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The Right of Access to Information Through the Internet: The Comparison of "Hard Law" and "Soft Law"

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Abstract

The internet has become a necessary tool for the development of people's lives. It is impossible to imagine a life without the internet since the vast majority of human beings use it in almost all of their daily activities. However, it is controlled by many government authorities around the world. This achievement of mankind, the world wide web, must not be arbitrarily deprived by the ruling authorities of any state. The question that this paper addresses is how the right of access to information through the internet is protected and restricted through international human rights instruments. Particularly, it identifies that "soft law" human rights instruments provide an access to information through the internet as an individual's claim-right, whereas "hard law" provides it as a freedom. The method of the comparison of "hard law" and "soft law" instruments make it possible to understand that the human right is still better protected by a "soft" tool. The first part of this paper will compare the degree of protection provided by "hard law" and "soft law" instruments on the right of access to information through the internet. The second part of this paper will identify to what extent the "hard law" and "soft law" instruments justify the restrictions applied on the right of access to information through the internet.

Keywords: human right, access to information, internet, restriction, justification

Introduction

Today, internet media accounts for a great deal of the dissemination, exchange, information transmission, expansion, and development of the range of people's vision. It is used in every sphere, every area of activity, every operation and work, thus making it difficult to imagine life without it. However, considering the fact that it is controlled and suppressed by authorities due to certain factors, access to information, and thereby all opportunities used in every sphere, activity, operation, and work are restricted.

In 1946 the United Nations General Assembly recognized the freedom of information as a fundamental human right. It was defined as "an essential factor in any serious effort to promote the peace and progress of the world" (G.A. Res. 59(I) 1946). Nevertheless, the access of information through the internet has a different level of protection and restriction through "hard law" and "soft law" instruments. It is more recognized as a right and less restricted under "soft law".

Methodology

Analysis of the research mostly required a review of primary sources, such as the United Nations Conventions on Human Rights and various model laws developed recently. In particular, it required an examination of treaty provisions provided by "hard law", which puts a duty on the second party to be responsible for certain actions, and "soft law", which recommends the second party to restrain from certain actions. The comparison of the two categories of law allowed me to realize that the human right is better protected on the recommendation level.

Justification

The right of access to information plays a crucial role in allowing democratic governance to function effectively. It is a key factor in increasing the transparency of government, reducing corruption, and promoting openness. The information is free to use as soon as it is available on the internet. It is available to anyone who has internet access. It is a freedom, not a right. If access to information through the internet is an individual's claim-right, it would then create a duty on the second party such as state, government, public, or private bodies to provide and protect it.

The right of access to information through the internet is protected under "hard law" and "soft law" instruments, but the degree of protection under each instrument varies. The contribution of this paper shows that "soft law" provides the right of access to information through the internet, whereas "hard law" provides only the freedom to information available through the internet. Since the "soft law" instruments have the potential to be transferred into "hard law", the observation of their differences may help to predict the future norms of the right of access to information through the internet.

Universal and Regional Human Rights Agreements

All United Nations Conventions on human rights, except for the Convention on the Rights of the Child, combine the right to freedom of expression with the freedom to seek, receive, and impart information. For example, Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) states that "the right to freedom of expression … includes freedom to seek, receive and impart information, and ideas of all kinds". Such provisions do not clarify the ways of seeking, receiving, or imparting information. They are general and imprecise.

In the case of *Mavlonov and Sa'di v. Uzbekistan*, the Human Rights Committee found that the non-registration of a newspaper was in violation of the reader's "right to receive information and ideas in print" under Article 19(2) of the ICCPR. Particularly, it stated that "the public has a right to receive information as a corollary of the specific function of a journalist and/or editor to impart information" (Comm. 1334/2004, U.N. Doc. CCPR/C/95/D/1334/2004).

Like the ICCPR, the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families contains a freedom to seek, receive, and impart information under the right to freedom of expression (Art. 13.2).

The Convention on the Rights of Persons with Disabilities has a different provision on the access to information. The convention defines the internet as an encouraged form of communication. Article 21 of the convention was titled as "freedom of expression and opinion, and access to information" and provides the following provision:

> States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, … including by:

> […]
> (d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities" (G.A. Res. 61/106, 2007).

Article 13(1) of the Convention on the Rights of the Child provides the UN standard clause, where the right to freedom of expression involves the "freedom to seek, receive and impart information and ideas of all kinds", but it is not limited to it. Along with the standard clause, the convention included a separate article on access to information. To be specific, Article 17 of the convention states that:

> Parties shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health" (G.A. Res. 44/25, 1989).

It may say nothing in relation to the internet, but it had once been considered that the mass media was a way of disseminating beneficial information to a child (ARTICLE 19, Kid's Talk, p.22). Mass media has different forms. The Internet, being one of them, was once described as "the biggest invention in mass media" (Uttara Manohar, 2016). Originally, during the negotiation of the Convention on the Rights of the Child, the Polish delegates proposed to draft Article 17 in a way to protect children from "harmful influence" that the mass media and other communication services may cause (ARTICLE 19, Kid's Talk). However, due to the uncertainty of the state's role in the protection of children against possible negative influences from the media, the drafters focused on the necessity to protect the "right to access information" (ARTICLE 19, Kid's Talk).

There are some other international conventions that provide rules on access to information. For instance, the Convention on Access to Information, Public Participation in Decision–making and Access to Justice in Environmental Matters have clear provisions on access to information that read as follows:

> Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks" (UN Economic Commission for Europe, 1998).

Among the regional human rights treaties, the European and American conventions have classical standards that most UN conventions on human rights have. The only difference is the European Convention on Human Rights, which does not include the freedom "to seek information". Instead, it includes the "freedom to hold opinions" (European Convention for the Protection of Human Rights and Fundamental Freedoms 1950).

The Inter-American Court of Human Rights recognized the access to information as an individual's human right, which imposes an obligation on states to provide and guarantee that right (Inter-Am. Ct. H.R. 2006, p.41). The American community devoted no less interest to the legal regulation of access to information. Juridical Committee's principles, recommendations by the OAS Department of International Law, annual reports, and Resolutions of the General Assembly all specified the vital role of the public's access to information (Inter-American Juridical Committee, 2008). Yet the question is whether the European and American Conventions cover the right of access to information through the internet, since they were drafted before the 1970s when the internet was not a common phenomenon.

In contrast to the European and American Conventions on Human Rights, the African Charter on Human and Peoples' Rights provides the independent provision on the right to receive information (O.A.U. Doc. CAB/LEG/67/3, 1981). Article 9 of the Charter states that "every individual shall have the right to receive information" (O.A.U. Doc. CAB/LEG/67/3, 1981).

"Soft law" on the right of access to information through the internet

The classic "soft law" on human rights is the Universal Declaration of Human Rights (UDHR). Article 19 states that "the right to freedom of opinion and expression … includes freedom to seek, receive and impart information and ideas" (G.A. Res. 217 (III) A, 1948). It did not clarify the ways of seeking, receiving, or imparting information.

The "soft law" instrument of recent development on the right of access to information is the Model Inter-American Law. The Organization of American States by the General Assembly Resolution adopted the Model Inter-American Law on Access to Public Information and Commentary and Guide for the implementation of the Model Law (OAS G.A. Res. 2607, 2010). It is a comprehensive draft law, which is very detailed in every aspect. According to the Model Law, "access to information is a fundamental human right and an essential condition for all democratic societies" (OAS G.A. Res. 2607, 2010). It covers all information held by public authorities regardless of their format and medium. Any restriction to the right should be "clearly and narrowly established by law" (OAS G.A. Res. 2607, 2010). More importantly, it provides that the published information should be accessible and understandable. In regards to the "publishing", the Model Law defined it as "the act of making information available in a form generally accessible to members of the public and includes all print, broadcast, and electronic forms of dissemination" (OAS G.A. Res. 2607, 2010). Yet it is still the framework that can only be served as an example for future application by states.

The Model Law on Access to Information for Africa also set clear rules on the right of access (African Commission on Human and Peoples' Rights, 2010-12). The African Model Law recognized the right of access to information as an international human right. Furthermore, it defined the word of "to publish" as to make "available in a form and manner which is easily accessible to the public and includes providing copies or making information available through broadcast and electronic means of communication" (African Commission on Human and Peoples' Rights, 2010-12).

There is no such model law within the European community, but there are conventions, declarations, recommendations, and directives on the access to official documents and information held by the public authorities (Declaration on the Freedom of Expression and Information 1982; Convention on Access to Official Documents 2009).

There are other "soft law" instruments which were not specifically designed for human rights, but contain the right of access to information. For example, the principles of the ILA New Delhi Declaration provides "a right of access to appropriate, comprehensible and timely information held by governments" (ILA 2002). Similarly, the UN 2030 Agenda for Sustainable Development addressed the importance of access to information through the internet. Its Goal No.9 aims to "increase access to information and communication technology and provide universal and affordable access to the Internet in least developed countries by 2020" (G.A. Res. 70/1, 2015). Additionally, under Goal No.16, the heads of states and representatives agreed to ensure the public access to information and protect fundamental freedoms (G.A. Res. 70/1, 2015).

Another "soft law" framework is the Rio Declaration on Environment and Development, which proclaims that "states shall facilitate and encourage public awareness and participation by making information widely available" (Rio Declaration 1992).

The right of access to information through the internet is closely related with other rights and freedoms, such as the freedom of the press, the right to privacy, and the right to participate in public affairs. The right of access to information through the internet can be closely associated with the right to know, or the public's right to know the information held by the government (ARTICLE 19, The Public's Right to Know, 1999). Although the internet was not specifically mentioned within their principles, they implied that the information should be open, maximally disclosed, published and easily accessible (ARTICLE 19, The Public's Right to Know, 1999).

Additionally, since the internet became an essential factor in educational spheres, the right of access to information through the internet is bound with the concept of access to knowledge. Particularly, the internet supports social progress and development. The right of access to information through the internet should be promoted by taking into account openness and transparency.

By comparing "hard law" and "soft law" instruments, it is clear that "soft law" instruments paid serious attention to the right of access to information through the internet. The right of access to information through the internet is better protected by the recommended "soft law". The human rights of the Universal Declaration were the first non-binding rules that later became very important human rights under two international covenants. Similarly, it is possible that the right of access to information through the internet can later become one of the most important human rights in the world.

Restrictions on the right of access to information through the internet under "hard law" and "soft law"

The Internet simplifies every task. Its use makes it possible for people to become self-educated and expand their horizons. On one hand, it is the most effective and quickest way to access information in any sphere, promote publicity, and develop people's awareness. On the other hand, it may be used as a dissemination tool for different sorts of information. In order to protect public order, morals, and national security, the internet is subject to censorship and surveillance by the government. Thus, it is crucial to know to what extent the "hard law" and "soft law" instruments justify the restriction on the right of access to information through the internet.

The right to freedom of information under the ICCPR is subject to fixed restrictions, where such restrictions must be "provided by law", and meet one of these legitimate aims: protection of individual's rights or reputations, national security, public order, and morals and public health (Art. 19.3).

The restrictions imposed under the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families are almost the same as the ICCPR. The only difference is in their legitimate aims. They restrict the right to freedom of information with an aim to prevent "any propaganda for war" and "any advocacy of national, racial or religious hatred that constitutes incitement of discrimination, hostility or violence" (Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 13.3). No similar restrictions can be found in the provisions of the Convention on the Rights of Persons with Disabilities.

The Convention on the Rights of the Child provides similar restrictions, such as the ICCPR on the right to freely receive information under Article 13. Basically, all UN conventions share similar provisions on the restriction to the right of freedom to information. Which are as follows:

i. Provided by law
ii. Necessary for the protection of certain aims.

The regional human rights agreements are slightly different from the UN human rights agreements. For example, the European Convention on Human Rights (ECHR) expanded the scope of justification to restrict the right. It stated that the right to freedom of information can be limited when it is:

i. Prescribed by law
ii. Necessary for the protection of certain aims
iii. Necessary in a democratic society (ECHR, Art. 10.2)

The restriction under the American Convention on Human Rights (ACHR) has been framed in a different way. It stated that the right "shall not be subject to prior censorship but shall be subject to subsequent imposition of liability" (ACHR 1969, Art. 13.2). That imposition of liability shall be:

i. Established by law
ii. Necessary for the protection of certain aims.

The African Charter on Human Rights does not state any restrictions within the article on the right to receive information, but provides another Chapter, which establishes the duties imposed on every individual. One of the duties is to exercise rights and freedoms "with due regard to the rights of others, collective security, morality and common interest" (Art. 27.2). So the universal and regional human rights agreements apply the principles of legitimacy, necessity, and proportionality when they restrict the right to freedom of information.

In contrast, "soft law" instruments are more advanced and contain an element of transparency. For example, the principles of the public's right to know provided by "ARTICLE 19" set up "the three-part test" for refusal to disclose information, which includes:

i. Legitimate aim provided in the law
ii. Substantial harm test
iii. Public interest test (ARTICLE 19, The Public's Right to Know, 1999).

The test of "substantial harm" and "public interest" is a new way of justification provided by "soft law" instruments. This means that the information should be disclosed when the public interest takes priority over the harm caused by the legitimate aims protected by the domestic laws (ARTICLE 19, The Public's Right to Know, 1999).

The Model Inter-American Law on Access to Public Information established the standards on partial disclosure and historical disclosure (OAS G.A. Res. 2607, 2010). This partial disclosure allows the publication of the redacted information. Additionally, the commentary on the Model Law set up the principles that should be applied when the right of access to information is restricted, which are:

i. Legal Recognition of Exceptions
ii. Restrictive Interpretation
iii. Principle of Good Faith
iv. Reasoned Decision and Grounds
v. Pre-eminence of the Law Over Other Laws that Create Exceptions (OAS G.A. Res. 2607, 2010).

An independent body such as ombudsman or court is necessary when the authorities refuse to disclose information. In fact, the decision for blocking certain websites must be undertaken by an independent judicial authority (U.N. HROHC, the Special Rapporteur's 2017 report). Some states, such as the UK and Belgium, have made a list of blocked websites and stated the reasons for the blocking. Such approaches make the restriction fairly transparent.

Conclusion

The right of access to information through the internet is a necessary human right for democratic society. If everyone has the right to access information in the easiest way, and if it is properly implemented, then no other law of transparency would be necessary.

Among current "hard law" instruments, only the Convention on the Rights of Persons with Disabilities explicitly encourages to protect the right of access to information through the internet. The right of access to information through the internet remains to be through "soft law". Nevertheless, it is an essential right for the future generation. The global agenda, such as the UN 2030 Agenda for Sustainable Development, addressed the importance of access to information through the internet. It is very likely that in the near future, the right of access to information through the internet will be protected more efficiently, be less restricted, and be more transparent all over the world.

References

African Commission on Human and Peoples' Rights, Model Law on Access to Information for Africa,2010-12.[Online]Available: http://www.achpr.org/files/news/2013/04/d84/model_law.pdf.

American Convention on Human Rights 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123.

CCPR/C/GC/34, 12 September 2011, General Comment №34 on Article 19 of the ICCPR

Communication No.1334/2004, *Mavlonov and Sa'di v. Uzbekistan* (HRC 19 March 2009).

Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990.

Council of Europe, Convention on Access to Official Documents, CETS No.205 (June 18, 2009).

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5 (Nov. 4, 1950).

Declaration on the Freedom of Expression and Information, COM (Apr. 29, 1982).

G. A. Res. 59(I) 1946, Calling of an International Conference on Freedom of Information.

G.A. Res. 217 (III) A, 1948, Universal Declaration of Human Rights.

G.A. Res. 44/25, 1989, Convention on the Rights of the Child.

G.A. Res. 61/106, 2007, Convention on the Rights of Persons with Disabilities.

G.A. Res. 70/1, 2015, Transforming our world: the 2030 Agenda for Sustainable Development.

ILA, New Delhi Declaration of Principles of International Law Relating to Sustainable Development (Apr. 2, 2002).

Inter-Am. Ct. H.R., *Claude Reyes et al. v. Chile,* Series C No.151 (Sep. 19, 2006).

Inter-American Juridical Committee, *Principles on the Right of Access to Information,* CJI/RES. 147 LXXIII-O/08, (Aug. 7, 2008).

International Covenant on Civil and Political Rights 1966.

Kid's Talk: Freedom of Expression and the UN Convention on the Rights of the Child. [Online] Available: https://www.article19.org/data/files/pdfs/publications/children-kid-s-talk.pdf. (Jan.15, 1999)

O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, African Charter on Human and Peoples' Rights 1981.

OAS G.A. Res. 2607 (XL-O/10), Model Inter-American Law on Access to Public Information (June 8, 2010)

Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug.12, 1992).

The Public's Right to Know, Principles on Freedom of Information Legislation, ISBN 1 902598105.[Online]Available: https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf. (June 1999).

U.N. HROHC, The Special Rapporteur's 2017 report to the United Nations Human Rights Council.[Online]Available: http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/SR2017ReporttoHRC.aspx.

UN Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998.

Uttara Manohar, *A Layman's Guide to the Different Types of Mass Media*, Buzzle. [Online] Available: http://www.buzzle.com/articles/different-types-of-mass-media.html. (Aug.14, 2016)