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A FRAMEWORK CONVENTION ON FREEDOM OF EXPRESSION?

A RESPONSE TO KAROL JAKUBOWICZ'S CALL FOR A RIGHT TO PUBLIC EXPRESSION

Karol Jakubowicz is right to call for a fundamental and comprehensive debate on freedom of expression, and the reasons he sets out for doing this now are appropriate. First, freedom of expression law and policy have been hindered by a prevailing 'negative rights' approach (freedom from the state, rather than a positive freedom to express ideas). Second, the rise of the internet makes it reasonable to expect much more than this basic negative approach, as self-publication is within the grasp of the majority.

He is also right to stress individual rights to expression rather than freedom of the media or of the press. For too long it has been acceptable in public and policy debate to use the notions of freedom of speech, of expression and of the press or media interchangeably. Jakubowicz demonstrates the value of separating these notions.

So he is to be thanked for clearing space for this debate in such a lucid way. However, there are a number of problems with his position.

Legal interpretation not the only way ahead

In Jakubowicz's ideal world, article 10 of the European Convention on Human Rights (ECHR) would be re-worded to reflect not merely the right to freedom of expression, but the right to freedom of *public* expression. Recognising that we don't live in such a world, and that rewriting the treaty is unlikely to happen, he advocates development of

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legal interpretation of the right, and using an expanded normative conception of the right to inform policy in this field.

As I will point out later however, these are not the only possibilities: a more practical intervention to address the problems he raises may well be to advocate the adoption of a Framework Convention on Freedom of Expression, clarifying key principles and the responsibilities of States in supporting positive rights to free expression.

The main problems with Jakubowicz's suggestion arise in relation to his notion of a 'right to public expression'. If this right is defined narrowly, it appears to be identical with existing rights. And if it is defined broadly, it appears to amount to a right to be listened to – with complex and perhaps unwelcome implications for the rights of the listener.

However, the semantics of this putative right should not distract from the important analytical dimensions of Jakubowicz's critique of the development of law and policy on freedom of expression. He is asking us to rethink, from a normative perspective, the right to free expression, and asking judges in particular, when they interpret freedom of expression, to depart from a number of key doctrines, definitions, tests and theories that have come to define the right as it has been interpreted in practice.

He says (p.4) that "the right to 'public' expression is a positive right, matched by the responsibility of the State to take specific action to guarantee its exercise." The proposal is to extend article 10 protections by strengthening the positive obligation on the state to protect free expression.

In addition, he makes clear that he is interested in expanding what ECHR scholarship has described as "horizontal effect", meaning the extent to which a convention right triggers responsibilities among private bodies and institutions outside the State narrowly defined, through a wider definition of what constitutes a public authority or through application by private bodies as well. In the case of freedom of expression, this would concern whether public and private media institutions – which mediate between individual expression and reception by a wider public – may have responsibilities to grant access to a wider variety of voices.

Publication in reach of the masses

According to Jakubowicz, the reason to revisit these issues in the current context is technological change. In the 1970s, calls for a "New World Information and Communication Order" and for "communication rights" were unrealistic because of the high cost these rights would impose on communications providers and the scarcities inherent in the then current model of mass media. Giving people the right of access to a television newsroom simply did not seem practical.

The internet changes all this by putting publication within reach of the masses. Recalling the NWICO debates of the 1970s, and the calls for 'a Right to

Communicate’, Jakubowicz argues that “today ... individuals do not need the state to give them the tools of public expression. Anyone with the right equipment and the right cultural and communication competence can, at least in democratic countries, broadcast their news and views to the entire world.”

But the notion of public expression needs further clarification. If the point is to replace freedom of expression with freedom of *public* expression, we might ask what this word adds. That it is unstable as a conceptual basis is clear from Jakubowicz’s own analysis (p.4), where he incorporates several competing uses of the term: public as non-commercial, public as accessible, and as a form of historical agent (‘the public’).

Listeners as well as speakers

The key meaning that Jakubowicz intends to add is clear from his opening claim (p.1) that “the need to complement ‘expression’ with ‘publication’ that is ‘listened to’ is key”. Hence, his concern is with reception by others – the right to be listened to. The problem with this position is that it concerns listeners as well as speakers. That listeners should themselves choose what to listen to seems self-evident, and it is worth noting that article 10 of the ECHR already contains the right to receive ideas.

Jakubowicz’s ambition becomes clear when he draws a distinction (p.15) between “a general concept of ‘communicating in the public sphere’ and a clear and unequivocal recognition of a right to public expression. The former leaves the modalities of such communication vague and unspecified, with the implication still being that this can be achieved via intermediaries of various kinds. The latter clearly signifies that, in the language of all human rights standards, everyone should have a recognized right to join the public discourse in a personal capacity.” Why has this suddenly become a realistic prospect? Because, Jakubowicz argues, of the rapid diffusion of the technology of publication in the form of the internet: “individuals no longer need the mass media to distribute their news and views around their own society, indeed around the world”.

The centrality of the internet to his argument leads to some problems, not least with the logic of the previous proposition. While internet access facilitates publication, it does not ensure that every publisher can or should have a public. The mass of new voices itself creates noise that prevents reception of the new messages.

Rose-tinted view?

In this respect, Jakubowicz surely takes a rose-tinted view of the new democratic ‘conversation’, and overstates its importance. Even in the most advanced and wired populations, only a small minority of citizens join in such a ‘conversation’. While the internet may represent the future, there are many reasons to suspect that, as with previous shifts in media history, the new will coexist with the old, where intermediaries continue to control expression.

Furthermore, the very babel of the contemporary proliferation of voices will create a demand for the functions of intermediaries, editors, aggregators and agenda-setters: functions that are associated with the former structures of media power.

To his credit, Jakubowicz acknowledges that he may have overstated the scale and rate of the current transformation of social communication, and qualifies his statement: “one can most probably expect that in developed societies a large section of the population will in the future be engaged in content creation and distribution via the new technologies”. Hardly a strong basis for constitutional reform, and in any case in itself still a contentious claim.

The chief problem, to sum up, lies in the notion of the public. “The public” and “public communication” are terms that have taken on their meaning in societies where mass communications media play a role. The internet does not simply offer access to an unchanged public realm of communication: it fundamentally alters the nature of publicness. If we are entering a situation in which everyone can speak, publicity may become harder to achieve – precisely because large numbers of people chose to speak.

Wider policy challenges

In this situation we do indeed need to revisit the notion of free expression, and the basic philosophical justifications of truth, democracy and self-expression upon which it is based. Extending the horizontal effect and the obligations of public authorities to permit individual freedom of expression is a key part of that, but we need to be alive to the fact that a right to speak publicly – which in Jakubowicz’s hands seems to be defined as a right to use the internet – is not a magic key.

In this context, he is right to focus our attention not only on the constitutional protection of individual rights, but also on the wider policy challenges that citizens and governments face. The UK government recently passed legislation to establish a public policy framework to guarantee universal broadband internet access, arguably a key building block of a positive right to public expression. Although the legislation offers positive rights, however, it also threatens to give private bodies powers to sweep them away. Like the *Loi Hadoppi* in France, the Digital Economy Act will empower ISPs to choke or cut the internet connections of those suspected of file sharing – and also their parents, siblings, sons and daughters. Yet the debate in the UK, unlike that in France, has paid scant attention to rights to freedom of expression.

A new practical step

While Jakubowicz is arguing for a new interpretation of the right, why not consider a practical step to ensure that states and courts have guidance about the fundamental right to freedom of expression as they negotiate these and other challenges thrown up by technological change?

If Jakubowicz is in the business of advocating the creation of new instruments like the right to public expression, then he might consider something else that would be equally ambitious but probably of more practical value. He suggests a developing case law, but a more practical way to advance his argument would be to enact a framework convention on the model of the Council of Europe's Framework Convention for the Protection of National Minorities, adopted in 1995.

The problem with his proposal, as I have pointed out, is that the notion of 'public' expression is too contested and unstable as a conceptual basis. A convention, by contrast, would enable partners to engage in a process of re-stating expression rights in today's radically different context. It would offer guidance to the developing case law and set out clarification of the key principles, along the lines advocated by Jakubowicz.

The Council of Europe has an Advisory Committee on the Framework Convention that has exerted a significant and lasting influence on the development of case law on minorities. The same could be true of an Advisory Committee on Freedom of Expression. It would also offer a means to articulate a peculiarly European approach to freedom of expression – which already affords a more positive, horizontal framework than other constitutional systems – in the new technological context.

And there is a related issue that Jakubowicz acknowledges but never fully answers. To what extent should we be concerned with making clearer and more justiciable 'universal' and human rights, and to what extent should these issues be seen as context-specific, national issues? The balance has shifted in some parts of the world to a situation where private bodies, rather than the state, now pose the growing threat to free expression.

In this context, the tendency to view any proactive state action as a threat of censorship is particularly counter-productive, and a positive rights emphasis is more appropriate. In other parts of the world, those engaged in fighting for freedom of expression need to focus on control of key intermediaries – the mass media – by state authorities.

It may be that behind Jakubowicz's broad brush approach to the ECHR, the ICCPR and the national constitutions, we can see a bifurcation of approaches: namely, a positive rights emphasis in those regions characterised by higher rates of internet access and speech protection, and a negative rights approach elsewhere.

All about the internet

Ultimately, Jakubowicz's right to public expression is all about the internet. He might be criticised for neglecting to acknowledge that internet access is as much about investment as it is about freedom of expression. In some countries, network infrastructure remains a publicly owned, publicly financed project. Even countries such as Australia and Korea are reverting to public finance in the effort to raise the larger investments required to build the next generation of high-speed internet networks.

Elsewhere, where private investors build and own the network, private bodies will exert much more control over content and services, and may constitute the biggest threat to free expression. The extent to which governments are permitted, for example, to cut off I.P. infringers, or 'manage' the content and applications that flow over the network in order to ensure that revenues flow to investors in this sector, will be a key battleground in the coming years.

And without succumbing to techno fatalism, it has to be acknowledged – with the history of Communications Rights and the NWICO in mind – that whilst normative appeals and declarations have an important symbolic value, their success depends as much on technologies and markets as on the normative debate. A realist reading of the rise of the first amendment in the USA and ECHR article 10 in Europe acknowledges that the protections afforded to the media within these legal frameworks were in fact the fruit of the gradual emergence not of a set of normative principles as such, but of a new autonomous field of media power in the form of the fourth estate. It was not a normative principle, but the autonomous exercise of media power that led to liberty of the press.