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The Protection of the Right to Freedom of Expression in International Human Rights Law: an Overview

Introduction

International human rights law guarantees protection to the right to freedom of expression. Due to the essential role played by freedom of expression in a democratic society, it benefits of a special protection and can only be restricted in exceptional circumstances, provided some conditions are met.

This article is divided into two parts. Firstly, it addresses the scope of the right to freedom of expression, presenting how this right is protected in the main international and regional human rights treaties, the obligations of States and private companies towards this right, the individual and social dimensions of freedom of expression and the types of speeches and kinds of information and ideas protected by this right.

Secondly, this paper focuses on the restrictions to freedom of expression, presenting the requirements that shall be met in order for a restriction to comply with international human rights law.

The scope of the right to freedom of expression in international human rights law

The International Covenant on Civil and Political Rights (ICCPR) guarantees protection to the right to freedom of expression, establishing that everyone shall have the right 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”¹.

At the regional level, in Europe and the Americas, the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR) also guarantee protection to freedom of expression².

According to the ICCPR and those regional treaties, States parties have an obligation to ensure that individuals under their jurisdiction are able to exercise their right to freedom of expression without unlawful interference³. The duty of States comprises the protection against abuse of this right by third parties, including business enterprises, as reinforced by the United Nations Guiding Principles on Business and Human Rights⁴.

The Guiding Principles on Business and Human Rights, reflecting an increasing call from the international community, also establish the responsibility of private companies to actively respect internationally guaranteed human rights, such as the right to freedom of expression, wherever they operate⁵. In the case of the right to freedom of expression, it is essential that social media companies adopt international human rights law in their businesses, as they are constantly moderating content on their platforms and, consequently, restricting freedom of expression⁶.

The Human Rights Council has acknowledged that freedom of expression „constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and development”⁷.

The regional courts of human rights share exactly this same view towards freedom of expression. While the Inter-American Court of Human

¹ Article 19 (2) of the ICCPR; The right to freedom of expression had already been recognized in article 19 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948. The wording of article 19 of the Universal Declaration of Human Rights is similar of that adopted by the ICCPR in article 19 (2), though the way the latter addresses the right in the other paragraphs of article 19 is a lot more comprehensive than the former did.

² The right to freedom of expression is recognized in article 10 of the ECHR and article 13 of the ACHR.

³ A. Shepherd, *Extremism, Free Speech and the Rule of Law: Evaluating the Compliance of Legislation Restricting Extremist Expressions with Article 19 ICCPR*, „Utrecht Journal of International and European Law” 2017, Vol. 33, p. 64.

⁴ United Nations, Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Principle 1.

⁵ *Ibidem*, Principle 11.

⁶ United Nations, Report on the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 6 April 2018, A/HRC/38/35, p. 5, para. 10.

⁷ United Nations, Human Rights Council, Resolution 21/12, 9 October 2012, A/HRC/RES/21/12, p. 1.

Rights (IACtHR) declared that the right to freedom of expression is the cornerstone of a democratic society⁸, the European Court of Human Rights (ECtHR) identified freedom of expression as an essential foundation of a democratic society⁹.

One might go even further and say there can be no democracy without freedom of expression¹⁰. Furthermore, freedom of expression is essential to the protection of all human rights, as it promotes transparency and accountability¹¹.

The right to freedom of expression has an individual and a social dimension¹². Its individual dimension means that not only individuals have the right to speak or write but also to use any appropriate means to disseminate information and ideas in order to reach the greatest number of people¹³. Its social dimension means that everyone has the right to receive those information and ideas¹⁴. Those two dimensions shall be equally and simultaneously guaranteed in order for the right to freedom of expression to be fully respected¹⁵.

The right to freedom of expression is interpreted broadly, comprising political, cultural, artistic and commercial speeches¹⁶, and including ideas and information disclosed and disseminated by any means¹⁷, including through the internet, which is nowadays the most relevant forum for the exchange of ideas and information of all kinds¹⁸.

⁸ S.G. Ramírez, A. Gonza, E.R. Vázquez, *La libertad de expresión en la jurisprudencia de la Corte Interamericana de Derechos Humanos*, 5th ed., Sociedad Interamericana de Prensa, Miami 2018, p. 25.

⁹ ECtHR, Case of Wingrove v. The United Kingdom (Application no. 17419/90), Judgment (Merits and Just Satisfaction), Court (Chamber), 25 November 1996, para. 52.

¹⁰ B. Wilson, *Le respect des convictions religieuses d'autrui et la protection de la morale: limites ultimes à la liberté d'expression au sens de l'article 10 § 2 de la Convention européenne des droits de l'homme?*, „Swiss Review of International and European Law” 2000, Vol. 10, Issue 4, p. 482.

¹¹ United Nations, Human Rights Committee, General Comment No. 34, p. 1, para. 3.

¹² IACtHR, Case of Ricardo Canese v. Paraguay. Judgment of August 31, 2004 (Merits, Reparations, and Costs), p. 54, para. 77.

¹³ IACtHR, Advisory Opinion OC-5/85 of November 13, 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), p. 9, para. 31.

¹⁴ *Ibidem*, p. 9, para. 32.

¹⁵ *Ibidem*, p. 9, para. 33.

¹⁶ Human Rights Committee, John Ballantyne et Elizabeth Davidson, et Gordon McIntyre v. Canada, Communications Nos 359/1989 et 385/1989, CCPR/C/47/D/359/1989 et 385/1989, 31 mars 1993, para. 11.3.

¹⁷ R. Toulson, *Freedom of Expression and Privacy*, „Law Teacher” 2007, Vol. 41, p. 141.

¹⁸ The Human Rights Council affirmed that the rights individuals have offline shall also be protected online, particularly the right to freedom of expression. United Nations, Human Rights Council, Resolution 20/8, 16 July 2012, A/HRC/RES/20/8, p. 2.

According to the ECtHR, freedom of expression not only applies 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”¹⁹. This is essential, as highlighted by the ECtHR, to the very existence of a democratic society²⁰.

Despite its fundamental character, the right to freedom of expression is not absolute as it may be subject to limitations²¹. Due to the essential role freedom of expression plays in democracy, restrictions shall be imposed prudently in order not to violate this right²². As the Special Rapporteur rightfully stated: „Since the freedom of expression is fundamental to the enjoyment of all human rights, restrictions on it must be exceptional, subject to narrow conditions and strict oversight”²³.

Restrictions to freedom of expression under international human rights law

The right to freedom of expression might only be restricted provided certain conditions established in international human rights law are met²⁴.

According to article 19 (3) of the ICCPR, restrictions to the right to freedom of expression shall be provided by law and be necessary for (a) the respect of the rights or reputation of others; or (b) the protection of national security or of public order, or of public health or morals²⁵.

Similarly, article 10 (2) of the ECHR establishes that restrictions to freedom of expression shall be prescribed by law and be necessary in a democratic society for (a) the prevention of disorder or crime; (b) the protection of health or morals; (c) the protection of the reputation or rights of others;

¹⁹ ECtHR, Case of *The Sunday Times v. The United Kingdom* (No. 2) (Application no. 13166/87), Judgment (Merits and Just Satisfaction), Court (Plenary), 26 November 1991, para. 50(a).

²⁰ ECtHR, Case of *Éditions Plon v. France* (Application no. 58148/00), Judgment (Merits and Just Satisfaction), Court (Second Section), 18 May 2004, para. 42.

²¹ Human Rights Committee, *Vladimir Viktorovich Shchetko and Vladimir Vladimirovich Shchetko v. Belarus*, Communication No. 1009/2001, 11 July 2006, para. 7.3.

²² J. Velu, R. Ergec, *La Convention Européenne des Droits de L'Homme*, Bruylant, Bruxelles 1990, p. 611, para. 753.

²³ United Nations, Report on the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 9 October 2019, A/74/486, p. 5, para. 6.

²⁴ N. Wenzel, *Freedom of Opinion and Expression, International Protection*, [in:] Max Planck Encyclopedia of Public International Law (OUP), 2014, para. 29.

²⁵ United Nations, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 11 May 2016, A/HRC/32/38, p. 4, para. 7; United Nations, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 23 April 2020, A/HRC/44/49, p. 5, para. 11.

(d) preventing the disclosure of information received in confidence; or (e) maintaining the authority and impartiality of the judiciary²⁶.

Finally, article 13 (2) of the ACHR states that restrictions to freedom of expression shall be expressly established by law and be necessary to guarantee (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals²⁷.

Despite a few differences between the universal, European and Inter-American systems, it is possible to identify certain common requirements that shall be cumulatively met in order for a restriction to comply with international law. Therefore, a restriction to the right to freedom of expression shall be provided by law, pursue a legitimate aim and be necessary to achieve this particular legitimate aim²⁸. Furthermore, the restriction shall be the least restrictive measure capable of achieving the particular legitimate aim pursued²⁹.

The conditions laid out on article 19 of ICCPR, article 10 of the ECHR and article 13 of the ACHR are cumulative and, therefore, it is not sufficient that a restriction is aimed at one of the legitimate aims, such as the protection of public health, as it must still meet the requirements of legality, necessity and proportionality³⁰.

Article 20 of the ICCPR establishes that any propaganda of war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law³¹.

The Human Rights Committee noted that articles 19 and 20 of the ICCPR „are compatible with and complement each other”, since all acts

²⁶ D. Pannick, *Article 10 of the European Convention on Human Rights*, „The King’s College Law Journal” 1993–1994, Vol. 4, pp. 44–45.

²⁷ IACtHR, Advisory Opinion OC-5/85, p. 11, para. 39.

²⁸ Human Rights Committee, *Kim Jong-Cheol v. Republic of Korea*, Communication No. 968/2001, 27 July 2005, para. 8.3.

²⁹ United Nations, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 29 August 2018, A/73/348, p. 12, para. 28.

³⁰ A/HRC/44/49, p. 5, para. 13.

³¹ Article 20 (1) and (2) of the ICCPR; According to the Special Rapporteur on freedom of expression: „There are two key elements of the type of expression that is prohibited under article 20, paragraph 2, of the International Covenant: first, only advocacy of hatred is covered, and second, it must constitute incitement to one of the three listed results. Thus, advocacy of national, racial or religious hatred is not a breach of article 20, paragraph 2, of the Covenant on its own. Such advocacy becomes an offence only when it also constitutes incitement to discrimination, hostility or violence; in other words, when the speaker seeks to provoke reactions (perlocutionary acts) on the part of the audience, and there is a very close link between the expression and the resulting risk of discrimination, hostility or violence. In this regard, context is central to the determination of whether or not a given expression constitutes incitement”. United Nations, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 10 August 2011, A/66/290, p. 10, para. 28.

addressed in article 20 are „subject to restriction pursuant article 19 (3)”³². The Human Rights Committee highlighted that a restriction justified under article 20 must still comply with the requirements of article 19 (3), the only difference being that for the acts addressed in article 20 the ICCPR requires from the State a specific response, which is their prohibition by law³³.

In conclusion, to comply with international law, a restriction shall meet the requirements of (a) legality, (b) legitimacy, (c) necessity and proportionality, as defined by international law³⁴.

(a) Legality

The restriction shall be provided by law in order to avoid arbitrary interference by governments³⁵. Nevertheless, the mere fact that a restriction is prescribed by law is not enough to comply with international law, as the national law establishing the restriction must comply with the requirements of accessibility and foreseeability³⁶.

Laws establishing restrictions to the right to freedom of expression must be clear, accessible and precise so that individuals can regulate their conduct accordingly³⁷. They must be able to anticipate, to a great extent, the consequences a particular act may entail when exercising their right to freedom of expression³⁸.

(b) Legitimacy

Each treaty presents a list of all legitimate aims which may justify a restriction on freedom of expression under its own system. Those legitimate aims are either based on the protection of the rights of other individuals or on a specific overriding public interest³⁹.

³² General comment 34, p. 12, para. 50.

³³ General comment 34, pp. 12–13, paras. 50–51.

³⁴ A/74/486, pp. 5–6, para. 6.

³⁵ S.G. Ramírez, Gonza A., Vázquez E.R., *op. cit.*, p. 44.

³⁶ ECtHR, Case of Ekin Association v. France (Application no. 39288/98), Judgment (Merits and Just Satisfaction), Court (Third Section), 17 July 2001, paras. 44–45.

³⁷ According to the Special Rapporteur, „the precision and clarity required under article 19 (3) of the Covenant mean that State laws should constrain the excessive discretion of government actors to enforce the rules or of private actors to use the rules to suppress lawful expression [...]”. A/74/486, p. 13, para. 31.

³⁸ ECtHR, Case of Perinçek v. Switzerland (Application no. 27510/08), Judgment (Merits and Just Satisfaction), Court (Grand Chamber), 15 October 2015, para. 131; E. Abbasli, *The Protection of the Freedom of Expression in Europe: Analysis of Article 10 of the ECHR*, „Baku State University Law Review” 2015, Vol. 2, Issue 1, p. 21.

³⁹ United Nations, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 6 September 2016, A/71/373, p. 5, para. 8.

For instance, restrictions under the ICCPR are only allowed to pursue the legitimate aims specified in article 19 (3)⁴⁰. Likewise, restrictions under the ECHR are only permitted if they are imposed in order to meet one of the legitimate purposes enumerated in article 10 (2) and restrictions under the ACHR are only permissible if they pursue the legitimate aims listed in article 13 (2)⁴¹.

It should be noted that the ECHR provides for a more expansive list of legitimate aims than the ICCPR and the ACHR⁴².

(c) Necessity and proportionality

Considering the essential role freedom of expression plays in a democratic society, restrictions to this right should be imposed carefully in order not to limit freedom of expression more than it is strictly necessary to achieve one of the legitimate aims⁴³.

The compliance with international law depends if the restrictions to freedom of expression are enforced to meet an overriding public interest⁴⁴. As Wenzel points out, a restriction to freedom of expression „must be required by a compelling State interest which clearly outweighs the social need for protecting freedom of expression and has to be proportional for the purpose pursued by the State”⁴⁵.

What is more, as the Human Rights Committee points out, „a State party [...] 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”⁴⁶.

Finally, according to international law, the restriction must be the least restrictive measure capable of achieving the particular legitimate aim pursued, in order to comply with the proportionality requirement⁴⁷.

⁴⁰ General comment 34, para. 22.

⁴¹ S.G. Ramírez, A. Gonza, E.R. Vázquez, *op. cit.*, pp. 44–45; IACtHR, Case of Herrera Ulloa v. Costa Rica, Judgment of July 2, 2004 (Preliminary Objections, Merits, Reparations and Costs), p. 66, para. 120.

⁴² N. Wenzel, *op. cit.*, para. 31.

⁴³ J. Velu, R. Ergec, *op. cit.*, p. 611.

⁴⁴ IACtHR, Case of Palamara Iribarne v. Chile. Judgment of November 22, 2005 (Merits, Reparations, and Costs), pp. 60-61, para. 85.

⁴⁵ N. Wenzel, *op. cit.*, para. 32.

⁴⁶ General Comment No. 34, p. 8, para. 35.

⁴⁷ IACtHR, Case of Ricardo Canese v. Paraguay, p. 63, para. 96; A/74/486, p. 6, para. 6.

Concluding remarks

The right to freedom of expression is essential to protect democracy and all human rights. For this reason, international human rights law guarantees a special protection to freedom of expression, establishing that it can only be restricted in exceptional circumstances, provided some conditions are met.

According to international law, a restriction must be provided by law, pursue a legitimate aim and be necessary to achieve this particular legitimate aim. Additionally, the restriction shall be the least restrictive measure capable of achieving the legitimate aim pursued. Therefore, freedom of expression may only be limited if the restrictive measure meets the requirements of legality, legitimacy, necessity and proportionality.

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Abstract

The Protection of the Right to Freedom of Expression in International Human Rights Law: an Overview

This paper provides an overview on the protection of the right to freedom of expression in international human rights law. It addresses the scope of this right and focuses on the exceptional circumstances in which this right might be restricted. According to international law, a restriction must be provided by law, pursue a legitimate aim and be necessary to achieve this particular legitimate aim. Additionally, the restriction shall be the least restrictive measure capable of achieving the legitimate aim pursued. In other words, freedom of expression may only be limited if the restriction meets the requirements of legality, legitimacy, necessity and proportionality, as defined by international human rights law.

Key words: freedom of expression, International human rights law, International Covenant on Civil and Political Rights, restrictions, requirements