

CHUN HUNG LIN*

Review of “Right to Communicate”: Universal Recognition under Trend of Telecommunications Development

Abstract. From a historical perspective, the “right to communicate” is based on human instinct and is also one of the fundamental human rights. The right to communicate relates to the fundamental freedoms and values of contemporary societies and represents the affirmation and expression of the most essential rights for human dignity. With the creation of new technologies of communication such as cellular phones, tele-facsimile and the Internet, it is clear that readily available access to telecommunication is highly important for our daily life. However, due to differences in economic development and resources distribution, there is still a big gap between industrialized and developing countries in access to basic telecommunications. Since everyone should have the equal right to communicate, it is the global aim to assist people living in remote and rural areas to gain basic telecommunications to access and connect with the outer world. The main aim of this article is to examine this innate right as it emerges from historic human rights legal documents and international agreements and to emphasize the equality of rights concerning access to telecommunication between industrialized and developing countries.

Keywords: Right to Communicate, Free Speech, Freedom of Expression, Freedom of Information, Teledensity, Confidentiality and Privacy, Universal Access

I. Introduction

Not only human beings, but also many kinds of animals, have the innate ability to express themselves via sounds, odors, colors, actions, and movements. In this way, their demands, feelings, and opinions can be observed and known by the opposite side—and that is so called “communication”. By communication, mankind can understand each other and exchange information actively. Obviously, “communication” itself and related tools play an important role in mankind’s

* Visiting Fellow, Lauterpacht Centre for International Law, University of Cambridge, United Kingdom; Associate Professor of Law, Feng Chia University Graduate Institute of Financial and Economic Law, Taichung Taiwan.
E-mail: jasolin626@yahoo.com.tw

scientific and civilization history. Nowadays, telecommunications are developing and increasing with high-speed and have become one of the essential components in our daily life. New communication tools such as cellular phones, telefacsimile, and the Internet have changed human's lifestyle and brought to light several legal problems of domestic and international levels.

From historic views, "the right to communicate" is one of human's instinct and also one of their fundamental human rights. The right to communicate, relating to the fundamental freedoms and values of contemporary societies, represents the affirmation and expression of the most essential rights for human dignity.¹ With the creation of new technologies, it is believed that readily available access to telecommunication is so important for our daily life. However, due to the differences of economic development and resources distribution, there is still a big gap between industrialized and developing countries in access to basic telecommunications. Because everyone should have the equal right to communicate, it is the global aim to assist people living in remote and rural areas to gain basic telecommunications to access and connect with the outer world.

The topic of the right to communicate is wide and contains many legal issues such as the history of Free Speech, personal freedoms versus national security, privacy and confidential protection, and the new technology and encryption, etc. In addition to providing a general description of the right to communication, this article will focus on the relationship between the right to communicate and global telecommunication development. As mentioned above, many people still lack the basic telecommunications access such as basic telephone lines to connect the outer world. It is believed everyone has the equal right to communicate, to use public services, and to enjoy the benefits of the new technologies. This is the main issue that will be discussed in this article.

II. The Right to Communicate

1. Introduction

"The right to communicate" contains broad ranges and comprises multitudinous aspects. This right is one of legitimate rights so that human beings could contact and exchange with each other. Many social scientists have long recognized that communication is on the basis of many societies or groups of human beings, and

¹ Trudel, P.: Le rôle du droit dans les politiques de communication, The Virtual Conference, Overview of Communication Law in the Context of Communication Rights; see <http://commposite.uqam.ca/videaz/docs/pitren.html>. 1998.

the history of humanity is an inextricably linked with communication.² The right to communicate relates to basic individual and collective freedoms, thus this right should be defined as a basic and inalienable human right as the right to food and life. As same as the saying of L. Ron Hubbard, "perhaps the most fundamental right any being is the right to communicate. Without this freedom, other rights deteriorate".³

2. *Historic Overviews*

Reviewing the history of human rights, "the right to communicate" can be tracked back to the 18 century. Both "the French Declaration of the Rights of Man and of the Citizen" announced in 1789 and the US Constitution First Amendment entered into force in 1791 mentioned about "free speech" that is considered the early description of the right to communicate.

a) French Declaration of the Rights of Man and of the Citizen (1789)

In August 1789, the French people overthrew the old Empire and pronounced the well-known revolutionary manifesto "Declaration of the Rights of Man and of the Citizen".⁴ Article 11 of the Declaration stated, "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law." In the Declaration, it recognized that "the right to communicate" is one of the most precious rights of human beings and such right was defined as free communication of ideas and opinions. Under the Declaration, people had such freedoms to speak, write and print. By speaking, writing and printing, people can express their ideas and opinions and communicate with each other in ways that corresponded to the meaning of free communication. Obviously, Article 11 of the Declaration contains certain principles of fundamental human rights including free speech, freedom of press, freedom of expression and freedom of information. Under this Declaration, the right to communicate and free speech were not unlimited and unrestricted. On the contrary, abuses of such rights and

² ITU: Proposal to establish an ACC inter-agency project on universal access to basic communication and communication and information services. p3.

³ See <http://www.freedommag.org/25thanni/express.htm>.

⁴ Lewis, G.: The People' and the French Revolution (The French Revolution, 1787–1799). <http://www.warwick.ac.uk/fac/arts/History/teaching/french-rev/people.html>

freedoms were prohibited by this Declaration and should be defined by laws, and people shall be responsible for their opinions and ideas.

At that moment, the Declaration was linked to the political issues. During the monarchic and autocratic period, French people were not allowed to hold anti-government opinions and would be punished for exchanges of prohibited information. Dissatisfied with such a condition, people struggled for more freedoms and rights. Some historians thought the Declaration had great influences on political thoughts, and several constitutional declarations of European states in the 19th century such as the Constitution of the Weimar Republic of Germany.⁵ Many scholars recognized the Declaration as a product of the Age of Enlightenment. The Declaration was very important not only because it established some doctrines of basic human rights at its earliest historic status, but it also brought the new ideas for modern democracy. It also stressed a reasonable and legal basis of rights and freedoms that was defined under Article 4. It stated that “Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.”

b) US Constitution First Amendment and Free Speech (1791)

As in France, US Congress also passed the Constitution Amendments, known as “Bill of Rights” in September 1789 and entered in force in 1791. The US Constitution First Amendment states “Congress shall make no law respecting ... or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” With First Amendment, several basic human rights were raised and protected: such as free speech, freedom of press, freedom of religious, right to assemble, and right to petition. Unlike French Declaration, the First Amendment does not mention the restriction and limitation of free speech and freedom of press. In other words, at the time Congress passed the First Amendment it basically did not limit or abridge free speech. Free speech is absolutely protected in the US Constitution, and it was delivered by the framers and had been precious guarded.⁶ At the beginning, many people strongly advocated that freedom of speech enshrines, more than any other freedom, the liberty of the individual and it is manifest in the constitutional protection under the First

⁵ See <http://funkandwagnalls.com/encyclopedia/low/articles/d/d00600326f.html>.

⁶ Kairys, D.: The History and Current Retrenchment of Free Speech. *Political and Civil Rights Law Review*, 73 (1994).

Amendment⁷ and rooted in natural law.⁸ However, some scholars have criticized that the right of free speech should be accompanied by a responsibility⁹ and it is an important part to protect the right in a constitutional democracy.¹⁰

Under the First Amendment, freedom of speech is no doubt the first freedom mentioned. However, the rights of First Amendment historically have come under huge pressures. During the Red Scare of the early 1920s, many people were deported for their political views.¹¹ At the time of McCarthy period, the infamous blacklist ruined lives and careers.¹² Until now, the creators, producers and distributors of popular culture are still being blamed for causing social problems in the United States. At the early establishment of US, most courts usually ignored the First Amendment rights of political minorities and free speech issues did not even reach the Supreme Court. Until 1919, the Supreme Court unanimously upheld the conviction of a Socialist Party member for mailing anti-war leaflets to draft-age men.¹³ A few months later, in the case of *Abrams v. US*,¹⁴ the defendant's conviction under the Espionage Act for distributing anti-war leaflets was upheld, but two dissenting opinions were formed and deeply influenced current applications of the First Amendment. Two Justices, Oliver Wendell Holmes and Louis D. Brandeis, argued speech could only be punished if it presented "a clear and present danger" of imminent harm. Ultimately, these justices were able to convince a majority of the Court to adopt the "clear and present danger test".

Nevertheless, until the 1950s, the Supreme Court still held the opinion that speakers could be punished if they advocated overthrowing the government

⁷ Gunther, G.: Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History. *Stanford Law Review*, 27 (1975) 719.

⁸ Thomas, C.: The Highter Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment. *Harvard Journal of Law and Public Policy*, 12 (1989) 63; also see Hamburger, Ph. A.: Natural Rights, Natural Law, and American Constitution. *Yale Law Journal*, 102 (1993) 907.

⁹ Trakman, L. E.: Transforming Free Speech: Rights and Responsibilities. *Ohio State Law Journal*, 56 (1995) 899.

¹⁰ See Chafee, Z.: Freedom of Speech in War Time. *Harvard Law Review*, 32 (1919) 932.

¹¹ See <http://www.scsd.k12.ny.us/alex/coldwar/redscare.htm>

¹² See <http://www.scsd.k12.ny.us/alex/coldwar/hunt.htm>

¹³ See *Schenck v. U.S.*, 249 U.S. 47 (1919); *Baer v. Same*, Nos. 437- 438, decided on March 3, 1919. Also see <http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=US&vol=249&invol=47>

¹⁴ See *Abrams v. US*, 250 U.S. 616 (1919), *Abrams et al. v. United States*, No. 316, decided on Nov. 10, 1919. Also see <http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=US&vol=250&invol=616>

even if the danger of such an occurrence were both slight and remote. This recognition seriously weakened the “clear and present danger” test and many political activists were prosecuted and jailed simply for advocating communist revolution. On the other hand, loyalty oath requirements for government employees were upheld and thousands of Americans lost their jobs merely based on flimsy evidence supplied by secret witnesses.¹⁵ Finally, in 1969, in the case of *Brandenburg v. Ohio*, the Supreme Court struck down the conviction of a Ku Klux Klan member and established a new standard to apply. The new standard set up that speech could be suppressed only if it is intended, and likely to produce, “imminent lawless action”. Otherwise, even speech that advocates violence is protected. The *Brandenburg* standard still prevails even now.¹⁶ The First Amendment exists precisely to protect even the most offensive and controversial speech from governmental suppression. By imposing “time, place and manner” restrictions, government can limit some protected speech. It is mostly commonly done by requiring permits for meetings, rallies and demonstrations. However, a permit cannot be unreasonably withheld, nor can it be denied based on content of the speech. That will constitute “discrimination” and is also unconstitutional. Therefore, the best way to counter obnoxious speech is opening more speech, by persuasion, not coercion.¹⁷

3. *Review of Some International Agreements*

Although the declarations and legislation concerning the right to communicate had been established at its earliest time in many industrialized countries, numerous developing countries and remote areas in the world still lack related announcements and standards. Because the right to communicate is rooted by a natural instinct of mankind, a general and wide-based agreement should be agreed to promote into the international community. With regard to the right to communicate, proclamations are set by Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, and several UNESCO Resolutions.

¹⁵ See <http://comm1.uwsp.edu/121/lectures/1stamen/tsld012.htm>

¹⁶ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969), Appeal from the Supreme Court of Ohio, No. 492, Also see <http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=US&vol=395&invol=444> and <http://comm1.uwsp.edu/121/lectures/1stamen/tsld013.htm>

¹⁷ See <http://www.aclu.org/issues/freespeech/isfs.html>

a) Universal Declaration of Human Rights

On Dec. 10, 1948 the General Assembly of UN proclaimed the Universal Declaration of Human Rights.¹⁸ Article 19 of the Declaration states "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." Article 19 of Universal Declaration is clearer than French Declaration and the First Amendment concerning the definition of the right to communicate. Under Article 19 of Universal Declaration, the right to communicate includes freedom of opinion, freedom of expression, and freedom of information that have been protected.

Considering phraseology, speaking is one kind of expression of human beings. Not only speaking, but also writing, printing and acting should be protected. Those protections are within the scope of freedom of expression. Moreover, expression is only a single side of "communication", and the other side is the role of receiver, listener, and reader. Including freedom of information that contains free seek, free receive, free impart information, the right to communicate can be well established. Also, those rights and freedoms should be "without interference" and "through any media and regardless of frontiers". Considering rapid changes of telecommunications, these two provisions correspond to the requirement of the modern information society.

In addition, Article 21 (2) states "Everyone has the right of equal access to public service in his country." The "service" mentioned here should include "universal service" defined thereafter as everyone's equal right to use basic telecommunication tools to connect the outer world. Article 2 of Universal Declaration also states that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status..." Thus the right to communicate is already recognized as a legalized and fundamental right under international law.

b) International Covenant on Civil and Political Rights

Article 19 of International Covenant on Civil and Political Rights:¹⁹

1. Everyone shall have the right to hold opinions without interference.

¹⁸ UN General Assembly Resolution 217 A (III), Dec. 10, 1948; see <http://www.un.org/Overview/rights.html>

¹⁹ U.N.T.S. No. 14668, vol 999 (1976), p. 171; see <http://www.tufts.edu/departments/fletcher/multi/texts/BH498.text>

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and idea of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with its special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights of reputations of others;
- (b) For the protection of national security or of public order, or of public health or morals.

Basically, Article 19 of International Covenant on Civil and Political Rights advocates free expression and free information defined under Universal Declaration. The difference between them is International Covenant regulates the restriction and limitation of such rights in Article 19 (3). It stresses the exercise of such rights should accompany with “special duties and responsibilities”. Under Article 19 (3), freedom of expression and freedom of information should not be “absolutely protected” and should have some “demarcation lines”.

To maintain the interests of the public and to limit the abuses of personal rights, several exceptions of freedom of expression and information are regulated under International Covenant including (1) respect other peoples’ rights, (2) respect other peoples’ reputations, (3) national security, (4) public order, (5) public health; and (6) public morals. It is a dilemma to balance interests between personal rights and public order. Any unbalanced action between them will cause either abuses of personal rights or excess of governmental power. Hence, how to establish the “demarcation lines” and to confirm the “special duties and responsibilities” should be well established and clearly defined. Article 19 (3) provides two measures: “legal basis” and “necessary” to set up the standard of reasonable personal freedoms and rights. Out of the “demarcation lines”, such freedoms will be considered as abuses of rights and will not be protected by law.

c) Convention on the International Right of Correction

Unlike Universal Declaration and International Covenant, the goal of the Convention on the International Correction likely focuses on the freedom of press. Nevertheless, from several articles of the Convention, the tracks of freedom of expression and freedom of information can be found. Article 11 of Convention on the International of Correction states “Recognizing that the professional responsibility of correspondents and information and information agencies requires them to report facts without discrimination and in their proper context

and thereby to promote respect for human rights and fundamental freedoms, to further international understanding and cooperation and to contribute to the maintenance of international peace and security, Considering also that, as a matter of professional ethics, all correspondents and information agencies should, in the case of news dispatches transmitted or published by them and which have been to be false or distorted, follow the customary practice of transmitting through the same channels, or publishing corrections of such dispatches,...

²⁰

d) Some Resolutions of UNESCO (United Nation Educational, Scientific, and Cultural Organization)

The Constitution of UNESCO stresses the need for information and communication within and between states. In accordance with the provisions of Article I.2 (a) of the UNESCO's Constitution, it regulates "the work of advancing the mutual knowledge and understanding of peoples, through all means of mass communication and to that end recommend such international agreements as may be necessary to promote the free flow of ideas by word and image". Since 1945, UNESCO has set up its action plans in the field of communication and information for decades to "promote the free flow of ideas by word and image". The purpose is to prevent wars and construct the defense of peace by "advancing the mutual knowledge and understanding of people" in spite of the "ignorance of each other's way and lives, suspicion and mistrust between the peoples of the world".²¹ Within UNESCO Resolution 3.2 of 1983, and UNESCO Resolution 4.1 of 1991 on the Right to Communicate,²² and the 1991 UNESCO Declaration of Windhoek, "the right to communicate" and freedom of information also had been reaffirmed to participant countries concerned and is expected to reduce disparities in information flow between developed and developing countries, international and national levels as well as the public and private sectors.

III. Applications and Restrictions of the Right to Communicate

"The right to communicate" is linked to several fundamental human rights such as freedom of speech, freedom of expression, freedom of information, and media rights, etc. From several historic declarations and international agreements, the

²⁰ Convention on the International Right of Correction, 435 U.N.T.S. 191, entered into force Aug. 24, 1962; see <http://www1.umn.edu/humants/instate/u1circ.htm>

²¹ See http://www.unesco.org/webworld/unesco_policies.html

²² See <http://rrr.dds.nl/pcc/nl/annexe.html>

right to communicate has been affirmed. To balance personal rights and public interests, some restrictions and limitations should be poured into considered within the scope of “the right to communicate”. Thus, how to protect personal rights relating to the right to communicate and properly safeguard access to information services concerning privacy and national security is an important issue. Following the creation of new technologies and the Communication Revolution, some new problems concerning the intellectual property right, encryption and privacy have been raised.

1. Freedom of Expression

As mentioned above, freedom of expression is affirmed both in the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. Both of them state that everyone has freedom of opinion, freedom of expression, and freedom to hold opinions without interference. The right to express one's thoughts and to communicate freely each other affirms the dignity and worth of every member of societies, and allows each individual to realize his or her full human potential. Thus free expression is an end in itself and as such, deserves society's greatest protection.²³

In the US, the purported basis of the doctrine of freedom of expression is the First Amendment.²⁴ Under the First Amendment, the protection of free speech is not limited to “pure speech” such as books, newspapers, leaflets, and rallies. It also protects “symbolic speech” like nonverbal expression whose purpose is to communicate ideas. The word “speech” under the First Amendment has been extended to a generous sense of “expression” including verbal, non-verbal, visual, and symbolic. In 1969, in the case of *Tinker v. Des Moines*, the Court recognized the right of public school students to wear black armbands in protest of the Vietnam War. The wearing of armbands with a peace symbol was protected as symbolic speech protected under the First Amendment.²⁵ Later on, in the case of *Texas v. Johnson* of 1989²⁶ and *U.S. v. Eichman* of

²³ See <http://www.aclu.org/library/pbp10.html>

²⁴ Perry, M. J.: Freedom of Expression: An Essay on Theory and Doctrine. *Northwestern University Law Review*, 78 (1983) 1137.

²⁵ See *Tinker v. Des Moines School District*, 393 U.S. 503, (1969).

²⁶ See *Texas v. Johnson*, 491 U.S. 397, (1989), Certiorari to the Court of Criminal Appeals of Texas, No. 88–155. Also see <http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=US&vol=491&invol=397>

1990, the Court struck down government bans on "flag desecration".²⁷ Other examples of protected symbolic speech include works of art, T-shirt, slogans, political buttons, music lyrics and theatrical performances. Protected expression now includes such non-verbal expressions as wearing a symbol on one's clothing, dance movements, or a silent candlelight vigil. Recently, Justice David Souter listed some of the forms of expressions protected under the First Amendment that have been recognized by the US Supreme Court such as painting, music, poetry, motion pictures, dramatic works, radio and television entertainment, drawings, and engravings.²⁸

The English philosopher *John Stuart Mill* (1806–1873) articulated what might be called the "liberal" or (better) the "libertarian" position on freedom of expression in his 1859 book "*On Liberty*".²⁹ His test for appropriate government interference with human liberties is his well-known "harm" principle.³⁰ This basic principle provides an excellent rule-of-thumb for approaching issues of freedom of expression. Most of the classic exceptions to freedom of expression, as established by the US Supreme Court, are consistent with this harm principle. Contemporary philosophers like Joel Feinberg³¹ and Carl Cohen³² following Mill's approach have summarized the exceptions to freedom of expression established by the US Supreme Court. Critics of Mill's approach to freedom of expression generally accept the harm principle as a justification for suppressing speech, but claim that additional reasons are sufficient to suppress speech. For example, Patrick Devlin and Edmund Pincoffs believed that the government should enforce morality and should legislate morality, suppressing

²⁷ See *United States v. Eichman*, 496 U.S. 310, (1990), Appeal from the District Court for the DC, No. 89–1433. Also see <http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=US&vol=496&invol=310>

²⁸ See *NEA v. Finley*, No. 97–371, (1998).

²⁹ J.S. Mill (1956), *On Liberty*, Currin V. Shields, ed., New York: Macmillan Publishing Company, originally published 1859. Also see <http://wiretap.spies.com/ftp.items/Library/Classic/liberty.jsm>

³⁰ *Ibid.*, see Chapter I, *Introductory*: "... the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant"; 13.

³¹ Feinberg, J.: *Limits to the Free Expression of Opinion*. In: Feinberg, J.–Gross, H. (ed.): *Philosophy of Law*. Belmont, California, 1995.

³² Cohen, C.: *Free Speech and Political Extremism: How Nasty Are We Free to Be?* 1992. *Law and Philosophy* (1989) 263–279. Adams, D. M. (ed.): *Philosophical Problems in the Law*. Belmont, California, 257–265.

speech to further that goal.³³ Until now, many *exceptions concerning free expression* have been decided by the courts, including defamation,³⁴ sedition,³⁵ breach of the peace, incitement to crime, “fighting words”,³⁶ causing panic,³⁷ and obscenity.³⁸ Thus the right to freedom of expression is restricted when expressions cause harm to another person.

2. *Freedom of Information*

Similar to freedom of expression, freedom of information is also endorsed both in the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. Meanwhile, freedom of information comprises freedom to seek, receive, and impart all kinds of information and ideas without interference. The right to communicate contains the right to free access to the essential services through the right to the use of information. The right of access to information through communication tools should be applied without restrictions at both individual and collective levels. The right to communicate concludes both the right to inform and the right to be informed.

³³ Pincoffs, E.: “*The Enforcement of Morality*”, from *Philosophy of Law: A Brief Introduction*. Belmont, California, 1991. 131–141; Devlin, P.: *The Enforcement of Morals*. Oxford, 1965.

³⁴ See *Wojnarowicz v. American Family Association*, 745 F.Supp. 130, S.D.N.Y. (1990).

³⁵ Although not without controversy, the U.S. Supreme Court has upheld statutes that prohibit the advocacy of unlawful conduct against the government or the violent overthrow of the government. As with prohibitions discussed earlier, the expressions in question are assessed according to the circumstances. Academic discussion of the theories of, say *Karl Marx* presumably would not be prohibited under such a test, especially in this post-Soviet era. The theoretical consideration and even endorsement of these views could not remotely be considered to be reasonable expectations of the actual overthrow of the government. But it is possible that an artist might develop a project, perhaps guerrilla theater or an exhibit that urged the destruction of the United States (the “Great Satan”) by extremist religious groups. The likelihood of success by the latter group would seem as improbable as the likelihood of success by contemporary Marxists. See <http://www.csulb.edu/~jvancamp/intro.html>

³⁶ See *Chaplinsky v. New Hampshire*, 315 U.S. 568–572, (1942). The U.S. Supreme Court held that the First Amendment does not protect “fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”

³⁷ See *Schenck v. United States*, 249 U.S. 47, (1919). This classic exception is credited to Justice Oliver Wendell Holmes: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”

³⁸ See *Miller v. California*, 413 U.S. 14, (1973). The U.S. Supreme Court established a three-pronged test for obscenity prohibitions that would not violate the First Amendment.

In the US, the federal and state governments have enacted laws concerning freedom of information that guarantee the right of the public access to governmental documents. The federal Freedom of Information Act (FOIA) was passed by US Congress in 1966 and amended in 1974. The FOIA creates procedures whereby citizens may obtain the governmental agencies' records. Also, the federal Electronic Freedom of Information Act Amendments of 1996 mandated that the federal government's electronic records are public to the same extent as their paper counterparts.³⁹ Although US Supreme Court has recognized the First Amendment right of access to governmental records in some limited situations, and a few states have enshrined a right of access in their state constitutions, statutes and the common law are more frequently invoked to create a presumption of openness.⁴⁰

The FOIA directs government agencies to disclose certain types of records and describes the manner of disclosure required.⁴¹ Under FOIA, some records that must be published in the Federal Register include description of the agency's organizational structure, description of the procedures that are set up to give the public access to the agency records, general description of how the agency functions and its decision-making process, the agency's rules of procedure, and the agency's general policies.⁴² Some records that must be made available for public inspection and copying include final decisions in particular administrative cases, policy statements that the agency uses but has not published in the federal register, internal manuals written for the agency's staff that affect members of the public, and an index of the kinds of information that must be made public.⁴³ Besides, Courts have reserved the right to interpret provisions broadly to achieve the goal of Congress of full disclosure.⁴⁴

Although the goal of FOIA is full disclosure of governmental records, US Congress concluded that some confidentiality is necessary for governments' administrative goal. The federal agency can refuse to release certain types of information. There are nine legal categories that are exempted under the law of the FOIA including national security, internal agency rules, governed by other statutes, business information, internal government memos, private matters, law enforcement investigations, regulation of financial institutions, and information

³⁹ <http://www.rcfp.org/handbook/viewpage.cgi?0901>

⁴⁰ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Montana, New Hampshire, North Dakota and Tennessee are among those states whose constitutions recognize a right of access to government documents.

⁴¹ See Freedom of Information Act (FOIA) Section 552 (a).

⁴² See FOIA Subsection (a) (1) lists.

⁴³ See FOIA Subsection (a) (2) lists.

⁴⁴ See FOIA Subsection (1) (3).

concerning oil well locations.⁴⁵ The FOIA requires an agency to provide a “reasonably segregation” portion of a record and cannot withhold an entire document merely because some portions of the document are exempt. The exemptions of FOIA are not mandatory, but discretionary. That means an agency can choose to release records even after it has determined the records fall within one or more of the above exemptions. In most states, there are only a few specifically designated types of records that are required to be kept secret.

3. Public Order and National Security

Article 19 of International Covenant on Civil and Political Rights states that the exercise about “the right to communicate” may be subjected to certain restrictions, but those restrictions shall provide by laws and are necessary for the protections of national security or of public order. In the name of national security, many governments have frequently used it as a pretext to violate fundamental human rights and civil liberties. For example, the US government had historically overused the concept of “national security” to shield itself from criticism, and to discourage public discussion of controversial policies or decisions. In the US history, President Jefferson countenanced internment camps for political dissidents; President Wilson authorized the round up and deportation of many foreign-born suspected “radicals” during the Palmer Raids,⁴⁶ and President Franklin Roosevelt interned Japanese Americans in World War II. During the period of Cold War, the US government also adopted some measures against free speech such as loyalty oaths, blacklisting and travel restrictions.

Additionally, the US government attempted to censor the “Pentagon Papers” in the Vietnam War era.⁴⁷ In 1971, the New York Times Corporation published and disclosed the “Pentagon Papers”⁴⁸ to the public, and that caused the conflicting claims between the rights of the First Amendment and national security. Meanwhile, the New York Times ignored the government's ban to cease publication; and the US government then took juridical actions against the company and the stage was set for a Supreme Court decision. The Supreme Court had ruled that the government could not, through “prior restraint”, obstruct publication of any material unless it could prove that it would surely

⁴⁵ See FOIA Section 552(b).

⁴⁶ See <http://chnm.gmu.edu/courses/hist409/red.html>

⁴⁷ See <http://www.aclu.org/issues/security/isns.html>

⁴⁸ The Pentagon Papers is a secret history and analysis of the US's involvement in Vietnam and the contents are some classified studies that entitled “History of U.S. Decision-Making Process on Viet Nam Policy.”

result in "direct, immediate, and irreparable harm" to the nation. The US government failed to prove and the public was given access to vital information.⁴⁹

The US Supreme Court has recognized the governmental interest to keep some information secret such as wartime troop deployments. The Court has never actually upheld an injunction against speech on national security grounds.⁵⁰ As the Pentagon Papers case shows, the government's claims of "national security" must always be closely scrutinized to make sure they are valid.⁵¹ Besides, "national security" is also one of the legal exemption categories that limit the public's right of free information in USA. Under FOIA, it regulates if showing governmental records would reasonably expect to cause damages to "national security", government agencies can refuse to disclose records. Those include military plans, weapons, scientific and technology data that relate to national security, and CIA records.⁵²

Due to national security and public order, most governments reserve the right to limit and restrict citizens' exertion in free expression and free information in order to achieve higher national interests and administrative goals. In other words, freedom of expression and freedom of information basically are not unlimited and should be regulated to avoid the damages of national and public interests. On the other hand, the rights to know and to communicate are essential in modern democratic systems and should not be violated arbitrarily by the name of national security or public order. Therefore, it is necessary to define the detailed scope of the free expression and free information by laws and due process.

4. Confidentiality and Privacy

Confidentiality and the right of privacy should be taken into consideration within the scope of the right to communicate. Through the new telecommunication technologies created, personal information and data are more easily available and could be unjustly obtained by anyone than ever before. It is possible to collect and gather personal information and computer data through new telecommunication tools such as telephone wiretaps, photographic and video cameras, microphones and amplifiers, as well as the Internet. Unlike many

⁴⁹ See *New York Times Co. v. United States*, 403 U.S. 713 (1971), Certiorari to the United States Court of Appeals for The Second Circuit No. 1873. Also see <http://caselaw.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=403&page=713>

⁵⁰ *Ibid.*

⁵¹ See <http://www.aclu.org/library/pbp10.html>

⁵² See FOIA Section 552(b).

legal concepts, the right of privacy has only recently recognized by law and still continues to establish its legal basis.⁵³ Following the introduction of the new technology such as telephones, telefacsimiles, and other many electronic telecommunication tools, the legal recognition of privacy as a fundamental right has been gradually established.⁵⁴ Some articles and judicial decisions believe privacy is accompanied by the right “to be let alone”.⁵⁵

In the US, the law regulates that people should be protected by privacy when they “believe that the conversation is private and can not be heard by others who are acting in an lawful manner”.⁵⁶ People have the right of privacy for contents of mail envelopes, telephone conversations, telegraphic messages, and electronic data by wire.⁵⁷ Additionally, confidential personal information such as contents of email in public system, bank records, library records, and student records is also considered as one kind of personal privacies and should be protected.⁵⁸ The right of privacy is also linked to some professional ethics, such as confidentiality of disclosures between attorney and client, physician and patient, as well as priest and penitent. Violations of such confidentiality will constitute a form of tort.⁵⁹

Based on this recognition, people not only own the basic right to communicate but also their communications should be protected, not unjustly or illegal occupied. As the Fourth Amendment states “The right of people to be secure in their persons, papers and effects, against unreasonable searches and seizures, shall not be violated...” There are many pending cases and petitionary activities concerning protections of the privacy of personal computer files and communications by using the encryption technology. Encryption is a technology that encodes computer file and communications, much like a combination lock secures a filing cabinet.⁶⁰ Certainly, the government has this duty to secure citizen’s privacy by adopting laws and regulations to protect its people against

⁵³ Warren and Brandeis: The Right to Privacy. *Harvard Law Review*, 4 (1890) 193; Prosser: Privacy. *California Law Review*, 48 (1960) 383, and the Second Restatement of Torts § 652A–§ 652I.

⁵⁴ Standler, R. B.: *Privacy Law in the USA*. see <http://www.rbs2.com/privacy.htm>. 1997.

⁵⁵ *Ibid.*; also see Cooley, T. M.: *A Treatise on the Law of Torts* (1888) 29, 2d ed.; *Wheaton v. Peters* (1834) 33 US 591. 634 and *Olmstead v. US* (1928) 277 US 438. 478.

⁵⁶ American Jurisprudence, (1974). Telecommunications § 209.

⁵⁷ See Ronald; 18 USC § 2510 et seq.; 18 USC § 1702; 39 USC § 3623.

⁵⁸ See Ronald; also see 18 USC § 2702(a); 12 USC § 3401; 20 USC § 1232g; NY CPLR § 4509.

⁵⁹ *Humphers v. First Interstate Bank of Orgeon* (1985): 696 P. 2d 527

⁶⁰ Americans for Computer Privacy: US Policy on Encryption Should Protect Our Right to Privacy; see <http://www.computerprivacy.org/about/>.

invasion of their information and data. The government should formulate related policies controlling the use of electronic recording of personal information and data for privacy protection. The governments also should enact laws and regulations to protect the interests of users, creators, producers and distributors. Only through legislative protections, the true meaning of the right to communicate can be achieved.

IV. Universal Access and Global Telecommunication Development

1. Scopes of Universal Access and Services

Universal service is defined as a telephone in every household and universal access is defined as being within easy reach of a telephone.⁶¹ Universal access to basic telecommunications has already been emphasized for decades in the 20th century. To make universal access affordable enough to address everyone's basic right to communicate gradually plays a vital role in international telecommunication cooperation. For most developing countries, universal access is more relevant than universal service. The policy of universal access has been drawn through provisions of public telephones, at least installing one public telephone in every village. Although the cost of providing telecommunication services in rural areas is quite high, the impacts on cultural, social, educational, and economic development are obvious and considerable.⁶² A large portion of populations of developing countries lives in rural areas, and those areas are often lacking communication tools to connect with the outside world. Making telecommunication and information accessible and available is essential and important for them. In other words, achieving universal access and services not only realizes everyone's basic right to communicate, but also has a great influence to the right to know, right to print, right to education, etc.

2. Teledensity—the Differences of Telecommunication Development between Industrialized and Developing Countries

There is a big gap between industrialized and developing countries in teledensity. The most common measure of telecommunication access is teledensity, the

⁶¹ BDT: Asia and Pacific Telecommunication Trade and Finance Colloquium, New Delhi, India, Nov. 3–5, 1997; see <http://www.itu.int/ITU-D-Finance/finance/Conclusions/asia.htm>; 4.

⁶² *Ibid.*

number of main telephone lines per 100 inhabitants. In the richest countries, there are 45 or more phone lines for each 100 people; however, there is less than one in the poorest countries mainly in sub-Saharan Africa. Many developing countries in Asia, Latin America, and Eastern Europe are somewhere in between.⁶³ The gap between industrialized and developing countries, the “information haves” and “information have nots” lasts for many years and continues to increase. Compared to all people in the world, the inhabitants that belong to “information haves” merely make up a very small proportion, and the major population in developing countries still belongs to “information have nots” that even do not even have the basic telecommunication tool—the telephone—in their daily life. For example, sub-Saharan Africa has fewer telephone lines than the city of Tokyo, while about 12 million telephone lines serve more than 700 million Africans. The biggest challenge for African countries is how to overcome the limited finance available for infrastructure provisions.⁶⁴ The big gaps existing between industrialized and developing countries relate to distribution of access, resources, and opportunities in the information and communication fields. Thus, it is extremely important to heighten the teledensity in remote areas.

People living in the industrialized countries have easier access to telecommunications than those in developing countries. In many developing countries, it is estimated probably more half of the population has no access to even simple telecommunication services such as telephones and telegraphs.⁶⁵ This is one kind of poverty, information poverty that appears in many lower-developing countries. Many developing countries, especially the least developed countries are not sharing the benefits of the communication revolution. Many of them lack financial support, suitable policies, technical skill, and trained manpower to develop, maintain and provide the basic telecommunications service. The telecommunication infrastructure is really fragile in most developing countries. The lowest-income countries that account for about 56% of the world’s population share only 7% of the world’s telephone mainlines. Excluding China (PRC) and India, a total of 57 lowest-income countries that account for one-fifth of the world’s population has only one-hundredth of the global telephone mainline.⁶⁶ Additionally, those lines are limited to major cities, the waiting lists for basic

⁶³ ITU: Inter-Agency Project on Universal Access to Basic Communication and Information Services, see <http://itu.int/acc/rtc/acctref/acctref.htm>

⁶⁴ Agence France-Presse, (May 4, 1998): Mandela says business must fuel Africa’s information age; Johannesburg.

⁶⁵ See the ITU report.

⁶⁶ ITU: ACC Statement on Universal Access to Basic Communication and Information Service; see <http://www.itu.int/acc/rtc/acc-rep.htm>.

telecommunication tools are still long, and there is no indication showing that the situation will improve soon. Without basic telecommunication services, information and knowledge cannot easily reach these areas and will impair their fundamental human rights concerning the rights to plant, shelter, health, medicine, education and development.

For developing countries, basic telecommunication development also brings problematic issues including nationwide availability, non-discriminatory access and widespread affordability. Considering economic, social, geographic, local demand, a telephone should be within a reasonable distance for everyone. The distance depends on the coverage of the telephone network, the geography of the country, and the density of the population and the spread of habitations in the urban and rural areas. It also can reflect the different policies such as providing a telephone to every village.⁶⁷ On the other hand, in industrialized countries, universal access is considered elementarily achieved, that the majority of the population already has the basic telecommunication - telephone in use.⁶⁸ The goals of developed countries will gradually focus on telecommunication market liberalization, higher quality, and more advanced telecommunication tools introduced such as cellular phones, pagers, the Internet, and satellite connections, etc. The poor telecommunication infrastructure in developing countries will also impact the telecommunication development and its accessibility in industrialized countries. Due to lacking of basic and reachable telecommunications, the people living in developing countries cannot connect with people living in industrialized ones, to know their cultures, and to promote future cooperation in telecommunications. The mutual understanding and assistance between developing and industrialized countries are necessary for global peace and development. Therefore, developed countries have the obligations to assist telecommunications-lacking countries and decrease the gap in teledensity.

3. Role of International Telecommunication Union (ITU)

Founded in 1865, the former ITU, the International Telegraph Convention was operated for solving problems of messages transmitted and transcribed across two or more countries caused by the different telecommunication systems. After the mid-20th century, following the participation of more and more developing countries into the ITU, the missions of ITU have been broadened from inter-

⁶⁷ See ITU: World Telecommunication Development Report (March 1998); 4 th edition, also see <http://www.itu.int/ti/publications/WTDR.98/index.htm>.

⁶⁸ *Ibid.*

national telecommunication cooperation to telecommunication developmental assistance for developing countries.

a) The Constitution of ITU and the Right to Communicate

Providing technical assistance to developing countries in order to make telecommunications available universally is one of important missions of ITU. Under Article 1.1 (b) of the Constitution of ITU, the ITU should “promote and offer technical assistance to developing countries in the field of telecommunications...” It is one of major purposes of ITU to reduce the differences and distances of teledensity between industrialized and developing countries. Article 1.1 (c) states the ITU should “promote the development of technical facilities and their most efficient operation with a view to improving the efficiency of telecommunication services... so far as possible *generally available to the public*.” Also, Article 1.1 (d) states the ITU should “promote the extension of the benefits of the new telecommunication technologies *to all the world’s inhabitants*.” Obviously, the ITU stresses telecommunications should be available to the public and everyone should enjoy the benefits of the new telecommunications. In addition, the ITU promotes everyone’s equal right to telecommunication. Under Article 33, every state should “recognize *the right of the public to correspond* by means of the international service of public correspondence. The services, the charges and the safeguards shall be *the same for all users* in each category of correspondence *without any priority or preference*.” The ITU also reserves the right to each state to stop or cut off telecommunications services due to national security, public order, and domestic legal requirement and decency.⁶⁹

b) Efforts of ITU in Global Telecommunication Development

For many years, the ITU has promoted the right to communicate as a basic human right. Under the aegis of UN’s Administrative Committee on Coordination, a project is under implementation on Universal Access to Basic Communication and Information Service. The project is designed to reduce the information gap between the developed and developing countries and make telecommunication and information services accessible easily. In 1984, the Maitland Commission recommended that by the year of 2000 everyone in the

⁶⁹ See Article 34.1 of the Constitution of the ITU: “Member reserve the right to stop the transmission of any private telegram which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency...”

world should have ready access to at least basic telephone service. This goal has not yet been reached; however, access to basic telephone services for the inhabitants in low-developing countries is rapidly increasing.⁷⁰ An inter-agency UN project on universal access to basic communication and information service—"the right to communicate"—was created at the initiative of Dr. Pekka Tajanne, former Secretary-General of ITU.⁷¹

At the beginning of the new millennium, the duty of ITU is to make telecommunications available to all of the world's inhabitants, at prices that are affordable to all. In addition, to strengthen the multilateral foundations of international telecommunications and to promote universal access and global connectivity should quickly be embarked.⁷² With the pilot and support of ITU, there are several Action Plan Programs planned and proceeding such as the Buenos Aires Action Plan and the Valetta Action Plan Program, etc. In 1998, the ITU held the World Telecommunication Development Conference in Malta and 143 participatory countries adopted the Valletta Declaration and Action Plan.⁷³ The Valletta Declaration underlines the importance of translating the indisputable potential of telecommunications into tangible results to improve the lives of all people of the world, especially those in developing countries.⁷⁴

The ITU encourages and supports universal service, global access and fair pricing and give special attention to the least developed countries. Those actions and programs are designed to develop best-practice, sustainable and replicable models of ways to provide access to modern telecommunication facilities and information services, especially to people living in rural and remote areas. The final goal of those programs and plans is universally accessible telecommunications to the whole of humanity. In the prevailing environments of converging technologies and globalization, it is the time to structure the telecommunication sector in order to stimulate public and private sectors' investments and accelerate the pace of expansion and modernization of telecommunication networks in developing countries. To the end, it will benefit everyone to provide basic telecommunication services and assist necessary technical skills in rural and remote areas.

⁷⁰ ITU: Proposal to Establish an ACC Inter-Agency Project on Universal Access to Basic Communication and Information Services; see <http://www.itu.int/acc/rtc/acctor1.htm>

⁷¹ "The Right to Communication: A New Declaration is Born." ITU News, 1997. No. 6; see <http://www.itu.int/acc/rtc/acc-rep.htm>

⁷² H. I. Toure (Director of Telecommunication Development Bureau of the ITU): BDT Director Message, see <http://www.itu.int/ITU-D/bdtint/Director/messdir.htm>

⁷³ M2 Presswire (Apr. 20, 1998): ITU: ITU World Telecommunication Development Conference adopts Valletta Action Plan, Valletta, Malta.

⁷⁴ *Ibid.*

V. Conclusion

With the creation of new technologies, the manners of telecommunication have changed with high-speed. The world is in the midst of the communication and information revolution, and a new lifestyle accompanied with modern telecommunication tools gradually has been formed. The new information highway will change the lifestyle of the people. Many services will be provided by new systems such as telework, telecommuting, teleservices, telemedicine, teleeducation, teleshopping, telebanking, etc. Under this new trend, physical location is becoming irrelevant to the ability to deliver or receive services and goods. The rapid explosion of the Internet and World Wide Web have provided a more convenient way for communication interface linking with computers in global communications, information and data exchanges for those who need it, look for it, and can download it whenever they want. With the rapid coming of the electronic flow of information across the whole world, the role of telecommunication has changed from a voice communications network to a component that underpins many economic activities. With the further development of new telecommunication technologies, the right to communicate should take on a more energetic role.

With the invention of new telecommunication tools and information technologies, several legal problems also arise. For example, should the doctrine of free speech be applied to new communication tools such as pagers, facsimiles, or Internet communications? Due to new high-speed technologies, it is easier to gain personal data and national secrets via cyberspace and multimedia. Does the government already establish a series of measures and regulations to protect the right of privacy and public interests? As mentioned above, the so-called "Encryption" software was invented to protect national confidentiality and personal privacy. However, some people criticize that such measures may be overused to violate the basic right to communicate, such as free expression and free information. "The right to communicate" is one of natural and fundamental rights affirmed by numerous historic legal documents and international agreements. Thus, even new communication tools that have been continually created should be freely used and protected by the name of free speech and free information. The legal standards to balance between these freedoms and national security or between freedoms and privacy also should be applied. In addition, the scope of universal access should be extended to include the Internet and other new electronic tools to support the effective use to achieve democratic ends.

We use the basic telecommunication tool, the telephone, to communicate with our family, friends, coworkers, and deal with thousands of business affairs every

day. We receive, listen, watch and are informed of daily news via broadcasting and television. Recently, we can even attend classes, transact stocks, and send emails through the Internet. However, there are still many people lacking the basic telecommunication access. Considering the principle of equal rights, it is necessary for developed countries to assist developing one to promote basic telecommunication services. As Dr. Tarjanne, the former Secretary-General of ITU said: "The Universal Declaration of Human Rights sets out the rights and freedoms that people everywhere should be able to enjoy. It is the best definition the world community has so far been able to develop of the common elements of humanity shared by all people." For all to enjoy these rights, they must have access to basic communication and information services. He warned: "Without action on the part of the world community, there is a very real danger that the global information society will be global in name only; that the world will be divided into the 'information rich' and the 'information poor'; and that the gap between developed and developing countries will widen into an unbridgeable chasm."⁷⁵

The relation between universal access and the right to communicate is very intimate. By liberalization and establishment of telecommunications, this relationship will achieve a great deal and prove widely beneficial. The developments of advanced telecommunication technology will quickly bring numerous benefits to everyone and everywhere. When the information society becomes a reality, electronic communications are becoming an ever more important tool in promoting the international communications and media regime. Access by individuals, and by collective groups such as governments, organizations, and enterprises, global telecommunication, will continue to inspire development and assistance for developing countries, and will make the information society come true and promote fundamental human rights for everyone.

⁷⁵ See ITU News, 1997. No. 6.