

Private Regulation and Freedom of Expression

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Freedom of expression as a constitutional right is common to European countries. The scope of application of this right is defined through the jurisprudence of domestic and European courts (European Court of Human Rights and the Court of Justice of the European Union), an ongoing process that determines not only the boundaries of freedom of expression but also its implications for media regulation. This article builds on this jurisprudence, constitutional principles, and the qualitative data provided by the MEDIADDEM project to understand what freedom of expression entails from a regulatory perspective and whether international and national, notably constitutional, instruments establish criteria that govern how the regulatory space can, or should, be partitioned between public and private spheres of operation.

Keywords: media freedom, private regulation, constitutional rights, media self-regulation, co-regulation, European media law

Freedom of expression as a constitutional right is common to European countries. The scope of application of this right is delimited through the jurisprudence of domestic and European courts (European Court of Human Rights [ECtHR] and the Court of Justice of the European Union [CJEU]), an ongoing process that also clarifies the implications of freedom of expression for media regulation. Constitutional principles contribute to the definition of the media and the choice among different strategies for regulating the media, including the degree of complementarity between public and private regulation. As is evident from many national legal systems, the principle of freedom of expression can lead to the development of criteria that determine how the regulatory space is to be partitioned between, on the one hand, those areas that can or should be regulated by legislation and, on the other, those that should be left to self-regulation. In other words, by setting the permissible limits of legislative intervention, they “implicitly”

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point to, or underline, the role of self- and co-regulation as a means to exercise self-determination in line with freedom of expression. As a consequence, the principle of freedom of expression influences the scope to choose among different regulatory approaches, which can range from self-regulatory regimes based on multi-stakeholder participation to co-regulation, as in the case of the journalistic profession. However, the ability to choose among different regulatory strategies should not be considered purely from the perspective of regulatory bodies at the national level; rather, the choices taken should be framed within a broader coordinated regulatory framework, one that involves public and private actors at national and transnational levels and enhances the openness, transparency, and accountability of media-related interventions (Cafaggi, Casarosa, & Prosser, 2012).

The regulatory implications of freedom of expression are well known in relation to media pluralism (Barton, 2010; Feintuck & Varney, 2006; Katholieke Universiteit Leuven–ICRI, 2009). Much less awareness seems to exist as to the broader correlation between freedom of expression and regulatory strategies, in particular, the use of private regulation as a device to guarantee freedom of expression (Puddephatt, 2011). This article makes use of the qualitative data provided by the MEDIADEM project to explore how freedom of expression is defined in the states studied and whether the national constitutions of those states have established criteria that determine how the regulatory space should be partitioned. The initial section provides an overview of the approach to freedom of expression at the European level, considering both the European Union and the Council of Europe. The final comparative section describes how freedom of expression and its limitations are defined at the national level and the consequent implications for the allocation of regulatory power.

The Scope for Public and Private Regulation in Implementing Freedom of Expression

There is a correlation between fundamental rights and regulatory options, the former influencing the allocation of tasks between public and private regulation, realized through various forms of self- and co-regulation (Donnelly, 2009; Metzger, 2003, p. 1377). Even when giving due weight to the principle of institutional autonomy, the possibility of having guidelines for the use of private regulation in the media sector would contribute to the proper implementation of freedom of expression.¹ The regulatory strategies adopted in Europe are often motivated by considerations of effectiveness with the delegation to private bodies, based on their specialist knowledge and expertise (Cafaggi, 2006; Koops, Lips, Nouwt, Prins, & Schellekens, 2006, p. 109; Price & Verhulst, 2005, p. 21).² There are examples of delegation to private bodies in the field of media regulation, formal delegation via contracts or agreements, or informal delegation via soft law. A more significant guiding role played by constitutional principles such as freedom of expression can, however, be asserted, one that provides clearer and more detailed indications as to whether regulatory power can be exercised by private actors and which requirements they have to meet to be made constitutionally accountable. The different forms of private regulation—ranging from professional codes of conduct to the various agreements undertaken along the supply chains between

¹ Consider Recital 44 and Article 4.7 of the European Union (2010; Audiovisual Media Services Directive [AVMSD]).

² The link between private regulation and better regulation is explicitly mentioned in Recital 44 of the European Union (2010; AVMSD).

content producers and service providers or broadcasters—are manifestations of the principle of self-determination embedded in the tradition of freedom of expression.

The European Framework

The Principle of Freedom of Expression: Concept and Limits

The importance of freedom of expression as a constitutional right is clearly expressed by both Article 10 of the European Convention of Human Rights (ECHR) and Article 11 of the Charter of Fundamental Rights of the European Union (EU Charter).³ Although with different wording, these two provisions establish the main components of freedom of expression, namely, the freedom to seek, impart, and receive information (Casarosa, 2010; Council of Europe, 2011; Lange, 2009).

From the plain wording of Article 10 ECHR, a number of distinct elements can be derived (Johnson & Houm, 2008). First, Article 10(1) ECHR recognizes freedom to impart information or ideas for any natural or legal person, prohibiting any limitation by the state. Second, it also includes within its scope the freedom to hold opinions⁴ and receive information.⁵ Finally, the degree of protection does not differ depending on the mode of expression (i.e., written vs. spoken; Flauss, 2009). Moreover, Article 10(2) adds a limitation clause reflecting the fact that those exercising freedom of expression have certain “duties and responsibilities,” namely, to respect the rights of others and to ensure that they do not abuse their right through irresponsible and dangerous forms of communication.

Article 11 of the EU Charter establishes an additional aspect that is not expressly mentioned in the ECHR, namely, media pluralism. With the exception of the last sentence of Article 10 ECHR, the first paragraphs of the two provisions are very similar, whereas the second paragraph of Article 11 EU Charter additionally provides that “freedom and pluralism of the media shall be respected.” As appears from the *travaux préparatoires*, this formulation was added at a late stage, resulting in the clear acknowledgment that media pluralism—although not further defined—is a principle that stems from the constitutional traditions common to the EU member states, hence, the necessity to observe it as a general principle of EU law (Barzanti, 2012, p. 20). However, the wording reflects the predominantly negative stance of the European Union toward media pluralism rather than a proactive approach that seeks to guarantee it directly.

³ See also Article 19 Universal Declaration of Human Rights, Article 19 International Covenant on Civil and Political Rights, Article 13 American Convention on Human Rights, and Article 9 African Charter on Human and Peoples Rights.

⁴ This implies that the state must not try to indoctrinate its citizens or distinguish between those holding specific opinions and others. The freedom gives citizens the right to criticize government and form an opposition.

⁵ This includes the right to gather information and seek information from all available lawful sources. In other international charters, such as Article 19 Universal Declaration of Human Rights and Article 19 International Covenant on Civil and Political Rights, there is also an expressed reference to the freedom to seek information.

Interpretation of these broadly worded articles by the European courts has been necessary to determine how freedom of expression should be implemented in practice. In particular, the ECtHR has described freedom of expression as one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. Moreover, the court has stressed that

[Article 10] is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population.⁶

Hence, the nature of the information is considered irrelevant to the question of whether Article 10 is applicable in a given case (Van Hoof & van Dijk, 1998, p. 559).

Regarding the right of individuals to receive information, the term indicates that the collection of information from any source should in principle be free, unless legitimate restrictions under Paragraph 2 can be raised (Van Hoof & van Dijk, 1998, p. 562). In line with this interpretation, the ECtHR has ruled that the right to receive information "basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him."⁷

The wording of Article 10 does not explicitly mention the press, nor does it provide for any differentiation among different media as regards the way in which individuals can exercise their freedom of expression. The reference to broadcasting, television, and cinema enterprises in the last indent of Paragraph 1 refers only to the ability of the state to impose restrictions on freedom of expression through a licensing system. Press freedom is, however, to be guaranteed on the basis of one of the arguments that underpins freedom of expression, namely, the argument for democracy (Barendt, 2005; Meiklejohn, 1961; Voorhoof & Cannie, 2010).⁸ This requires that free and independent media can monitor politicians and citizens' representatives so as to provide the public with the information necessary for the opinion-forming process.⁹

The case law of the CJEU (with the European Court of Justice [ECJ] renamed the Court of Justice from 2009) follows the ECtHR approach, acknowledging freedom of expression to be one of the fundamental principles of a democratic society. The interpretation and implementation of Article 10 ECHR allow restrictions to be imposed on this fundamental freedom where the objective of the national legislation is to maintain pluralism and preserve the diversity of opinions (Casarosa, 2010; Scheuer, Bachmeier, Rock, & Schmeier, 2012, p. 30).¹⁰

⁶ ECtHR, *Handyside v. UK*, December 7, 1976, Appl. 5493/72.

⁷ ECtHR, *Leander v. Sweden*, March 27, 1987, Appl. 9248/81, para. 29.

⁸ The main arguments used to justify press freedom are the arguments for democracy, truth, self-fulfillment, and autonomy (see Wragg, 2009, p. 54).

⁹ ECtHR, *Observer and Guardian v. UK*, November 26, 1991, Appl. 13585/88, para. 59.

¹⁰ See ECJ, Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media*, [1991] ECR I-4007, paras. 22, 23; Case C-353/89, *Commission v. Netherlands (Mediawet II)*,

***Allocation of Regulatory Power among Public and Private Actors in the ECHR Framework:
The Scope for Private Regulation within the Boundaries of Article 10 ECHR***

As mentioned above, Article 10 ECHR allows restrictions on freedom of expression when they pass a three-step test. One of the three criteria requires that any limitation be “prescribed by law.” Here, one might question whether the term *law* (at the European or national level) can in principle be interpreted as covering also secondary law—therefore including co-regulatory or even self-regulatory provisions. On the one hand, it is apparent that private regulation can constitute a limitation on freedom of expression when, for instance, it prohibits the publication of specific types of content or requires content to be labeled so as to facilitate subsequent filtering (Hans Bredow Institute, 2006). On the other, the degree of state involvement determines whether private regulation becomes classifiable as co-regulation. When this is so, the state may also have direct responsibility to verify that the private regime complies with the principles enshrined in the ECHR.¹¹ Thus, where rule-making power has been delegated to private actors, the rules drafted and implemented by the latter can fall within the definition of *law* for the purpose of Article 10(2) ECHR.

The jurisprudence of the ECtHR also requires that for a rule to be classifiable as law, it must be “accessible to the person concerned, who must moreover be able to foresee [its] . . . consequences,”¹² which would cover rules of international, European Union, customary, and judge-made law.¹³ Where the delegation has been defined through a formal act of the public authority, the responsibility of the state is immediately clear (Cafaggi & Casarosa, 2012; Cafaggi et al., 2012)¹⁴; nonetheless, in a specific case,¹⁵ the ECtHR addressed the question of whether professional rules have to be justified under Article 10(2) ECHR. Here, the ECtHR acknowledged that where rules of professional conduct are defined by an independent rule-making body that has powers delegated by parliament, with the additional requirement that such rules must be approved by the state, the rules will be considered law in the sense of the Convention¹⁶ (Hans Bredow Institute, 2006, p. 151).

[1991] ECR I-4069, paras. 29, 30; Case C-148/91, *Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media*, [1993] ECR I-487, paras. 9–10; ECJ, Case C-23/93, *TV10 SA v. Commissariaat voor de Media*, [1994] ECR I-4795, paras. 18, 25.

¹¹ So far, the application of the Convention principles to nonstate actors (so-called *Drittwirkung*) has not been accepted for Article 10 ECHR, although some hints in this direction can be acknowledged (see Hans Bredow Institute, 2006, p. 150).

¹² ECtHR, *Sunday Times v. UK*, April 26, 1979, Appl. 6538/74, A 30, para. 49. See also ECtHR, *Markt Intern Verlag v. Federal Republic of Germany*, November 20, 1989, Appl. 10572/83, A 165, para. 30.

¹³ ECtHR, *Groppera Radio AG v. Switzerland*, March 28, 1990, Appl. 10890/84, A 173, para. 68.

¹⁴ This is clear in the cases of Denmark and Italy, regarding delegation of regulatory power to, respectively, a press council and journalists’ association (see Casarosa & Brogi, 2012; Helles, Søndergaard, & Toft, 2012).

¹⁵ ECtHR, *Barthold v. Federal Republic of Germany*, March 25, 1985, Appl. 8734/79, A 90.

¹⁶ ECtHR, *Barthold v. Federal Republic of Germany*, March 25, 1985, Appl. 8734/79, A 90, para. 46.

It should also be emphasized that any private regulatory intervention should provide for effective remedies pursuant to Article 13 ECHR. As affirmed in the *Peck v. UK* case, the self-regulatory body should be able to award compensation or alternative remedies to limit the effects of the breach (e.g., prohibition of publication).¹⁷ This decision implicitly acknowledged that private regulatory regimes are compatible with the ECHR where, through recourse to courts, remedies are ultimately available in case of breaches of human rights (Prosser, 2008, p. 105).

The ECHR and the Role of Private Regulation in the Journalism Field

Private regulation has played a particularly important role in relation to journalism. The ability of journalists to regulate themselves has always been considered a consequence of the constitutional protection of press freedom (Zencovich, 2008). The connection between freedom of expression and journalistic activity has been clearly acknowledged also by the ECtHR, clarifying, on the one hand, that states are subject to a negative obligation not to impede the press in pursuit of its "public watchdog role": "The national authorities' margin of appreciation is thus circumscribed by the interest of democratic society in enabling the press to play its vital role of 'public watchdog.'"¹⁸ On the other, the court has emphasized that the exercise of freedom of expression by journalists is not an absolute right, without any limit or responsibilities. Instead, it is linked with duties and responsibilities that flow from the privileged position that journalists enjoy, among them the ethics of journalism, derived from the private regulatory regimes set up at the national level.¹⁹

One of the relevant criteria used by the ECtHR to strike a balance between freedom of the press and conflicting rights or interests invoked by defendant states is whether the journalist has acted according to his or her professional ethics. In many cases, the court has referred to the fact that the journalist acted in conformity with professional ethics to support press freedom and to characterize interference by the authorities as a violation of Article 10 ECHR.²⁰ However, the same test allows the court to conclude that a disregard for journalistic ethics legitimates interference with journalistic activity.²¹

Of relevance here is the decision in *Stoll v. Switzerland*,²² where particular weight was given to the decision of the Swiss Press Council regarding the conduct of the claimant journalist (Fathaigh & Vorhoof, 2015). The ECtHR initially affirmed the need for an objective independent analysis of the publication in question, which included material from a confidential diplomatic report, without drawing directly on the assessment of the Press Council (or equivalent body) but it nevertheless went on to address two aspects that relate to the "techniques of reporting," considering both the manner in which the

¹⁷ ECtHR, *Peck v. UK*, January 28, 2003, Appl. 44647/98.

¹⁸ ECtHR, *Radio France and Others v. France*, March 30, 2004, Appl. 53984/00, para. 33. See also ECtHR, *Bladet Tromsø and Stensaas v. Norway*, May 20, 1999, Appl. 21980/93.

¹⁹ See ECtHR, *Cumpana and Mazare v. Romania*, December 17, 2004, Appl. 33348/96, para. 104.

²⁰ See ECtHR, *De Haes and Gijssels v. Belgium*, February 24, 1997, Appl. 19983/92, para. 39.

²¹ See ECtHR, *Prager and Oberschlick v. Austria*, April 26, 1995, Appl. 15974/90, para. 37.

²² ECtHR, *Stoll v. Switzerland*, December 10, 2007, Appl. 69698/01.

journalist obtained the information used to write the article and the form of the published article.²³ As a result, the court considered restrictions on media freedom to comprise not only content restrictions but also requirements relating to the way in which an article is written or researched. In regard to the latter, the ECtHR endorsed the findings of the Swiss Press Council that the report's truncated and misleading nature undermined its public value, which also weakened its claim to protection under Article 10 ECHR.²⁴ One can anticipate that this current trend on the part of the ECtHR to extend review to the self-regulatory rules developed by the profession will influence the way in which national self- and co-regulatory bodies concerned with journalistic ethics develop their conduct and content rules in the future.

The Allocation of Regulatory Power among Public and Private Actors under EU Law

Regarding EU law, the allocation of regulatory power to private actors needs to pass a double test. On the one hand, Article 288(3) of the Treaty on the Functioning of the European Union [TFEU] enables member states to select the form and method of implementation of EU law when this is enacted through directives. On the other, Article 51(1) of the Charter of Fundamental Rights of the European Union [EU Charter] provides that not only EU institutions but also member states, when implementing EU law, should comply with the principles enshrined in the EU Charter (High Level Group on Media Freedom and Pluralism, 2013, p. 17).

Compliance with treaty provisions requires that the objectives defined by directives should be correctly implemented in national law, but this does not require either *verbatim* incorporation of the text into national legislation²⁵ or the adoption of legislation,²⁶ providing some leeway for the delegation of regulatory power to private actors. Moreover, the importance of cultural and social aspects that characterize media regulation at the national level means that the principle of subsidiarity has a considerable role to play, leaving the determination of content regulation largely to member states (Prosser, 2008, p. 105). The case law of the CJEU has clarified that for the full implementation of EU law there must be a sufficiently clear and precise transposition, the measure must function effectively, and must have a binding nature so as to ensure compliance with the rules enacted.

²³ ECtHR, *Stoll v. Switzerland*, December 10, 2007, Appl. 69698/01, paras. 141–152.

²⁴ ECtHR, *Stoll v. Switzerland*, December 10, 2007, Appl. 69698/01, paras. 151–152.

²⁵ For case law on this point, see *Commission of the European Communities v. Germany*, [1995] ECR I-02303, para. 18; ECJ, C-96/95, *Commission of the European Communities v. Germany*, [1997] ECR I-1653, paras. 35, 40; ECJ C-217/97, *Commission of the European Communities v. Germany*, [1999] ECR I-05087, para. 31; ECJ, C-392/99, *Commission of the European Communities v. Portugal*, [2003] ECR I-03373, para. 80; ECJ C-233/00, *Commission of the European Communities v. France*, [2003] ECR I-6625, para. 76; ECJ C- 296/01, *Commission of the European Communities v. France*, [2003] ECR I-13909, para. 55; ECJ C-58/02, *Commission of the European Communities v. Spain*, [2004] ECR I-621, para. 26. For further analysis, see Hans Bredow Institute (2006, pp. 151–173).

²⁶ See, for example, ECJ C-233/00, para.76; C-296/01, para. 2, at Footnote 25. Where the directive provides for a specific form and method of implementation, the choice of the national authorities is then limited.

A clear example in which private regulation has been supported as a means to implement a directive is provided by the Audiovisual Media Services Directive, Article 4(7) of which encourages member states to adopt "co-regulation and/or self-regulatory regimes at national level in the fields coordinated by the use of this directive to the extent permitted by their legal systems."²⁷ This should be read in conjunction with Article 4(6) that emphasizes the adoption of "appropriate means" to secure compliance with the directive, both through monitoring activity by national communication authorities and through an effective enforcement system.²⁸ However, the provisions in the directive do not go so far as to require that the private regulatory regimes adopted at the national level comply with specific criteria relating, for example, to openness, participation, and representativeness,²⁹ transparency, monitoring, reporting, and an effective enforcement system.³⁰

Nonetheless, the above framework should also be compliant with EU Charter provisions and thus with Article 11. Although the case law so far has only referred to Article 10 ECHR, the articles of the EU Charter have already been used to strike down secondary legislation, in particular, a council regulation that failed to respect the rights of individuals to privacy.³¹ Where Article 11 EU Charter is used to verify compliance by national implementation with EU law, this could also involve cases in which regulation has been delegated to private actors (Marsden, 2012, p. 281).

National Constitutions

Freedom of Expression: Concept and Limits

The principle of freedom of expression is the first and main reference point at the national level when considering the regulatory strategies available in the media sector. Although framed differently in each country, freedom of expression is legally protected in all the countries analyzed in the MEDIADEM

²⁷ See also Recital 44 of the European Union (2010; AVMSD).

²⁸ Even before the AVMSD was enacted, the UK communications authority Ofcom had adopted an internal regulation defining the criteria that should guide the adoption and implementation of self- or coregulatory regimes, including accessibility to the public, near universal participation by the industry, independence from interested parties, the presence of an auditing system, and the possibility of review by Ofcom as well as an appeals mechanism (Ofcom, 2004).

²⁹ The Court of First Instance [CFI] of the EU (post 2009 renamed the "General Court") has established that coregulation is only legitimate where the "representativeness" of relevant stakeholders is well realized; see Case T135/96, *UEAPME v. Council* [1998] ECR II-2335.

³⁰ See the public consultation proposed in the framework of the Communication on Corporate Social Responsibility 2010 that identified key elements that should be included in any self- or coregulatory initiative.

³¹ Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR, Hartmut Eifert v. Land Hessen* [2010] ECR I-11063. Note that compliance with the EU Charter has been questioned also as regards the participation of the European Union in international agreements (see http://europa.eu/rapid/press-release_IP-12-354_en.htm)

project.³² In the United Kingdom, which does not have a codified written constitution, Article 10 ECHR is given effect in domestic law through the Human Rights Act 1998; in all other cases, the national constitutions include this freedom as part of the general principles associated with citizens' rights. Freedom of expression, which protects the ability of individuals to have and express opinions, directly and indirectly, is closely related to the role of the media in disseminating information and providing the citizen with a range of views and opinions. The German Constitution, for example, guarantees the freedom to express and disseminate opinions through speech, writing, and images (Article 5 BGB). The wording seems to limit the scope of application to "opinions," that is, a declaration of fact that includes a value judgment,³³ but the Federal Constitutional Court has extended it to statements of fact to the extent that they can "contribute to the formation of an opinion."³⁴ Moreover, the Constitutional Court in a different case affirmed that free and independent media are intrinsic to a democratic society, composing not only traditional forms of press and broadcasting but also electronic and converged media.³⁵ In Italy, the Constitutional Court has interpreted the principle of freedom of expression and the right to be informed as two sides of the same coin, both of which seek to enhance a pluralistic environment.³⁶

Freedom of expression is thus closely connected with press freedom, and this is emphasized in those constitutional clauses that prohibit the seizure (either across the board or in specific cases) of publications.³⁷ This is illustrated by Article 77 of the Danish Constitution, which prohibits any preventive measure that could require prior approval before publication of anyone's thoughts or opinions, thus leaving to the courts the task of sanctioning, after the event, any unlawful publication. However, up to the mid-1970s, this strong principle was watered down by the so-called distinction between "formal" (constitutionally protected) and "substantive" (based on primary legislation) freedom of speech (Scheuer et al., 2012, p. 199), which allowed the legislator to address the substantive freedom of expression deciding on any subsequent sanctions, for instance, in case of libel, slander, and privacy cases, without considering the constitutional protection in the analysis.

In only a few of the countries analyzed do the national constitutions clearly distinguish between the freedom of expression and press freedom, introducing additional clauses or separate articles on this point. An example is provided by the Belgian Constitution, which includes a general declaration of freedom of expression in Article 19 and a specific provision on freedom of the press in Article 25. Similarly, the Bulgarian, Turkish, and Slovakian Constitutions develop the relationship between the two in several

³² Belgium: Article 25; Bulgaria: Article 39 ff; Denmark: § 77; Estonia: § 41; Finland: § 12; Germany: Article 5 I, 2, 3, II GG; Greece: Article 14, 15; Italy: Article 21 S. 2–8; Romania: Article 30; Slovakia: Article 26 1.1; Spain: Article 20 I lit d, II–V.

³³ Federal Constitutional Court, Decision October 10, 1995, 93 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 266.

³⁴ Federal Constitutional Court, Decision April 19, 1994, 90 BVerfGE 241.

³⁵ Federal Constitutional Court, Decision August 5, 1966, 1 BvR 586/62, NJW 1966, p. 1604.

³⁶ Starting from decision 105/1972, then through decisions 826/1988, 348/1994, and 466/2002.

³⁷ For instance, Article 10(5) of the Italian Constitution.

articles.³⁸ In a few other cases, additional legislation supports the constitutional principle by addressing freedom of the press or freedom of the media (e.g., Croatia and Finland) or further reference is made to media freedom in the context of media legislation (e.g., Estonia).

This is also reflected in the case law of domestic courts. Like the ECtHR, national supreme courts consider cases involving the press or controversial expressions of opinion in terms of their contribution to public debate.³⁹ In practice, national courts often refer to the Strasbourg Court's jurisprudence to support their reasoning.⁴⁰

The Allocation of Regulatory Power among Public and Private Actors

A common feature of the principle of freedom of expression as provided for by national constitutions is the limit it imposes on state intervention in the press sector, leaving market actors (industry and professionals) to regulate themselves through different forms of private regulation (Tambini, Leonardi, & Marsden, 2008; Scheuer et al., 2012, p. 295). Table 1 shows the current allocation of regulatory power to public or private actors as enshrined in the national constitutions considered in the MEDIADDEM study.

Table 1. The Influence of Constitutional Principles, Notably Freedom of Expression, Enshrined in National Constitutions on the Adoption of Public or Private Regulation.

Country	Principle
Belgium	Private regulation possible for the press. Public regulation required for broadcasting.
Bulgaria	Public regulation for restrictions relating to public decency; incitement of a forcible change to the constitutional order; the perpetration of a crime; incitement of violence against anyone.
Croatia	There appears to be nothing in the constitution that creates a distinction between different forms of media.
Denmark	There appears to be nothing in the constitution that creates a distinction between different forms of media. Public regulation required for restrictions in the field of libel and hate speech.

³⁸ The Bulgarian Constitutional Court interprets the three articles that address, respectively, freedom of expression, freedom of the press and other mass information media, and the freedom to seek, obtain, and disseminate information (Articles 39, 40, and 41) altogether, affirming that freedom of expression is the basis of the other two freedoms and incorporates them. See Decision 7 from 1996 of the Bulgarian Constitutional Court.

³⁹ The Danish Supreme Court, in a case regarding a subeditor accused of defamation as a result of articles in his newspaper relating to assaults on children, questioned whether the defendant could be held guilty of defamation, given that the national rules were to be interpreted in the light of Article 10 of the Convention (Decision April 15, 2004, *Ugeskrift for Retsvaesen*, 1773).

⁴⁰ See also in Italy, Constitutional Court Decision No. 172/1972.

Estonia	Public regulation required for restrictions regarding public order and morals; rights and liberties, health, honor, and the reputation of others; state and local government officials; the protection of state or business secrets or confidential communications; the protection of family life and privacy of other persons; and the interests of justice.
Finland	Public regulation for the implementation of the principle of freedom of expression in practice.
Germany	Public regulation required for restrictions regarding the protection of young persons; the right to personal honor; and protection of privacy. Public regulation required for broadcasting and "telemedia" (commercial and public service broadcasting).
Greece	Public regulation required for broadcasting. Public regulation required for restrictions regarding causing offence to religion and insulting the President of the Republic; to protect public order and decency.
Italy	Public regulation required for restrictions relating to public morality.
Romania	Public regulation required for broadcasting. Public regulation required for restrictions designed to protect an individual's dignity, honor, privacy of person, and right to their own image; or relating to defamation of the country and the nation; any instigation to war, or to national, racial, class, or religious hatred; any incitement to discrimination, territorial separatism, or public violence; any obscene conduct contrary to morality.
Slovakia	Public regulation required for broadcasting. Public regulation required for restrictions designed to protect the rights and freedoms of others; state security, law, and order; and health and morality.
Spain	Public regulation required for public service media in the light of pluralism. Public regulation required for restrictions to protect the right to honor, privacy, personal reputation, and youth and childhood.
Turkey	Public regulation required for the implementation of freedom of expression principle. Public regulation required for restrictions designed to protect national security, public order; public safety and the basic characteristics of the Republic and to safeguard the indivisible integrity of the state with its territory and nation; to prevent crime, punish offenders; withhold information duly classified as a state secret; to protect the reputation, rights, and private and family life of others; and to ensure the proper functioning of the judiciary.
United Kingdom	No formal written constitution, but widespread acceptance of the principle that the printed press should be free from sector-specific state regulation. ^a Acceptance of sector-specific public regulation in the field of radio and television broadcasting. Acceptance of co-regulation for on-demand audiovisual media services.
^a Now qualified by the introduction by the Crime and Courts Act 2013 of statutory incentives for the press to engage in a co-regulatory regime.	

As Table 1 shows, constitutional clauses at the national level rarely explicitly allocate regulatory power to private actors; however, the fact that constitutional provisions commonly lay down that freedom of expression can be subject to restrictions that are “prescribed by law” can in principle allow the application of co-regulation and self-regulation in areas such as the press and new media.

Several national case study reports note that there is suspicion of government or state regulation in the press sector,⁴¹ and that a preference for private regulation is justified by freedom of expression (see also Barendt, 2005, p. 38).⁴² Here, the clearest example is provided by Bulgaria, where the Constitutional Court, interpreting Articles 39, 40, and 41 of the Bulgarian Constitution, stressed the need to establish an institutional, financial, and technical separation between the press and the state, indicating that no regulation or intervention by public actors could be considered admissible in this sector. The Bulgarian Constitutional Court, adopting a market approach, went on to allocate to market mechanisms, namely, competition among market actors, the task of achieving a plurality of views (Smilova, Smilov, & Ganey, 2011). Additional examples can be given, in particular, the case of Belgium, where the greater efficiency of private regulation has been proposed to overcome the different allocation of competences between the communities and the state as regards press and audiovisual media (Van Besien, 2011).

Press Freedom and Journalism Ethics

One of the main sectors in which private regulation has been established is that of professional journalism, falling as it does within the field of press regulation (Tambini et al., 2008, p. 64). However, at least as regards “traditional” media, the role of professional private regulation varies rather significantly. Whereas in the field of the printed press, the role of professional self-regulation has been predominant, in broadcasting, co-regulatory models have emerged⁴³ given the higher level of content regulation and the presence of public service broadcasting.

In exercising their freedom of expression, journalists have to comply with ethical principles concerning respect for their sources, accuracy in collecting information, and respect for the fundamental rights of individuals and legal entities. These ethical principles have been operationalized through private regulatory systems taking the form of either self- or co-regulation, depending on the medium and the legal system involved.⁴⁴

⁴¹ In Germany, the Federal Ministry of Internal Affairs proposed in 1950 a National Press Law that would have introduced a self-monitoring body in the form of a public corporation, which triggered the establishment by journalists/publishers of the, still existing, Press Council. See Scheuer et al. (2012).

⁴² See, in particular, Decisions No. 11/1968 and No. 71/1991 of the Italian Constitutional Court on the role and competence of the journalists’ association.

⁴³ In the United Kingdom, this has occurred primarily in relation to the regulation of broadcast advertising. See also the failed experience of coregulation in Greece, where the national broadcast media (public and private) were required to establish ethics committees that were never in fact developed (Psychogiopoulou, Anagnostou, & Kandyla, 2011).

⁴⁴ The link between editorial responsibility and respect for fundamental rights is clearly articulated in the

Despite this general European trend, the differences among states remain remarkable. In some countries, integrated models that cover all media regulate journalistic activity. Even in relation to the press, co-regulatory models have emerged because of legislative intervention or, more recently, to amendments to existing legislation (Belgium and Denmark), which have expanded the scope of regulation to electronic media. In other countries, regulation remains fragmented with separate regulation of the press, broadcast, and electronic media, whereas in the United Kingdom, certain online newspapers are regulated by the press regulator. On the other hand, in some countries, the use of private regulation in the press sector has been questioned, in particular, because of the horizontal application of self-regulatory rules to nonmembers, as in Italy, where membership of the journalists' association is obligatory.⁴⁵

Media Freedom and Communication Authorities

The differential regulation of the print and audiovisual media also has historical roots. The drafting of the constitutional principles in several countries dates back to a period when the only available mass medium capable of informing the public was the printed press. The formulation of the principle of freedom of the press thus had this medium in mind. In countries where there has been no subsequent constitutional reform allowing texts to be updated in the light of technological developments, constitutional guarantees of press freedom and freedom of expression have been extended through the jurisprudence of constitutional courts, initially to broadcasting and then, eventually, to online media.⁴⁶ Technological developments have, however, been taken into account in those countries where there have been recent constitutional revisions, as in Greece.⁴⁷

Regarding broadcasting, freedom of expression does not require sector-specific regulation to be carried out by private actors and, as noted previously, Article 10(1) ECHR allows states to regulate through licensing broadcasting activity and to impose restrictions on the basis of the aims identified in Article 10(2).⁴⁸ In practice, this sector tends to be subject to public or co-regulatory regimes. Several reasons have been put forward for the different approach in this sector. First, the limited number of usable frequencies in the electromagnetic spectrum has been understood as legitimating government control over the assignment and use of the airwaves in the public interest. Second, broadcasters are considered to have a more "captive" audience than the print media, so that government intervention is necessary to

recommendations by the Council of Europe (2011).

⁴⁵ To grant *erga omnes* application for private regulation, regardless of membership of the Italian journalist association, the code of practice concerning the processing of personal data in the exercise of journalistic activity was drafted by the journalists' association in collaboration with the data protection authority and has acquired the status of ordinary law (Legislative Decree No. 196, June 30, 2003). See also Court of Cassation, Decision No. 16145/2008.

⁴⁶ One exception to this general trend is Belgium where there have been conflicting interpretations by the constitutional and civil courts as to the extent to which constitutional principles apply to new technologies (Van Besien, 2011).

⁴⁷ The latest constitutional reform addressing freedom of expression dates back to 2001 (Psychogiopoulou, Agnastou, & Kandyla, 2011).

⁴⁸ See also *R. (Gaunt) v. Ofcom* (Liberty intervening) [2010] EWHC 1756 (Admin); [2010] WLR (D) 180.

ensure programming in the public interest. Finally, the airwaves do not have the traditional physical boundaries characteristic of other, more tangible, means of communication. Because broadcast messages are more pervasive, their potential social influence is great and, as a result, the government can regulate broadcasting and limit, to some extent, freedom of expression (Salomon, 2008, p. 12).

Thus, in Bulgaria, the above-mentioned decision of the Constitutional Court⁴⁹ affirmed that a regulatory role for the state in relation to the electronic media is required for "juridical, financial, technical or technological reasons,"⁵⁰ the relevant technological reason being the responsibility of the state for the radio frequency spectrum (Article 18(3) of the constitution). In the court's view, because the freedom of the electronic media is crucial to guarantee public access to information, regulation of the structure and financing of the electronic media by an independent state body are not only admissible but actually required (Smilova et al., 2011). Another example in which a paternalistic approach toward broadcasting was adopted is the Greek case, where Article 15 of the constitution emphasizes that

Radio and television shall be under the direct control of the State. The control and imposition of administrative sanctions are under the exclusive competence of the National Radio and Television Council, which is an independent authority, as specified by law.

Here, the Greek Constitution frames freedom of expression so as to allocate regulatory power to public actors. Moreover, it not only expresses a preference for public regulation, but even identifies explicitly the type of regulatory body that is to be in charge of enforcement.⁵¹ A similar allocation of regulatory power to independent regulatory authorities, although shared with the state, is also evident in the case of Spain. Article 20(3) of the Spanish Constitution affirms that

The law shall regulate the organization and parliamentary control of the means of mass communication under the control of the State or any public agency and shall guarantee access to such means to significant social and political groups, respecting the pluralism of society and the various languages of Spain.

Here, the allocation of regulatory power to the state is also supported by the fact that freedom of expression falls into the category of "fundamental rights and public freedoms": Article 81 of the Spanish Constitution provides that the type of legal instrument that can be used for the implementation of such rights and freedoms is the so-called *organic law*⁵² (De la Sierra & Mantini, 2011).⁵³

⁴⁹ Bulgarian Constitutional Court Decision n. 1996: Interpretation of Articles 39, 40, and 41 of the Constitution, State Gazette No. 55/1996.

⁵⁰ In the Bulgarian legislation, electronic media encompass mainly broadcasting with the recent addition of audiovisual media services, as defined by the AVMSD.

⁵¹ Note the reference in the Bulgarian Constitutional Court decision (see Footnote 50) to the independent regulatory authority.

⁵² An organic law, although not hierarchically higher than ordinary laws, must be passed by an absolute majority of the Congress of Deputies (not merely a majority of those voting).

Within this framework, the most relevant role is played by independent regulatory authorities. However, the independence of such authorities in the exercise of their regulatory powers vis-à-vis state bodies varies. The allocation of regulatory power in a few countries, such as Greece, has been unevenly balanced in favor of political bodies to keep key decisions within government; in others, although the powers are delegated to the independent regulatory authorities, the independent regulatory authorities are subject to a degree of politicization, as is the case in Bulgaria, Romania, Slovakia, and Turkey. This suggests that independence in both theory and practice has been more difficult to achieve in countries with a recent tradition of authoritarian government, where the cultural conditions for such independence have not taken root. In other countries, such as Belgium, Denmark, Finland, Germany, and the United Kingdom, the national reports point to greater independence of the regulatory authorities. Even in these countries, however, relations with government and with other institutions can be complex. There is, for example, a wide variety of appointment procedures and different rules relating to security of tenure for members of such authorities.

Concluding Remarks

This analysis has considered the scope that domestic constitutions afford private regulation, with specific reference to the principle of freedom of expression. Several issues emerge from this analysis that specifically concern the development of media policy and, more broadly, regulation as a whole. One such issue relates to the impact of ongoing technological convergence, which calls for a more integrated approach to media policy (Council of Europe, 2011). An integrated notion of the media requires both new and conventional media to be considered part of the same regulatory field, integrating linear and nonlinear communication systems (Scheuer et al., 2012). In terms of regulatory approach, this does not necessarily mean uniform regulation across the various media. On the contrary, room for territorial and functional regulatory differentiation remains and should be rationalized taking into account the development of the linear/nonlinear divide.

An integrated notion of the media, reflected in a coordinated framework for regulation, should then trigger consolidation, or at least coordination, of regulatory functions among public regulators (High Level Group on Media Freedom and Pluralism, 2013). As regards regulatory powers, pan-European coordination of regulatory approaches, use of soft law, and the exchange of best practices seem key to a more integrated single market. Possible ways to achieve this goal include a strengthening of the role and powers of the European Platform for Regulatory Authorities, which could play a pivotal role in coordinating horizontally with the Contact Committee established under the AVMS Directive. The regulatory capacity of both public and private regulators should also be strengthened, given the emerging complexity of the value chains that support media production and distribution at EU and global levels. Emerging global connections in a world of integrated media call for appropriate regulatory responses that promote and

⁵³ Yet, the court argued that direct regulation of the freedoms should only be understood as that which aims to establish a comprehensive global, essential, and exhaustive regulation, comprising all the possible constitutional and technical modalities for a specific communication's medium. Thus, the regulation of a specific technical means of dissemination for a broadcast medium (e.g., private television) would not be constitutionally required to follow the organic law procedure. See Decision 127/1994, May 5, 1994.

monitor the use of private regulation.

Significant effort should therefore be devoted to the development of criteria and methodologies designed to assess the legitimacy and effectiveness of private regulation in the media sector. Private regulation is essential in this field, but could also lead to very undesirable consequences given a lack of adequate governance, accountability, transparency, and also government monitoring (Cafaggi et al., 2012; Leveson, 2012). The European Commission should aim to develop concrete guidance for EU and national policymakers concerning when, and how, to assess the alignment of private regulatory schemes with public policy goals and fundamental rights.

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