Appeal No 0058 of 2012 (2014).

danger” test (echoed in recent Canadian jurisprudence), which requires that “substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.”²⁹⁰ In *Pennekamp et al v Florida*,²⁹¹ the Court considered a series of articles criticising Florida judges. Although the articles contained factual errors and “did not objectively state the attitude of the judges,” they did not constitute a clear and present danger to the administration of justice. The State of Florida had hence not been justified in finding the journalists in contempt of court.²⁹²

The ECtHR has dealt with several cases, not entirely consistently, and with generally less liberal conclusions as regards freedom of expression. In its first such case, *Barfod v Denmark*,²⁹³ the Court considered the application of a journalist convicted of defamation for questioning the ability of two lay judges to reach an impartial decision in a case against their employer, the local government. The Court found no violation of freedom of expression, concluding that the article:

“[W]as not a criticism of the reasoning in the judgment...but rather...defamatory accusations against the lay judges personally, which was likely to lower them in public esteem and was put forward without any supporting evidence.”²⁹⁴

In *Prager and Oberschlick v Austria*,²⁹⁵ the Court reached a similar decision in relation to an article of general criticism against judges of the Vienna Regional Criminal Court, some of whom were described as “arrogant” and “bullying”. The ECtHR again declined to find a violation of Article 10, because of “the excessive breadth of the accusations, which, in the absence of a sufficient factual basis, appeared unnecessarily prejudicial.”²⁹⁶

In *De Haes and Gijssels v Belgium*,²⁹⁷ by contrast, the Court found in favour of the applicants, who had been convicted of contempt of court, following a series of articles criticising a court decision in a children’s custody case. It tried to differentiate this case from *Prager and Oberschlick*.²⁹⁸

“Looked at against the background of the case, the accusations in question amount to an opinion, whose truth, by definition, is not susceptible of proof. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but it was not so in this instance; in that respect the present case differs from the *Prager and Oberschlick* case.”²⁹⁹

De Haes and Gijssels were “proportionate” in their criticisms and had offered to demonstrate the truth of their allegations. Even while finding in their favour, however,

²⁹⁰ United States Supreme Court: *Bridges v California*, 314 US 252 (1941).

²⁹¹ United States Supreme Court: *Pennekamp et al v Florida*, 328 US 331 (1946).

²⁹² *Id.*

²⁹³ ECtHR: *Barfod v Denmark*, Application No 11508/85 (1989).

²⁹⁴ *Id* at paras 34-25.

²⁹⁵ ECtHR: *Prager and Oberschlick v Austria* Application No 15974/90 (1995).

²⁹⁶ *Id* at para 37.

²⁹⁷ ECtHR: *De Haes & Gijssels* Application No 19983/92 (1997).

²⁹⁸ ECtHR: *Prager and Oberschlick v Austria supra* note 295.

²⁹⁹ *De Haes & Gijssels supra* note 297.

the Court underlined the priority in protecting public confidence in the judicial system:

“The courts — the guarantors of justice, whose role is fundamental in a State based on the rule of law — must enjoy public confidence. They must accordingly be protected from destructive attacks that are unfounded”.³⁰⁰

More recently, the ECtHR overturned the conviction of a lawyer for defamation of two investigative judges in an article the lawyer had written in *Le Monde* on the grounds that it unjustifiably infringed freedom of expression. The Court took into account that the applicant was a lawyer, that he was making a contribution to a debate on a matter of public interest, the nature of the remarks and the circumstances, as well as the sanction that had been imposed.³⁰¹

³⁰⁰ *Id* at para 37.

³⁰¹ ECtHR: *Morice v France* Application No 29369/10 (2015).



Hate Speech and Incitement

The issue of “hate speech” and incitement is one that creates an enormous amount of disagreement among defenders of freedom of expression. Free speech advocates usually have little difficulty uniting against infringement of press freedom in the name of national security, say, or the reputation of politicians, yet there is much less unanimity in defence of expressions of hatred.

This is because, in principle, speech that expresses or incites hatred is not only potentially subject to limitation under Article 19(c) of the ICCPR, but also conflicts directly with an explicit obligation in Article 20 of the ICCPR to prohibit incitement to hatred:

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

The balance between freedom of expression and protection against incitement is understood very differently in different jurisdictions. On the one hand, the United States, given the near absolute character of the First Amendment to its Constitution protecting free speech and press freedom, has permitted hate speech and will only draw a line when there is a “clear and present danger” of hateful expression resulting in violence. By contrast, the ECtHR has applied its usual reasoning in determining the legitimacy, lawfulness and necessity of any given restriction on freedom of expression, with differing outcomes. National jurisdictions have taken a wide range of approaches, with none as permissive as the United States. Even within Europe, which is more restrictive on this issue than the US, there is a considerable divergence between countries like France and Germany, with extensive legal prohibitions on hate speech, and the United Kingdom, which is traditionally more permissive.

Incitement, or a similar offence, exists in many legal systems. It is an inchoate crime – that is to say, it is not necessary that the action being incited actually has to occur. The question, therefore, is what test should apply to determine that speech is in fact incitement.

- Should specific past events be off limits for discussion because of their sensitive or offensive character?
- How far can the general protection of political speech be understood to protect hateful speech?
- To what extent can the media be held liable for reporting hateful sentiments expressed by others?

In addition to Article 20 of the ICCPR, which can be properly interpreted as being consistent with the requirements of Article 19(3), another international instrument requires the prohibition of hate speech. The Convention on the Elimination of Racial Discrimination, in Article 4, requires that States Parties:

“Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

The difficulty is that the jurisprudence of the Committee on the Elimination of Racial Discrimination (CERD) has been extremely problematic in its inconsistency with the Human Rights Committee – charged with interpreting ICCPR Articles 19 and 20 – and with most regional and national case-law.

The CERD itself recognises the inherent tension between freedom of expression and prohibition of speech that incites to discrimination, referring to the need for Article 4 to be interpreted in line with the principles contained in the Universal Declaration of Human Rights. However, the CERD committee has sometimes been inclined to disregard this tension, as for example in the recent case of *TBB v Germany*,³⁰² where the Committee found against Germany for its failure to prosecute an individual for offensive and derogatory statements about Turkish people made in the course of a magazine interview.³⁰³ The refusal to prosecute was made on freedom of expression grounds. A dissenting opinion by Committee member Carlos Manuel Vazquez offers cogent reasons for deferring to the national prosecutors’ reading of the situation, with a much more nuanced appreciation of the tension between freedom of expression and combating hate speech.³⁰⁴

In *Ross v Canada*,³⁰⁵ the Human Rights Committee observed that:

“[R]estrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible.”

This implies that the same three-part test – legitimate aim, prescribed by law, necessary in a democratic society – that is required for applying a restriction under Article 19(3) applies equally to the restrictions required by Article 20. Importantly, this contrasts with

³⁰² CERD: *TBB-Turkish Union v Germany* Communication No 48/2010 (2013).

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ Human Rights Committee: *Ross v Canada* Communication No 736/1997 (2000).

the way in which Article 4 of the Convention on the Elimination of Racial Discrimination has usually been understood and applied.

The Human Rights Committee has decided a number of cases involving hate speech, generally in favour of restrictions on freedom of expression, but offering a clearer line of reasoning to be emulated. In *Ross v Canada*³⁰⁶ the Human Rights Committee made clear how freedom of expression may be limited for the “rights and reputations of others.” In this instance, Ross was a school teacher responsible for anti-semitic statements and publications, who had been removed from his teaching position. The Human Rights Committee remarked that others had the “right to have an education in the public school system free from bias, prejudice and intolerance”.

In *Faurisson v France*, the Human Rights Committee made clear that the interests to be protected by restricting freedom of expression were those of the community as a whole. Faurisson was a professor of literature convicted of violating the Gayssot Act, which makes it a crime to contest the facts of the Holocaust. He had expressed doubts in his publications about the existence of gas chambers for extermination purposes.

The Human Rights Committee analysed whether the restrictions “were applied for the purposes provided for by the Covenant.” These included not only “the interests of other persons [but also of] those of the community as a whole”. In particular, such interests included the interest “of the Jewish community to live free from fear of an atmosphere of anti-semitism”.³⁰⁷

Was Hate Speech Intended to Incite

One important strand in the case law on hate speech has been the requirement that the speaker (or author) *intended* to incite hatred. Perhaps the key case in this regard is *Jersild v Denmark*³⁰⁸ before the ECtHR. Jersild was a television journalist who made a documentary featuring interviews with members of a racist, neo-Nazi gang. He was prosecuted and convicted for propagating racist views – indeed the case was included in Denmark’s report to the CERD as an example of its commitment to suppress racist speech.

When Jersild took his case to the ECtHR, however, the Court took a different view. The journalist’s *intent*, clearly, was to make a serious social inquiry exposing the views of the racist gangs, not to promote their views. There was a clear public interest in the media playing such a role:

“Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern.”³⁰⁹

³⁰⁶ *Id.*

³⁰⁷ Human Rights Committee: *Robert Faurisson v France* Communication No 550/1993 (1996) at para 9.6.

³⁰⁸ ECtHR: *Jersild v Denmark* *supra* note 151.

³⁰⁹ *Id* at paras 33-35.

In its consideration of the case, the ECtHR made an observation, often repeated subsequently, about the courts having no role in determining how journalists go about their work:

“[T]he methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists.”³¹⁰

Hence:

“The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.”³¹¹

The ECtHR has similarly dealt with this issue of intent in some of its Turkish cases. In *Gokceli v Turkey*,³¹² the Court invoked the “attitude” behind a writer’s articles on the Kurdish situation as evidence that “the tenor of the article could not be said to be an incitement to the use of violence”.³¹³ In *Gunduz v Turkey*,³¹⁴ where the issue was the broadcast of a television programme about Islam and *sharia* law, the Court said that “the simple fact of defending shari’a, without calling for violence for its establishment, cannot not be said to be ‘hate speech’”.³¹⁵

By contrast, in *Surek*,³¹⁶ in which the Court did find the publication to be “hate speech and glorification of violence”, there was found to be a “clear intention to stigmatise the other side to the conflict”, that constituted “an appeal to bloody revenge”.³¹⁷

Some national courts have followed a similar approach. In *R v Keegstra*,³¹⁸ the Supreme Court of Canada had to determine the consistency of a section of the Criminal Code prohibiting “wilful promotion of hatred” on racial or ethnic grounds with the freedom of expression provisions of the Canadian Charter of Rights and Freedoms. Although the Court upheld the section of the Criminal Code, it did so by focusing on the word “wilful” and underlining the importance of subjective intent. “Wilfully” meant, according to the Court, that the “accused subjectively desires the promotion of hatred or foresees such a consequence as certain or substantially certain to result”. The Court went on to note that “this stringent standard of mens rea is an invaluable means of limiting the incursion of s. 319(2) into the realm of acceptable (though perhaps offensive and controversial) expression”.

³¹⁰ *Id* at para 31.

³¹¹ *Id* at para 35.

³¹² ECtHR: *Gokceli v Turkey* Application Nos 27215/95 and 36194/97 (2003).

³¹³ *Id* at para 22, translated from French.

³¹⁴ ECtHR: *Gunduz v Turkey* Application No 35071/97 (2003).

³¹⁵ *Id* at para 51, translated from French.

³¹⁶ ECtHR: *Surek v Turkey* Application No 26682/95 (1999).

³¹⁷ *Id* at para 62.

³¹⁸ Canada Supreme Court: *R v Keegstra* [1990] 3 SCR 697.

The special rapporteurs on freedom of expression for the UN, the Organisation for Security and Cooperation in Europe and the Organisation of American States have also taken the view that there is an intent requirement if hate speech is to be used as a ground to limit freedom of expression:

“In accordance with international and regional law, hate speech laws should, at a minimum, conform to the following that no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence.”³¹⁹

Must Violence or Hatred Actually Result

As incitement is an inchoate offence, there is no requirement that hatred (or violence or discrimination) actually results from it. However, there must be the possibility of demonstrating a plausible nexus between the offending words and some undesirable consequence. Courts in different jurisdictions have differed on what exactly this nexus should be.

The United States (perhaps not surprisingly) has the strictest test. Its standard – usually known as “clear and present danger” – derives from the Supreme Court decision in *Brandenburg v Ohio*.³²⁰ Brandenburg was a leader of the racist Ku Klux Klan. He and his confederates held a rally to which they invited representatives of the press. The Ku Klux Klan displayed weapons, burned crosses and made racist comments, and were convicted under a law banning “advocat[ing] ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform”.³²¹

In its decision, the Supreme Court concluded that a restriction on advocacy of the use of force not only required the intent to incite but also a finding that it “is likely to incite or produce such action.”³²²

Few other jurisdictions (with the partial exception of Israel) have such a stringent standard. Nevertheless, many do require that there is some demonstrable connection between the hateful expression and the undesirable outcome. This was the view of the Human Rights Committee in the *Ross* case already discussed. The reason why the suspension of the anti-semitic teacher was not a violation of freedom of expression was that his statements were partly to blame for a “poisoned school environment”³²³ experienced by Jewish children.

The Danger of Vagueness

As we have seen, the obligation to prohibit racist discrimination and violence is strongly rooted in international human rights law. It can be defined according to the intent behind

³¹⁹ Joint Statement on Racism and the Media London (2001).

³²⁰ United States Supreme Court: *Brandenburg v Ohio*, 395 US 444 (1969).

³²¹ *Id.*

³²² *Id.*

³²³ Human Rights Committee: *Ross v Canada supra* note 305.

it and the real possibility that it will cause violent or discriminatory consequences. The danger, clearly, is that vague prohibitions are used to penalise expression that has neither the intent nor the realistic possibility of inciting hatred. Many of the Turkish cases heard by the ECtHR fall into this category.

The Constitutional Court of South Africa reflected at length and constructively on precisely this issue. In *The Islamic Unity Convention v The Independent Broadcasting Authority et al*, it was required to rule on the constitutionality of clause 2(a) of the Code of Conduct for Broadcasting Services, which prohibited the broadcast of “any material which is ... likely to prejudice ... relations between sections of the population”. There is no constitutional protection for propaganda for war, incitement of imminent violence, and the advocacy of hatred. However, the Court noted that material that might prejudice relations between sections of the population might not necessarily fall into these categories.

Whereas the constitutional definition was “carefully circumscribed, no such tailoring is evident in” the language of clause 2(a). The latter, by contrast, was “so widely-phrased and so far-reaching that it would be difficult to know beforehand what is really prohibited or permitted”. Hence, the Court found clause 2(a) inconsistent with the constitutional right to freedom of expression.³²⁴

Advocacy of Genocide and Holocaust Denial: a Special Case?

Within the debate on hate speech and incitement, the issues of advocacy of genocide and Holocaust denial occupy a particular place – although the phenomena are certainly not identical.

The 1948 Genocide Convention lists among its “punishable acts” “[d]irect and public incitement to commit genocide.”³²⁵ This followed the trial at the Nuremberg Tribunal of Julius Streicher, editor of the pro-Nazi newspaper *Der Stürmer*, who was convicted of crimes against humanity and hanged for his incitement of genocide, having called for the extermination of the Jews. The tribunal linked Streicher’s propaganda to the actual genocide of Jews. Another Nazi publicist, Hans Fritzsche, was acquitted on the basis that, although there was evidence of his anti-semitism, the link between his work and the genocide was less direct.

In the 1994 Rwanda genocide, the media again played a role in generating propaganda against the victims. This role led to the first prosecutions at the International Criminal Tribunal for Rwanda (ICTR) for “direct and public incitement to commit genocide.” This was defined as an inchoate offence, meaning that it was not necessary that the genocide actually occurred, but required the intent on the part of the accused that it should do so. “Direct” was defined in a broad sense, not necessarily meaning explicit, but with the implication that listeners were being called on to take some specific action. When specific action was not called for, this was defined as “hate propaganda.”

³²⁴ South Africa Constitutional Court: *Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC).

³²⁵ Article III, Genocide Convention.

There were several cases brought against journalists at the ICTR, notably *Nahimana et al.*,³²⁶ often known as the Media Trial.³²⁷ Two of the three journalists in the latter case were the founders of a radio station that broadcast anti-Tutsi propaganda before the genocide. Once it had started, the station actually broadcast the names and licence plate numbers of intended victims.

The Tribunal found that “[t]he actual language used in the media has often been cited as an indicator of intent,” But that it is not necessary to show “any specific causation ... linking the expression at issue with the demonstration of a direct effect.”³²⁸

The Rome Statute establishing the International Criminal Court also establishes the crime of incitement to genocide – although not incitement to any of the other crimes (such as crimes against humanity, war crimes etc) covered by the treaty.

The genocide of the Jews in Nazi-occupied Europe was such a formative event in the creation of the European human rights system that Holocaust denial – claiming that the genocide did not occur – is an offence in several countries and is treated in a particular fashion within the ECtHR jurisprudence.

Hate Speech against LGBT Individuals

In southern Africa, hate speech and incitement to violence against LGBT individuals is a disturbingly common occurrence. It is particularly damaging when such statements are made by high-ranking political officials: in May 2012, the Zimbabwean Minister of Local Government, Rural and Urban Development, Ignatius Chombo, allegedly made the statement that “chiefs are there to protect and promote our cultural values and those who support same-sex marriages must be banished from the communities and dispossessed of their land”; and in January 2016, Ken Masonda, a spokesperson for the opposition Peoples Party in Malawi, said that “gays and lesbians are worse than dogs” and that “the best way to deal with this problem is to kill them.”

Fortunately, courts in southern Africa have recognised that hate speech against LGBT communities is unjustified. For example, the Ugandan High Court, in December 2010, interdicted a local newspaper, Rolling Stone, after it published the names and addresses of people it claimed were gay or lesbian, under the heading “Hang them, they are after our kids!!!”. Even though same-sex sexual conduct is criminalised in Uganda, the Court stated that this does not criminalise a person for being gay. Using an objective test, the Court concluded that the publication threatened the rights of the Applicants to respect for human dignity and protection from inhuman treatment and the right to privacy of the person and home.³²⁹

International courts have also issued judgments that prohibit homophobic hate speech.

³²⁶ ICTR: *The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* Case No ICTR-99-52-A (2003).

³²⁷ *Id.*

³²⁸ *Id.* at paras 86-90.

³²⁹ Uganda High Court: *Jacqueline v Rolling Stone* Misc Case No 163 of 2010.

In the February 2012 judgment of *Vejdeland v Sweden*,³³⁰ the ECtHR stressed that discrimination based on sexual orientation was as serious as discrimination based on race, origin or colour.

The *Vejdeland* case concerns four Swedish nationals who were convicted in Sweden for violating the Swedish Penal Code when they distributed leaflets at a school which *inter alia* stated that “homosexuality has a morally destructive effect on the substance of society”. The ECtHR held that the law’s interference with the Applicants’ exercise of their right to freedom of expression can “be regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others”.³³¹

Religious Defamation

Many states have laws prohibiting defamation of religion, while in the common law there exists the crime of blasphemous libel.

Because of the doctrine of the “margin of appreciation,” the ECtHR has been very reluctant to find against states in matters of blasphemy and defamation of religions. Because this falls within the area of “public morals,” the Court often declines to interfere in decisions made at the national level:

“The absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions broadens the Contracting States’ margin of appreciation when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or religion”.³³²

The ECtHR applies a doctrine of the “margin of appreciation.” This refers to the flexibility available to states in applying the European Convention. The margin in cases involving political speech, for example, will be very small because this is regarded as being a common value of great importance. The margin will be considerably greater for cases involving “public morals” because this is an area of greater cultural difference between European countries.

In more recent cases, however, the Court has been reluctant to find that religions have been defamed. In a French case, in which a writer published an article critically examining Roman Catholic doctrine and linking it to anti-semitism and the Holocaust, the Court found that a verdict of defaming religion was a violation of Article 10. While it invoked the margin of appreciation doctrine, the Court still underlined the importance of a liberal application of Article 10 on matters of general public concern (of which the Holocaust is undoubtedly one):

“By considering the detrimental effects of a particular doctrine, the article in question contributed to a discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in

³³⁰ ECtHR: *Vejdeland v Sweden* Application No 1813/07 (2012).

³³¹ *Id* at para 59.

³³² ECtHR: *Giniewski v France* Application No 64016/00 (2006) at para 44.

a democratic society. In such matters, restrictions on freedom of expression are to be strictly construed. Although the issue raised in the present case concerns a doctrine upheld by the Catholic Church, and hence a religious matter, an analysis of the article in question shows that it does not contain attacks on religious beliefs as such, but a view which the applicant wishes to express as a journalist and historian. In that connection, the Court considers it essential in a democratic society that a debate on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely.”³³³

The gradual move away from blasphemy laws and the protection of religion may derive in part from the sense that the protection offered was uneven and unfair. In *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury*,³³⁴ a District Court in London ruled on the refusal of a magistrate to issue a summons for blasphemy against the author Salman Rushdie, at the request of a Muslim organisation. The court made a clear finding that the common law of blasphemy only protected the Christian church – actually, not all Christians, but those who constitute the state religion in England and Wales.

“Furthermore, the absence of a law protecting religions other than Christianity was not a breach of the United Kingdom’s obligations under the European Convention for the Protection of Human Rights and Individual Freedoms because the protection of freedom of religion in article 9 of that convention did not require a domestic law to provide a right to bring criminal proceedings of blasphemy and such proceedings would be contrary to the author’s right of freedom of expression under article 10 of the convention.”³³⁵

In 2008, the offence of blasphemy was abolished in the United Kingdom.

The final word on this issue is with the Human Rights Committee:

“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.”³³⁶

³³³ *Id* at para 51.

³³⁴ United Kingdom District Court: *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 All ER 313.

³³⁵ *Id*.

³³⁶ Human Rights Committee: General Comment 34 at para 48.

Conclusion

The manual seeks to be a resource tool for lawyers in southern Africa faced with situations in which freedom of expression of individuals or groups is threatened. It brings together jurisprudence from various countries as well as from trans-national bodies such as the African Commission, the Human Rights Committee and the African, European and American regional courts. This jurisprudence provides examples of the difficult issues courts around the world have grappled with in the sphere of freedom of expression, and assists in the development of defences based on the right to freedom of expression.

The manual recognises that the right to freedom of expression is not absolute, and that there are many justifiable ways in which the right can arguably be limited. We have provided detailed analyses of the most common limitations, and comparative jurisprudence on the extent to which these limitations can operate. Many of the thematic issues mentioned in this manual are ones that come up repeatedly in different countries, and the way in which other courts have addressed them can be of help to domestic courts grappling with the same issues.

The objective of this manual is to give domestic lawyers the tools and the confidence to use comparative jurisprudence in their litigation before domestic courts and international tribunals. It is our hope that this will contribute to a rich jurisprudence on freedom of expression in the southern Africa region.

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