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USEFUL INSIGHTS AND DUBIOUS PROPOSITIONS

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

Karol Jakubowicz's paper provides an insightful analysis of the impact of new technologies, the democratic possibilities they create, and the interactive cultures they have given rise to. It also points to a number of useful policy and practical approaches which could maximise the potential of new technologies to promote more direct forms of democracy, and foster new two-way forms of communications. Its central thesis, however, proposing a new "right to public expression", is unconvincing.

Section III of the paper situates the analysis in the context of the right to communicate. The analysis is solid and informative. However, the attempt to draw a clear distinction between the right to communicate and the right to public expression – based on the idea that the latter focuses on individual communication in the public sphere while the former focuses more on the mass media – is not quite persuasive.

If advocacy of a right to communicate has focused heavily on the mass media, this is because they remain a dominant space for public discourse, even in the most technologically developed societies. Furthermore, the right to communicate, as presented by its advocates, encompasses all forms of communication, including use by individuals of the new media.

Section IV, on "semiotic democracy", describes how new technologies are transforming democratic possibilities, as well as how people interact in modern societies. This includes some interesting claims – such as that Web 2.0, "based on an implicit 'architecture of participation'" (p. 18), is making possible a "new stage of social communication", and access to "more public-spirited content than in the past" (p. 20). The ways in which new technologies are changing communicative modalities – especially looked at from a democratic or participatory perspective – is a fascinating

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topic and these are bold assertions. My only criticism is that more attention could have been devoted to it.

The largest section of the paper presents a number of useful policy and practical ideas about what can be done to build opportunities for public expression in modern societies. These include a number of solid suggestions for public service media in the new media environment, along with strong pleas for support for community media and universal internet access.

The paper perhaps dismisses too easily the possibility of promoting participation in the private media (p. 31), for the same tools that have been used to promote diversity, including in the private media, could at least potentially be brought to bear here. Subsidies, for example, could, within an appropriate framework, be used to support more participatory media, and this could be a criterion to be taken into consideration in the licensing process and other forms of authorisation for broadcasters and distributors

This section also looks at how the democratic process could be aligned more closely with the more user-driven style of the new media. It describes convincingly the failure of traditional governance and democratic systems to provide more forward-looking participatory opportunities (“government 1.0 vs. society 2.0”). But it is somewhat disappointing when it describes how this failure might be addressed, although this is admittedly difficult terrain (and the paper describes it as the “most challenging” area). Perhaps contextualising this in a wider framework of participatory modalities would help.

It is perhaps unfortunate that the wealth of useful material described above is presented in the framework of a call for a new human right, for this is by far the least convincing part of the paper. What is more, there was no need for Jakubowicz to take this step, because the right to freedom of expression accommodates all of the rights ideas implicit in the ‘right to public expression’ as described; indeed, it does so easily and without controversial extension.

In order to argue otherwise, the paper presents two very dubious propositions. First, it suggests that freedom of expression is a negative right (or, actually, that it is a freedom, a category which the paper claims is negative by definition). To support this claim, it focuses on a particular European Court of Human Rights case (p. 6), where a positive element of the right was established, but this was limited to preventing attacks which undermined the right to freedom of expression by other individuals. The paper also highlights the fact that the Court recognised limits on the scope of positive obligations.

In point of fact, the Court has recognised positive obligations to protect freedom of expression on a number of occasions, and going far beyond simply preventing ‘horizontal’ (individual to individual) interference with the right. Perhaps most significant was the recognition in 2008 that the right to freedom of expression imposed a positive obligation on the State to put in place systems to grant access to information

held by public bodies. Other authoritative human rights statements have recognised numerous positive elements of the right to freedom of expression, many of which are similar to those advocated in Jakubowicz's paper.

Second, the paper argues strongly that freedom of the press fails, in both practical terms and in principle, to ensure a right to public expression. Regardless of the merits of this argument – and the practical argument is susceptible to criticism on various grounds – it has nothing to do with the question of whether freedom of expression supports a right to public expression. Certainly, freedom of expression covers expression through the (traditional) media, but it equally clearly covers expression through any media, including the new media.

Although some argue that the (traditional) media merit special protection under the right to freedom of expression, I have never accepted this argument, which I think has no basis in principle. The media have traditionally been, and still are (although this may be changing), the main means by which almost all individuals access information and engage in public debate. Certain practical implications flow from this, but they are founded on individuals' right to receive information, not on freedom of the media per se, an important distinction.

There are also problems with the argument, presented in section V, that changes in the modalities of communication (i.e. new technologies) mean that we need to establish new communicative rights. The right to freedom of expression, at least under international law, was crafted in a forward-looking fashion, which means that it is quite able to accommodate technological and even underlying social changes. It refers, for example, to the right “to seek, receive and impart” information and ideas, and “through any media” (which has been interpreted to include any distribution system for expressive content). The fact that it applies to both speaker and listener, as well as all new media, provides a strong basis for the rights elements of the ‘right to public expression’.

It is inherent in the very nature of human rights that our understanding of them is subject to continuous evolution. Although it came as a shock to many when the European Court first ruled that politicians were required to tolerate more criticism than ordinary citizens, informed individuals now take this for granted. Similarly, until relatively recently many (even Western) European countries had public television monopolies, whereas now this is clearly understood as a breach of the right to freedom of expression.

The paper states: “At the very least, [human rights] standards may need to ‘translated’ in ways that would spell out their practical meaning in new technological realities.” Yes indeed. But this is very different from saying that these standards are not able to bear that ‘translation’ (I would prefer to say ‘interpretation’).

The most interesting parts of this paper look at the ways in which new communications possibilities are affecting, or have the potential to affect, the public, or

participatory, sphere, along with some ideas about how we can best harness them to this end. I wonder if the paper would not have been more convincing if it had been cast in the framework of a proposed new 'right to participate' instead of a 'right to public expression'.