

Freedom of Expression and Utilitarianism: Variants of Constitutional Standards

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Abstract: This Article is generally aimed at rediscovering the connection between the idea of utilitarianism and the right to freedom of expression. Herein, the history and criticism of utilitarianism and the notion of freedom within the theory is discussed. Freedom of expression, being the vital one to initialize the claims for other rights, is also given proper priority here. Freedom of expression, being a right to be associated with other parts of the society, need a fine line of control, which needs to be both precise and justified. Herein, utilitarianism is discussed with this specific right to have an idea on that justification.

Key Words: *Freedom of expression, Democracy, Constitutional Standard, Utilitarianism, Totalitarianism.*

Introduction

Human being is a social creature. Both emotionally and practically, they have to be together with each other. The bonding in a society is based on both rights and duties in both emotional and practical way. However far the emotions get influenced by the practicality of the right-duty bonds, legal concepts are to be based on the practical parts of it only i.e. rights and duties covering practical implications of human acts in a society.

At the base of being together, interests surround the practical purpose. Commonness of interests brings ahead two separate forms interactions, one is, conflict of interest and another is struggle for common interest. First one is basically a right-duty conflict and second one is common right association. Outcomes of such conflicts and struggles surrounding interests are actually the resources for social bonding.

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A utilitarian approach aims at maximizing the utility following a rule or, accomplishing an act. Though, there are sects within the theory that differs in some views, the core of the theory is to look at a situation to understand the balance of pain and pleasure and decide to take the way where the utility (pleasure) is maximized, both in quality and quantity.

Freedom of expression has a long history of struggle with the other part of the society. In the modern era of knowledge and science, religion seemed to have a bar on freedom of expression. Struggle of Copernicus and Galileo against the Vatican to express what they held true had been historical in the history of free expression. In Milton's *Areopagitica*, he said, "Truth emerges through Free Expression".² To find the truth, practically has been the priority of the majority of the society. For the satisfaction of knowing the truth with the practical efficiency comes along the knowledge of the truth. Therefore, on the face of the facts and circumstances, freedom of expression has its balance of utility in general and thus, the right is supported by the theory. Iver Jennings said, "Without freedom of speech, the appeal to reason which is the basis of democracy cannot be made".³

In the current article, we'll try to look at the circumstances of different countries, as in their constitutions, over the issue of Freedom of Expression. On the details of it, we'll try to take the justifications in the view of utilitarianism in different cases and situations arose.

George Bernard Shaw has said that our whole theory of freedom of speech and opinion for all citizens rests not on the assumption that everybody was right. But on the certainty that everybody was wrong on some point on which somebody else was right, so that there was a public danger in allowing anybody to go unheard.⁴

² Johan Milton, *Aeropagitica and Other Tracts*, 27 (1644).

³ Jennings, W.I., *Cabinet Government*, 13. [Cited in Dr. Madhabhusi Sridhar, *The Law of Expression, An Analytical Commentary on Law for Media* 18 (Asia Law House, Hyderabad, 18, (2007)].

⁴ George Bernard Shaw, *Socialism off Millionaires*, 16 (1901).

Freedom of Expression

Freedom

'Freedom' can have different meanings over the context of it. Here we're concerned with political freedom. Isaiah Berlin distinguished between a concept of negative freedom and a concept of positive freedom. Examination of these concepts helps to recognize the difference between freedom from constraint and the freedom that comes from self-mastery or self-realization. Understanding freedom with slavery is the freedom from constraint and freedom for thinking and flourishing according to one's own wish is more like self-mastery or self-realization. According to Kant "The fundamental postulate of liberty, is that, no man can be used as a means as man is an end to him as well as to the others".⁵

Freedom is the right and capacity of people to determine their own actions, in a community, which is able to provide for the full development of human potentiality. Freedom may be enjoyed by individuals but only in and through the community.

Freedom of Expression

Right to express one's ideas and opinions freely through speech, writing, and other forms of communication but without deliberately causing harm to others' character and/or reputation by false or misleading statements. Freedom of speech is the right to communicate one's opinions and ideas without fear of government retaliation or censorship. The term freedom of expression is sometimes used synonymously, but includes any act of seeking, receiving and imparting information or ideas, regardless of the medium used.

Democracy and Utility of Expression

The essence of freedom of expression, of course, is not the right to insult the beliefs of others, but rather the freedom to report or

⁵ Immanuel Kant, "Meta Physics of Morals". [Cited in Dr. Madhabhusi Sridhar, The Law of Expression, An Analytical Commentary on Law for Media 18 (Asia Law House, Hyderabad (2007))].

convey facts, opinions, philosophies, and worldviews in an effective manner, using both objective and subjective means. Freedom of expression empowers citizens through knowledge, opinion, and the possibility to gain their own voice. Within democracies, free expression allows citizens to challenge political leaders, journalists to uncover information for the public, and the public to ensure the accountability of their government. Without the principles of a free media and free speech, there could be no self-government. A suppression of speech, in its more painful consequence, would be the mental sterilization of the community.⁶

Expression is communication between the state and its citizens. The citizens, being human beings, can communicate the people who are running the state i.e. government. Therefore, to make the state as per the will of the citizens of it, the proper expression is required. The power of the will of the people, when authorized, is called democracy. For democracy to be flourished and effective, freedom of expression is very much needed. In modern democratic nations, where democracy is based upon indirect elections and the elections are held in a considerable gap of time, freedom of expression is essential to hold a nation as a state.

Constitutional and Legal Stance of Freedom of Expression in Different Countries

Constitution being the supreme law of the state has to be set for upholding the right. However, many of the country's constitutions do not hold the right and sometimes in different legislations, it restricts the right. We'll discuss over the state of freedom of expression in some of the countries.

In USA, congress shall make no law respecting an establishment of religion⁷, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a

⁶ Ernest William Hocking, "Freedom of the Press: A Framework of Principle" (A Report from the Commission on Freedom of the Press, 88-89, 1947).

⁷ Neisser, Eric (1991). Recapturing the Spirit: Essays on the Bill of Rights at 200. Rowman & Littlefield. p. 68. ISBN 978-0-945612-23-0.

redress of grievances. The five freedoms of the citizens of the United States of America include both Freedom of Press and Freedom of Speech.⁸ In the United States the First Amendment to the United States Constitution protects freedom of expression. There are several common law exceptions including obscenity, defamation, incitement, incitement to riot or imminent lawless action, fighting words, fraud, speech covered by copyright, and speech integral to criminal conduct etc.⁹

United Kingdom citizens have a negative right to freedom of expression under the common law¹⁰. In 1998, the United Kingdom incorporated the European Convention into its domestic law under the Human Rights Act. However, there is a broad sweep of exceptions including threatening, abusive or insulting words or behavior intending or likely to cause harassment, alarm or distress or cause a breach of the peace, sending any article which is indecent or grossly offensive with an intent to cause distress or anxiety etc. UK laws on defamation are among the strictest in the western world, imposing a high burden of proof on the defendant. However, the Education (No. 2) Act 1986 guarantees freedom of speech within institutions of further education and institutions of higher education as long as it is within the law.

The European Convention on Human Rights (ECHR), signed on 4 November 1950, guarantees a broad range of human rights to inhabitants of member countries of the Council of Europe, which includes almost all European nations. These rights include Article 10, which entitles all citizens to free expression. The Convention established the European Court of Human Rights (ECtHR). Any person who feels his or her rights have been violated under the Convention by a state party can take a case to the Court. Judgments finding violations are binding on the

⁸ U.S. Constitution amend. I.

⁹ *Roth v. United States*, 354 U.S. 476, 483 (1957). However, Justice Douglas, dissenting, wrote: “[T]here is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment.”

¹⁰ Klug, Francesca (1996). Starmer, Keir; Weir, Stuart, eds. *The Three Pillars of Liberty: Political Rights and Freedoms in the United Kingdom. The Democratic Audit of the United Kingdom*. Routledge. p. 165. ISBN 978-041509642-3.

States concerned and they are obliged to execute them. The Committee of Ministers of the Council of Europe monitors the execution of judgments, particularly to ensure payment of the amounts awarded by the Court to the applicants in compensation for the damage they have sustained.

Freedom of speech in Denmark is granted by their constitution. Any person shall be at liberty to publish his ideas in print, in writing, and in speech, subject to his being held responsible in a court of law¹¹. Censorship and other preventive measures shall never again be introduced. Hate speech is illegal according to the Danish Penal Code.¹² Any person who, publicly or with the intention of disseminating makes a statement threatening, insulting, or degrading a group of persons on account of their race, national or ethnic origin or belief shall be liable to a fine or to simple detention or to imprisonment for a term not exceeding two years.

France adheres to the European Convention on Human Rights and accepts the jurisdiction of the European Court of Human Rights. The Press Law of 1881, as amended, guarantees freedom of the press, subject to several exceptions. The Pleven Act of 1972 prohibits incitement to hatred, discrimination, slander and racial insults.¹³ France does not implement any preliminary government censorship for written publications. Any violation of law must be processed through the courts. The government has a commission recommending movie classification, the decisions of which can be appealed before the courts. Another commission oversees publications for the youth. *Article 5 of the Basic Law grants freedom of expression* for the Federal Republic of Germany, which also states that there is no censorship and that freedom of expression may be limited by law. The law of Germany as well as all 16 States of Germany regulates the

¹¹ Constitution of Denmark.

¹² Weinstein, James (2011). "Extreme Speech, Public Order, and Democracy: Lessons from The Masses". In Hare, Ivan; Weinstein, James. *Extreme Speech and Democracy*. Oxford University Press. p. 58. ISBN 978-0-19-954878-1.

¹³ Mbongo, Pascal (2011). "Hate Speech, Extreme Speech, and Collective Defamation in French Law". In Hare, Ivan; Weinstein, James. *Extreme Speech and Democracy*. Oxford University Press. p. 229. ISBN 978-0-19-954878-1.

press¹⁴. Freedom of speech is regulated in three parts of the Constitution of Sweden. Chapter 2 Fundamental Rights and Freedoms protects personal freedom of expression "whether orally, pictorially, in writing, or in any other way". Freedom of the Press Act protects the freedom of printed press, as well as the principle of free access to public records. Fundamental Law on Freedom of Expression extends protections to other media, including television, radio and web sites.

In Hong Kong, Under "Chapter III: Fundamental Rights and Duties of the Residents" of the Hong Kong Basic Law¹⁵, it says, Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike. Chapter III, Article 21 of the Japanese constitution, guarantees freedom of speech. There are few exemptions to this right and the media and authorities tolerate a very broad spectrum of opinion.

There is heavy government involvement in the media in china, with many of the largest media organizations being run by the Communist-Party-led government.¹⁶ Currently, social networking sites such as Twitter, Facebook, and *Snapchat* are banned as a whole and books and foreign films are subject to active censorship.¹⁷ The biggest search engine, Google however, was unbanned on the 25th anniversary of the massacre of Tiananmen Square. However, usage is still limited. Beijing has also lifted bans on foreign websites within the Shanghai free trade zone. Although China's constitution deals with citizens' freedom of speech, the language has been vague, thus giving

¹⁴ Esser, Frank; Hemmer, Katharina (2008). "Characteristics and Dynamics of Election News Coverage in Germany". In Strömbäck, Jesper; Kaid, Lynda Lee. Handbook of Election Coverage Around the World. pp. 291–292. ISBN 978-0-8058-6037-5.

¹⁵ "Chapter III : Fundamental Rights and Duties of the Residents". The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. July 13, 2012.

¹⁶ [Constitution of the People's Republic of China]. The Central People's Government of the People's Republic of China (in Chinese). Retrieved September 26, 2014.

¹⁷ "Freedom of Expression and the Internet in China". A Human Rights Watch Backgrounder.

more space for the government's arbitrary and unilateral judgments. For example, according to the Article 5, No unit or individual may use the Internet to create, replicate, retrieve, or transmit the some specific kinds of information.

South Africa is one of the most liberal in granting freedom of speech. Despite, South Africa's racial and discriminatory history, the Constitution of the Republic of South Africa of 1996 precludes expression that is somehow bases hatred. Freedom of speech and expression are both protected and limited by 16 section in the South African Bill of Rights and chapter 2 of the Constitution.

The Indian Constitution apparently guarantees freedom of speech to every citizen, but itself allows significant restrictions.¹⁸ Article 19 of the Indian constitution states regarding this. The National Security Act of 1980 restricts freedom of speech. Freedom of speech is also restricted by Section 124A of the Indian Penal Code, 1860 which deals with sedition and makes any speech or expression.

Articles 19 of the Constitution of Pakistan guarantees freedom of speech and expression, and freedom of the press with certain restrictions. Blasphemy against Islam is illegal in Pakistan. In practice, local and national politicians with political power or mandate can censor any criticism by opposition or common man through authorities, monopoly or fear and violence.

In Sudan, Blasphemy against religion is illegal in Sudan under Blasphemy laws and restricts freedom of expression in a considerable way. Despite the Tunisian revolution, freedom of speech is still a controversial issue and a subject of uncertainty.

Artists, journalists, and citizens still face many kinds of harassment when they try to express their ideas freely. Also in Indonesia, Blasphemy against religion is illegal in Indonesia under blasphemy law. Blasphemy against Islam is illegal in Saudi Arabia, under punishment of death.

¹⁸ "19. Protection of certain rights regarding freedom of speech, etc." (doc). The Constitution of India. 1949-11-26. p. 8

Blasphemy against Islam is illegal in Iran. According to the Press Freedom Index for 2007, Iran ranked 166th out of 169 nations. Only three other countries - Eritrea, North Korea, and Turkmenistan - had more restrictions on news media freedom than Iran. The government of Ali Khamenei and the Supreme National Security Council imprisoned 50 journalists in 2007 and all but eliminated press freedom. Reporters Without Borders (RWB) has dubbed Iran the "Middle East's biggest prison for journalists."

The United Nations Universal Declaration of Human Rights, adopted in 1948, provides, in Article 19, that, 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.

Technically, as a resolution of the United Nations General Assembly rather than a treaty, it is not legally binding in its entirety on members of the UN. Furthermore, whilst some of its provisions are considered to form part of customary international law, there is dispute as to which. Freedom of speech is granted unambiguous protection in international law by the International Covenant on Civil and Political Rights which is binding on around 150 nations.

In adopting the United Nations Universal Declaration of Human Rights, Ireland, Italy, Luxembourg, Monaco, Australia and the Netherlands insisted on reservations to Article 19 insofar as it might be held to affect their systems of regulating and licensing broadcasting.

Utilitarianism

Definition

Utilitarianism is one of the best-known and most influential moral theories. Like other forms of consequentialism, its core idea is that whether actions are morally right or wrong depends on their effects. More specifically, the only effects of actions that

are relevant are the good and bad results that they produce. A key point in this article concerns the distinction between individual actions and types of actions. Act utilitarian focus on the effects of individual actions (such as John Wilkes Booth's assassination of Abraham Lincoln) while rule utilitarian focus on the effects of types of actions (such as killing or stealing).

Utilitarians believe that the purpose of morality is to make life better by increasing the amount of good things (such as pleasure and happiness) in the world and decreasing the amount of bad things (such as pain and unhappiness).

They reject moral codes or systems that consist of commands or taboos that are based on customs, traditions, or orders given by leaders or supernatural beings. Instead, utilitarians think that what makes a morality be true or justifiable is its positive contribution to human (and perhaps non-human) beings.

The most important classical utilitarians are Jeremy Bentham (1748-1832) and John Stuart Mill (1806-1873).¹⁹ Bentham and Mill were both important theorists and social reformers. Their theory has had a major impact both on philosophical work in moral theory and on approaches to economic, political, and social policy. Although utilitarianism has always had many critics, there are many 21st century thinkers that support it.

The task of determining whether utilitarianism is the correct moral theory is complicated because there are different versions of the theory, and its supporters disagree about which version is correct. This article focuses on perhaps the most important dividing line among utilitarians, the clash between act utilitarianism and rule utilitarianism. After a brief overall explanation of utilitarianism, the article explains act utilitarianism and rule utilitarianism, the main differences between them, and some of the key arguments for and against each view.

¹⁹ Habibi, Don (2001). "Chapter 3, Mill's Moral Philosophy". John Stuart Mill and the Ethic of Human Growth. Dordrecht: Springer Netherlands. pp. 89–90, 112. ISBN 978-90-481-5668-9.

Criticism of Utilitarianism

Distastefulness

By far and away the most common criticism of utilitarianism can be reduced simply to: "I don't like it" or "It doesn't suit my way of thinking".

For an example of this, here's something from someone who might prefer to remain nameless. "Producing the greatest good for the greatest number is fine as long as you are not hurting someone you really love in the process.

Utilitarianism is alleged to be faulty in the way it requires us to think about all kinds of actions - to apply the felicific calculus in disregard to any feared distaste of the result. For example, some issues or potential actions are (to a non-utilitarian) "morally unthinkable".

Utilitarianism does indeed have something to say on this issue - otherwise it would suggest that the life of this extra individual was of no importance. The argument from distaste is often expressed as a suggestion that utilitarianism doesn't provide enough support for individuals' rights. It is quite strange that many people will accept "the pursuit of happiness"²⁰ as one of life's fundamental entitlements, yet should suddenly develop ascetic inclinations as soon as the quarry appears obtainable.²¹

Happiness, in the utilitarian sense, includes the exemption from suffering. A charge of triviality for pleasure can perhaps be made, if our only frame of reference is the knowledge of felicific states currently achievable, but it is altogether less plausible against the depths of suffering currently experienced by the world's less fortunate beings.

²⁰ Gay, John (2002). "Concerning the Fundamental Principle of Virtue or Morality". In Schneewind, J. B. *Moral Philosophy from Montaigne to Kant*. Cambridge University Press. pp. 404–5. ISBN 978-0521003049.

²¹ Hume, David (2002). "An Enquiry Concerning the Principles of Morals". In Schneewind, J. B. *Moral Philosophy from Montaigne to Kant*. Cambridge University Press. p. 552. ISBN 978-0521003049.

Impossibility

The second most common criticism of utilitarianism is that it is impossible to apply - that happiness (etc) cannot be quantified or measured, that there is no way of calculating a trade-off between intensity and extent, or intensity and probability (etc), or comparing happiness to suffering. If happiness was not measurable, words like "happier" or "happiest" could have no meaning: "I was happier yesterday than I am today" would make no sense at all - it can only have the meaning which we (or most of us, at any rate) know that it has if we assume that happiness can be measured and compared.²²

(One is reminded of the story of the mother handing out home-baked cookies as a special treat to her family. The youngest child, on finding his cookie to be slightly smaller than the others, smashes it up and storms out in tears. In his disappointment, he interprets a fine gift as an affront, and he would rather make things worse than better - but then he's only a child. Adults, of course, have much less obvious and more subtle means of smashing their cookies.)

Initially, it seems very odd that the landowner should ask for a penny. If nothing can be compensation, why does he not ask for nothing? What use is this tiny amount of money? Far from suggesting that the trees are invaluable, it suggests that any money he could get for them is worthless to him! But, we may still ask, why the penny? And then we realize: it's a token; a chip in a psychological game (often called "Poor me!"). One can imagine the penny being carried about by the ex-landowner, and produced to elicit pity from those unfortunates he manages to convince to listen to his story. That will be his best effort at compensating himself.

In the original scenario, the sensible thing to do would be to ask for enough money to buy a new bit of land and to plant a new avenue of limes on it; but, since the principle of utility does not

²² Schneewind, J. B. (2002). *Moral Philosophy from Montaigne to Kant*. Cambridge University Press. p. 446. ISBN 978-0521003049.

imply the absence of fools, this criticism has no effect, and we needn't consider this matter further.

Impracticality

The third most common criticism is that it is too difficult to apply - that we cannot calculate all the effects for all the individuals (either because of the large number of individuals involved, and/or because of the uncertainty). The principle of utility is, essentially, a description of what makes something right or wrong - so in order for it to fail, someone must give an example of something which is useful but obviously wrong. The principle does not imply that we can calculate what is right or wrong - completely accurately, in advance, or at all! It does not harm the principle of utility at all merely to comment that it is difficult for us to work out what is right - it is merely a lament against the human condition.²³

Overlapping Controversies between Utilitarianism and Freedom of Expression

Totalitarianism: "Truth Is the Mortal Enemy"

The rise of totalitarian regimes in the 20th century had an opposite dynamic: eradicating all freedom. Totalitarian regimes took complete control of the media, making it into an instrument for conveying state ideology, and attempting to control thought and conscience through propaganda and the intimidation of deviant or dissenting views and opinions. Indeed, such regimes moved immediately to control expression upon seizing power.

In the earliest days of the Russian Revolution, for example, the Bolsheviks imposed censorship, using tactics such as destroying the presses of political rivals and destroying private ("bourgeois") libraries. The Bolsheviks' leader, Vladimir Lenin (1870–1924), set the early direction of state propaganda in his famous maxim "A lie told often enough becomes the truth."

²³ Bentham, Jeremy (January 2009). *An Introduction to the Principles of Morals and Legislation* (Dover Philosophical Classics). Dover Publications Inc. p. 1. ISBN 978-0486454528.

Stalin further institutionalized censorship by establishing a state body to oversee censorship (called Glavlit in Russian) and the Writers Union (1932), which became the only legal union for writers. These actions by Stalin were instruments for directing every aspect of public expression and for establishing socialism as the only allowable ideology. In the terror under Stalin's rule (the height of repression lasted from the late 1920s to the late 1930s), thousands of writers, journalists, and artists who refused this straitjacket found themselves in prison camps and even graves.

Totalitarianism vs. Free Thought

Within totalitarian regimes, one finds not just unimaginable suffering, but also remarkable profiles in courage of individuals who struggled to write freely and reveal the truth for the world and for history. Such courageous individuals include the Cuban author Reinaldo Arenas (1943–90), the Czech dissident Vaclav Havel (1936–), the Russian author of the 1973 *The Gulag Archipelago*, Alexander Solzhenitsyn (1918–), and many, many others. For these individuals, intellectual freedom could not be compromised because it meant compromising truth itself. Those who were imprisoned found ways both to write and to smuggle their works out of their countries, creating a distinct new form of literature called prison writing. Their pursuit of truth and their efforts to overcome censorship define the meaning of free expression.

Freedom of Expression: A Universal Standard

The apocalyptic destruction and murder carried out by Nazi Germany and other Axis powers caused the international community to create new institutions and instruments after the war to protect human rights and prevent a repeat of the war's atrocities. The UN's first act was to create the Human Rights Council, chaired by Eleanor Roosevelt. For democratic countries, free expression was among the primary goals of the new human rights regime. Article 19 of the Universal Declaration of Human Rights (1948) thus declares,

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.

Conclusion

Utilitarianism is one of the core materials for the democratic society, a legit logic to uphold will of the mass over the strength of the few. The expression being the instrument to build up the democratic society, it is as always to be maintained that, freedom of expression always has to be in some debt with Utilitarianism. For the greater good, for the greater happiness, some can be sacrificed and thus, the regulations surrounding freedom of expression holds its base upon Utilitarianism.