

Market-Driven Challenges to Freedom of Expression and the Interaction Between the State, the Market, and the Media¹

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Abstract

The controlling function of the media is essential for freedom of expression in a democratic society. One of the pre-conditions of this controlling function is independence in relation not only to the state but also in relation to commercial interests. It is the latter relationship that is the focus of this article.

Recent changes in the media landscape have put pressure on the independence of the media. Commercial interests seem to gain more influence on media content. The distinction between journalism and advertising has become less clear and it is not always maintained despite both legislation and self-regulation that dictate such a division.

The aim of this article is to analyse the consequences of the changes in the media landscape and the challenges posed to the infrastructure for freedom of expression in Sweden, including legislation and self-regulation. The analysis is made with the help of the analytical distinction between market-driven and democracy-driven freedom of expression.

Keywords: freedom of expression, democracy-driven freedom of expression, market-driven freedom of expression, independent journalism, controlling function of journalism, Swedish infrastructure for freedom of expression, advertising

Introduction

Freedom of expression is constantly under pressure, as an individual right and common good. The democratic role of the mass media, for the common good in the public sphere, is connected to the long historical protection of the press in the constitutional framework, and in the infrastructure² for freedom of expression.

State initiatives to restrict freedom of expression are well known and widely discussed, for example when it comes to censorship and state-controlled television. There are also threats from groups and individuals who want to limit the concept of freedom of expression, especially when it comes to religion (e.g. the threats against Salman Rushdie for writing *The Satanic Verses*, the controversy over cartoons of Mohammed, and the 2015 attack on the satirical magazine *Charlie Hebdo*).

Apart from these challenges, there is one not as widely discussed as the others: the pressures on freedom of expression from the market. Newspapers are under pressure from decreasing revenues due to technological developments and changing media business models. New forms of collaborations emerge between editorial and commercial

interests, resulting in advertising dressed as journalism, such as native advertising. Concerns have also been raised on the risks of media industry ownership concentration for freedom of expression, especially when it comes to the problem of one-sided views and agendas (McChesney, 1999; McChesney & Pickard, 2011; Rønning, 2013: 19). At the same time, increased demands to strengthen the legal protection for commercial messages are made. The traditional emphasis on protecting primarily political speech is extended to also encompass commercial speech (Piety, 2012; Heide-Jørgensen, 2013). These market-driven challenges have implications for the infrastructure for freedom of expression.

News media has been described as the third or fourth estate³ due to its controlling function. Traditionally the controlling function has primarily been aimed at the state and at political power. However, the abuse of power can also come from other power centres, such as market economy institutions (Rønning, 2013). One of the pre-conditions for the media to perform this function is independence, from the state and from the market (McManus, 2009). In the current situation, it is essential to reflect on how the scrutinising and controlling function of journalism can remain independent in relation to commercial interests and can safeguard freedom of expression in the name of democracy. As the legal scholar C. Edwin Baker states: “democracy is impossible without a free press” (Baker, 2002: 125).

In most jurisdictions, the controlling function of journalism in the service of the citizens is considered to be part of the general statement of freedom of expression as a restriction on the state’s ability to interfere with individual rights. In some jurisdictions, such as in Sweden, the democratic function of the media is established through a specific regulatory model, originally developed for the press but, in modern times, also adapted for other kinds of media. The model, with its constitutional and statutory provisions complementing media self-regulation and state subsidies for media pluralism, is unique. It has several features often highlighted in the conceptual framing of media governance. According to the legal scholar, Thomas Bull, the emphasis on the free press is a particularly strong and entrenched part of the Swedish constitution and is a bulwark against the misuse of power (Bull, 2014: 18). The Swedish model can be seen as based on a democracy-driven view of freedom of expression and therefore will be used as an example here.

The conceptual distinction between *market-driven and democracy-driven freedom of expression* captures a tension between two ideal types of rationalities. The rationality of democracy-driven freedom of expression is committed to safeguarding free and independent information and expressions as a prerequisite for democracy. The rationality of market-driven freedom of expression is committed to safeguarding all information and expressions regardless of their interests and purposes.⁴ The process in which commercial interests have claimed and gained more recognition and protection⁵, and also have acquired more influence on news media due to changes in media business models, is a global phenomenon.⁶ The aim of this article is to use these concepts to analyse the consequences of the changes in the media landscape and to discuss the challenges that are posed to the national regulatory systems, including the legislation and the self-regulation that make up the infrastructure for freedom of expression in Sweden.

Changes in the Media Landscape

Challenges to Financing Journalism

Advertising has for a long time been a major income source for the press and the commercial broadcast media. Changes in the media landscape have contributed to a huge economic shift for the media industry. Content providers are losing advertising revenues to distributors and to platform providers. With the expansion of digital communication, traditional news companies are losing money due to changes in audience and changes in market patterns. The Nordic press has long been accustomed to high subscription-rates for newspapers, but younger generations are less willing to pay for a newspaper and the subscription-rate is declining. The household cost for a newspaper is now a minor cost compared with all other media expenses.⁷ There are also shifts in revenues from local/national media companies to intermediaries such as the telecom-industry and global actors such as Google and Facebook. The advertisers have turned their investments away from the daily press. The local mass media has become less attractive for advertisers when global actors are better at individually tailored advertising (Sundin, 2013; Ohlsson, 2015a). The market share for the Swedish daily press has declined from 82 per cent in 1989 to 45 per cent in 2013 (Ohlsson & Truedsson, 2015: 9-10). Google and Facebook alone are estimated to have between a third and a half of digital investments in the Swedish media market (Herlin, 2015: 4).

The current situation leads to a lack of financing of the type of journalism that would be expected to fulfil the controlling function of the media. It's mainly a problem for printed press in Sweden; television commercials are still creating big revenues for national commercial broadcasters, but their programming focus is more on entertainment than on journalism (Asp, 2013: 13-14). The audience seems to be more interested in entertainment than in traditional quality journalism, and the media has focused increasingly on providing entertainment (Sundin, 2013: 11-12).

The new global actors do not have the same explicit democratic mission and responsibility in terms of common good and controlling function. In addition, people in general are experiencing what has been called advertising fatigue.⁸ With more commercials on television and more ads on the Internet, people seek different ways to avoid commercials, which in turn leads to a tension between advertisers and traditional media.

Public service broadcasting has traditionally been more independent of revenues from the market and usually has a wider mission within the democratic society. When public service was the only broadcast provider in the Nordic countries, few questioned this type of television and radio. With the advent of modern technology, more commercial broadcasters have emerged and traditional print media houses now publish on many different platforms, including television. These companies see public service broadcasting as unfair competition, and they have raised demands for limitations to be put on the public service's special finance model.⁹ These demands are to a certain degree accommodated by the EU, and public service broadcasters are obliged to report new permanent program services. The Swedish government demands that public service broadcasters submit new services for approval to the Swedish Broadcasting Commission (Media Development, 2011: 93).¹⁰ In Norway, conservative politicians even demand paywalls for public service in order to meet the claims from commercial actors (*Aftenposten*, 2015). In Denmark, the public services have found new ways of financing content and, since 2008, there has been a Public Service Fund mainly aimed at drama production but also aimed at docu-

mentaries, regional programmes, and children's programmes (New Public Service Fund For Danish TV 2007). This has opened up opportunities for private media companies to produce public service content.

Challenges to Pluralism

The changes in the media landscape challenge pluralism, in terms of media providers and media content, a condition necessary for freedom of speech and an informed society.¹¹ There is a trend towards concentrating media ownership with fewer companies owning more press titles while others are closed down. On the market side, large national media companies are able to work within the local digital market, and this threatens the small local media outlets (Herlin, 2015). Another trend is that some news content is syndicated; thus different titles might have the same or similar content diminishing the diversity of voices and opinions. The syndication of news also leads to smaller newsrooms and fewer journalists. During recent years, there have been substantial lay-offs in many media companies. As a result, the ability of news media to function as a watchdog becomes weaker.

Despite these trends, recent technological developments might also facilitate media pluralism.¹² Due to digitalisation it has never been easier for someone to publish his or her opinion. Citizens are often seen as "prosumers"¹³ of media content, and there are now seemingly endless ways for citizens to share information. From the citizen's perspective, the digital platform serves as an open-access arena for discussions where anyone can publish their own stories and news. Every citizen has the potential to become a journalist, part of what is commonly known as "citizen journalism". Traditional separations between private and public communication and between mass and individual communication are dissolving (Löblich & Pfaff-Rüdiger, 2013). This can be seen as a democratisation of freedom of expression. In earlier days one needed substantial capital to publish one's work; today it is only a click away. The content itself might be more diverse as more voices share and discuss the material.

Investigative journalism presupposes professional journalists and editors. The decline of advertising revenues and loss of subscribers have impacted on the size of the newsrooms, and many journalists have been laid off or face the prospect of temporary positions.¹⁴ This means that fewer qualified journalists can scrutinise the power-wielding groups in society and can inform the citizens.¹⁵ The increasing opportunity for every citizen to become a "journalist" contributes to pluralism, but it cannot compensate for a lack of professional journalists. Resource-demanding investigative journalism and the ability to hold people accountable can hardly be expected of individuals without resources to scrutinise the power structures in society.

Challenges to the Division Between Editorial and Commercial Content

As media houses have been looking for new business models, there have been a number of attempts to finance content that blurs the line between commercial messages and journalism. Product placement, sponsorships, and advertorials are just some examples of how media content is paid for and monitored by commercial interests. However, while these models provide better financing of media content, they come with the risk of losing the trust of the audience. This development can be seen both in the national media

and in the global arena where new companies such as *Buzzfeed* get their revenues from ‘native advertising’, a form of paid content that looks like journalism. Even traditional daily newspapers such as *The Guardian* and *The New York Times* use sponsored content in the hope of creating new revenues (Lu, 2014; Ponsford, 2014).¹⁶

The changes are all examples of a process that affects regulatory systems, including legislation and self-regulation, in both a global and a national context. We can see an international trend towards more protection of commercial messages under the notion of freedom of expression. The US has gone the farthest in this process, and some countries in Europe are on their way. According to the legal scholar, Heide-Jørgensen, it is possible to sense the beginning of a phase in which commercial messages have the same protection as other forms of expression (Heide-Jørgensen, 2013: 538). This process can be seen as a natural consequence of the modern market economy, according to which the “right to make commercial communications, including advertising, is fundamental to the conduct of business and to competition, and it is also important for consumers.” (Heide-Jørgensen, 2013: 19)

Before we turn to the discussion on which demands might be legitimate to meet in terms of legislation and self-regulation of freedom of expression, we will introduce the Swedish system for freedom of expression because of its extensive legal infrastructure.

An Infrastructure for Freedom of Expression – The Swedish Example

Contextualising Sweden

Freedom of expression can be expressed as a relationship between the state and the citizen, and it is reflected in legal norms such as in the American Constitution, which states, “Congress shall make no law (...) abridging the freedom of speech (...)”¹⁷, and in the European Convention, which states, “Everyone has the right to freedom of expression (...) without interference by public authority (...)”.¹⁸ A non-interfering state seems to be a precondition for citizens’ freedom to express themselves.

The relationship is, however, much more complex than this, and it includes other parties such as the media. In addition, securing freedom of expression in reality actually requires some interference from the state. Journalism has for a long time been emphasised as an important actor in upholding the relationship between the state and the citizens as reflected in, for example, the Swedish Press Act¹⁹ and in the US Free Press Clause²⁰. Several scholars and philosophers at the beginning of the 19th century pointed out the role of a free press as “a controlling power, indispensably necessary to the maintenance of good government”.²¹

The governance of media (Llorens & Costache, 2013) is, in most jurisdictions, a combination of formal and informal mechanisms of legislation (constitutional and/or statutory), regulation, and self-regulation. In Sweden journalism is protected by extensive legislation as well as self-regulation.

The Swedish System to Guarantee Free Media

To promote the controlling function of journalism, two positions are possible. The media’s independence can be perceived as a matter of *independence from* the state or as a matter of independence *safeguarded by* the state, e.g. a non-intervening state or an

active state, respectively. In Sweden, freedom of expression is not only safeguarded as a right for the individual in relation to a non-intervening state, but there is also a complex system of regulation of the tripartite relationship between the state, the citizens, and the media in order to guarantee freedom of expression as a common good, i.e. in the name of democracy. In terms of the international distinction between negative and positive approaches to free speech as a legal right, the Swedish model would be one example of a positive approach to rights. The Swedish system welcomes and even requires state intervention to uphold free speech, which is in contrast to a negative approach that sees state non-intervention as a prerequisite for free speech (Kenyon, 2014).

Hallin and Mancini characterise the Swedish media system as a democratic corporatist model. This model, according to which the state is considered to have the responsibility for ensuring a free media (Syvertsen et. al., 2014), is prevalent not only in Sweden but in Northern Continental Europe. For example, article 100 in the Norwegian Constitution includes the clear obligation of the State authorities to facilitate an open and enlightened public dialogue. In Sweden, the responsibility of the state is to ensure that freedom of expression and freedom of the press are formally and in reality guaranteed by legislation (Gustafsson, 1980: 104-105). Moreover, in the service of democracy and its citizens, the state has a responsibility to create and maintain an information and press system that will guarantee a free media and accommodate many and diverse voices. In such a system, there are substantial state subsidies for the press and support for public service broadcasting. In Sweden, there is also a comprehensive constitutional system that guarantees the media the freedom to fulfil its controlling function. The media is not only considered as private enterprise, as in countries characterised by the liberal model²², but also as a social institution for which the state has a responsibility (Hallin & Mancini, 2004: 191). According to Färdigh, the quality of government is higher in systems with a high level of media independence (Färdigh, 2013).

The Swedish emphasis on the media's democratic role and its independence was already a distinctive characteristic of the Swedish form of government in the late 18th and the beginning of the 19th centuries. From an international perspective, the Swedish system is unique due to its historically strong constitutional protection of the press. Freedom of the press (at that time the only media type) was considered to be one of the most important cornerstones for democracy in its function as a reviewer and controller of the government. Freedom of the press was considered to be part of the constitutional separation of state powers, and as such the press formed a legally codified control mechanism that was built into the system of separation of power and the balance of power (Eek, 1942: 261-261). An expression of this separation of power – and according to which one of the ideal functions of news media is to be the people's watchdog over political power's interests – is the conceptual characteristic of the press as the third estate. The third estate is consequently considered to be an essential part of freedom of expression as a common good and as a prerequisite for democracy.

These provisions ensure the right of individuals to express themselves through published works, but they also, and this is especially true for the Swedish Act, establish the press as a third power and as an independent estate controlling the parliament (and the government) in the service of the citizens. Independence of the press is guaranteed by an extensive legislative framework, complemented by a self-regulatory system of codes of conduct. Together with different kinds of provisions for media such as television,

radio, and printed media, we can talk about an infrastructure for freedom of expression. We characterise the system as democracy-driven due to the emphasis on the media's controlling function as described in the constitution and realised through statutory laws. The system of media governance in Sweden is, as in many other jurisdictions, a mixture of formal and informal regulation with an extensive system of components. The components are there to safeguard independence from the state and commercial interests and to provide for control of the state (and other power subjects) and to provide for pluralism in both providers and content.

Freedom of expression in Sweden is regulated in three constitutional acts. The Instrument of Government²³ from 1974, contains the general provision on the rights of the individual, comparable to Art. 10 of the European Convention on Human Rights. This right can be restricted for important social interests, including the security of the country, the national supply of goods, public order and public safety, the good reputation of the individual, the sanctity of private life, and the prevention and prosecution of crime.²⁴ These restrictions are all codified in specific laws.

Freedom of expression and the role of the press, radio, and television²⁵ are safeguarded in two other constitutional acts that emphasise both the media's special controlling function in the democratic process and the relation between the state and the citizens. The press is protected by a constitution going back to 1766. The Freedom of Press Act²⁶ was originally the only constitutional provision on freedom of expression, but since 1992, other media, such as television and radio, have had equivalent protection under The Fundamental Law on Freedom of Expression²⁷.

The protection of speech disseminated by the media (the press, television, radio, and some other media) is stronger than the protection for pure and simple speech made by individuals (Bull, 2009: 87). In the two constitutional acts protecting speech in the media, the protection is regulated in more detail and there is less room for restrictions. A special procedure must be followed, and for restrictions on freedom of expression to be adopted, decisions must be made in two consecutive parliaments with an election in between.

The constitutional system for protection of a free media (especially the press, radio, and television) and the increased protection for journalists and editors consist of several elements. First, there is the identification of the areas of speech that are considered worthy of protection. Second, there is the right to publish and enter into a special system of responsibility and protection from interference as regulated in the two constitutional acts concerning the media. Moreover, the right to access to information held by public authorities is an essential principle for the media that makes it possible to control the authorities and ensures the substantiality of freedom of information.

There are additional protective elements for the editorial content of the press, radio, and television. The rule of exclusivity means that if there is a conflict between the constitution and any other legislative act, the constitution has precedence. The protection for sources and informants makes it easier for the press to receive information on controversial subjects. There is also a special system for criminal responsibility, a prohibition on prior restraint, a special judicial procedure for cases under the Act, special rules on evidence and intent, and very strict statutes of limitation. All of these parts "interact so as to form a system that makes it very difficult indeed to take legal measures against any publication that falls under the protection of the Act." (Bull, 2009: 83)

Supporting Plurality in Sweden

To guarantee plurality, both when it comes to providers and content, there are substantial state subsidies for the press in all the Nordic countries in order to safeguard diversity of opinions as a democratic value in society. In the 1960s, the plurality of the daily press in Sweden was considered to be of such important democratic value that it became a governmental issue. The existence of at least two newspapers on the same local media market was seen as so important that the Social Democratic government together with the Centre (Agrarian) Party launched the idea of compensating the smaller 'second' newspaper for its loss of advertisement revenues due to low numbers of subscribers. In 1971, the selective press subsidy was introduced and financed by taxes on advertisements, and in 1976 the system that is still in existence today was introduced (Gustafsson & Ryden, 2010: 267-268).

The government-appointed Press Subsidies Council²⁸, which seeks to preserve diversity in the newspaper market, distributes the state's subsidy to the daily press according to the Statute of Annual Press Subsidies.²⁹ There are two forms of subsidies for the daily press, an operational subsidy and a distribution subsidy. In 2013, around 87 daily newspapers received operational subsidies totalling 460 million SEK, and 134 daily newspapers shared approximately 58 million SEK in distribution subsidies (Press Subsidies Council, 2014). The Swedish press subsidies were 2.6 per cent of the total revenues of the newspaper companies according to the 2014 annual reports of the Swedish newspapers companies (459 million SEK) (Ohlsson, 2015b: 46).

The subsidy system has tried to adapt to the digital era by also giving subsidies to newspapers that are only distributed digitally, and so far two such newspapers have qualified. Recently, an overview of the system was made with the conclusion that the system should be continued.³⁰ However, concerns were raised from certain members of the review board about whether the subsidies could be seen as supporting the press as such, instead of the purpose, i.e. of having a citizen and consumer perspective and allowing for people to take part in independent journalism (SOU, 2013: 66, p 451-4) The debate continues within an ongoing public committee (SOU, 2015: 26; SOU, 2015: 94).

Public service broadcasting has a special obligation to offer a broad range of programmes that are accessible to all, that reflect the diversity of the entire country, and that are characterised by good quality, versatility, and relevance. The obligations are defined in legislation and in agreements with the Government.³¹ Public service broadcasting is mainly financed by licence fees³², and the level of the fees is decided by parliament.³³

There is also public support for film production and certain periodicals through the Swedish Film Institute and the Swedish Arts Council.

Political and 'Commercial Speech' – Levels of Protection

The legitimacy and credibility of the press rely on its ability to separate editorial and commercial content. The two types of content, internationally labelled as 'political speech' and 'commercial speech', and in the Swedish jurisdiction as 'speech' and 'commercial messages', have different levels of protection in different jurisdictions. Although scholars such as Meiklejohn argue that free speech principles centred on political speech in the 1960s have been influential (Wragg, 2009), the US constitution has, since the 1970s, given commercial messages the same protection as political speech. In contrast,

the Swedish constitution gives non-commercial speech stronger protection, and it is much easier to restrict commercial messages in statutory law. The reason for this is that commercial messages are seen as less important than non-commercial messages. Also in Norway, ‘political speech’ is mentioned as especially important in the constitution.³⁴

The conceptual background for giving commercial speech protection under the First Amendment of the US Constitution is said to be the interpretation of the metaphor of “the marketplace of ideas”. The metaphor originally derived from John Stuart Mill’s rationale for freedom of expression that found its way into American jurisprudence through Justice Holmes’ dissent in *Abrams vs. United States* in 1919.³⁵ The free trade in ideas, or the marketplace of ideas, a metaphor for how to best promote the seeking of truth, has been interpreted literally as protecting commercial expressions. Holmes and the interpretation of his dissent could be said to correspond to the market-driven freedom of expression used in this article. And, this concept goes together with the concept of laissez-faire and a non-intervening state. The doctrine has been challenged using arguments for democracy-driven freedom of expression. The critique is directed towards the dominant interpretation of the First Amendment as including commercial expressions in what it is considered protected speech (Piety, 2012) and to its relation to laissez-faire and state non-intervention (Fiss, 1986-87; Brettschneider, 2012). A more general critique on giving commercial speech stronger protection comes, for instance, from Eric Barendt, who states that the argument for free speech coverage of commercial speech is weak, in relation to all three functions of freedom of expression, to discover truth, to serve self-development or autonomy, and to promote democratic forms or self-government. Commercial messages aims to persuade the target audience to buy particular products (Barendt, 2010; Petäjä, 2006; Kenyon, 2010).

The conceptual background for giving non-commercial speech stronger protection in the Swedish constitutional acts is the importance of securing democratic debate. While the emphasis traditionally has been on democracy, the argument for protection of commercial communication has been raised in recent years based on the argument that the modern market economy presupposes the protection of commercial communication (Heide-Jørgensen, 2013: 19).

In an international context, three phases of the process of strengthening legal protection for commercial interests have been identified (Heide-Jørgensen, 2013: 538). In the first, commercial messages³⁶ are not included under the scope of freedom of expression. In this stage, commercial messages are not considered to have the same purpose as the protected forms of expression and are consequently not considered as protection-worthy under the constitution. In the second phase, commercial messages are protected but to a lesser degree than other non-commercial expression. Finally, in the third phase, commercial messages are protected to the same degree as other forms of speech and are talked about as commercial *speeches*. The US has recognised commercial messages as protected speech since the 1970s, while most European countries are in the second phase. However, the role of the state in promoting certain values and at the same time protecting freedom of expression is highlighted not only in a Nordic but also in an American context (see Brettschneider, 2012).

The Swedish system allows for limits to be placed on commercial communication, and these limits have been manifested in two ways. Firstly, they have been directly applied through constitutional acts concerning media when it comes to advertising for

certain specific commodities such as tobacco, alcohol, and medicines. Secondly, the ability to limit commercial communication that is provided for in the constitution has been used in the Marketing Act, where the provisions mainly have to do with the time, space, and manner aspects. Self-regulatory codes of conduct, like for instance the International Chamber of Commerce (ICC) code for advertising & marketing³⁷, complement the formal provisions concerning commercial communication.

Self-regulation as Part of the Infrastructure

Both the state and the media industry regard self-regulation, such as ethical codes, as a main strategy for controlling and safeguarding freedom of expression. There are two self-regulatory bodies regulating Swedish media, the Swedish Press Council/Press Ombudsman and the Advertising Ombudsman (RO). Both were created and are financed by the media industry and media organisations. Both self-regulatory bodies exist to create credibility and to make it possible for the individual citizen to file a complaint. (The Swedish Broadcasting Commission monitors complaints about radio and television content.)

The importance of having separate editorial and commercial content is a shared interest for editors and advertisers, but new forms of media content have challenged these interests. The International Chamber of Commerce (ICC) – a global business organisation – has provided guidance on marketing and advertising in the publication entitled *Advertising and Marketing Communication Practice*.³⁸ The purpose of this document is to serve as an instrument of self-regulation to achieve responsibility and good practice in advertising and marketing communication and to minimise the need for detailed governmental and/or inter-governmental legislation. Another purpose, according to the ICC, is to safeguard the freedom of speech of those engaged in marketing communication. Marketing communications should, according to ICC Articles 9 on identification, be clearly distinguishable as such, and, when an advertisement appears in a medium containing news or editorial matter, be so presented that it is readily recognisable as such. And, according to Article 10, the identity of the marketer should be apparent. The adherence of these guidelines is monitored in Sweden by the RO.

The Press Council does not deal with blended content or the lack of commercial identification in editorial content. From the 1960s until 2005, there was a committee for text-like advertising where the Swedish Media Publishers' Association (Tidningsutgivarna) and the Consumer Agency had an agreement on how to mark content that was commercial. However, since 2005 this has been a matter for the editor-in-chief of the publication to decide, guided by the ethical codes for the press that state, "Make sure that there is no mixing of editorial content and commercial messages."³⁹ As the content is becoming more blurred, it seems that there is an imbalance or lack of self-regulatory measures in order to help readers know what type of media content they are dealing with. Between 2010 and 2015, Sweden's largest tabloid *Aftonbladet*, has received 17 complaints from the RO for lacking identifiers for advertisements (Wisterberg, 2015). Editorial and advertising collaborations have also led to complaints among journalists and caused journalists to leave the field (Edström, 2015; Wallgren, 2015).

Concluding Remarks – Analysis

In this article it has been emphasised that numerous changes in the media landscape are challenging freedom of expression as a common good. The controlling function of journalism is under pressure when the interaction between the state, the market, the media and the citizens, is changing. The challenges call for reflection on whether the system for freedom of expression can withstand and protect democracy. With the conceptual distinction between market-driven and democracy-driven freedom of expression, these challenges in a Swedish context can be perceived in the following ways.

Sweden can be understood as an example built on a democracy-driven rationality of freedom of expression. The role of journalism to perform the democratic controlling function as a common good is protected by an extensive constitutional system as well as through self-regulation. One core aspect of the democracy-driven rationality is to distinguish between editorial and commercial content and to give preference to editorial content in legislation. According to this rationality, journalism is more than a commodity, whereas according to a market-driven rationality it does not have this special status.

The market-driven rationality, committed to safeguarding all information and expression regardless of their interests and purposes, becomes evident in Sweden as the changing relationship between editors and the market, and the distinction between journalism and advertising seems to be more difficult to uphold. Decreased revenues from advertisements and citizens' decreasing willingness to pay for journalism as subscribers has led to even greater dependence on revenues from advertisements than before. In addition, advertisers are turning to other platforms than traditional media as the interest from the citizens (as presumable consumers) for traditional media has decreased. This negative spiral has been difficult to stop, and the old media business model, where the financial base came from subscribers and advertisers, is in crisis. At the same time, public service broadcasting and state subsidies for the press have been criticised. This development has made journalism more vulnerable, and the question of how the independence of journalism can be ensured into the future needs to be addressed. Investigative journalism is expensive, while 'click journalism' is often cheap, and the challenge is to maintain the role of journalism in safeguarding democracy when it is seen more as a cost than as a resource. As the media becomes more synonymous with entertainment, there is the increasing problem of securing the audience's trust. If one of the functions of journalism is to safeguard democracy, then the media must be trustworthy.

Challenges also exist when it comes to pluralism in terms of providers and content, and there are two diverging trends in this regard. On the one hand, digitalisation has made it possible for all individuals to express themselves, while on the other hand there has been increasing concentration when it comes to ownership, providers, and content. The first trend can, of course, be positive for democracy, but in order to safeguard everyone's access and use, certain measures are required. The infrastructure, such as broadband access for everyone, should be guaranteed, and efforts should be made to close the digital divide in the population. In a democracy-driven model for freedom of expression, this could well be a state obligation. The second trend, media concentration, is more clearly negative because it counters the aim of media policies to promote media plurality as essential for democracy.

Arguments based on a democracy-driven rationality are: the media and journalists as watchdogs have an important function that can be supplemented, but not replaced, by

individuals' increasing opportunities for publishing and disseminating their thoughts and opinions. The principled argument of freedom of expression in the name of the citizens is not enough. There is a relation between democracy and democratic communication, the media as an independent actor in this communication, the controlled actors (state and market actors), and the citizens. The controlling function of journalism must be guaranteed through a sustainable system of media governance guaranteeing journalism that is free from state and commercial intervention. Statutory provisions are not sufficient on their own, but they certainly have an essential role as the foundation of such a system. Self-regulatory codes of ethics are also crucial.

Market-driven rationality seems to be gaining ground. But, giving commercial communication increasing space and protection from state intervention might in fact have a constraining effect on non-commercial communication, the core element of freedom of speech. Commercial communication is mainly a means to sell ideas or products. Non-commercial communication is mainly a value in itself and has an explicit democratic function in terms of the common good. Also, when the lines between non-commercial and commercial content are blurred, it is no longer always possible to distinguish between journalism and advertising. The trust of both editors and advertisers is at risk.

If the controlling function of journalism and the scrutinising ability is hampered, the media risk losing legitimacy and credibility and, in a long-term perspective, this might erode democracy. In this situation the crucial issue is how to safeguard *free* democratic communication.

Notes

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2. Infrastructure for freedom of expression is used here as a concept that includes regulatory models (both legislation and self-regulation) and economic, technical, and social conditions for citizens and the Third Estate. For an elaboration of the concept infrastructure for freedom of expression, see (Kenyon, Svensson & Edström, forthcoming 2016).
3. This expression signifies the specific function given to the press as an estate to control power in the name of the rights of the citizens (Eek, 1942). In British, French, and American contexts, this function of the press is often called the fourth estate, going back to the 1820s. The first three estates were defined by Edmund Burke as the three estates in the British Parliament: the clergy, the nobility, and the commoners. The term “fourth estate” emerged later and refers to the independent press as a power structure outside the established power structure. In the Swedish context, the same role of the press is called the third estate, where the first estate is the government and the second is the parliament.
4. The conceptual distinction was introduced within the project *Market driven freedom of speech – Swedish media between democracy and market* (see note 1) and is defined in (Svensson & Edström, 2014:482). The concepts are developed in Edström & Svensson, 2016. A similar concept is market-driven journalism, (McManus 1994).
5. Cf. (Karppinen & Moe 2014: 328). Our concept embraces both the concrete and abstract conception of “market logic”.
6. The media is increasingly seen as a valuable commodity for the market than as a service to the citizenry. This can be seen in international trade agreements, for example, the Transatlantic Trade and Investment Partnership (TTIP) agreement between the US and the EU. Initially culture and media were included in the negotiations, but thanks to France they were finally excluded as an exception from what is considered to be commercial products, “the cultural exception”. (The Project for Democratic Union 2013; European Commission 2014).
7. The annual household expenses for media in Sweden were 17,000 SEK per year in 2014. Most of that money was spent on broadband services and other Internet-related expenses, and the daily newspaper

- was only a minor expense for the households. (IRM/MMS *Hushållens medietgifter* 2014).
8. Since 1992 there has been a steady decline in people with positive attitudes toward television commercials. In 1992, six out of ten Swedish residents accepted the commercials on television, and only one in eight were very negative. Twenty years later, one in three were very negative. (Börjesson & Edström, 2014).
 9. Five private publishing and broadcasting companies and organisations started a Public Service Broadcasting Commission in October 2015 to pursue that argument.
 10. See also Communication from the Commission on the application of state aid rules to public service broadcasting 2009/C 257/01
 11. Pointed out already in *SOU 1975:49* p. 103.
 12. According to media scholar Miklós Haraszti, this possible increase in plurality needs to be safeguarded. “Freedom of expression is only possible under a media market that is not marred by monopoly.” Therefore, according to Haraszti it is crucial to ensure ownership control as well as keeping plurality as a main goal for regulators, (Council of Europe 2011: 7-8).
 13. Alvin Toffler introduced the notion of the prosumer in the early 1980s. It means the “progressive blurring of the line that separates producers from consumers”. (Toffler, 1980: 267. In Fuchs, 2012).
 14. Only 47 per cent of the journalists in digital media have a fixed position (European Federation of Journalists 2015).
 15. Seven hundred journalists were laid off in Sweden in 2014 (Byström 2014).
 16. Lu mentions the promotion of the television show *Orange Is the New Black* in New York Times. An example mentioned by Ponsford from The Guardian is the collaboration with Unilever that started in 2014.
 17. The First Amendment to the United States Constitution, 1791.
 18. European Convention on Human Rights, article 10.
 19. Swedish Press Act (TF), 1766.
 20. The First Amendment to the United States Constitution, 1791.
 21. Eek 1942:339. Eek is referring here to Jeremy Bentham, Benjamin de Constant, and Oeuvres Mirabeau.
 22. Hallin and Mancini contrast the democratic-corporatist model with the liberal model (Britain, Ireland, North America) and the polarised pluralist model (Mediterranean countries).
 23. Regeringsformen, RF.
 24. The Instrument of Government, Chapter 2 Article 23.
 25. The technological situation today makes the distinction between press and other media such as broadcast outdated, and most media is now present on several platforms. This issue has been discussed in *SOU 2010:68*, but no decisions on changes have been taken. However, the protections afforded by the two constitutional acts are substantially the same.
 26. Tryckfrihetsförordningen, TF.
 27. Yttrandefrihetsförordningen, YGL.
 28. Presstödsnämnden
 29. Presstödsförordning 1990:524
 30. The Swedish government has asked the European Commission for a prolonging of the Swedish press subsidies until 2019. Betänkande 2014/15:KU12 *Statens stöd till dagspressen*.
 31. Also some commercial broadcasters have public service responsibilities, e.g. TV2 Denmark and TV4 Sweden.
 32. Advertising are also financing public service in varying degree, e.g. TV2 Denmark, and in the shape of sponsoring in sports and in collaboration with European Broadcasting Union (EBU) in e.g. SVT.
 33. As mentioned earlier, print media owners criticise public service broadcasting as unfair competition.
 34. Article 100 in The Norwegian Constitution: “Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever.”
 35. The connection between Mill’s and Holmes’ ideas is elaborated upon in (Ten Cate 2010).
 36. A commercial message/speech can be defined as (in a Swedish context) “a message which concerns purely commercial circumstances”, (Bernitz, 1997) or (in an English context) as “a speech of profit-oriented entities” (Baker, 2007: 222). Using *message* or *speech* signals in which phase of the three the concept is placed.
 37. The International Chamber of Commerce (ICC) code for advertising & marketing, 2011.
 38. The International Chamber of Commerce (ICC) code for advertising & marketing, 2011.
 39. The full quotation in Swedish: “Låt inga misstankar uppstå hos allmänheten att utomstående otillbörligt kan påverka innehållet i, eller utöva inflytande över, det som publiceras. Se till att ingen sammanblandning kan ske av redaktionellt material och reklambudskap”, (Riktlinjer för textreklam, *Spelregler för press, radio och tv*, 2010).

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