

# Why are the rights of media owners considered superior to the personal right to communicate?

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In the late 1700s Jeremy Bentham conceived the principle of publicity as a critical impulse against the injustice caused by the secrecy and partiality of state actions, and by Immanuel Kant as an enlightening momentum substantiating human freedom and making citizens equal in the public use of reason. Bentham favoured a free press as an instrument for public control of government in the interest of general happiness.<sup>1</sup> Kant respected free public discussion as an instrument for the development and expression of the autonomous rationality of citizens. With the constitutional guarantee of a free press in parliamentary democracies, discussions of freedom of the press were largely reduced to the pursuit of freedom by/for the media, thus neglecting the idea of publicity as the basis of democratic citizenship. Yet, as this article argues, a free press embodied in the property rights of the owners of the press may well fail to achieve either Benthamite or Kantian goals. Such goals should lead to a personal right to communicate rather than to a corporate right to press freedom.

Bentham's idea of publicity anticipated the theory and legal doctrine of the freedom of the press as the Fourth Estate or Fourth Power that came to prevail in the 20th century. He conceptualized publicity and the press as instruments of public control over governmental activities, but he did not consider the possibility that the press itself would direct and control public opinion and/or would be controlled by sinister interests. Thus he saw no need to regulate the power of the press. Neither he nor his immediate followers had any worries that resources beyond personal intellectual capacities might be needed for a newspaper to become a 'constantly acting' organ of the public to control and/or enforce the state actions.

The reasons for Bentham's disregard of the danger that the press, like any other power, could be used as an instrument of misrule were simple, and also help explain why Kant completely neglected the matter. The financial or business side of publication seemed irrelevant in the pre-industrial period of the press. At that time a close association existed between the author and the publisher (and even readers) of a newspaper. The honourable status of the authors of literary and scientific texts alike reflected readers' trust and admiration, and public attitudes toward the authors of newspaper articles did not significantly differ from those toward the authors of books. In both cases it was the contents of communication rather than the means that attracted readers' attention and admiration. As late as the early 1900s, critical social theorists — Gabriel Tarde, John Dewey, Robert Park, and Ferdinand Tönnies, to mention just the most prominent among them — believed that newspapers ought to comply with (ethical) rules that guide science rather than with political or commercial 'imperatives'.

The most significant changes in the development of the press from an intimate companion to an industrial corporation took place since the (late) nineteenth century, long after Bentham and Kant had codified their 'principles of publicity'. In that period the metaphors denoting the press as the Fourth Power and enthroning it in 'the free marketplace of ideas' took root. In the twentieth century, the doctrine of the Fourth Power remained consistent with Bentham's ideas of the indispensability of the press to the democratic process, and the requirement that nobody be punished for defamation unless libellously based on false assertions. These optimistic images obscure the fact that neither is the 'fourth power' an autonomous power separated from other powers nor in 'the free marketplace of ideas' does everyone have an equal opportunity to present his or her opinion.

Bentham's vision of the press as controlling potentially corrupt interests, the moral integrity of those who act on behalf of the public, and embodying everybody's right to publish freely without external restriction faded away. Those who were assumed to provide opportunities to the members of the Public Opinion Tribunal by Bentham, mind primarily their own business, and the 'free' choice of consumers in the marketplace of ideas is often limited by constrained supply. That is why the concept of the Fourth Estate (or Power) has lost its moral vigour.

#### **Increasing power of the State and private capital**

Trust in the visions of democratic control subsided due to the increased power accumulated in the hands of the State and incorporated economic power of private capital, with the owners of media corporations becoming part of the power elite composed of top political, economic and military people. The inordinate individualism brought about by the deregulated capitalism of the late 1900s contained no inclination for personal liberties beyond freedom of enterprise. Indeed, freedom of expression and publication as a personal right had been largely neglected on account of freedom of the Fourth Estate as the real right. The latter has been rendered increasingly ineffective in its mission of surveillance because of the profit maximizing operations of private media capital and consecutive alliances with power élites silenced the bark of the 'watchdog'. As C. Wright Mills suggested, the rise of the power élite led to a complete absence of a civil service that would not be politically biased and to 'the increased official secrecy behind which great decisions are made without benefit of public or even Congressional debate' (Mills, 1956/2000: 296). In other words, the once dignified great power of the Public Opinion Tribunal and its main vehicle, the press as the "Fourth Power," in securing public confidence has vanished.

The free marketplace model of the press 'remains an essentially idealist transposition of the model of face-to-face communication to that of mediated communication' (Garnham, 1992: 361). It failed to conform to the radical changes introduced into the public sphere with the development of mass press and broadcast media, corporate capitalism, and the modern state. The insistence that market competition of the media is the most important precondition of their freedom invalidly assumes that the right to private property — because everyone has this right — guarantees both freedom of the media (their independence from the state) and freedom of citizens (free choice between different media and contents). Apparently, this is an 'ideal type of free market' of the media, which in practice does not exist due to the processes of capital concentration and centralization. As a consequence, the 'free' media market is largely oligopolized, and the 'free' choice is severely limited by constrained supply.

Even for producers, the free market does not ensure free access to the 'deregulated' market place because of the levels of investment required entering the market, rising programme production costs, and already existing oligopolies. Organizational concentration and conglomeration in mass communications tend to stifle non-profitable voices, to limit the opportunities of independent producers profitably to offer something different from mainstream supply, to foster standardization of programme supply across the entire media (particularly television) industry, and to create a risk that the main channels of access to the public may eventually be controlled by a small number of strategically placed and minimally accountable gatekeepers.

The development of oligopolized mass media, propaganda, opinion polls, and of new forms of communication have radically transformed the meaning of critical publicity. Publicity now prevalently means promoting commodities through advertising and public relations, which has nothing in common with the surveillance of power or with the process of rational critical discussion. The (post)modern reconceptualization of publicity is clearly reflected in the fact that the very word 'publicity', which used to refer to reasoned debates, has been overshadowed by 'the activity of making certain that someone or something attracts a lot of interest or attention from many people' or 'a type of public relations in the form of a news item or story which conveys information about a product, service, or idea in the media', as advertisers conceive of it.

In contrast to the Kantian ethical principle of publicity as an 'instrument' to achieve both individuals' independent reasoning and legal order in society, and to regulate relations between politics and morals through public law, the form of publicity that has been institutionalized in practice with the powerful mass media has entirely suppressed its ethical foundation. This new form of communication, which became a momentous element of the political and economic system, transformed the very nature of the publicity 'mechanism' itself: instead of enabling citizens to use their own reason in public, the media represented them in public following the example of boundless political representation; instead of securing the personal right to publish opinions to citizens, they effectively deprived them of that right.

The press definitely lost its 'natural freedom' tied to personal liberty of the author: a complex network of relations between the media and political and economic actors transformed the former relatively simple process of mediation between authors and small circles of readers, and between politics and morals, into complex, widespread processes of (public) mediation between economy and politics, which utterly enervated the idea of immediate and universal citizens' participation.

### **Contemporary realities**

Globalization is bringing about new institutions that are inter- or transnational, but not cosmopolitan in the Kantian sense of 'world citizenship' since the sovereign in the 'transnational states', such as the European Union, is not citizens but nation-states. Although processes of globalization provide conditions for an international civil society of non-governmental organizations and a cosmopolitan critical public, they may also loosen the responsibility of nation-states and their responsiveness to public opinion. Generally, attempts to (re)regulate the media internationally by virtue of the principle of publicity were even less effective than at the national

level. Some self-regulatory efforts even have the opposite effect, such as the recent cases of the European and World associations of press councils. The Alliance of Independent Press Councils of Europe (AIPCE) resembles more the Japanese 'press club' system with its exclusive, closed-shop atmosphere and personal relationships between representatives of media industry and political powers, not making their discussions available to the general public, to say nothing of the latter's participation in their debates.

In the EU, the Amsterdam Protocol (1997), the European Commission's Communication on the Application of State Aid Rules to Public Service Broadcasting (2001), and other political documents were adopted with the intention of making public service broadcasting compatible with 'the principles of fair competition and the operation of a free market', but in fact, they stimulated further objections against public service broadcasting and the EU's moderate regulatory efforts.

In dealing with contemporary realities, it might be thought that as long as every group aspiring to political power can 'freely use' their own media while competing for support in the 'free marketplace of ideas', as long as the mass media are independent of political authority, the necessary and sufficient conditions for freedom of expression as a personal right have been met. The private media owners sector is trying to persuade the authorities that nothing but competition law is really needed to regulate the media. But such views of free expression make the latter pointless, since the mass production of standardized products intended for mass consumption compatible with this version of free expression — according to which individuals may 'participate' — paves the way neither for control over the state nor for the expression and development of citizens' rational capacities. Under such circumstances, the mass media acquired legitimization by claiming that they served the public interest and citizens' 'right to know', and thus deserved legal (constitutional) protection from political interference. But with the strengthening of commercial interests in mass media, control over them has been steadily absorbed by economic power.

We should accept public reasoning both as a personal need, duty, and right, and as a societal need and obligation. It is usually taken for granted that freedom of thought and opinion is not an intrinsically collective exercise of freedom and thus does not legitimately invite public regulation. Such a belief is essentially delusive. As Kant (1786: 325) put it, 'How much, and how correctly would we think if we did not think, at the same time, in community with others?' thus emphasizing the collective nature of the personal right to use one's reason in public. Social experience, or 'putting ourselves in the position of everyone else' in Kant's words, plays a fundamental role in constructing personal autonomy.

### **Relating the right to communicate to the right to private property**

And then, we are confronted with the question of how the right to communicate relates to the right to private property. The complexity of the problematic of communication and democracy does not allow restricting them to mass communication only. Nevertheless, the questions related to mass communication are much more than just examples. The importance of the mass media for contemporary democracies becomes quite clear when contemporary society and its

communication networks are compared with ancient and medieval societies, and the political and economic significance of the modern mass media are compared with those of other forms of communication. Democracy is believed to assure the people a certain degree of (political) equality and the fullest possible involvement in procedures for arriving at collective decisions about public affairs. Without doubt, both the understanding of 'the people' and the scope of 'public affairs' to be discussed by the people considerably varied over time, as did the significance of 'public', non-personal (or impersonal) communication. Classical Greek democracy was marked by participation of all citizens in common life of the city-state, which was based on the equal right to speak in the sovereign assembly. Materialization of this right enabled citizens to develop and realize their capacities and skills. For ancient democracy, freedom of opinion and expression was universal in terms of the then disposable communication technologies. Citizens' participation in the process of government was restricted only by their skill to use their reason in public.

In terms of personal rights, the fundamental difference between interpersonal and mass mediated public reasoning is in the relationship between individuals communicating and the external means of production and control. In direct interpersonal communication — that is not controlled in terms of time and choice of subject by a human mediator set between individual communicator and recipients (regardless of the number of the latter) — such means are either (1) not necessary at all, as in face-to-face communication; (2) part of individual consumer technology (telephone, personal computer); or (3) they are, by definition, part of political, i.e. public infrastructure (e.g., public meeting halls, the Internet), so no collision of the personal right to communicate with the real property right may emerge. The case of interpersonal communication still reminds us of the right to communicate existing as a natural right of human beings when the individual's relation to his or her language was only determined by his or her membership in community, i.e. as a component of the relation of a 'natural' member to his or her human community.

In modern mass communication, however, the personal right to publish opinions (which still is a right only philosophically but not yet practically), collides with real property right as a matter of principle: the proprietor's right to dispose of communication means as 'external things' also includes the right to control the supply and the choice of contents. Why should a private proprietor of communication means prefer — or want at all — to make contents serviceable for democratic public reasoning over his or her private interest in maximizing commercial profit, if this would be only a moral duty, whereas no such duty would pertain to proprietors of any other external thing? Why would s/he countenance and encourage minority opinions, as J. S. Mill requested, if that were harmful to his or her business?

The answer is very simple: s/he would not do it at all — unless required by law. In Europe, the USA and elsewhere, opposition from private media owners is the major obstacle to any legislation that would reduce the level of profit in media industries. If a communication medium is used as any other productive property, that would result in commercial enterprise. Any communication organization exposed to market regulations would be forced to respond to the popular demand of the market place; it is not likely that it would countenance the expression of dissenting or minority opinions. As Jan van Cuilenburg's empirical study revealed, 'media markets are far better at producing reflection of majority civic interests and consumer preferences than equal openness to political and cultural innovations stemming from minorities.' Thus he concluded that 'in democratic societies, opinion dominance, lack of political and cultural competition and other forms of "market failure" inevitably ask for government policy to enhance the entrance of new ideas and rivalry among existing ideas and opinions' (1998; emphasis added).

Since communication belongs to the sphere of inalienable personal rights, all forms of communication, including the media, should be primarily regulated according to the principles of personal right. On that account, expressing opinions should become a civil right of citizens in the civil state of society, as it had been a natural right in the natural state of society. This consideration implies the need for regulation of media property rights in order to make them compatible with the personal right to communicate. This does not mean a revocation of media property rights, but only restraints on those that would give effect, under the protection of law, to the judgments and opinions of those who have no external means to communicate them. Such intervention is called for by the fact that the realization of the civil right to communicate in modern democratic societies requires a level of resources proportional to the increase in its complexity since its existence as a natural right to communicate.

The achievement of the enlightenment objectives under modern conditions requires a theory of the right to communicate as a fundamental personal moral right — i.e. a right that cannot be reduced to the property rights of media owners. In the long run, the right to communicate is a fundamental precondition for both the collective development of people's rational powers and for human progress.

#### **Note**

1. I discuss in detail the two conceptualizations of the principle of publicity in my recent book on *Principles of Publicity and Press Freedom* (2002).

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