The Press: Fourth Power or Counter-power?

Marco Marsili [*]

Abstract

The freedom of the press – or the freedom of expression – traces its roots in the enlightenment period. Often presented as the "fourth power" — sometimes as "counter-power" — free press is considered a feature of liberal-democracies, and a fundamental human right. This brief paper explores the validity of these definitions and the role of the press in democratic societies characterized by governments constrained by checks and balances. Most of this paper draws on my previously published works.

Keywords: freedom of the press; freedom of expression; freedom of speech; freedom of opinion, media.

[*] Research fellow at the Centro de Investigação do Instituto de Estudos Políticos da Universidade Católica Portuguesa (CIEP-UCP) under grant no. SFRH/BD/136170/2018 funded by the Fundação para a Ciência e a Tecnologia (FCT). Research associate at: Centro de Estudos Internacionais (CEI-IUL) – Instituto Universitário de Lisboa (ISCTE-IUL); Centro de Investigação, Inovação e Desenvolvimento da Academia Militar (CINAMIL); Centro de Investigação e Desenvolvimento do Instituto Universitário Militar (CIDIUM).

Introduction

Keith Devlin gathers that knowledge is reached only through the individual use of information[1], and I strongly support this idea. Knowledge is an individual capacity; it is based on information, but it implies the ability to know how to search for it, interpret it, select it and manage it, and then connect it to others and produce new ones[2]. When knowledge has been produced, the goal of the society would be to promote its maximum diffusion[3]. It is a concept, as we see later, first expressed by Locke, Mill, Milton, and many other advocates of the "freedom of the press".

The notion of "freedom of the press" – later embodied in the U.S. Constitution, through the First Amendment – it is commonly rooted in the landmark decision of August 5, 1735 in the case *Crown v. John Peter Zenger*[4]. Freedom of the press is one of the rights that a democratic government, together with the media — newspapers, radio, television, Internet, etc. — should guarantee to its citizens, to ensure the freedom of expression. Freedom of the press also extends to the right receive and impart information and ideas through any media[5].

In liberal democracies, the freedom of the press implies that all people should have the right to express themselves through their writings or in any other way of conveying personal opinions or creativity — orally, in writing or in print, in the form of art, or through any other media. Notwithstanding, the freedom of the press is not protected by a specific charter of rights or by specific articles of the Constitution in all democratic countries. For example, Australia has no article in its Constitution and not even a 'charter of rights' that protects the freedom of the press[6].

The freedom of opinion and expression is recognized by core international instruments: Art. 19 of the *Universal Declaration of Human Rights* (UDHR) of 1950; Art. 10 of the *European Convention on Human Rights* (ECHR) of 1950; Art. 13 of the *American Convention on Human Rights* of 1959; Art. 19 of the *International Covenant on Civil and*

[1] Devlin, Keith (1999), *Infosense: Turning Information into Knowledge*, New York, W. H. Freeman & Co.
[2] Marsili, Marco (2009), *La rivoluzione dell'informazione digitale in Rete. Come Internet sta cambiando il modo di fare giornalismo*, Bologna, Odoya, p. 20.
[3] Id., p. 21.
[4] Marsili, Marco (2011), *Libertà di pensiero. Genesi ed evoluzione negli ordinamenti politici dal V secolo A.C.*, Milano-Udine, Mimesis, Series "Filosofie" No. 133, pp. 136-140.
[5] For the purpose of this paper, the terms "freedom of thought", "freedom of speech", "freedom of press", "freedom of expression", and "freedom of the media", have the same meaning.
[6] Marsili (2011), p. 69.

Political Rights (ICCPR) of 1966; Art. 9 of the *African Charter on Human and Peoples' Rights* (ACHPR, also known as the *Banjul Charter*) of 1998.

The ECHR, one of the most advanced instruments on the protection of fundamental human rights, embodies many of the principles enshrined in the *Declaration of the Rights of Man and of the Citizen* of 1789, that introduces in its preamble the fundamental characteristics of the rights which are qualified as being "natural, unalienable and sacred" and consisting of "simple and incontestable principles" on which citizens could base their demands, including the freedom of speech and press[7].

The Press: Power or Counter-power?

The origins of the protection of the freedom of the press, as a fundamental human right, are rooted in Europe, and can be traced back to the Magna Charta, the French Revolution and the revolutions of 1848[8]. The notion of the press as the fourth branch of government (the so called "Fourth Estate" or "fourth power") is used to compare the press and news media to the three branches of democratic government – legislative, executive and judicial[9]. The quote is credited to the Anglo-Irish politician and philosopher Edmund Burke, called "the British Cicero", who said that the reporters' gallery has become the fourth Estate of the Parliament, that implies the capacity of advocacy and the ability to frame political issues by the press[10].

The principle of separation of powers, which was explicitly rejected by Hobbes[11], is a European idea, conceived by political philosophers such as Locke[12] and Rousseau[13], that has roots in the enlightenment period. The tripartite system was later deepened by French political philosopher Montesquieu in *The Spirit of the Laws* (1748). In this system of checks and balances, the powers are separated so that no one could usurp complete power. The idea of checks and balances, ensures that in U.S. government no one branch becomes too

[7] Marsili, Marco (2018), The protection of Human Rights and fundamental freedoms at the origins of the European integration process, *Europea* No. 1 (May), p. 200. DOI: 10.4399/978882551597810. See also: Marsili (2011), pp. 35, 211.
[8] Id., p. 203.
[9] Marsili (2011), p. 70.
[10] Ibid. The Three Estates of the Realm are: the clergy, the nobility, and the commoners.
[11] Hobbes, Thomas (1651), *Leviathan, or the Matter, Form, & Power of a Common-Wealth Ecclesiastical and Civil,* A. Crooke, London.
[12] Locke, John (1764) [1689], *Two Treatises of Government,* London, A. Millar et al.
[12] Rousseau, Jean-Jacques (1895) [1762], *The Social Contract, or Principles of Political Right*, translated with an historical and critical introduction and notes by H. J. Tozer, etc., London, Swan Sonnenschein & Co.

powerful, is summarized by James Madison in the *Federalist Paper No. 51* with the phrase "Ambition must be made to counteract ambition"[14] — the press is one of these 'counter-powers'.

Locke's work, that inspired both the French and American revolutions, has been fundamental for the theorization of human rights and constitutional guarantees — positivization of "unalienable" natural rights that every human being is born with, based on the universal natural law, recognizing them and guaranteeing them against any arbitrary intrusiveness[15]. Since then, the freedom of the press became a must for every truly democratic society.

The development of the Western media tradition follows in parallel the development of liberal-democracy in Europe and in the United States. At the ideological level, the first advocates of the press freedom were the liberal thinkers of the seventeenth and nineteenth centuries. They developed their own ideas in opposition to the monarchical tradition in general and to the divine right of the king in particular. These liberal theorists argued that freedom of expression was a right based on natural law[16]. Thus, press freedom was integral part of individual rights promoted by liberal ideology. In fact, in the sixteenth century the compiler and the printer had a restricted liberty: the "privileged gazette" was subject to the exclusive regime — the privilege granted by the monarch — and to preventive censorship, and the compiler was often a court official. The "privilege" system consisted of subsidies that actually established the monopoly of political information (e.g., *La Gazette* published in Paris in 1631, by Théophraste Renaudot, under the rule of King Louis XIV, at the behest of Cardinal Richelieu, then his minister)[17].

Other currents of thought later presented arguments in favor of the freedom of press without relying on the rights arising from natural law — the freedom of expression began to be considered as a component of the social contract[18], namely the basic agreement between the state and its citizens regarding the rights and duties that the government and each part of the society had to grant and accept with respect to the others[19].

---

[14] Madison, James (Feb. 8, 1788), The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments, *Federalist No. 51*.
[15] Marsili (2011), pp. 28, 211.
[16] For a discussion on natural law, see: Gierke, Otto Friedrich Von and Ernst Troeltsch (1959), *Natural Law and the Theory of Society 1500 to 1800,* trans. by Sir Ernest Barker, with a Lecture on "The Ideas of Natural Law and Humanity", by Ernst Troeltsch, Cambridge, University Press.
[17] Murialdi, Paolo (2000), *Storia del giornalismo italiano*, Il Mulino, Bologna, cited by Marsili (2011), p. 72.
[18] For a discussion on the social contract, see: Gough, John Wiedhofft (1936), *The Social Contract*, Oxford, Clarendon Press.
[19] Marsili (2011), p. 72.

Fear of a Free Press?

In Part 6 of the *Leviathan,* Hobbes supports the limitation of some rights[20]. He believes that censorship of the press and restrictions on the rights of free speech should be considered desirable by the sovereign to promote order. According on the Constitution and ordinary or special law, government can classify or restrict the access to documents in its, arguing that information is sensitive, classified or secret and thus preserving it from being revealed to the press, for protecting the national interest and national security[21].

As set forth in Art. 4 of the ICCPR, certain non-derogable rights should be respected in any circumstances, and derogations must be exceptional and temporary; derogation of the ECHR is permitted under Art. 15 of the Convention[22]. While freedom of expression can be restricted on grounds of national security, under Art. 10 of the ECHR and Art. 19 of the ICCPR, such restrictions should not only be necessary to national security, but also proportionate[23].

Freedom of the press is an extremely problematic issue for many non-democratic societies since, in the modern era, the strict control of access to information is critical for the existence of authoritarian governments and their security apparatus. For this end, many non-democratic governments use state-run news agencies to disseminate propaganda as an essential tool to maintain political power and to crack down — often very brutally, through the employment of force — any attempt, carried out by the media or independent journalists, to challenge the official line of the government on disputed issues[24]. In these countries, journalists operate at the limits of what could be considered "acceptable", and they often suffer intimidations by state agents[25]. Intimidations can rank from threats to their professional career (dismissals, blacklists, etc.), to threats of death, kidnapping, torture and even murder[26].

[20] Hobbes, xviii and p. 119. See also: Marsili, Marco (2012), *Il libro nero della Polizia. Piccoli omicidi di Stato tra amici 2001-2011*, Milano, Termidoro, pp. 19–21.
[21] Marsili (2011), p. 70.
[22] Marsili (2018), p. 202.
[23] Ibid.
[24] Marsili, Marco (2015), "Propaganda and International Relations: an Outlook in Wartime", *Vozes dos Vales*, No. 7 (May) - Pesquisas Doutorais, pp. 1-38. Reprinted in *artciencia.com*, No. 19 (July-December 2015), pp. 1-26.
[25] Marsili (2001), p. 71.
[26] Ibid.

At the time of the English Civil War (1642–1651), John Milton writes *Areopagitica*, a manifesto in support of press freedom, in which he argues energetically against arbitrary government licensing, and pre-publication censorship[27]. Although at that time this pamphlet did not provoke reactions to stop these practices, the manifesto will be seen in later centuries as a milestone in the struggle for the freedom of speech and the freedom of the press from government interference[28].

The central argument proposed by Milton is that every person is able to judge ideas for themselves, with the reason, free will, and conscience, and to distinguish good from evil, truth from falsehood. In order to develop the capacity to exercise this rational ability in the right way, people must have access to the ideas of their fellow citizens in a "free and open encounter". Milton develops the concept of the "marketplace of ideas": when people expose conflicting or opposing arguments, good arguments prevail. In his book *On Freedom*, published in 1859, the British philosopher and economist John Stuart Mill, that was heavily influence by Milton's treatise, concludes that it is evil to silence the expression of opinions[29]. Individual freedom of expression, therefore, is essential for the wellness of the society.

Speaking before the Estates-General on the eve of the French Revolution, the leader of the constitutionalists, Count Mirabeau, defended the freedom of press with a passionate speech, stating that it was essential; without it, none of the other freedoms could be attained[30]. Even the French revolutionaries, tried to stifle the public debate by limiting the freedom of the press.

The French Terror punishes with death penalty the authors of the writings deemed "counter-revolutionary or insidious"[31], thus considering them a "counter-power". Not even the Directory of Paul Barras — an organ at the top of French institutions in the last part of the Revolution, the so-called Termidoro — will be much more liberal than the Terror in terms of the press: instead of guillotine, deports journalists[32].

Even the most advocates of freedom, such as Napoleon, have always been afraid of the press, as counter-power, and have tried, somehow, to control it: "Less it's printed, better

[27] Milton, John (1644), *Areopagitica. A speech of. Mr. John Milton, For the Liberty of Unlicenc'd Printing, To the Parlament of England*, cited by Marsili (2011), pp. 124-5.
[28] Marsili (2011), p. 125.
[29] Mill, John Stuart (1947) [1859], *On Liberty*, edited by Alburey Castell, New York, Appleton-Century Crofts, p. 16.
[30] Marsili (2011), p. 35.
[31] Id., p. 36.
[32] Id. p. 37.

is"[33]. The freedom of the press was one of the achievements of the Revolution, but since Bonaparte was convinced that the newspapers were a hotbed of opponents, he censored and suppressed a large number[34].

After 1806 — double coronation of Napoleon as Emperor of the French in 1804, and as king of Italy in 1805 — the freedom of press vanishes, even if the authoritarian turn takes place only in 1812, when the Emperor establishes a repressive regime and introduces the preventive censorship by the prefects[35]. The Restoration that follows the Congress of Vienna of 1815, erases the political and democratic achievements of the French Revolution, and restores authoritarian practices, reintroducing the censorship on the press[36]. European monarchs were afraid of the press as a counter-power.

I believe that a fair, accurate, and factual public information[37] serves to establish a fiduciary relationship with the media and citizens; a different behavior risks tarnishing trust in the state institutions[38]. Napoleon himself understood the significance of the press, and, when he returned from the island of Elba, he promulgated a more liberal Constitution, going back to the principles of '89 – the French Emperor said to Constant: "I understand that newspapers are necessary, too"[39]. According to Constant, Napoleon himself, speaking on June 7, 1815 before the legislative body, reiterated the need for freedom of the press[40].

The independence of the press is closely linked to the freedom of the society itself[41]. Garapon argues that, in a democracy, the media represent an "irreplaceable" counter-power, since their logic is not political but commercial[42]. I disagree, as I find that, from bastion of freedom and pulpit of independent criticism, the publishing industry folded itself to serve political and economic interests. Castels argues that the media are the social space where power is decided – it shows the direct link between politics, media politics[43]. The newspapers — or, more broadly, simply "the media" as a whole — respond to the interests of powerful

[33] Ibid.
[34] Id., p. 38.
[35] Id., p. 41.
[36] Id., p. 42-3.
[37] We adopt the definition of "public information" set forth in 44 USCS § 3502.
[38] Marsili (2012), pp. 27, 122.
[39] Marsili (2011), p. 35.
[40] Ibid.
[41] Id., p. 70.
[42] Garapon, Antoine (1997), *I custodi dei diritti: giudici e democrazia*, Milano, Feltrinelli, p. 78.
[43] Castells, Manuel (2007), Communication, Power and Counter-power in the Network Society, IJOC Vol. 1, p. 238–266. DOI: 1932-8036/20070238.

lobbies and are no longer able to ensure an impartial and correct information to their audience[44].

Although that is not the purpose of this article, a critical reflection on the freedom of the media cannot ignore considerations on key-issues such as the principle of publicity, the public opinion and the public sphere. In his book published in 1999 Splichal[45] looks at the role of mass media in the formation and expression of public opinion and critically examines popular modern research strategies such as the spiral of silence model proposed by Noelle-Neumann [46]. The underpinning theory developed in the nineteen-seventies by the German political scientist states that a social group or society might isolate or exclude members due to the members' opinions. This ascertain argues that individuals are afraid of isolation that consequently leads to stay silent instead of voicing opinions. Mass media's effects on both public opinion and the perception of the public opinion are central to the spiral of silence theory. The theory borrows much to the work of Walter Lipmann that in his book *Public Opinion*, published in 1922, stresses the relationship between media and the formation of public opinion[47].

The role of public opinion is a central concept in the thought of Jürgen Habermas. In his book *The Structural Transformation of the Public Sphere* [48], the German philosopher and sociologist explores the role of public opinion in Western democracies and links it to the growth of democracy, individual liberty and popular sovereignty. He sees the public sphere as a place between private individuals and government authorities in which people could meet and have critical debates about public matters — the public sphere it's essentially a domain of social life where public opinion can be formed. Habermas argues that in post-war Western societies the citizens are free to express their opinions in the public sphere, while the state is considered a counterpart that in liberal democracies is legitimized through the elections. Therefore, the public sphere works as a counterweight to political authority that permits democratic control of state activities. To summarize, the role of public opinion is to control the state. Therefore, it is clear why the political authorities tried, and keep trying, to influence the public opinion exercising some kind of control over the media.

[44] Marsili (2009), p. 373.
[45] Splichal, Slavko (1999), *Public Opinion: Developments and Controversies in the Twentieth Century (Critical Media Studies: Institutions, Politics, and Culture)*, Lanham, MD, Rowman & Littlefield.
[46] Elisabeth, Noelle-Neumann (1974), The spiral of silence: a theory of public opinion, *Journal of Communication* Vol. 24, No. 2, p. 43–51.
[47] Lippmann, Walter (1922), *Public opinion*, San Diego, CA, Harcourt, Brace & Co.
[48] Habermas, Jürgen (1989) [1962], *The Structural Transformation of the Public Sphere: An Inquiry into a category of Bourgeois Society*, trans. by Thomas Burger and Frederick Lawrence, Cambridge, Polity.

Habermas[49] concludes that when the media became a tool of political forces and a medium for advertising rather than the medium from which the public got their information on political matters, this resulted in limiting access to the public sphere and the political control of the public sphere. That means that the market of ideas is no longer entirely free. He expresses concern about the effects of commercialization and consumerization on the public sphere through the rise of mass media. Therewith emerged a new sort of influence, the "media power", used for purposes of manipulation[50]. The public sphere, simultaneously restructured and dominated by the mass media, developed into an arena infiltrated by power in which, by means of topic selection and topical contributions, a battle is fought not only over influence but over the control of communication flows that affect behavior, while their strategic intentions are kept hidden as much as possible[51].

Conclusions

Defining the role of the press in democratic societies is a hard task, which would require more space to be properly debated, and which I have addressed in several publications. The purpose of this article is not an historical overview of censorship over the press, which, considered a 'watchdog' of political and economic power, is feared by the rulers — especially tyrants — as 'counter-power'.

In a ideal 'free-market of ideas' the role of the press is to inform, criticise and stimulate debate. Media as a whole are an important factor that influences both the dominant idea and people's perception of what the dominant idea is, and, precisely because of this pivotal function in liberal-democratic societies its independence must be guaranteed, especially from political power.

The backbone of any democracy is an independent, professional and responsible media. I believe that, in order to be able to exercise its function, and be authoritative to the audience, the press should be independent and free from economic and political influences. Otherwise, it's only a propaganda tool.

[49] Ibid.
[50] Habermas, Jürgen (1992), Further Reflections on the Public Sphere, in Craig Calhoun, Craig, *Habermas and the Public Sphere*, Cambridge Mass.: MIT Press, p. 437.
[51] Ibid.

Acknowledgment

This work received financial support by the European Social Fund (ESF) and by the Fundação para a Ciência e Tecnologia (FCT), Portugal, under grant SFRH/BD/136170/2018.

Bibliography

Castells, Manuel (2007), Communication, Power and Counter-power in the Network Society, IJOC Vol. 1, p. 238–266. DOI: 1932-8036/20070238.

Devlin, Keith (1999), *Infosense: Turning Information into Knowledge*, New York, W. H. Freeman & Co.

Garapon, Antoine (1997), *I custodi dei diritti: giudici e democrazia*, Milano, Feltrinelli.

Gierke, Otto Friedrich Von and Ernst Troeltsch (1959), *Natural Law and the Theory of Society 1500 to 1800,* trans. by Sir Ernest Barker, with a lecture on "The Ideas of Natural Law and Humanity" by Ernst Troeltsch, Cambridge, University Press.

Gough, John Wiedhofft (1936), *The Social Contract*, Oxford, Clarendon Press.

Habermas, Jürgen (1989) [1962], *The Structural Transformation of the Public Sphere: An Inquiry into a category of Bourgeois Society*, trans. by Thomas Burger and Frederick Lawrence, Cambridge, Polity.

Habermas, Jürgen (1992), Further Reflections on the Public Sphere, in Craig Calhoun (ed.), *Habermas and the Public Sphere*, Cambridge Mass.: MIT Press, p. 421–461.

Hobbes, Thomas (1651), *Leviathan, or the Matter, Form, & Power of a Common-Wealth Ecclesiasticall and Civill,* A. Crooke, London.

Lippmann, Walter (1922), *Public opinion*, San Diego, CA, Harcourt, Brace & Co.

Locke, John (1764) [1689], *Two Treatises of Government,* London, A. Millar et al.

Madison, James (Feb. 8, 1788), The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments, *The Federalist Papers No. 51*.

Marsili, Marco (2009), *La rivoluzione dell'informazione digitale in Rete. Come Internet sta cambiando il modo di fare giornalismo*, Bologna, Odoya.

Marsili, Marco (2011), *Libertà di pensiero. Genesi ed evoluzione negli ordinamenti politici dal V secolo A.C.*, Milano-Udine, Mimesis, Series "Filosofie" No. 133.

Marsili, Marco (2012), *Il libro nero della Polizia. Piccoli omicidi di Stato tra amici 2001–2011*, Milano, Termidoro.

Marsili, Marco (2015), "Propaganda and International Relations: an Outlook in Wartime", *Vozes dos Vales*, No. 7 (May) – Pesquisas Doutorais, pp. 1–38. Reprinted in *artciencia.com*, No. 19 (July–December 2015), pp. 1-26.

Marsili, Marco (2018), The protection of Human Rights and fundamental freedoms at the origins of the European integration process, *Europea* No. 1 (May). DOI: 10.4399/978882551597810.

Mill, John Stuart (1947) [1859], *On Liberty*, edited by Alburey Castell, New York, Appleton-Century Crofts.

Milton, John (1644), *Areopagitica. A speech of. Mr. John Milton, For the Liberty of Unlicenc'd Printing, To the Parlament of England*, London.

Montesquieu [Charles de Secondat, Baron de La Brède et de Montesquieu] (1949) [1748], *The Spirit of the Laws*, 2 Vols., trans. by Thomas Nugent (1750), with an introd. by Franz Neumann, New York, Hafner Pub. Co.

Murialdi, Paolo (2000), *Storia del giornalismo italiano*, Bologna, Il Mulino.

Noelle-Neumann, Elisabeth (1974), The spiral of silence: a theory of public opinion, *Journal of Communication* Vol. 24, No. 2, p. 43–51. DOI: 10.1111/j.1460-2466.1974.tb00367.x.

Rousseau, Jean-Jacques (1895) [1762], *The Social Contract, or Principles of Political Right*, translated with an historical and critical introduction and notes by H. J. Tozer, etc., London, Swan Sonnenschein & Co.

Splichal, Slavko (1999), *Public Opinion: Developments and Controversies in the Twentieth Century (Critical Media Studies: Institutions, Politics, and Culture)*, Lanham, MD, Rowman & Littlefield.