

# Rethinking the spiral of silence at (new) legal costs contribution to a sociological approach to international normative policies

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## Introduction

How to articulate freedom of expression, human rights and media law? It is to reflect on this thorny issue that I invite you in this presentation. The relationships between these three components of human and social life have never been so turbid. So much so that it seems easier, in the digital age, to approach them from the point of view of globalist trends and experiences emerging from the practices of each geographical area, than to attempt to draw a general theory from them. It is clear that the responses drawn both from the reports of international organizations and from the provisions of the international system provide a comfortable body of references that can help to understand how national experiences comply with international provisions, the resulting gaps and ways to legitimately harmonize national instruments and practices with international rules.

Yet the concern of the theorist and researcher remains largely unfounded when one considers two very different situations: first, the increase in violations of freedom of expression in many countries, violations that do not necessarily overlap the international division of respect for human rights with the level of political and economic development of States: the United States (which maintains the death penalty in some States violates human rights, in the same way as Bolivia, South Africa and Nicaragua). Secondly, respect for freedom of expression, which overlaps with the level of economic development, places poverty and non-respect for fundamental freedoms in a close causal relationship. Finally, the association between freedom of expression, human rights and media freedoms acts as a framework of thought whose very nature produces asymmetry because of the intrinsic differences between the three terms of this association. Drawing on the classic presentations of the concept of public opinion, I wish to establish that the relationship between public opinion and media opinion, which serves to articulate the three terms of exchange, namely freedom of expression (at the individual level), human rights (at the level of human groups) and communication law (at the level of society), can help to reflect the process by which individual rights relate to and change in contact with the social environment without prejudice to the existence of the normative system governing them and by maintaining it outside their interaction. Our assumption therefore consists in asserting that human rights, however heterogeneous they may be, owe their media coexistence to the articulation of practices that define the spaces of a tense right of expression. This hypothesis therefore forces us to examine again the thesis of the spiral of silence ushered in by Marie-Noelle Neuman in 1974, considering that a media can renounce its own judgment in order not to be isolated in a context of general agreement on an issue. I will examine this proposal on two levels: first, the presentation of the relative incompatibility of these rights

- a) Second, the forms of institutional and legal arrangements by which these incompatibilities force the observance of these rights.

- b) Particularly when the media are bound by their sources to respect their sources' rights and to express public opinion in the context of a spiral.
- c) Based on this concept of an interactionist process generating a "spiral" of silence, I will define public opinion as that opinion which can be expressed in public without risk of sanctions, and on which public action can be based.

## Spiral of media silence

How does the notion of public opinion highlight the incompatibility between freedom of expression and freedom of communication? Public opinion can be defined as a dominant opinion, which, by its power of influence, is so strong that individual or dissenting opinions are pushed back into the margins and made inaudible. Many authors have pointed out the differences between public opinion and mass,<sup>1</sup> since the contingent nature of the mass effect is linked to the momentary and sudden interest in an issue without any link of interest or class being established between the people who form a mass, or even with the political system,<sup>2</sup> it is the framework of influence that characterizes public opinion. To summarize the studies, it would seem that public opinion fulfils some conditions that can be recalled by drawing inspiration from Anglo-Saxon works: it occurs in a longer and indeterminate period of time, has several forms, can change radically from one period to another, is not very standardized and subject to debate, lacks historical perspective and requires few resources to group and process it. The spiral of silence is already apparent, insofar as the relative manoeuvrability and circulation power of public opinion because of its ability to explain and justify both force into silence those who would have a contrary opinion, as Tocqueville<sup>3</sup> already showed. In his book "The Old Regime and the Revolution", Tocqueville shows how, in the face of the rise of contempt for religion in the 18th century in France, the Catholic Church becomes "silent". Fearing the isolation, they risked by remaining alone faithful to the religion, the believers then joined everyone's opinion, which therefore

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seemed irresistible. In short, public opinion is formed when a large number of individuals express the same opinion in the public space and tend to consider it true beyond the principles that define truth. It can be modelled on the three social conditions that determine the prosperity of an opinion, namely its manageability, i.e. its ability to be usable by the greatest number of people, its simplicity, i.e. its ability to be understood and assimilated, and its adaptability, defined by its ability to explain and justify. Traditional taxonomy also attributes several figures to it: freedom as a thought figure of autonomy and inviolability; rationality considered from the point of view of the ability to serve as an argument for collective deliberation; and the coherence given to it by an aggregation mechanism such as the media system. This is why the public opinion that uses the media eventually merges with the opinion of the media when, for particular reasons, the gate-keeping principle no longer acts within the media. Indeed, this ability of a media editorial to scrutinize the information received before publishing it<sup>4</sup> is not unshakeable and even less their ability to be more open and liberal than the rest of society, an openness that would be due to the norms and values that serve to strengthen their critical function, as Noelle-Neumann<sup>5</sup> thought. This capacity can be weakened in various ways, internally by insufficient training of journalists and influential members of the editorial staff, by the alliance of objective interests between media owners and external groups or by pressures of all kinds from the political or economic field, various pressure groups or international powers.<sup>6,7</sup>

The spiral of media silence is triggered when a large number of dominant media, often international, relay the same news, sometimes without taking the time to check it and crosscheck it. To avoid being left behind by competition, not to be left behind, by loyalty to a captive clientele, or finally by simple mimicry or more often by docility and allegiance to so-called international opinion, the national media - from the global periphery-will become the docile amplifiers of such information, which will flow to national opinions and constitute the undeniable version of the new. By thus stifling freedom of expression, the spiral of silence structures communication and imposes a media form linked to the law by the international principle of the free communication of information and ideas. This asymmetric tension in the relationship between national and international media therefore tends to overlap with that between the individual and society,<sup>8</sup> particularly when it comes to their articulation with communication.<sup>9</sup> It is also found in societies in which social limitations on freedoms are also intended to preserve individual freedoms. It is found here in a context where the ability of national media to deal freely with national or international news events is limited by the international mainstream media that serves as their sources and in particular, when public opinion is formed outside the media sphere itself. In this way, the social conditions for the reproduction of the dominant version of the facts are being created, the proximity of which no longer influences at all the fair and balanced treatment that the national media can give them. The conditions for the application and enjoyment of rights of expression, information and/or communication are more or less distorted by the international stakes involved in the interpretation of national news.

### The media in the order of freedoms

Let us now examine the test to which freedom of expression and freedom of communication and the resulting rights constrain the enjoyment of these rights. Moreover, the resulting tense institutional and legal arrangement. The role of the media in shaping public opinion

is not, in our view, a problem as mentioned by Noelle Neumann.<sup>4</sup> Even before its first attempts at formalization, it was possible to theorize this role more systematically,<sup>10,11</sup> work that can be understood from three levels of the relationship of the media to the spiral of silence: thus, it appears from these studies that the media play a triple role: they serve as facilitators, relays and creators of public opinion. Freedom of expression is based at the international level on a set of matters ranging from freedom of thought and opinion to the right to take part in cultural life, including the right of access to information, the right to communicate one's thoughts and ideas "without interference from public authorities and regardless of frontiers" (European Convention on Human Rights). But in general, this freedom is not unlimited and most international instruments indicate, as does European law, that "The exercise of these freedoms involving duties and responsibilities may be subject to certain formalities, conditions, restrictions or sanctions prescribed by law which are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder and crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of confidential information or for guaranteeing the authority and impartiality of the judiciary".

The African Charter on Human and Peoples' Rights states (Article 19):

1. Everyone has the right to information.
2. Everyone has the right to express and disseminate his or her opinions within the framework of laws and regulations.

Thus, the main limits to freedom of expression, which are often considered to be defamation and insult, are not only to be found on the side of the law itself, but also on the side of the constraints imposed on its exercise by the ability to resist public opinion. First, at the substantive level, freedom of expression is indeed limited by the law itself when the texts list the mechanisms of enjoyment: by "respect for the rights of others, collective security, morals and common interests" (Article 27 of the African Charter), the promotion of war crimes, crimes against humanity, or crimes of collaboration with the enemy or "provocation of discrimination, hatred or violence against persons on the grounds of their origin or membership or non-membership of a particular ethnic group, nation, race or religion", or "their sexual orientation or disability" (Articles 23 and 24 of the European Charter). In short, from a legal point of view, no prosperity is guaranteed to an opinion if it contravenes the relevant provisions of laws and regulations. To think otherwise would therefore be to presuppose that there would be a rite of passage from individual opinion to public opinion that would ensure that only those individual opinions subject to prior selection of the Kantian or even divine reason would be eligible for public opinion. The contract for the publication of opinions is far from obeying such rules, as evidenced by the history of genocides over the centuries. Media opinion, as in the case of Radio des Mille Collines in Rwanda, is affected by the shift from opinions common to public opinion and from public opinion to media opinion. The fear of isolation, the doubt about the capacity of individual judgment in the face of a conflicting or even conflict-generating situation, will structure public opinion and feed the media. In other words, in the field of freedom of information, legal recognition cannot be the only reference.

Another issue that arises from media opinion is known today in the form of social responsibility. Jean Ismert traces the first signs

of media influences in political communication in France back to the 17th and 18th centuries. “In this pre-industrial period, the development of a middle class, the bourgeoisie, sought to take more power at the expense of the monarchies of the time. At the same time, the Lumières current plays a major role in the emancipation of new ideas, the pursuit of a scientific and non-faith-based approach, and the search for truth. In 1964, in his publication *Aeropagitica*, John Milton advanced the right to freedom of thought and the right to information to exercise his rationality. Two hundred years later, John Stuart Mill brought his utilitarian vision by saying, “I can do what I want as long as I don’t cause harm to others,” he wrote Later, the media were given a large number of functions in society, as evidenced by a flourishing number of theories ranging from agenda setting to agenda building. These various studies attest to the fact that media freedom is essential for socio-political development and this recognition is based on the condition of a freedom whose borders have since then been the subject of debate. The birth of the profession of journalist has added an ingredient to the debate and has led to a growing number of semantic shifts between freedoms, without any consideration of the cacophony that resulted from them under the conditions of coexistence of these freedoms. The emergence of social media and the development of a form of journalism known as citizen journalism have at the same time put to the test most of the legislation already severely tested by the very principle of their existence.

### The legal uncertainty of communication rights

The right to diverse and independent media, such as the right of access to the media, has been recognized in several forums of debate organized in places as diverse as UNESCO, the European Court of Human Rights, the Federal Constitutional Court of Germany and the Supreme Court of Sri Lanka, although its principle is still under discussion. These debates complement concerns about the exercise of the right of the media and journalists to access information. But as we have just seen, between the freedom to express one self, to inform, to be informed and to communicate, the legal channels are extremely sinuous or even dead ends as to the value to be given to public opinion. Noelle-Neumann attempts to exegesis it by discussing the concept of a spiral of silence using a questionnaire interview with 2000 people between 1971 and 1972. Based on five hypotheses relating mainly to the electoral forecasts and voting intentions of German citizens, she concludes that “that a minority convinced of its future domination and, consequently, willing to express itself, will see its opinion become dominant if it is confronted with a majority doubting that its views still prevail in the future, and therefore less willing to defend them in public. The opinion of this minority becomes an opinion that cannot be contradicted without running the risk of some sanction. It thus moves from the status of a faction’s mere opinion to that of public opinion”.

This simple mention is sufficient to give an idea of the fate that the freedom or the different freedoms relating to information and communication are likely to suffer in the face of a dominant opinion. Regardless of the constraints previously highlighted, it is necessary first of all to focus on the extreme fragility imposed by the law on the legal identity of the litigant as a matter of principle. Well before those which their sources exercise on the choice of subjects submitted to media debates, the question of legal security, which has not been very well studied in the sociology of law, is mainly based on violations of the rights of individuals on the basis of what doctrine now admits as the normative disorder, instability and complexity of legal systems.<sup>12,13</sup>

Because the system cannot initiate “the struggle of the legal system against itself”, to use Molfessis<sup>14</sup> excellent formulation, a heavy silence overshadows the threat posed by multiple, overabundant legal texts emanating both from doctrine and case law. To the security of citizens, even before their responsibility is engaged through the famous formula “no one is supposed to ignore the law”; the climate of insecurity is already fuelled by a series of threats, including the instability of the definition of the matters covered by a law or a set of national and international legislative provisions. All the more so, as Pacteau<sup>15</sup> so aptly puts it, “the notion of legal security, when analysed and when one seeks to exploit its virtualities, has as its first and apparent defect-at least for handicap-not to constitute a legal category at borders, nor with perfectly delimited consequences, contours or content”. However, an analysis of laws on the freedoms of communication, information, the media or expression, subjected to the test of legal discourse and its content, would highlight, beyond the value of evidence that is difficult to contest that their status confers on legal texts, their endangerment by gender itself. To take only a few species, we can observe a form of fetishization of the texts on the evocation of the notion of freedom and its principles of generality and universality, the limitations often appearing only as empirical residues left to the wisdom of the legislators within States. It follows that the dissuasive nature of these limitations does not constitute a substantial barrier to the fantasy of unlimited enjoyment of these freedoms by both journalists and the public. In the age of the Internet and social networks, we can imagine the excesses to which fragile minds are exposed by an extensive interpretation of individual, corporatist or professional freedom. A generalized public opinion resulting from the deliberation of citizens and controlled by laws or even the wisdom of peoples seems in this case impossible to think of. The international classification of human rights considers human rights and the rights of the individual as synonyms. However, their extension and complexity have led to their classification by category and/or generation. Because of the issues at stake, no classification considers them in terms of their importance, in particular by distinguishing between major and minor rights. Thus, the typology of these rights carried out by Normand Landry of the Université du Québec in 2013 Gitling,<sup>16</sup> in two categories-enabling rights and reassuring rights-as stimulating as it may have been, has notoriously gone unnoticed. However, it is nowadays one of the most fruitful analyses of the relationship between human rights and communication. The author considers that the rights relating to communication are of problematic application. While communication rights encompass relevant aspects aimed at creating a climate of mutual respect and tolerance both between individuals who hold these rights and between communities and cultures, ethnic groups and nationalities, and which the author refers to as secure rights, they are also backed or even subject to other communication rights-meta rights-without which they cannot be fulfilled, namely the enabling rights.”By their very nature, communication rights call into question whether social structures limit and differently promote the ability of different individuals and groups to communicate effectively within societies,” he writes. According to the author, there are therefore two types of rights that coexist within communication rights, secure communication rights and other enabling rights.<sup>17</sup>

For the author, communication rights require a more comprehensive application of what he calls the “spirit of freedom of expression” to remove constraints on entire segments of society, to encourage access and skills for those excluded from it. The author’s typology classifies them as security rights, which he also calls exercise rights and



enabling or accompanying rights. The first category of information and communication rights has a twofold relaxing function: first, it consists of rights whose effective realization promotes the establishment of a more favourable and secure context for full participation in communication; second, full respect for these rights is a prerequisite for the exercise of other rights and freedoms. Thus, the right to life (security law) performs several other functions related to the so-called enabling rights. According to the author, security rights include freedom of opinion, freedom of expression, right of access to information, freedom of thought, conscience and religion, freedom of assembly and association, the right to self-determination, the right to participate in public affairs and the right to take part in cultural life. Their combined objective is to give everyone the legitimacy to think, express themselves and act freely. The confidentiality of communications, which is essential for the exercise of freedoms of expression, assembly and association; the right to protection from war propaganda and hate speech promotes the exercise of the right of minorities to participate in public affairs; the right to protection of the moral and material interests of creators encourages participation in cultural life. Finally, the securing rights would aim to protect people against attacks on their honour and reputation.

The second category of information and communication rights is therefore based on aspects of other human rights contained in the International Bill of Human Rights and other treaties and legal documents. It would cover a wide range of rights: to participate in one's own culture and use one's mother tongue, including ethnic, religious or linguistic minorities; the right to information on governance and matters of public interest; the right to free primary education and the progressive introduction of free secondary education. The author considers that the rights of exercise, first category rights, frequently expose those who claim them to actors in a position of power who set up different social control mechanisms such as censorship, judicial repression, technical controls and social and political repression in order to limit their enjoyment and exercise. Because the main objective of these rights is to ensure the widest possible inclusion of people, perspectives and ideas in the public sphere, a new habermasian public space including public institutions (parliaments, municipal councils), meeting places and places for the exchange of ideas (libraries, cafés, universities), traditional media and digital communication networks (telephony, Internet). These rights are therefore by their nature part of the expression. The problem of establishing a democratic public space and a more inclusive and diversified media space would therefore be the criticism of citizen participation in the production and dissemination of information and communication.

## Conclusion

What capacity for interpretation can these analyses, which are very stimulating, claim to have, particularly in critical circumstances, when a nation is facing a political or social crisis? While the paradigm of the spiral of media silence can make a substantial contribution to the understanding of public opinion and its relationship to freedom of information and communication, the intertwining of media influence with social pressures, public communication policies, individual freedoms, in short the place of freedom of expression in the international legal order and the exercise of human rights at the national level, remains largely to be disentangled. Legal sociology can only shed light on it, without claiming to ensure that it is fully intelligible.

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## Conflicts of interest

The author declares that there are no conflicts of interest.

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