

Freedom of Expression: A Comparative Summary of United States and European Law[†]

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Introduction

This document lays out the legal basics and normative underpinnings of freedom of expression in the transatlantic context. It provides a common starting point for our understanding of freedom of expression for the Transatlantic High Level Working Group on Content Moderation Online and Freedom of Expression. It will look at the legal sources of freedom of expression in United States,

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European, and international law, and detail the shared normative foundations on both sides of the Atlantic, while explaining relevant exceptions and legal differences. On this basis, it will help to ground conversations on measures related to viral deception, extremism, and hate speech and their impact on freedom of expression.

Freedom of expression, or freedom of speech in the United States, is a pillar of liberal society and an essential component – if not the central piece – of a healthy democracy. The right to freedom of expression is a global standard, protected under regional and international human rights instruments, treaties, and frameworks. At the outset it must be stressed that it does not exist in isolation. Freedom of expression is inexorably linked with the right to peaceful assembly and association, freedom of thought, conscience, and religion, and the right to privacy, as well as other rights. More generally, freedom of expression is dependent on effective enforcement of the rule of law.

Freedom of expression has a long history, shaped by political, economic, and cultural developments, and is deeply affected by technological change, ranging from the discovery of the printing press to radio broadcasting to digital technologies. With each wave of change in the communication landscape and services, new questions have emerged about how best to articulate the value of freedom of expression and protect people against new forms of government interference as well as undue limitations by private parties.² The internet has offered unprecedented opportunities for freedom of expression, while also giving rise to new forms of censorship, control, and threats to participation. Challenges to freedom of expression – such as hate speech and deception/propaganda – are not new. Still, our current landscape presents new questions and opportunities to respond to these challenges in a way that protects fundamental rights.

Why care about freedom of expression?

Throughout history, many political systems have recognized freedom of expression as a central value. However, the normative theories for why it matters have differed. Here we discuss the most important arguments for freedom of expression: the protection of individual liberty and self-fulfillment, the search for truth, the functioning of democracy, and as a check on government power.

First, freedom of expression is seen as the foundation of individual liberty and self-fulfillment. This theory holds that freedom of expression is rooted in the value of human liberty, freedom of choice, and the value of and respect for diversity. Freedom of expression is presumed to be one of the most basic conditions for self-fulfillment in society. It is an end in itself – and as such, deserves society's greatest protection.

Another school of thought emphasizes that freedom of expression is vital to the attainment and advancement of knowledge, and the search for truth. At the heart of this theory is the work of John Stuart Mill, who argued that

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of

exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error. (Mill, *On Liberty*)

In other words, even unpopular, untrue, or undesirable opinions deserve protection, as their expression allows them to be tested. “The cure for bad speech is more speech” is another popular expression of this theory. Related is the concept of the “marketplace of ideas,” which holds that “the best test of truth is the power of the thought to get itself accepted in the competition of the market” (Holmes in *Abrams v. United States*).

Other theories see freedom of expression as essential to democracy, and tend to emphasize the freedom to express and receive information and ideas of societal and political relevance. Freedom of expression is important as it supports political participation, and allows citizens to inform themselves about matters of public concern. The press and the media receive particular attention in this theory, because they serve as a forum for deliberation and a way for the public to inform itself. Habermas’s theory of the public sphere also connects freedom of expression to the interest of free and public deliberation on matters of public concern.

Finally, freedom of expression is seen as a check against government overreach and abuse. These theories emphasize the risk of government involvement in matters of speech as well as the importance of creating space for speech that is critical of government actors. In Europe and international law, it is considered the role of the State to create a positive and enabling environment for freedom of expression, pluralism and diversity in light of restrictions by others than public authorities as well.

Sources of Law

a. Freedom of expression at the international level

During its first convening, the UN General Assembly declared that “Freedom of Information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.”³ The **United Nations Universal Declaration of Human Rights**, subsequently adopted in 1948 by the United Nations General Assembly, protects freedom of expression in **Article 19**, which states that:

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.⁴

The UN has several specific institutions that aim to promote and enforce human rights (incl. freedom of expression), including the UN Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR), which coordinates human rights activities in the UN system. The UN General Assembly has adopted numerous resolutions on freedom of expression. Since 1993, the UN system includes a Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (the current Special Rapporteur is David Kaye, who is a member of the

Transatlantic Working Group). The Special Rapporteur conducts country studies as well as annual and thematic reports, including one recently on online content moderation, the role of internet access providers, the role of states and private sector and encryption.⁵

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) provides for more detailed protection of freedom of expression at the international level.⁶ It 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 respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

The ICCPR imposes a positive obligation on its signatories to “take the necessary steps” to ensure its protection, including adopting “laws or other measures as may be necessary” and providing “an effective remedy” to those whose freedom of expression has been violated. The ICCPR has its own quasi-judicial oversight body, i.e., the United Nations Human Rights Committee. The United States ratified the ICCPR in 1992, but with a number of reservations, including to Article 20 of ICCPR, as discussed below. Generally, through its courts and political institutions, the United States legal system tends to be relatively non-receptive to the influence of international law.

b. Freedom of expression in the United States

In the United States, protection for freedom of expression is codified in the **First Amendment of the U.S. Constitution**, part of the 1791 Bill of Rights:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.⁷

The Due Process clause of the 14th Amendment carries these federal protections over to individual states. The Supreme Court is the ultimate judicial arbiter of what is or is not protected speech under U.S. law and has been responsible for a body of case law on the First Amendment spanning more than 200 years.

c. Freedom of expression in Europe

In Europe, freedom of expression is protected in foundational instruments from the Council of Europe, and at the European Union level. Additionally, it receives protection at the national level through freedom of expression provisions in national constitutions.

The cornerstone of freedom of expression protection in Europe is **Article 10 of the 1950 European Convention on Human Rights (ECHR)**.⁸ This guarantees freedom of expression as part of the regional human rights treaty for the Council of Europe region (including non-EU countries, such as Turkey and Russia). Article 10 of the ECHR provides:

- (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 requiring the licensing of broadcasting, television or cinema enterprises.
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Compliance with the ECHR is overseen by the European Court of Human Rights (ECtHR) in Strasbourg, which can issue binding rulings for the member states and has through its case law had a major impact on freedom of expression in Europe. The Council of Europe also adopts soft law recommendations. The ECHR is a “living instrument,” meaning that the ECtHR takes account of new conditions affecting the exercise of freedom of expression. According to ECtHR doctrine, all rights guaranteed by the ECHR must be “practical and effective” and not merely “theoretical or illusory.” All countries in the European Union are signatories of the ECHR.

Under the European Union, Article 11 of the **Charter of Fundamental Rights of the European Union** (2000) (EU Charter) protects freedom of expression in the context of EU law.⁹ It provides:

- (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.
- (2) The freedom and pluralism of the media shall be respected.

The Charter is a relatively new instrument. It applies exclusively to matters of EU law, as opposed to purely national law in EU Member States. EU law includes important areas for freedom of expression such as intermediary liability and illegal content online. Notably, the EU Charter states that its

safeguards are, at a minimum, equivalent to those of the ECHR. As a result, the case law of the ECtHR is also relevant for interpreting the EU Charter.

National constitutions also include provisions on freedom of expression and may add to the protection afforded by the ECHR or the EU Charter. For example, the Human Rights Act of 1998 embeds the ideals of the ECHR into UK law. The Dutch Constitution has specific provisions on prior restraint (censorship). In Germany, Article 5 in the Basic Law for the Federal Republic of Germany has been applied to relations between private entities, a doctrine called *Drittwirkung*.

Key similarities and differences between U.S. and Europe

a. What is Protected, and the Possibility of Limitations

Freedom of expression encompasses much more than the ability for people to speak without constraints. According to general UN human rights standards, which apply as a baseline in both the U.S. and Europe, freedom of expression has the following key features:

- It applies to everyone equally without distinction or discrimination;
- Its material scope (while not unlimited) is broad and encompasses information and ideas of all kinds, including political, cultural, and also commercial speech;
- It includes protection for information and ideas that may be considered harmful by some, extending protection to information and ideas that “offend, shock or disturb”;
- It includes the rights to receive as well as impart information and ideas, thus protecting the rights of both listeners and speakers;
- Everyone is free to impart their ideas using any form of media;
- Its geographical scope is unlimited, as it applies regardless of frontiers.

Freedom of expression is not absolute and can be restricted, in limited circumstances. International, European, and U.S. law all share this common principle of limited state interference for individual expression, constrained to specific circumstances. When restrictions on this right are properly followed, limitations on freedom of expression can be permissible. Historically, restrictions on speech have included that of national security, intellectual property, obscenity, crime, contempt of court, and the protection of official secrets.

Article 19(3) of the ICCPR provides the international-level framework to evaluate restrictions on the freedom of expression. Interferences need to:

- be provided for by law, which needs to be clear and accessible to everyone;
- pursue a legitimate aim: respect for the rights or reputations of others, or the protection of national security, public order, public health or morals;

- be necessary and proportionate, i.e., interferences should deploy the least restrictive means required to achieve the purported aim.

Taken together, these requirements aim to ensure that governmental restrictions on free speech are limited in scope and purpose, narrowly tailored, and include adequate safeguards against abuse. Additionally, Article 20(2) of the ICCPR requires states to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,” an obligation which is unpacked in the Rabat Plan of Action.¹⁰ The United States has made a reservation with respect to Article 20 ICCPR.

A different set of limitations is included in the International Convention on the Elimination of Racial Discrimination (ICERD), which in Article 4(a) requires States to *inter alia* “condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form.”¹¹ ICERD contains much broader positive obligations on member States to prohibit certain types of speech than the ICCPR. Interpretation of the ICCPR and ICERD standards by international and regional bodies has been too inconsistent to offer clear guidance to states on possible limitations on freedom of expression.

European doctrine follows a similar approach to the ICCPR. Under the ECHR, interferences with freedom of expression must follow a three-step test that requires that they are (1) provided by law, (2) pursue a legitimate purpose, and (3) are necessary in a democratic society. The ECHR does not contain any obligation on States to prohibit any form of expression, as under Article 20(2) of the ICCPR. However, the European Court has recognised that certain forms of harmful expression must necessarily be restricted to uphold the objectives of the ECHR as a whole. Under the EU Charter there is an additional requirement for interferences to respect the essence of the right to freedom of expression.

The United States, by contrast, operates under different doctrines. First Amendment analysis tends to take account of the type of speech as well as the type of restriction. First, it considers several narrow categories of expression as “unprotected speech,” including incitement, defamation, fraud, obscenity, child pornography, fighting words, threats, defamatory lies (libel or slander), and lying under oath. For protected categories of speech, First Amendment analysis focuses on the type of restriction. Here an important distinction is made between “content-based” restrictions, which regulate speech based on its substance, and “content-neutral” restrictions. Content-based restrictions are subject to strict scrutiny, which renders them presumptively invalid. Content-neutral restrictions are subject to a balancing test, known as “intermediate scrutiny,” in order to determine whether the restriction is legally permissible.

Though these approaches in Europe and the United States may appear different, they often reach similar outcomes. Most of the categories of “unprotected speech” identified by the U.S. Supreme Court, such as child pornography and violent threats, also receive no or relatively low protection in Europe. And in deciding whether a regulation is “necessary in a democratic society,” the ECtHR is

more likely to accept a time, place, or manner restriction than a content-based restriction. Still, key differences remain. The most relevant for our project are discussed below: the status of hate speech and extremism, the status of disinformation/factually incorrect information, and the status of private entities, including intermediaries.

b. Status of Hate Speech and Violent Extremism

While “hate speech” has no definition under international human rights law, the expression of hatred toward an individual or group on the basis of a protected characteristic can be divided into three categories, distinguished by the response that international human rights law requires from States:

- Severe forms of “hate speech” that international law requires States to prohibit, including through criminal, civil, and administrative measures, under both international criminal law and Article 20(2) of the ICCPR;
- Other forms of “hate speech” that States may prohibit to protect the rights of others under Article 19(3) of the ICCPR, such as discriminatory or bias-motivated threats or harassment; or
- “Hate speech” that is lawful and should therefore be protected from restriction under Article 19(3) of the ICCPR, but which nevertheless raises concerns in terms of intolerance and discrimination, meriting a critical response by the State.

Treatment of hate speech differs across the Atlantic. In the United States, hate speech is fully protected by the First Amendment unless it falls under an exception, most commonly true threats, incitement to violence, or defamation.¹² These are relatively narrow exceptions. For instance, incitement to violence may only be restricted in cases where “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Accordingly, hate speech enjoys a relatively high level of protection in the United States. Famously, the U.S. Supreme Court has prohibited restrictions on public rallies by the Ku Klux Klan (*Brandenburg v. Ohio*) and by neo-Nazis (*National Socialist Party of America v. Village of Skokie*) on the basis of the First Amendment.

In Europe, countries differ significantly in how they approach and define the topic of hate speech, and in how they apply the above concepts. These variations generate significant inconsistencies in the law and its application across the region and even within countries. The European Court of Human Rights has followed a case-by-case approach. The Court has excluded from the scope of freedom of expression certain extreme forms of expression, including Holocaust denial, as an “abuse of rights.” In other situations, it has dealt with these cases through the regular test of Article 10 that interferences need to be necessary in a democratic society. The case law suggests that if there is doubt about certain expression qualifying as hate speech, the ECtHR follows the framework of Article 10 ECHR and its test for interferences with freedom of expression.

Many European countries have distinct laws to combat hate speech.¹³ These laws mostly emerged after World War II with the aim to quell hatred pertaining to religion and ethnicity. In France, Section

24 of the Press Law of 1881 criminalizes “racial discrimination hatred, or violence on the basis of one's origin or membership (or non-membership) in an ethnic, national, racial, or religious group.” The German Penal Code criminalizes a range of expression including hate speech, Holocaust denial, membership in or support of banned political parties, dissemination of means of propaganda of unconstitutional organizations, use of symbols of unconstitutional organizations, and insulting of faiths. The new German NetzDG law creates mechanisms for dealing with those speech offenses in the online environment.

Violent extremism is a term used in governmental programs to counter violence and incitement to violence. It has potential overlap with the concept of hate speech, but from the perspective of human rights and freedom of expression it is different. As stated in the Joint Declaration on Freedom of Expression and Countering Violent Extremism, if the concept is used as a basis for restricting freedom of expression, the concept should be clearly and narrowly defined and restrictions should be “demonstrably necessary and proportionate to protect, in particular, the rights of others, national security or public order.”¹⁴

c. Status of Disinformation

Disinformation (also: fake news, false news, misinformation, viral deception) is not a well-developed concept in freedom of expression law or theory.¹⁵ As emphasized recently at the international level,¹⁶ freedom of expression is “not limited to ‘correct’ statements” and only in specific circumstances does disinformation map to a category of speech that can be legally restricted. Examples of speech that can be restricted on the basis of factual incorrectness under applicable standards are defamation and false or misleading advertising. Disinformation that amounts to hate speech can be restricted under applicable freedom of expression standards discussed above.

Generally speaking, a distinction has been made between the statement of opinions on the one hand (which cannot be false and may generally not be restricted) and statements of facts, which can be false and can be restricted in narrow circumstances. In *Gertz v. Robert Welch, Inc.*, the U.S. Supreme Court ruled that “there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas.” Similarly, the ECtHR has judged that “the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. ... As regards value judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10.”

False statements of fact are treated differently but have generally been accepted as a necessary part of free debate. Strict legal requirements for proving the truth of publications (e.g., by journalists) are considered in violation of freedom of expression as they would keep the media from fulfilling their societal function to inform the public. Under Article 10 of the ECHR, journalists are expected to be “acting in good faith and on an accurate factual basis and provide ‘reliable and precise’ information in accordance with the ethics of journalism.”

Propaganda and disinformation originating from or disseminated by State actors have been of special concern from the perspective of freedom of expression. In Europe and at the international level, this concern has translated into the stipulation of positive obligations on the State to create a favorable environment for expression and abstention from these practices.

d. Status of Private Entities

The status of private parties under freedom of expression is an important area in which the United States doctrine differs from European and international standards. This is of particular relevance to the TWG project, considering the role of platforms in facilitating and (potentially) restricting online expression. Private intermediaries play a central role in most (proposed) regulations and policies in the area of hate speech, extremism and disinformation.

A first question is whether corporations, in contrast to individuals, have a right to freedom of expression. In Europe, although perhaps not widely known or accepted, this is clearly the case, both for Article 10 ECHR and Article 11 EU Charter. In the United States, the protection of corporate speech is particularly broad as evidenced by judgments such as *Citizens United v. FEC* in which certain restrictions on corporate contributions to political campaigns were struck down on the basis of the First Amendment. Under international law, the issue remains contentious.

A second question is whether private entities can have any (legal) obligations under freedom of expression. Under international human rights law, States are the bearers of legal responsibilities. The key guidance on how to apply the international human rights framework to private entities appears in the **Guiding Principles on Business and Human Rights**, also known as the Ruggie Principles.¹⁷ Under this framework, States have a duty to protect while corporate actors have a duty to respect human rights, including freedom of expression. States have a duty to ensure that private entities under their jurisdiction fulfill this obligation. The UN Special Rapporteur on freedom of expression has recently adopted a number of reports that specifically deal with the question of the role and responsibilities of the private sector in view of freedom of expression in the digital age.¹⁸

In the United States, the First Amendment requires so-called State action. In brief, this means that if there is no relevant exercise of government power, the First Amendment does not apply and no legal case can be brought to court. The First Amendment functions as a *negative right*, protecting private entities from undue interferences by public authorities.¹⁹ The Supreme Court has been very reluctant to create any exceptions to this principle.²⁰

In the European context, the situation is more complex. In the first instance, freedom of expression under Article 10 ECHR is similarly focused around State interferences. But in addition, the ECtHR recognizes so-called positive obligations and the possibility of indirect horizontal effect. These doctrines emphasize the need of the state to act to support freedom of expression and provide safeguards against particular forms of private abuse of power that restricts freedom of expression.

Positive obligations are duties for the state to proactively foster the freedom of expression (as opposed to merely refraining from interference). Among the main positive obligations for the State under

Article 10 ECHR are the obligation to guarantee pluralism, to promote the free exercise of the right to freedom of expression and provide for the societal conditions in which free exercise can prosper. These positive obligations do not tend to translate into clear legal rights, but tend to be used as (important) arguments in Article 10 ECHR case law.

Indirect horizontal effect entails the interpretation of private law (such as contract law or property law) in light of the value and need to respect the effective enjoyment of fundamental rights. At the national level, this indirect effect is often effectuated through the interpretation of open norms in private law, such as general duties of care, fault requirements, equity and fairness, or of the interpretation of other norms in light of constitutional guarantees. In the context of the ECHR, indirect horizontal effect is typically effectuated through recognizing positive obligations on the State to protect the enjoyment of fundamental rights in the sphere of relations between individuals or in cases of a complaint relating to a conflict between private parties and competing fundamental rights.

Finally, both in the United States and in the European Union, the law provides for statutory safe harbors that protect online intermediary services (like social media platforms, web hosting services, cloud infrastructure, etc.) from liability for their user's content. In the U.S., the main safe harbors are the **Communications Decency Act** (CDA, 1996) and the **Digital Millennium Copyright Act** (DMCA, 1998).²¹ In the Europe Union, the **e-Commerce Directive** harmonizes intermediary liability in the Member States.²² These laws were created in the 1990s and are seen as important conditions for online innovation and free speech to flourish. The U.S. CDA, Section 230 is by far the strongest safe harbor provision internationally, since it immunizes online intermediaries unconditionally for the speech of others (outside of the area of intellectual property and federal criminal offenses). It also immunizes online intermediaries for decisions to filter and remove speech from their services. In Europe, Article 12-15 ECD provide similar safe harbors, but they have important exceptions: Once an online intermediary obtains knowledge about illegal content, it risks becoming liable. This provides the basis for notice and takedown procedures. Article 15 ECD prohibits states from imposing general duties on intermediaries to monitor their services for illegal content. CDA 230 and the ECD safe harbors have come under growing pressure and the EU is widely expected to revise the ECD in the next Commission period. Both in the United States and in Europe, courts have indicated that some safe harbor protection may be mandatory based on freedom of expression. The Council of Europe has adopted a series of soft-law instruments related to intermediary liability, including a recommendation from 2017.²³

Appendix: Major Provisions on Freedom of Expression

International

- At the first meeting of the United Nations General Assembly in January 1946, States passed a resolution that recognized freedom of information as a fundamental human right and “the touchstone of all the freedoms to which the United Nations is consecrated.”

- It provided an early definition of freedom of expression: “Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world.”
- In 1948, the **Universal Declaration of Human Rights** was enacted. Article 19 of the Declaration stipulates that: “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.”
- Freedom of expression is ensured under international law, as codified in Article 19 of the **International Covenant on Civil and Political Rights (ICCPR)**, which was enacted by the United Nations in 1966. Article 19 of the ICCPR stipulates that:
 - (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 respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.
- The **International Covenant on Economic, Social and Cultural Rights (ICESCR)** recognizes the right to freedom of expression under Article 15(3): “The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.”
- There are more treaties that demonstrate an international consensus on freedom of expression, such as the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention for the Rights of the Child; and the International Convention on the Protection of All Migrant Workers and Members of their Families.

European: the Council of Europe

- The **European Convention of Human Rights (ECHR)** was signed in 1950. By now, the ECHR counts 47 signatories, including EU member states but also states as far west as Iceland and as far east as Azerbaijan. Article 10 ECHR protects the right to freedom of expression:
 - (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 requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

- In addition, Article 17 ECHR prohibits the abuse of fundamental rights granted under this instrument:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

- The Council of Europe offers additional guidance for the interpretation of these rights in the case law of the European Court of Human Rights (ECtHR) and the ‘soft law’ instruments of its Parliamentary Assembly and Committee of Ministers.

Europe: the European Union

- The European Union is also subject to the **Charter of Fundamental Rights of the European Union** (also known as the ‘European Charter’ or ‘EU Charter’), created in 2000. This document is binding for all EU Member States, as well as its supranational institutions such as the European Commission and European Parliament.

- Article 11 of the EU Charter protects the freedom of expression and information:

(1) Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(2) The freedom and pluralism of the media shall be respected.

- Article 52(1) governs restrictions on fundamental rights, including freedom of expression and information:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

- Article 52(3) requires that the rights laid down in the Charter offer, at a minimum, the same level of protection as the corresponding rights in the European Convention on Human Rights.
- Article 54 of the Charter prohibits abuse of rights:

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for therein.
- Additional guidance on the interpretation and enforcement of the EU charter is provided in the opinions of the Court of Justice of the European Union (CJEU) and in the publications of the EU's Fundamental Rights Agency (FRA).

Europe: National Constitutions

- Most if not all European states also have free speech rights codified in their national constitutional systems. What follows are some key examples:
- In France, freedom of expression is protected under Article 11 of the Declaration of the Rights of Man of 1789:

The free communication of thoughts and of opinions is one of the most precious rights of man: any citizen thus may speak, write, print freely, except to respond to the abuse of this liberty, in the cases determined by the law.
- The French Constitution of 1958 incorporates this declaration as a document of constitutional status.
- In Germany, the Federal Constitution of 1949 (or "Basic Law") protects freedom of expression under Article 5:

Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
- These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honour.
- Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.
- In the United Kingdom, freedom of expression is guaranteed under the Human Rights Act of 1998. This instrument was enacted as a means to implement the UK's duties under the ECHR.

As such it does not offer its own definition of freedom of expression, but refers to the right defined in the ECHR.

United States

- In the United States, freedom of expression is protected under the First Amendment to the United States Constitution, alongside the freedom of establishment of religion:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

- These federal protections also apply to individual states, by virtue of the Due Process clause of the Fourteenth Amendment,
- The United States Supreme Court is the ultimate judicial arbiter of what is or is not protected speech under U.S. law.
- In addition, freedom of expression is also protected under most state constitutions. For instance, the New York Constitution protects freedom of expression under Article 1, Section 8:

Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Notes

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² The question of the status of private parties under freedom of expression is addressed in the end of Section 4.

³ The concepts of freedom of information and freedom of communication are directly related to freedom of expression. These concepts were partly used to stress the importance of the free use of new information and communication

infrastructures, such as telecommunications, and were prominent in the debates that informed the UNDHR in the 1940s.

⁴ United Nations Universal Declaration of Human Rights (1948).

www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf

⁵ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (2018). <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/38/35&Lang=E>

Research Paper 1/2018, of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Encryption and Anonymity follow-up report.

<https://www.ohchr.org/Documents/Issues/Opinion/EncryptionAnonymityFollowUpReport.pdf>

⁶ International Covenant on Civil and Political Rights (1966),

<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁷ US Constitution Bill of Rights (1791).

https://en.wikisource.org/wiki/Constitution_of_the_United_States_of_America

⁸ European Convention on Human Rights (1953). https://www.echr.coe.int/Documents/Convention_ENG.pdf

⁹ Charter of Fundamental Rights of the European Union (2000). www.europarl.europa.eu/charter/pdf/text_en.pdf

¹⁰ Rabat Plan of Action, Annex to UNHCR Report on the experts workshop on the prohibition of incitement to national, racial, or religious hatred A/HRC/22/17/Add.4 (2013).

https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf

¹¹ International Convention on the Elimination of All Forms of Racial Discrimination (1965).

<https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>

¹² As most hate speech will be qualified as opinion, defamation will generally not be relevant.

¹³ For a recent overview of approaches to hate speech in Europe, see Article19, “Responding to ‘hate speech’:

Comparative overview of six EU countries,” 2018. https://www.article19.org/wp-content/uploads/2018/03/ECA-hate-speech-compilation-report_March-2018.pdf

¹⁴ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Freedom of Expression and Countering Violent Extremism (2016).

<https://www.article19.org/data/files/medialibrary/38355/Joint-Declaration-on-Freedom-of-Expression-and-Countering-Violent-Extremism-2016.pdf>

¹⁵ For a brief discussion, see e.g. T. McGonagle, “‘Fake news’: False fears or real concerns?,” *Netherlands Quarterly of Human Rights* 2017, Vol. 35(4), p. 203-209.

¹⁶ The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, Joint declaration on freedom of expression and “fake news,” disinformation and propaganda (2017).

<https://www.osce.org/fom/302796?download=true>

¹⁷ Guiding Principles on Business and Human Rights (2011).

https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf

¹⁸ Report of the Special Rapporteur to the Human Rights Council on Freedom of expression, states and the private sector in the digital age A/HRC/32/38 (2016). Report of the Special Rapporteur to the human rights council on the role of digital access providers A/HRC/35/22 (2017). Report of the Special Rapporteur to the Human Rights Council on online content regulation A/HRC/38/35.

Each report available online here: <https://www.ohchr.org/en/issues/freedomopinion/pages/annual.aspx>

¹⁹ “Negative right” indicates a right against government interference, as opposed to a positive right to enlist government protection or support (a “positive right”).

²⁰ One could note here that expressive torts (intentional infliction of emotional distress, privacy violations and defamation) have been constitutionalized.

²¹ US Communications Decency Act (1996). <https://fas.org/sgp/crs/misc/LSB10082.pdf>

²² e-Commerce Directive (2000), <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031>

²³ Council of Europe Recommendation CM/Rec(2018)2 of the Committee of Ministers to Member States on the roles and responsibilities of internet intermediaries
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14