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DO WE REALLY NEED THIS NEW RIGHT?

A RESPONSE TO KAROL JAKUBOWICZ'S CALL FOR A RIGHT TO PUBLIC EXPRESSION

In this wide-ranging and panoramic essay, Karol Jakubowicz sets out a range of values, with almost all of which I am in sympathy. Nevertheless, I have at least two substantial worries. The first is that Jakubowicz's effort to conceptualise these widely differing values under a single right – the right to public expression (RPE) – is somewhat awkward and implausible. And second, it is unclear, particularly given the data that he rehearses on the explosion of access to new information technologies, why RPE needs formal recognition as a separate and “new” human right. Arguing for new rights is always fraught, and where, as I think is the case here, existing instruments recognising the right to freedom of expression (suitably understood in light of new circumstances) do the job, it is best to leave well enough alone.

1. The meaning of RPE: Jakubowicz never says exactly what this right is. On the face of it, the crucial idea would seem to be that it is a right of all persons to have a voice in public discourse: a right, that is, to be able to speak, ‘audibly’ as it were, in public, and a concomitant right to access information that is available from others who are

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themselves ‘speaking’.² In this regard, Jakubowicz emphasises that the right rests in individuals – and criticises, rightly I think, the mainstream media as no longer adequate proxies for the enjoyment of the right by persons.

So far, so good. Later in the essay, however, Jakubowicz turns to the familiar themes of the need for support for public service broadcasting, for the creation (with public participation), and broadcast, of public interest content by public service broadcasters, for requiring government bodies and officials to be receptive to input through electronic means from citizens, and so forth.

While these are all worthy goals, it is not evident how they fit under a right to public expression. If these goals are underpinned by a kind of right, it would presumably be a right of people to be provided with information that would be salient for them to participate in public democratic life. Perhaps they involve a right to be in a position to make informed judgments about matters of public interest, and/or a right to be able to make informed contributions to public debate – as opposed to the right simply to be able to contribute.

But this is an entirely different matter from the right to express oneself in public and to access the expression of others. After all, if there were the expectation that, in the exercise of the right of some to public expression (rather than of the undefined right to communicate publicly), a decent amount of public interest content would be disseminated, there would be no need for duplication by public authorities. In other words, the value of creating public service content is conceptually, and even empirically, distinct, from the value of freeing up expression.

2. Formally recognising RPE: This ambiguity, or perhaps overexpansiveness, in the delineation of the RPE carries over to Jakubowicz’s argument that the RPE needs to be formally embraced as a new right in international instruments. In his words, that there is a need for a “clear and unequivocal recognition of” RPE; a “new right” needs to be considered; and the old right to freedom of expression needs to be reinterpreted in light of new technologies.

Like others, some of whom Jakubowicz mentions, I do not see why we need a new right, particularly given that, as he eloquently explains, new technologies have enabled expression (that is, the dissemination by individuals of information) which has the

² I write of a right to receive, or access, otherwise available information. What I mean by this is not the right to access information held by governments, as is familiar from the FOI advocacy context. Rather, I have in mind the basic right to receive, which is correlative to the classic right to impart, information, as provided for in the freedom of expression articles of the main international instruments. For example, this is a right against government interference with one’s efforts to access already existing (and legal) websites, newspaper and electronic media content. See, e.g., the UN Human Rights Committee decision in *Mavlonov v. Uzbekistan*, Communication 1334/2004, which explicitly locates this right within Article 19 of the ICCPR.

potential to reach wider audiences than ever before, and without government interventions of any notable sort:

[T]he major hurdles to the exercise of the right to public expression are being removed, at least in developed countries. Individuals do not now need the State to give them the tools of public expression. Anyone with the right equipment and the right cultural and communication competence can broadcast their news and views to the entire world.

Indeed, “the floodgates of universal public expression are open”.

Given these developments, what is missing that could only be supplied by recognition of a new right? There are two possibilities, as far as I can see, but neither provides what Jakubowicz seems to need.

First, he may have in mind that a new right needs to be recognised in order to justify requirements on government to ensure access to new technologies, particularly the internet – including through appropriate training.

Yet the problem of access to ‘places’ in which one may make one’s views known to others has been around as long as the concept of freedom of expression – though, to be sure, access to the internet in particular has arisen as an issue only over the last few years. The right to assemble for communicative purposes in public places, the right to demonstrate in those same places, the right to speak from a soapbox – these are precisely issues of access to willing audiences so that one can make one’s own messages available to them. There is a considerable jurisprudence and policy history on these issues in which freedom of expression has taken a central place. Of course, some of the types of communication, and in particular some of the new means of dissemination, are very different now. But it is unclear why that fact requires, so far as the issue of access to audiences goes, a re-interpretation of an existing right, let alone the promulgation of a new one.

Indeed, even the issue of the provision of, so to speak, equipment to enable access, has an existing history. Consider, for example, arguments for the provision (in the old days) of library services so that citizens could access already existing (and disseminated) information. Issues of this sort too have been set out and argued precisely under the rubric of freedom of expression for many years. While it has been unclear to some degree what the basic right of freedom of expression has to say about providing the resources or ‘equipment’ to facilitate access to those otherwise unable to make their views known in public, I do not see that the emergence of new technologies (and hence

new equipment needs: computers, mobile phones, and the like) has altered this issue as a conceptual matter.³

The foregoing rests on the narrow reading of the RPE as a right of individuals to disseminate (and access) information through emergent technologies. The second possible contribution that could be made by recognition of a new RPE would relate to the wider reading of that right as including a right to be provided with salient information of public interest, and a corresponding duty on the state to assist in its production and dissemination – in the form of public service broadcasting, inclusion of individual citizens in the production of public interest content, and so forth.

But the provision of salient information and the corresponding duty do not sit at all comfortably under the rubric of an individual right to expression. There may well be, as I have suggested, an argument from the nature of democracy, or of democratic participation, to the necessity that citizens be provided with this sort of information. But this would be a far cry from the basic right to be able to speak, or to access existing information, where it is precisely inappropriate for the state to make distinctions based on the quality, or indeed (almost) any other feature of the concerned content: no advocate of rights of expression feels comfortable with the notion of the government choosing, as a general matter, which content may or may not be disseminated by speakers or accessed by ‘listeners’.

My concern here is that, lumping these latter values, relating to getting information of public interest out to citizens, together with the right to express oneself and to access the expressive activity of others, will turn an intuitive, well-established, and already-existing right into one that is less intuitive, less ‘saleable’, and altogether more hybrid. Better to keep separate things separate, to fashion policy arguments for each of them in the terms best suited to their particular content – and hence not to fight a battle for a right to public expression in the name of justifying support for public service broadcasting and related matters.

In sum, if RPE is construed narrowly as a right to express oneself in and to the public, and to access otherwise available information, it is a right that is already well established in international human rights law – although perhaps its contours have yet

³ Jakubowicz asserts that the very notion of a right, as opposed to a freedom, implies an obligation on the state to enable its enjoyment. Of course, if this were so, it would follow nearly immediately from the original right to freedom of expression, in light of new technologies, that all persons should be provided access to, e.g., the internet, and even relevant ancillary education. But the view that a right entails an obligation on the state to enable its enjoyment (rather than an obligation on it not to interfere when others attempt to assert it) is not widely shared, at least not in the philosophical or legal literature on rights. That said, I actually agree with Jakubowicz on this: there is an argument for guaranteeing basic access, from the existence of the underlying right (of freedom of expression). This is a tough argument, however, and not one to be derived simply from the distinction between rights and freedoms.

to be fully articulated in the information age. And if it is construed broadly to embrace the values of public service broadcasting and public interest content, it is a right with too many parts, which do not fit well together, and is too unwieldy for establishment in the pantheon of international human rights. In either case, there is no strong reason for recognizing RPE as a separate right. At least, Jakubowicz has not yet given us such a reason.