Epistemic Institutions: The Case for Constitutionally-Protected Academic Independence

Oliver Milne, National University of Ireland, Galway, o.milne2@nuigalway.ie

A power over a man’s subsistence amounts to a power over his will [...] The plan of the [constitutional] convention accordingly has provided that the judges of the United States “shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office” (Federalist 79, Hamilton 1788).

Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence [...] The convention acted wisely in copying from the models of those constitutions which have established good behaviour as the tenure of their judicial offices, in point of duration (Federalist 78, Hamilton 1788).

By these means the American Founding Fathers endeavoured to defend the independence of their judiciary, and because of these defences the present partisan state of that country’s Supreme Court is a result, not of pressure exerted on the judges by the executive and legislature, but of their selection of sincere ideologues for its lifetime salaried appointments.

The reason Alexander Hamilton gives for this fastidious protection of judicial independence is that the judiciary enforce constitutional restrictions on the power of the legislature. This they clearly cannot do if they fall under its control. What I want to argue is that the underlying reasoning here is broader in its application: that the judiciary’s power is best thought of as public epistemic power, that academic and media institutions have power of the same kind that can be abused to the same ends, and that, as a result, those institutions should be furnished with protections analogous to those Hamilton, Madison, and their colleagues arrayed around the judiciary.

**Judicial Power as Epistemic**

To treat judicial power as epistemic initially seems a little strange. After all, don’t we usually talk about judges enforcing or striking down laws? But these forms of words are misleading. It is not judges who drag convicts to prison, or unlock their shackles and let them walk free. They may ‘impose’ fines and penalties, or ‘force’ one party to compensate another, but the big stick that enables them to do so is not held in their own hands—it is wielded by police and prison officers, and at last resort the military.

Nor are the judiciary supposed to make their decisions primarily on the basis of their vision of the public good, or their own preferences, or loyalty to one party or another. The judgements they hand down are interpretations of the law: their professional assessments of whether a particular action or bill is compliant with it. They have the authority to produce verdicts. These are epistemic activities—they inform both the enforcement agencies and the public of the legal status of events. It’s those other agencies that turn that information into action.
We can therefore justifiably describe the judiciary as an *epistemic institution*: a body of specialists whose task is to discover and deliver knowledge of a certain kind to the public and to public institutions—knowledge that would not otherwise be reliably available to those audiences, and for the veracity of which they must rely on the authority of the specialists. But this description quite clearly does not describe the judiciary alone. It also embraces two other major social institutions: academia and the press. But to claim equivalence between these three institutions on this basis alone would be too hasty. We must look at what the information they provide is used for—and the scope for abuse control over it may afford.

In the case of the judiciary, these questions are easy to answer. Their judgements are, in general, swiftly rendered into violent action by the agents of the state. A ruling against someone can result in their being stripped of their property, their liberty, or even, in some countries, their life, and can be used to cripple a corrupt actor’s political opponents or economic competitors. As Hamilton and Madison observed, if the judiciary can be compelled to turn a blind eye to lawbreaking, the law offers no protection against the beneficiaries of their neglect, either to individual victims or the public at large. Control of the judiciary, therefore, can allow a corrupt actor to do enormous damage to the public interest.

**Treating Misinformation**

The impacts—and potential corrupt use—of the (mis)information produced by academia and the media are less direct. The case of the media doesn’t need much elaborating—the media’s ability to shape the public mood, create or destroy political reputations, and manufacture support for the political priorities of a corrupt actor capable of controlling significant portions of it is widely recognised as the principle reason for protecting the freedom of the press (Schiffrin 2018). The impacts of academic research bear a little more exposition.

That knowledge (and lies) produced academically can create substantial harms or benefits to society based on the subjects investigated and neglected, the conceptual frames through which that investigation is conducted, and the honesty with which it is carried out is not controversial. What does bear emphasising is the potential for those outcomes to be affected, not just by ideology and social bias (Foucault 1972; Said 1978), but by control over funding and tenure by corrupt actors.

Both attacks on academic producers of inconvenient truths by means of funding and organisational control on the part of the state and the use of those means to produce ideological reinforcement for that state are familiar phenomena. Current events furnish us with numerous examples: the present assault on the humanities in Central Europe and elsewhere is the most powerful demonstration possible of the ability of corrupt actors (in this case men like Viktor Orbán, Jarosław Kaczyński and Jair Bolsonaro) to use power over the pay and tenure of academics to stifle the production of knowledge that has effects contrary to their interests (Bárd 2018; Goździak and Main 2018; Pells 2018; Peto 2019) The Polish government’s attempt to replace gender studies with the alleged field of ‘family
studies’, meanwhile, is a transparent attempt to mobilise the power of academic knowledge production in pursuit of their own conservative agenda.

The possibilities for corrupt actors to use financial and organisational influence to manipulate academic knowledge production to their own ends are not limited to the state, however. The private sector is perfectly capable of taking advantage of them too. Over the past century, enormous harms have been done by private corporations’ use of scientists under their financial or organisational influence to manufacture doubt surrounding the health impacts of smoking, asbestos and, most damagingly of all, climate science (Oreskes and Conway 2010). Many, even most, of these academics may have been perfectly sincere in the unorthodox positions they advocated; but their research was (and in some cases still is) lavishly funded and their voices given a platform disproportionate to their credibility through the financial power of the captains of industry who stood to benefit from people believing them.

Private financial power can also be used to suppress research that threatens large industries’ business models. In the field of agricultural research in the US, for instance, the mere implicit threat that private funding may be withdrawn has had a powerful chilling effect on research that might threaten corporate agricultural interests (Cox and Brown 2019). Universities reliant on private-sector funds to sustain institutes, professorships, and scholarship programs can all too easily find themselves trapped in the ‘golden handcuffs’ of perverse incentives.

The fact that these abuses occur in a free market is crucial. It shows that it’s not just necessary that genuinely independent academics exist, but that their independence be guaranteed by a quality-control mechanism verifiable by outsiders. This a distinctive feature of all epistemic institutions: because they produce knowledge others can’t routinely check, the general public is usually unable to accurately evaluate the quality of their output. As a result, they must have valid grounds to trust their output—in terms of both independence and competence.

Present systems in developed electoral democracies address the competence criterion quite well in all three cases, insofar as it is separable from the independence criterion. In the case of the news media, the distinctive relevant mechanisms are press regulatory bodies and the fact that the news media’s output is consumed directly and regularly by the general public, allowing them to develop sufficient media literacy to spot certain signs of gross incompetence, such as spelling errors or failures in production. In the case of academia, the primary distinctive mechanism is peer review, with political oversight sometimes playing a secondary (and easily-abused) role. In the case of the judiciary, the hiring and oversight procedures enshrined in public law are the distinctive mechanisms. In all three cases at least, three other, more universal mechanisms are also at play: particular organisations’ word-of-mouth reputations (wherein informed opinion filters out through informal channels into wider circulation); coverage by (other) news media; and the simple fact that news organisations, research institutions, and the judicial branch comprise relatively large associations of qualified and/or experienced people whom the public can reasonably expect
to police one another’s competence, at least insofar as it is not against their interests to do so.\(^1\)

**Public Trust and Intellectual Integrity**

The mechanisms available to ground public trust in the independence of the media and the academy from corrupt interests, on the other hand, are feebler. Independence from government control is a relatively favourable case: if a news publication regularly attacks the governing party, it is probably independent of it; if it is directly owned by the government, its independence falls into question. But this is a special case because the public broadly knows what the government wants, namely favourable coverage of itself and its publicly announced policies, and what it owns. Other corrupt interests are not so well-known, and modern autocracies tend to prefer ‘private’ ownership of media by their allies to direct state ownership (Komuves 2019). The only remaining mechanism is informal reputation. For academia, the situation is even worse: institutions’ reputation for intellectual integrity with the general public rests largely on word of mouth reports of their internal culture, media reportage, and support from publicly-trusted governments.

The upshot of all this is that existing protections for the independence of the media and the academy, even in the world’s most democratic countries, are inadequate. What is called for are systems of funding for these institutions that prevent powerful actors—whether inside or outside government—from using their wealth to control their output. These systems, since they function as part of the separation of powers within a state, would demand the highest protections available under that state’s constitutional system—in the US, for instance, the status of constitutional amendments.

For the media, this might mean something like a central media fund, overseen by a randomly-selected citizens’ jury, that doles out a constitutionally-mandated pot of cash to news media outlets proportional to their share of the votes garnered in periodic polls of the entire public, in which each member of the public would receive multiple votes. To receive funds, a media organisation would have to renounce outside funding and be subject to a press regulator overseen either by a jury or by the media organisations themselves; media organisations outside the system would be subject to legal curbs. The combination of the press regulator with the allocation of funds by public vote serves to control for competence as well as independence—in particular, the regulator would be able to prevent media outlets from undermining one another’s reputations in pursuit of funding.

For academia, on the other hand, the main task is to insulate the system from funding threats. The academy’s competence-control systems are already overwhelmingly either internal or based on how useful industry finds its output, for the unavoidable reason that it’s often impossible for a non-expert in a field to judge the quality of research within that field.

\(^1\) These are not, of course, the only factors relevant to these institutions’ actual competence; factors not directly verifiable by outsiders, such as their internal institutional culture, also play crucial roles. But internal factors of this kind cannot provide reasons for outsiders to trust the institutions; to do so, they must be mediated by systems such as investigative journalism or informal reputation.
Constitutionally-guaranteed inflation-indexed funding for named institutions, tied to prohibitions on those institutions accepting outside funds, would be a start, but to address corporate funding and promotion of scholarly results that make their business models look good, a delicate balance would have to be struck: the private sector’s development of technology must be impeded as little as possible, while its ability to manufacture favourable science must be impeded as much as possible. Measures such as preregistration of research programmes—already proposed by science-integrity activists for medical trials (“AllTrials mission statement” 2013)—could play a role; schemes to address the private-sector demand for research and development while reversing the direction of funding, so that corporations would have to apply to research institutes to use the time and money of researchers funded by their taxes, on the strength of the potential of the research they wanted to do, might preserve the benefits of private-sector research while avoiding the accompanying moral hazard.

Whatever the best approach may be, though, one thing is clear: the status of academia and the media as epistemic institutions on a par with the judiciary renders their present vulnerability to manipulation a profound threat to the public interest—a threat that traditional liberal protective measures are insufficient to handle.

References


