ISLP International Senior Lawyers Project

USING INTERNATIONAL LAW TO DEFEND FREE SPEECH IN THE INFORMATION AGE

A GUIDE FOR HUMAN RIGHTS ADVOCATES

Using International Law to Defend Free Speech in the Information Age

A Toolkit for Advocates

International Senior Lawyers Project

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Foreword

Freedom of expression is a fundamental human right that is an essential component of democracy. The exercise of this right can sometimes come into conflict with other rights. Freedom of expression online and offline is not spared, in many African countries different groups of people from media practitioners to ordinary citizens have borne the scourge of these conflicts. There are some African countries that have procured surveillance and privacy invasive technologies which are directed at stifling public opinion and ultimately the right to freedom of expression. There are ongoing debates over the scope and limitations of this right. As Africa continues to work towards greater regional integration and cooperation, the role of regional courts in promoting the rule of law and protecting the rights of individuals and member states has become increasingly important. Given the contemporary challenges to digital rights there is a need for the increased utilization of strategic litigation to hold both state and non-state actors accountable. This toolkit provides a valuable resource for anyone seeking to navigate the complex landscape of the various regional bodies available to SADC citizens, and to understand their role and significance. We commend the authors for their comprehensive and insightful analysis. This toolkit will make a valuable contribution to the legal and policy discourse on regional integration and cooperation within Africa.

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Preface

This toolkit was created by International Senior Lawyers Project (ISLP) to share strategies for defending media freedoms in the digital age with lawyers and human rights defenders. ISLP's Media Law Working Group has, for the past 20 years, protected freedom of expression by supporting journalists and watchdog non-governmental organizations that investigate, report on, and litigate matters involving the right to freedom of expression. ISLP's Media Law Working Group also provides legal advice relating to telecommunications, freedom of information, and privacy laws. ISLP believes that freedom of expression is necessary to a transparent, accountable, and democratic government and is the foundation of a free society.

This toolkit was developed from the publishers' experience working with lawyers, journalists, and human rights defenders in Southern and Eastern Africa. ISLP has worked with local chapters of the Media Institute of Southern Africa (MISA) in training lawyers and human rights defenders from Malawi, Mozambique, Zambia, and Zimbabwe on protecting freedom of expression using international law arguments. The practical information provided in this toolkit is designed to enable local advocates to use international law in regional bodies to defend freedom of expression and argue for stronger human rights protections in SADC. This resource focuses on international law arguments to defeat criminal defamation and cyber libel charges brought against journalists and bloggers.

Approaching the Regional Bodies in SADC

Bridget Mafusire & Helen Sithole

Introduction

The right to free expression is a constitutional freedom in all SADC Member States, and all are party to both the International Convention on Civil and Peoples Rights (ICCPR) and the African Charter on Human and Peoples Rights (ACHPR). Both the ICCPR and the ACHPR recognize the right to free expression, including the right to receive information[1]. In 2019, the ACHPR adopted The Declaration of Principles of Freedom of Expression and Access to Information in Africa, which imposes an obligation on states to "facilitate the rights to freedom of expression and access to information online and the means necessary to exercise these rights"[2].

In spite of these treaty obligations, most SADC Member States are in the process of or have recently enacted laws that limit free expression in the form of cyber laws that seek to regulate online conduct. The African Union (AU) Convention on Cyber security and Personal Data Protection (Malabo Convention) provides for states to recognize the rights of citizens by adopting legal measures in the area of cyber security and the establishment of an implementation framework. At the time of publication, only five SADC Member States have ratified the Malabo Convention [3].

To resist the chilling effect that the enactment of cyber laws has on free expression, advocates may potentially make use of the sub-regional and regional court structures. This article outlines the regional forums for enforcement of human rights for advocates operating in SADC Member States.

The SADC Tribunal

The SADC Tribunal was established as one of the institutions of SADC with the duty to ensure adherence to and proper interpretation of the SADC Treaty and its subsidiary instruments, and to adjudicate disputes referred to it.[4] The Tribunal has jurisdiction over the interpretation and application of the Treaty, protocols, and subsidiary instruments of SADC and on all matters arising from specific agreements between member states, whether within the community or amongst themselves.[5] The provision establishing the jurisdiction of the tribunal omits an express mention of jurisdiction over human rights.[6] There has been argument that the tribunal lacks a clear human rights mandate.[7] Nevertheless, despite the argument regarding the nature of its

[1] ICCPR, Zambia ratification in 1984, Article 19; ACHPR, Zambia ratification in 1983, Article 9.
[2] ACHPR, Declaration of Principles on Freedom of Expression and Access to Information in Africa, November 2019, Principle 37.
[3] Angola, Mozambique, Mauritius, Namibia, and Zambia.
[4] Article 9 (1) (g) and 16 (1) of the SADC Treaty 2001.
[5] Article 14 of the SADC Treaty 2000.
[6] Lucyline Nkatha Murungi and Jacqui Gallinetti, "The Role of Sub-Regional Courts in the African Human Rights System", *SUR* 13 (2010), https://sur.conectas.org/en/role-sub-regional-courts-african-human-rights-system/, accessed April 18, 2023.
[7] Eborah, James (2009) 1 *AHRLJ* 312-335 2009b, p. 20.

jurisdiction over human rights, the SADC Tribunal has thus far heard and determined two human rights related matters.[8]

There is potential to amend the SADC Treaty by inclusion of explicit language on the jurisdiction of the Tribunal on human rights issues. This would lead to a deeper harmonization of the law and jurisprudence to better protect human rights in SADC. Member States have not shown a commitment to that approach.[9] It is reported that inclusion of a specific human rights mandate for the SADC Tribunal was discussed and rejected, with a panel of experts mandated to draft a proposal for the tribunal preferring a general jurisdiction with respect to human rights.[10] The need for a SADC tribunal with jurisdiction over human rights issues to strengthen the mechanisms for enforcement of human rights in the region cannot be underscored enough.

The African Commission on Human and People's Rights (ACHPR)

The African Charter of Human and People's Rights (the African Charter) is a human rights instrument adopted by the African Union in 1981. It gave rise to the African Commission on Human and People's Rights (ACHPR). This quasi-judicial body is responsible for promoting and protecting human and people's rights in Africa. It is currently situated in Banjul, Gambia. Article 9 of the Charter guarantees the right to freedom of expression, which includes the freedom to receive and impart information and ideas without interference. When approaching the ACHPR regarding a freedom of expression matter it is important to understand the context and principles of the Charter.

The ACHPR is based on the principles of dignity, equality, and respect for human rights, and its provisions should be approached in a manner that upholds these principles. To approach the ACHPR regarding a freedom of expression matter, one could file a complaint or communication with the ACHPR governing body – the Secretariat. There are several stages involved in the communications process, which are governed by the Communications Procedure. The ACHPR has broad standing provisions. Communications to the ACHPR must:

- Identify features of the person or organization filing (e.g. the name, nationality, and address where correspondence can be received);
- The state alleged to have committed the violation;
- The reason for registering the communication (if being for the public good or on behalf of someone);
- A description of the violation;
- Other steps taken before reaching this point.

The communication should outline the nature of the alleged violation of the right to freedom of expression and should provide evidence to support the claim. Anyone can register a communication including CSOs, states, victims of abuses, or interested individuals acting on behalf of victims of abuses. There is also the *actio popularis* approach whereby the author of the communication need not know or have a relationship with the victim.

[8] Mike Campbell (PVT) Limited and Another v The Republic of Zimbabwe SADC (T) 2/2007 and in Luke Muntandu Tembani v The Republic of Zimbabwe, case number SADC (T) 07/2008 (Southern African Development Community Tribunal, 2008).
[9] Ruppel, O.C. (2009). Regional economic communities and human rights in East and southern Africa.
[10] Viljoen, Frans, *International Human Rights Law in Africa*, 1st edn (Oxford, 2007; online edn, Oxford Academic, 22 Mar. 2012), https://doi.org/10.1093/acprof:oso/9780199218585.001.0001, accessed 5 May 2023.

Once the communication has been successfully submitted, Article 55(2) of the African Charter requires that a decision by a simple majority of eleven commissioners is needed for the ACHPR to be seized with the matter. The ACHPR will then proceed to consider if the communication is admissible in terms of Article 56 of the African Charter. Following the confirmation of admissibility, the ACHPR will give the parties time to present their written arguments. The ACHPR tends to prefer deciding matters on paper as it evaluates the factual and legal arguments.

The final determination of the ACHPR is called a recommendation. The ACHPR has the power to investigate violations of human and people's rights and make recommendations to the state concerned. The recommendations vary but usually include the following:

- A decision of admissibility;
- An interpretation of the provisions invoked;
- A discussion (on the alleged violation);
- If a violation is found, what the required action(s) are for the state to remedy the violation.

The recommendations are not legally binding but can become binding if adopted by the African Union Assembly of the Heads of State and Government pursuant to Article 59 of the Charter. The ACHPR does not have a discretion to create remedies beyond what has been asked by the parties. Therefore, it is important to craft remedies clearly, concisely and include all the relief that is being sought.

There are no procedures to supervise the implementation of ACHPR recommendations. However, the Secretariat typically issues correspondence to states that have been found to have violated provisions of the Charter, which calls upon them to honour their obligations. If the state fails to comply with the recommendations, the ACHPR can refer the matter to the African Court on Human and People's Rights (ACHPR's judicial arm) for a binding decision.

The African Court on Human and Peoples' Rights (AfCHPR)

The African Court on Human and Peoples' Rights (AfCHPR) is a regional court established by Protocol to The African Charter on Human and Peoples on The Establishment of an African Court on Human and Peoples' Rights (the African Court Protocol). It has a mandate to hear cases and issue advisory opinions on matters related to human rights and peoples' rights in Africa. The court sits in Tanzania and has jurisdiction over all member states of the African Union, including SADC member states. The AfCHPR is a full judicial body with binding decision-making authority. It compliments and reinforces the functions of the ACHPR but has different procedures which are laid out in the African Court Protocol and the Rules of Court[11]. The Practice Directions[12] provide guidance to litigants on filing a submission.

Article 5 of the African Court Protocol indicates who can submit a case. This includes state parties, African intergovernmental institutions, NGOs with observer status before the ACHPR

[11] African Court on Human and People's Rights Rules of Court, 01 September 2020.
[12] African Court on Human and People's Rights Practice Directions AFCHPR/6.E. S/PL/N°010.

and individuals, but only against the states that have made a declaration accepting the competence of the African Court to receive such cases in accordance with article 34(6) of the African Protocol. At the time of publication, Malawi is the only SADC member that has such a declaration.[13] When a state makes a declaration accepting the competence of the court, individuals or organisations can approach the AfCHPR with petitions involving the state. To approach the court, they must however prove that they have:

- exhausted domestic remedies in their country;
- submitted a communication in writing and included information of the alleged human rights violation, including the relevant facts and evidence and the legal arguments supporting the claim.

In terms of Rule 22 of the Rules of Court, every party to a case shall be entitled to be represented or be assisted by legal counsel or by any other person of the party's choice. *Amici curiae* are also permitted in terms of rules 45(1) and 45(2) of the Rules of Court and the process for joining a matter as *amicus curiae* is contained in section 42 to 47 of the Practice Directions.

Jurisdiction and admissibility are determined together. The court will review and determine whether it has jurisdiction to hear a matter and whether the communication is admissible. The court will consider whether the case has any merit and thereafter issue a decision. The decision may include recommendations to the respondent state to take measures to address the violation as well as orders for reparations or other remedies for the complainant.

[13] See African Court declarations, https://www.african-court.org/wpafc/declarations/#:~:text=Article%2034%20of%20the%20Protocol,(3)%20of%20this%20Protocol, accessed on 01 April 2023.

Challenging Cyber Libel Prosecutions

By Richard Winfield

"Freedom of expression is the matrix, the indispensable condition of nearly every other form of freedom" - Palko v. Connecticut, 302 U.S. 319 (1937) Cardozo, J.

Most jurisdictions in Southern Africa ratified the International Covenant on Civil and Political Rights (ICCPR). ICCPR Article 19 grants broad rights of freedom of expression. The provisions of Article 19 are generally similar to the provisions of Article 10 of the European Convention on Human Rights (ECHR), which also grants very broad rights of freedom of expression. Since 1959, the European Court of Human Rights (ECtHR) has ruled over 1,000 Article 10 cases. Article 10 case law is highly protective of political criticism. Article 10 cases are broadly recognized statements of international norms. Both Article 19 ICCPR and Article 10 ECHR recognize that a restriction of Freedom of Expression must be "necessary in a democratic society." They also recognize that any punishment must be "proportionate." The ECHR stated that imprisonment for punishing criticism is "not necessary in a democratic society" and "not proportionate. " Some national laws impose prison for online defamation.

ISLP has argued cases in the Middle East and North Africa region (MENA) where defendants faced prison for violation of similar laws. ISLP has argued in Algeria, Iraq, Tunisia, and three times in Palestine on behalf of defendants who violated cyber libel provisions. ISLP filed as *amicus curiae* in each of these cases and argued that conviction of defendants would mean the country violates its treaty obligations under ICCPR. In all the matters where ISLP filed as *amicus curiae*, the court dismissed all charges.

ISLP's briefs in Iraq, Palestine, Tunisia, and Algeria all use the same basic argument: Using criminal penalties to punish free speech violates Article 19 of the ICCPR. ISLP supports its argument by relating protections in Article 19 to language used in Article 10 of the European Convention on Human Rights (European Convention). The European Court of Human Rights (ECHR) is responsible for interpreting the European Convention. In its interpretation of Article 10, the ECHR has developed standards for freedom of expression that are very influential to international law. One important standard is that punishing speech with criminal penalties, including imprisonment or fines, violates freedom of expression protections because it is disproportionate and unnecessary in a democratic society. This standard has become widely used in international law and was adopted by the UN Human Rights Committee in its official comments on the ICCPR.

The argument cites important case law decisions by the ECtHR which have shown that criticism of government and/or politicians is strongly protected free speech. The ECtHR has held again and again that punishing political speech with prison or heavy fines violates Article 10.

Many countries have ratified additional treaties which protect freedom of expression. ISLP uses case law from the ECHR because it is known to be prestigious and influential in relation to

standards of international human rights. However, it is important to note that this case law is only persuasive authority. Brief arguments can be strengthened by adding persuasive or binding authority based on additional treaties (such as the ICCPR and the Malabo Convention) or courts relevant to the jurisdiction. An example of ISLP's arguments is contained in section 3 of this Toolkit.

Useful Resources

A. ISLP's Legal Arguments on Freedom of Expression

AMICUS CURIAE BRIEF

Respectfully Submitted by: [International Senior Lawyers Project]

ARGUMENTS

[BRIEF STATEMENT OF CASE].
This *Amicus Curiae* brief will not discuss the facts, but rather will offer the Court an evaluation of the limits of punishment and censorship as prescribed by [name of country]'s international treaty obligations and international norms which protect freedom of expression.

1. This brief is respectfully submitted by International Senior Lawyers Project, an independent, not-for-profit, non-governmental organization of 2000 experienced lawyers devoted to advocacy on a *pro bono* basis for the rule of law, human rights, and just, accountable, and inclusive development.

2. In [YEAR], [COUNTRY] signed and ratified the International Covenant on Civil and Political Rights (ICCPR), which, among other things, protects the right of all individuals to fully enjoy and realize their freedom of expression. The paramount purpose of Article 19 of the ICCPR is to protect and promote freedom of opinion and freedom of expression, "indispensable conditions for the full development of the person [and that such freedoms] are essential for any society."[14] It is the *sine qua non* of democracy.

a. Punishment For Non-Violent Expression Must Be Necessary and Proportionate

3. Article 19(1) of the ICCPR ensures that "Everyone shall have the right to hold opinions without interference." Article 19(2) guarantees that "Everyone shall have the right to freedom of expression; this right shall involve freedom to...impart information and ideas of all kinds...." Article 19(3) provides that the exercise of these rights "may...be subject to certain restrictions, but these shall only be such as provided by law and are necessary...for the protection of ...public order…..." However, in its general comment No. 34, the Human Rights Committee, that monitors the implementation of ICCPR, emphasizes that restrictions should be provided by law and be necessary: (a) for the respect of the rights or reputations of others; and (b) for the protection of national security or public order, or of public health or morals. It further explains

[14] United Nations Human Rights Committee, *General Comment No.34 on Article 19: Freedoms of opinion and expression* CCPR/C/GC/34.
UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 2 June 2022].

that any restriction on the exercise of such freedoms must conform to the strict tests of necessity and proportionality.[15]

4. Significantly, the European Convention on Human Rights (ECHR), Article 10 incorporates the same protections for freedom of expression as ICCPR Article 19. Article 10(1) guarantees that "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..." Article 10(2) of the ECHR parallels ICCPR Article 19(3) by requiring that "restrictions … placed on the exercise of these rights are prescribed by law and are necessary in a democratic society...for the prevention of disorder...for the protection of the rights of others..."[16]

5. The prestigious European Court of Human Rights has, in over 1000 judgments, developed Article 10 case law which is highly protective of political criticism. Those cases represent broadly recognized statements of international norms and will be cited herein.

6. The protections in Article 10(1) represent principles; the possible restrictions in Article 10(2), however, are exceptions which must be strictly and narrowly construed.[17] The requirement, "prescribed by law," means a restriction must be clear, precise and accessible, so that a citizen can regulate his conduct to foresee the consequences that a given action may entail.[18] Vague or imprecise laws tend to chill legitimate expression and violate Article 10.[19] A restriction is "necessary" only when it (a) corresponds to a "pressing social need," which must be "convincingly established," (b) is “proportionate to the legitimate aim pursued” and, (c) is the least restrictive means.[20]

7. The provisions of [violating law] which authorize punishment of non-violent expression will be analyzed in light of these norms.

b. To Imprison or Fine A Critic For Non-Violent Expression Is Disproportionate

8. Both ICCPR Article 19 and ECHR Article 10 require that any restriction on freedom of expression must be "necessary in a democratic society."[21] In order to satisfy this requirement, the European Court has determined that the restriction, in this case the punishment, must be proportionate. Any restriction, therefore, must be the least intrusive means to achieve the necessary and prescribed aim.

9. The Human Rights Committee, under Article 5 (4) of ICCPR Optional Protocol I, considered the communication Berik Zhagiparov vs. Kazakhstan and concluded Mr. Zhagiprov’s

[15] UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34 , available at: https://www.refworld.org/docid/4ed34b562.html [accessed 6 June 2022].
[16] Council of Europe: European Court of Human Rights, Guide on Article 10 of the European Convention on Human Rights - Freedom of Expression, 31 August 2020, available at: https://www.refworld.org/docid/6048e2930.html [accessed 6 June 2022].
[17] *Sunday Times v. UK*, (1979) 2 EHRR 245.
[18] *Id*. [para 49].
[19] *Silver v. UK*, (1983) 5 EHRR 347.
[20] *Handyside v. UK*, (1976) 1 EHRR 737.
[21] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html [accessed 8 June 2022].

punishment was a violation of his right to seek information under Article 19.[22] Mr. Zhagiparov filed a communication with HRC claiming that the State party violated his rights because he was sentenced to 22 days of administrative arrest for his work as editor of a regional newspaper. The State Party invoked the permissibility of restrictions under Article 19 (3). The committee adopted the views that "restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated…it is for the State party to demonstrate that the restrictions on…rights under article 19 of the Covenant were necessary and proportionate."[23] Following HRC's General Comment No. 34 the Committee stated "penalization of a journalist solely for being critical of the Government [...] can never be considered to be a necessary restriction of freedom of expression."[24]

10. In Stern Taulats and Roura Capellera v. Spain,[25] anti-monarchists set fire to a large photograph of the royal couple and were convicted of insulting the crown. If defendants failed to pay a fine, they would be imprisoned. The ECtHR reasoned that setting fire to the photograph was a symbolic political critique of the institution of monarchy in general, and of the Kingdom of Spain, and went no further than the use of a certain permissible degree of provocation to communicate their message. Further, the ECtHR stated that the disputed act could not reasonably be construed as incitement to hatred or violence, nor could it be considered as constituting hate speech. Moreover, the criminal penalty imposed on the applicants – a prison sentence of 15 months, to be executed in the event of failure to pay the fine of 2,700 euros – amounted to an interference with freedom of expression which had been neither proportionate to the legitimate aim pursued nor necessary in a democratic society.

11. In Otegi Mondragon v. Spain,[26] an activist denounced the King of Spain at a press conference, as "the person in command of torturers, who defends torture and imposes his monarchic regime on our people through torture and violence." The activist was imprisoned for serious insult to the King. The ECtHR found that although provocative, the language was of general, political interest and did not incite violence and did not amount to hate speech. The sanction was disproportionate and violated Article 10.

12. In Cumpana and Mazare v. Romania,[27] The Grand Chamber of ECtHR held that imprisonment of journalists for publishing insults against public officials was disproportionate, not necessary in a democratic society, and thus violated Article 10. Imposing criminal sanctions creates a chilling effect on speech. The Court notes that it must "exercise the utmost caution where the measures taken, or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern."

13. In Şahin Alpay V. Turkey, a journalist, known for criticizing the Turkish government, was arrested and held in pre-trial detention following an attempted military coup which authorities claimed the journalist was a part of. The ECtHR found the broad interpretation of anti-terrosim laws that justified the pre-trial detention violated Article 10 and had a clear chilling effect on the

[22] Berik Zhagiparov v. Kazakhstan (CCPR/C/124/D/2441/2014), para 13.43.
[23] Id., para 13.3.
[24] Id., para 13.6.
[25] Judgment of 13 March 2018.
[26] Judgment of 15 March 2011.
[27](2005) 41 EHRR 200; Cf. Smajić v. Bosnia and Herzegovina, Judgement of 16 January 2018.

press. The Court emphasized that "the existence of a 'public emergency threatening the life of the nation' must not serve as a pretext for limiting freedom of political debate." Because detention inevitably chills speech, it must be reserved for the most extreme cases where the government can prove with concrete evidence that national security is at serious risk.

14. The ECtHR holds that imprisonment or fining defendants who express non-violent speech, particularly if it is political, violates freedom of expression guaranteed under ECHR Article 10.

15. The ECtHR has applied identical reasoning regarding the proportionality and necessity of criminal convictions relating to online speech. In Savva Terentyev v. Russia[28], the Court held that a sentence of a one-year suspended prison term for insulting online comments directed at police officers was disproportionate to the legitimate aim invoked. While offensive, the comments were entitled to protection because they were part of public discussion, did not promote violence or justify hatred, and were directed at official authorities, who must tolerate a wider scope of criticism. The court emphasized again that exceptions to freedom of expression must be clear, precise, and "strictly construed in order to avoid a situation where the State's discretion to prosecute for such offenses becomes too broad and potentially subject to abuse through selective enforcement."

16. We have cited provisions of the law which seriously punish non-violent expression. We submit that the Court should weigh those provisions against both (1) the guarantee of freedom of expression which [Country] made in ratifying Article 19 of the ICCPR, an international treaty and (2) international norms which protect freedom of expression found in the Article 10 case law of the ECtHR.

17. When politicians deploy criminal actions against their critics, ostensibly to vindicate their honor, dignity and reputation or to preserve order, a more realistic view holds that their purpose and certainly their effect is to intimidate and silence their critics. Such actions raise the stakes against the prospect of future critical coverage and commentary. What suffers is the free flow of information that is vital to vigorous political discourse. If political expression is to be protected effectively, the rules governing political litigation against critics are critically important.

Dated: [Date]

[28] Judgment of 28 August 2018.

B. Cybercrime, Defamation, and Democracy: An International Litigation Strategy

Kasey Clarke and Julia Peoples

Abstract

This article, written for the International Senior Lawyers (ISLP), presents research on the increase of cybercrime laws around the world that have led to a corresponding increase in government prosecutions of online speech. Laws that target online speech are called "cyber libel" laws. Cyber libel laws increase government power to punish political opposition, which creates a serious threat to freedom of speech.

The paper argues the following: that using criminal penalties, like fines or prison time, to punish speech is at odds with international legal norms on freedom of expression. Lawyers can use international norms in domestic courts to argue that domestic laws that are harmful to freedom of expression should be repealed. The paper focuses on three legal trends that threaten freedom of expression: (1) online insult laws, (2) strategic litigation on public participation, and (3) online misinformation laws.

Many recent online insult laws put harsh penalties on loosely defined "false information" that insults the government or harms a person's reputation. Politicians and law enforcement can abuse online insult laws that are too vague, or laws that include strict punishments. Vague laws allow politicians to censor political speech that is protected under international norms for freedom of expression. Strict punishments have a "chilling effect" on speech because journalists who fear the risk of imprisonment or fine will "self-censor" or choose not to publish controversial information because they are intimidated. Countries should use international defamation law standards found in international human rights treaties to guide the drafting of online misinformation laws. International protections for freedom of expression limit the scope, vagueness, and severity of these laws.

Strategic litigations on public participation (SLAPPs) are lawsuits where powerful or wealthy persons and/or governments sue a person for publishing unflattering information about them. Persons who use SLAPPs know that their lawsuit is not likely to succeed, but they use the lawsuit to intimidate journalists or individuals from sharing information they don't want the public to know. People and/or organizations who use SLAPPs can abuse broad defamation laws to silence their critics.

Misinformation laws are not defamation laws, because they are not used to defend a person's reputation. But misinformation laws can also be abused by politicians to censor journalists and the media if "false information" is not properly defined, or if the law does not limit discretion used to apply the law.

Provisions of cybercrime laws that do not fit international standards should be amended or repealed. Strong protections for freedom of speech are needed, especially because governments have increased use of surveillance to spy on journalists, and there has been an increase in authoritarian power across the globe, which seeks to block democratic participation.

Lawyers can use international norms on freedom of expression, supported by international human rights treaties and courts, to defend against use of cyber libel laws and argue for their repeal. The media and civil society organizations can support and spread information about strategic litigation that push for the repeal of harmful laws. These parties can work together to develop policy which promotes democratic values and protects their rights. International organizations can work together to reinforce the adoption of international norms on freedom of expression. These efforts are necessary to stop journalists, bloggers, and human rights defenders from unjustly going to jail for sharing information the public has a right to know.

To access the full paper, follow this link.

C. How to Defeat Politicians' Cyber Libel Prosecutions of Journalists

Richard Winfield

Abstract

Richard Winfield, one of the founders of ISLP and the chair of the Media Law Working Group, shares in this article ISLP's argument against cybercrime laws that put criminal penalties on defamatory information shared online. The article focuses on the growing threat of politicians using criminal online defamation laws to censor journalists. Because these laws are vague and carry heavy penalties, they can be used to intimidate journalists who wish to report on politics and elections. The laws are effective at silencing political criticism.

The article explains that many countries have ratified the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the ICCPR protects freedom of expression. To show what the substance of protections of freedom of expression consists of, litigators can reference the European Court of Human Rights' decisions on Article 10 of the European Convention on Human Rights (ECHR). Article 10 of the ECHR and Article 19 of the ICCPR use the same language to protect freedom of expression, so interpretations on protections in ECHR Article 10 can be argued to be substantially similar to the protections that are granted by Article 19 of the ICCPR.

To access the full article, follow this link.