

Legal framework for media and democracy

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Abstract

Open discourses and the free formation of opinions through unfettered information flows and communicated diversity of opinion are unthinkable without independent media and essential prerequisites for a functioning democracy. Notwithstanding the importance of the linkage between media and democracy, there is no harmonized framework addressing this issue. By adopting a legal perspective, this study shall outline existing and emerging regulations, with a particular focus on broadcast, print, and online media. Two regulatory tiers are distinguished: At the international level, the establishment of a World Information Order as well as the human rights perspective intrinsic to the subject matter will be addressed. At the national level, legal approaches to particular tensions accompanying state regulation of the media will be examined.

Keywords: media and democracy, media pluralism, media regulation, mass communication

Introduction

Open discourses and the free formation of opinions through freedom of information, communicated diversity of opinion, and media pluralism are unthinkable without independent media and essential prerequisites for a functioning democracy (Beierwaltes, 2000: 9–61; Nobel and Weber, 2007: 35).

When adopting a legal perspective on the relationship between media and democracy, several differentiations are necessary:

Since law is based on linguistic instruments, the ample notions of “democracy” and “media” need delineation to ensure their legal application and functionality. Hereinafter, priority is given to three different forms of mass communication, namely, broadcast, print, and online media.

Moreover, because the general conceptualization of democracy can be a daunting task, a distinction between substantive and procedural democracy aspects is adopted.

Furthermore, different tiers of law need to be considered. A distinction should be made mainly between the internationally and the nationally effective regulations. Although regional regulations have gained importance within the European Union (EU), the number of effective media regulations remains limited. Radio and print media have not (yet) become a topic of EU regulation and the Internet is mainly addressed within the context of potential criminal activities. Several attempts to release a directive on the avoidance of media concentration – an important topic regarding the balancing of interests between media and democracy – have not succeeded and remain uncertain (see Weber and Dörr, 2001: 128–138; Kellermüller, 2007: 98–99). The existing EU framework has primarily focused on the broadcasting sector; however, in light of digitalization developments, it is interesting to note that non-linear audiovisual media services are also being addressed (see Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC, OJ L 332, Retrieved December 18, 2007: 27).

Clearly, the legal problems governing the tensions between media and democracy are not identical at the global and local levels. Differentiations already apply in view of the regulatory frameworks' addressees: While international law traditionally addresses states as primary subjects, human rights grant individuals a certain standing, particularly in the communications field. At the national level, the regulatory addressees are less constrained, enabling many more detailed provisions on the relationship between democracy and the media as well as the different stakeholders involved.

Although the issue's importance has been acknowledged, a comprehensive framework related to media and democratic values has not been developed. Nevertheless, some regulations are available. In the following section, an outline of existing and emerging regulations, based on the delineated differentiations, is presented.

Regulatory framework of the World Information Order

World Information Order

Activities of UNESCO. In the early 1970s, a group of block-free states discussed the idea of a “New World Information Order” (NWIO). After its launch at the Summit of 1973 in Algiers, it soon became obvious that this order would have to be incorporated into a broader concept of a

third world development policy. The Soviet Union proposed a “Mass Media Declaration” under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO). This attempt provoked the opposition of Western countries who were afraid that the principle of the “free flow of information” could be jeopardized. In 1976 the UNESCO agreed to begin inquiring into the factual background of the existing information and communication regime (Weber, 2004: 97).

In December 1977, an international commission, appointed by UNESCO, began its study of world-wide information and communication issues. Within about two years, the commission, chaired by Nobel Prize laureate Sean MacBride, compiled an impressive report under the title “Many Voices One World.” Furthermore, the UNESCO General Conference in November 1978 agreed on the “Declaration on the Fundamental Principles concerning the Contribution of the Mass Media to Strengthening of Peace and International Understanding, the Promotion of Human Rights and to Encountering Racism, Apartheid and Incitement to War” (UNESCO Doc. 20C/Res.4.9.3/2 of November 28, 1978). The MacBride-Report addresses a large number of matters, with particular attention paid to the following aspects (see Weber, 2004: 97–98): (1) strengthening independence and self-reliance of communication capacities; (2) integration of communication into policies on technological challenges and social problems; (3) improvement of professional integrity and ethic standards; (4) acknowledgement of communicative democratization (i. e., avoidance of media concentration and realization of media diversity); (5) fostering international co-operation; and (6) providing for more financial resources. While a large share of these issues remain essential in today’s media landscape, some traditional topics of the MacBride-Report, such as the perception of journalists as main “speakers” within the communication order, seem outdated, as direct access to information channels through the Internet is now easily possible. Journalists no longer need to transport content as “direct” media, but rather are challenged by the selection and interpretation of the information flows (Weber, 2004: 101).

After the publication of the MacBride-Report, only a limited discussion took place within UNESCO. In the context of UNESCO’s vital political crisis (canceling of membership by the United States and the United Kingdom), the topic of a global information and communication order became less relevant in the 1980s. As a result, drafts of a NWIO disappeared from the political agenda.

Information Society Principles. In the late 1990s, discussions on a global regime for an information and communication society were revitalized by the International Telecommunications Union. The major objectives are summarized in the “Declaration of Principles of the World

Summit on the Information Society” held in Geneva in December 2003 (WSIS I; see WSIS-03/GENEVA/DOC/4-E). The following aspects that focus on information and communication technologies (ICT) for the benefit of the global population also have an influence on the issue of media and democracy (Weber, 2004: 99): (1) promotion of information and communication technologies; (2) improvement of ICT infrastructures as an essential basis for an inclusive information society; (3) provision of access to information and knowledge; (4) capacity to acquire the necessary skills and knowledge in ICT; (5) building confidence in the use of ICT; (6) good governance within the information order; (7) improvement of ICT applications; (8) promotion of cultural diversity and identity; (9) freedom of media and freedom of information; (10) promotion of the ethical dimensions of the information society; (11) improvement of international and regional co-operation.

The guarantee of the freedom of the media and of information is a key issue in the relation between media and democracy. This issue has been reconfirmed in the context of the WSIS II in Tunis (November 2005) and particularly within the “Tunis Commitment” (WSIS-05/TUNIS/DOC/7-E, para. 4). ICT are acknowledged as effective tools in enhancing “democracy, social cohesion, good governance and the rule of law, at national, regional and international levels” (para. 15). The “Tunis Agenda” (WSIS-05/TUNIS/DOC/6(Rev.1)-E) reaffirms “the independence, pluralism and diversity of the media, and freedom of information” by calling for a “responsible use and treatment of information by the media in accordance with the highest ethical and professional standards” (para. 90[o]). Despite such developments, however, media and democracy were not key issues of the WSIS that focused more on the “governance aspects” of the Internet.

Nevertheless, the outcomes of the MacBride-Report and the WSIS principles underscore the fundamental meanings of the freedom of information and the right to access information. The re-affirmation of human rights in the WSIS principles can also be crystallized around the following goals in an open information society (Weber, 2004: 100): (1) everyone should be able to receive basic information and electronic education; (2) charge-free access to public data is essential in the information society; (3) economically adequate access to infrastructure must be guaranteed; (4) intellectual property rights may not prevail over the right to education and knowledge.

Democratic development and media

Certain functions that were previously executed under the auspices of UNESCO have been assumed by the Organization for Security and Co-

operation in Europe (OSCE). The OSCE promotes democracy in Europe and assists participating states in building democratic institutions, thereby implementing media monitoring approaches. The OSCE has insofar established two institutions: (1) The Office for Democratic Institutions and Human Rights (ODIHR) is particularly active in the fields of election observation, democratic development, human rights, tolerance and non-discrimination, as well as rule of law; (2) the OSCE Representative on Freedom of the Media observes media developments within the OSCE states. Based on OSCE principles and commitments, the Representative advocates and promotes the full compliance to these provisions, albeit without exercising a legal role. The Representative rather seeks direct contact with the participating states and the parties concerned and assists dispute resolutions (Decision No. 193, Mandate of the OSCE Representation on Freedom of the Media, para.1–4).

Human rights perspective

Significance and characteristics of human rights

When addressing the relationship between democracy and the media, the right to freedom of opinion and expression is the core element of the human rights framework. Article 11 of the French *Déclaration des Droits de l'Homme et du Citoyen* already guaranteed the right to freedom of expression as one of the most precious rights of human beings. Indeed, the rights encompassing free communication constitute the heart of the individual's emancipation and political empowerment toward responsible citizenship and reflect the linkage between civil and political rights. On the one hand, free communication satisfies the human need to communicate; on the other, the role of the media has a political aspect: The knowledge on different individual opinions and their discussion deliver important inputs for a society's development and arguably provide for chances toward a more just social order. The right to form his or her own opinion freely, based on a right to free information, is deemed to be an indispensable prerequisite for life in a democratic society and the performance of political rights (Nowak, 2005: Art. 19 para. 1–11; Müller and Schefer, 2008: 347).

In the aftermath of the World War II and the establishment of the United Nations Charter in 1945, the adoption of the Universal Declaration of Human Rights followed in 1948 (G.A. Res. 217A (III), U.N. Doc. A/810 at 71). Article 19 of the Declaration is worded to include the right to freedom of opinion and expression. Despite the strong impact the Universal Declaration of Human Rights had in international law, the declaration was adopted as a legally non-binding UN General Assembly

Resolution. In light of the tensions between the Eastern and the Western hemispheres, it took the world community nearly an additional twenty years to sign the International Covenant on Economic, Social and Cultural Rights (ICESC) and the International Covenant on Civil and Political Rights (ICCPR) (both adopted by G.A. Res. 2200A [XXI]) in 1966, thereby legally binding the current 161 contract parties. The right to freedom of opinion and expression is enshrined in Article 19 ICCPR; this provision also encompasses “the freedom to seek, receive and impart information,” a controversial regulation that arguably gives the media unrestricted, “shameless” admission to the private sphere. As free communication should not compromise human coexistence in society, the right to freedom of expression is generally subject to certain (proportionate) legal restrictions with respect to the rights or the reputations of others and for the protection of national security, public order, public health, or morals (Article 19 para. 3). Furthermore, human rights protecting minorities can be of particular importance to ensure diversity of opinion within national democracies, such as the prohibition of discrimination on grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 26 ICCPR), or the right to freedom of thought, conscience and religion (Article 18 ICCPR). The right to take part in the conduct of public affairs, directly or through elected representatives, and the right to vote as well as the right to elections that “shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors” are also guaranteed by Article 25 ICCPR.

At the regional level, the European Convention on Human Rights (ECHR), adopted in Rome on 4 November 1950 (ETS No. 005), stands out as a particularly effective legal framework for human rights. The ECHR includes some basic structural provisions on democracy through the guarantee of specific human rights to the individuals within the jurisdiction of the Convention’s parties; the right to freedom of expression is included in Article 10 ECHR. Although not expressly mentioned in the provision, Article 10 ECHR is interpreted to encompass the right to freedom of the press, which includes the duty of the press to inform the public, leading to its “public watchdog” function and ensuring respect for certain democratic guarantees (Nobel and Weber, 2007: 43–45; *Sunday Times v. United Kingdom*, European Court of Human Rights, Ser. A, No. 30 [Judgment of April 26, 1979]). Article 10 para. 2 ECHR also stipulates certain duties and responsibilities in the context of the right to freedom of opinion and expression. Corresponding restrictions need to be prescribed by law and must be necessary in a *democratic* society.

Possible tensions between media and democracy are, however, not an independent regulatory topic.

The rights provided in the ICCPR and the ECHR are traditionally perceived as only giving rise to “vertical”, “negative duties” for the states, preventing them from interfering with the freedoms of the individuals. Rights that require the state to take positive actions are far more disputed. However, the strict distinction between negative and positive duties is critically assessed. Indeed, the right to democratic elections stemming from Article 25 ICCPR can hardly be framed as merely “negative”, as the state will have to fulfill its positive duty to set up a corresponding electoral system securing this fundamental right (Fredman, 2008: 2; Nowak, 2005: Art. 19 para. 19). Furthermore, the emerging comprehension of human rights as horizontally binding non-state actors is gradually emerging, raising questions such as whether media enterprises have specific human rights obligations (see, inter alia, Clapham, 2006).

In sum, a “right to democracy” does not exist and would not be justiciable; rather, human rights protect particular aspects of a human life that may include the protection of rights generally associated with democratic guarantees. Drawing on legally binding *rights* entails an element of empowerment for the human rights holders affected, granting them a voice and a means to enforce specific aspects of democratic rights in the broadest sense.

Tensions between individual rights and functional obligations

Individual rights cannot be regarded as absolute. In fact, they are generally restricted by state interventions that are applied to ensure the operation of the public communication system. For this purpose, the media may be entrusted with functional obligations. Depending on the media sector in question, such state interferences are designed differently.

In most Western democracies, governmental interventions in the print media sector can only be justified if imminent state and societal interests need to be preserved. As experience shows, society’s interests are not static; quite to the contrary, they shift over time. Due to the changing societal risks, different interests constantly need to be balanced. Overall, however, a legal and factual “guarantee” for a free print media sector is a constituting element of democratic structures.

Functional obligations of the media have been imposed particularly in the broadcasting market, as repeatedly emphasized and confirmed by the German Constitutional Court (see BVerfGE 73, 118; BVerfGE 74, 297; BVerfGE 83, 238). Since the potential influence of television programs on their audience is material, amounting to a type of “fourth state

power”, legislators tend to aim at protecting the civil society from undue effects by establishing a “public” enterprise (which may also be a private entity assuming a public function, such as the example of the Swiss SRG illustrates) with an assignment to fulfill a certain mandate ensuring the supply of the population. This mandate is considered to serve the interests of the civil society (“Leistungsauftrag” according to Art. 93 para. 2 of the Swiss Constitution), constituting an institutional approach to human rights. In return for these services, such broadcast enterprises receive the recipients’ charges as a secured source of income, while the private broadcasting enterprises have to look for financing sources in the advertising markets. Such institutional functions of the public broadcasting entity have been emphasized particularly by the German Constitutional Court, which established the model of a “dual” broadcasting system (“duale Rundfunkordnung”) (BVerfGE 73, 118; Weber, 2007a: 41–57). The implementation of governmentally stated yardsticks, for example to contribute to the education of the civil society, to acknowledge the cultural identity of the citizens, and to take into account different regions (populations) of a country, however, affect the television enterprises’ freedom to choose the program topics at their own discretion.

Further governmental interventions may aim at the guarantee of human rights for the whole society, since granting extensive freedoms in favor of individual entrepreneurs could endanger the freedoms of other members of society. State interferences are then justified by the intention to provide for a democratic order to secure a diversity of voices and opinions.

Media and the perspective of the fourth power

Tensions between autonomy and influence

Considered as a “fourth power” in democratic states, media are granted autonomy guarantees to ensure that media enterprises can produce programs that are not influenced by any governmental agencies or societal groups. While autonomy is undisputed for print media, it raises more questions in the field of broadcast:

Often linked to the acknowledgment of media’s autonomy is the requirement to comply with a large number of quality provisions: Most constitutions request that facts and information presented in television programs must be true and correct from a quality point of view and that the programs support the public’s opinion formation. Personal judgments and evaluations are to be made transparent in order to indicate that the respective statements are not to be considered as facts. The

requirement of true and fair information goes much further than, for example, requirements introduced by civil law in the context of the protection of personality. According to the legislator's perception, the potential influence of television programs on the civil society are so substantial that a rigid qualitative framework is justified. However, to a certain extent, the European Court on Human Rights has mitigated too far reaching qualitative requirements, holding that only mandatory interests of a state can justify proportionate interferences (Monnet c. Suisse, No. 73604/01, September 21, 2006).

Another constraint concerns the diversity of opinions and information emitted in television programs. This requirement attempts to address cultural diversity of content, in particular in countries with different languages, varied geographical areas, or diverse populations. As in the case of truthfulness and fairness of information, the diversity approach can be a desirable ideal, however, such provisions may result in binding restrictions for the media makers.

As these examples show, qualitative requirements generally conflict with the principles of independence and autonomy of broadcast enterprises. Experience from the past and from a number of less developed countries show that a governmental attempt to influence television programs can have detrimental effects. Legal provisions obliging broadcast enterprises to act in a specific way jeopardize their autonomy to a certain extent. Moreover, no substantial evidence is available documenting that content regulation clearly improves program quality.

Institutional approaches try to establish inputs for solving such tensions. Switzerland, for example, follows a decentralized, federal system in the organization of its public service broadcast provider in order to ensure the representation of its cultural diversity within its institutions. The national enterprise consists of four regional associations, designed to reflect the four linguistically different geographical Swiss areas (Weber, 2007b: 36). The German Constitution entrusts the "Länder" with the regulation of broadcast. Furthermore, public participation is enhanced within the public broadcasting enterprises by the pluralistic embodiment of their executive committees, which attempt to represent the German society. This framing of broadcasting enterprises' organizational structures is no coincidence; it is a direct consequence of Germany's experience in the 1930s. Independent public institutions and the pluralistic members of the executive committees are requested to particularly avoid (1) governmental and private influence beyond a democratically admitted degree (Palzer, 2007: 43, 48, 50–51) as well as (2) media concentration in order to protect the diversity and quality of broadcasting programs. However, if legislators try to avoid developments of media concentration by governmental oversight, broadcasting enterprises' autonomy is affected (Meier, 2007: 90–97).

*Tensions between individual rights and governmental monitoring
(compliance and surveillance)*

In most democratic countries, television enterprises are bound by a more or less strict compliance and surveillance regime: The government controls the television enterprises' compliance with the applicable regulations, not only in terms of programming, but also with regard to advertisements and sponsoring. Violations of such rules have legal consequences: For example, monetary fines may be incurred or, in severe cases, the broadcasting license may be revoked.

Governmental supervision is common in most democratic countries. This kind of supervision is justified in cases of so-called "public" television enterprises that are mandated to offer public service, but also have the advantage of being financed by license fees. Since the media recipients pay these charges, the governmental agencies ensure that the supported broadcasters use their financial resources in an appropriate and efficient manner.

Program surveillance is an accepted tool in democratic societies, the basic principles of human rights allowing individuals to express their opinions within the given framework of the protection of personality notwithstanding. Due to the fact that judges are not necessarily the best "evaluators" of programs, mediation agencies are often established to help reach a compromise between the television enterprise and the concerned persons. Such mediators do not however have the competence to render judicial decisions; the legislative objective must rather be seen in the hope that the legal dispute can be settled beforehand. Only if the mediation is unsuccessful can a claim be filed with a court. Overall, it is expected that the courts' monitoring function has a factual influence on the media makers' preparation of broadcasting programs, for legal procedures are expensive and impact reputation.

Conclusion

The media as technical means of information dispersion play an essential role for democracy. A core task of the media consists of enabling communication and contributing to the formation of the public opinion, a vital prerequisite for the functioning of democracy. Despite the importance of the issue, there is no unique legislative model addressing media and democracy as such. Furthermore, there is no general agreement on the applicable notion of democracy at the global level, since international agreements cannot impose a "correct" form of government on sovereign states. In order to overcome this stumbling block, an agreement should first be reached on the underlying favored principles.

At the international level, media and democracy are perceived through the lens of human rights, focusing on international oversight on the observance of the right to freedom of opinion and expression within the different states. Furthermore, the issues of global information and communication have been addressed by the umbrella term “information society,” following discussions at the two WSIS in Geneva and Tunis. Their outcomes have emphasized the human rights approaches and the principle of a free flow of information. However, in light of the “digital divide,” reaching global information in terms of a “world democracy” seems to be a very ambitious objective. Therefore, the relatively loose international framework, based on soft law and non-binding declarations, does not grant many stable rights to media makers and it cannot implement democratic structures for civil society in terms of a legal mandate. Possibilities for democratic participation and governance as well as democratic processes on the international stage need further elaboration followed by practical implementation.

The different national regulations provide for a more specific legal framework regarding particular aspects of the relationship between media and democracy. (1) In order to ensure a certain quality of the information necessary for the forming of opinion through broadcast, for example, legislation stipulates specific guidelines for the content of the broadcasting program. Such qualitative requirements must be duly balanced with the principles of independence and autonomy of the media as a fourth state power. (2) The organizational structure of media enterprises should not be underestimated when addressing the enhancement of democratic aspects. A decentralized system can be reflected in the organization of the public service broadcast providers in order to meet the requirements regarding cultural diversity issues. Moreover, undue influence of both governments and private actors should be avoided and an independent review system applied in favor of a democratic system. In conclusion, in order to harmonize the regulatory system applicable for all regulatory tiers, further core issues should be addressed at the international level, with the aim of enhancing a comprehensive legal framework for media and democracy.

Bionotes

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