Human Rights and Democracy in Cyberspace

Frameworks, standards and obstacles

by Shalini Venturelli

This paper will address aspects of information rights for cyberspace involving the validity of conceptions for freedom of communication, and principal handicaps and challenges to development of international standards for constitutional human rights guarantees of free expression.

This paper and, to a large extent, the contributions in this issue together pose a rather simple but essential question: in what sense of freedom of communication do we mean an 'information society'? Contemporary political choices in public policy, technological development and global structures for cyberspace emerging in the international system raise some central issues for the problem of freedom of communication. This paper will address aspects of information rights for cyberspace involving the validity of conceptions for freedom of communication, and principal handicaps and challenges to development of international standards for constitutional human rights guarantees of free expression.

It is argued here that the problems of information policy for the public sphere of the information society are very much problems of conceptualisation. Modern history has shown that the right to vote, the rule of law, contractual liberties and private interests can all exist, without, in fact, the existence of democracy. Membership in political community does not necessarily bring with it the actual experience of freedom of communication and information participation. Partly this is related to the ungovernability which afflicts democratic states caught up in the integrative vortex of contemporary transnational liberalisation. We may have created a technological world the imperatives of which we can no longer control and whose emancipation from all human will and purpose have rendered it extremely difficult for us to govern ourselves, to remain our own political masters.

To develop new grounds for understanding the challenge to free communication in the information society. it is useful to recall mankind's evolving historical experiment in democracy. The experiment has shown that the sphere of formal representative democracy (government and the state) and the sphere of society (the economy, culture and private life) share but one critical mediating institution, namely, the institutional infrastructure of public space. Any mediation must be real, not illusory or deformed, else free expression, knowledge, and participation with respect to the direction and choices of political society become severely limited, rendering illegitimate the social order. This precondi-

tion of democracy suggests a central responsibility of public policy in ensuring the institutional form of a public sphere whose structures do in fact perform the function of mediation to promote the widest possible participation in judgment and the exploration of consensus on common interests. A proper conception of freedom of communication would suggest, therefore, no possibility to develop civil society as an information society without a fully democratised public sphere.

This approach to freedom of communication points to a constitution of public space that is neither dominated nor governed by a single logic, such as that of commercial expression, or by a handful of proprietors, such as conglomerates, oligopolies, monopolies, whether public or private. In these circumstances alone would it be practical to imagine the emergence or institutional differentiation, diverse forms of participation, and alternative reasonings and conceptualisations of the social order. For if democracy is confined solely to one sphere, to the legislative procedures of representative democracy and periodic voting, while oligarchic forms of governance and unaccountability prevail in the economy and in social and cultural life, then the prospects of freedom of communication become progressively undermined. The renewal of alternative publics, voices and groups is thus intrinsically tied to the renewal of the public sphere itself and to the elimination of built-in processes of exclusion. The structure of freedom of communication characterised by a plurality of forms of public space contains, therefore, the promise of more meaningful and actual participation in expression on several levels, structures otherwise unaccounted for in the design of an information society.

Since the political reality of freedom of communication is incompatible with forms of an information society based on domination, oligarchy, or systematic inequality, the argument for an international framework to advance human rights of expression and information in cyberspace suggests the need for a post-liberal meaning of democracy.

Framework for Free Communication in the Information Society: the Question of Validity

The enlarging international regime of trade laws and agreements for the development and regulation of cyberspace carries some profound implications for the internationalisation of free speech rights. Carried out under projects of information liberalisation, this expansion of a corpus of international norms for the information society derives from the idea of a free marketplace of ideas which holds freedom is better reached by free trade in ideas and that the best test of truth is the power of the thought to get itself accepted in the competition of the market. The model of free flow of information assumes that the structure of any market is self-evidently undistorted and that this neutral realm of market transactions will inherently generate the conditions of political freedom.

The assumptions of liberty of expression embedded in marketplace essentialism has been spectacularly successful in securing all across the world, regardless of political system, a class of rights otherwise known as property rights, contractual rights and private rights. Yet it has been far less successful in advancing those rights having to do with free communication, such as the rights of assembly, association, public participation and expression. This holds true not only of new and emerging democracics but also of older well established democracies where information rights have failed to enlarge themselves since the onset or the industrial age and its accompanying decline

of race-to-race communities. Instead, the public space of advanced industrialised democracies is increasingly governed by commercial expression, with the result that the latter has been gaining larger protections in legal jurisprudence and public policy than the political expression of citizens and their information needs for public opinion formation (as an example, see cyberspace policies in US Government 1997). This is the model of public space and free speech that is now evolving through multilateral and bilateral agreements for the globalisation of cyberspace (see World Trade Organization 1997; US Government 1997; World Intellectual Property Organization 1996).

To imagine the question of free expression in cyberspace in ways other than through a marketplace model, it would be necessary for any free communication framework to explain what it would mean for real people living real lives in democratic societies to engage in practices of public (not just private) free expression. Why should it be important that citizens of an information society be allowed to engage in practices of knowledge and deliberation and what is the place of such a practice in political society. Public participation in free expression is supposed to accomplish a rationalisation of public opinion and will formation. For it is only in rationalising the process through which individuals come to believe their democratic context to be legitimate can they reconcile justice with the social order. Rationalism in this conception of free communication is introduced not as a rational plan for society but as a process of rationalising the consensual foundations, the common interest, of society. The framework here will outline what is required of information policy to allow public space to be structured in a manner which makes it possible for individuals to engage in the practice of free communication.

A post-liberal framework for freedom of communication replaces the liberal private rights, 'marketplace of ideas' framework in structure, policy and law. In order for the right of free communication to be truly democratising, it cannot be undertaken as a rhetorical experiment to reference an ideal world, or to justify existing practices and tendencies in technological innovation, global competition or projects for wealth creation. The framework fails if the information society amounts to imagination or a revolutionary change in information diffusion (often attributed 'to revolutionary innovation in communication technology') without corresponding policy provisions in reality to ensure that the proper emergence of an information democracy will not be left purely or mostly to the governance and non-accountable structures or marketplace rivalries among large-scale content and infrastructure monopolies. By insisting that the framework must be undertaken in fact, we ensure that liberal principles of freedom of public discourse encoded in constitutional law do not take the form of paradoxical coexistence with oligarchic governance of public communications in practice - as is inevitably the case with the marketplace or ideas model - but are institutionalised and reflected in real structures and socio-legal arrangements. Social and political institutions cannot maintain their legitimacy entirely through the exercise of social power or strategic manipulation, as Weber (1946, pp.78-79) observes on the exercise of power by modern states. This mode of freedom of communication can also be said to be consistent with Hegel's (1952/1821) idea of reconciliation between principles of freedom and their proper embodiment or objectification in political community in order for the latter to qualify for legitimacy.

A free communication framework which transcends the limited 'marketplace

of ideas' model of liberalism suggests a very simple and specific test for information policy - namely, that democratic legitimacy of social-political institutions and common interests or norms are secured only if citizens would freely consent to them. But genuine consensus on these matters is possible only when there exist: (a) broad access to the public realm, and (b) content structures of public space which provide a potential for real knowledge and deliberative engagement. It is the structures of access and content, and not just any ambiguous notion of free communication, that serve as the test of free consent. Thus on the basis of actual conditions of access and content we may reasonably address the question of democratic legitimacy.

In policy terms, this form of a free communication framework establishes thresholds of validity for information policy in the presence of provisions requiring that admission to the public communication network is non-discriminatory to all voices, commercial and non-commercial; and that adequate space on the network, regardless of technology, is reserved for undistorted-substantive fora of information, dialogue and debate. While these provisions may suggest many communication forms, it is obvious that not just any public communication system contributes to real knowledge and deliberative opportunity. By the terms or Kant's 'principle or publicity' (1991/1784), and the standards or Aristotle's (1981) participation in judgment for collective will-formation, public communication in society can be said to be more or less knowledge-producing and more or less conducive to participatory expressions of judgment, to the degree that its structures and content provide diverse representations of social reality, and not just of social fiction, fantasy or ideology.

This is not to say that the forms must exclude entertainment - which is the predominant cultural form of the modern multimedia public sphere permeating both fiction and non-fiction - merely that public space also be guaranteed for production and distribution of non-commercial, non-industrialised expression that is transparent with respect to the social reality of the modern political order. Else, neither information nor deliberative practice will have a rational basis, and consent, consensus and legitimacy would be annulled. This is just as true for political expression as it is for cultural expression. In effect, this free expression problematic describes the crisis of contemporary democracy, viz, the vast alienation of individuals within liberal democracies - reflected in declining voter turn-out and public participation - from the democratic process and from political institutions (Dahrendorf 1994: Turner 1992; Habermas 1973). Members of political society necessarily require real knowledge or their social, cultural and political environment in order to make reasoned judgments regarding their own welfare and that of political community. For the 'force of the better argument' to prevail, for participants, viewers or users to be 'convinced by reason' (Kant 1991, p.85), there must be set conditions to ensure carriage of a substantive diversity of opinion, argument and discourse forms in the public sphere, as well as conditions to ensure these are immunised in a special way against repression of voices and inequality in program representation. Thus if public policy fails to address the content of public space, citizens cannot build better foundations to their opinions or their life plans, or for institutions and norms of their society, and thus cannot be said to enjoy freedom of communication.

Since a participatory free communication framework is the institutional form of democratic will-formation, its normative test leaves the structures of public communications with the 'task of supplying reasons

why an existing political order deserves to be recognized' (Habermas 1987, p.188), for without such a process the shared background to the social world would fall apart. This test replaces the liberal test of public space as a marketplace of ideas governed by elite entities, individual, institutional or corporate, whose interests compete with each other for domination. Instead freedom of communication is guaranteed by conditions with the potential to lead to construction of common understandings among a wide range of social actors. The free communication test fails, therefore, if opening the information infrastructure through democratisation of media access and content ownership for both commercial and non-commercial voices is excluded from information society policies and laws.

Accordingly, key policy issues identified in a post-liberal framework for freedom of communication include: the principles and criteria for minimum conditions or non-discriminatory access by individuals, social groups and content providers to the information network; positive content regulation - not negative for that may lead to curbs on the range of voices - to ensure adequacy of information services so they are neither predominantly commercial nor predominantly entertainment: rules regarding ownership of content and infrastructure and forms of consolidation which affect participation in provision of programs and which structure access to key features of the information infrastructure; the structure of proprietary rights or intellectual property rights governing who owns information and the creation of a balance between the interests of three principal social groups - the cultural industries, creative labour, and the public in deciding who benefits from production and exploitation of content; rules regarding governance, accountability and public interest standards in development and functioning of a multimedia public sphere, including the need to address the decline of the public service model of regulation and its displacement by the converging interests of the liberalisation and nationalist models (see discussion in Venturelli 1998); the implications of privatisation of law, privatisation of the state, privatisation of constitutions and privatisation of public goods in emerging policies for the information society; construction of the competitive order of the information society in regulation of the distribution of market power as concerns tendencies to monopoly or oligopoly, reflected in the terms and application of competition law to multimedia cultural industries: and finally, provisions to ensure that public and constitutional information rights of citizens to expression and information are privileged over private rights of the information industries to be free from obligations to the public opinion formation process, to cultural diversity, education and other constitutional functions of public space.

Together, these issues point to an essential policy question for freedom of communication in the information society: how can the structure of public communications be democratically justified when the social conditions in which participation, expression, knowledge and deliberation are carried on, and judgment and consensus generated, do not exist? It is also incumbent on any analysis of information policy to explain and ground the implicit normative view of freedom of communication which guides public debate and directs it to consider certain elements of the socio-legal basis of the construction of the information society.

Constitutional Obstacles to International Standards of Free Expression

Aside from problems inherent in na-

tional and international policies for the information society, there are a number of serious difficulties with constitutional traditions for communication rights which currently dominate the international system. Such politically powerful traditions as that of the US and some European countries, including the European Union, can be evaluated in terms of the potential of constitutional grounds of communication rights to provide avenues for democratic transformation. The issue is central to assumptions of a free society whereby democracy is possible only under institutional conditions of public space that are conducive to the creation of universal guarantees or access to participation in collective political judgment (some of these standard assumptions are articulated in Hegel 1952/1821). The problem of communication rights as a basis for regulating cyberspace will be considered here, first, in the context of the US standard to establish the international reference point, and second, to reveal how this context defines the central dilemma in the development of communication rights, therefore political rights, in a globalised and networked information age.

The right of expression in the United States is a negative right, with a twofold guarantee bestowed by the First Amendment[1] to the US Constitution: it applies to the transmission of information content as well as to its reception. The negative guarantee of both transmitters' and receivers' rights comprises a restraint or political barrier to state action and has the same function, according to Sumon (1991), in the area of political intervention as the antitrust laws have in the field of economic intervention, ie: to provide the implicit regulatory norm to the courts. As interpreted in jurisprudence and in the policies of the state, the function of the constitutional constraint on government is to stimulate the 'marketplace of ideas' by submitting ideas to the test of acceptability in the market (Smolla 1992; Simon 1991). At the outset, therefore, the right of communication, or political right in the US is handicapped in three ways:

First, since the US free expression standard is a negative right, it does not allow public policy and law to account for conditions governing participation and communication practice except by defaulting to governance by the market, thereby reinforcing the inequalities of existing conditions. The restraint on public policy would thus logically privilege those private social interests possessing the power to exercise the right.

Second, and this is obviously an aspect of the first, releasing the conditions or political practice to the market, ie., to the 'natural' or private sphere, allows communication practice and access to public space to be determined by proprietary criteria alone. This eliminates from consideration other important standards in determining how to maintain the information liberties of a civil society. Included in these standards are, for example, criteria such as the structures of content, ownership of infrastructure and expression, content production adequately representing the broad range of social and economic interests, and conditions conducive to deliberative, as against subjectivist, expression and non-commercial, as against commercial, expression.

Third, the default to the market, meaning the governance of public space by proprietary factors alone, sets the stage for the final absorption of freedom of communication to the contractual and precedent-based, contractual law tradition. It is argued that this political basis of policy and law is narrowly drawn to recognise economic rights of media owners in contractual market relations regulating asset transfers and extractive agreements, and narrowly drawn

to favour precedents from prevailing proprietary holdings. Obviously, then, contractually centred law excludes from judicial discretion and policy options the public scrutiny of citizens in determining the sufficiency of content and adequacy of access.

The inherent tendencies of the US First Amendment are further compounded by the historical context of its institutionalisation. Since its conceptual and political logic privileges prevailing conditions in the marketplace, the proprietary structures in communication benefit from the prohibition on government to guarantee structures of public space in the common interest. The result of this political form of communication rights has been particularly detrimental with respect to the rights of viewers and listeners in broadcasting.

The difficulty is illustrated in new information society laws and policies proposed in the US (see, for example, US Congress 1996; US Government 1995), under which the telecommunications industry gains the same communication rights granted to broadcasters to be largely unencumbered by any serious non-commercial obligations in the provision of video services. While the American cable industry initially opposed this move, fearing competition from telecommunications, the fear of competition is now irrelevant given regulatory signals favouring consolidation across industry sectors through alliances and partnerships (see summary of conflicting industry positions over new legislation, in US Congress 1994: Venturelli 1998). Thus the move away from the common carrier model of regulating telecommunications and cable, whereby a non-discriminatory access obligation is imposed in order to further the political intent of the First Amendment to multiply the diversity of information sources, is also being set aside through the policies of information liberalisation. If information society policies succeed in allowing communications industries, such as cable and telecommunications, to join the category of audiovisual producers, broadcasters and the print press through reclassification from common carrier status to program content provider status, as seems increasingly likely. Liberalisation's political exploitation of constitutional rights by denying application of political rights of communication to the structure of public space bring about a definitive end to the promise of modern democracy. This promise has been intrinsically tied to freedom of communication in order to enable individuals to judge politically and play an active role in the creation and maintenance of their freedom in a self-managed democratic system.

The development of free expression rights under information liberalisation in the European Union, while similar in some ways, is less determined and suggests emergence of opposite tensions. In a recent study (Venturelli 1998), I have demonstrated the extension of proprietary dominion over the public realm in areas of information liberalisation affecting audiovisual policy and intellectual property. These changes, I argue (ibid), indicate the transformation of freedom of information from the problem of participatory and information needs of individuals into the exigencies of content ownership concentration for private entities. Protestations of 'human enrichment' notwithstanding (Commission of the European Communities 1995, p.1). I suggested that in terms of actual policy provisions the regulatory boundaries for the multimedia age preclude development of the network for public applications at the same time that it is being granted full licence for development in commercial applications. It now remains to be seen whether the emerging grounds for a legal foundation or constitutional guarantee of the communication right in the European Union offers the ba-

sis for a counter-trend to the powerful but flawed international standard derived from the US First Amendment.

It would seem incongruous, at first glance, to associate the principle of liberty of expression to that of free flow of services. The first liberty has evolved in the domain of the rights or man, the second in that of free trade. The linking of the two in the European Union has occurred from the absorption of transnational communication regulation by EU trade law. Insofar as communications networks are now authorised at the EU level 'to receive and impart information and ideas ... regardless of frontiers' ('ECHR', *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950, Article 10, para 1), they constitute a support of liberty of expression. And to the extent the EU legal and policy regume assures the free circulation of information services and distribution structures, the principle of free trade has come to constitute an essential component of the liberty of expression.

The Commission's green paper 'Television Without Frontiers' (Commission of the European Communities, 1984) first assessed the relation between principles of free expression and free trade while attempting to develop a rationale for some link. The green paper concluded that the rights of man form an integral part of the EU's central mission to create a single market, and that far from this being a coincidental correspondence, relations between Article 59 on free movement of services in the Treaty of Rome (Commission of the European Communities 1993) and Article 10 of the ECHR constitute a source for enriched development of both human rights protection and the normative grounding of European trade law. Defending the EU's authority in the area of public communications, the green paper maintains that liberty of expression and the market can mutually enrich each other, thus rendering more effective rights of freedom of communication.

It is evident, then, that the EU has strategically identified free expression as a desirable legal foundation for trade in information services even while simultaneously applying competition and liberalisation policies the logic of which places actual control of expression within a consolidating proprietary sector. Further, in recent years, the Commission, the European Parliament, and the European Court have each moved to assimilate human rights into the EU's constitutional foundations by adopting the ECHR, international human rights treaties and conventions, common constitutional principles drawn from member states, and the accumulation of human rights case law (see European Parliament 1989a, 1989b). At the EU level, therefore, the principal legal protection for communication rights derives from an appeal to Article 10 of the ECHR.

The differences both in formulation and interpretation between Article 10 and the First Amendment are substantive in many respects. The most significant distinction, I have argued (Venturelli 1998), is that Article 10 of the ECHR grants a positive communication right and to that extent is a more extensive protection than the First Amendment guarantees. Article 10 states:

> «Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.» ('ECHR', *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950, Article 10, para 1).

By granting not only the right of conscience and speech, but also the right to 'receive ... information', Article 10 generates a positive claim which citizens can exercise on law-givers to guarantee their rights against the competing claim of freedom from obligation asserted by information content providers. Thus European law confers a more extensive right to individuals, viz, listeners, viewers and users; it provides public policy with a positive legal foundation to regulate with the aim of advancing a non-commercial common good and not merely proprietary and contractual goods; and it imposes a constitutional obligation on producers, providers and distributors of communication content by holding these entities to standards of adequacy, sufficiency and plurality of information forms in their exploitation of the public realm.

As I have suggested (Venturelli 1998), in order for a free society to maintain the conditions of public freedom and of political rights so that the common good and processes of collective will formation may be identified and arise by democratic means, it is essential for the body politic to consider how the right of individuals to receive information and to participate in the public arena, which is non-reducible to the market, may be prescribed by law. From this standpoint, the Community can be said to have succeeded in establishing that human rights, in particular, rights of communication, are now fused into the existing constitutional framework of union. The EU has also succeeded in legalising a higher level of protection for freedom of information than provided by the First Amendment. Yet notwithstanding these developments, two issues central to the actualisation of the right remain ambiguous, with potential to undermine the trade/speech rights regime.

First, the very fact of the legal guarantee of liberty of expression existing in conjunction with the guarantee of market freedoms says very little, if anything. As is evident in the case of the US, discussed above, the institutionalisation of communication rights within liberalism's competitive order (see Venturelli 1998), effectively effaces the political right - though not the private/subjective right—of individual citizens, and transfers the protection to proprietors of the public realm. Thus the question that ought to be asked, it seems, is not if the right is codified but, rather, what is its political relation with other rights? No legal code of free expression can answer the question of how public policy in a specific historical context, confronting a particular social order, should implement the free speech guarantee. The code gives some guidance to the responsibility of the state to help members of political association in realising their citizenship in a certain way, as well as how the character of the democratic state and citizens' relationship to it is best interpreted: and it also clarifies the legal grounds on which a democratic conception of social and political life differs from a non-democratic conception.

But the question of what actions ought to be taken that might be successful in furthering a democratic transformation of soial life and creating relations of public communication, ie., deliberative relations, between citizens, can be answered only by the extent to which public policy can secure the conditions of public space for information, knowledge, deliberation and judgment among a broad representation of citizens and social interests. It is members of political society who have to arrive at common decisions, not just private opinions, and no free expression code can provide the political knowledge and experience that is derived from the conditions and experience of actual political participation. This requires public space to be reserved for non-commercial, associative development even

while it could not be forbidden for proprietary expansion and commercial development.

One of the issues for the European Union, indeed the international system, to resolve, therefore, is whether the principle of free trade is constitutionally higher or lower in relation to the principle of liberty of expression. If higher than the communication right, the latter's status is merely formal and negative as in the US, notwithstanding its more extensive positive formulation in Article 10 or the ECHR. Only in the case where proprietary freedoms of the market are subordinated to the higher principle of political rights to speech and reception of information can information policy undertake to defend the democratic development of the public sphere. Fusing the two classes of rights into an undifferentiated group, as the 'Television Without Frontiers' directive (Commission of the European Communities 1989) attempts to do, works to the disadvantage of the communication rights of individuals since their political claim to this liberty can be absorbed into the market claim of freedom from content regulation under the same rights, by the communication industry.

And this is precisely what seems likely wherever the information society is evolving under liberalisation's free trade/free speech model. A study of information society policy in the EU (see Venturelli 1998) demonstrates that liberalisation's theory of property overwhelms all other rights of man in public policy and law if permitted to meld without distinction. The transformation of human rights emerging from this process is in a form whereby proprietary and contractual freedoms achieve greater authority from the assimilation of the communication right, thus assigning their interests a higher constitutional status for prescribing the responsibility of public policy. In considering the framework for free communication in cyberspace, the international system and the EU would, therefore, need to establish which of the two rights - trade or free expression - is a first principle before any positive formulation of communication rights such as Article 10 could be realistically embodied in the institutional organisation of the information society.

The second issue determining actualisation of the communication right under these circumstances of converging trade and speech rights relates to the restructuring of the role of the state sector through information liberalisation. Regardless of the strongest constitutional framework or judicial opinion, if the scope of state action has been reordered to function as a central mechanism in proprietary growth and consolidation, as my study of the EU has revealed in the analysis of information society policy and law (ibid), the possibility for the state to act upon alternative grounds and by other means is already seriously impaired. The policy architecture of the information society is increasingly imposing a fundamental limitation, not on the power of the state to act, but on the form of its intervention (ibid). Thus it is apparent that EU policy has been forced to expel from enabling provisions other alternative grounds of regulation, such as setting public service obligations of non-commercial, broadly representative program content production and distribution standards, and the public interest of moral rights of authors in copyright protections for the information superhighway (ibid).

The separation of a political sphere composed of procedural voting rights and representative-legislative conditions - where public freedoms can, at best, be only hypothetical - from the sphere of communication structures and practices, allows the public realm to be declassified as a political space of universalism, freedom, equality,

and justice - the components of a participatory freedom of communication paradigm - thus making it far easier for communication structures to default to regulation by private interests through particularism, atomism, subjectivism, inequality, natural law and property dominion.

No level of constitutional protection for political rights in cyberspace of speech, thought and knowledge can have significant effect or meaning, other than as formal, even ideological, code, unless the conception and structure of public policy can account for the political organisation of its role on those terms. A democratic constitution emphasising political rights and common interest institutionalised on grounds of private proprietary interests and of contract by the actions of a delimited liberal policy framework, will have just as much effect as would the absence of a constitution from the outset. This is most vividly illustrated un the example of the US, and in the liberalisation logic of the European Union where neither the tradition of public constitutional law nor that of positive communication rights seem to influence the actual provisions of policy, due to the transformation of public policy by the competitive order of information liberalisation and its underlying theory of property (ibid).

I have argued (ibid) that at least three legal and normative foundations are needed to ensure freedom of communication in the information society: first, the constitutional orientation of public law as a first principle over contractual law: second, the adoption of human rights, especially communication rights, implemented at all institutional levels of state and civil society: and third, republican models of public service and participatory frameworks of information rights that have arisen in several nation states, especially in the EU, though admittedly often in conjunction with nationalist conceptions of state and society.

Given these historically available options, it ought to be possible to reformulate information policies in terms of the communication as rights of viewers and listeners to receive information and ideas. That is to say if communication policies were to be regarded as the objective condition of the communications rights of citizens, the constitutional liberty of expression would most likely be ensured. But if such policies are regarded as mechanisms of a particular competitive order or proprietary enlargement, as is apparent under transnational trade agreements and liberalisation, the communication right would be imprisoned in the formal principle of the constitution but not embodied in the constitution of society. Even more serious, I have argued (ibid.) that the precipitous decline of communications rights of listeners, viewers and users of information networks and services in the policies of public space points to the possibility of the systematic destruction of political rights of speech, action and participation (the 'principle of publicity') in the information age, and hence the inevitable passing of public service and its concept of public liberty from the promise of modern democracy.

This is why the existence of a positive right to receive and be informed in the communication right of the ECHR could, if applied in European law, become the basis for an extraordinary advancement in the democratisation of the public realm of cyberspace. Yet it remains only a formal right so long as the provisions of public policy are not constituted by its terms, or so long as the international system as a network of law-making institutions is reconstituted by the competitive order of information liberalisation to function as guarantor of economic consolidation.

Conclusion

In the US, where the positive right does not exist, even as formal principle, the

development of public space in modernity confronts no limitations to the processes of dismantling most barriers to proprietary extension through rationales of competition and private interest. Treating policies and laws of public space as a fundamental political question rather than as an economic, competitive, technological or cultural question, remains the only approach to the information society that is likely to bring about a potential for the actualisation of freedom of communication in modernity.

Given the supranational expansion of negative political rights, ascendance or contractual law, and the absence of a theory of universalism of general welfare (public service) embodied in international information policies and laws emerging from world trade agreements, the potential to address freedom of communication as first and foremost a political rights issue may no longer be a historical possibility for the information society in the US. Even further, it may indeed constitute a serious socio-legal obstacle to the global democratisation of cyberspace. Yet, for the EU and for a few non-European countries, there are still some possibilities for renewal of a post-liberal framework of information rights provided that international standards of free communication derived from information liberalisation have not already reconstituted the three crucial institutions of positive rights, public law and public service into a facade for unaccountable governance of the public sphere by liberalism's theory of property.

The challenge to free expression inherent in the globalisation of cyberspace may become one of the most significant turning points in the reform and historical development of democracy. Universality of thought and law embodied in republican and participatory models of information rights are easily destroyed by unquestioned hegemonic logics, be they authoritarian collectivism or oligarchic liberalism. If the opportunity for serious examination of the constitution of the public realm is marginalised in the global information society agenda, the potential for conceiving participatory structures may indeed be lost to mankind as political society disappears under the alienation of reason and the evolution of nationalist and proprietary absolutism in cyberspace.■

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Footnotes

1. The First Amendment to the Constitution of the United States reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances.

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