

Freedom of Expression in International Law

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Abstract

The right to freedom of opinion and expression has been protected in all relevant international human rights treaties since its inclusion in Article 19 of the Universal Declaration of Human Rights. It is essential at an individual level, as it contributes to the overall development of a person and is a foundation stone of democratic society. However, there is a global trend of governments limiting vibrant discussions and debates within civil society and among civil societies, political leaders and governments. This is particularly concerning in western democracies like the USA and UK.

Keywords: western democracy, judiciary, democratic society, fundamental rights, UDHR, USAID

Introduction

Freedom of expression is a fundamental human right for every person around the world. All people have the right to hold their own opinions, and the right to seek, receive and share information and ideas. For journalists, this right is essential to seeking out and sharing the truth. Without this freedom, they cannot interview citizens or request information from public officials and they cannot empower people to share their opinions and ideas publicly. Furthermore, they cannot impart reliable, accurate information to people so they can make informed decisions about their lives. They cannot play a critical role in democracy, development and good governance and, ultimately, we cannot expose human rights abuses.

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And ultimately, we cannot expose human rights abuses. Not only do journalists need freedom of expression to do their jobs, but journalists also help others exercise their freedom of opinion and expression by providing citizens with important, timely and accurate information upon which to base their ideas and opinions. Media outlets must be able to operate freely, without censorship or unfair restrictions, to allow these rights to be fully exercised.

This primer provides an overview of the right to freedom of expression as protected by international law. It begins by outlining the United Nations-based treaties that protect freedom of expression at the international level and then moves on to discuss protection by regional bodies such as the Organization of American States, the Organization for the Security and Cooperation of Europe, and the African Union, as well as the Special Rapporteurs that report to these bodies. The protection of freedom of expression as customary in international law will also be discussed.

As with most human rights, there are limitations and restrictions on freedom of expression. This primer will also examine what is not protected and how the right can be legitimately restricted. The right to freedom of expression is not only restricted by law, but it also must be necessary to attain one of the following purposes, i.e.: (a) to respect the rights or reputations of others; (b) to protect national security; (c) to protect public order; (d) to protect public health; and (e) to protect public morals. HRC states that the right to freedom of expression is of paramount importance in any democratic society and any restrictions on the exercise of this right must meet a strict test of justification (Human rights commission judgment, 1998).

This primer will specifically address some other issues connected to freedom of expression that journalists encounter on a daily basis: the right to access information, the right to privacy, and freedom of the press.

The modern roots of the origin of the right to freedom of expression can be traced back to the seventeenth century when documents such as the 1688 English Bill of Rights provided freedom of speech and debate within the Parliament. It was later expanded gradually by the United States Bill of Rights (added to the Constitution in 1791) and the French Declaration of the Rights of Man and the Citizen (1789). (Gudmundur Alfredsson and AsbjornEide, p. 394.) These two declarations reshaped the principle of freedom of expression in the era of United Nations from 1946 till 1948 when, finally it was agreed and the provision of Freedom of Expression was included in the UDHR of 1948.

Defining Freedom of Expression

The right to freedom of expression covers many freedoms which are essential for the working journalists around the world. The United States Agency for International Development (USAID) and the International Research and Exchanges Board (IREX) issued a joint report that recognized four fundamental freedoms – all of which rely on the right to freedom of expression.

Empower journalists to do their work freely and independently:

- a) The freedom of issuing newspapers and publications
- b) The independence of broadcast licensing and regulation
- c) The prohibition of all forms of censorship
- d) Freedom of accessing, obtaining and circulating information [Jordan Primer]

The definition of freedom of expression, as recognized by law, has been evolving. When the United Nations General Assembly met for the very first time in January 1946, one resolution that it passed recognized the freedom of information as a fundamental human right and “the touchstone of all the freedoms to which the United Nations is consecrated.” [UN Res 59(1)]

Furthermore, it has 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 peace and progress in the world (At 19 UNDR).

Nearly three years later, in December 1948, the General Assembly adopted the UDHR. It protects freedom of expression under Article 19: Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (At 19 UNDR).

International Human Rights Treaties and reports by the UN Human Rights Committee and Special Rapporteurs have expanded on the definition of this right and how it relates to day-to-day life. The right to freedom of expression does not exist in isolation. All rights are interrelated, interdependent, and indivisible. Freedom of expression is linked with the right to peaceful assembly and association (Article 20 of the UDHR) and freedom of thought, conscience, and religion (Article 18 of the UDHR).

Methodology of the Study

This research is based on the doctrinal method. Under the doctrinal method, prevailing national and international instruments of freedom of expression have been

critically evaluated. It covers International and Regional Conventions, Constitutions and other Acts of the House of Representative (Parliament), and Courts' decisions, law Books, Law Journals, Articles, Newspapers and some other kinds of publications.

International Development

Article 19 of UDHR proclaims the general principle of the right to freedom of information and expression for all individuals without any interference. This includes the right to seek, receive and impart information and ideas through any media and regardless of frontiers. (Art. 19 of UDHR) The Article does not impose any limitations on the exercising of this freedom. Article 29(2) and (3) include the general limitations on all rights and freedoms contained in the UDHR, including the freedom of expression. It is Article 19 of ICCPR that precisely puts out this freedom together with limitations which read as: Everyone shall have the right to hold opinions without interference. It includes the 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 medium of his choice. The right may 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 (public order), or of public health or morals

The ICCPR also establishes the Human Rights Committee which monitors the implementation of rights found under the Covenant (Part IV of ICCPR), The Procedures for bringing the Complaint under it.

Regional Development

The principle laid down in Article 19 of the UDHR not only has an enormous impact on the elaboration of United Nations instruments, but also the content of this article, somehow in its modified form, appears in all the major regional human rights instruments as well. These include: (a) The European Convention on Human Rights; (b) the American Convention on Human Rights and (c) the African Charter on Human and Peoples' Rights. Each region will be explained in separate headings below:

European Convention for the Protection of Human Rights (1950)

Under Article 10 of the European Convention for the Protection of Human Rights, the principle of freedom of expression reads as: 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 authorities and regardless of frontiers.

The situations in which a restriction may be justified include the need to protect public interests such as national security, territorial integrity, freedom from crime and disorder, health and morality, and the authority and impartiality of the judiciary, as well as protection from individual rights, such as the right to privacy or reputation. However, when a contracting party imposes restrictions upon the exercise of freedom of expression, the right must not be rendered meaningless. Besides, the restrictions should be provided by law; proportionate, and necessary in a democratic society, and only be imposed for the specified aims (Onder Bakircioglu, pg 9). The restrictions permitted under the Convention on the rights relating to freedom shall not be applied for any purpose (Jacob and White, pg 220). The main purpose is for protection of the rights under the European Convention established by the European Court of Human Rights into operation on 1 November 1998 to fully function on a permanent basis. In a number of cases on the issue of limitations for the protection of morals, the Court allows wide latitude of the national discretion under the margin of appreciation doctrine establishing.

Organization of American States

The Inter American Human Rights system modeled after the European system came into existence in 1978 which serves as an example of other human rights declarations and charters 49. The American system establishes a Commission and Courts to oversee the implementation of specified civil and political rights and it is believed to be the largest international framework that provides the greatest scope and the broadest guarantees of protection to the right to freedom of thought and expression.

American Convention on Human Rights-ACHR (1969)

The detailed provision on freedom of expression is found in Article 13 of the American Convention of Human Rights which reads as : Everyone has the right to freedom of thought and expression. It includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. In the exercise of the right provided, it shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure : (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public health or morals (American convention on Human Rights, 1969).

Article 13(2) of the Convention set out three conditions for limitations to be admissible i.e. : (1) the limitation must have been defined in a precise

and clear manner by a law, in the formal and material sense; (2) the limitation must serve compelling objectives authorized by the Convention; and (3) the limitation must be necessary in a democratic society to serve the compelling objectives pursued; strictly proportionate to the objective pursued; and appropriate to serve said compelling objective. On top of that, the Inter- American Declaration of Principles on Freedom of Expression was adopted and acted as an authoritative interpretation/clarification of Article 13 of ACHR.

African Charter on Human and Peoples Rights-ACHPR (1982)

The African Union is less developed as compared with other regional developments by having very weak formulation of freedom of expression. Political intolerance, often in the wake of the establishment of a military dictatorship or installation of a one-party state, has put this freedom in jeopardy. The right to freedom of expression is explained under Article 9 of the ACHPR, which reads as: Every individual shall have the right to receive information as well as the right to disseminate opinion within the law. The provision contains the claw-back clauses restricting freedom of expression from the start, meaning that it recognizes and guarantees the right in question only to the extent that such right is not infringed upon by national law. The African Commission which established this Charter has given little attention to freedom of expression.

In the case of *Media Rights Agenda and Others v. In Nigeria*, the Commission said that the right and limited 'in accordance with law' should be understood to require such limitations to be done in terms of domestic legal provisions which comply with international human rights standards. As a consequence of serious violations of the rights of freedom of expression in Africa, it adopts the Declaration of Principles on Freedom of Expression in Africa (2002) which comes up with several principles for the purpose of improvement of this freedom and is regarded as an authoritative elaboration of the guarantee of freedom of expression found in Article 9 of the African Charter on Human and Peoples' Rights. The declaration affirms that freedom of expression is an individual human right and a cornerstone of democracy, as well as a means of ensuring respect for all human rights and freedoms. All laws and customs that repress freedom of expression are a disservice to society. They also acknowledge that respect for freedom of expression, the right of access to information lead to public transparency and accountability, as well as to good governance and the strengthening of democracy.

Discussion

Free Speech as a Norm of International Law

The UDHR, proclaimed by the United Nations General Assembly in 1948 in the wake of the holocaust, expressed a commitment by the world to promote and observe a full suite of fundamental human rights. Article 19 of the UDHR protected freedom of opinion and expression in the following terms (United Nations, 1948): 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.

Seventy years later, the rights contained within the UDHR, including freedom of opinion and expression, are firmly protected in international treaties, regional human rights instruments, and newly established domestic human rights laws (e.g. Canada, 1982; Council of Europe, 1953; Organisation of African Unity, 1981; Republic of South Africa, 1996).

Many countries have ratified the International Convention on the Elimination of all forms of Racial Discrimination (ICERD, United Nations, 1965), the International Covenant on Civil and Political Rights (ICCPR, United Nations, 1966), the Convention on the Rights of the Child (CRC, United Nations, 1989), and the Convention on the Rights of Persons with Disabilities (CRPD, United Nations, 2006), each of which protects freedom of opinion and expression. 178 of 197 countries have ratified the ICERD; 169 of 197 countries have ratified the ICCPR; 196 of 197 countries have ratified the CRC; and 174 out of 197 countries have ratified the CRPD (Office of the High Commissioner for Human Rights, 2017a). Through ratification, the countries become party to those treaties and voluntarily agree to be bound in international law to uphold the human rights contained therein. By virtue of the overwhelming rate of treaty ratification and its inclusion in the UDHR, freedom of speech is now considered to be a norm of customary international law (Triggs, 2011).

About Freedom of Opinion and Expression in International Law

Freedom of opinion and expression are fundamental rights that contain both a personal and a social dimension. They are considered “indispensable conditions for the full development of the person”, “essential for any society” and a “foundation stone for every free and democratic society” (UN Human Rights Committee, 2011, para. 2). All forms of communication are protected, including “political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching and religious discourse” (UN Human Rights Committee,

2011, para. 11). Under the ICCPR, freedom of expression includes the “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 medium of a person’s choice” (United Nations, 1966, Article 19(2)). This protects expression in all forms, including spoken, written and sign language, and non-verbal expressions through artworks (UN Human Rights Committee, 2011, para. 12).

Without free speech, the enjoyment of other rights is not possible. For example, freedom of speech, along with freedom of assembly and association, are necessary for the effective exercise of the right to vote (UN Human Rights Committee, 1996, para. 12). The right to vote is compromised in a society that does not have a free exchange of ideas and information on public and political matters between citizens, candidates, and elected representatives (UN Human Rights Committee, 2011, para. 20). However, free speech is not an absolute right and can be limited where it is necessary and done in a proportionate manner. Under the ICCPR, freedom of expression can only be restricted by law and, where necessary, to respect the rights or reputations of others; or for the protection of national security or of public order, or of public health or morals (United Nations, 1966, Article 19(3)). By reason of those parameters, defamation and hate speech laws can be justifiable as protecting the reputation and rights of others, so long as they are not overbroad. However, laws, for example, that restrict door-to-door canvassing in an election or activities such as blocking access to media sources are likely to violate freedom (UN Human Rights Committee, 2011, para. 37). Finally, freedom of expression plays an important role in upholding other human rights. Transparency and accountability for human rights abuses are enhanced by freedom of expression, making it an essential precondition to ensuring the proper protection of rights (United Nations Human rights committee, 2011).

Free Speech in Western Democracies

The defense of freedom of expression and other democratic rights are strongly associated with western democracies, like the UK and USA, as a legacy of the Cold War era. Whereas the Soviet Bloc largely promoted treaties that protected economic and social rights (such as rights to housing, education and health), the West, like the USA and UK, prioritized civil and political rights (such as free speech, freedom of assembly and rights to expression).

The UDHR and ICCPR are silent under these criteria. But the Johannesburg Principle made it clear about these criteria. It states that “no restrictions on freedom of expression or opinion unless the government demonstrates that

the restriction is necessary in a democratic society". In the European system, this is the main test applied by the Court in determining the acceptability of restrictions on freedom of expression under the ECHR and it must comply with the genuine interest of democracy and is not merely political expediency in disguise. The word necessary implies the existence of pressing social needs. (In National Security, Freedom of Expression and Access to Information, 1999:115)

In the American system, any state that imposes limitations upon freedom of expression is obligated to demonstrate that they are necessary for a democratic society to serve the compelling objectives pursued. (Report of the Special Rapporteur for Freedom of Expression 1994). While under the African system, Principle II of the Declaration of the Principle of Freedom of Expression states that: "any restrictions on freedom of expression shall be provided by law and be necessary in a democratic society".

Freedom of Expression in International Law

The right to freedom of expression and opinion is a right of the International Covenant on Civil and Political Rights and is described as an essential test right, the enjoyment of which illustrates the degree of enjoyment of all human rights enshrined in the United Nations Bill of Rights, that comprises the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and reflects a country's standard fair play, justice and honesty (Report of the Special Rapporteur for the promotion and protection of the right of freedom of opinion and expression, UN DOC E/CN.4/1995/32, 14 December 1994). This right has a dual dimension (individual and collective form of freedom of expression).

An individual dimension, consisting of the right of each person to express his/her own thoughts, ideas and information, and a collective dimension, consisting of society's right to obtain and receive any information, to know the thoughts, ideas and information of others, and to be well-informed. It includes freedom of access to the State and freedom from the State. The former refers to the participation of the individual in matters of the state. The latter refers to the realm of privacy of the individual and requires absolute protection against any undue external interference. The legal obligation imposed by Article 2 of ICCPR is that the State must respect, protect and refrain from interference in these rights either by the State organs itself or by third parties. (Article 2 of ICCPR Participate in public life) (Office of the High Commissioner for Human Rights, 2008, p. 9; Roth, 2004). However, freedom of expression is currently under assault across the world.

In October 2016, the UN expert on freedom of expression reported that individuals seeking to exercise their right to expression face all kinds of government-imposed limitations that are not legal, necessary or proportionate (UN General Assembly, 2016) noting that the “targets of restrictions include journalists and bloggers, critics of government, dissenters from conventional life, provocateurs and minorities of all sorts” (UN General Assembly, 2016, para. 55). Recent laws and policies show that western democracies are not immune from this trend, with governments increasingly willing to limit the freedom of civil society to participate in public debate and discussion.

Diminishing Rights to Protest

Protests are found to have engaged both in freedom of expression and assembly. In the context of protests, people will express themselves verbally, as well as through non-verbal expression, such as raising banners or placards (UN Human Rights Committee, 1994). In 2017 in the United States, in response to large-scale protests arising out of emerging people’s movements such as Black Lives Matter and the opposition to the Dakota Access Pipeline, at least 20 states proposed new laws to limit people’s ability to protest (American Civil Liberties Union, 2017). The laws proposed to limit protest rights in a range of ways, including by prohibiting the wearing of masks or hoods in public (State of Washington, 2017a); establishing mandatory penalty enhancements for obstructing commercial vehicles or interfering with pipelines or oil-related facilities (State of Washington, 2017b); criminalising protest on private land (North Dakota, 2017); and, the most extreme, providing immunity for drivers who accidentally run over protesters who are obstructing a highway (Florida, 2017; North Carolina, 2017; Texas, 2017; Tennessee, 2017). As at June 2017, anti-protest bills remain pending in seven states, were passed in five states and 12 states failed to pass any of the anti-protest laws introduced (American Civil Liberties Union, 2017). These laws are being proposed in a country where Supreme Court has held that both the rights to freedom of speech and assembly encompass the right to peaceful social protest, which in turn is critical to the preservation of “freedoms treasured in a democratic society” (US Supreme Court, 1965). Two UN experts made a joint statement of concern in relation to the proposed anti-protest laws, stating that: The bills, if enacted into law, would severely infringe upon the exercise of the rights to freedom of expression and freedom of peaceful assembly in ways that are incompatible with US obligations under international human rights law and with First Amendment protections. The trend also threatens to jeopardize one of the United States’ constitutional pillars: free speech. (High Commissioner for Human Rights, 2017)

Similarly, in Australia, state-based anti-protest laws are criminalizing peaceful protests. In the state of Tasmania, for example, a 2014 anti-protest law has effectively criminalized peaceful protests on public land, even for a short time. The laws criminalise all protest activities, peaceful or otherwise, that occur on or near certain business premises and which “pre-vents, hinders or obstructs” access to business premises (Tasmania, 2014, section 6). This law applies to both public and private property and carries with it substantial penalties of up to \$10,000 and four years’ imprisonment (Tasmania, 2014). Three UN experts on freedom of opinion and expression called the laws “disproportionate and unnecessary” (Office of the High Commissioner for Human Rights, 2014). In October 2017, Tasmania’s law was struck down by Australia’s highest court for violation of the implied freedom of political communication in Australia’s constitution (High Court of Australia, 2017).

Free Speech and Freedom of the Press

Another alarming trend in western democracies is metadata retention laws that jeopardize free speech and press freedom, and which could dissuade people from sharing information on matters of public interest. Freedom of expression requires a free, uncensored, and unhindered press in which the media can comment on public issues without censorship or restraint and can inform public opinion (UN Human Rights Committee, 2011). A fundamental tenet of journalism is the ability to access information and in doing so, to keep sources safe and confidential. Yet governments in western democracies are jeopardizing the confidentiality of journalists’ sources through increased surveillance of peoples’ telecommunications metadata. Metadata is not the content of communications, but the details around it – the time and place you made a phone call, the length of the call, the recipient, or the web browser you visited and for how long. Metadata can reveal an enormous amount about a person’s habits, private and social life. The European Court of Justice said: That data, taken as a whole, is liable to allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as everyday habits, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them. In particular, that data provides the means of establishing a profile of the individuals concerned, information that is no less sensitive, having regards to the right to privacy, than the actual content of communications. (European Court of Justice, 2016).

Unsurprisingly, schemes that require the mass collection and retention of metadata and allow authorities access without appropriate safeguards have been declared by courts in Europe to be invalid due to the severe impact on the

right to privacy (European Court of Justice, 2016; German Federal Constitutional Court, 2010).

However, there is also an impact on freedom of expression in circumstances where metadata retention laws are actively used to pursue journalists' sources, thereby undermining press freedom. This is because by looking at a journalist's phone or email metadata; authorities can quickly see who has been in contact with them, revealing the identity of sources and whistle blowers. In Australia, although there are some protections in place for accessing the metadata of journalists that require law enforcement agencies to obtain a special warrant, in at least one case the Australian Federal Police have admitted to unlawfully accessing a journalist's metadata without the relevant warrant (Colvin, 2017; Knaus, 2017). Further, government reporting shows that authorities were granted warrants to access two journalists' data on at least 33 other occasions (Australian Attorney-General's Department, 2017).

The European Court of Justice has also noted that the invasion of people's privacy through meta-data collection can also dissuade people from speaking freely. It states: The fact that the data is retained without the subscriber or registered user being informed is likely to cause the persons concerned to feel that their private lives are the subject of constant surveillance. . . The impact of this scheme could have an effect on the use of means of electronic communication and, consequently, on the exercise by the users of their freedom of expression (European Court of Justice, 2016, para. 100).

The extensive, intrusive nature of data collection regimes, in combination with a lack of transparency over which bodies are able to access it and for what purposes, risks discouraging the legitimate exercise of freedom of expression.

Conclusion

A vital human right that must be preserved in democracies is the freedom of expression. However, there is a concerning global trend where governments are arbitrarily restricting free speech, specifically targeting journalists, protesters, and other people seen as dissenting from the government's viewpoints. Laws are limiting protest actions even in western democracies and endangering press freedom and free speech through obligatory metadata retention programs. It is essential that civic communities across the world maintain freedom of expression with vigilance. This is essential for improving people's lives and for building and maintaining strong, healthy democratic communities.

In general, the UN and regional systems have created a great deal of legal guidance on how this right should be exercised and guaranteed by the States,

as well as the standards for restricting this right. It should be highlighted that despite domestic laws offering just a minimal level of protection or differing from international standards, states are nonetheless bound by international law to fully uphold their commitments to defend human rights. In international law, the freedom of expression is given a fair amount of protection. Due to the fact that this right is not absolute, it must be balanced with other rights, particularly the right to privacy and the right against discrimination. State have responsibilities to safeguard media, free expression, and individual privacy rights.

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