SPEECH AND SOCIETY IN TURBULENT TIMES

This volume explores how societies are addressing challenging questions about the relationship between expression, traditional and societal values, and the transformations introduced by new information communications technologies. It seeks to identify alternative approaches to the role of speech and expression in the organization of societies, as well as efforts to shape the broader global information society. How have different societies or communities drawn on the ideas of philosophers, religious leaders, or politicians, both historical and contemporary, that addressed questions of speech, government, order, or freedoms and applied them, with particular attention to applications in the digital age? The essays include a wide variety of cultural and geographic contexts to identify different modes of thinking. The goal is to both unpack the "normative" Internet and free-expression debate and to deepen understanding about why certain Internet policies and models are being pursued in very different local or national contexts as well as on a global level.

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Speech and Society in Turbulent Times

FREEDOM OF EXPRESSION IN COMPARATIVE PERSPECTIVE

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Foreword

In the newsrooms and courtrooms of many countries, journalists, lawyers, and judges, in particular, tend to take fundamental rights like freedom of speech for granted. Once a principle like the individual right to free speech is recognized as an axiom, little thought goes into the reasons behind its acceptance. But this is changing. Long-dominant frameworks for internationally accepted norms are now more frequently questioned. And even where there is some rough acceptance of the established tenets of free speech, proponents of national sovereignty often undercut what has long been prevailing thought by drawing on idiosyncratic cultural concerns. This book responds to the present moment by putting this contemporary questioning in comparative context. The contributors to this volume each strive to find the roots of varying approaches to international norms within long-contrived differences among states and regions.

The language of universal and fundamental rights often exists in its own ideological echo room, at times impervious to the complex social system of communication in which it functions. This leads to limited and odd effects. The very proposition that a right is fundamental means that its foundational principles are surrounded by a kind of taboo, a taboo that limits more careful considerations of context and contingency, but helps preserve the overall framework. This kind of taboo is convenient. Calling a claim or interest a "fundamental right" helps avoid recurring and repetitive soul-searching and mind-boggling analysis. Of course, there is still a place for recalibration in the balancing act needed in measuring competing rights. But in societies where freedom of expression is elevated to a human right or a fundamental constitutional right, there is frequently very limited debate about the legitimacy and priority of the rights claim. The foundational justifications, even if originally shaky or contradictory, have been rarely challenged and nor are such challenges taken particularly seriously in judicial and regulatory decisions. Such

cracks as may exist in the doctrine of free speech remain hidden under the face powder of triviality and respect for the status quo.

Today, however, wrinkles appear in this Enlightenment makeup, wrinkles that indicate cracks in the body politic as public debates threaten old axioms and create new assumptions. Such debates throw grave doubt upon prior faiths such as the belief that in a free marketplace of ideas, truth will ultimately prevail, hardened and secured. Even where there has been long established acceptance of the underlying principles, new coalitions or ideologies, often linked to national sovereignty, begin to undercut what has long been prevailing thought. The grand tradition of free speech may be dominant but not universal, despite claims to the contrary.

This book is about the gulf between the dominant and the universal and it comes at a time when "universal" assumptions are more questioned than ever. The consequence of this questioning is that most of the discourse concerning free speech issues concerned the permissibility of certain restrictions within the existing parameters of the scope of the right. The debate did not concern itself with the status of freedom of expression among the venerable social values in a democracy, nor was it linked to broad and deep cultural differences among societies. Freedom of speech comes "naturally"; at least until one is offended or afraid of it. After all, speech is a human default, and silence is abnormal. Humans pertain to a gabby species. Silence is the result of drilled-in conditioning, even if coated in politeness and civility. It is a product of oppression, even if censorship is the act of alleged responsibility, as was argued during the Inquisition. Communication is the default for humans, but not all default situations amount to a right.

Of course, freedom of expression can be very limited. There are "no entry" zones for free speech principles in the organization of our social institutions. "Elites" and "power holders" build a reality where freedom of expression is squeezed out and the boundaries of the zones of free speech are in constant shift. Privacy is one of those areas of shifting boundaries. There are domains or fiefdoms where those who control communication are able to block imagination: at any given time, there are spheres of communication that are simply not imagined as areas where free speech is appropriate. Silencing and imposed views are the rule here. It is perhaps ironic that in democratic societies, speech in national parliaments occurs in one of the most restricted spaces. Freedom of expression is often legally limited where freedom of religion prevails; that is, within the religious community. Expression is commonly restricted in schools, the army, state bureaucracy, and in the workplace. Where established, these zones of "no entry" are the subject of constant challenge, a challenge that was made unseen in the normalizations provided by regulatory process. For

example, this is the case with state secrets and confidential information. But it is also true that new "free speech zones" are carved out by new social sensitivities turned into social conventions. And while much has been made of the so-called democratizing or empowering abilities of social media to give voice and greater power to ordinary citizens, such spaces are proving easily manipulated, echo-chambers where it is not only the gatekeepers of communication who can limit freedom of expression but determined individuals or small groups as well.

Moreover, as this volume indicates, the self-confident axiomatic assumption made by over-confident democracies that freedom of expression is a right, although universalistic in its aspiration, runs into its own limits. Freedom of speech assumed relatively rational adults, open to arguments. Freedom of expression works "for the calmer and more disinterested bystander," as J. S. Mill argued. In many respects, though, these assumptions about the individual for an effective free speech regime fail, not because of illiteracy or imposed nonage, but increasingly for socio-psychological reasons as people prefer to live in bubbles of self-selecting information where the bubble looks more and more a bunker with cave-mentality inhabitants. This is how despotism disguised as paternalism operates: government and other dominant powers determine what is "proper" information: citizens are taken only to be in need of *proper* information. Information gatekeepers cater such select information relying on the limited deliberative capacity of the citizen.

For whatever reasons, the assumption about the importance of freedom of expression (in particular beyond trade and science) is not accepted in many cultures. In a globalized world with new, selective technologies of communication that do not allow time and distance for reflection, where mediation is replaced with the fake money of the slogan of "equal value of all utterances," the foundations of freedom of expression (and with it constitutional democracy) lay bare. The cultural foundations of free speech are not shared anymore where information is a threat to security and the likelihood that the information is false grows ever higher. Cultures (including political cultures) that did not cherish free speech are now taking their revenge. One form of despotism, the one that stars populists, makes a particular use of this cultural force. With the legitimation of an absolutist popular sovereignty, it justifies a new censorship as defender of national cultural habits. Nationalism, relying on the primacy of sovereignty, claims that in its disregard of universal norms, it is only protecting local culture. This *is* despotism *disguised* as nationalism presented as reclaiming sovereignty. All this has rather well-known censorial effects. Of course, all information regulation (including regulation by architecture) is censorial but not all censorships are equal.

This backlash (a term that will likely have become overused by the time this volume is published) seems to resonate most among those who build their identity as being victims of globalization. It grows in the sentiments of those unwilling to tolerate uncertainty who rally behind populists in the eviscer-ation of the "mainstream media."

While this volume clearly demonstrates the local cultural differences in creating and limiting free speech, it begs the question how these reserva-tions to the international human rights law narrative of freedom of expression became suddenly much more forceful and respectable. Because the multi-layered constitutional regime was transnationally open, it was malleable. For a while, constitutionalism and human rights reached vulnerable countries that had to adapt to these developments, but once the governments in these coun-tries (riding, very often, local nationalist and populist winds) became more self-conscious and powerful (for economic and military reasons), they could to some extent reverse the circulation of expectations and standards. Freedom of expression that was accepted at least as "best practices" within a rule of law package is gradually replaced with "anything that stands for national security practices goes." And this was encouraged by shifts in those countries which formally stood (and claim to continue to stick) to the position that open com-munication and freedom of expression is part of their culture. Sovereignty is again the talk in town, and sovereignty facilitates the culture of censorship. Open communication across borders has become a threat, the international law protecting it looks suddenly obsolete, and the nation-state of impermeable borders promises protection of the shelter.

Phenomena related to the Internet and social media give an opportunity, be it a pretext or a moral urge, to challenge the very legitimacy of free speech as we know it. The rise of these new modes of communication have caused challenges to the justification of free speech, exposing, among others, the anthropological foundations of free speech justifications (that people are truth seeking, fully rational beings) as well as the very foundations of democratic social institutions. The critiques refer to online experiences, and dubious find-ings of neuroscience, claiming that the assumptions relied upon in freedom of expression are not sustainable. Humans, at least online, are irrational, instinct-ively aggressive, and their sociability is perverted, so the criticism goes. Weak humans find each other's company discomforting and human weaknesses reinforce that tendency. Extremists will break through their isolation and will mutually encourage and radicalize each other. This observation leaves out of the equation that all sorts of vulnerable and powerless people too will likewise benefit from online empowerment. Empowering the powerless, however, does not necessarily lead to liberation; certainly not without mediation.

Among the challenges to traditional free expression justifications, I would single out one as of critical and (to my mind) dangerous importance. Breathtakingly short, the argument is that the free flow of ideas has the potential *itself* to restrict democracy, and now more so than ever. Therefore, as the criticism goes, "proper" regulation of speech is needed; such regulation, it is argued, will enhance democracy and increase social justice. As a related matter, lying or dissemination of false information becomes a ground for "screening" the free flow of information and it may be that it will develop into a legitimate ground for a tactic of national security to spread false information for the sake of militant democracy. This, in itself, raises a traditional problem, namely that of the dangers of governmental regulation of speech. There are too many people of influence who are cocksure what "proper" means when it comes to regulation. While some view the government as exercising judicious and enlightened regulation, governmental regulation of speech is inherently limited to the viewpoint of the regulators.

It is now also increasingly argued that there is nothing special about speech that would grant it priority, the kind of priority that would require the government to provide compelling reasons to justify an interference. In this dubious approach, there is nothing to justify the privileged treatment of speech among other liberties and interests, for example security and good morals. After all, until the 1960s, even in the United States, speech was just one among the many constitutional concerns that was handled in balancing with other interests, a position toward which Europe is moving dangerously close, in view of recent ECtHR judgments.

Why is freedom of speech to be provided special protection that is not accorded to other forms of conduct? Why are resulting harms, and in particular risks of harm, which would otherwise be unacceptable, at least tolerated, just because freedom of expression is elevated to a human right?

The standard political argument in the justification of free speech was one of democracy. Democracy as choice cannot exist without the alternatives provided by free speech. The Internet seemed to open up democracy, promising more robust, interactive participation. In other words, democracy becomes more accessible, and the government becomes more transparent or at least easier to control. It creates a kind of citizen press, which makes information more easily and rapidly available than it was with broadcast news. News becomes more democratic. Online communication is more democratic in the sense of participation than the broadcast model, where a select few talk to an invisible and manipulated mass audience. Online democracy is much more individualistic and individual liberty enhancing. That has been the hope.

Internet and social media–based democracy is, or can be, trans-political. As the American legal scholar Jack Balkin has demonstrated, Internet speech is of a populist nature. (He may have hoped for a different kind of populism: but this is the nature of people that is brought to light in social media.) It was hoped that this populist speech will be innovative and will create new communities. And it did: we have virtual communities but hardly to the benefit of a democracy of fairness. Participation in decision making in these communities and societies composed of such partly virtual communities results in a democracy that is polarized and merciless, if it can be considered democracy at all.

In the justification of dethroning the primacy of freedom of expression, it is argued that it is one-sided; free *speech* disregards the audience and privileges the speaker. After being silenced for a long time in many countries, the censor dares to ask it once again: what about the communicative rights of the audience to receive information? The empirical experience with online speech seems to add weight to these speech skeptics. On the other hand, equality for all speakers (to destroy the communication monopoly of conspiratorial elites) – this is the self-destructive argument of populist democracy.

One has to admit that when more information is available, faster and from so many sources, the likelihood of misinformation (including deliberate political and governmental manipulation and systematic lies) increases. There might be a need to take steps to reduce the prevalence of this misinformation. But this is, by the traditional democratic free speech definitions, dangerous as it denies a previously cherished principle that more information and better information will drive out lies. Until there is compelling evidence of a Gresham Law dynamic in speech where "bad money drives out good money," or in our case that false news prevails against critical facts, the presumption generated by the free-speech principle should still apply.

This volume suggests that Gresham's Law maintains some (increasingly threatening) power in contemporary communication. Not the first time in the history of manipulation.

Consequentialist arguments supporting freedom of expression collapse once the assumed consequences do not materialize. Of course, this is not a theoretically relevant objection once freedom of expression has an inherent value but politicians and the public do not believe in values that they consider to be relative. One cannot argue successfully that free speech is part of human autonomy (self-development or self-fulfillment) when people are afraid of autonomy, or even detest it for that reason.

Non-consequentialist justifications should not be immune to a reality check. A belief in human rationality and goodness underlies both consequentialism

and non-consequentialism. These justifications, at least in the world of practical considerations, depend on anthropological facts. What if humans are simply unable to act autonomously? What if anonymous speech that helped Jonathan Swift (though not his printer, who died in prison) results in a mass online disinhibition effect? Speech is liberating – but how do people behave once they are liberated in their bias-reinforcing chatrooms?

This volume, with its essays written with impassionate critical scholarship, does what freedom of expression promises: it enables us to use our rational judgment. The value choice in matters of censorship is ours.

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