



Restricting Freedom of Expression: Standards and Principles

Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression

By Toby Mendel
Executive Director
Centre for Law and Democracy
toby@law-democracy.org

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I. Introduction

It is universally acknowledged that the right to freedom of expression is a foundational human right of the greatest importance. It is a lynchpin of democracy, key to the protection of all human rights, and fundamental to human dignity in its own right. At the same time, it is also universally recognised that it is not an absolute right, and every democracy has developed some system of limitations on freedom of expression.

International law does provide for a general three-part test for assessing restrictions on freedom of expression, and this test has been elaborated on in numerous judgments by international courts tasked with oversight of international human rights treaties. National courts, often interpreting constitutional guarantees which are based on or are similar to international guarantees, have also helped elaborate the precise meaning of the test for restrictions on freedom of expression.

Assessing restrictions on freedom of expression, however, is an extremely complex matter. There are several reasons for this, including that the primary guarantee of freedom of expression is itself multifaceted, that the grounds for restricting freedom of expression – or interests which such restrictions aim to protect – are numerous, and that the contexts in which the need for restrictions is asserted are almost limitless.

This Paper provides an overview of the key issues relating to restrictions on freedom of expression, describing how international and in some cases national courts have approached them. It also highlights some problem areas or issues which remain unclear or which lack sufficient elaboration. For these, it poses questions which might be considered by participants at the two meetings for which the Paper serves as background material. It does not, on the other hand, elaborate on specific areas of restrictions – such as defamation law, media regulation and protection of national security. To do justice to these issues would require a full-length book.

II. The Right to Freedom of Expression

The right to freedom of expression is guaranteed in very similar terms by both Article 19 of the *Universal Declaration on Human Rights* (UDHR),¹ a UN General Assembly resolution, and Article 19(2) of *International Covenant on Civil and Political Rights* (ICCPR),² a formally binding legal treaty ratified by 165 States.³ The latter states:

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.

All of the three regional human rights treaties – the *European Convention on Human Rights* (ECHR),⁴ the *American Convention on Human Rights* (ACHR)⁵ and the *African Charter on Human and Peoples' Rights* (ACHPR)⁶ – guarantee the right to freedom of expression, respectively at Article 10, Article 9 and Article 13. These guarantees are largely similar to those found in the ICCPR.

It is not disputed that freedom of expression is a right of the greatest importance. At its very first session in 1946 the United Nations General Assembly declared:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.⁷

Regional courts and other bodies, as well as national courts around the world, have reaffirmed this. For example, the Inter-American Court of Human Rights has stated:

¹ United Nations General Assembly Resolution 217A (III), 10 December 1948.

² UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.

³ As of March 2010.

⁴ Adopted 4 November 1950, entered into force 3 September 1953.

⁵ Adopted 22 November 1969, entered into force 18 July 1978.

⁶ Adopted 26 June 1981, entered into force 21 October 1986.

⁷ Resolution 59(1), 14 December 1946. The term freedom of information as used here was meant in its broadest sense as the overall free flow of information and ideas in society, or freedom of expression.

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.⁸

The European Court of Human Rights has noted:

[F]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.⁹

And the African Commission on Human and Peoples' Rights has indicated, in respect of Article 9 of the African Convention:

This Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of the public affairs of his country.¹⁰

At the same time, freedom of expression is not absolute and every system of law provides for some limitations on it. Article 19(3) of the ICCPR provides:

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

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

This has been interpreted as meaning that only restrictions which meet a strict three-part test are considered to be legitimate (see below).¹¹

International guarantees of the right to freedom of expression have a number of key features. First, opinions are absolutely protected by Article 19(1) of the ICCPR. Technically, of course, opinions are not expressions. But it is significant that they are afforded absolute protection. This means that it is permissible to think the most evil and depraved thoughts, although giving expression to them may legitimately warrant a sanction.

Second, the right applies to 'everyone'. It must be protected "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".¹²

⁸ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.

⁹ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49.

¹⁰ *Media Rights Agenda and Others v. Nigeria*, 31 October 1998, Communication Nos. 105/93, 130/94, 128/94 and 152/96, para. 52.

¹¹ See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).

¹² Article 2(1) of the ICCPR.

Third, it applies to information and ideas of any kind. As the UN Human Rights Committee, the body of experts tasked with overseeing compliance with the ICCPR, has indicated, this includes any information or ideas which may be communicated:

Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others....¹³

It also includes factually incorrect statements, opinions which appear to lack any merit, and even offensive statements. As the European Court of Human Rights has noted:

It matters little that [an] opinion is a minority one and may appear to be devoid of merit since ... it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas."¹⁴

Fourth, protection is also wide in terms of the manner in which a communication is disseminated. This is signalled by the phrase "through any other media of his choice" in Article 19(2) of the ICCPR as well as the term "capable of transmission to others" in the quote from the Human Rights Committee above. The manner of dissemination, as well as the form of the expression, has often been taken into account by international courts when assessing the legitimacy of a restriction. Screaming a statement out to an angry crowd is not the same as incorporating that statement into a poem.¹⁵

Fifth, the guarantee protects not only the right to impart information and ideas – the right of the speaker; protection is extended to the rights to seek and receive information and ideas – the rights of the listener. As the Inter-American Court of Human Rights put it so compendiously:

[W]hen 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. ... 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. ... For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.¹⁶

In a case decided last year, the UN Human Rights Committee held that the refusal of the Uzbek authorities to register a newspaper was a denial not only of the freedom of expression rights of the editor, but also of the right of a reader of the newspaper to receive information and ideas.¹⁷

¹³ *Ballantyne and Davidson v. Canada*, Communication No. 359/1989 and *McIntyre v. Canada*, Communication No. 385/1989, 31 March 1993, para. 11.3.

¹⁴ *Hertel v. Switzerland*, 25 August 1998, Application No. 25181/94, para. 50.

¹⁵ See, for example, *Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, para. 52 (European Court of Human Rights).

¹⁶ Note 8, para. 30.

¹⁷ *Mavlonov v. Uzbekistan*, 27 April 2009, Communication No. 1334/2004, para. 8.4.

This is a very important aspect of the right which serves as an underpinning for, among other things, rules prohibiting undue concentration of media ownership, the right to access information held by public bodies, and using the process of licensing to promote diversity in the broadcasting sector. It may be noted that the interests of listeners can sometimes conflict with those of speakers – for example where an owner wishes to build a large media empire – which can raise difficult conceptual issues from the perspective of freedom of expression.

Finally, while freedom of expression is primarily negative in nature, inasmuch as it constrains the State's ability to limit expression, it also has an important positive dimension. In this aspect, the right requires States to take positive action to protect it. This falls into two main categories. First, the State may be under a positive obligation to take action to prevent private actors from interfering with the exercise of freedom of expression by others, a form of horizontal application of rights. Thus international courts have often held that States must act to prevent or investigate attacks by private actors on media outlets or others.¹⁸

Second, the State may be required to put in place positive measures to ensure that its own actions contribute to the free flow of information and ideas in society, what may be termed 'direct' positive measures. This might involve, for example, putting in place a system for licensing broadcasters which helps ensure diversity and limit media concentration.¹⁹ Perhaps the most significant example of this is the relatively recent recognition of the obligation of States to put in place a legal framework to provide for access to information held by public bodies.²⁰

The traditional three-part test for restrictions on freedom of expression does not work for either of these types of positive obligations. Thus, in *Özgür Gündem v. Turkey*, the European Court of Human Rights held that Turkey had failed to discharge its positive obligation to protect a newspaper against attacks by others. In doing so, however, it did not apply the three-part test for restrictions on freedom of expression. Instead, it postulated, and then applied, a different sort of test:

In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of

¹⁸ See, for example, *Özgür Gündem v. Turkey*, 16 March 2000, Application No. 23144/93 (European Court of Human Rights), *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, October 1995, No. 74/92 (African Commission on Human and Peoples' Rights) and *Miranda v. Mexico*, 13 April 1999, Report No. 5/99, Case No. 11.739 (Inter-American Commission on Human Rights).

¹⁹ See, for example, Recommendation 2007(2) of the Committee of Ministers of the Council of Europe on Media Pluralism and Diversity of Media Content, adopted 31 January 2007.

²⁰ See *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151 (Inter-American Court of Human Rights) and *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application No. 37374/05 (European Court of Human Rights).

situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources.²¹

Similarly, in *Claude Reyes and Others v. Chile*, the Inter-American Court of Human Rights did not engage in a three-part test analysis to find that the State is under a positive obligation to provide access to information held by public bodies. Rather, the Court based its findings on international statements supporting the right to information, the fact that many countries have right to information laws and the importance of access to information to democratic objectives such as accountability and participation.²²

There are good reasons for this since an absence of measures to promote freedom of expression is fundamentally different from restrictions. The absence of positive action cannot be assessed by reference to the existence of a law, as required by the “provided by law” part of the test. Furthermore, the nature of the competing interests is different. As is clear from the *Gündem* case, positive obligations will often involve expenditures, and these need to be weighed against other social priorities, rather than balanced against a risk of harm to a protected interest.

At the same time, the absence of any established test or at least framework for assessing whether a State is under a positive obligation to provide protection for freedom of expression – whether through a horizontal application of rights or directly – is problematical. Among other things, it means that the scope of the right to freedom of expression is unclear, both to States and to those who benefit from the right.

Positive obligations, particularly of a direct nature, are also relevant to an assessment of restrictions in another way. Where effective, positive measures will enhance the free flow of information and ideas in society, often contributing to the ability of all groups to engage in expressive activities through greater diversity of the means of communication. As such, they change the underlying environment – fostering more speech, which may then be more effective in countering ‘bad speech’ – and hence the calculation of ‘necessity’. This may be particularly relevant, for example, in assessing whether racist speech incites to hatred. Where the racist speech is effectively countered, this is less likely to be the case. Where other voices are few or unable to express themselves, the racist speech is more likely to create hatred.

Question:

- What sort of test might be applied to assess whether or not a State is under a positive obligation – of either a horizontal or direct nature – to protect freedom of expression.

²¹ Note 18, para. 43 *et seq.*

²² Note 20, paras. 77-87.

III. What Constitutes a Restriction or Interference

The first step in assessing whether a particular measure or situation breaches the right to freedom of expression is to assess the threshold question of whether or not someone's right to freedom of expression has been interfered with or restricted. If it has, one then proceeds to apply the three-part test.

The scope of what constitutes an interference with freedom of expression is very wide. The European Convention on Human Rights, for example, refers to any "formalities, conditions, restrictions or penalties" imposed on the exercise of the right. In many cases, it is fairly obvious that there has been an interference, for example where someone has been sanctioned for making a statement or prevented from establishing a media outlet. International courts take a wide view of this. For example, the UN Human Rights Committee held that removing a teacher from the classroom for racist statements made outside of the classroom, while keeping him employed on the same conditions, was an interference with his right to freedom of expression (albeit ultimately one that was justified by reference to the three-part test).²³

It is, however, only where a public actor is involved that the question of an interference with freedom of expression is raised. A private store owner, for example, has every right to prohibit individuals from campaigning in her store, whereas prohibiting the same activity in a public place must be justified. States may be under a positive obligation to prevent private action that interferes with freedom of expression, but that is different.

Threshold issues arise in determining what is a public body. In the United Kingdom, for example, the Press Complaints Commission (PCC), a private body set up by newspaper editors to provide a complaints mechanism for the public for the print media accepted that it should be subject to review under the Human Rights Act as if it were a public body.²⁴ This could be problematical because one of the reasons self-regulatory bodies like the PCC are effective is because they are not subject to the same constraints that public bodies are. In *Casado Coca v. Spain*, the European Court of Human Rights held that the bar association was a public body, both because it was a public law corporation and because it served the public interest.²⁵

A difficult issue arises where a measure designed to promote freedom of expression – for example a rule prohibiting undue concentration of media ownership – may also be claimed to be a restriction on freedom of expression – in this case of an owner who wishes to build a large media empire. It may be noted that a promotional measure which also impacts on freedom of expression may be either negative (as in the example just given) or positive (for example where the promotion of diversity is an aspect of the system for licensing of broadcasters and

²³ *Ross v. Canada*, 1 May 1996, Communication No. 736/1997.

²⁴ See *R (Ford) v Press Complaints Commission*, [2001] EWHC Admin 683; [2002] EMLR 95.

²⁵ 26 January 1994, Application No. 15450/89, para. 39.

this leads to someone's application for a licence being refused). In most cases, such measures aim to promote the right to receive information and ideas at the expense of the right to impart them. As such, they pit the speaker against the listener. This may be seen as a contest between a private rights model of freedom of expression and one which seeks to preserve public expressive space, or a traditional, non-interference, paradigm against one which calls for regulation to protect the right to receive.

Regardless of this, because promotional measures, by definition, aim to protect freedom of expression, rather than a competing interest, it is not appropriate to require them to be justified by reference to the three-part test. This test is designed to assess restrictions on freedom of expression, and it presents a high barrier to their acceptance. To require measures designed to promote freedom of expression to surmount this barrier would be to erect a presumption against their validity; specifically, it would assign hierarchical superiority to the right to impart information over the right to receive it (or to one conception of the right over another). This is clearly not appropriate under the international law formulation of freedom of expression, which does not suggest that one or another aspect of the right has lexical superiority over another.

On the other hand, these measures must meet some standard of legitimacy, for otherwise measures which seriously limited freedom of expression and yet were ineffective in achieving any promotional objective would be allowed to stand. International courts have not addressed this issue directly and, in the few cases where it has arisen, have skated over the central issues. In the United States, the issue of anti-concentration of media ownership rules was raised in a 1943 case in which anti-concentration rules set by the regulator, the Federal Communications Commission, were challenged by media companies on the basis that they violated the First Amendment (which protects free speech).²⁶ The Supreme Court easily rejected the challenge, but its reasoning was limited. Furthermore, the rules protected small media players against the larger networks, so the direct (speaker) free speech element was fairly pronounced.

It is submitted that promotional measures should be deemed legitimate only where they meet a dual test of effectiveness and proportionality.²⁷ Where they can be shown not to be effective in their primary promotional goal (for example of preventing concentration of ownership or of promoting media diversity) – for example because they are not well-designed or because new technologies or business models enable them to be side-stepped – they should be rejected as unjustifiable limitations on freedom of expression. Furthermore, where their negative impact on freedom of expression is disproportionate to the benefits they create for the right, they should again be rejected. This might be the case, for

²⁶ *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943).

²⁷ See Mendel, Toby, "Restrictions on Political Expression" in European Audiovisual Observatory, *Political Debate and the Role of the Media* (2004, Strasbourg, European Audiovisual Observatory).

example, where a measure did prevent concentration of ownership, but it also inhibited the overall development of the sector.

Questions:

- What standards should be applied to determine whether or not a body is a public body for purposes of determining whether there has been an interference with the right to freedom of expression?
- Is the dual effectiveness and proportionality test for assessing the legitimacy of measures designed to promote freedom of expression the right one? If not, what should the test be?

IV. Provided by Law

The first part of the three-part test for restrictions on freedom of expression is that the restriction must be provided for by law. This requirement will be fulfilled only where the law is accessible. Secret laws may be legitimate in some circumstances, but not where they limit freedom of expression. This is fairly obvious, as the whole aim of such a law should be to ensure that individuals do not make statements which cause harm. As the European Court of Human Rights has stated: “the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case”.²⁸

It is clear that the term ‘law’ encompasses different types of laws, including administrative, civil and criminal laws, as well as a constitution.²⁹ It is also clear that in common law systems, legal norms developed through the case law (i.e. common law norms) meet the requisite standard.³⁰ This is potentially problematical, in particular where the restriction in question applies to criticism of the administration of justice or, even more so, judges as individuals, as with the law on contempt of court. In such cases, there is no separation between making and applying the rules, potentially a breach of the right to an effective remedy as guaranteed by Article 2(3) of the ICCPR.³¹

It is less clear that secondary norms of law, such as regulations passed by the executive under the authority of primary legislation, meet the standards of international law. An important rationale for the rule is precisely to limit who may impose restrictions on rights and how this may be done.

²⁸ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49.

²⁹ *Refah Partisi (The Welfare Party) and Others v. Turkey*, 13 February 2003, Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98 (European Court of Human Rights), para. 58 *et seq.*

³⁰ The European Court of Human Rights has often accepted such norms as meeting the provided by law part of the test for restrictions. See the *Sunday Times*, note 28, para. 47 and *Observer and Guardian v. United Kingdom*, 26 November 1991, Application No. 13585/88, para. 50-53.

³¹ In many common law countries, judges can issue a conviction for contempt of court in a mini-proceeding inside of the main proceeding, immediately after the allegedly contemptuous statement has been made, or by way of summary proceedings before the judge or court to whom or which the statements relate. The South African Constitutional Court has ruled that this is a breach of the right to freedom of expression. See *State v. Mamabolo*, 2001(3) SA 409.

The Inter-American Court of Human Rights issued an Advisory Opinion on this issue in 1986,³² in which it assessed the meaning of the term 'law' in Article 30 of the ACHR, which states:

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

The Court devoted some attention to the idea that the meaning of this term precluded executive action to restrict rights, noting that rights represent "inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power",³³ that it is "essential that state actions affecting basic rights not be left to the discretion of the government",³⁴ and that it cannot be the case that "fundamental rights can be restricted at the sole discretion of governmental authorities with no other formal limitation than that such restrictions be set out in provisions of a general nature".³⁵ The Court thus held:

The Court concludes that the word "laws," used in Article 30, can have no other meaning than that of formal law, that is, a legal norm passed by the legislature and promulgated by the Executive Branch, pursuant to the procedure set out in the domestic law of each State.³⁶

However, at the end of the judgment, the Court made the following statement:

The above does not necessarily negate the possibility of delegations of authority in this area, provided that such delegations are authorized by the Constitution, are exercised within the limits imposed by the Constitution and the delegating law, and that the exercise of the power delegated is subject to effective controls....³⁷

This, read in conjunction with the earlier statements of the Court, suggests that primary legislation duly adopted by the legislature might allocate the power to the executive or an administrative body to issue rules limiting freedom of expression, but appropriately constrains their discretion to do so, this will pass muster under the provided by law part of the test. What would not be permitted, however, would be broad allocations of power which did not sufficiently constrain official discretion, such as wide powers to a president to adopt decrees or ordinances effectively to run the country, including during a claimed state of emergency.

³² *The Word "Laws" in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86 of 9 May 1986, Series A, No. 6.

³³ *Ibid.*, para. 21.

³⁴ *Ibid.*, para. 22.

³⁵ *Ibid.*, para. 26.

³⁶ *Ibid.*, para. 27.

³⁷ *Ibid.*, para. 36.

In practice, laws in many countries do allocate discretion to administrative authorities to restrict freedom of expression. For example, in many countries, the broadcast regulator is given the power to adopt a binding code of conduct for the broadcast media. Often, these laws grant relatively broad discretionary powers to regulators as to what might be included in these codes. At the same time, this is often considered to be the least intrusive manner of promoting professional standards in broadcasting and protecting viewers and listeners against potential harm.

A related, but slightly different point, is that laws restricting freedom of expression should not grant executive or administrative authorities excessively broad discretionary powers to limit expression. In *Re Ontario Film and Video Appreciation Society v. Ontario Board of Censors*, the Ontario High Court considered a law granting the Board of Censors the power to censor any film it did not approve of. In striking down the law, the Court noted that the evils of vagueness extend to situations in which unfettered discretion is granted to public authorities responsible for enforcing the law:

It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.³⁸

The UN Human Rights Committee has also expressed concern about excessive discretion, specifically in the context of broadcast licensing:

The Committee expresses its concern ... about the functions of the National Communications Agency, which is attached to the Ministry of Justice and has wholly discretionary power to grant or deny licences to radio and television broadcasters.³⁹

Another aspect of the requirement that restrictions be provided by law is that the law must be give adequate notice to those subject to it of what exactly is prohibited. Otherwise, these laws will exert an unacceptable “chilling effect” on freedom of expression as individuals stay well clear of the potential zone of application in order to avoid censure. As the European Court has stated:

[A] norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.⁴⁰

Furthermore, vague provisions are susceptible of wide interpretation by both authorities and those subject to the law. As a result, they are an invitation to abuse and authorities may seek to apply them in situations that bear no relationship to the

³⁸ (1983) 31 O.R. (2d) 583 (Ont. H.C.), p. 592.

³⁹ Concluding Observations on Kyrgyzstan’s Initial Report, 24 July 2000, CCPR/CO/69/KGZ, para. 21.

⁴⁰ Sunday Times, note 28, para. 49.

original purpose of the law or to the legitimate interest sought to be protected.

Courts in many jurisdictions have emphasised the chilling effects that vague provisions have on freedom of expression. The US Supreme Court, for example, has cautioned:

The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within “narrowly limited classes of speech.” ... [Statutes] must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.⁴¹

On the other hand, it is not realistic to expect laws to be perfectly precise. They need sufficient flexibility to be applied in different circumstances, as well as to remain relevant over time. This has also been recognised by the European Court:

Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Whilst certainty in the law is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.⁴²

The case law fails to provide much guidance as to what degree of precision is required. Instead, courts seem to rely heavily on the context, including the nature of the restriction and the sanctions which a breach may attract, when assessing this.

In *Hashman and Harrup v. United Kingdom*, for example, the European Court of Human Rights held that an order for the applicants not to breach the peace or behave *contra bonos mores*, defined as “behaviour which is ‘wrong rather than right in the judgment of the majority of contemporary fellow citizens’” was not sufficiently precise.⁴³ Similarly, in *Herczegfalvy v. Austria*, the same Court held that provisions in the Hospital Law used to deny a convicted criminal detained in hospital access to radio and television and to restrict his correspondence were not sufficiently precise.⁴⁴ The main provision in question was Article 51(1) of the Hospital Law, which stated:

Patients who are compulsorily detained ... may be subjected to restrictions with respect to freedom of movement or contact with the outside world.

On the other hand, in *Wingrove v. United Kingdom*, the European Court held that “blasphemy cannot by its very nature lend itself to precise legal definition”.⁴⁵ In *Ross*

⁴¹ *Gooding v. Wilson*, 405 U.S. 518 (1972), p. 522.

⁴² *Feldek v. Slovakia*, 12 July 2001, Application No. 29032/95, para. 56.

⁴³ 25 November 1999, Application No. 25594/94, para. 35.

⁴⁴ 24 September 1992, Application No. 10533/83.

⁴⁵ 25 November 1996, Application No. 17419/90, para. 42.

v. Canada, the Human Rights Committee recognised the “vague criteria of the provisions” in question, but relied heavily on the Supreme Court of Canada in holding that they were nonetheless sufficient to pass muster as being provided by law.⁴⁶ The rules in question prohibited discrimination in the provision of services and established a wide range of remedies to address discrimination where it does occur.⁴⁷

Questions:

- Should it be open to the courts to develop common law rules which restrict freedom of expression? What about rules which aim to protect the administration of justice? Or judges?
- Should restrictions on freedom of expression adopted by administrative bodies be considered to meet the standard of provided by law? If so, what constraints on their discretion to adopt such rules are necessary? What limits on discretion are necessary for other administrative acts to be considered valid?
- What degree of vagueness in a law is acceptable? Can principles on this be formulated or does it largely depend on the circumstances?

V. Legitimate Aim

The second part of the test for restrictions on freedom of expression is that the restriction must be for the protection of a legitimate and overriding interest. The list of interests in Article 19(3) of the ICCPR is exclusive in the sense that these are the only interests whose protection might justify a restriction on freedom of expression.⁴⁸ International courts very rarely strike down a restriction on the basis of this part of the test, and the jurisprudence regarding it is relatively underdeveloped.

In assessing whether a restriction on freedom of expression addresses a legitimate aim, it seems clear that both its purpose and its effect should be taken into account. The Supreme Court of Canada has held that where the original purpose was to achieve an aim other than one of those listed, the restriction cannot be upheld:

[B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.⁴⁹

Furthermore, the Indian Supreme Court has held that restrictions must be exclusively, not just tangentially, directed towards the legitimate aim:

⁴⁶ 18 October 2000, Communication No. 736/1997, para. 11.4.

⁴⁷ Ross, a teacher who had published anti-Semitic work, was removed from his position as a teacher and transferred to a non-teaching position.

⁴⁸ See *Mukong v. Cameroon*, note 11, para. 9.7 (UN Human Rights Committee).

⁴⁹ *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, p.331.

So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.⁵⁰

In assessing this, courts go beyond the general aim the law serves and look at its specific objectives. As the Canadian Supreme Court has stated:

Justification under s.1 requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing and substantial as to be capable of overriding the Charter's guarantees.⁵¹

Article 30 of the ACHR, noted above, recognises as legitimate only restrictions which are applied for the purpose for which they were adopted.⁵²

International courts, however, have tended to limit their analysis under this part of the test to considering whether the law in question could plausibly serve one of the legitimate aims listed. The European Court, for example, does not assess whether the primary purpose of the impugned provision is to protect the legitimate aim, and it leaves the question of whether an interest is 'pressing and substantial' enough to warrant overriding a fundamental right to the necessity part of the analysis.

This arguably undermines the logic and rigour of the three-part test, leaving too much to hinge on the necessity analysis and failing to enforce the conditions the legitimate aim part of the test was designed to impose. Many of the interests listed in Article 19(3) of the ICCPR – including the rights of others, public morals, national security and public order – are quite general in nature. A more rigorous application of the legitimate aim part of the test could rule out those aspects of these interests which do not warrant limiting a fundamental human right.

One of the most general interests listed in Article 19(3) of the ICCPR is the rights of others, which encompasses an extremely wide range of potential reasons to limit freedom of expression. It is clear from *Ross v. Canada* that this includes rights held by groups or communities, as well as by individuals.⁵³

It might be argued that includes only rights that are protected under international human rights law. This issue has not been addressed directly in the jurisprudence, but in practice, international courts do not take this approach. For example, in *Casado Coca v. Spain*, the European Court held that a ban on advertising by lawyers had the aim of ensuring that they were "discreet, honest and dignified".⁵⁴ While this is no doubt a worthy goal, it hardly qualifies as a fundamental human right.

⁵⁰ *Thappar v. State of Madras*, [1950] SCR 594, p.603.

⁵¹ *R. v. Zundel*, [1992] 2 SCR 731, p.733.

⁵² See also Principle 6 of the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, UN Doc. E/CN .4/1985/4.

⁵³ Note 23, para. 11.5.

⁵⁴ Note 25, para. 46.

On the other hand, to allow any private interest protected by law to pass muster under this part of the test would largely deprive it of any value, since the first part of the test already requires that restrictions be provided by law. Any (sufficiently accessible and clear) law purporting to protect a private interest would, under this interpretation, pass the legitimate aim part of the test. Even a law that protected politicians against statements that undermined their electoral chances would be acceptable (subject, of course, to consideration under the necessity part of the test).

Principle 36 of the Siracusa Principles addresses this difficult issue in the following manner:

When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms.⁵⁵

This is helpful inasmuch as it seeks to provide priority to human rights, but it fails to provide concrete guidance as to the applicable standards.

As noted above, a number of the other protected interests are also extremely broad in nature. Public morals are not only hard to define, and change over time, but despite a number of cases on this, both nationally and internationally, it remains very difficult to identify what is being protected. In the case of obscene material, for example, the need to protect children is clear enough in theory, if not necessarily in practice, but once you go beyond that the matter becomes very messy. As Justice Potter Stewart of the United States Supreme Court once famously wrote of pornography: “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.”⁵⁶ It is submitted that the real problem here is not the impossibility of defining the concept, but lack of clarity as to what is actually being protected.

It is understood that the term “public order (*ordre public*)” in Article 19(3) does not refer simply to the maintenance of physical order, but also includes “the organization of society in a manner that strengthens the functioning of democratic institutions and preserves and promotes the full realization of the rights of the individual”.⁵⁷ It remains very unclear what, within this potentially vast set of notions, might constitute an interest sufficiently important to warrant overriding the right to freedom of expression.

Perhaps the most notorious interest protected by Article 19(3), in terms of potential for abuse as a restriction on freedom of expression, is national security. The problem is that, on the one hand, national security is a social value of the highest

⁵⁵ Note 52.

⁵⁶ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

⁵⁷ Note 8, para. 66. See also *Engel and others v. Netherlands*, 23 November 1976, Application Nos. 5100/71, 5101/71, para. 98 (European Court of Human Rights).

order, upon which the protection of all human rights, indeed our whole way of life, depends. On the other hand, it is very difficult for non-experts, including judges, to understand and assess what constitutes a threat to security, undermining oversight mechanisms. This problem is compounded by the shroud of secrecy, sometimes legitimate, that surrounds national security matters. As Smolla has pointed out:

History is replete with examples of government efforts to suppress speech on the grounds that emergency measures are necessary for survival that in retrospect appear panicky, disingenuous, or silly.⁵⁸

The problem is such that even efforts by freedom of expression proponents to define the nation have not always been successful. The *Johannesburg Principles: National Security, Freedom of Expression and Access to Information*,⁵⁹ for example, provides, in Principle 2, that a restriction is not legitimate unless its purpose and effect is 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” from either an internal or an external threat.⁶⁰ This is an unrealistically limited definition. The attacks of 11 September 2001, for example, could hardly be said to have threatened the existence or territorial integrity of the US, unless this is interpreted so broadly as to largely defeat the purpose of this narrow definition in the first place.

International courts have done little to redress this problem. In the few cases where they have refused to accept that a legitimate national security interest was engaged, either the abuse of the concept has been very egregious or the State has adduced no evidence at all to support its claim.⁶¹

In other cases, however, the courts have shown a great deal of deference to claims by States about national security interests. Thus, in the *Observer and Guardian v. United Kingdom*, the European Court of Human Rights was faced with a case where a book containing the memoirs of a former secret agent had been banned in the United Kingdom, even though it had already been published and widely distributed in Australia and the United States. It decided the case under the necessity test, since any possible harm to national security had already become irreversible due to prior

⁵⁸ Smolla, Rodney, *Free Speech in an Open Society* (New York: Knopf, 1992), p. 319.

⁵⁹ Adopted by a group of experts convened by the international human rights NGO, ARTICLE 19. (London: 1996).

⁶⁰ This definition, in turn, draws inspiration from Principle 29 of the Siracusa Principles, note 52.

⁶¹ For example, in Mukong, note 11, para. 9.7, Cameroon had claimed without providing any evidence that the arrest and detention of the applicant was necessary to maintain national unity. In *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, the UN Human Rights Committee noted, in respect of a conviction under a national security law, that the “State party has failed to specify the precise nature of the threat which it contends that the author’s exercise of freedom of expression posed” (see para. 10.3). The applicant had been involved in a student association advocating for the reunification of North and South Korea while studying in the United States. See also *Sohn v. Korea*, 19 July 1995, Communication No. 518/1992 (UN Human Rights Committee).

publication, rather than assessing whether or not the ban served a national security goal in the first place.⁶²

An even more surprising case involved a Swedish national who was dismissed from a job with the Swedish government on national security grounds, but was refused access to the information which provided the basis for his dismissal. The European Court found an interference with private life but held that this was justified as necessary to protect Sweden's national security, even though no direct evidence was presented of the alleged threat. The Court was prepared to accept that official safeguards against abuse of the system were sufficient.⁶³ Ten years later, it transpired that the individual had been fired for his political beliefs and that the Swedish authorities had simply misled the Court.⁶⁴

Questions:

- Is it enough for international courts to assess whether a law could serve one of the legitimate interests protected under international law under the legitimate aim part of the test? Or should they go further to assess whether such protection is a key purpose of the law or provision and, furthermore, whether or not that specific purpose is sufficiently important to warrant overriding a fundamental human right?
- Should the reference to "rights of others" in Article 19(3) of the ICCPR be understood as being limited to the human rights of others, or should it extend to all rights protected by law? In the latter case, what conditions might be placed on this notion to avoid it seriously undermining this part of the test?
- How can other protected interests – including public morals, public order, national security – be defined more narrowly?

VI. Necessary

The third part of the test is that restrictions on freedom of expression must be "necessary" to protect the interest identified under the second part of the test. This is the part of the test upon which the legitimacy of a restriction hangs in the vast majority of international cases. Unlike the other two, this part of the test presents a high standard to be overcome by the State seeking to justify the restriction, apparent from the following quotation, cited repeatedly by the European Court:

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.⁶⁵

⁶² *Observer and Guardian v. United Kingdom*, 26 November 1991, Application No. 13585/88, paras. 56-71.

⁶³ *Leander v. Sweden*, 26 March 1987, Application No. 9248/81.

⁶⁴ On 27 November 1997 the Swedish government officially recognised that there were never any grounds to label Leander a "security risk" and that he was wrongfully dismissed. They also paid him compensation of 400,000 Swedish crowns (approximately US\$48,000).

⁶⁵ See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

“Necessary” is a complicated notion but it has been interpreted to include a number of different elements. First, as noted above, international courts often assess whether or not there is a “pressing” or “substantial need” for the restriction.⁶⁶ This assessment would seem to align more logically with the question of whether or not the restriction served a legitimate aim but, in practice, most international courts consider it under this part of the test.

Second, it has been held that the measures to protect the right must be rationally connected to the objective of protecting the interest, in the sense that they are carefully designed so as to be the least intrusive measures which would effectively protect it. This is somehow obvious since when restricting rights one may not “use a sledge-hammer to crack a nut”. As the Inter-American Court of Human Rights has held: “[I]f there are various options to [protect the legitimate interest], that which least restricts the right protected must be selected.⁶⁷ Similarly, the Supreme Court of Canada has held:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective.⁶⁸

An example of this might be systems for regulating harmful content in broadcasting. In some countries, directly applicable content prohibitions are found in the primary legislation. In others, the law provides for the regulator to work with stakeholders, including broadcasters, to develop a code of conduct which it applies through a system of complaints leading mainly to warnings for breach. Inasmuch as the latter is effective and yet less intrusive, it is mandated by the necessity part of the test. There is no reason why this should not also extend to self-regulatory systems for the media. Thus, if an effective self-regulatory system is available, it will be difficult to justify layering a statutory system over this.

A closely related but different notion is that a restriction should not be overbroad in the sense that it targets not only the harmful speech but also legitimate speech. Once again, this makes obvious sense since it is not appropriate to go further than is necessary and limit protected statements. As the Inter-American Court has noted: “Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary.”⁶⁹ The US Supreme Court has similarly warned against the dangers of overbroad restriction on speech:

⁶⁶ See, for example, *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 39 (European Court of Human Rights).

⁶⁷ *Compulsory Membership*, note 8, para. 46.

⁶⁸ *R. v. Oakes*, [1986] 1 SCR 103, pp.138-139.

⁶⁹ *Compulsory Membership*, note 8, para. 46.

Even though the Government's purpose be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved.⁷⁰

The rational connection, and to a lesser extent the overbreadth, aspect of the necessity test, however, is subject to some sort of practical limitations. Governments cannot always be expected to explore every possible option when limiting freedom of expression to protect an overriding public or private right, although they may not ignore an obvious option. Similarly, even the most carefully designed restrictions may occasionally be applied in a manner that oversteps appropriate bounds.

The European Court of Human Rights addresses this, in part, through the application of the doctrine of the "margin of appreciation". Thus, in *Ahmed and Others v. United Kingdom*, the European Court, assessing new regulations which restricted the political activities of officials, stated:

Against that background, the introduction of the Regulations had to be considered a proportionate response to a real need which had been properly identified and addressed in accordance with the respondent State's margin of appreciation in this sector.⁷¹

This may be reasonable, but it lacks logical precision. Put differently, the Court has failed to develop clear principles regarding the application of the margin of appreciation.⁷²

Finally, it is well established that restrictions must meet a sort of proportionality test, whereby the benefit in terms of protecting the interest must be greater than the harm caused to freedom of expression. Otherwise, on balance, the restriction cannot be justified as being in the overall public interest. This goes to the substance of a restriction, as well as to any sanction imposed for breach of it.⁷³

Overall, the interests deemed to which may justify restrictions on freedom of expression may be divided roughly into private and public categories. When international courts are faced with claims based on private interests, they tend to assess the actual damage caused by the statements,⁷⁴ but when faced with claims based on public interests, such as national security and public morals, they are more

⁷⁰ *Shelton v. Tucker*, 364 US 479 (1960), p. 488. See also *R. v. Oakes*, note 68, pp. 138-9: "Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question".

⁷¹ 2 September 1998, Application No. 22954/93, para. 59.

⁷² The Court has held that the margin is wider in relation to restrictions aimed at protecting moral values than restrictions on political speech (see *Wingrove v. United Kingdom*, 25 November 1996, Application No. 17419/90, para. 58), but this is not the same as principles governing when it may be applied.

⁷³ See, for example, *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application No. 18139/91 (European Court of Human Rights).

⁷⁴ Of course there are exceptions to this. Thus, in *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90, the European Court of Human Rights was faced with an injunction against publication, and the harm was projected rather than actual. In many cases, the precise extent of the harm – for example from a defamatory statement – is not clear, but the existence of (at least some) harm is still established.

likely to assess the risk of harm.⁷⁵ This makes the assessment of whether the restriction was necessary far more complicated.

Courts around the world have sought to address this by requiring a close nexus between the impugned speech and the risk of harm. Thus, the Supreme Court of India has noted:

The anticipated danger should not be remote, conjectural or far fetched. It should have proximate and direct nexus with the expression. The expression should be intrinsically dangerous.... In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'.⁷⁶

In a case from South Africa, *S. v. Nathie*, the appellant was charged with inciting offences against the Group Areas Act in the context of protests against the removal of Indians from certain areas. The appellant stated, *inter alia*: "I want to declare that to remain silent in the face of persecution is an act of supreme cowardice. Basic laws of human behaviour require us to stand and fight against injustice and inhumanity." The Court rejected the State's claim of incitement to crime, holding that since the passage in question did not contain "any unequivocal direction to the listeners to refuse to obey removal orders" it did not contravene the law.⁷⁷

Perhaps the clearest and strongest statement of the need for a close link between an expression and the risk of harm before the former may be restricted comes from the United States, where the Supreme Court has held:

[T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.⁷⁸

This latter establishes a clear test to be applied. International courts, however, have not been so prescriptive, tending to rely instead on a wide range of contextual factors when assessing national security restrictions on freedom of expression. These do include the nature of the link between the expression and the risk of harm, but are not limited to it.⁷⁹

Questions:

⁷⁵ For purposes of this analysis, hate speech rules are deemed to protect a public interest – equality or public order – although in *Ross*, they were also considered as protection of the rights of a group.

⁷⁶ *S. Rangarajan v. P.J. Ram* [1989](2) SCR 204, p. 226.

⁷⁷ [1964](3) SA 588 (A), p. 595 A-D.

⁷⁸ 395 U.S. 444, 447 (1969).

⁷⁹ See, for example, *Zana v. Turkey*, 25 November 1997, Application No. 18954/91 (European Court of Human Rights), *Incal v. Turkey*, 9 June 1998, Application No. 22678/93 (European Court of Human Rights) and *Arslan v. Turkey*, 8 July 1999, Application No. 23462/94 (European Court of Human Rights).

- When assessing whether a measure is the least intrusive means to protect an interest, should non-binding systems, such as media self-regulatory complaints systems, be taken into account?
- What guidance can be given as to how to balance the need for restrictions on freedom of expression to be rationally connected to the protected interest and not to be overbroad, and the need for some flexibility in designing these measures?
- Should international courts do more to develop principles governing the nexus that is required between a particular expression and the risk of harm to a public interest before the latter may be restricted? What guidance can be given to them in this regard?

VII. Positive Requirements to Restrict Expression

The analysis above has focused largely on the question of when a State may restrict freedom of expression, should it wish to do so. A few provisions of international law specifically require States to restrict freedom of expression to protect other rights or interests. For example, Article 20 of the ICCPR states:

- (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.

Article 17 of the ICCPR protects against both “arbitrary or unlawful interference” with privacy and “unlawful attacks” on honour and reputation. It also calls for “the protection of the law” against such interference or attacks (Article 17(2)). This is distinctly weaker than the Article 20 protections, inasmuch as it only calls for protection against arbitrary or unlawful attacks.⁸⁰ Protection against unlawful attacks – the only protection afforded to reputation – is presumably dependent on the existence of a national law prohibiting the attack in the first place.

Judicial interpretation of some rights has also called for restrictions to be imposed on freedom of expression. For example, the European Court of Human Rights has held that the right to privacy places a positive obligation on the State to provide adequate protection against attacks by others on both privacy and reputation.⁸¹

A question arises as to whether, when balancing freedom of expression against other rights which require the former to be limited, such limitations should be assessed by reference to the three-part test for restrictions on freedom of expression. A second question arises as to whether positive claims for protection of other rights should be treated in the same way as claims against restrictions on

⁸⁰ Some of the regional human rights treaties do guarantee respect for privacy. See, for example, Article 8 of the *European Convention on Human Rights* (ECHR), adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953. The European Court of Human Rights has also read a right to reputation into this guarantee. See, for example, *Pfeifer v. Austria*, Application No. 12556/03, 15 November 2007.

⁸¹ *Pfeifer v. Austria*, 15 February 2008, Application No. 12556/03.

freedom of expression. It may be noted that all of the cases involving hate speech before both the UN Human Rights Committee and the European Court of Human Rights have involved complaints of a violation of the right to freedom of expression (from the application of hate speech laws), rather than claims that the absence of hate speech laws failed to provide adequate protection for equality. However, cases involving freedom of expression and privacy or reputation include claims of violations of both rights.

The UN Human Rights Committee, in a number of cases involving restrictions on racist speech, has specifically held that such a restriction had to be justified by reference to the test set out in Article 19(3) of the ICCPR.⁸² The drafting history of Articles 19 and 20 of the ICCPR, as well as the case law, suggests that the restrictions that are permitted by the former are very close to the restrictions required by the latter.⁸³ This suggests that only intentional incitement of hatred, discrimination or violence would meet the strictures of Article 19(3).⁸⁴

The European Court, however, takes a different approach in different cases involving hate speech, depending on its appreciation of the nature of the speech in question. In some cases, it holds that the speech is not subject to protection under the guarantee of freedom of expression on the basis that it constitutes an activity aimed at the destruction of other rights (specifically to equality), contrary to Article 17 of the European Convention.⁸⁵ Article 17 stipulates that nothing in the European Convention may be interpreted as giving anyone the right to engage in any activity aimed at the destruction or undue limitation of the rights it proclaims. In other cases, the Court engages in the traditional three-part assessment of restrictions on freedom of expression.⁸⁶ It is hard to point to any clearly decisive factors, let alone a concrete test, in the Courts decisions that would justify these radically different approaches. Rather, it seems that the route depends on whether, *a priori*, the Court seems convinced that the author of the statements was motivated by racist intent.

This hardly seems appropriate and it is submitted that a better approach would be to take the interests protected by Article 17 into account when assessing the

⁸² See, for example, *Ross v. Canada*, note 46, para. 11.1 and *Faurisson v. France*, 8 November 1986, Communication No. 550/1993, para. 9.4.

⁸³ See Bossuyt, M., *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff Publishers, 1987), pp. 398-411. See also *Faurisson v. France*, note 82, concurring opinion of Evatt, Kretzmer and Klein, para. 4.

⁸⁴ The term 'advocacy of hatred' in Article 20(2) is widely seen as requiring intent.

⁸⁵ See, for example, *Garaudy v. France*, 7 July 2003, Application No. 65831/01 and *Norwood v. United Kingdom*, 16 November 2004, Application No. 23131/03. In both of these cases, the Court rejected the applications as inadmissible on the basis of Article 17.

⁸⁶ See, for example, *Jersild v. Denmark*, 22 August 1994, Application No. 15890/89, *Incal v. Turkey*, 9 June 1998, Application No. 22678/93 and *Lehideux and Isorni v. France*, 23 September 1998, Application No. 24662/94.

necessity of the restriction.⁸⁷ It may be noted that this would not limit the impact of Article 17. Rather, it would force decision-makers to take into account the various factors that have been established for assessing restrictions on freedom of expression.

An assessment of the privacy/reputation cases before the European Court is also instructive. In some cases, as noted, the Court is faced with a claim of a breach of the right to freedom of expression in light of a restriction based on privacy or reputational interests. In such cases, the Court goes through the three-part test, sometimes finding a breach of the right to freedom of expression and sometimes upholding the restriction.⁸⁸

However, when the Court is faced with a claim that privacy or the right to a reputation has been breached in light of a published statement, the essence of the claim is that national law does not provide enough protection to these rights (i.e. that the State has not met its positive obligations in this regard). This, like positive claims for protection of freedom of expression, cannot go through a pure three-part test analysis. There is not necessarily a restriction that is being challenged; instead, the decision, if it holds there was a breach, is calling for (additional) restrictions on freedom of expression. Furthermore, the very basis of the application is that privacy or reputation, both legitimate interests, is not sufficiently protected.

The real issue is how to come to an appropriate balance between freedom of expression and the competing right and, in particular, whether this should involve a necessity analysis, as with other restrictions on freedom of expression. In practice, the European Court has not established any sort of test or approach, but simply weighed up, in a seemingly rather random way, various competing factors.⁸⁹ This is no doubt a complicated matter. But that does not relieve international courts of their obligation to proceed with rigour when approving, or requiring, restrictions on fundamental human rights.

Questions:

- It is appropriate to use provisions like Article 5 of the ICCPR and Article 17 of the European Convention, which rule out the use of a right for activities aimed at the undue limitation of other rights, to avoid application of the three-part test for restrictions on freedom of expression?
- When positive conceptions of other rights involve restrictions on freedom of expression, should the three-part test or some other test be applied? If the latter, what sort of test?

⁸⁷ It may be noted that Article 5(1) of the ICCPR is almost identical in its language to Article 17 of the European Convention, and yet the Human Rights Committee has not relied on it to dismiss claims of a breach of the right to freedom of expression, even in the context of highly racist speech.

⁸⁸ See, for example, *Fressoz and Roire v. France*, 21 January 1999, Application No. 29183/95 and *Egeland and Hanseid v. Norway*, 16 April 2009, Application No. 34438/04.

⁸⁹ See, for example, *Pfeifer*, note 81, para. 44 *et seq.* and *Von Hannover v. Germany*, 24 June 2004, Application No. 59320/00, para. 58 *et seq.*