

Situating the Values of the Networked Communications Environment Within the International Human Rights Framework

Paper for the Freedom of Expression Project, April 2008

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*Principles for a Public Interest Communications Environment*¹ sets forth a set of values (Values) which inform a progressive policy for communications. The question for this paper is: which provisions of international human rights law underpin which of the Values?

I argue here that there is, or is likely to be, some support for each of the Values in international human rights law. But, equally, no single international law provision, not even the very strong protection afforded freedom of expression under the regional and international human rights instruments, can serve to underpin *all* of the Values. In fact, some of the Values may actually be inimical to freedom of expression, even though they may be justified elsewhere. Given different sources of justification, the Values themselves, at least as presently stated, are in some tension with each other. Since that is the case, part of an evaluation of the Values must involve playing them off against each other by interpreting them appropriately, with an aim to harmonising them to the degree possible.

I. The Values

The Values I will discuss are the following:

- 1. Accessibility:** All people should have equal ability to publish, disseminate and access content via any media.
- 2. Independence:** Channels of communication and content producers should operate independently of established interests.
- 3. Diversity:** Content should contain a diverse (and representative) range of information, culture, and political opinion.
- 4. Navigability:** People should be able to find the content that is relevant to them, and mechanisms to aid navigation should be transparent and publicly accountable.

¹ A Freedom of Expression Project initiative to define public interest policy principles for the networked communications environment. See <http://www.freedomofexpression.org.uk/resources/public+interest+principles+for+the+networked+communications+environment>

5. Democratic governance: All stakeholders have responsibilities to ensure that the environment is secure, protects human rights and encourages innovation. All should have equal opportunities to be involved in policy processes concerning governance of the environment.

6. Balance: Content producers must accept their responsibility to respect the rights of others within the communications environment.

II. How freedom of expression ‘interacts’ with the Values

Article 19 of the ICCPR is reasonably representative of the protections for expression contained across the regional instruments,² in providing at sub-article 19(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.

Freedom of expression has been widely and robustly embraced by international and regional courts, and to varying degrees, the judgements of these court have been embraced by national courts – in addition to which, virtually all national constitutions contain their own protections for freedom of expression.

While the right to express *oneself* is typically at stake in international jurisprudence (e.g., the right to speak at gatherings, the right to publish or otherwise disseminate information, and so forth), it is directly relevant here that courts have recognised the right to *receive* information as well. The Inter-American Court has written particularly clearly about this, noting (for example) that Article 13’s protection of freedom of expression

² The other relevant major instruments include the African Charter on Human and Peoples’ Rights, the American Convention on Human Rights, and the European Convention on Human Rights. With respect to these instruments, there is a wide range of supporting materials, including declarations and statements by relevant judicial or other oversight bodies, reports and statements by Special Rapporteurs, and so forth. While these would be relevant to a detailed analysis of the scope of coverage of the relevant charter or convention provisions, they need not be canvassed in this concept note.

For reference, here are the freedom of expression “positive” provisions in these instruments (I omit, for brevity, the limiting clauses in the American and European Conventions):

African Charter 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.

American Convention Article 13(1): 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

European Convention Article 10(1): 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 of requiring licensing of television, television or cinema enterprises.

implies ... everyone's right to know opinions, reports and news. For the ordinary citizen, the right to know about other opinions and the information that others have is as important as the right to impart their own.³

(Where convenient, I will refer below to the rights of *speakers* when the focus is on the right to impart or disseminate information, and to the rights of *recipients*, when the focus is on the right to receive information.)

Care needs to be taken here on two points. First, the right to receive information at issue here is *not* the right to receive information held by government bodies (or, significant private actors) – the so-called right to information in the freedom of information context. Rather, the right to receive information to which I refer, and which is firmly established in international law, alongside the right of speakers to express themselves, is the right to receive, or to access, *already existing and available* information.

Second, and related, the right to receive information is not a right held by individuals against other private individuals or entities (with, perhaps, some exceptions not pertinent here). For example, I do not have a right to demand information of you – e.g., to have access to your website if you don't want to grant me access, or to a study you have written which you may be ready to distribute to others. Perhaps the right to receive information has some consequences in the form of positive obligations a State might have, to make access to already-available information, e.g., information already in the public domain, easier than it might otherwise be; but this is about as far as one can go in this direction. The relevance of this point will emerge shortly.

Given that the internationally-recognised right to freedom of expression encompasses both a right to impart and a right to receive information – as just delineated – our question is: which of the Values are underpinned by this dual right? Which Values may be in tension with that right?

1. Accessibility: On its face, this Value is both speaker- and recipient-centred. Speakers should have access to media (in particular, as I will say, they should have access to channels in the various media) by which they can disseminate their messages; (interested) recipients should be able to access channels of their choosing.

Let me take Accessibility at its most modest to begin with, and use an illustration. Suppose a person has ready access to the internet, and to a free service which would allow him to post content on his own webpage, and

³ *Ivcher Bronstein Case*, Judgment of February 6, 2001, Inter-Am Ct. H.R. (Ser. C) Not. 74 (2001). See also the European Court's stated view in *Open Door and Dublin Well Women v. Ireland*, Application Nos. 14234/88, 14235/88, ECHR Judgement of 29 October, 1992, ¶80 (noting, *inter alia*, the right of women who attend abortion clinics in Ireland to receive information relating to abortions which professionals at the clinic were ready and able to impart to them).

which allows free access by interested third parties. Further, let us assume that the content contravenes no content-restrictive law which is consistent with freedom of expression – e.g., that it is not hate speech, does not incite to violence directed against minorities, etc. Accessibility, at a bare minimum, implies that such a person must be able to post that content on that webpage; equally, it implies that others with access to the internet must be able to access that webpage – at least, that there can be no official interference with such access. There can be no question that these speaker and recipient rights are absolutely core to freedom of expression, and therefore that this weak version of Accessibility is well grounded in that right.

But Accessibility may be read to require much more. On the most expansive reading, it ensures access by *every* person to *every* communication channel, both for disseminating and for receiving information. On this reading, Accessibility actually is at odds with freedom of expression guarantees. To see this, consider that, from the speaker side, an essential aspect of freedom of expression is the right *not* to disseminate information, or certain types of information, if one chooses not to. But this extreme form of Accessibility implies that I should be able to post a message of my choosing on your website, or that I should be able to publish a letter in your newspaper or that I should be able to comment on any news broadcast, if and when I want to. According to that right, however, obliges others to disseminate that information whether or not they wish to, in violation of the expression rights of those persons. (There are exceptions here, for example, with respect to a right of reply; also, as will be noted again below, where a license has been granted to disseminate information over a channel in a scarce medium (e.g., the analogue television spectrum), and conditions have been asserted by the relevant regulator in return for the granting of a license for the use of that channel. But these exceptions are narrow, and should not detain us here.)

What about on the receiver's end? Remembering that the international instruments typically require States to take positive steps to ensure the enjoyment of the rights they recognise and protect, it may be thought that States will need to take steps to ensure that interested recipients in fact have, as it were, maximal access to information of interest to them. Perhaps that is true, but this is the point at which we need to remind ourselves that the right to receive information is *not* a right against individuals or private entities. It may follow then, that while States may appropriately take steps to make access to information whose disseminators are willing to have accessed easier, they may not be able to *require* disseminators who are unwilling, to make their information accessible to all. At least, they may not do so without risking violating the freedom of expression of those disseminators.⁴

⁴ Occasionally, the Human Rights Committee makes remarks which suggest that a more robust version of Accessibility may be justified by Article 19. For example, in its Concluding Observations on Italy, 03/08/94, CCPR/C/79/Add.37, it remarked that “excessive control of the media in a small group of people ... may affect the enjoyment of the right to freedom of expression and information under article 19 of the Covenant.” This at least suggests the propriety of reserving some channels of communication for people outside the “favoured” group, and the propriety of ensuring access to such channels for interested people. The problem here is that the Committee has not elaborated on such remarks, and so it is a little unclear what to make of them.

This is no doubt an unduly wide reading of Accessibility, but it is useful to set it out and to see how it would conflict with freedom of expression, just as the narrowest reading of Accessibility is clearly underpinned by freedom of expression. Intermediate interpretations of Accessibility might understand it to require that any person should be able to disseminate or to access information through any media *type*: for example, by radio, by television, by print, and so forth, rather than through every channel in every medium. There may still be problems here, from the point of view of freedom of expression – particularly if, as in television, we are dealing with a relatively limited (though expanding) spectrum not able to accommodate all potential communicators, and at the same time a person is insisting on disseminating a type of information which is of limited interest to a very limited audience. But it may not be useful to pause over such potential difficulties at this juncture. The vital point is that Accessibility, in a weak form, not only is compatible with freedom of expression, but is demanded by it. In stronger forms, in which what it ensures may require that some other speakers or recipients refrain from disseminating or accessing information so that others may do so, there may well be clashes with freedom of expression protections. No doubt, part of the work of the workshop will be to delineate the proper contours of Accessibility, with these considerations in mind.

2. Navigability: It is possible that freedom of expression may underpin Navigability to some degree. What is clear, as already noted, is that freedom of expression protects (though it does not necessarily facilitate) the accessing of *already available* information: for example, it ensures that library patrons can access controversial materials at a free library's public computers; and it ensures their ability to purchase newspapers with critical material should they be available for general purchase (and it of course protects the rights of editors and journalists to make such materials available for purchase, or for free). The tremendous complication that the new media environment creates is that the notion of 'availability' is under great strain. To take the most familiar example: with millions of webpages online, the only means of accessing any of them, as a general rule, is by means of (commercial) search engines. But whether a particular webpage shows up after a search (that is, whether it is, practically speaking, *available* to the searcher), is determined by the nature, including, typically, the commercial aspects, of the search engine. Accordingly, whether information which is posted *somewhere* on the web is, in practical fact, accessible to interested recipients is a matter of what constraints search engines (electronic programme guides, etc.) may be put under. If, for example, it is thought that Navigability requires that a 'representative' sampling of content should be returned by search engines, so that potential recipients have roughly equal chances of accessing information interesting to them, this will surely require substantial constraints on the operators of search engines – who are themselves, of course, commercial speakers. This has the potential for posing freedom of expression problems – at least where commercial expression is understood to have a freedom of expression component. The risk, therefore, is that Navigability may end up being in some tension with the freedom of expression of speakers, even if it may provide some support for the freedom of expression rights of recipients.

3. Diversity: It appears straightforward that honouring Diversity by imposing a diversity obligation on a disseminator of information will simply violate his/her freedom of expression whenever the information that the speaker is being obliged to disseminate is not what he/she would elect to disseminate: this would simply be a case of forced speech. (Of course, for those speakers who would provide diverse content voluntarily, there is no freedom of expression problem.) This is only to say, it should be emphasised, that freedom of expression is not the normative source of a duty to convey diverse content; it is by no means to say that there is no underpinning in international human rights law for this value. (There are complications here: it has generally been accepted, and indeed it is nearly explicit in Article 10 of the European Convention, that conditions may be imposed on potential communicators in return for their being licensed to use scarce media space – e.g., the analogue television spectrum.⁵ And again, it has been recognised that conditions may be imposed on communicators in return for the receipt of public support – the classic example, of course, would be a public service broadcaster. But these exceptions are narrow and do not significantly affect the main point.)

4. Independence: It will be interesting to see how this Value is developed in the discussion, as it is somewhat difficult to comment on it in its current broad form. Established political parties, identified entirely with established interests, for example, are protected under principles of freedom of expression to disseminate in print or electronically their political messages. If Independence is so strong as to rule such information dissemination out, because the content producer will be allied with established interests, it will not be compatible with freedom of expression.

5. Balance: as stated, Balance does not set forth which rights content producers must respect. Suffice it to say that some rights, for example, the right to reputation, are expressly ‘carved out’ of the basic right to freedom of expression: for example, the ICCPR, and the European and American Conventions, provide that restrictions on freedom of expression are permissible when necessary to protect the reputations of others. So, a restriction on a content producer to respect the reputation rights of others is, so to say, directly compatible with freedom of expression. Other restrictions, for example, on the dissemination of hate speech, are also permissible (indeed obligatory under some instruments), and so cannot rightly be said on their face to be restrictive of freedom of expression. Discussion should make clearer which other rights may be implicated by Balance, and which of them may cause tensions with freedom of expression protections.

6. Democratic Governance: It is not clear if this Value can be grounded fully in freedom of expression. While it’s clear, for example, that freedom of expression protects the rights of people to express their views about important

⁵ And then there are the remarks of the Human Rights Committee, see note 3, to the effect that ownership concentration in media poses freedom of expression difficulties, which may imply that a diverse ownership requirement, even if not a diverse *content* requirement, may be impossible by States consistently with Article 19.

policy matters, and the rights of others to access those views if they are interested, it is another matter whether these rights, per se, impose obligations on policymakers to listen to the views of all who want to weigh in on a policy matter, that is, to give their holders the right to express them at relevant policy events. See the discussion of the right to political participation for a bit more detail on this..

III. Other justificatory underpinnings for some of the Values

I have suggested that some of the Values, most notably Diversity, some strong versions of Accessibility, and possibly Navigability, may actually be in tension with, and hence are not underpinned by, the right to freedom of expression. But there are other possible sources for their protection in international human rights law. I explore a couple of alternative avenues in this section: the right to culture, and the right to political participation. I want to emphasise now, however, that the suggestions below are to some degree speculative. I am unaware of concerted efforts, in the context of either of these rights, to make the case that they protect the sorts of communication values at issue here. On the other hand, the lack of such efforts may only be reflective of how new this field is.

1. The Right to Culture

The right to culture is perhaps most robustly covered by Article 27 of the ICCPR and its related General Comment, which not only reiterate the right of ethnic, religious or linguistic minorities, “in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, [and] to use their own language,” but also provide that the State has positive obligations to enable such minorities to “enjoy and develop their culture and language.” (It must be acknowledged, however, that Human Rights Committee jurisprudence under this Article has tended to be tentative and rather conservative.)

Other instruments, some more directly than others, also recognise the right to enjoyment of culture. Article 26 of the American Convention imposes obligations on States to secure economic and social rights including (by reference to Article 50 of the OAS Charter), by ensuring that “the benefits of culture will be available to the entire population [and that they] will promote the use of all information media to fulfil these aims”. (It is likely that the term ‘culture’ here has a different meaning from the meaning of ‘culture’ in Article 27 of the ICCPR.) Article 17 of the African Charter provides that “Every individual may freely take part in the cultural life of his community,” and that “the promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.”

a) Diversity: Article 27 of the ICCPR, including its positive obligations on States, may well be argued to impose certain limited diversity obligations on States, both to ensure that content relevant to minority groups living within their borders is disseminated by media in a quantity and quality sufficient to assist the communities to enjoy their own culture – this may include imposing minority language quotas, information programming, and perhaps some

ownership stipulations on major media. I do not mean to suggest, however, that every media channel, e.g., every private internet website, or every radio station, or every channel on cable television, would necessarily have such obligations. Indeed, to impose such widespread obligations would pose significant freedom of expression difficulties, because they would amount to restrictions on expression, and could be argued to be disproportionate. Still, that some such restrictions and conditions could, and perhaps must, be imposed on Article 27 grounds is plausible. Even more broadly (because not necessarily restricted to the rights of cultural *minorities*), the American Convention might be argued to impose some duty on States to ensure that “culture,” more broadly, is disseminated across the population – perhaps by imposing some modest diversity obligations on major private media players, or at least by ensuring that a publicly-funded broadcaster provide such coverage.

b) Balance: As already noted, freedom of expression in almost all the international instruments is restricted by a duty not to injure the reputation of others. But the right to enjoy one’s culture may justify the imposition of further restrictions on the right to freedom of expression – for example, the obligation on media to ensure generally that the rights of cultural minorities are not interfered with by their dissemination of information.

c) Independence: To the extent that Independence needs to be asserted to ensure adequate coverage for cultural minorities, there may be an argument that it too is underpinned, insofar as such minorities are concerned, by the right to culture. The rationale, however, would be the same as that set out above for Diversity. I am unsure if there could be a separate argument here in favour of Independence.

d) Accessibility: A right by minorities to be able to access channels of communication to disseminate information relevant to their cultures may well follow from, e.g., ICCPR Article 27 general values, and it may well be argued that States have positive obligations to facilitate such access. Equally, and on the same rationale, members of relevant minority populations might be argued to have some claim against States to enable them to access that information once it is made available.

2. Right to participate

All the international instruments (except the European Convention⁶) ensure the right of people to take part in public affairs, either directly or through their elected representatives.⁷ All the instruments, in addition, provide for the right

⁶ Although the First Protocol to the European Convention, at Article 3, provides for the holding of free elections which would “ensure the free expression of the opinion of the people in the choice of the legislature.”

⁷ See:

ICCPR Article 25 (a) and (b):

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

to vote, and the Council of Europe in particular, in various instruments, has recognised the need to ensure that election coverage is fair and unbiased, and that persons standing for election (subject to certain restrictions) are given equal or at least proportionate time on major media to represent their views.

At the same time, it has to be said that international tribunals (again, notably the Human Rights Committee) have been somewhat conservative in their jurisprudence relating to this right. For example, while the Committee's General Comment on ICCPR Article 25 provides that

in order to ensure 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[.]

the Committee rejected Applicants' Article 25-based argument that they, as members of an acknowledged aboriginal group, had the right to attend a constitutional conference convened to determine the extent and nature of aboriginal rights in Canada, noting that

article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a).⁸

That said, I am not convinced that arguments like the ones envisaged below could not be successfully made under the right to participate; as I have said, this is all quite new terrain, and the arguments really have yet to be made in any systematic way.

a) Diversity and Independence: It is possible that the right to participate can be argued to be empty, or nearly so, unless some media are required to carry relevant and unbiased information about electoral candidates, about the political process itself, and a wide range of other relevant material, without which genuine participation in the political process, and in particular, informed voting, would not be possible. If this were correct, there would be an

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c)”

African Charter Article 13(1): “Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”

American Convention Article 23 (1) and (2), providing that every citizen shall have the right and opportunity “(1) to take part in the conduct of public affairs, directly or through freely chosen representatives, (2) to vote ... in genuine periodic elections ... guarantee[ing] the freedom of expression of the will of the voters ...”

⁸ *Marshall v. Canada*, Communication No. 205/1986 (1991) at ¶5.5.

argument here as well, based on the right to participate, to the legitimacy of another kind of diversity of disseminated information – this time not wed to issues of culture, but to issues of responsible citizenship instead. Similarly, this right could underpin the imposition of an obligation on certain media to be “independent” in their coverage of elections and, more generally, of the political process in a country or region – at least, to be independent of the established interests with which they may be aligned in parts of their election coverage. (Here, as throughout this paper, the question remains open as to how wide an application relevant regulations might reach. – Certainly, the reach could not be universal; certainly, it would be a significant violation of freedom of expression, e.g., to require that the publications and broadcasts of political parties or candidates themselves be ‘independent’ with respect to the candidacies of their opponents.)

b) Democratic Governance: For these purposes, I focus only on the second sentence of this Value. The applicability of the right to participate here can, I think, reasonably be argued. For example, in its General Comment 25 (already referred to), the Human Rights Committee noted that “Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves.” This suggests that the right of political participation includes the right of citizens to have a voice in matters of public affairs. Given the plausible assumption that issues of governance relating to the communications environment are public affairs, ensuring citizens the opportunity to have a say in those issues would seem to be envisaged by the Committee, under Article 25 – although, what it means to ‘have a say’ will be subject to considerable dispute. (See, for example, the brief description of the Human Rights Committee’s *Marshall* case just above.)

IV. The need to balance

This discussion indicates that the Values themselves are in tension with one another; the best evidence of this is that some of them are underpinned by some rights while others are inimical to those same rights (e.g., Diversity may threaten freedom of expression while Accessibility, in some form, is required by it). The same point may be made about the rights that, I’ve argued, may underpin the various Values: they too may conflict, or at least are in tension with each other: for example, the right to culture may require that some voices be preferred, officially, to others; the right to participate may similarly allow the preference of certain messages over others – while the right to freedom of expression (for the most part) does not permit preferences based on the content of expression.

Given the tensions between them, it is fairly clear that the Values cannot all be asserted, in their fullest form, if one wants to assert them all in the interest of a progressive communications policy. The question for discussion, then, is this: how can the Values be balanced against each other so that each is maximised within a system that champions all of them?