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The Right To Communicate

HOWARD C. ANAWALT*

I. INTRODUCTION

Toward the end of the 1970s, international attention began to focus on the creation of communication rights for individuals and groups who neither own nor control portions of the large mass media of today. Communication was recognized as an enormously important political instrument and as a means of self-expression. It was argued that communication rights are inadequate if they protect only those who already possess communication power. The power to initiate contact with important audiences must be spread among large segments of the population, if communication is to serve democracy. Thus, the movement for a "right to communicate" was born.1

The right to communicate seems to have emerged as a proposed legal concept in an article concerning direct broadcast satellites written by Jean d'Arcy in 1969. "The time will come that the Universal Declaration of Human Rights will have to encompass a more extensive right than man's right to information, first laid down twenty one years ago in Article 19. This is the right of man to communicate."2 In the ensuing years the right to communicate has been explored with some intensity in the United Nations Economic, Social and Cultural Organization (UNESCO). Its chief proponents readily acknowledge that it remains today "an idea and an ideal", a possibility that may come into being.3

The concept received a strong boost in 1980, when the MacBribe Commission issued its final report. The Commission recommended:

Communication needs in a democratic society should be met by the extension of specific rights such as the right to be informed, the right to participate in public communication—all elements of a new con-

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1. Similar concerns have become apparent within the United States during the past decade and a half. Access to American media has been much debated. See Barron, Access—The Only Choice For the Media—Government Obligation to Enforce First Amendment, 48 Texas L.Rev. 783 (1970); Archibald Cox, Freedom of Expression 56 (1981).


3. "The Right to Communicate is an idea and an ideal. . . . It is an idea inasmuch as it exists as yet only in the conceptual stage. . . . It is an ideal in that its supporters are working to have it drawn up, defined and promulgated as a basic human right." Desmond Fisher, The Right to Communicate: A Status Report, UNESCO, Reports and Papers on Mass Communication, 94, p. 5.

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cept, the right to communicate.  

The Commission explained that the right to communicate is to be in large part a remedy for modern mass communications which have characteristics of monologue, that is, one way communication from an authoritative source to a passive audience. “The demands for a two-way flow, for free exchange, for access and participation, make a qualitatively new addition to the freedom successively attained in the past.”

One of the immediate difficulties facing the right to communicate movement is the problem of definition. The literature that has emerged so far indicates that the right is intended to operate in two very different domains. First of all, the right is seen as a means of establishing a legal claim of individuals and groups to participate in the communication institutions of their respective societies. In this case, the right would create some form of legal claim against national governments and probably certain private institutions as well. Secondly, the right has been understood as one which protects cultural diversity in a world which is increasingly subject to the homogenizing influences of technology. In this second aspect the right to communicate is linked to some of the broader concepts of a “new world information order” endorsed by many developing nations. For example, one UNESCO consultation concluded that “the exercise of the right to communicate presupposes the availability of adequate facilities and their equitable distribution within and between societies.”

4. MacBride Commission, Many Voices, One World 265 n. 17 (1980). The International Commission for the Study of Communications Problems, popularly known as the MacBride Commission, was composed of individuals prominent in the field of communications from sixteen different countries.

5. Id. at 172.

6. A UNESCO right to communicate working group gathered in Ottawa, Canada in September 1980 and agreed to a formulation of the right to communicate including the following: “Everyone has the right to communicate. Communication is a fundamental social process which enables individuals and communities to exchange information and opinions.” Desmond Fisher, The Right to Communicate: A Status Report, op. cit., Appendix D, p. 54. The UNESCO Consultation on the Right to Communicate: Legal Aspects held in Bucharest, Romania in February of 1982 concluded: “Active participation in the communication process is regarded as the core of the right to communicate. . . . The public at large should be enabled to make their opinions known through adequate channels of communication (press, broadcasting and the like) even if through their representatives only, i.e., their spokesmen (as different from media professionals). UNESCO, draft final report, Right to Communicate: Legal Aspects, April 1982, p. 3.

7. The MacBride Commission report addresses the question of creation of a new world information order primarily on the basis of the need for eliminating inequality in the communication resources available to the various different national cultures in the world. “Inequalities in communication facilities, which exist everywhere, are due to economic discrepancies or to political and economic design; still others to cultural imposition or neglect. . . . it is for the international community to take the appropriate steps to replace dependence, dominance and inequality by more fruitful and more open relations of interdependence and complimentarity, based on mutual interest and the equal dignity of nations and peoples.” Many Voices, One Word, supra note 4, at 268.

8. UNESCO, Report of a consultation organized by the International Institute of Communications and UNESCO, “The Relationship Between the Right to Communicate and a
In order to preserve cultural independence, it would be necessary to recognize the right of each of the many different cultures to a fair share of communication capacity.

The scope of the right to communicate must be scaled down if the concept is to have utility. The statement that there is a right to communicate suggests that there is a legally supportable claim against someone. The definition of the right needs to be refined so that it reflects only those elements which can be stated in terms of legal rights and obligations. For example, when speaking of an individual’s right to communicate to his or her fellow citizens, one can designate a legal right of access to certain media, such as radio. The correlative duty would be the obligation of those in control of radio broadcasting to yield some portion of the broadcast day to communications by individuals. The fact that such a right of access is conditioned or limited does not undermine the notion that it is a claim of legal right.

Let us pursue the matter of conditional access rights in more detail. Assume that Mr. Jones, a citizen somewhere, wants to communicate to his fellows concerning “desperate needs for changes in early childhood education.” Mr. Jones seeks a platform for projecting his particular suggestions. He goes to the newspapers, but they will not publish. Perhaps the editor is not interested, thinks Mr. Jones is simply eccentric, or believes the public has had enough of that subject just now. As a result of the editorial decision, Jones gets no forum in the newspaper.

It may be, however, that in Mr. Jones’ country there is a right to gain access to radio at certain times to broadcast citizens’ views. This might require that the individual show that he or she express the views of a certain size group, that the spokesperson pay for the broadcast, that the broadcast is restricted to certain times and that time is available on a first come first served basis. Even when so conditioned the opportunity is a claim of right. When the conditions are met—size of group, tender of payment, and place in line—then a competent tribunal can decree that the opportunity to speak must be accorded.9

Legally defined and enforceable rights must be contrasted with other kinds of stated expectations. In the communications field, a right of access to some existing public media can be posited as a legal right. However, the hope or expectation that given nations or groups of people shall have a complete opportunity of cultural or individual expression cannot be stated as such a right. The latter notion is admirable, and it is probably supported by the nations at large. Nevertheless, it cannot be shaped into a legally supportable claim against someone or some things. This is particularly true of the general claims of lesser developed nations to more

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9. It is critical that the person claiming access have some independent forum which will hear and judge his or her claim. Without such a forum the right cannot be assured any practical effect.
equitable representation in the world communications order. Assume that the claim is stated in the form of a right, for example, "the right to communicate is a right of individuals, groups, peoples, and states to participate fully in and benefit from communication on a basis of full equality with all other." The primary defect in this definition is that it does not state a claim of right that can be asserted against any particular nation or international body. No single entity is responsible for denying this general proposition of communication equality. Unlike the case of the radio station, an aggrieved nation or people cannot find anyone or anything that is obliged to fulfill the expectation. The addition of the phrase "right to communicate" does not aid what is essentially an economic claim. This difficulty is compounded by the lack of definition of essential terms. The terms "equality" and "full participation" do not indicate sufficiently the conditions, which once fulfilled, give rise to the perfected claim.

Some of those working for elaboration of a right to communicate have acknowledged that it should not be burdened with such claims in favor of economic equality.

The right to communicate is not a panacea for the world's ills. It is not going to solve the problems of development, of a more balanced communications flow, of fairer distribution of communication resources nationally or internationally. Indeed, if the right is to be meaningful, such concepts should be eliminated from the definition. The claims of economic equality relative to communications are important internationally, but they should be pursued in economic arrangements or in specific legal forums which can accommodate them.

What then can the right to communicate be defined to include? In general, it can be defined to include attributes of communication which are not presently covered by international declarations. For example, Article 19 of the Universal Declaration of Human Rights already declares certain undoubted components of such a right. These include the right


12. Such legal forums dealing with communication include the International Telecommunications Union and the World Administrative Radio Conferences. Each of these is competent to deal with certain claims to allocation of communication resources, for example, appropriate allocations of the use of the radio spectrum.

to freedom of opinion and expression and the rights to receive and to impart ideas through any media. What appears to be lacking in this formulation is clear assurance of rights to participate in the editorial functions of media and rights of access to the media themselves. Article 19 does not spell out a right of even conditional access as in the radio access example which has been discussed.¹⁴

At a meeting of legal and communications professionals in 1982, a statement of the right to communication was considered which was limited to stating obligations concerning provision of access and participation. The text of the statement affirmed that the right to communicate is a fundamental human right which includes the rights set forth in Article 19. The text then stated that in order to be effectively exercised it is essential that adequate channels exist and “that individual groups who wish to use those channels should have fair and equitable access to them, and opportunities for participation in them, without discrimination of any kind. . .” The draft further specified that restrictions on the exercise of right to communicate, including exercise of access and participation “should be strictly confined to those authorized by international law. . .”¹⁵

II. DIFFERENCES IN LEGAL PHILOSOPHIES

Even when the right to communicate is scaled down to manageable concepts such as access and participation, there remain definite divisions among the points of view expressed by various nations and cultures.

Initially, there is the problem of domestic effect of international legal norms. Basically, the existing international law system focuses primarily, and nearly exclusively, on relationships between states. Generally, international legal norms do not displace domestic legal institutions, nor do they create rights which the citizens of a particular state may claim against their own national government.¹⁶ There are exceptions to this

¹⁴. The author, as a participant in the UNESCO Roundtable on the Right to Communicate in Bucharest, Romania in February 1982 argued that Article 19 itself creates a claim of legal right to some form of access: “In fact, it is the recognition of the inequality of modern communication resources and development which has stimulated greater concern with rights of access and participation. Article 19 speaks to these needs as well, when it states that individuals have a right to ‘seek, receive and impart information and ideas through any media. . .’ While it is doubtful that Article 19 intends to require that each particular medium yield a portion of its communication space to all comers, it is equally unlikely that the provision was intended to underwrite monopoly of effective communication means. It is more likely that Article 19 calls upon member states of the world community of nations to provide at least some adequate forum for the interchange of ideas which come from individuals or groups of people.” UNESCO, “Right to Communicate: Legal Aspects, a Consultation” Draft Final Report April 1982, Annex III, p. 45.

¹⁵. Id. at 6.

¹⁶. Article 2(7) of the United Nations Charter recognizes this basic approach. It specifies that “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present char-
general approach, as when a treaty is determined to have domestic effect. Since World War II, a new role of international law, namely, the protection of individual rights against government power, including the power of one's own government, has begun to emerge. This movement challenges some of the basic propositions of the existing international order. In particular, it may make it possible to perfect claims of human rights against one's own government. The status of international law protecting human rights can be described as one of flux at the present time. Generally, protection of human rights through internationally recognized rules or enforceable norms appears to be growing and strengthening.\(^{17}\)

The Soviet Union is resistant to claims that international law may supplant domestic law in the area of human rights. The Soviet view is that the rights and duties of citizens of a given state are determined exclusively by the national law of that state. Speaking specifically in reference to problems of communication rights, Iuri Kolossov, a Soviet legal scholar and communications negotiator, stated: "International law cannot regulate legal relationships within a particular state if only for the reason that it has a coordinating and not subordinating character as distinct from national law."\(^{18}\) Thus, at the international level, communication rights and responsibilities must be viewed simply as a part of a general system of international law, a system which imposes obligations which are owed only by one national state to another. Furthermore, communication rights do not exist in isolation from communication obligations. Since individuals are not truly the subjects of international law, according to the Soviet view, individuals should not be permitted to make any authoritative claim concerning communication rights based on international law. Their sole basis of a claim is dependent on national legislation.\(^{19}\)

In addition to differences of opinion concerning the individual's capacity to enforce human rights guarantees, there exist basic differences in

\(^{17}\) International law can protect human rights in two ways. First it can create standards which are recognized by the individual nations and applied, in effect, as elements of domestic law. Secondly, international law can posit norms and procedures which protect human rights directly and which provide for mechanisms of enforcement of those rights against one's own state. The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, is probably the most straightforward example of an arrangement under which an international tribunal has jurisdiction over human rights violations claimed by individuals against their own state. As to those countries which have specifically acknowledged the competence of the Human Rights Commission to hear individual complaints, the Commission has authority to act. See O'Boyle, *Practice and Procedure Under the European Convention on Human Rights*, 20 SANTA CLARA L. REV. 697, 700 (1980). Also see the procedure of the Economic and Social Council of the United Nations pursuant to ECOSOC Resolution 1503, 20 REV. OF INT'L COMM'N OF JURISTS 33 (1978).


\(^{19}\) Id. at n. 50.
philosophy concerning the function of communication in society. At the risk of oversimplification, it is possible to identify three basic approaches to communication which predominate in the world today. One of these is what may be called the western point of view, which emphasizes communication freedom as a lively political process, as a set of journalistic freedoms, and as an important commercial activity. This point of view is "western" because it has grown up in the European societies which have experienced the decline of feudalism and monarchy and the replacement of these systems by some form of representative government. Freedom of communication is valued as a means of exchanging ideas and a public examination of competing political programs. Since the economies of these countries have grown rapidly, both in their colonial and post-colonial periods, communication resources have become intertwined in commercial activity itself.

A second approach to communication, which may be called the development of point of view, emphasizes that communication is an essential process in the creation and preservation of national identity and national economic and social strength. This view emphasizes the use of communication to serve the needs of lesser developed countries, countries which for the most part have only recently emerged from the status of colonies to full independence. The economic structures of these countries are relatively weak by twentieth century standards. Communication is seen as a means for building the economy, helping to improve health and literacy standards and enhancing the self-image of these cultures. The developing nations are particularly concerned with preserving the independence of their cultures.20

A third view of communication may be called the Soviet view. This appears to give little recognition to the need for legal protection of communication voices which are independent of the party or the government. The Communist party is seen as an organ which fully represents the people. The party supervises and coordinates the various activities of the people, including the various aspects of mass media communication. This view is called the Soviet view simply because it reflects communication practices which have developed in the Soviet Union and which appear to predominate in eastern European countries as well.

Present day application of principles of press freedom and press responsibility requires reference to Western doctrines, to Soviet doctrines, and to doctrines emanating from the lesser developed nations of the Third World.

A. The Western-American View

Western doctrines are fairly well exemplified in Article 19 of the Universal Declaration and Article 19 of the Covenant on Civil and Political Rights. That is, the national law and traditions of most western nations

20. See supra note 10 and accompanying text.
and the practices in those nations reflect the proposition that the press should be free to communicate, absent war or some other condition of stress, and that this communication should be generally free of censorship. The Soviet tradition, on the other hand, emphasizes Communist Party control of the content of mass media, and thus rather explicitly accepts censorship. The developing nations have, over the past fifteen years, begun to inject a third voice into this worldwide debate over control of the content of mass media. It is too early to generalize effectively what the position of the Third World is, especially since it is such a diverse phenomenon. However, many Third World nations appear to be expressing a philosophy that mass communications should be affirmatively guided for the purposes of achieving national self-development and cultural independence, but that they should not necessarily be subject to negative censorship.

In international discussions of legal institutions to regulate media activities, the Soviet and American views invariably square off against each other. The United States view distills and emphasizes the freedom to communicate element of international legal tradition, while the Soviet view is a severe application of the doctrine of preservation of public order.

On the issue of censorship, the United States position is a full and unequivocal condemnation of government control of content. An enormous variety of governmental interferences with freedom of inquiry and freedom of communication have been struck down in the United States. The Supreme Court has declared unconstitutional government restriction of Communist propaganda, criminal penalties for general advocacy of violence, enforcement of flag misuse statutes and injunctions against splinter group political rallies including those by the Nazis. Freedom of communication, especially with respect to public demonstrations, was an important element in the movements for civil rights and for termination of the Vietnam War in the 1960's. The civil rights movement also resulted in a virtual reformation of American defamation law, for it created a broad new privilege to comment on public officials and public figures without the monetary dissuasion of successful defamation actions. Government censorship in the United States is at a minimum largely because of the role of active litigants and the pronouncements of the Supreme Court. Censorship in the United States is therefore imposed principally through


private means such as editorial judgments, corporate policy pronouncements and advertising determinations.

The American position, a minimum censorship principle, is based on interpretations of the First Amendment made by Justice Oliver Wendell Holmes shortly after the close of the First World War. Holmes' idea was very similar to one expressed by John Milton three centuries earlier. Holmes states that there is a market place of ideas where all communications are free to circulate. The best ideas will win attention and acceptance on their merits. For Holmes, and subsequent American thought and practices, the marketplace is not a mindless sea of ideas, but is a constant intellectual process. The press, therefore, is not aimlessly adrift, but is an active part of society, presenting the ideas which hopefully will receive thoughtful consideration and selection.

Justice Holmes' position is familiar. He believed that speech and press could be free provided their activities did not pose any "clear and present danger" to major government policies. As long as the state articulated its goals in legislation, it could protect those goals from substantial interference fomented by intentional communication activity.

Ultimately, Justice Holmes and his colleague, Justice Brandeis, became very strict in their interpretation of what communication activity could actually constitute substantial interference sufficient to punish the speaker. A communicator could be punished only if his words or actions posed a grave and intended threat to the public order, and if the threat carried with it likely and immediate consequences.

But Holmes did not start out with a view which so strongly protected speech and press. In fact, his "clear and present danger" test was first articulated and applied when Holmes wrote several decisions of the Supreme Court which denied freedom of speech claims of individuals who

24. John Milton was the leading critic of the English 17th Century licensing system. He observed that the censors' work was bound to be boring, "to be made the perpetual reader of unchosen books and pamphlets, oftimes huge volumes." Milton readily admitted that the power of the State must loom large in his life, but he argued, "the State shall be my governours, but not my criticks; they may be mistak'n in the choice of a licencer, as easily as this licencer may be mistak'n in an author. . . ." The licensing system was a cowardly one to Milton, for it denied the strength of truth. He concluded his argument stating, "For who knows not that Truth is strong next to the Almighty; she needs no policies, nor stratagems, nor licencings to make her victorious, those are the shifts and the defences that error uses against her power: give her but room & do not bind her when she sleeps, for then she speaks not true. . . ." MILTON, AREOPAGITICA, reprinted in VERSIONS OF CENSORSHIP, 19, 21 3132 (J. McCormick & M. MacInnes ed. 1962).

25. See Gitlow v. New York, 268 U.S. 652, 670 (1925) (Holmes, J., dissenting); Abrams v. U.S., 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). In the Abrams case, Holmes stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .", 250 U.S. at 630.

had protested against American involvement in the First World War. The activity of these individuals consisted merely of the publication of leaflets, mailing of circulars, and delivery of speeches condemning the American war effort and urging individuals not to support it. In *Schenck v. U.S.* 28 the first of the WWI protest cases, defendants had mailed anti-war circulars to draftees. In that case, Holmes declared that the communication activity of these men, including the Socialist leader, Eugene Debs, could be condemned and punished by heavy jail sentences because they spoke during a time of war, and thus undermined an effort which demanded ultimate cohesion within the nation. "The character of every act," he said, "depends upon the circumstances in which it is done." 30

The circumstance at hand was war, and the audience included those who might fight or otherwise support the war effort. This was enough for Holmes. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right." 30 On this basis, Holmes led the Court in affirming the convictions of the protestors.

On November 10, 1919, a scant eight months after the decision in the *Schenck* case, Justice Holmes had a chance to reconsider his views. The case, *Abrams v. United States*, 31 was strikingly similar to those cases decided earlier that year. Abrams stood convicted of having conspired during war-time to publish "disloyal, scurrilous and abusive language" about the United States government and language "intended to incite, provoke, and encourage resistance to the United States in said war." The leaflets involved had been printed up at night in New York city and distributed by being thrown from windows and handed out secretly in that city. One of the leaflets denounced President Wilson as a hypocrite and a coward and stated that his "shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the Plutocratic gang in Washington and vicinity." The circular concluded with an appeal to the workers of the world to awake and arise and "put down your enemy and mine! Yes! friends, there is only one enemy of the workers of the world and that is CAPITALISM. 32 The majority of the United States Supreme Court found the leaflets plainly urged and advocated resorting to a general strike which might cripple the production of necessary munitions during time of war. This activity was found by the majority to be sufficient to sustain the convictions.

Justice Holmes, however, perceived something wrong in the affirmance of these convictions. In his analysis, the earlier cases had been

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30. *Id.*
32. *Id.* at 620.
rightly decided. But built into those cases was a point of resistance against government suppression of ideas, even impassioned appeals during a crisis like war. In order for a danger to be clearly and presently evinced by a mere communication, it would be necessary for the government to prove that criminal defendants had a specific intent "to produce a clear and imminent danger that it (speech) will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent." In effect, the defendant must be convicted of an attempt to interfere with the war effort. Inflammatory phrases, including urging of a general strike and the suggestion that workers use weapons, did not, in Holmes' opinion, amount to an attempt to achieve results. These views have matured in American jurisprudence and now form the core of a protection of political speech which permits no punishment of a speaker unless the speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." This protection of political speech, coupled with firm protection against prior restraints or censorship, is the foundation of current American doctrine concerning governmental interference with speech and press.

B. The Soviet View

The Soviet point of view on international communication freedom and responsibility reflects a strong orientation toward preservation of public order. The Soviet position bears the marks of pre-revolutionary Russian history and of the intense activity of the revolution, as well as the imprint of Lenin's philosophy concerning the Communist Party. When compared with the Russian revolution, the American revolution appears as a rather easy severance of ties with a mother country. By and large, the political institutions, the social mores, and the economic basis of the society in the United States after the revolution resembled those of pre-revolutionary days. In Russia, however, nearly an entire century of social and political rebellion and realignment preceded the 1917 pair of revolutions. When the Revolution of March 1917 occurred, Russian society was being bled white by the First World War, and after the October Revolution the entire nation was in turmoil. The Bolshevik Party was determined to set the country on an entirely new basis, including a new economic and social system. In order to accomplish his revolution, Lenin conceived of and insisted upon a strict central control of political activity by the leadership of the Bolshevik Party. The Bolsheviks would cooperate with other parties in efforts to seize power, but they would not drive political bargains with them or compromise what they determined to be basic principles of Marxist political and economic organization. After seizing power in a relatively bloodless and swift action in October 1917, the Bolsheviks intended to carry forward a coherent policy based on Marxist interpretation of the

33. Id. at 627.
productive forces of history.

Lenin, like the American Holmes, was concerned with the conditions of wartime. However, in most other respects, his experience was vastly different. The Soviet Union had only been in existence for a matter of days and months when he drafted some of his original premises on communication freedom and responsibility within the Soviet state. War and internal political dissension (soon to be civil war) were occurring on Russian soil and threatened at any minute to engulf the fledgling Communist state. Lenin was responsible for organizing his successful revolution at a time when Justice Holmes was completing a long and distinguished career as a judge. In the early years before the revolution, Lenin had emphasized the essential role of the Communist party and of the media as a means of planning and guiding the New Society. Lenin and the Bolshevik leadership put these ideas in force immediately after seizing power. Within days of the Bolshevik’s seizure of power, Lenin issued a decree governing the use of the press and advertising in the Soviet Union. These measures included closing down those elements of the press which urged open resistance or defiance to the new government, which sowed discord by distorting facts and obvious slander, and which called upon the people to commit patently criminal acts.

A Revolutionary Press Tribunal was empowered to try crimes and offenses committed by the press, including spreading a false rumor or distorting information. Paid advertising in periodicals was declared to be a state monopoly, and advertisements were permitted to be published only by ordinance of the Soviet government. The stiff pro-censorship regime was created by these decrees.

However, even the initial decree indicated that strong party control of the press should be regarded as the temporary measure, forced upon the government and the party by the surrounding circumstances.

In the grave, crucial hour of the Revolution, and the days immediately following it, the Provisional Revolutionary Committee has been forced to undertake a series of measures directed against the counter-revolutionary press of all hues and shades. As soon as the new order is consolidated, every administrative measure of restriction with regard

35. On the eve of the Bolshevik Revolution, September 28, 1917, Lenin set forth some of his ideas concerning the press in an essay entitled On Freedom of the Press, in Lenin About the Press 186 (1972). In this essay he stated, “The capitalists (followed either from stupidity or from inertia, by many S.R.’s and Mensheviks) call freedom of the press a situation in which censorship has been abolished and all parties freely publish all kinds of papers. In reality it is not freedom of the press, but freedom for the rich, for the bourgeoisie, to deceive the depressed and exploited mass of the people.” The opposition or bourgeois press was seen to be a forceful weapon which would be used to exterminate Lenin’s revolution, something that no revolutionary would tolerate.

to the press will be lifted; it will be granted a full freedom within the limits of its responsibility before the courts, in conformity with the broadest and most progressive press laws. 37

In addition, Lenin repeatedly urged that various independent groups should be supplied with newsprint and printing presses in order to circulate their views. 38 One such statement was contained in a draft resolution prepared on November 17, 1917 and stated, “For the workers’ and peasants’ government freedom of the press means liberation of the press from capitalist oppression, and public ownership of paper mills and printing presses; equal rights for public groups of a certain size (say, numbering ten thousand) to a fair share of newsprint stock and the corresponding quantity of printers’ labor.” 39

Thus, the pro-censorship regime engendered by Lenin and his party, was tempered by the pronouncements of Lenin himself. The strict censoring position of the Communist party was to give way to a freedom of the press for opposition points of view as soon as the regime’s position was stabilized. Taking these views seriously, it seems apparent that the Soviet regime is obliged by the words of its founder to restore the opportunities of individuals and groups to critique national and party actions through editorially independent and multiple group presses. 40

The press was viewed by Lenin as an organ of social control from the time of his enforced exile in 1900 until his death in 1924. According to him, Marxist analysis should not permit the underlying material realities of society to be obscured by any superficial aspects, including heady discussions of ideas or theories. The press should not reflect just a spirit of “freedom of criticism” but should represent an exposition of the actual workings of society. In 1902 Lenin wrote:

“Freedom” is a grand word, but under the banner of Free Trade the most predatory wars were conducted; under the banner of “free labor,” the toilers were robbed. The term “freedom of criticism” contains the same inherent falsehood. Those who are really convinced that they have advanced science, would demand, not freedom for the new views to continue side by side with the old but the substitution of

37. V.I. LENIN, Decree on the Press, Id. at 205.
39. V.I. LENIN, Draft Resolution, Id. at 208.
40. The Soviet Union and the Communist Party should also be obliged to live up to this promise by the provisions of Chapter VII, Article 50, of the 1977 Constitution of the U.S.S.R. and its predecessors. Article 50 provides: “In accordance with the interests of the working people and with a view to strengthening the socialist system, citizens of the USSR shall be granted the freedom of: speech, press, assembly, meetings, street processions, and demonstrations.

The realization of these political freedoms shall be ensured by granting public buildings, streets and squares, extensive dissemination of information, and the possibility of using the press, television, and radio to the working people and their organizations.” W. Butler, The Soviet Legal System 13 (1978).
the old views by the new views. The cry “Long live freedome of criti-
cism” that is heard today, too strongly calls to mind the fable of the
empty barrel.41

The Leninist approach embodies the use of the media as a means of plan-
ning and guiding first a revolution and later a new society.

C. The Development—Third World View

There is no single approach to the problems of censorship which will
hold true for all of the developing countries or the Third World. These
countries are geographically dispersed and possess very different cultural
heritages. Furthermore, the historical development of most of these na-
tions has been altered by periods of colonialism which have, in some
cases, only recently terminated. Therefore, the legal traditions with re-
spect to the press embody elements from different traditions and have
not crystallized into a uniform or final pattern. Despite this, there is one
theme which is so prevalent that it can be called a general Third World
approach. This is the theme of development. Third World nations want
and need to channel their national energies into the political, social and
economic improvement of their cultures. Communication media are
viewed as a positive element in this development. These media are availa-
ble to circulate public health data, to generate support for public projects,
to assist in educating people and to mobilize general support for the prev-
alent policies of development. A basic philosophy for Third World coun-
tries is that communication should serve development.

The political structures of the developing countries differ widely. Some
of these countries have single party states, while others have multi-
party systems. The single party states present issues of freedom of ex-
pression which parallel those that are to be experienced within Commu-
nist systems. A basic issue presented in Third World nations with single
party regimes is the status of freedom of press. The International Com-
mission of Jurists recently inquired into this and other related matters in
a conference on human rights in a one-party state, held in Dares Salaam,
Tanzania. This conference exhibited a theme that one-party African
states should be recognized as very different from those established in a
Communist setting. Professor Telford Georges, formerly a chief justice in
Tanzania, urged that one major difference is that in Tanzania “there has
been no explicit founding of the one-party state on any identifiable politi-
cal theory. This means that there is no pattern of legal thinking to which
the judicial officer is obliged to conform—no party line on jurisprudence.”42

41. V.I. LENIN, What Is To Be Done?, THE COLLECTED WORKS OF LENIN, THE ISKRA
PERIOD, No. 2, 96-97 (1929). The reference to a barrel is to a fable by Krylov. When a full
barrel and an empty barrel are rolled down the street, the empty barrel will make much
more noise than the full one.

42. INTERNATIONAL COMMISSION OF JURISTS, HUMAN RIGHTS IN A ONE- PARTY STATE
(1978). Quoted statement is part of an address delivered by Professor Georges originally in
Participants in the one-party human rights conference appeared to acknowledge that the range of freedom of expression and freedom of association in such a system is necessarily limited by restrictions on the right of organizing political opposition and prohibitions on the right of organizing political parties. In order to assure meaningful opportunities for popular participation in the formation of government policy, it is of great importance that the press be free to vent new ideas and considerations. A workshop of leaders from the various participating countries concluded, "Continued freedom of the press was probably the most important element of freedom of expression and workshop participants were fully agreed on the need for its protection." The workshop pointed out that it was difficult for the press in a one-party state to criticize fundamental positions of the party, but nevertheless the freedom of the press to criticize was essential. The press should function as a principal check on errors or abuses of the party itself. Emphasizing the positive role of the press, the workshop states that "it has also a powerful and valuable role to play as an educator of the public in the important issues of the day, in helping to form public opinion and in popularizing the significance of the rule of law and fundamental human rights." The press is thus seen as integral and essential to the process of achieving political freedoms in a one-party state context.

In situations where the press is supported or sponsored by the government the protections should come in the form of legal or political guarantees. For example, the small African country of Rwanda recently set up its first national newspaper. The newspaper is small, comprising eight pages. The front page will usually contain a picture, a major editorial, news items and a table of contents. The rest of the paper includes a section regarding the nation, regions, the party, Africa at large, social and home questions, news concerning the capital city, Kigali, and sports and entertainment. A UNESCO advisor who assisted in setting up the paper, Diomansi Bombote, was concerned about the need for popular expression and criticism in such a newspaper. If it was absent from the newspaper, there would be no significant national forum. Furthermore, the voice of the government might well be heard to the exclusion of other points of view.

Mr. Bombote resolved this problem by an implicit agreement with the Minister of Information of the government. He asked the minister whether he wanted a newspaper: "Of course," was the reply. "But do you also want people to read the newspaper?" Again, the minister replied, "Yes." "Then you must allow criticism of the ministers and the government within the newspaper," suggested Bombote. Thus, a bargain was

December 1965.

43. The Conference included 37 active participants from the following countries: Zambia, Sudan, Uganda, Tanzania, Barbados, Swaziland, Switzerland, Botswana, United Kingdom, Lesotho and Kenya.

44. INTERNATIONAL COMMISSION OF JURISTS, supra note 42, at 85.
struck - freedom of commentary would be allowed to the editors and a section would be provided for letters from the readers to be published in the newspaper. The result is fragile. Editorial freedom within this essential medium must be reaffirmed on a day to day basis.

Thus there is evidence that the developing countries are articulating a philosophy of mass media which emphasizes media as an educator or leader in public affairs. This may entail for example, a different attitude to what constitutes news. A distinguished Indian journalist, Narinder Aggarwala, has commented on the positive function of news:

News, to my thinking, is what happens, and the most important thing happening in the Third World, even more important than coups, famine and civil wars, is social and economic change, imperceptively slow and miserable, invisible against the backdrop of enormous problems, but nonetheless a reality. Efforts to control endemic diseases which constitute a matter of life and death for millions of people of Africa, the Middle East and Asia, or the introduction of animal traction for farming in Paraguay will not sound impressive; to 300,000 farmers of that country, it is comparable to the introduction of the steam engine in the West. Bangladesh, once condemned as a perennial international basket case by Henry Kissinger, is now on the verge of achieving self-sufficiency in food. India, not long ago considered synonymous with hunger and famine, today has the world’s second largest food buffer. All of these are instances of important changes happening in the Third World which remain unreported in the international media.45

Development news and media coverage emphasizes the positive—the possibilities of achievement and the methods of getting certain jobs done. A developing country’s philosophy on censorship may very well be to institute some form of “positive” censorship or an editorial function which would insist on the reporting of events and methods which will genuinely aid development. There is no reason to expect that this positive editorial function will carry with it any kind of insistence on “negative” censorship or the interference with the free expression of criticisms, comments and divergent new ideas. Caution must be used, however, to avoid affirmative requirements which become so burdensome that they undermine the freedom to communicate.

III. Conclusion

The three approaches which have been described place different emphasis on the relative importance of freedom to initiate messages, on the one hand, and the need to control content of messages in the name of public order, on the other. These two concerns are present in the basic norms of international law which are recognized today. Article 19 of the Universal Declaration of Human Rights emphasizes freedom to communi-

cate messages. This freedom is recognized as an essential component of human rights. Article 29 of the same Declaration emphasizes the importance of public order and recognizes that communication rights, like other individual rights and freedoms, may be limited by law in order to meet "the just requirements of morality, public order and the general welfare in a democratic society." On a spectrum which emphasizes complete communication freedom at one end and complete control in the name of public order at the other, one would place the western view toward the communication freedom end and the Soviet view toward the public order end. The development point of view does not fit so comfortably on that spectrum, although it probably fits between the western and Soviet positions. The development point of view emphasizes communication as a freedom, but also as a source of change for the betterment of all of the people in a given developing nation. Thus, it may be fair to say that the development point of view emphasizes using communication initially to improve the lot of the people, and secondarily, as a means of self-expression for individuals and groups.

It will no doubt be difficult to get further agreement on substantive premises regarding rights to communicate, because of these divergent views. However, it is possible to find support for conditional rights of access and participation in each of the three philosophies which have been described. None of these philosophies presents a principled claim that individuals and groups should be denied effective participation in mass media communications. Therefore, there is some hope that further discussions on the right to communicate can achieve some meaningful agreement on such rights.

Even if further discussion concerning the right to communicate leads to description and general acceptance of rights such as access and participation, there will be the overriding problem of realization of these rights in practice. Professor Louis Henkin has stated in the most recent edition of his book, How Nations Behave:

The human rights norms set forth in the International Covenants, particularly that on civil and political rights, compare with those enlightened libertarian national constitutions. Even the derogations and exceptions, e.g., for national security or public order, are not on their face extravagant or unduly permissive. The weakness in the law is in its enforcement, a weakness far greater here than in other international law.47

The primary problems facing the advocates of a right to communicate lie in the areas of enforcement, voluntary compliance with the principles,

47. LOUIS HENKIN, HOW NATIONS BEHAVE 232 (2d ed. 1979).
and provision of the basic necessities which make communication possible. In some countries, the problems will be primarily political and legal, that is, existing communications institutions may rigidly resist claims of access. In other countries, the problems may be economic and social, for example, public media such as local newspapers or radio stations may not exist, or a lack of education may make access to and use of media of relatively small importance.

The existing international communication norms are impressive. The greater difficulties are found in the area of enforcement or realization of those guarantees, rather than in the elaboration of new international norms. However, this observation should not detract from the utility of the efforts to articulate further communication rights. The very process of trying to hammer out the content of a right to communicate or a right of access creates a necessary conversation among these different world views. If communication rights are to flourish on a worldwide scale, there needs to be a continuous exchange between nations of views concerning the appropriate role and the legal rights of communicators. At the end of such discussions, one can hope that some common minimum of participation rights can be agreed to, and that, perhaps, some means for realizing these communication rights can be established as well.

In conclusion, the consultations on the right to communicate have contributed to the development of international communications institutions. The consultations have evidenced a desire to enhance individual and group participation in communications. If this is to be accomplished, the statements of the right must be relatively clear and should stand in a form that can be enforceable against some responsible party. More importantly, the proponents of access and participation rights should turn to the difficult problems of implementation and enforcement. The world stands much to gain from enhanced participation in communication, but no principle, no matter how grand, can be effective without concrete means of realizing its goals in practice.