

What is the Human Right to Freedom of Expression?

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Abstract

The contribution examines the right to freedom of expression and why it is important in a changing, multicultural world. First, the human right to freedom of expression is described by reference to legal instruments and the practices and *opinio juris* of States that form customary international law. Second, the limitations that States may place on the right are described. These limitations form part of the right and their understanding is necessary for understand the right itself. Third, the relationship of the human right to freedom of expression to other human rights and general international law is discussed. This discussion traces the importance of the human right to freedom of expression from the Universal Declaration of Human Rights in 1948 to contemporary times. And finally, the contextual reasons why this right is important to different types of societies. Although this contribution is from the perspective of an international human rights lawyer, an effort will be made to present the law in an accessible manner and with attention to its larger social context.

Introduction

The human right to freedom of expression was traditionally among the most fundamental civil and political rights, something that is borne out by its inclusion in almost every major universal or regional human rights instrument. It is a right that is of increasing importance in a world where the manipulation of information is being increasingly used to affect how individuals participate in national and international society. It is also a right that is increasing in prominence in the relations between sovereign States.

This contribution seeks to briefly describe the freedom of expression under international human rights law, including its limitations. It also seeks to describe the relationship between the freedom of expression and other human rights and some of the rules of general public international. And finally, it seeks to comment on why the freedom of expression is such an important human right. In this contribution, the right to freedom of expression is viewed in its contemporary fulfillment context and reference is made to some contemporary problems involving the freedom of expression.

The Human Right to Freedom of Expression

The human right to freedom of expression is found in numerous human rights instruments. These range from non-legally binding legal instruments to legally binding treaties. In the latter category are such provisions as article 19 of the Universal Declaration of Human Rights (UDHR), article IV of the American Declaration on the Rights and Duties of Man (ADRDM), and article XII of the Universal Islamic Declaration of Human Right (IDHR), just to name a few examples. In the latter category are article 19 of the International Covenant on Civil and Political Rights (ICCPR), article 9 of the African Charter on Human and Peoples' Rights (ACHPR), article 13 of the American Convention on Human Rights (ACHR), article 32 of the Arab Charter on Human Rights (ArbCHR), and article 10 of the European Convention on Human Rights (ECHR). In addition, the right to freedom of expression is often found in treaties protecting certain groups of individuals such as children, women, and refugees, among others.

Despite the many expressions of the freedom of expression its human rights seems to have a core of elements that provide an identity for the right. This core can be found, for example, in the right to freedom of expression in article 19 of the ICCPR that recognizes that everyone has the right to hold opinions "without interference" (para. 1) as well as 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 media of his choice" (para. 2). In other words, the right to freedom of expression includes both the right to receive and to impart information.

Limitations on the Freedom of Expression

While the right to hold opinions without expressing them, like the freedom of conscience, is unlimited, the right to express one's opinions may be limited. These limits however must be carefully prescribed by existing law, necessary for society in which citizens can participate, and justified on the basis of specific interests of the State. States can limit their obligations to ensure the right to freedom of expression based only on the provisions of treaties, and perhaps customary international law, they prescribe strict conditions on a State's ability to restrict the right to freedom of expression.

The requirement that any limitation be based on existing law means that a State cannot really create a law when it wants to interfere with the right to freedom of expression. The law must be preexisting the interference. This requirement is perhaps the easiest for a State to meet.

In addition, a State seeking to limit the right to freedom of expression must show that the limitation is necessary in a democratic society or a society in which citizens can participate in their own government. It requires the State to provide more than mere *prima facie* arguments in support of its limitation of the right to freedom of expression. In fact, it is this criteria of necessity that allows the court or other authoritative body a significant degree of discretion in determining whether each State has acted legitimately in interfering with the right to freedom of expression.

Finally, the limitation of the right to freedom of expression must be justified for one of the reasons stated in a particular treaty. These reasons invariably relate to securing public order, national security, public health, public morals, or the rights of others. It is not enough to eight government merely state the reason for which it is acting, but the government must prove that it is acting for the reason it is stated. It is essential for any government seeking to limit human rights to understand that it shoulders the burden of proof of showing that its limitations are justified.

While it is important to recognize that States may limit the right to freedom of expression in some circumstances, it is important to understand that such limitations must be narrowly tailored.

Freedom of Expression and Other Rights

The Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights held in Vienna, Austria in 1993, makes clear that “[a]ll human rights are universal, indivisible and interdependent and interrelated...[and that]...[t]he international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.” This appears to mean that no State can justify its failure to respect the right to freedom of expression based on effective use prioritizing other rights. In fact, this interpretation is not always been correct. The reason for this is that sometimes rights will compete with each other. Thus, for example, in the case of the *Otto Preminger Institute v. Austria*, before the European Court of Human Rights, the Court found that Austria could limit the right to freedom of expression when its exercise interfered with the right to freedom of religion of Austrians living in the Tirol region of the country. This interference with the right to freedom of expression was justified under paragraph 3 of article 10 of the European Convention on Human Rights that allows for limitations based on the human rights of others.

Perhaps even more serious or situations when an attempt is made to restrict their freedom of expression in a particular country by one or more foreign countries. When one State, or a group of States, encourage or demand that another State violate the right of its own citizens and those under its jurisdiction, an issue of general international law is relevant. No State is entitled to cause harm to another State. Demanding that another State violate the human right to its own citizens or other individuals under its jurisdiction is clearly causing harm to the interest that every State has to ensure the protection of its citizens human rights.

The situation that has arisen between Qatar and other Arab States is concerning. The UAE, Saudi Arabia, Kuwait, and Egypt have demanded that the government of Qatar close down the media outlet, namely Al-Jazeera. *Prima facie* if the government of Qatar was to oblige in this demand it would be violating the right to freedom of expression both of Al-Jazeera and of those receiving information from this media source. These four neighboring Arab governments are seeking to prevent the government of Qatar from respecting the right to freedom of expression of its people, which, of course, includes the right to disseminate as well as to receive information. The mere act of a State or group of States demanding that another State violate the human rights of individuals under its jurisdiction raises serious questions about the State responsibility of the demanding States for internationally wrongful act.

Although the question of State responsibility in such a circumstance is more one of obligations between States rather than obligations of the State towards those under its jurisdiction—traditional international human rights law—the human right that is ultimately at stake is the right to freedom of expression. In a well-known arbitration referred to as the *Trail Smelter Case*, the concerned arbitration tribunal established the proposition of international law that a State may not cause harm to another State. Under international law it is not necessary to prove that the State or States causing harm have malice intention. It is enough for the injured State to show that harm has been caused. The causing of harm by one State or a group of States to another State will incur the state responsibility of the former States. As international State responsibility is both joint and several, all the consequences, of, for example, compensation will become incumbent upon any State participating in the internationally wrongful act.

The human right to freedom of expression as can be seen from the few examples above is integral part of both international human rights law as well as general public international law. And respect for the right to freedom of expression may be important for ensuring respect for either of these areas of law.

Why is Freedom of Expression So Important?

When the Universal Declaration of Human Rights was drafted after World War II under the guidance of the prominent American Mrs. Eleanor Roosevelt, the United States submitted a draft for this seminal document that included one human right, the right to freedom of expression. While ultimately, the Universal Declaration of Human Rights adopted by the UN General Assembly was based on drafts submitted by Cuba in Panama, the United States' attention to freedom of expression made this human right a priority for the United Nations. From statements made by the United States representatives during and after the drafting of the Universal Declaration one might surmise that the United States understood the right to freedom of expression as the basis for all other human rights. It was that important to the United States.

Indeed, as the last section of this contribution is indicated, the right to freedom of expression is inextricably linked to other human rights. Many of the human rights depend on the exercise of the right to freedom of expression and the right to freedom of expression depends on having other human rights secured. For example, citizens cannot participate in their own government as article 25 of the International Covenant on Civil Political Rights provides them a right to do in unless they are able to express themselves freely. At the same time, individuals who do not have the right to health protected, as required by article 12 of the International Covenant on Economic, Social, and Cultural Rights, will likely be severely handicapped in the exercise of their right to freedom of expression.

As noted above, the right to freedom of expression includes not only the right to express oneself but also the right to receive information. This aspect of the right to freedom of expression is increasingly important in a world in which individuals' actions can be manipulated by the control of information. In this sense, the proliferation of media outlets, acutely well-resourced media outlets with professionally trained journalists, is essential to the exercise of freedom of expression and eight other related human rights.

Short Biography

Dr. Curtis F.J. Doebbler is an international human rights lawyer, professor of law, writer, and human rights defender who makes use of everything at his disposal, including the internet, to pursue the goal of human rights for all in a just and equitable world. He holds law degrees from New York Law School, Radboud Universiteit, and the London School of Economics and Political Science. He has published eight books, more than two hundred academic and popular newspaper articles, and numerous online contributions.

He represents the NGO International-Lawyers.Org at the United Nations and practices international law (Doebbler.org) before international tribunals and advises both governments and non-governmental actors. He has taught law at universities in the Middle East, Africa and Europe. He is currently Research Professor of Law at the University of Makeni and a visiting professor of law at Webster University in Geneva.

