MEDIA CULTURE &SOCIETY

Review essay

Freedom, rights and regulations

John Corner

Slavko Splichal, *Principles of Publicity and Press Freedom*. Lanham, MD: Rowman and Littlefield, 2002, 228 pp.
C. Edwin Baker, *Media, Markets and Democracy*, Cambridge: Cambridge University Press, 2002, 377 pp.
Denis McQuail, *Media Accountability and Freedom of Publication*, Oxford: Oxford University Press, 2002, 366 pp.

Over much debate about how the media should be organized, and how they should act, the idea of 'freedom' presides as a stirring but deeply deceptive first principle. The deceptiveness follows largely from the way in which 'media freedom' is routinely invoked to indicate a desirable absence of constraint on the media industries themselves rather than to indicate the desirable conditions for members of a democratic public to access a range of information and to encounter and express a range of opinions. Thus a negative and essentially economistic version of media freedom supplants a more positive and essentially civic version, if not always and not altogether (the idea of Public Service Broadcasting being an outstanding exception, although one often unclear in specific application and increasingly under threat).

The connotations surrounding the idea of 'regulation' have often followed directly from this rhetorical and unqualified notion of 'freedom'. In a strategic alignment of classical liberal with neo-liberal perspectives, 'regulation' can easily appear the enemy of liberty, an unwarranted interference of 'control' into processes best left to themselves. It follows that 'de-regulation' (aka 'liberalization') is the way forward. At a time when in many countries the imaginative use of regulation to square public values with market systems is the major political challenge, such a fuzzy approach to thinking is disabling.[1]

That redolent phrase 'the free marketplace of ideas', without which no discussion of media policy appears to be quite complete, helps to sustain the confusions around freedom and regulation by appearing to provide a grand Miltonic or Millian justification for minimal interference. Its attractive image of bustling interaction around stall-holders engaged in lively competition for trade ignores the real profile both of media markets and of knowledge distribution within corporate capitalism. But quite how much this phrase works with what is

Media, Culture & Society © 2004 SAGE Publications (London, Thousand Oaks and New Delhi), Vol. 26(6): 893–899
[ISSN: 0163-4437 DOI: 10.1177/0163443704047033]

essentially a *metaphor* of lively interchange (an *agora* of opinion and dispute) and how much it implies a particular economic model as the essential basis for the flourishing of democratic discourse varies with the particular context of argument within which the citation is offered.[2]

These three fine books all push through beyond the rhetoric and variously open up historical, legislative and comparative perspectives on how notions of media freedom have sometimes been thwarted by, but also quite often realized through, principles and practices of regulation.

As well as the frequent, distorting emphasis on the negative dimension of freedom, there is often an equally unhelpful sliding around on the question of precisely what the negative freedom is freedom *from*. Here, the classic, historical answer, grounded in the liberal political philosophy of the 18th and 19th century, is essentially that it is freedom from the interference of the state. Against this threat, it is the libertarian dynamics of the market that are presented as the countervailing force. However, without at all making the mistake of supposing that state constraint on media activities has gone away, it is the dangers posed by the structure and activities of media markets that have now been at the top of the agenda internationally for some time. The impact of ownership concentration on real diversity and the distorting consequences of advertising are just two of the continuing areas of concern (on the former, see Doyle, 2002, for a useful overview). All the books recognize this and address it in their different ways.

Slavko Splichal's monograph is a thorough exploration of the history of ideas underpinning the changing meanings of 'press freedom'. He connects back to the various philosophical perspectives from which it emerges. What finally becomes the corporate idea of 'freedom for the press' is contrasted with an earlier, more individualized and civic emphasis on 'freedom of speech' and the relationship between the two, notionally the former supporting the latter but quite often in practice denying it, is investigated.

The deconstructive focus on 'press freedom' is allied to an interest in the ideas of publicity and of public opinion. A long and densely argued Chapter 3, 'Freedom to Reason, Right to Communicate' works across the thinking of Kant, Bentham, Marx and Mill, among others. How did theorists of liberal democracy, including its critics, perceive the nature and function of the 'public'? Following this question through, in a manner that is convergent with the recent, wide-ranging account of Nicholas Garnham (2000), Splichal gives attention to the 'Principle of Publicity' as it appears in the writings of Kant. Here, the public use of reason is seen as politically foundational. It is framed by a more general sense that the very business of making public, of publishing, of rendering manifest the bases of disagreement, accord and action, constitutes a new and emancipatory phase of political and social organization. This is part of the dynamics of 'enlightening', grounded in a confident universalism. Freedom of the press within this view is not primarily about surveillance of the sovereign but, as Splichal notes, about 'the right of citizens to publish their critical opinions' (p. 108). The issue of freedom of the press was for Kant, says Splichal, essentially an issue of 'freedom of the pen' (directly citing an English translation). It was, he goes on, 'not freedom of the publisher or newspaper but freedom of the author or citizen to publish with the aid of the press' (p. 109). Clearly, such a firm subordination, even in theory, of newspaper freedom to freedom of authorial expression is only likely to have emerged, even as an aspiration, in a period prior to the establishment of the press as a major industrial interest. It also poses the difference between citizen rights as, essentially, authorial rights (very much a writer's perspective on the issue) and the more modern emphasis, within a 'news culture' (and a 'news politics'), on the

'receiver' rights to read and hear a range of what, in many cases, will be the products of professional journalism.

However, an emphasis on the *institutional* rights of the press did not always align with an acceptance of press freedom as a matter of economic interests. Splichal quotes Marx's direct critique of those 'who seemed to defend freedom of the press but in fact only advanced freedom of ownership' (p. 124). Marx demanded the legal regulation of press freedom, noting that 'the primary freedom of the press is not to be a business' (cited p. 127). Unlike most previous writers, including Kant, for Marx the press itself and its *representative* functions, not simply the generality of writing and speech, was a focus of attention. Splichal quotes from an essay of 1842:

> The free press is the ever-present vigilant eye of the people's spirit, the embodiment of a people's trust in itself, the communication link that binds the individual with the state and the world. (cited p. 118)

Of course, what is at issue in binding the 'individual with the state' (Marx also referred to the press in the same essay as 'the spirit of the state') poses a number of contentious questions of political order and political subjectivity.

Sustaining the same level of fastidious inquiry, Splichal moves on to consider how John Stuart Mill's ideas figure within the changing intellectual contexts for debate.

He notes that there are only two passing references to the press in the whole of the *Essay on Liberty*, with Mill observing at one point that the liberty of the press no longer needs to be defended from tyranny. Mill's concern, in this respect close to Kant's, is with the quality and range of expression of individual thought, relatively regardless of the specific economic and institutional arrangements for achieving this. The commitment both to freedom and to quality requires a degree of 'regulation' often only indirectly expressed. For instance, 'there was never more necessity for surrounding individual independence of thought, speech and conduct with the most powerful defences in order to maintain . . . originality of mind . . .' (p. 143, citing *The Principles of Political Economy*). Splichal comments that quite what these 'most powerful defences' might be is not developed further, indicating perhaps the edges of Mill's primary concerns and even a certain reluctance to engage with the antinomies of regulation as legislative practice.

Throughout this central chapter, then, Splichal is concerned to trace the history of 'press freedom' as a history of intellectual tensions, contradictions and often unwarranted assumptions about social organization and human behaviour. In a gradual shift, and allowing for differences in national histories, the emphasis on personal liberties is replaced by the installation of a 'fourth estate' model, in which the press itself becomes an institutionalized political actor and its economic liberty becomes the primary reference point, either in its defence or in critique of its exploitation and its distortion of the public circulation of knowledge.

Splichal's final chapter puts forward four clusters of rights as 'constituent elements of the citizen right to communicate'. They are: rights to be given information, rights of transmitting information and expressing opinion, rights of free access to the media, and rights to participate in decision-making and the management of the media. To them he adds another cluster. These are corollary conditions, the performance requirements that all participants are obliged to acknowledge, highlighting rationality, communicability and educativeness. Against this ambitious normative scheme, present circumstances, as Splichal realizes, must be regarded as deeply in deficit. Even the achievements of European public service broadcasting he regards, alongside attempts at devising 'social responsibility'

frameworks for the press, as having made only limited progress. He calls for 'new forms of socio-cultural regulation that would fully recognize the universal principal of publicity' (p. 197). Perhaps not surprisingly, the Internet is seen as offering grounds for positive development. It 'enables reflexive reasoning of participants – to detach themselves from the subjective, personal conditions of their judgement and reflect on it from a universal standpoint, as Kant has suggested two centuries ago' (p. 195). While he also registers some of the limitations of the Internet, including its inability fully to substitute for a defective mass media system, this assessment of its potential for the development of public reason is strikingly upbeat. It is a good deal less convincing than it would be were it to show an engagement with the emerging pattern of application and use that has made many recent forecasts so pessimistic.

Baker's *Media, Markets and Democracy* offers an extensive review of the issues from the perspectives of political theory, media economics and of regulatory practice itself. Here, the United States provides the major source of examples and of issues at the constitutional level, but Baker is also aware of European contexts and uses them to broaden the argument of his book.

In his opening chapter 'The Special Nature of Media Products', Baker sets out the argument, familiar in broad terms but routinely in danger of being ignored or marginalized in current policy shifts, that the media should not be seen as simply as 'another business'. Picking up on the much-cited remark of FCC Chairman Mark Fowler in the early 1980s that 'television is just another appliance . . . a toaster with pictures' he makes the case for thinking about the media as requiring special and interventionist attention. He considers the 'positive and negative externalities' that media systems generate, the impacts that they carry outside the immediate terms of product transaction. What are the benefits or costs to people other than those who are the immediate readership or audience? Baker explores the way in which 'third party effects' are a massive consequence of media activity. These include the quality of public opinion and political participation, the terms of audience members' interaction with other people, and the benefits that follow from the exposing of abuses of power. Left to 'itself' the market is an extremely defective way of taking account of 'externalities', despite claims for its sensitive efficiency in meeting needs. What kind of 'social responsibility' can be encouraged then? And how?

Throughout, Baker's account is exemplary in its clarity and thoroughness of exposition. Even where the terms of the argument are known from the existing literature, their placing within this broader framework of ideas gives them a newly provocative character. One of Baker's most useful chapters is 'Different Democracies and their Media', in which he outlines the relationship between perspectives on democratic structure and process on the one hand and, on the other, the political role given (often implicitly) to media and particularly to journalism. The absence in most of contemporary political theory of any direct and sustained address to the issue of the media is surprising. It presumably follows from the absence in political science more generally, at least until very recently, of an awareness of just how far most types of actually practised democracy are in fact 'mediated democracies' in quite defining and consequential ways. Baker's discussion, relating not only to broader issues of the circulation of political knowledge but to opinion polling and campaigning, and to questions of 'fairness' and partisanship, will provide a valuable point of reference for future commentary and research.

Perhaps at his best when tracing the often hidden implications and assumptions of policy and when providing forensic scrutiny (as befits a Professor of Law) of particular regulatory measures, Baker disappoints a little in his account of the

'Complex Democracy' which he chooses as a way forward. 'Complex democracy', in his definition, combines elements both of a liberal pluralist perspective, with its emphasis on individual and sectional group interests, and republican democracy, with its stronger concern for a broader 'common good' and a more inclusive, holistic sense of the public and the civic. This is useful, but in a book of nearly 400 pages what is essentially offered as the most promising framework for thinking about media–political relations deserves more than two pages of general address. In its most obvious sense, 'complexity' is an indisputable and prominent characteristic of contemporary democracy. A move upwards from that routine perception to the idea of a defining category needs some serious arguing through, even though other theorists have been there before, including Habermas (whom Baker acknowledges). However, he is always perceptive even when a little too condensed. In respect of his diversity/commonality combination he notes how Mill's case for free speech is not about the value of diversity as such but about the need for differences of opinion to be expressed in order that we can arrive at 'the truth'. Mill maintains that 'no belief which is contrary to the truth can really be useful' (cited p. 146), a view that, seemingly unexceptionable at one level can, taken in a certain direction, raise some pressing questions of *authority* and of social order. Baker sees the tension between diversity of opinion as the means of establishing political and social truths and the very different idea of diverse 'truths' which (whilst they may keep in dialogue) *remain* diverse, as a continuing source of difficulty. At the level of social organization, he goes on to note, it is a tension between the 'melting pot' model and multiculturalism.

His book provides the issue of media regulation with new philosophical as well as legislative and procedural insight.

As McQuail's title suggests, it is the idea of accountability, including the processes of recognizing obligation and responsibility, that provides his dominant perspective. He is concerned with regulatory measures, but also with other kinds of procedure and practice, including those less directly legislative ones that derive from the normative codes of media professional groups. He is wary of what appear to be simple 'solutions'. In this respect, as in his degree of 'economic realism', he can be compared with Baker. The emphasis is pragmatic, on possible improvements that will always fall short of the level of control sometimes sought. He writes in his final section that 'trying to solve these problems [of freedoms of, and also through, the media] by compulsory and restrictive regulation often leads to unwanted side effects' (p. 337), having noted earlier on the same page that 'the main focus of public policy should thus be on establishing the conditions that make voluntary and effective accountability more likely'. Of course, this still leaves open to dispute the kind and level of regulation that might be needed in 'establishing the conditions'.

He is the best of all three writers reviewed here on the issue of 'self-regulation', perhaps because he is more inclined to see the positive possibilities in addition to the well-established tendency towards tokenism, ineffectiveness and deceit. He also makes a more sustained connection with the idea of public service broadcasting (PSB) and the way in which this, whatever its current state, has been a quite distinctive approach to 'social responsibility'. PSB's various institutional and legislative achievements in specific national settings make it very different from simply an aspirational perspective, of course, and its particular ways of engaging with issues of freedom and accountability for radio and television are crucial reference points for any review of regulation. Splichal and Baker might have brought its successes and failures further into their own accounts. They might also

have benefited from reference to Mike Feintuck's (1999) fine general account of regulatory issues in the media area, which McQuail cites at a number of points.

Like the other authors, McQuail assesses the Internet in terms of its perceived potential to be the dream instrument of social communication, neither the creature of state nor market, noting the revisions that are increasingly having to be introduced into such a view.

A strong characteristic of his expositional style is the extensive use of typologies and taxonomies to bring out categories of circumstance, for instance, or aspects of a problem. This has its advantages in the very directness by which it dissects and differentiates. However, it also seems occasionally to get a little out of hand, cutting across the continuity of argument and setting up so many variants and subvariants under different but related headings that the job of cross-referencing becomes a challenging one for the reader who wants to keep the broader theme in view. One just occasionally has the feeling of having entered a maze.

Quite apart from questions of practicality, including disputed judgements as to what is actually *possible*, different normative issues are raised by attempts to regulate at different points in the media process. All three books address this. There are important distinctions to be drawn, even if only in terms of primary emphasis, between economic intervention (where constraints on ownership, often designed to free up rather than restrict market activity, can be introduced, perhaps involving public funding); intervention in organization and structure (where economic consequences may follow, but where the focus is on systemic factors, on institutional bodies and procedures of governance); and intervention in content (where attempts to control for 'quality' and to discourage or even make illegal certain types of output are made).

Not surprisingly, there is ample scope here for ideological slipperiness on the 'regulation–freedom' axis, as Golding and Van Snippenberg (1995) usefully suggest. The same government may be keen on slackening economic controls to boost investment and at the same time seek to increase intervention in aspects of organization or even content. On the other hand, it might be keen to protect its domestic industry with economic controls but loath to be involved in explicit regulation of the standard or nature of provision. As Golding and Van Snippenberg also show, public perception of policy change is likely to vary in relation to where the interventionary emphasis is placed and how it is aligned with the current climate of economic and cultural anxieties.

Indications of a new language at work in regulatory discourse, heralding a broader change in the regulatory environment, can be found at work in the principles of Ofcom, the new communications regulator in the UK. Its mission is to 'further the interests of citizen-consumers through a regulatory regime which, where appropriate, encourages competition' (www.ofcom.org.uk/about_ofcom). The idea of 'citizen-consumers' perfectly catches at the new kind of balancing act envisaged between market relations and civic interest. A degree of nervousness, of facing both ways, continues in the more detailed statements of policy intent. For instance, 'Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required' (website as above). Or 'Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives.' Viewers will be 'protected', diversity will be 'promoted'. However, investors are recognized too. They will have their need to 'flourish' supported.

It is easy to be cynical about language such as this, and indeed the rather too flexi-stretch character of the phrasing encourages a critical response. However, recognition of the conflicting dynamics now at work in many media systems is an

essential element of any regulatory discourse seeking to have a real impact upon structure and practice. All three books contribute greatly to the kind of critical understanding that is necessary both in the formation of policy and in the challenging of it.

Notes

Some of the issues raised in this review article are developed further in a forthcoming account of the history of media regulation and the public sphere in Britain since the 1960s. This has been developed within the European Science Foundation project 'Changing Media/Changing Europe' and I am grateful to the members of Team One of this project for the context of debate they have provided.

1. In their review of European public attitudes to media regulation, Golding and Van Snippenburg (1995) see the underlying negative view of regulation as creating confusions and contradictions within many debates about media policy, particularly where, as in recent years, proposals for 'de-regulation' have provided the focus.
2. In fact, the phrase did not become commonplace in discussion of press freedom until 1919, when it was used by Justice Oliver Wendall Holmes in deliberating on a US court case (see Napoli, 1999, for a brief conceptual history and an illuminating review of usage by the Federal Communications Commission since the 1960s). As Splichal notes in the book under review, it is not to be found anywhere in Mill. The degree of figurative and literal indication at work in deployment of the term 'marketplace' is also well brought out by McQuail (see particularly pp. 231–2) in the volume reviewed here.

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