

July 2010

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Recommended Citation

Zaid, Zaid Ali (2010) "Freedom of Speech in International Law," *Journal Sharia and Law*: Vol. 2010 : No. 43 , Article 7.

Available at: https://scholarworks.uaeu.ac.ae/sharia_and_law/vol2010/iss43/7

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Freedom of Speech in International Law

Cover Page Footnote

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Freedom of Speech in International Law *

By

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Abstract:

Freedom of speech is best understood as freedom of expression since ideas and opinions can be expressed by conduct as well as by words. In fact, modern technology permits unique methods or ways of expression via the worldwide web with little means of regulating and limiting free speech and expression. Freedom of speech and expression are considered to be inalienable civil rights of all democratic systems. Be that as it may, even in the context of democratic freedoms, free speech and expression are subject to limitations calculated to minimize harm.(1) As such, democratic nations recognizing and indorsing the right to free speech have set common law and statutory restraints on all civil liberties including free speech and expression. This study will divide into chapters; the first chapter examines the concept of freedom of speech in the lights of general principle of international law. The second chapters will discuss the role of the media in freedom of speech in general and Enforcement of Free Speech on an International Level.

• **Accepted 6.1.2010.**

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Introduction

Freedom of speech is best understood as freedom of expression since ideas and opinions can be expressed by conduct as well as by words. In fact, modern technology permits unique methods or ways of expression via the worldwide web with little means of regulating and limiting free speech and expression.⁽²⁾ Freedom of speech and expression are considered to be inalienable civil rights of all democratic systems.⁽³⁾ Be that as it may, even in the context of democratic freedoms, free speech and expression are subject to limitations calculated to minimize harm.⁽⁴⁾ Democratic states recognizing the right to free speech have set common law and constitutional restraints on all civil liberties including free expression. This study will divide into chapters; the first chapter examines the concept of freedom of speech in the lights of general principle of international law. The second chapters will discuss the role of the media in freedom of speech in general and Enforcement of Free Speech on an International level.

1: The Concept of freedom of Speech

1.1 Freedom of Speech in International Law

The right to free speech is recognized and documented in international law. Article 19 of the *Universal Declaration of Human Rights* (1948) provides as follows:

“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.”⁽⁵⁾

This right like all other rights and liberties provided for under the *Universal Declaration of Human Rights* is subject to restraint. Broadly speaking civil liberties require responsibility and duty toward maintaining the

⁽²⁾ Malliard, Julien. “Freedom of Expression, the Internet, and the Costs of Control: The French Example.” 33 *N.Y.U. J. INT’L L. & POL.* 1179 (2001)

⁽³⁾ Baker, Edwin. *Human Liberty and Freedom of Speech*. Oxford: Oxford University Press, 1989

⁽⁴⁾ Ibid

⁽⁵⁾ *Universal Declaration of Human Rights* 1948, Article 19, Resolution 217 (III) adopted by United Nations General Assembly, 10 December 1948.

peace of one's own community. Article 28 of the Declaration makes the following provision:

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”⁽⁶⁾

The *International Covenant on Civil and Political Rights* is international treaty with membership of approximately 148 States are parties. The Covenant is thus binding upon Member States and endorses the Universal Declaration of Human Rights.⁽⁷⁾ By virtue of Article 2 of the *International Covenant on Civil and Political Rights* Member States are required to adapt municipal laws that reflect the freedom of speech principles set out in Article 19 of the *Universal Declaration of Human Rights*.⁽⁸⁾ The *European Convention on Human Rights* (1950) contains similar freedom of expression guarantees as those contained in the *Universal Declaration of Human Rights*.⁽⁹⁾

Article 19(3) of the *International Covenant on Civil and Political Rights* recognizing the limitations on freedom of expression sets the parameters including to which Member States may regulate and control freedom of expression. Article 19(3) states that fundamental freedoms come with certain responsibilities and as such they are likely to 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.”⁽¹⁰⁾

Therefore, restrictions on freedom of expression in international law must satisfy a three tier test, otherwise any restriction contravenes Article 19 of the

⁽⁶⁾ *Universal Declaration of Human Rights* 1948-1998, Article 29(2)

⁽⁷⁾ *UN General Assembly Resolution 217A(III)*, 10 December 1948

⁽⁸⁾ *International Covenant on Civil and Political Rights* Article 2

⁽⁹⁾ *European Convention on Human Rights* 1950 Article 10

⁽¹⁰⁾ *International Covenant on Civil and Political Rights* Article 19(3)

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Universal Declaration of Human Rights.⁽¹¹⁾ The first part of the test requires that the restriction on free speech be provided for by domestic law. The European Court of Justice determined in *The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, 2 EHRR 245, that in order for the law to be enforceable it must be fully circulated and:

“..formulated with sufficient precision to enable the citizen to regulate his conduct”.⁽¹²⁾

Once it can be established that the limitation on freedom of expression is provided for by concise and widely circulated law it must be proved that the limitation serves a legitimate purpose. As previously stated those legitimate purposes must be pursuant to the protection of the rights of others and for the “protection of national security” or “for the protection of public health or morals.”⁽¹³⁾

Thirdly, the restriction must be shown to be “necessary”.⁽¹⁴⁾ The European Court of Justice previously discussed the meaning of the word necessary in the context of free speech within the ambit of international law. In the case of *Lingens v. Austria*, 8 July 1986, Application No.9815/82, 8 EHRR 407 the European Court of Justice determined that a restriction on free expression and free speech is only necessary when it furthers a “pressing social need.”⁽¹⁵⁾ The Member State must provide reasons for the restrictions and those reasons must not only be “relevant and sufficient” but they are also required to be “proportionate to the aim pursued.”⁽¹⁶⁾ In the United States Supreme Court, Justice Oliver Wendell Holmes provided a relatively straightforward rationale for the restriction on freedom of speech in *United States v. Schwimmer*, 279 U.S. 644 (1929). Holmes stated that:

⁽¹¹⁾ *Mukong v. Cameroon*, views adopted by the UN Human Rights Committee on 21 July 1994, No.458/1991, para. 9.7

⁽¹²⁾ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, 2 EHRR 245, para. 49

⁽¹³⁾ *International Covenant on Civil and Political Rights* Article 19(3)

⁽¹⁴⁾ *Ibid*

⁽¹⁵⁾ *Lingens v. Austria*, 8 July 1986, Application No.9815/82, 8 EHRR 407 paras 39-40

⁽¹⁶⁾ *Lingens v. Austria*, 8 July 1986, Application No.9815/82, 8 EHRR 407 paras 39-40

“The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic...The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”⁽¹⁷⁾

1.2. The Impact of Freedom of Speech on other Fundamental Freedoms:

Obviously, freedom of speech and expression are intricately tied to other fundamental freedoms. Restrictions and limitations on speech and expression are required to maintain a balance between those freedoms and peace and security of communities. Maryam Namazie, a London based civil rights activist and commentator explains how free speech impacts other basic human rights. Namazie stresses that international laws on freedom of speech have failed to protect individuals and groups who have steadfastly exercised their rights to free speech and expression based on unjustified government censorship.⁽¹⁸⁾

Namazie recounts several incidents of unjustified restrictions on freedom of expression pursuant to demands for other fundamental rights in the Middle East. In Tehran, for example, bus workers rallying for recognition of their labor law rights were arrested together with family members and some of them were subjected to torture.⁽¹⁹⁾ In another extreme example, teachers in Afghanistan who spoke out in favor of females obtaining an education were threatened with death.⁽²⁰⁾ A similar position was adapted against women who advocated for equal treatment for woman generally in Iraq.⁽²¹⁾ Journalists in Iran were imprisoned for publishing an article that compared Khomeini with the AIDS epidemic.⁽²²⁾ In Yemen an editor awaits execution for publishing an account of Mohammed’s endorsement of “the killing of a woman who had insulted him.”⁽²³⁾ Namazie explains that these incidents are manifestations that many

⁽¹⁷⁾ *United States v. Schwimmer*, 279 U.S. 644 (1929)

⁽¹⁸⁾ Namazie, Maryam. (March 25, 2006) “Freedom of Expression: No Ifs and Buts”. <http://maryamnamazie.blogspot.com/2006/03/freedom-of-expression-no-ifs-and-buts.html> Accessed November 5, 2007

⁽¹⁹⁾ Namazie, Maryam. (March 25, 2006) “Freedom of Expression: No Ifs and Buts”. <http://maryamnamazie.blogspot.com/2006/03/freedom-of-expression-no-ifs-and-buts.html> Accessed November 5, 2007

⁽²⁰⁾ Ibid

⁽²¹⁾ Ibid

⁽²²⁾ Ibid

⁽²³⁾ Ibid

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States do not recognize the ambit of free speech and primarily treat it as a privilege rather than a universal right. Namazie warns that:

“Any limits on free speech & expression are really attempts by those in power or vying for power to limit our rights and the rights of the population at large.”⁽²⁴⁾

While this is not entirely true since limitations on free speech are often necessary for the protection of health, morals and the rights of others, piecemeal limitations to grant government autonomy is precisely what the Universal Declaration of Human Rights and the European Convention of Human rights seek to avoid. Namazie’s comments about limitations on freedom of speech and expression encompass limitations that prevent government accountability and foster oppression of other rights. This is obvious from the examples listed above. It is impossible, Namazie explains to defend and insist upon other fundamental rights if governments were permitted to legislate against freedom of speech.⁽²⁵⁾

1.3. The Importance of Freedom of Speech in International Law

Aside from enabling the exercise of all civil liberties, free speech and expression is also beneficial to the democratic process. Perhaps the European Court of Justice expressed the import of universal standards of freedom of speech in its ruling in *Handyside v. United Kingdom*, 7 December 1976, Application No.5493/72, 1 EHRR 737. Acknowledging that freedom of expression is an essential democratic tool, the European Court of Justice pointed out that:

“In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.”⁽²⁶⁾

⁽²⁴⁾ Ibid

⁽²⁵⁾ Namazie, Maryam. (March 25, 2006) “Freedom of Expression: No Ifs and Buts”. <http://maryamnamazie.blogspot.com/2006/03/freedom-of-expression-no-ifs-and-buts.html> Accessed November 5, 2007

⁽²⁶⁾ *Handyside v. United Kingdom*, 7 December 1976, Application No.5493/72, 1 EHRR 737

J. Herbert Altschull credits the First Amendment to the US Constitution as a model law for other nations. He notes that:

“No doctrine announced by the new republic has been more widely cheered around the world than the declaration of free expression. The declaration has fueled the fires of every revolutionary movement for two centuries.”⁽²⁷⁾

Today most national constitutions contain language that encompasses a salient link between free speech and freedom of expression. One is indistinguishable from the other.⁽²⁸⁾

2: The Role of the Media in Freedom of Speech

2.1. The Role of the Media in Freedom of Speech

International law is particularly important with respect to free speech and expression in the media. The European Court of Justice in *Castells v. Spain*, 24 April 1992, Application No. 11798/85, 14 EHRR 445 explained how the role of the Press importance. Freedom of the press provides the public with the information necessary for the formation concerning the attitudes and opinions of political leaders. Politicians also have the ability via the press to consider public opinion and to comment accordingly.

“enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.”⁽²⁹⁾

The European Court of Justice reiterated that the press should receive particular protection in respect of freedom of expression since it was a pivotal tool for rendering the information available to the public. It is this information that permits the public to form opinions and ideas.⁽³⁰⁾ Intricately tied to the press’s duty to disseminate information to the public is the public’s right to receive that information.⁽³¹⁾ Likewise the Inter-American Court of Human Rights endorses the importance of the role of the press for the protection of freedom of expression. The Inter-American Court of Human Rights declared that:

⁽²⁷⁾ Altschull, J. Herbert. *Agents of Power: The Media and Public Policy*. New York: Longman, 1995 p. 8

⁽²⁸⁾ Ibid

⁽²⁹⁾ *Castells v. Spain*, 24 April 1992, Application No. 11798/85, 14 EHRR 445, para 43

⁽³⁰⁾ Ibid

⁽³¹⁾ Ibid

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“It is the mass media that make the exercise of freedom of expression a reality.”⁽³²⁾

The link between free expression and freedom of the press is specifically alluded to in the First Amendment to the US Constitution which forbids Congress passing any law that stifles both free press and free expression.⁽³³⁾ Despite this comity of nations there are differences in the approach taken by Western democracies with respect to restrictions on freedom of expression in the press. For instance the European Union endorses a policy of protection of privacy and sets limits to what is actually in the public interests. The United States on the other hand places very little emphasis on the distinction between privacy and the public’s right to know.⁽³⁴⁾ Be that as it may there are many the United Nations Member States that promote authoritarian media control. In other words the media freedom of expression provided that it does not contain anti-government material. The result is that the media is either subject to government intimidation or is intricately connected to the government.⁽³⁵⁾

Singapore provides a good example of undemocratic media control by the government. The government of Singapore refuses to tolerate critical reporting by either domestic or the foreign press. There have been incidents in which the foreign press inclusive of the Economist, Far Eastern Economic Review and the Asian Wall Street Journal have had their circulation suspended and in some instances reduced or levied with penal fines.⁽³⁶⁾ In 2002, the Bloomberg information service in addition to being fined was ordered to apologize to the former Singapore Prime Minister, Lee Kuan Yew for publishing an article that

⁽³²⁾ “Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism.” *Advisory Opinion* OC-5/85 of 13 Nov. 1985 Series A. No. 5 Para. 34

⁽³³⁾ *US Constitution*, First Amendment.

⁽³⁴⁾ Silverman, Debra, L. “Freedom of Information: Will Blair Be Able to Break the Walls of Secrecy in Britain?” *American University International Law Review* Vol. 13 p. 471

⁽³⁵⁾ Sussman, Leonard and Karlekar, Karin Deutsch. “The Annual Survey of Press Freedom 2002”. *Freedom House*, 2002. Available online at: www.freedomhouse.org Retrieved November 6 2007

⁽³⁶⁾ Sussman, Leonard and Karlekar, Karin Deutsch. “The Annual Survey of Press Freedom 2002”. *Freedom House*, 2002. Available online at: www.freedomhouse.org Retrieved November 6 2007

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policies that contravene Article 19's regulations on the protection of freedom of expression. Although Article 19 of the *Universal Declaration of Human Rights* sets a global standard for Member States to follow there is no means by which the United Nations can force Member States to incorporate these legal standards into their domestic orders. While there may be recourse in the event of cruel and inhumane treatment and punishment, there is very little that can be done with respect to authoritarian control of domestic journalist and civil disobedience in general.

Governments of the world will have to unanimously aspire to fundamental freedoms in order for freedom of expression to become universally possible. Franklin Delano Roosevelt expressed his view of world peace and freedom on January 1, 1941. Chief among his formula for a free world was freedom of expression and speech. He formulated what he referred to as a "world founded upon four essential human freedoms."⁽⁴⁴⁾ Roosevelt identified four freedoms which were listed as freedom of religion, freedom of expression and speech, freedom from fear and want. He further maintained that his vision was for:

"...definite basis for a kind of world attainable in our time and generation."⁽⁴⁵⁾

This is the vision shared by the United Nations in its drafting of the *Universal Declaration of Human Rights*. Be that as it may, until the world at large shares this vision freedom of expression will continue to be a misnomer on an international level. It goes without saying however, that Roosevelt's four pillars of freedom are a good starting point for domestic governments when deciding how to govern the people under their command. Freedom from fear encompasses freedom of expression. As previously noted, freedom of expression is intrinsically linked to other fundamental freedoms. Without it, civil liberties are virtually non-existent.

In the words of Zechariah Chafee, Freedom of speech "means liberty, not license."⁽⁴⁶⁾ In exercising the right to free expression and free speech the

⁽⁴⁴⁾ Hoopes, Townsend and Brinkley, Douglas. *FDR and the Creation of the UN*. Yale University Press, 1997 pp 26-27

⁽⁴⁵⁾ Ibid

⁽⁴⁶⁾ Chafee, Zechariah. *Freedom of Speech*. Harcourt, Brace and Howe, 1920 p. 368

individual has a residual duty to safeguard against interference with social order. He or she is also minded to take account of moral values, education and how freedom of expression impacts upon the youth. A line has to be drawn between sedition and civil liberties.⁽⁴⁷⁾ Until the lines are clearly defined and the world at large can agree on those lines, freedom of speech will mean different things to different nations and will be governed according to a particular government's own domestic agenda rather than on international standards of civility. Chafee explains how international cohesion on the issue of free speech can be achieved. Governments and their people are required to realize that:

“Argument on one side and argument on the other is the best way that we have on earth to bring about truth. Once force is thrown into the scale, once the pressure of government is used on one side or the other, it becomes simply a matter of chance on which side it is use, and then the natural ability to decide the matter by argument is altogether gone.”⁽⁴⁸⁾

3. Conclusion and recommendations:

Freedom of speech and expression are therefore key elements for the maintaining of liberal and free society. On an international level, free speech is connected to broader liberties and promotes the free flow of information and ideas. However, it is also recognized that free speech and expression cannot be an absolute right since the careless and reckless expression of thoughts and ideas have the capacity to override fundamental rights of individuals.

Harmony of laws among nations of the world has proven to be difficult to achieve. International Treaties such as the *Universal Declaration of Human Rights* can only go so far as to set guidelines for Member States to follow. Unless a Member State implements these guidelines, there is no such thing as an internationally binding law on in respect of freedom of speech. The best that can be achieved is harmony through similarity, better, the uniform of domestic laws stem or must flow from the application of relevant international norms (which by definition common to the State) . If the trend continues where more and more countries are beginning to accept and implement laws that reflect the United Nations' concept of freedom of speech as provided for via Article 19 of

⁽⁴⁷⁾ Ibid

⁽⁴⁸⁾ Chafee, Zechariah. *Freedom of Speech*. Harcourt, Brace and Howe, 1920 p.369

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the Universal Declaration of Human Rights, free speech will eventually become legal norm.

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- *United States v. Schwimmer*, 279 U.S. 644 (1929)
- *US Constitution*

ملخص بحث

حرية التعبير في القانون الدولي

د. زايد علي زايد

أستاذ القانون الدولي العام المساعد

جامعة الشارقة

يتناول البحث بالشرح والتحليل مفهوم حرية التعبير في القانون الدولي. وتعتبر حرية الكلام والتعبير غير قابلة للتصرف ومن الحقوق المدنية في جميع النظم الديمقراطية. وحتى في سياق الحريات الديمقراطية، وحرية الكلام والتعبير تخضع لقيود لتقليل الضرر اللاحق. على هذا النحو، وضعت الدول حق التعبير ووضعت القيود القانونية على حرية الرأي كأحد القيود الواردة على الحريات المدنية والسياسية. هذه الدراسة تنقسم إلى مبحثين أساسيين، المبحث الأول يتناول مفهوم حرية التعبير في ضوء المبدأ العام للقانون الدولي. والمبحث الثاني يناقش دور وسائل الإعلام في حرية التعبير بشكل عام، وتأثير حرية التعبير على الصعيد الدولي.