



The Importance of Freedom of Expression

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

Madanhire and another v Attorney General

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

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

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

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

Article 19 states:

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

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

²⁵ Article 19, UDHR.

²⁶ Article 19, ICCPR.

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

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

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

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

What Does “Within the Law” Mean?

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

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

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

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

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

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

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

²⁸ *Id* at para 102

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

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

³¹ Article 10, European Convention.

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

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

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

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

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

Why is Freedom of Expression so Important?

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

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

³² Art 13(3) of the American Convention.

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

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

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

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

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

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

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

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

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

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

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

³⁶ *Id* at para 36.

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

³⁸ *Id* at para 40.

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁴ *Id.*

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

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

Two Facets of Freedom of Expression

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

“It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.”⁴⁷

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

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

The African Commission cited the Inter-American Court of Human Rights jurisprudence in *Law Office of Ghazi Suleiman v Sudan (II)*⁴⁹ where the Commission acknowledged that “when an individual’s freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right, of all others to ‘receive’ information and ideas.”⁵⁰

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

Press Freedom

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

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

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

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

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

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

⁵⁰ *Id* at para 50.

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

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

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

The Press as Public Watchdog

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

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

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

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

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

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

The South African Constitutional Court put it thus:

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

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

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

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

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

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

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

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

And in *Castells v Spain*:⁵⁹

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

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

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

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

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

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

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

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

⁶⁰ *Id* at para 43.

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

⁶² *Id*.

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

And further:

“As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.”⁶⁴

Right to Information

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

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

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

⁶³ Human Rights Committee: General Comment 34.

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷² *Id.*

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

⁷⁴ *Id.* at para 13.4.

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

⁷⁶ *Id.*

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

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

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

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

⁷⁸ *Id* at para 6.3.

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