

Protecting the human right to freedom of expression in international law

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INVITED COMMENTARY

Protecting the human right to freedom of expression in international law

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Abstract

Since its inclusion in Article 19 of the Universal Declaration of Human Rights, the right to freedom of opinion and expression has been protected in all of the relevant international human rights treaties. In international law, freedom to express opinions and ideas is considered essential at both an individual level, insofar as it contributes to the full development of a person, and being a foundation stone of democratic society. Free speech is a necessary precondition to the enjoyment of other rights, such as the right to vote, free assembly and freedom of association, and is essential to ensure press freedom. However, there is a clear and worrying global trend, including in western democracies, of governments limiting vibrant discussion and debate within civil society and among civil society, political leaders and government. Two examples illustrate this trend. First, anti-protest laws in Australia and the United States threaten the ability of people to stand together and express views on issues they care deeply about. Secondly, metadata retention laws jeopardise press freedom by undermining the confidentiality of journalists' sources and dissuading people from speaking freely on matters of public importance.

Keywords: *Article 19; Universal Declaration of Human Rights; United Nations; civil society; international law*

Free speech as a norm of international law

The Universal Declaration of Human Rights (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).

An overwhelming majority of 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 media 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 of 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 the freedom (UN Human Rights Committee, 2011, para. 37). Finally, freedom of expression plays an important role 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 (UN Human Rights Committee, 2011, para. 3).

Free speech in western democracies

The defence of freedom of expression and other democratic rights is strongly associated with western democracies, 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 prioritised civil and political rights (such as free speech, freedom of assembly and rights to

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. Two examples illustrate this trend: the rise of anti-protest laws and the government surveillance of citizens’ telecommunications metadata.

Diminishing rights to protest

Protests engage both 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 peoples’ movements such as Black Lives Matter and the opposition to the Dakota Access Pipeline, at least 20 states proposed new laws to limit peoples’ 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, antiprotest bills remain pending in seven states, were passed in five states and 12 states failed to pass any of the antiprotest laws introduced (American Civil Liberties Union, 2017). These laws are being proposed in a country whose 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 antiprotest 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. (Office of the High Commissioner for Human Rights, 2017, para. 4)

Similarly in Australia, state-based anti-protest laws are criminalising peaceful protest. In the state of Tasmania, for example, a 2014 anti-protest law effectively criminalises peaceful protest on public land, even for a short time. The laws criminalise all protest activity, peaceful or otherwise, that occurs on or near certain business premises and which "prevents, 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 jeopardise 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 jeopardising 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 life 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 regard to the right to privacy, than the actual content of communications. (European Court of Justice, 2016, para. 99).

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 metadata collection can also dissuade people from speaking freely. It stated:

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.

Conclusions

Freedom of expression is a fundamental human right that must be upheld in democratic societies. Yet there is a worrying global trend of governments unjustifiably limiting freedom of speech, targeting journalists, protesters and other persons considered to be dissenting from government views. Even in western democracies, laws are curtailing protest activities and threatening press freedom and free speech through mandatory metadata

retention schemes. It is imperative that civil societies across the globe are vigilant in defending freedom of expression. This is necessary for the enhancement of people's lives and the creation and maintenance of strong, health democratic societies.

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Declaration of interest

There are no real or potential conflicts of interest related to the manuscript.

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