

# A historical view of freedom of speech

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## **Abstract:**

From Article 11 in the French Declaration on the Rights of Man and of Citizens in 1789 (“The free communication of thoughts and of opinions is one of the most precious rights of man: any citizen thus may speak, write, print freely, except to respond to the abuse of this liberty, in the cases determined by the law”) to the preamble of the UN’s Universal Declaration of Human Rights in 1948 (“the advent of a world in which human beings shall enjoy freedom of speech”), a long combat was necessary until the French act on freedom of the press extended, in 1881, freedom of speech, with specified degrees of liability, to the press and all means of information and communication. Are these rights upheld in the digital realm? On the one hand, the illusion of a universe with total freedom of speech and, among other things, for-free services, anonymity and the “viral” dissemination of online information... but on the other hand, profiling, mass surveillance and forms of regulation that need to prove their trustworthiness. New rights need to be vouchsafed.

## **A historical perspective**

Following WW II, in the preamble to the Universal Declaration of Human Rights in 1948, the United Nations proclaimed, “*The advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.*” The first fundamental right that encompasses and overreaches freedom of the press is freedom of speech.<sup>1</sup> This was also the sense of Article 11 of the Declaration of the Rights of Man and of the Citizen in 1789. Its admirably concise wording defines both the contents and limits of this freedom: “*The free communication of thoughts and of opinions is one of the most precious rights of man: any citizen thus may speak, write, print freely, except to respond to the abuse of this liberty, in the cases determined by the law.*”<sup>2</sup> Of all the freedoms mentioned in this text, only this one is said to be among the most precious. Following heated debates during the Enlightenment on this subject, Article 11 listed all the forms of expression known at the time (speaking, writing and printing). Its scope is wide enough to encompass future forms of expression and communication, as they develop.

On 24 August 1789, a debate flared between two extreme minorities, on the one side, conservatives who wanted the rights of the religion of the Church and king to be proclaimed, recognized and protected; and on the other side, those who, like Robespierre, wanted freedom to be infinite, boundless. Marat declared, “*The freedom to say anything has no enemies save those who want to keep for themselves the freedom to do anything. When saying anything is allowed, the truth*

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<sup>1</sup> [This article, including quotations from French sources, has been translated from French by Noal Mellott \(Omaha Beach, France\). The translation into English has, with the editor’s approval, completed a few bibliographical references. All websites were consulted in June 2021.](#)

<sup>2</sup> <https://revolution.chnm.org/exhibits/show/liberty--equality--fraternity/item/555>

*speaks by itself, and is assured of its triumph.*” The brilliant formulation by Mirabeau in Article 11 warded off the possibility of censorship, which had been relentless during the 18th century. The word “respond” was intended to avoid censorship prior to the acts of speaking, writing, printing while also creating a space with bounds for this freedom by foreseeing that the law alone could define abuses.

Questions about exercising this freedom arose, of course, once newspapers were circulated in mass during the 19th century. Though abolished by Napoleon, this freedom gradually re-emerged; and Charles X was ousted because he wanted to restore censorship. The Second Republic had hardly been proclaimed along with a nearly complete freedom of speech before the party of law and order came to power and considerably restricted this right, even before the coup of 2 December 1851. A new problem arose when fines were set that were too heavy for the press to bear. This sector of activity was not tied to wealth or the growing might of economic forces. Lamennais closed his journal with the conclusion “*Silence for the poor!*”<sup>3</sup>

Not until the Third Republic, following a seminal debate in parliament during which the young Clemenceau stood out, did an act of law state the abuses for which newspapers could be held accountable. This act of 29 July 1881 on freedom of the press defined the space for this freedom.<sup>4</sup> It, or at least its general principles, were intended for all means of communication. The main party to be held responsible, including penally, was the publisher who managed a newspaper or publishing house. Publishers were easy to identify. True, legislation in 1894, known as the *lois scélérates*,<sup>5</sup> passed for the purpose of cracking down on anarchists, restrained the social movement’s voice. On the whole however; the system stood firm. What was coming to threaten freedom of press was, of course, the cost of producing a newspaper. In the wake of the National Council of the Resistance, executive orders issued in 1944 tried to better control these costs.

Ameliorations like the Pleven acts in 1972 against acts of discrimination, hate and racism broadened the scope of protected rights. However some critics think that these procedural restrictions are too protective (in particular the short statutory limit) and want to remove certain abuses set by this law. The one side wants to exclude defenses of terrorism — and the other side, racist remarks — from freedom of speech and to place them under common law. Once the tight restrictions set by law start to crack, other parties will try to enter the breach. Demands are already being made to remove insults or provocations against police officers or harassing, outrageous remarks against women or homosexuals from coverage by the freedom of speech. Indeed, there is a tendency to abuse the abuses set by law. The abuse of the freedom of expression may be severely sanctioned if lawmakers decide to do so; but it is dangerous to remove sorts of speech, even unacceptable ones, from the scope of this freedom and place them in the field of common law. Such exclusions blur the space for exercising this freedom.

The regulation by the law of freedom of speech in the audiovisual industry raised new problems. We need but recall the emergence during the 1970s of “free radio” stations and the debate about the continuance of the French state’s monopoly over radio and television. This monopoly had become evident during the events of May 1968. François Mitterrand personally took up this cause and, as president, put an end to the monopoly. An act of 30 September 1986 worked out the principle of the freedom of audiovisual communications ensuing from the suppression of the state’s monopoly over radio and television (through acts of law: November 1981, May 1983 and 29 July 1987). However the effervescence in favor of free speech, as observed for a while during a period of genuine “acts of resistance”, has been toned down owing to the stranglehold of moneyed economic interests and the uncertainty that has surrounded the successive entities set up by the state during the following years to exercise oversight.

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<sup>3</sup> <https://aimable-faubourien.blogspot.com/2010/08/silence-au-pauvre-lamennais-1848.html>

<sup>4</sup> <https://www.legifrance.gouv.fr/loda/id/LEGITEXT000006070722/2020-12-14/>

<sup>5</sup> [https://fr.wikipedia.org/wiki/Lois\\_de\\_1893\\_et\\_1894\\_sur\\_l%27anarchisme](https://fr.wikipedia.org/wiki/Lois_de_1893_et_1894_sur_l%27anarchisme)

Article 10 of the European Convention on Human Rights made a major change in the aforementioned principles. More exhaustively explaining what was stated in the Declaration in 1789, it imposes a broad, concrete conception of the rights related to the freedom of speech on the countries that sit on the Council of Europe. Through its decisions, the European Court of Human Rights in Strasbourg has increasingly imposed its conception and orientation (usually liberal and limpid) on French jurisdictions. Let us cite a constantly used formula that sheds a clear light on this conception of freedom in a democratic society: *“Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to ‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”*<sup>6</sup> The meaning and space of this freedom of expression as a pillar of democracy could not be put more clearly in words.

## **Is the digital revolution supportive of democracy?**

Comparing, circulating and debating ideas are actions that enlarge our horizon and make opinions and theories move — actions that should be conducive to democracy. Since the coming of the Internet, the Web 2.0 and the social media, the means for obtaining news and information and for venting opinions have, undeniably, become instantaneously accessible to anyone. This “digital revolution” has been likened to the invention of the printing press. In effect, digital technology has stimulated the production and circulation of knowledge as well as the access to information, and created the possibility for anyone to vent and diffuse his views more or less widely depending on his proficiency in using the technology. Opening new spaces of freedom implies new rights.

The UN Human Rights Council has recognized access to the Internet to be a fundamental right, but the fact that most contents and services (apart from access to the Internet) are for free has spawned business models that lead to massively collecting personal data for commercial purposes, thanks to the growth of storage capacities and ever more effective algorithms and artificial intelligence. These models relate income from marketing to the quantity of data that are collected and turned into profiles for sales, and income from advertising to the traffic and time spent on websites and platforms. As the French Council of State stated in its annual report in 2014, these business models have forced institutions to reconsider the issue of the protection of fundamental rights, such as the freedom of expression or the protection of privacy.<sup>7</sup> This is a condition for maintaining citizen confidence in big tech and stimulating commercial transactions. Besides the aforementioned historical guarantees, Convention 108 of the Council of Europe and the EU’s GDPR have adapted these rights; and a proposed UN resolution on privacy should reinforce them.<sup>8</sup>

Protecting rights does not, however, suffice to make the virtual realm a safe space for freedom of expression. The dangers are inherent in the scale of the power of the tools being used. These tools are of two major sorts: the surveillance of cybernauts and “malveillance” in the guise of (a relative) anonymity.

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<sup>6</sup> Case of Handyside V. the United Kingdom (Application no. 5493/72), judgment of 7 December 1976 available at <http://hudoc.echr.coe.int/fre?i=001-57499>.

<sup>7</sup> CONSEIL D’ÉTAT (2014) “Étude annuelle 2014 - Le numérique et les droits fondamentaux”, available at <https://www.conseil-etat.fr/ressources/etudes-publications/rapports-etudes/etudes-annuelles/etude-annuelle-2014-le-numerique-et-les-droits-fondamentaux>.

<sup>8</sup> Respectively: <https://edoc.coe.int/fr/internet/7734-convention-108-convention-pour-la-protection-des-personnes-a-legard-du-traitement-des-donnees-a-caractere-personnel.html>; <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1478961410763&uri=CELEX:32016R0679>; & <https://digitallibrary.un.org/record/3889702>.

## Surveillance

Those who defend freedom very early sounded the alarm on surveillance. The latter is best exemplified by profiling, which might seem harmless. Firms (in particular GAFAM: Google, Amazon, Facebook, Apple and Microsoft) misuse profiling to obtain payment for the for-free services they offer. More serious forms of surveillance involve manipulation and the intelligence services of most countries, as revealed by the Snowden affair in 2013.<sup>9</sup> These revelations rang like a sudden wake-up call about the extent to which data are being collected from digital firms and to which the confidentiality of data has been subverted.

This has had a lasting impact on the confidence of cybernauts. When people know they are under surveillance, they will tend no longer act naturally but to behave as they imagine they should do to be seen as “normal”. This is a fetter on the freedom of speech. For instance, when browsing Jihadist websites (including informative sites) becomes a penal offense, a self-censorship results that is prejudicial to the right to information, as guaranteed under the International Covenant on Civil and Political Rights.

This surveillance has, of course, been amplified since 2000 owing to terrorist attacks that have used digital weapons. Measures of widespread surveillance by governments lead us to wonder whether we all might not be potential suspects.<sup>10</sup> The UN and European Court of Justice are opposed to this widespread surveillance.

## Malveillance: Cybercriminality and online hate

Like all freedoms, freedom of speech has limits. Digital technology, owing to the ease of using it and to the (sometimes illusory) “guarantee” of anonymity, soon spawned excesses: slander, incitement to discrimination and hatred, threats, etc. What has often been called “hate speech” does not yet have a legal definition. Such speech acts are the grounds for criminal offenses, but they are often manipulated (in particular the feelings attached to them) and amplified by platforms’ methods for making their algorithms “go viral”. In effect, when an online remark goes viral, traffic spikes in what has been called the filtered “bubble” where a platform’s users receive the information that is supposed to reflect their own opinions. In actual fact however, users are being manipulated to project these perceptions onto the “real” world.<sup>11</sup> Hate speech and fake news could become a serious menace for our democracies.

Paradoxically, these very firms are being asked to conduct the fight against hate speech.<sup>12</sup> This is not acceptable since the measures (taking down contents, blocking accounts without warning) used by the platforms are lacking in transparency and efficiency. They seem incomprehensible for several reasons. The wording and meaning of questionable contents can be complicated, and the moderators or algorithms used by a platform do not know all the subtleties of pejorative language. In addition, the platforms do not always authorize appeals to their sanctions. Furthermore, they do not go to the root of the problem, and, by the way, this is not their role. Besides, they are not always ready to cooperate to identify their users even when legal actions are undertaken.

Protecting the freedom of expression entails investments in educating and training citizens. It also means letting the judges, who safeguard our freedoms, fight against the forms of speech that they qualify as hateful.

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<sup>9</sup> SNOWDEN E. (2019) *Permanent Record* (New York: Metropolitan Books); French translation by É. Menanteau & A. Blanchard (2019) *Mémoires vives* (Paris: Le Seuil).

<sup>10</sup> <https://www.coe.int/fr/web/freedom-expression/freedom-of-expression-still-a-precondition-for-democracy>

<sup>11</sup> Take the example of Cambridge Analytica scandal: [https://en.wikipedia.org/wiki/Facebook%E2%80%93Cambridge\\_Analytica\\_data\\_scandal](https://en.wikipedia.org/wiki/Facebook%E2%80%93Cambridge_Analytica_data_scandal).

<sup>12</sup> See the provisions in the “Avia” bill of law in France: <https://www.cncdh.fr/fr/publications/avis-relatif-la-proposition-de-loi-visant-lutter-contre-la-haine-sur-internet>.