

Human Rights and the Freedom of Expression

Media Training Diploma Course
Oslo, 22 – 26 October, 2018



Human Rights & the Freedom of Expression
(Structure of this lecture)

- **Definitions of Human Rights**
 - Legal, philosophical, political and social grounding
- **Relevant Treaties and Texts**
 - CCPR, ECHR, US Constitution, African H&PR Charter
- **Justifications of Freedom of Expression:**
 - Discovery of Truth
 - Aspect of Self-Fulfilment
 - Citizen Participation in a Democracy
 - Distrust of Government
- **A Contribution from the Social Sciences:**
 - Free Speech and Conflict Dynamics



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Definitions and significance of HR

1. A claim about equal dignity: all humans have dignity (v honour)
2. An infrastructure for political and legal implementation (v all-encompassing ethical codes)
3. A liberating spirit (v tradition)
4. A category of political and moral appraisal (v 'realism')



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- A law-oriented definition: That branch of international law which is concerned with the protection of individuals and groups against violations of their internationally guaranteed rights, and with the promotion of these rights (Burgenthal 2009)
- Definitions from anthropology: a particular way of ordering political relations in nation-states; a particular way of framing disputes as well as common aspirations; set of claims about how particular privileges belong to particular groups at particular sites
- Definitions from political science: a response to modernity, social justice in the state- and market-driven world of today (Donnelly 2003); what establishes the sovereign (popular sovereignty) in democratic political systems (e.g. Habermas 1994)



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Enforcing Human Rights (the infrastructure)

- Through national law: Ratification of treaties entails domestic application through legislation and policy-making
- Through international law (UN or regional treaties (quasi-judicial) and their respective treaty bodies committees)
- Through political and coercive mechanisms: Security Council-backed targeted sanctions or military intervention
- Through international courts (ICC and ICJ)
- Through 'soft' mechanisms: diplomacy, persuasion, international cooperation, development and humanitarian aid
- Through reporting to UN treaty bodies
- Through special investigations and the OHCHR system of special rapporteurs, determining 'patterns of gross and systematic' violations
- Through individual complaint procedures
- A growing body of 'views', 'general comments' and case law from international tribunals



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CCPR

- Art 19: 1. ‘Everyone shall have the right to hold opinions without interference.’
- 2. ‘... shall have the right to freedom of expression, to seek, receive and impart information and ideas of all kinds ...’
- 3. ‘... restrictions ... only as are provided for by law and are necessary (a) for respect of the rights or reputations of others (b) for the protection of national security or of public order or of public health or morals.’
- Art 20: 1. ‘Any propaganda for war shall be prohibited by law.’ 2. ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’

ECHR

- Art 10. 1. ‘Everyone has the right to freedom of expression. ... shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ... shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.’
- 2. ‘... may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ...’



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US Constitution (First Amendment)

- ‘Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’

African Charter of Human and Peoples’ Rights

- **Art 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.’
- **Art 10: 1.** ‘Every individual shall have the right to free association provided that he abides by the law.’
- 2. ‘Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.’

Compare CCPR, ECHR, US Constitution and African charter: Characteristics? Similarities? Differences?



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Justifications (after Barendt) of the ‘free speech principle’

(1) Discovery of truth or best course of action:

- **‘... however true it may be, if it is not fully, fearlessly and frequently discussed, it will be held as dead dogma, not living truth.’ (JS Mill)**
- **‘... the best test of truth is the power of the thought to get itself accepted in the competition of the market discussions’ (Holmes)**
- **discussions: fact v opinion; what sort of market, what sort of community? A shared commitment to the discovery of truth?**

(2) Aspect of self-fulfilment:

- **Necessary for being free to weigh the arguments for or against various courses of action**
- **Necessary for developing ever more mature individuals; for providing ‘security in numbers’, i.e., a community in which to be mirrored and ‘seen’**



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(3) Citizen participation in a democracy

- **‘... the final end of the State [is] to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary ... the greatest menace to freedom is an inert people’ (Whitney)**
- **Necessary for fostering understanding of political issues (citizens v ‘idiots’); cf. the ‘right to receive and impart information and ideas’**
- **Restrictions necessary to prevent majority dictatorship**
- **Most influential in case law**

(4) Distrust of government

- **‘... of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders ...’ (Schauer)**
- **The evils of regulation; power corrupts. Deeper distrust in the US than in Europe**



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Courts must determine, weigh and balance agents and utterances, with the aid of law and reason

Free speech interests

- **of the speaker: Self-advancement, duty to share and participate**
- **of the audience: to be informed, to enable recipients to discover ...**
- **of the general public: gather information and opinion pertinent to choice, limitations to protect**

Value conflicts

- **In considering ‘hate speech’:**
- **effect of restrictions? self-censorship, identities will remain uncontested**
- **Pluralism?**
- **Promotion through law, for enabling free and diverse speech**



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Popularly: where are the limits? In legal terms, this question translates to: How to determine when a speech act constitute ‘hate speech’?

Buyse’s article: A contribution from the social sciences to human rights law, for balancing better when applying the principles of and the legal regulation of the freedom of expression

Buyse’s proposition: Hate speech is better imagined as ‘fear speech’ when considering the actual connections between violence and irresponsible speech.

- **Investigating the dynamics of escalation of tensions between groups (typically ethnic groups)**
- **Using framing theory to understand (theorise) such escalation**
- **Exploring potential uses of such insights in human rights work**



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The dynamics of escalation between groups (ethnic groups):

In a crisis, when dealing with insecurity: The ‘other’ is increasingly perceived as a group (category) member

This increases internal cohesion and control and heighten the boundaries against ‘the other’, thus paving the way for militant leadership. It gives rise to polarisation and consolidates group thinking

By using explanatory frames that refers to historical patterns, essentialisations, particular types of (aggressive or defensive) past and future action, a group is mobilised, a protective identity is offered, an enemy is defined



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Framing theory: explanatory frames ('discourses')

- **Information is always contextual. Context directs possible interpretations and provides meaning which, in turn, is stabilised through discussion and interaction ('the social life of speech acts'). Context and sequencing organise involvement.**

Functions of frames:

- **Defining an issue**
- **Diagnosing causes**
- **Represent moral evaluations (existential issues)**
- **Recommend (suggest) action**

Collective action frames:

- **Diagnostic (assignment of blame)**
- **Prognostic (indicating available frames of action: competition, justice, fear/threat, etc.)**
- **Motivational, geared towards mobilisation, recruitment**



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Human Rights

- **as law: a framework for balancing interests between right-holders and duty-bearers (in the area defined by the right in question)**
- **as a category of appraisal: characterising, judging, acting socially**

The penal code is the state's instrument for dealing with conflict; this code has to comply with HR norms

A court reconstructs conflicts in legal terms when it 'applies the law'

- **Finding relevant legal figures (identifying paragraphs) in the hierarchy of rules:**
 - **constitutions and international law**
 - **law and decrees**
 - **regulations, by-laws and statutes**
 - **precedence and custom**
 - **preparatory work or lawmaker's intention**
- **Legal interpretation; linguistic and contextual**
- **Weighing of evidence**
- **Reasoning a decision**



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A proposal from the social sciences:

Additionally to the above, the court should establish the cultural or meaning-supplying context

- **How the previous violence is framed by the speaker (sequencing)**
- **In which frame it is received by the audience (social and cultural context)**

When do cases of ‘hate speech’ become cases of ‘reverberating stereotypes’ that dehumanise the other?

