

Merris Amos, Jackie Harrison  
and Lorna Woods (eds.)

Published under the auspices of the  
Clemens Nathan Research Centre

# **FREEDOM OF EXPRESSION AND THE MEDIA**

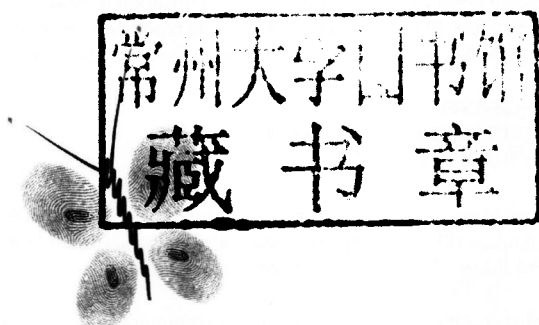
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# Freedom of Expression and the Media

*Edited by*

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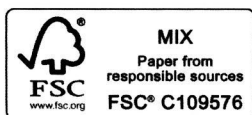
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## Freedom of Expression and the Media

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## FOREWORD

The Clemens Nathan Research Centre has held a series of one-day conferences here at the International Institute for Strategic Studies to highlight different issues in human rights. We were pleased that Lord Guthrie was our keynote speaker, together with an excellent team of others, on Terrorism and Human Rights; Sir Jeremy Greenstock led a conference on foreign policy and human rights and Professor Paul Collier headed up the discussion on development policy and human rights. We have also held several other meetings through our sister-organisation, the Consultative Council of Jewish Organisations (CCJO), with Robert Badinter, former Minister of Justice of France and former President of the French Constitutional Council, with General Sir Rupert Smith, and with Rolf Ekéus, who between 1991 and 1997 was Director of the United Nations Special Commission on Iraq after the Gulf War.

The aim of these meetings is to achieve an analysis of current situations and perhaps provide some recommendations of what could be done. We often publish the proceedings of the meetings so that the fruits of our labour are available to a wider audience.

The founder of the CCJO, the late René Cassin, was instrumental in the drafting of the Universal Declaration of Human Rights and received the Nobel Prize for Peace for this work. We believe that our modest Research Centre is carrying on in his spirit to help make people more aware of what needs to be done in the field of human rights.

Media and Human Rights is a subject which concerns us all, whether it is due to our wish for privacy or for open dialogue. There have been two outstanding reports based on government communications: the Sir Robert Phillis Report (2003, with revisions in 2004) and the House of Lords Government Communications report at the end of January 2009. Government communications need to be truthful and factual, but it is fascinating to see how the Government has tried to re-assess the whole approach it has to media. This is of course in response to rapidly developing new technologies and ever-larger media made available to the public, who in turn have greater expectations about access to information. It is overwhelming that over 3,000 people are working in the Government Information and Communication Service—let alone all the other national and international organisations, including media companies, voluntary

and non-governmental organisations. The impact of this is huge, as it can be exceptionally difficult to develop the skills and tools to reach the public and give them a fair understanding of current issues.

There are so many vested interests in different organisations to promote one view or another. This of course can be healthy in a diverse society and democracy. We all need to know that there is opportunity to express our views, even if they are controversial to others, but we also need to know when these are controversial views, as against clear, truthful and factual information on which to base our own decisions.

The creativity in writing websites is quite outstanding today, and the various methods used to make information attractive to the public in digital and print form is remarkable—even if many of us wish for less of this and instead for more factual information! The growth of the Internet, twitter, blogs and other vehicles available to every citizen is transforming communications between people and governments.

In 2011, the United Kingdom witnessed the ‘phone-hacking’ scandal. It seemed that many of the issues discussed in the papers that follow came to a head during the summer months, as News International withdrew the *News of the World* newspaper. Employees had sanctioned widespread ‘hacking’ into the phones of celebrities, crime victims and relatives of service personnel, and the nation was outraged. At the time of writing, a full enquiry has been launched, and we await the outcome. Never before have the issues discussed in this book on media and human rights been more relevant.

With respect to the conference, and this publication, I have to thank particularly our two chairmen, William Horsley and Richard Schiffer. I would also like to thank Merris Amos, Jackie Harrison and Lorna Woods for their enormous help in organising this conference and then editing the papers for this volume, and my colleague Dr Tony Gray who has done much of the work behind the scenes.

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## INTRODUCTION: FREEDOM OF EXPRESSION AND THE MEDIA

Merris Amos, Jackie Harrison and Lorna Woods

Freedom of expression—particularly freedom of speech<sup>1</sup>—is, in most Western liberal democracies, a well accepted and long established, though contested, constitutional right or principle. Whilst based in ethical, rights-based and political theories such as those of: justice, the good life, personal autonomy, self determination, and welfare, as well as arrangements over legitimate government, pluralism and its limits, democracy and the extent and role of the state, there is always a lack of agreement over what precisely freedom of expression entails and how it should be applied. For the purposes of this book we are concerned with freedom of expression and the media with regard to the current application of legal standards and self regulation to journalistic practice.<sup>2</sup> These applications, it must be said, presume certain views: first and most generally that people should be free to speak their mind; secondly there co-exists within this freedom, a freedom of the press and publication; and thirdly that freedom of expression serves a public good. Each is a contentious matter and subject to revision, constraint and extension as well as much public debate, as—in a slightly different context—the Wikileaks saga has shown. This book is concerned with these issues as they affect the contemporary media, the practice of journalism and why imposed constraints and the extent of the freedoms attached to freedom of expression are managed, and why they may or may not be ultimately regarded as legitimate or not legitimate. It is the practical matter of contemporary journalism and freedom of expression that concerns us. Consequently this is not a philosophical work so much as a work concerned with the way that freedom of expression is evoked and applied and those arguments that support or refute such evocation and application, focusing on areas of tension between freedom of expression and other considerations. In short, this is a book concerned with what the various

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<sup>1</sup> This chapter will use the terms 'freedom of expression' and 'free speech' as interchangeable.

<sup>2</sup> As such we exclude the entertainment side of the media business, such as films and dramas, game-shows and reality television, though obviously this boundary is somewhat porous.

authors regard as good practice as well as what they regard as problematic and why.

Some background is in order and what follows immediately is a sketch of some theories of freedom of expression that most impact upon the form of regulation, self regulation and the conduct of the contemporary media. Essentially this sketch is comprised of the following overlapping views that: freedom of expression is essential to the discovery of truth and error; that it secures government by discussion; that it requires a vibrant public sphere; enables autonomy and deliberation and that it is an essential condition of a democratic relationship to Government all of which the media should, in part, serve. Combined they frame a space within which media companies—and particularly news journalists—are required or are obliged to operate. While this space is not quite the *mediapolis* of the kind Silverstone<sup>3</sup> desires, namely one concerned to grow a global morality, it is, as Silverstone demonstrates, an ethical space nonetheless which houses both the demands for freedom of expression and its limits; and what one has a right to know and under what circumstances that right does not apply. It is a space in which freedom of expression, public will formation and the responsibilities the media have to its audiences are played out.

One of the earliest arguments on behalf of freedom of expression is that freedom of speech is essential to the discovery of truth and error or is necessary to guide and legitimate political decisions. These positive arguments, as Harrison reminds us in her chapter, received one their first expressions in the work of the seventeenth century, republican and poet John Milton (1608–1674). Milton argued against the licensing requirement on books<sup>4</sup> which stated that ‘no book, pamphlet or paper shall be henceforth printed unless the same be first approved and licensed by such, or at least one of such, as shall be thereto appointed,’ by distinguishing public prohibition from private choice. He argued: ‘all opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest’. Milton did, however, accept the need to have some control over what was published: he accepted the needs of a person’s reputation, as well as the validity of copyright and, as Harrison notes, Milton’s sense of tolerance and freedom of expression existed

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<sup>3</sup> Roger Silverstone, *Media and Morality: On the Rise of the Mediapolis*. Cambridge and Malden, MA: Polity Press, 2006.

<sup>4</sup> John Milton *Areopagitica* in *Areopagitica and other Prose Works of John Milton* (J.M. Dent: London, 1927).

alongside his constant insistence that only those who themselves advocated censorship and violence, and were themselves deeply intolerant, should be censored. The 'proponents of unfreedom—Rome, Charles 1st, [and] Presbyterians,'<sup>5</sup> were according to Milton, the most deserving of censorship and worthy of the 'sharpest justice on them as malefactors.' Whilst much of *Areopagitica* reflects its time, the height of the English Civil War, its importance as a defence of freedom of expression manifest through a free press, 'Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties,' continues to be profound.<sup>6</sup> Indeed, J.S. Mill (1806–1873) dedicated a chapter of *On Liberty* to freedom of expression and of the press.

In this work Mill argues from the basis of a liberal conception of the individual as sovereign. He argues that the only warranty for interfering with an individual's 'liberty of action' is self protection and that certain forms of government, most notably those that represented the 'tyranny of the majority' over the freedom of the individual, were one of the greatest threats confronting 'liberty of action.' Significantly Mill believed that liberty of action has as one of its key elements freedom of expression which consisted of the freedom to think, feel, form opinions and to publish. From this position Mill argued that freedom of expression carries with it the responsibility man and government have, namely a duty to form the truest opinions they can, or as Walter Bagehot<sup>7</sup> summarised this view—government by discussion. Where the actions of government were concerned Mill argued that,

the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.<sup>8</sup>

In short, and in the words of Bernard Williams, Liberal theories such as Mill's regard freedom of expression as both an individual right and

<sup>5</sup> Harrison p ... citing Christopher Hill *Milton and the English Revolution* p157 (London: Faber and Faber, 1977).

<sup>6</sup> John Milton *Areopagitica*, *supra*.

<sup>7</sup> Bagehot argued that "A Parliamentary Government, is essentially a Government by discussion; by constant speaking and writing a public opinion is formed which decides on all action and all policy." Walter Bagehot. *Physics and Politics* Chicago: Ivan R. Dee Publisher, 1999. xi + 211 pp original 1872.

<sup>8</sup> J.S. Mill 'Of the Liberty of Thought and Discussion' in *On Liberty* (1860) Harvard Classics Volume 25 (1909 P.F. Collier & Son).

a political good, as it establishes a 'market place of ideas' from which truth can be discovered.<sup>9</sup> This view is encapsulated in the opinion of Holmes, J. in *Abrams v US*, in which he said, 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'.<sup>10</sup> However, unless we refer to an idealised or perfect market, what market places actually do is show up imbalances in power and asymmetries in information and access to these ideas and subsequently the means by which to debate them. Consequently, the 'market place of ideas' has two, potentially conflicting, aspects. First, there is what we might call a quantitative aspect where the 'market place of ideas' equates to the acceptance of ideas through popularity, thereby raising the spectre of the tyranny of the (ill-informed) majority, or even mob-rule. Second there is what we might call a qualitative aspect where the 'market place of ideas' equates to democratic deliberation, sound reasoning and rational debate (certainly what Milton, Bagehot and Mill had in mind). Thus, while all these arguments share the idea that some form of public discussion is required, and that public opinion and will formation are desirable so that we might better come to understand the truth of matters, and that such public discussion must be 'unfettered', the metaphor of the market place of ideas is potentially misleading.

Recently the most potent metaphor for public discussion has been that of the 'public sphere' which Habermas defines accordingly:

The public sphere is a social phenomenon just as elementary as action, actor, association, or collectivity, but it eludes the conventional sociological concepts of "social order." The public sphere cannot be conceived as an institution and certainly not an organisation. It is not even a framework of norms with differentiated competencies and roles, membership regulations and so on. Just as little does it represent a system; although it permits one to draw internal boundaries, outwardly it is characterised by open, permeable, and shifting horizons. The public sphere can best be described as a network for communicating information and points of view (i.e. opinions expressing affirmative or negative attitudes); the streams of communication are, in the process, filtered and synthesised in such a way that they coalesce into bundles of topically specified public opinion.<sup>11</sup>

On the issue of whether there is one public sphere or many, Habermas has this to say:

<sup>9</sup> Bernard Williams *In the Beginning was the Deed* (2005 Princeton: Princeton University Press) p140.

<sup>10</sup> *Abrams v United States* 250 US 616.

<sup>11</sup> Habermas, J. 1996. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, p360 trans William Rehg. Cambridge: The MIT Press.

Despite the manifold differences [of public spheres] all the partial publics constituted by ordinary language remain porous to one another. The one text of "the" public sphere ... is divided by internal boundaries into arbitrarily small texts for which everything else is context; yet one can always build hermeneutical bridges from one text to the next.<sup>12</sup>

In other words, the public sphere materially links the social practice of public deliberation and freedom of expression together with public opinion and its role—a role that is usually conceived of as the most important mainstay of some contemporary liberal participative democracies.<sup>13</sup>

Dworkin extends this last point and links freedom of expression to 'the freedom of the human being to develop in society' so as to protect a person's autonomy.<sup>14</sup> He suggests that the state should not remove or limit the right of individuals to form their own respective conceptions of the good, and restricting speech would of course violate this, prioritising some views over others and offending against claims for equality of respect.<sup>15</sup> Dworkin expands his position with the claim that individuals should be able to develop their own personality and integrity. At the bottom is the need to respect individuals who are capable of making their own choices. Or, as Isaiah Berlin put it, 'The "positive" sense of the word liberty derives from the wish on the part of the individual to be his own master'.<sup>16</sup> The argument for self-development may be taken further, to acknowledge the significance of human interaction, particularly in regards to each individual's ability to progress and develop. Indeed, this idea may be implicit in Mill's arguments, as he recognised that debate improves capacity. Beyond this, the expression of views may allow an individual to give form or precision to that which was perhaps not previously recognised within him or herself.<sup>17</sup> While not all discussion, public or otherwise, is concerned with matters of truth or concerned with the functioning of a liberal participative democracy, these arguments also emphasise the point that freedom of expression includes speech which may, from the point of view of some, seem trivial, controversial, eccentric or, in some cases, quite bizarre. From this it follows that we encounter the increasing difficulty of establishing

<sup>12</sup> Ibid., p374.

<sup>13</sup> Meiklejohn, A., 'The First Amendment is Absolute' [1961] *Supreme Court Rev* 245.

<sup>14</sup> Dworkin, R., *Taking Rights Seriously* (1978), p 272.

<sup>15</sup> Some speech may itself violate respect for equality of others.

<sup>16</sup> Berlin, I., 'Two Concepts of Liberty' in *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969) p 131.

<sup>17</sup> Moon, R., 'The Scope of Freedom of Expression' (1985) 23 *Osgoode Hall LJ* 331 at 348, citing C Taylor, *Hegel and Modern Society* (1978).

boundaries to opinions in terms of what is acceptable and what is not acceptable, what views should be aired publicly and what views should not; and even whether all expressions are worthy of protection.

One way forward is to say that freedom of speech is more or less confined to what, in the context of news journalism, Inglis calls<sup>18</sup> 'our unasuageable hunger to know what on earth is going on' or, as Bernard Williams argues,<sup>19</sup> is centred on the fact that: 'Neither the citizens themselves nor anyone else can answer the question "What is actually going on?" without true information and the possibility of criticism.' In short, freedom of speech is effectively the power of critique orientated toward 'to any reasonable conception of the individual's interest.'<sup>20</sup> Speech which does not meet that standard is not automatically protected by freedom of speech, whether such speech is seen as not falling within the scope of expression, or—more likely—because the limitations on speech in such a case are seen as justified.

Another way forward is adopted by Scanlon<sup>21</sup> who argues that rather than focussing on the rights of the speaker, we should consider the position of the mediated audience. According to Scanlon, a person is only free or autonomous whilst s/he is free to weigh and to choose the arguments put before him or her. Consequently, a government should not seek to limit speech on the basis that it would harm the audience. There are clear links with Mill's arguments again, though Scanlon does not argue that the output of this process would be truth; rather than looking to the consequence of the process, Scanlon focuses on the individuals and their rights. Freedom of expression is not limited to political discourse, but to all speech which provides information and opinion, though it does distinguish between communication relevant to the formation of moral or political beliefs and technical information. The latter may be limited. The fundamental weakness of this position is the ascription to all of the ability to comprehend and to weigh all forms of information in all circumstances. As an approach, it might also seem to overlook to some degree the interests or rights of the speaker but never the less does bring to our attention the relationship, pursued in the subsequent chapters, between audiences

<sup>18</sup> Inglis, *Fred Peoples' Witness* (New Haven and London: Yale University Press, 2002), p376.

<sup>19</sup> Bernard Williams *In the Beginning was the Deed* (Princeton: Princeton University Press, 2005), 74.

<sup>20</sup> Ibid.

<sup>21</sup> T. Scanlon, 'A Theory of Freedom of Expression' in Dworkin (ed.) *The Philosophy of Law* (Oxford: Oxford University Press, 1977).

and media organisations. In short, the rights of the audience have had and continue to have an impact on reasoning about the regulation of the media, especially in the context of public service broadcasting.

To summarise, the above sketches simply describe an ethical space within which the media reside and which require that the relationship between the media and freedom of expression covers the terrain of matters to do with the discovery of truth and error; legitimate political action; government by discussion; the public sphere; individual autonomy and enabling public deliberation as well as being free from Government corruption and intimidation. Indeed, in many cases the approach taken by the courts is to emphasise the role of the media in a democracy. Policy documents reflect this, and the need to ensure representation and, in terms of the famous mantra that defines the BBC, to inform, educate and entertain the audience.<sup>22</sup> These issues are contentious, and whilst the different approaches noted may produce different regulatory terrains, these theories cannot be assessed in isolation. In short, our sketches simply show that justifications for freedom of expression do, in the end inevitably involve the conduct of the media and it is this that concerns our authors. It is the activities of the media relying on freedom of expression inner change technological and economic environment with which this book is concerned.

Most of the chapters in this book assume a UK regulatory framework; which, influenced by the EU requirements, imposes a differentiated burden on the broadcast media by comparison with the press and, to some degree, content on the Internet. The appropriate regulatory burden for each type of medium (insofar as clear distinctions can be made) has been the subject of as much debate as freedom of expression itself. While the press (and various internet groups) typically relies on a simplistic argument that regulation is bad as it infringes freedom of expression, the regulation of broadcast media has been accepted, however reluctantly. There are four main arguments that support the regulation of the media in one form or another,<sup>23</sup> but each reflects to a large degree the perceived relationship between media, public debate and an instrumental view of freedom of expression. These can be summarised as follows:

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<sup>22</sup> BBC Charter, October 2006, Cm6925, Article 5.

<sup>23</sup> For a fuller discussion of other possible arguments, see Hoffman-Riem, *Regulating the Media: The Licensing and Supervision of Broadcasting in Six Countries* (New York: Guildford Press, 1996), pp 267–80; for more on the four categories, see for example Barendt, E., *Broadcasting Law: A Comparative Study* (Oxford: Clarendon Press, 1995), pp 3–10.



- (1) *Airwaves are a public resource*: while it is debatable whether airwaves are in fact a public resource and, assuming that is so, whether that fact in itself justifies regulation, it is much less contentious to argue that regulation is necessary to avoid overlapping signals and interference;
- (2) *Spectrum scarcity*: this phrase encapsulates the idea that where a limited amount of content was possible (because of technological limitations) some regulation to ensure either a fair playing field or to counter market failure so as to ensure a balanced range of content, was acceptable. Some argue that with the development of different delivery platforms and the use of digital technology which allows a greater amount of content to be sent over the same bandwidth, the spectrum scarcity argument no longer holds good. On this view, we are in an age of plenty, where the consumer can choose from a wide range of content. It is, however, a view which assumes that content is wide-ranging in subject matter and also includes new programming, rather than providing content limited to just the mainstream and the popular and/or repeated content. As regards the latter point, public debate is unlikely to arise in a dialogue with a tape recoding of the past. A view espousing the age of plenty argument, if it is to cater for public debate, also assumes any such content is generally available.
- (3) *Power of broadcasting*: it has often been argued that the broadcast media, particularly television because of its visual impact, has a greater influence due to its immediacy and place in the home. The impact of modern media, specifically the internet, is not directly addressed by this argument. This point now has more force given that the boundaries between television and internet have increasingly become blurred as the same consumer devices can be used to access different services.
- (4) *Compensation for the failings of the press*: it has been argued that taken together the (unregulated) press and the (regulated) broadcasters form a complete system where the characteristics of each—influenced by its respective relationship to the regulatory environment—complements the other. This view has also been criticised<sup>24</sup> and from a theoretical perspective it is hard to justify a regulatory regime to one form of media and not another, particularly if we are concerned with the quality and range of information available to the viewer or reader, a point Feintuck makes in chapter 4 in relation to impartiality rules.

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<sup>24</sup> Barendt E., *Ibid.*



While this distinction may be used to argue against the regulation of the broadcast media, equally it can be used to argue for the extension of a regulatory regime to currently unregulated (or self-regulated) media, albeit one which needs to satisfy the usual requirements of good governance. Indeed, we see this direction of travel in the discussions regarding the revision of the Television without Frontiers Directive, as it became the Audiovisual Media Services Directive.<sup>25</sup>

The above arguments emphasise the role of the speaker and only to a lesser extent the role of the audience perceived as a public of citizens. The dominant theme in jurisprudence has been the scope of speakers' rights. This unidimensional conception of freedom of expression and the way it is reflected in regulatory thought, is emphasised as policy makers increasingly regard broadcasting as a consumer service rather than a public service, as a market based product rather than a merit good and, as such, increasingly approach regulatory matters with regard to their economic rather than civil or political consequences. This policy direction is further reinforced by the response of policy makers to a changing technological and economic environment, in which more platforms exist, different ways of using and interacting with technology have developed and cross-border media is more easily available.

Against this background Gibbons argues that we need to make a reinvigorated case for government regulation in the interests of speech and protection of a space in which speech may take place despite the libertarian impetus of a commercialised, multimedia environment. Gibbons suggests it is necessary that the components of free speech should be identified, and a clearer understanding of the nature of the right delineated. He starts from Lichtenberg's suggestions about the purposes of speech and Berlin's distinction between the freedom from and the freedom to—in short, a distinction between a negative and positive conception of the right. Gibbons then discusses the scope of the speech activity and the objectives of speech before considering the specificities of the media environment. Of necessity, we must consider the different nature of impediments to speech; indeed, this aspect is often the focus of discussion within a traditional approach to free speech. Physical and normative interference with speech then become central to the discussion, but Gibbons argues that this results in a narrow and arguably useless

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<sup>25</sup> Although the press is not regulated by the directive, some internet services are.