
Conclusions

ANDRÁS KOLTAY

This volume reviews the press regulation and jurisprudence of a number of countries with fundamentally different legal, political and economic systems. A meaningful comparative analysis at the level that a volume of this kind can reach is not really possible. We have not sought to do more than to place the countries side by side, by presenting similar issues, and to leave any comparison to the reader. Even so, some general conclusions still can be drawn.

This is certainly a more difficult task than in the case of Volume 1, where European legal systems were presented, which are somewhat similar, and which are harmonised by the law of the European Union in all the Member States and by the case-law of the European Court of Human Rights. The conclusion of that volume was that a common European concept of freedom of the press actually exists, that the foundations of the national legislations are the same or very similar, even if there are significant differences in detail (and that Russia can be considered a special case, not only because of its non-EU status but also because of its undoubted democratic problems).

This volume does not focus exclusively on fully democratic states either, but even in countries where there are problems with the political system, the issue of press freedom – and at least its formal protection – is present in public life and in the legal rules. The book also presents democracies that are relatively young (South Africa, Chile) and where, as a consequence, press freedom protection is not yet fully developed. The book also presents well-established democracies where press freedom protection is outstanding, but where it is also not a completely closed issue, and legislators and courts have to deal with it constantly, under pressure from social, market and technological changes. Press freedom is equally important everywhere, and is the cornerstone of the democratic system, or of the aspirations towards it.

It is by no means certain, and this volume can serve as a lesson in this respect, that the extent to which press freedom is protected depends exclusively or primarily on the existence of constitutional and other legal guarantees. What is certain is that the texts of legislation can sometimes obscure the reality of the situation. In Australia, for example, there is no constitutional provision on freedom of the

press, but no one would think that the Australian press is not free as a consequence (which is not to say that there may not be problems there waiting for a solution). The First Amendment to the United States' (US) Constitution explicitly refers to press freedom, but the US Supreme Court has consistently refused to recognise special constitutional protection for the press, yet the press is obviously also entitled to a high level of protection for free speech, and at the level of the US states this protection may be even stronger than the Supreme Court's practice would lead us to believe.

However, nowhere does legislation and judicial decisions paint the full picture. Laws have to be interpreted and inevitably only a small number of contentious cases reach the courts. Freedom of the press requires a healthy political culture, a demanding public and the necessary economic background that allows it to operate. Press laws exist in only a small number of the countries surveyed, which is both good and bad news for the press: laws can both broaden the protection of press freedom and limit it. Press self-regulation, on the other hand, exists in many of the countries presented (examples are Chile, South Africa, New Zealand, Israel and South Korea) and faces similar challenges in all of them. Although self-regulation can replace or complement legal (statutory) regulation, the question is how effective and independent it can be.

The regulation of other media beyond the press (traditional broadcasting and its digital versions) is also addressed in several chapters. It can be seen that the regulation of these services is much more detailed everywhere, for historical and technological reasons, and stems from the belief that the media of moving images and sound have a greater impact on their audience and are therefore more dangerous than the press. (In the age of the internet, this argument is losing its persuasive force, but this volume does not address these issues, focusing on the press.)

Freedom of the press can be seen as a separate right from freedom of expression, with its distinct content. Those who exercise freedom of the press (primarily journalists and editors, and indirectly the owners of publishing houses) may exercise more rights and be subject to stricter regulation than the right to freedom of expression generally grants to anyone. All the democratic states covered in this volume grant some form of privilege to the press. These prerogatives vary from one country to another, of course, but the approach is common: the press has a key role to play in a democratic society and must therefore be guaranteed the ability to play that role. This is why the widely known protection of sources, or the protection against searches and seizures, privileged access to the courtroom, protection against surveillance and, above all, protection of the press publishing content of public interest against the general rules on defamation and privacy are justified.

Recognition of the democratic role of the press could even lead to a requirement of social responsibility. This social responsibility is widely invoked in some countries, but is not actually required by law. The press is free to choose the issues it wishes to cover and even to avoid public issues altogether. If it chooses to cover public issues, it can do so mostly within the limits of freedom of expression.

But fairness, accuracy, impartiality, objectiveness and journalistic ethics are not required by law. Some of these may be imposed by the courts or self-regulation in some cases, in the absence of legal provisions. At most, the law may provide for the possibility of a reply (when untrue factual statements are published concerning the claimant), as in Chile and South Korea (and almost all of Europe except the United Kingdom). This is all very well and fosters the hope that a strictly protected press, with these protection and privileges, will indeed contribute to the proper functioning of democracy.

The regulation of press freedom can no longer be discussed without taking into account the regulatory issues of the internet and, more specifically, of online platforms (in particular social media and video-sharing portals). Some chapters in this volume also cover these issues, although they do not focus on them. While the operation of these platforms has a fundamental influence on the press, the approach to their regulation is fundamentally different from that of the press. This book covers the current regulation of the press, but some chapters also look at the regulation of online platforms. This is a key issue also for future regulation of the press. The European Union has detailed legislation on this subject,¹ but it does not address all the issues involved. Comprehensive attempts at regulation are completely lacking elsewhere.

The internet expanded the possibilities of public communication considerably, allowing virtually anybody to publish his or her opinion without significant cost. The various online forums, blogs, chatrooms, comment streams and social media sites, are full of opinions on important matters (and trivial ones). The internet has started to dismantle the obstacles standing between professional journalists and independent opinion leaders, and has contributed to the democratisation of the public sphere, at least in a sense that it has made possible the emergence of more voices in the public space.

The internet thus also has an impact on professional journalism. First, the internet news services and social media platforms have greatly transformed earlier reader/user habits and turned a considerable section of the public away from professional media products, thereby undermining the economic foundations of the latter.² Second, the news aggregator sites and social networking websites (also) profit from the content produced by professional journalists, without any real effort on their part (that is content production), thereby disrupting the earlier business models.³ Furthermore, changes to the habits of users do not necessarily expand the number of people meaningfully contributing to public debates (or the

¹ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

² R Foster, *News Plurality in a Digital World* (Oxford, Reuters Institute for the Study of Journalism and University of Oxford, 2012) 16–24.

³ B Rossi, 'The Reinvention of Publishing: Media Firms Diversify to Survive' *The Guardian* (30 January 2017), www.theguardian.com/media-network/2017/jan/30/reinvention-publishing-media-firms-diversify-survive.

number of opinions expressed): blogs that can be considered independent forums usually do not attract large crowds,⁴ and the most powerful and popular websites are mostly the online versions of dominant offline news outlets that have also managed to exploit their economic power on the online markets.⁵ On the other hand, less fortunate media outlets have to struggle to survive.

The world of news services is thus changing, but not necessarily in the way one might have hoped. The biggest loser in the market restructuring is the primary 'home' of serious journalism, the press. Though the voices replacing the press are indeed numerous, their power is negligible and their function is not the same as that of professional journalism. The spare-time breed of writers or (on the contrary) elite opinion leaders disguised as 'independent bloggers' are incapable of investigative journalism due to their obvious financial constraints, and the mainstream media products adapted to the internet do not especially contribute to the growth of the diversity of content and opinions. Some authors are arguing already that the internet will lead to the demise of professional media.⁶

In an essay published in 1995, Eugene Volokh sought to predict the future path of the transformation of the online public sphere.⁷ He welcomed the phenomenon he called 'cheap speech', as he believed it would eliminate the existing technological scarcity and enable any person to articulate an opinion on public matters cheaply (or even for free) and without any intermediary (television, radio or press), thereby moving the democratic process of decision-making onto broader and more direct foundations.⁸

Almost three decades later, it seems unclear whether such 'cheap speech' is indeed a welcome development. The opportunities afforded by online mass communication and the emergence of social media platforms have challenged the business model of traditional journalism and the enforcement of professional standards. Due to the drop in revenue from advertising and the material weakening of the press, investigative journalism has lost its prominent role and has been replaced by sensationalist and impulse-based content production. User habits have also changed, and lengthy and thorough articles (if written at all) have a difficult time finding (sufficient) readership. These phenomena facilitate the spread of disinformation, while the decline of local news services enables the spread of local corruption and the deterioration of public political discourse,

⁴J Curran, 'The Internet of Dreams: Reinterpreting the Internet' in J Curran, N Fenton and D Freedman (eds), *Misunderstanding the Internet*, 2nd edn (London, Routledge, 2016) 23–25; M Hindman, *The Internet Trap: How the Digital Economy Builds Monopolies and Undermines Democracy* (Princeton, Princeton University Press, 2018).

⁵Curran (n 4) 23.

⁶RW McChesney and J Nichols, *The Death and Life of American Journalism: The Media Revolution that Will Begin the World Again* (New York, Nation Books, 2009); A Keen, *The Cult of the Amateur: How Today's Internet is Killing Our Culture* (New York, Currency, 2007).

⁷E Volokh, 'Cheap Speech and What It Will Do' (1995) 104 *The Yale Law Journal* 1805. See also E Volokh, 'What Cheap Speech Has Done: (Greater) Equality and Its Discontents' (2021) 54 *UC Davis Law Review* 2303.

⁸Volokh, 'Cheap Speech and What It Will Do' (n 7) 1849.

making a mockery of election campaigns and breeding extremism.⁹ Some studies found that anonymous ‘trolls’, who challenge reasonable public discourse on numerous forums, cannot be disciplined or banned, and there is no adequate solution to the problems they raise. Trolls therefore keep provoking and insulting others and making it impossible to engage in a thoughtful and progressive debate. Moreover, this state of affairs does not even represent a problem for the social media platforms but rather a benefit, as their economic interests seem to be better served by heated and active interaction than by calm and reasonable discussion of public affairs.¹⁰

Indeed, social media, as a new means of consuming news, seem not to be conducive to revealing any truth.¹¹ Whether or not it comes from an authentic or reliable source, all news is presented in Facebook’s news feed in the same way as gossip and scandals; sensationalist titles and reports are much more popular than pieces of actual journalism (which are difficult to read on mobile devices anyway), and even the existing products of real journalistic effort get lost in the endless and continuously updating flood of information. The market of traditional media is occupied by personalised news feeds and the freely available mass of junk news.¹² Social media have conquered the production and consumption of news. The general consensus on a commonly accepted ‘truth’ and some common ground that connects members of society has been weakened or even eliminated – every social group, if not each and every person, has its own ‘truth’ on the internet.¹³ The professional requirements of accuracy and the verification of facts have also fallen victim to the decline of the institutionalised press.¹⁴ In this changed market environment there is no pressure to meet popular demand, and it is increasingly difficult to enforce legal liability; these were the two main means of holding the press accountable by or on behalf of the public. Meta and Google – the two biggest online companies – have not only occupied the news and traditional journalism, they have occupied everything, from political campaigns to the banking system, from the entertainment industry to trade. Not even government or national security functions the same way as it used to in the pre-social media era.¹⁵ In such a

⁹ RL Hasen, *Cheap Speech: How Disinformation Poisons Our Politics – and How to Cure It* (New Haven, Yale University Press 2022).

¹⁰ L Rainie, J Anderson and J Albright, *The Future of Free Speech, Trolls, Anonymity and Fake News Online* (Pew Research Center, 2017), http://assets.pewresearch.org/wp-content/uploads/sites/14/2017/03/28162208/PI_2017.03.29_Social-Climate_FINAL.pdf.

¹¹ See P Coe, ‘Redefining “Media” Using a “Media-as-a-Constitutional-Component” Concept: An Evaluation of the Need for the European Court of Human Rights to Alter its Understanding of “Media” within a New Media Landscape’ (2017) 37(1) *Legal Studies* 25, 42–44.

¹² M Taibbi, ‘Can We Be Saved From Facebook?’ (*Rolling Stone*, 3 April 2018), www.rollingstone.com/politics/politics-features/can-we-be-saved-from-facebook-629567.

¹³ K Viner, ‘How Technology Disrupted the Truth’ *The Guardian* (12 July 2016), www.theguardian.com/media/2016/jul/12/how-technology-disrupted-the-truth.

¹⁴ L Levi, ‘Social Media and the Press’ (2012) 90 *North Carolina Law Review* 1531, 1555–72.

¹⁵ E Bell, ‘Facebook Is Eating the World’ (*Columbia Journalism Review*, 7 March 2016), www.cjr.org/analysis/facebook_and_media.php.

landscape, it seems to have become the responsibility of governments to promote the production of content and news, and to guarantee equal access to information through grants and regulations in order to strengthen democracy.

Social media platforms open the gates to the spread of false news, that is the deliberate dissemination of false information.¹⁶ Despite appearances, this is not a malfunction that could be dealt with by an appropriate intervention but a nearly inevitable consequence of the very nature of such platforms.¹⁷ Accurate profiling is made possible by huge volumes of data and information collected about users in bulk, and such profiles can be used to deploy algorithms that display targeted advertisements and select pieces of content to be presented to users – a decisive factor is the goal of triggering a psychological need to return to the platform with increasing frequency. Another factor is the architecture of such platforms, including the nature of communication through them, as they facilitate the spread of sensationalist content that can be consumed quickly but which is not interesting for a long period. False news has always existed, even before the existence of media and at earlier stages of technical advancement. The difference is that such news now becomes available quickly and *en masse*, and that the new information platforms do not simply disseminate false news randomly but provide an ideal environment for it to spread.¹⁸ Traditional media outlets use citizen journalists and social media generally as sources of news. Thus, in the same way that bloggers may regurgitate false or misleading information obtained, for instance, from the traditional media or other bloggers, the traditional media may do the same in respect of information obtained from social media.¹⁹

These are issues that the legal systems in this volume will also have to deal with, sooner rather than later. Concerns about the state of the democratic public sphere are felt around the world, but so far regulation has done little to address them. This book paints a very diverse picture of the state of regulatory approaches to press freedom in countries beyond Europe, a diversity that has some common features. These common features allow us to talk about press freedom within a common conceptual framework and to identify the problems accordingly. Of course, the book is not just about the *problems* of press freedom: centuries of struggle for this right have led to reassuring and well-established legal solutions in many countries. We must consider this a great achievement, even if, by its very nature, this struggle can never end. The authors of this volume are therefore driven by the conviction that their joint efforts can contribute to the further strengthening of press freedom, which we all cherish.

¹⁶ L Levi, 'Real "Fake News" and Fake "Fake News"' (2018) 16 *First Amendment Law Review* 232.

¹⁷ P Bernal, *The Internet, Warts and All: Free Speech, Privacy and Truth* (Cambridge, Cambridge University Press, 2018).

¹⁸ *ibid.*

¹⁹ Coe (n 11) 414–15.