



Freedom of Expression



A) Function of this Fundamental Freedom:

One of the basic needs of human beings is to live in a group of human beings. Living together with other people makes it necessary to understand them, **communicate** with them and to discuss with them common problems and the solution of these problems.

Another basic need of all human beings is to **participate** in the process of decision making. As every human being has the same value like all other human beings its individual opinion also has the same value like the opinion of others.

The concept of a pluralist society is based on this idea. It makes a society more lively, colorful and stronger when all of its members can contribute their ideas and points of view. To hear **all** opinions increases the chance to find the right solution for the problems of society. It increases also the chance to make the right decisions.

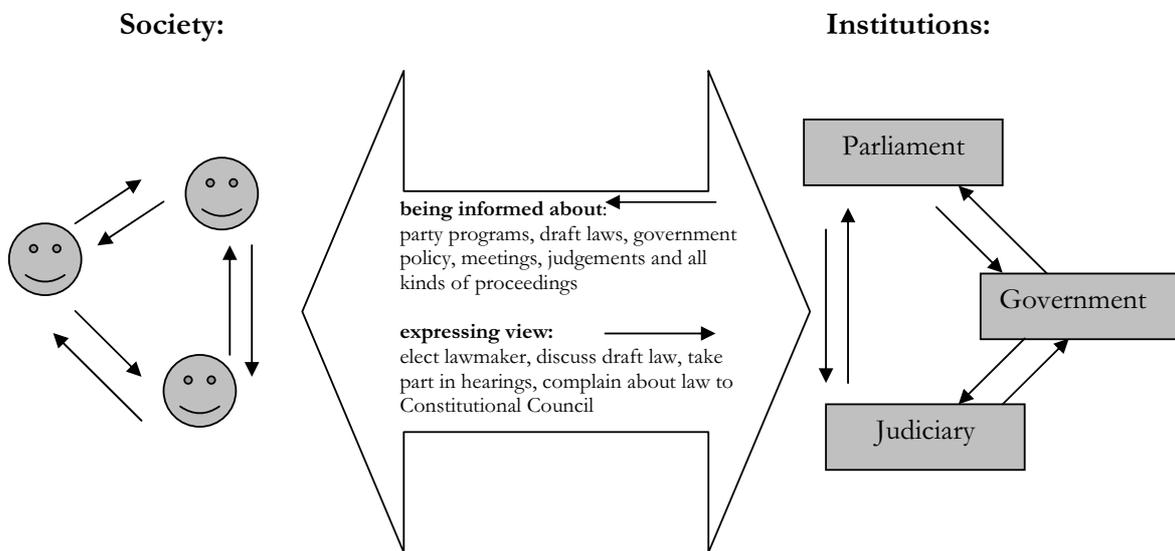
To rely just on one point of view is a sign of a lack of wisdom because experience teaches: “Four eyes see more than just two eyes”. To suppress other views is also a sign of weakness and fear because it shows that the suppressor can not bear and tolerate the existence of other opinions and is not self-reliant enough to enter a free competition of opinions.

In a pluralist democracy with millions of people (example: 14 million Cambodians) direct communication and exchange of opinions among each other is not possible. Therefore people participate by delegating their power of decision-making (through the act of voting) to their representatives. These representatives (for example: Commune Councils, Members of Parliament and Senate, elected Student Representatives) make the laws. The government exercises the laws and the judiciary controls the application of law. They are all accountable to the people.



Therefore a **free flow of information** between all these actors is vital for a democratic society:

- 1) On the one side people must be able to **get free information** about their society and all relevant topics and actors (example: party programs, draft laws, government policy, meetings, judgements and all kinds of proceedings). Otherwise they could not freely chose their representatives, participate in the law making process by discussion, control the executive power of their government and influence the application of law by the courts who decide in the name of the people.
- 2) On the other side they must be able to **express their point of view** about all these matters, to give their opinion, to discuss with others and to contribute their ideas about the solution of problems of the society to the process of decision-making.



The **freedom of expression** is vital for democracy which is based on public debate, open decision making and the free exchange of ideas, opinions and information. This freedom is essential for the development of knowledge and understanding among people. It promotes tolerance and cooperation. Free access to information ensures the **transparency** and **accountability** of the democratic institutions, especially the government²¹. Without freedom of communication, the state is deaf and so are the people.

“Publicity is the remedy for social diseases. Sunlight is the best disinfectant”²².
“Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power knowledge gives”²³.

²¹ see the **Johannesburg Principles** (www.hrni.org/~lhennebe/files/instruments/HRNi_EN_470.rtf) and the **Inter-American Declaration** of Principles on Freedom of Expression (www.hrni.org/~lhennebe/files/instruments/HRNi_EN_1076.rtf).

Both declarations are not binding conventions but provide helpful tools for a detailed interpretation of the freedom of expression.

²² US-Supreme Court Judge Louis. D. Brandeis

²³ James Madison, “Father of the US Constitution”.



B) The Elements of Freedom of Expression:

As this freedom is essential and basic it is **not a concession by the state but a fundamental and inalienable right** of every human being. This right is legally guaranteed by two provisions:

Article 41 Cambodian Constitution:

Khmer citizens shall have freedom of expression, press, publication and assembly.

In more detail the International Covenant on Civil and Political Rights describes the elements of freedom of expression and protects to all kinds of expression:

Article 19 ICCPR:

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.

In this broad sense freedom of expression does not only include freedom to “impart information and ideas of all kinds” but also freedom to “seek” and “receive” them “regardless of frontiers” and in whatever medium, “either orally, in writing or in print, in the form of art, or through any other media of his choice”²⁴.

This means that:

- freedom of expression refers not only to **facts, data and information** but also to **ideas, opinions, views**.

Notice: Opposite or critical ideas and views about politics or the government are clearly also within the scope of protection of the fundamental right of free expression.

- basically this freedom also includes **freedom of information** which means free **access to information**²⁵ because information about opinions and facts is the base for forming opinions and views.

²⁴ UN Human Rights Committee, General Comment on Art.19 ICCPR - 29.6.1983 (click: “Treaties” on the UNHCR-homepage: www.unhcr.ch)

²⁵ see <http://usinfo.state.gov/products/pubs/archive/freedom/freedom6.htm>



Example: To guarantee this fundamental right of freedom of information court trials or sessions of the National Assembly in Cambodia are open to the public. The right of free access to information is affected when journalists are no longer allowed to attend and report about the meetings of the Phnom Penh Municipality or when the administration chief of the National Assembly makes a regulation that he has to be informed about each visit of a journalist to a member of parliament in the parliament building. The right of free access to information means that the public interest in obtaining information has top priority and all government documents must be disclosed unless the government can prove that this would violate national security²⁶.

- expression by and receiving information from **electronic media like radio, television, satellite, cable or internet** is also covered by the freedom of expression. Freedom of expression is not limited to the spoken word or to the free press.

Example: China violates this right by technically blocking internet access to certain human rights homepages.

- **free flow of information** is not restricted to the territory of one country but includes **exchange of information and ideas with all other foreign countries.**

Example: To threaten to withdraw the license for a radio station in Cambodia which wants to broadcast foreign programs of BBC or Radio Free Asia would also affect the right of free expression because it would cut off the Cambodian public from outside information.

C) Dangers for the Right of Free Expression:

Many people and governments and private persons do not really understand the tremendous value of a free flow of information for the society. They regard free expression as an obstacle or even a threat to their politics and ways of doing business. They do not want an open, critical and transparent process of discussion which increases their accountability but prefer people to be deaf and mute. Or they do not understand the concept of pluralism and think only their point of view is important.

For these reasons they try to suppress free expression by various means:

- The worst measures are the **killing or arbitrary arrest** or the direct **threatening** of journalists or other people who try to communicate freely.
- Or laws are used to suppress free expression.

Example: Press laws which regulate **prior censorship** or **defamation/libel laws** are used to file law suits against journalists or media which sometimes even ruin

²⁶ see Principles 11 -19 of the Johannesburg Principles (see footnote 21)



their economical base. Finally **criminal laws** are used to punish the exercise of right of free expression and imprison critical persons.

- The complete lack of clear **media laws**²⁷ or **laws on free access to information** or the unclear or restrictive formulation of such laws is abused for imposing excessive control or restrictions on the free flow of information.

A lot of institutions exist worldwide which publish such dangers for the right of free expression and try to fight them.

Example:

- The **Special Rapporteur** of the UN Commission on Human Rights annually publishes a report on the worldwide situation of the freedom of opinion and expression²⁸.
- The **International Freedom of Expression eXchange (IFEX)** publishes a lot of information and reports on that right including some reports on the Cambodian situation²⁹.
- The **International Press Institute (IPI)**³⁰ and the **OSCE Representative of Freedom of Expression**³¹ as well as **Reporters without Borders (RSF)**³² also cover that issue.
- The **Global Campaign for Free Expression** publishes a lot of interesting comments and information related to Article 19 ICCPR³³.

D) Restrictions on the Right of Free Expression:

Many human rights articles in the constitution or in international conventions explicitly state that this basic right can be limited and restricted by a law for clearly named purposes, especially for the purpose to protect the freedom of others.

Article 19 ICCPR:

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 (*order public*), or of public health or morals.

²⁷ How to build free media? See <http://usinfo.state.gov/procuacts/pubs/archive/freedom/freedom1.htm>

²⁸ see his report for 2002: www.hri.ca/fortherecord2002/vol1/opinionchr.htm

²⁹ see homepage: www.ifex.org and its link to reports about the Cambodian situation: www.ifex.org/en/content/view/full/146/

³⁰ see homepage: www.freemedia.at/

³¹ see homepage: www.osce.org/fom/

³² see homepage: www.rsf.org

³³ see homepage: www.article19.org



Article 41 Cambodian Constitution:

Khmer citizens shall have freedom of expression, press, publication and assembly. No one shall exercise this right to infringe upon the rights of others, to affect the good traditions of the society, to violate public law and order and national security.

A law that imposes such restrictions on this basic right is only constitutional and compatible with human rights standards as long as it follows the special purpose and does **not impose an unnecessary (=disproportionate) restriction** on this right. In all cases the limitations imposed by the law must **not be so severe as to totally suppress the exercise of the right**. The law also must precisely name in which cases it imposes restrictions. A law that in vague words only authorizes in general the executive to limit a right does not meet the requirements of a constitutional limitation of a right. It must give clear indications when this restriction can be imposed. It must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful³⁴.

Attention:

These provisions open a door for restrictions. This always creates a danger that government officials, lawmakers or the judiciary refer to these provisions to justify restrictions which are not covered by the special purpose or which are not necessary or not clear enough.

So all restrictions should always be checked as follows:

- is it a restriction by a law (or based on a law) ?
- is the law text precise enough or too vague ?
- does the restriction follow one of the purposes which are mentioned in the human rights article ?
- is the restriction proportionate (is it necessary ? is it so strong that it does not leave at least a little rest of the right but suppresses it totally?)

The authorities bear the burden of proof that a restriction fulfills these criteria if they want to impose such a restriction!

According to Article 19 ICCPR and Article 41 CC the right of free speech can be limited only for a number of exclusively and explicitly named purposes. The reason is that although freedom of expression is basically not related to violence and has a tremendous value its exercise includes in a very few clear cases a danger for others: Insulting words

³⁴ see Principle 1.1.a) of the Johannesburg Principles (see footnote 21)



can hurt as much as a sharp knife and damage human dignity. Telling untrue things about someone in the public has the same effect. And words can be used to create hate that leads to violence against others. This kind of exercise of free expression is not protected.

The clearly named purposes for restrictions on free expression are the protection of:

- **the rights of others**

Example: to protect the reputation of others (right of honor: Article 38 II CC³⁵) against insulting speech. This means of course no protection against criticism but protection against a certain way of uttering ones negative views about someone by choosing certain (bad, disrespecting, nasty) words that violate his/her personal dignity. So a politician can be called “corrupt” if there is proof for it but s/he can not be called a “corrupt dog”.

A legal purpose for limitation of free speech also would be the suppression of all forms of discriminating speech that instigates violence, war, racial hate and crimes toward minorities (see Article 6 and 11 of the Press Law, Article 61 I Criminal Law or Article 20 I, II ICCPR). Free expression (for example showing films in cinemas) could be limited to protect the youth against confrontation with the description or showing of sex and crime because this would damage their moral education (Article 48 II CC³⁶).

- **good traditions of the society**

This purpose has to be checked very carefully because it has a very vague meaning and therefore could be abused to suppress opposite and critical views. Who defines what the “good” traditions of society³⁷ are? It is only up to the society itself to define these traditions. The lawmakers as representatives of society define this term in **law** texts (for example: Article 14 Press Law).

Example: “Good traditions of the Khmer society” could be to respect older people (Article 47 II CC³⁸) or to respect the “inviolable” Cambodian King (Article 7 III CC³⁹). Certainly it can not be called a “good tradition” that public criticism is widely seen as impolite. This kind of interpretation would be aiming at the very heart of a free flow of information and exchange of views and ideas.

³⁵ “The law shall protect life, honor, and dignity of the citizens”

³⁶ “The State shall protect children from acts that are injurious to their educational opportunities, health and welfare”

³⁷ Is it the government? See Article 52 CC: “The Royal Government of Cambodia shall ... preserve the good national traditions of the country.” **Attention**: “Preserve” does not mean “define”.

³⁸ “Children shall have the duty to take good care of their elderly mother and father according to Khmer traditions”.

³⁹ “The King shall be inviolable.”



- **public law and order**

All laws that do not aim especially at suppressing one special opinion but have other aims can limit the free expression.

Example: The traffic law has the goal to protect an easygoing, not dangerous traffic. Such a law can for example prohibit putting up a political poster (or any other poster that expresses the opinion of someone) in the middle of the road (see Article 52 Law on Land Traffic). Although it limits the freedom of expression it only limits the special way of expressing the opinion. But it does not restrict only a special opinion but every opinion which is expressed in this dangerous way.

An example for a law that aims at a special opinion would be a law that prohibits the expression and publication of communist views and orders all books written by communist authors to be confiscated.

Another example is the Malaysian law that bans publication of the Christian bible based on the presumption that this would cause public unrest in this Muslim dominated country.

- **national security**

National security does not mean every security interest of the government. Otherwise the government could ban all free speech by just saying that it is against government interests.

National security must be defined in a more narrow way: National security means a danger for the life and security of the whole population, for example the life of the whole nation is in danger because of a military attack by another country or incitements to a violent overthrow of the government.

Example: The law can prohibit to publish military secrets or punish expressions which are intended to incite imminent violence.

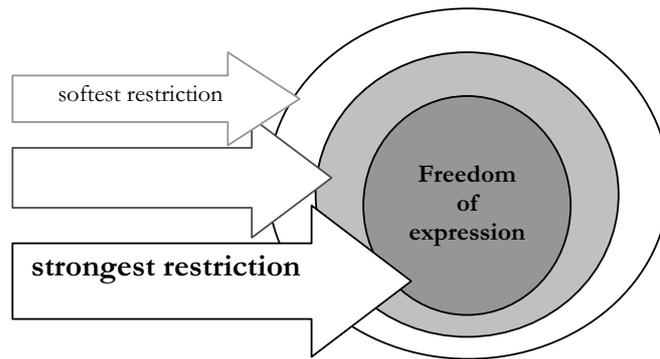
But it is **not within the purpose to protect national security to prohibit:**

- non-violent criticism of the government,
- calls for a peaceful change of the government,
- the exposure of governmental wrongdoings,
- revelations of information about the bad functioning of public institutions,
- the call for a strike or industrial unrest or
- the promotion of a particular ideology⁴⁰.

Always keep in mind:

Even if the text of the human rights articles in the Cambodian Constitution or in the ICCPR provide a legitimate purpose for a restriction of the freedom of expression not all restrictions are allowed but only proportionate restrictions that limit the right in the possible softest way.

⁴⁰ see Principles 1.1, 1.3, 2, 6 and 7 of the Johannesburg Principles (see footnote 21)

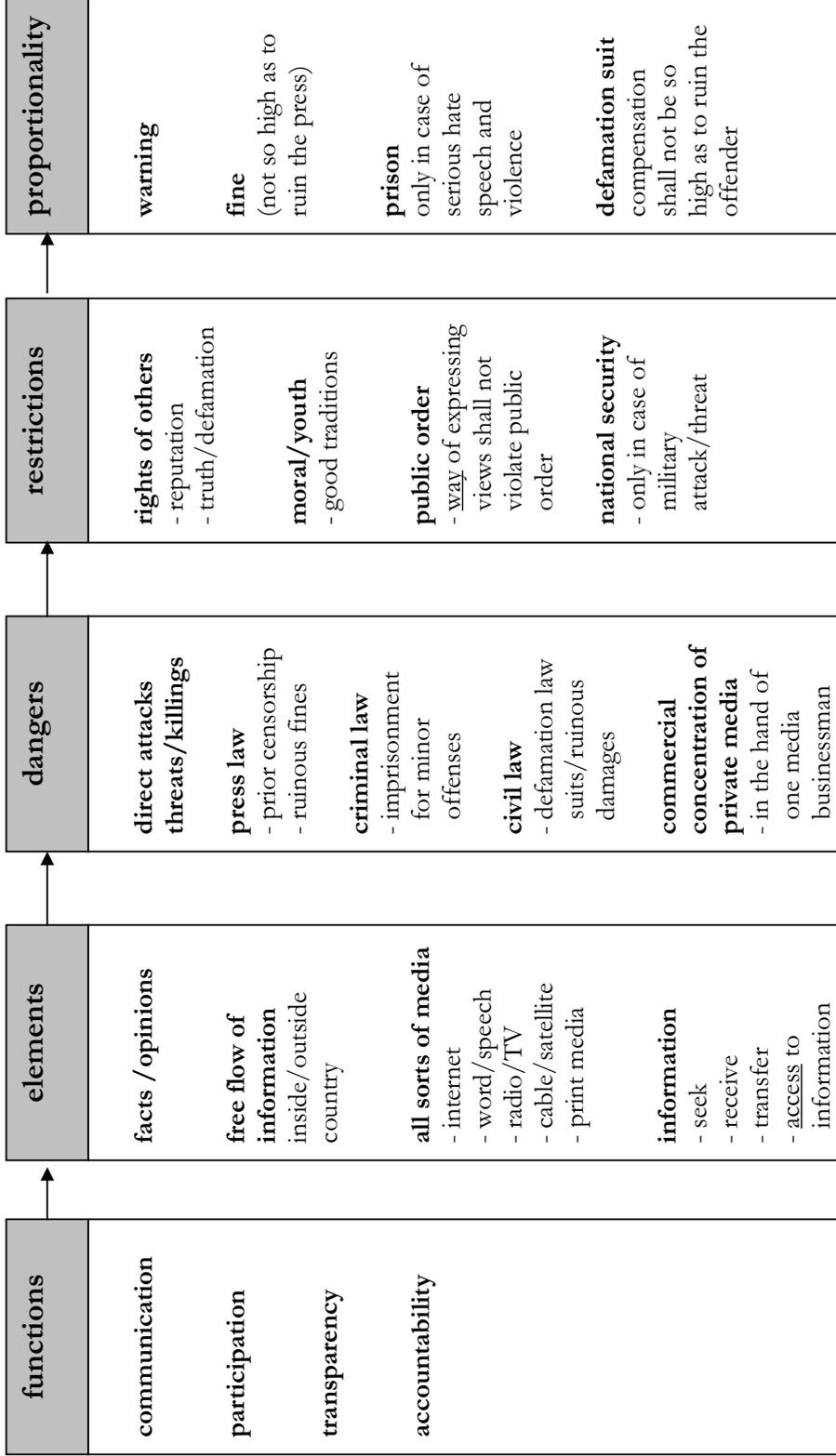


The softest measure to restrict free expression would be just to issue a warning to someone who does not respect the press law and publishes for example an article using insulting words. If untrue information is published the stronger restriction measure would be to order the publication of a corrected version. In cases of libel or defamation a fine can be imposed or a civil court can pass a judgement that a financial compensation has to be paid (example: Article 10 Press Law). Even in clear cases of defamation the fines or the compensation orders shall not amount to such a sum of money that it ruins the journalist or the newspaper or radio station because this would be a disproportionate restriction. Imprisonment of journalists or private persons based on violation of criminal code provisions would be the strongest restriction. This strongest restriction of free expression shall not be applied in cases of defamation or libel but shall only be applied in cases involving racist or discriminatory speech or calls for violence⁴¹. Taking this into consideration it is recommendable to check whether all restrictions in Articles 59 - 63 UNTAC Criminal Code are proportionate.

⁴¹ see the recommendations of the Special Rapporteur on Freedom of Expression and Principle 10 of the Inter-American Declaration (see footnotes 21)



Freedom of Expression





Study Question 9

- a) Please cite international and national legal provisions (article numbers) which protect the rights of free expression!
- b) For what reasons the freedom of expression can be restricted?
Please list them all as they are mentioned in the national and international law texts.



Study Question 10

An article in a small newspaper names a politician a “corrupt dog”. The politician files a complaint against the newspaper at the civil court. The civil court imposes a fine of 5 Million Riels on the newspaper (see Article 10 V Press Law). The small-sized newspaper can not pay this amount of money and has to close down.

- a) Is this restriction of the freedom of expression covered by the Cambodian Constitution?
- b) What would be a proportionate reaction of the court to this case?
- c) Look at the restrictions on freedom of expression in Article 12 I Press Law.
Are the two different terms “national security” and “political stability” compatible with the Cambodian Constitution?



Study Question 11

Please read the Press Law.

- a) Does the Press Law allow censorship? Quote the relevant regulation(s)!
- b) Article 20 Press Law refers to possible violations of the Criminal Code. Please cite them carefully!
- c) Case:
The members of “The Teachers’ Association” discuss their salaries and a possibility to go on strike. The Provincial Governor claims that this discussion is illegally because it is a threat to “national security” as higher salaries would damage the national budget. Then he prohibits the discussion.

Is his prohibition legal or illegal?