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978-1-107-08386-8 - The United Nations and Freedom of Expression and Information: Critical Perspectives

Edited by Tarlach McGonagle and Yvonne Donders

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The development of freedom of expression
and information within the UN: leaps
and bounds or fits and starts?

TARLACH MCGONAGLE

1 Introduction

This chapter tells the story of how the rights to freedom of expression and information have been shaped by the United Nations' (UN) institutional dynamics over the years. It is an abridged version of the story because it does not purport to offer a full institutional history of those rights – a version which would require meticulous analysis of the workings of various committees over a protracted period of time. Instead, the chapter gives an account of how the growth of the rights to freedom of expression and information has been both stimulated and stymied by different factors in the particular institutional context of the UN. It traces the broad contours of the two rights by connecting the largest conceptual, normative, historical and institutional dots. This sketching exercise sets out the parameters not only of the present chapter, but of the book as a whole.

The chapter opens with a brief exploration of the contiguous nature of the rights to freedom of expression and information. This necessarily involves reflection on the instrumental role that the media and new communications technologies can play in the realization of both rights in practice. The remainder of the chapter has an overtly institutional focus. Its next three substantive sections correspond to three broad – roughly chronological, but occasionally overlapping – phases in the development of freedom of expression and information at the UN. Each period is denoted by its key features or aspirations: trailblazing, consolidation and expansion, and the quest for coherence and consistency. Various thematic challenges have presented themselves during these periods, a number of which are woven into the chapter's narrative. Finally, after offering some substantive conclusions, the chapter will explain the objectives and structure of the book as a whole.

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As suggested by the chapter's title, the development of the rights to freedom of expression and information has had a chequered history within the UN. Bold rhetoric characterized the UN's initial approach to the protection of the rights, but the promise of that rhetoric was soon thwarted by the escalation of Cold War politics. The enshrinement of the rights, first in Article 19 of the Universal Declaration of Human Rights (UDHR or Universal Declaration) and then in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), provided hard-and-fast bases for the later consolidation and expansion of the right. Relevant provisions in subsequent treaties have tended to replicate or build on Article 19, ICCPR, for instance, by applying its core principles to specific groups or thematic concerns (e.g., the rights of children and persons with disabilities).

As well as expanding the scope of the rights to freedom of expression and information, later treaties have also helped to ensure that the rights are interpreted in an evolutionary manner that reflects societal and technological developments. In the same vein, the Human Rights Committee's General Comment No. 34 on Article 19, ICCPR,¹ adopted in 2011 – nearly thirty years after its previous General Comment on the same article – seeks to provide a comprehensive, coherent and modern interpretation of the scope and content of these rights. General Recommendation No. 35 on racist hate speech, adopted by the Committee on the Elimination of Racial Discrimination (CERD) in 2013, has a similar purpose and potential in respect of relevant provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Besides treaty law, various other institutional forces contribute on an ongoing basis to the development of these rights. The UN Educational, Scientific and Cultural Organization (UNESCO, a specialized agency of the UN) and the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (a specialized mandate) are good examples of such institutional forces.

2 Freedom of expression and information: contiguous rights

2.1 *Conceptual considerations*

Circumspection is required when describing the relationship between the rights to freedom of expression and information. Their relationship is

¹ HRC, General Comment No. 34: Article 19 (Freedoms of opinion and expression), UN Doc. CCPR/C/GC/34, 12 September 2011.

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contiguous and complicated; logical and paradoxical. It is characterized by mutual dependencies. Freedom of expression and information contribute to the opinion-forming process in different ways. Information is the basis for expression that seeks to communicate with and persuade others, as well as for participation in public affairs. In that sense, information can be seen as antecedent to expression. However, expression can also produce and disseminate information, which suggests a more complex and symbiotic relationship. The availability and accessibility of information are prerequisites for any well-functioning democratic society. The most commonly advanced rationales for freedom of expression suggest, if only implicitly, that freedom of information is subsumed in freedom of expression. Normative articulations of the right to freedom of expression similarly tend to style it as a compound right, comprising the rights to freedom of opinion, and to seek, receive and impart information and ideas.

Theoretical justifications for the protection of freedom of expression are numerous, rich and varied.² Each of the theories has 'explanatory power' and 'serious weaknesses' and there is a 'synergy among the various explanations for freedom of expression that is lost when the discussion deals with the strengths and weaknesses of a single theory'.³ It therefore makes sense not to seek to ground freedom of expression in any 'unitary principle'⁴ but to be cognizant of the 'full panoply of justifications'.⁵ Those justifications tend to style freedom of expression as a vital vector for the advancement of individual autonomy or self-fulfilment, or for the advancement of democratic practices or societal interests. The main rationales for freedom of expression could be briefly summarized as: self-fulfilment/individual autonomy; the advancement of knowledge/discovery of truth/avoidance of error; effective participation in democratic society; self-government; distrust of government/slippery

² See generally: E. Barendt, *Freedom of Speech*, 2nd edn (Oxford University Press, 2005); F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982); W. Sadurski, *Freedom of Speech and Its Limits* (Dordrecht/Boston/London: Kluwer Academic, 1999); T. M. Scanlon, 'A Theory of Freedom of Expression', in T. M. Scanlon, *The Difficulty of Tolerance* (Cambridge University Press, 2003), 6–25; T. I. Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, 1966).

³ L. A. Powe, Jr., *The Fourth Estate and the Constitution: Freedom of the Press in America* (University of California Press, 1991), 240.

⁴ F. Schauer, 'Free Speech and the Argument from Democracy', in J. R. Pennock and J. W. Chapman (eds.), *Liberal Democracy: Nomos XXV* (New York University Press, 1983), 242. See also, Schauer, *Free Speech*, 14.

⁵ Powe, *Fourth Estate*, 240.

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slope arguments. Other justifications include: societal stability and progress; tolerance and understanding/conflict prevention or resolution, and the enablement of other human rights.

Any analysis of the rights to freedom of expression and information would be incomplete without due consideration of the position, role and freedom of the media/press and other communication and information technologies. The media play a crucial instrumental role in the realization of the right to freedom of expression. In practice, information and ideas are circulated widely by the media and debate is conducted extensively in the media. By virtue of their reach, speed, influence and impact, more often than not, the media are the most effective means of receiving, imparting and seeking information and ideas. But the media are much more than just sheets of typed paper or ‘wires and lights in a box’;⁶ they select, push, frame and manage (editorial) content. These are all complementary roles that generate considerable power and influence for the media in society. Thus, the media (as traditionally understood) have come to be regarded as ‘an essential dimension of contemporary experience’⁷ and as ‘the central *institution* of a democratic public sphere’.⁸

The media’s importance stems from both their role as society’s public watchdog or the Fourth Estate, monitoring and checking misuse and abuse of power by the State and other powerful forces in society. It also stems from the media’s ability to create forums in which democratic deliberation and debate on matters of public interest can take place. This can be termed participation *through* the media. Another important dimension to participation (albeit one that is less widely appreciated) is participation *in* the media, i.e., in media decision-making structures and processes. The distinction between participation in and through the media is important,⁹ particularly for disadvantaged or disenfranchised groups in society. Participation in the media implies ‘participation in the production of media output (content-related participation) and in media

⁶ E. R. Murrow, ‘Wires and lights in a box’ speech, Radio Television News Directors Association Convention, Chicago, 15 October 1958, www.rtdna.org/content/edward_r_murrow_s_1958_wires_lights_in_a_box_speech#.U6ljALRRaXg (last visited 23 June 2014).

⁷ R. Silverstone, *Why Study the Media?* (London: Sage, 1999), 1. See also, P. Dahlgren, *Television and the Public Sphere: Citizenship, Democracy and the Media* (London: Sage, 1995), 155.

⁸ (emphasis per original). C. E. Baker, ‘Viewpoint Diversity and Media Ownership’, *Federal Communications Law Journal* 60(3) (2009), 654.

⁹ N. Carpentier, *Media and Participation: A Site of Ideological–Democratic Struggle* (Bristol/Chicago: Intellect, 2011), 66–70.

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organizational decision-making (structural participation)', which enhances the potential for members of different groups in society to influence how they are represented in the media.¹⁰ Self-representation and empowerment are strengthened through participation in the media.

Advances in information and communications technologies have transformed the media environment of the past and they clearly have far-reaching consequences for how information and ideas are disseminated and processed. The internet holds unprecedented potential for multidirectional communicative activity: unlike traditional media, it entails relatively low entry barriers. The participatory architecture of Web 2.0 is particularly conducive to sharing information and ideas and participating in public debate. Whereas in the past it was necessary to negotiate one's way through the institutionalized media in order to get one's message to the masses, this is no longer the case. There is reduced dependence on traditional points of mediation and anyone can, in principle, set up a website or communicate via social media. While there are no guarantees that an individual's message will actually reach wide audiences, the capacity to communicate on such a scale clearly does now exist.

Given the interactive and many-to-many character of social media,¹¹ it is difficult to position them in a traditional institutional or institutionalized media setting; rather, they operate around existing institutionalized media. In different ways, they complement, enhance, compete with, challenge and even disrupt traditional media. Besides social media, other Internet-based actors, e.g., search engines, also determine the shape of freedom of expression and information today. The media are therefore no longer the main moderators of public debate or the main gatekeepers of the information highways and byways. The complexity of the evolving media, communication and information ecosystem poses a gamut of new regulatory dilemmas.¹² It also calls for a thorough reappraisal of traditional understandings of the rights to freedom of expression and information in order to ensure their optimal application in the evolving ecosystem.

¹⁰ *Ibid.*, 68.

¹¹ See generally, E. Siapera, *Understanding New Media* (Los Angeles, CA: Sage, 2012) and C. Fuchs, *Social Media: A Critical Introduction* (London: Sage, 2014).

¹² See generally, K. Jakubowicz, *A New Notion of Media?: Media and Media-Like Content and Activities on New Communications Services* (Strasbourg: Council of Europe, April 2009).

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2.2 *Freedom of expression and information in an emergent institutional framework*

These conceptual and terminological considerations, confluences and confusions have been centrally relevant to the UN's engagement with the rights to freedom of expression and information. Indeed, they pre-date it: in his famous 'Four Freedoms' State of the Union address in 1941, Franklin Delano Roosevelt looked forward to 'a world founded upon four essential human freedoms': freedom of speech and expression, freedom of worship, freedom from want and freedom from fear.¹³ The Four Freedoms later had a palpable influence on the preamble of the Universal Declaration of Human Rights. It has been reported that Roosevelt, while thinking through these freedoms in closed circles before delivering his famous address, identified freedom of information as a fifth freedom, distinguishing between 'freedom of knowledge, freedom of information' and 'freedom to express oneself'.¹⁴ This could suggest that Roosevelt saw both the commonalities and distinctions of both rights and was trying to figure out whether it would be best to calibrate them as an integrated right or as separate rights.

Writing in 1953, Salvador P. López – then UN rapporteur on freedom of information, explained that the *term*, "freedom of information" is a relatively new one', while the *concept* 'is old, being little more than the aggregate of the more familiar antecedent principles of freedom of thought, freedom of expression and freedom of the Press'.¹⁵ On such a reading, 'freedom of information' is taken to cover a cluster of related freedoms.

Over the years, the two terms have not been used entirely consistently across the UN. The term, freedom of information, was initially in vogue and it was taken to cover freedom of expression, before that approach was inverted so that freedom of expression (covering freedom of information), became the dominant phrase. The adoption of the Universal Declaration of Human Rights appears to have been the major catalyst for this shift in terminological preferences. Freedom of expression remains the conventionally used term today and its dominance is attested to by its

¹³ F. D. Roosevelt, 'The four freedoms', State of the Union Message, 6 January 1941.

¹⁴ J. H. Burgers, 'The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century', *Human Rights Quarterly* 14 (1992), 468–9.

¹⁵ S. P. López, *Freedom of Information*, Report by the Rapporteur on Freedom of Information, UN ECOSOC, Official Records, 16th Session, Supp. No. 12 (New York: United Nations, 1953), 2.

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prevalence in the texts of relevant international human rights treaties. Freedom of information tends to be subsumed into a more capacious understanding of freedom of expression. Nevertheless, ‘freedom of information’ has since acquired the autonomous meaning of ‘freedom of access to information’ and has itself become a conventionally used term in its own right.¹⁶

3 Trailblazing

3.1 *Towards a Universal Declaration of Human Rights*

The architects of the post-war international order were charged with a most daunting task. They had to overcome their fear of the past and create robust institutions that would embrace the future. They had to write bold texts that would provide universal guarantees of a panoply of human rights for everyone without distinction everywhere. It was significant that references to universal human rights were included in the Charter of the United Nations.¹⁷ The inclusion of such references constituted authoritative grounding for the further development of human rights, even if the Charter ‘did not say what those rights may be, and no one knew whether any rights really could be said to be universal, in the sense of being acceptable to all nations and peoples, including those not yet represented’ in the UN.¹⁸ It is also noteworthy that the potential of the human rights provisions is trammelled by the provisions for the protection of national sovereignty.¹⁹ These observations have led to the Charter’s human rights provisions being called ‘a glimmering thread in a web of power and interest’.²⁰

That thread was promptly picked up during the drafting of the Universal Declaration of Human Rights. The right to freedom of expression posed particularly acute challenges. With long and venerable traditions in civilizations across the world, the right has also been persistently honoured in the breach. There was no real blueprint for its affirmation, at least not at the universal level. Given the tabula rasa nature of the drafting exercise, the drafters sought inspiration from a wide range of

¹⁶ See generally, M. McDonagh, ‘The Right to Information in International Human Rights Law’, *Human Rights Law Review* 13:1 (2013), 25–55.

¹⁷ See, for example, Articles 1, 13, 55 (*juncto* 56), 62 and 68.

¹⁸ M. A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), 19.

¹⁹ *Ibid.* ²⁰ *Ibid.*

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legal, political, religious and philosophical sources. They looked at international precedents – such as they were²¹ – as well as practices from the national level. They needed to formulate a provision that would do justice to the differentiation inherent in prevalent understandings of what the right entails, yet provide a textual basis for its consistent interpretation and effective realization in practice.

In 1948 the UN General Assembly proclaimed the Universal Declaration of Human Rights as ‘a common standard of achievement for all peoples and all nations’. The very idea of a universal declaration of human rights was tremendously ambitious and ground-breaking, but so, too, was its content. Some of the drafters, like Eleanor Roosevelt, harboured the hope that it ‘may well become the international Magna Carta of all men everywhere’.²² Yet, its ambition was modest in other respects, creating moral obligations, not legal ones. It is declaratory and exhortatory in character and sought to contribute to the bigger project of a full-blown international bill of human rights. Although the Universal Declaration does not purport to be legally binding, the majority of its provisions have come to acquire legally binding status through customary international law. In that sense its actual impact has surpassed its original, formal ambition.

Article 19 of the Universal Declaration is probably the best-known free expression provision in any international instrument and it is certainly the firmest foundation stone in the UN’s protection of freedom of expression. It sets out the right to freedom of expression 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.

At first glance, it appears to be unequivocal and to broker no exceptions or restrictions. Such a reading of the provision would be erroneous, however. The Declaration’s ‘integrated articles’ should not be read as a

²¹ For a succinct overview of ‘Freedom of Information prior to the United Nations’, see López, *Freedom of Information*, 4–6; K. Nordenstreng and T. Seppä, ‘The League of Nations and mass media: the rediscovery of a forgotten story’, Paper presented at the 15th Conference of the International Association for Mass Communication Research (IAMCR), Section of International Communication session ‘Communication and Peace: The Role of the Media in International Relations’, New Delhi, 27 August 1986.

²² Cited in Glendon, *World Made New*, 166 and in J. P. Humphrey, *Human Rights & the United Nations: A Great Adventure* (New York: Transnational, 1984), 73.

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‘string of essentially separate guarantees’.²³ The drafters of the Universal Declaration deliberately opted to condense the notion of restrictions on rights in Articles 29 and 30, rather than repeat them in respect of each of the rights they govern. A general, catch-all limitations clause is structurally tidier, but it has nevertheless resulted in the limitations being almost hidden in Article 29(2).²⁴ This should not, however, be seen as down-playing their importance as they ‘turn up in the front line in all the conventions and in the practice of their implementation’.²⁵ Articles 29 and 30 read as follows:

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. 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.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Article 30 is a prohibition of abuse of rights clause, designed to prevent any provisions in the Declaration from being invoked in a manner contrary to its letter or spirit. It has become typical for such ‘safety-valve’ clauses to be included in international human rights treaties.²⁶

Besides these more general and sweeping restrictions, specific restrictions on the right to freedom of expression are also foreseen by the articles protecting other rights, e.g., privacy. The interplay between freedom of expression and privacy can, in practice, lead to limitations on either right. For instance, Article 12 of the Universal Declaration states:

²³ Glendon, *A World Made New* (2001), 239.

²⁴ T. Opsahl, ‘Articles 29 and 30: The Other Side of the Coin’, in A. Eide, G. Alfredsson, G. Melander, L. A. Rehof and A. Rosas, with the collaboration of T. Swinehart (eds.), *The Universal Declaration of Human Rights: A Commentary* (Norway: Scandinavian University Press, 1992), 459.

²⁵ *Ibid.* ²⁶ See, for example, Article 5, ICCPR and Article 5, ICESCR.

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‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.’ The latter sentence envisages situations in which the law could restrict the right to freedom of expression in order to protect individuals against attacks on their honour and reputation.

Similarly, Article 7 concerns equality before the law, non-discrimination and equal protection of the law. The second of its two sentences reads: ‘All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.’ The entitlement to protection against incitement to discrimination should be seen as another specified ground for the permissible limitation of the right to freedom of expression.

The UN’s engagement with the rights to freedom of expression and information actually pre-dates the Universal Declaration of Human Rights. In one of its earliest Resolutions, the UN General Assembly demonstrated its awareness of the importance of information about its own activities; an early recognition of the importance of transparency for the fledgling organization.²⁷ In another of its earliest Resolutions, the UN General Assembly affirmed the fundamental importance of freedom of information, describing it as the ‘touchstone’ of all other human rights.²⁸ The main purpose of the Resolution was to call for an international conference on freedom of information, which was held in 1948.

3.2 *The UN Conference on Freedom of Information*

The UN Conference on Freedom of Information is one of the most neglected chapters in the history of the development of the rights to freedom of expression and information within the UN system. The concrete output of the Conference comprised: three draft conventions (most notably a draft Convention on Freedom of Information); draft articles on freedom of information for inclusion in the International Bill of Rights, and no fewer than forty-three Resolutions on different aspects

²⁷ UNGA Resolution 13(1), ‘Organization of the Secretariat’, 1 February 1946. Section II, entitled ‘Information’, opens with the acknowledgement that the UN ‘cannot achieve its purposes unless the peoples of the world are fully informed of its aims and activities’. For commentary, see D. Goldberg, ‘Freedom of information in the 21st century: bringing clarity to transparency’, 14 *Communications Law* (2) (2009), 52.

²⁸ UNGA Resolution 59(1), 14 December 1946.