



BRIEFING NOTE SERIES ON FREEDOM OF EXPRESSION

Civil Content Restrictions

Centre for Law and Democracy
International Media Support (IMS)

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

Defamation

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

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

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

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

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

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

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

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

Privacy

Like freedom of expression, privacy is a human right, protected in Article 17(2) of the ICCPR. One of the main challenges with privacy is defining it clearly, a difficult task which has generally been avoided by courts. For example, in the case of *Niemietz v Germany*, the European Court of Human Rights (ECHR) stated: “The Court does

not consider it possible or necessary to attempt an exhaustive definition of the notion of ‘private life.’”

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

Interpretation of these standards varies widely both between jurisdictions and in the context of different cases. Courts in the United States have identified four different types of privacy interests worthy of protection:

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

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

At the same time, and in perhaps more high profile ways, privacy can come into conflict with freedom of expression, for example where the media wish to publish stories which include references to private matters. In these contexts, and also where the right to information comes into conflict with privacy (i.e. where individuals make requests for information that is deemed to be

private), the accepted approach is to undertake a public interest balancing, immunising the expression or providing access to the information where this is in the overall public interest. In applying this test, courts have generally favoured freedom of expression over privacy, although this has been considerably less true in the context of the right to information.

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

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

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

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

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

FURTHER READING

- ARTICLE 19, *Defining Defamation Principles on Freedom of Expression and Protection of Reputation*, 2000: <http://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf>
- *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 17 April 2013, UN Doc. A/HRC/23/40: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx>
- Toby Mendel, Andrew Puddephatt, Ben Wagner, Dixie Hawtin & Natalia Torres, *Global Survey on Internet Privacy and Freedom of Expression*, UNESCO, 2012: <http://unesdoc.unesco.org/images/0021/002182/218273e.pdf>