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Media Regulation and Public Sphere in the Digital Age: An Analysis in the Light of Constructive Democracy

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Abstract**—**The article proposed intends to analyze the possibility (and conditions) of a media regulation law in a democratic rule of law in the twenty-first century. To do so, will be presented initially the idea of the public sphere (by Jürgen Habermas), showing how it is presented as an interface between the citizen and the state (or the private and public) and how important is it in a deliberative democracy. Based on this paradigm, the traditional perception of the role of public information (such as system functional element) and on the possibility of media regulation will be exposed, due to the public nature of their activity. A critical argument will then be displayed from two different perspectives: a) the formal function of the current media information, considering that the digital age has fragmented the information access; b) the concept of a constructive democracy, which reduces the need for representation, changing the strategic importance of the public sphere. The question to be addressed (based on the comparative law) is if the regulation is justified in a polycentric democracy, especially when it operates under the digital age (with immediate and virtual communication). The proposal is to be presented in the sense that even in a twenty-first century the media in a democratic rule of law still has an extremely important role and may be subject to regulation, but this should be on terms very different (and narrower) from those usually defended.

Keywords**—**Media regulation, public sphere, digital age, constructive democracy.

I. Introduction

FROM the early 21st Century, the notion of freedom of press and freedom of speech has been confronted with a very controversial proposal: media regulation. In a society characterized as being an "information" society, the media has been the object of significant attention, not only because people recognize it as important for democracy, but especially because of demands for it to fulfill what others call its social role: promoting full access to information while being committed to the truth and to impartiality. Within that perspective, an information society (and, consequently, democracy) depends crucially on how the media operates. For this reason, lawmakers are required to develop rules which will make an information society democratic.

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It is based on that logic that this article discusses the issue of the alleged democratization of the media, introducing as successful examples the regulatory laws which appeared in Venezuela (2004), Argentina (2009) and England (2013). Although they are completely distinct pieces of legislation and part of very different historical and social contexts, the fact that such regulations exist is understood as a sign that the era in which the media could operate freely is gone. Indeed, according to those who support media regulation, fully achieving the fundamental right to information and maintaining the Rule of Law requires (at least) regulation that governs the activities of those (large monopolies?) who control the flow of information, aiming at protecting impartiality and guaranteeing universal access to available content. Some elements of this reasoning, though, deserve a deeper analysis, such as the fact that no one ever fully clarifies how this intended regulation of conduct is to result in democratization, or the fact that the speech about the issue concentrates on large groups in the industry, ignoring the fragmentation of information in the digital era. However, those elements are not related to matters of smaller importance, but rather to fundamental elements of the speech regarding media regulation. For this reason, they deserve to be clarified before any discussion moves forward. Therefore, a debate is imperative based on what people perceive as media democratization, in addition to the degree of control that large business groups effectively have over information, even in the digital age. To that end, the issue of the relationship between the public sphere and democracy will initially be addressed, showing how such concepts are connected according to the theory of Jürgen Habermas, in order to analyze to what extent the effectiveness of democracy depends on a public sphere that is adequately functional. Next freedom of press and of speech will be analyzed, with the goal of establishing which elements are fundamental to the abovementioned rights, and then establish a relationship between democracy and the fundamental right to information. The goal is to understand how those concepts are related and to which extent the media is important for the Democratic Rule of Law to become a reality.

Based on the classical theoretical discourse, a brief analysis of comparative law will be conducted, based on legislation from Venezuela, Argentina and England on the matter, with the aim of analyzing how theory has effectively been converting into rules that aim at regulating the media. Once an overview of those specific pieces of legislation has been provided, an analysis will be conducted arising from two conclusions: a) in the digital age, the role of the media in the effectiveness of the fundamental right to information must undergo a review considering the fragmentation and diffusion of sources; and b) the concept of democracy itself must be the subject of a new perspective (called constructive), in order to transcend its indirect and representative nature.

After those considerations are made, this article will propose that media regulation should be seen under a different perspective according to which the role of the media is not necessarily related with the access to information or impartiality, but rather with the purpose of keeping alive the flow of information that feeds the public sphere and that is crucial in allowing people to choose the pieces of information they will use to build their own reality. For this reason, the intention of regulating the media should be seen with caution and admitted with severe restrictions.

II. The Public Sphere and Democracy

In the concept developed by Jürgen Habermas [1], the public sphere is understood as an adequate place to communicate content and to take a stand and form opinions, a place where the flow of information is filtered and summarized to the point where it converts into public opinion. Therefore, it is a communication structure related with social space, where decisions are not made but where spontaneous public understanding is allowed to mature. In other words, its role consists basically of gathering and problematizing society's problems as a whole.

In order to fulfill its role, the public sphere must be open to permanent interaction between people who are interested in the topics being discussed, to the extent that it is the forum where public debate takes place. A fundamental condition for this to happen is the lack of government intervention in its activities, under penalty of deforming the communication structures that are crucial in keeping society alive and active. In that sense, the public sphere is where citizens will interact permanently. This will enable civil society to mature its point of view on the several issues it is directly interested in, as well as the position adopted by the Government to solve them. Therefore, there is a close relationship between the public sphere and democracy. Indeed, as far as democracy (in the classical sense) is directly related with people's ability to influence government decisions [2], then the public sphere takes on a crucial role for its operation, to the extent that it is through the public sphere that civil society and the political world will be in touch. This happens because in the public sphere actors cannot exercise political power, only influence, and so its structure has to be kept intact so that it is possible to influence democratic institutions and transform public opinion into legislation. Therefore, in complex societies the public sphere forms an intermediate structure that stands between the political system and the private sectors of life. However, in traditional public spheres of Western democracies there is much skepticism as to the real possibilities of civil society influencing the political world. Broadly speaking, it is understood that their groups detect problems effectively, but they cannot issue sufficiently strong signs to stimulate learning processes in the political system or to change the focus of decision processes. Considering this feeling of powerlessness, there must be a discussion on how we can restructure the public sphere so that it will continue to show it is able to fulfill its role. Indeed, if the public sphere is unable to channel the influence of civil society over the political world, alternative scenarios must be addressed which can be more effective in awarding greater functionality to the Democratic Rule of Law (as a model under which government decisions are made with the participation of all stakeholders).

III. The Media as an Element of the Functionality of the Democratic Rule of Law

Refunctionalizing the principle of the public sphere is based on restructuring that which may be considered its institution par excellence: the press/media. Therefore, based on the role played by the public sphere in the democratic environment, one can investigate the role given to the press/media in this system, as well as the role it is allowed to play. Understanding the role played by the media in the public sphere is taking the first step toward understanding its relationship with democracy and, therefore, toward analyzing the pillars of its regulation/democratization.

Jürgen Habermas himself offers an answer, in the sense that, in the constitutional political systems, it is up to the media: a) to oversee the sociopolitical environment, making public those developments which can positively or negatively interfere with citizens' wellbeing; b) to define significant issues in the political agenda, identifying key issues, as well as the forces which generated them and which can bring a solution; c) establishing platforms which will allow politicians and spokespeople for other causes and other stakeholder groups to defend their positions in a way that is intelligible and clarifying; d) allowing a dialogue between different viewpoints and those who hold power and mass audiences; c) creating mechanisms that will allow us to hold those in charge accountable about the way they are using such power; f) encouraging citizens to learn, choose and become involved in the political process, abandoning the role of mere spectators; g) resisting, in the name of well-defined principles, efforts from outside the media which intend to subvert its independence, integrity and ability to serve the public; and h) respecting spectators and readers as individuals who are virtually involved and able to understand their political environment [3]. Even if one does not fully agree with all the items listed above, one can say that they converge toward a perception of the media as an instrument of identification and expansion of public opinion. They also have as their premise the concept that democracy is organized under a system that allows the separation between public and private spheres, especially with respect to the political process (so much so that we need the public sphere to connect the two of them). In other words, considering that decisions are made at the government level, the media has a crucial role because it allows civil society to have an active voice in the political world while preserving its independence and influence, protected from possible domination of those who hold the power. However, a threat other than government oppression hovers over the media: the hijacking of this institution by exclusively private interests, which can cause a distortion of the public sphere and make it cease to be a reflection of what happens in civil society and become an instrument for manipulation. Indeed, concentrating media outlets into the hands of a few groups with significant economic power often compromises the media's critical capacity. This happens because as the public sphere is invaded by commercial advertising (and placed in a position where it depends on the latter); individuals start acting as private owners of those who are in the position of target audience. Therefore, we realize that the media is threatened both by interference from political power and economic power. Those are two types of power which are always present in the media, whether because it works as a means for interaction between civil society and the political system, or because it depends on funding in order to function. In any of those cases, there is a real risk that the media's independence is compromised and one cannot say that one type of interference is more desirable than another. What one needs to understand is that the functionality of democracy depends on the media working properly. That is why the media needs to be protected, so that it can work as an environment where civil society is able to freely produce a public opinion that has the power of influence. In other words, taking the classical model of representative democracy, it is impossible to forget that the fulfillment of the Democratic Rule of Law depends on an independent media, to the extent that undue interference will prevent the fundamental communication between civil society and the political world. Even based on the notable paradigms of the 20th Century, this should be the starting point for a discussion of the issue of media regulation, especially when one intends to do it under the pretext of promoting a democratization of the industry. In fact, the discussion should be about how appropriate it is to use classical paradigms (with the purpose of updating its premises for the reality of the new century), but before that we need to briefly see how a few countries attempted to address the problem of media democratization.

IV. Regulation Models: Venezuela, Argentina and England

Based on the classical concept of democracy and on the role played by the media in the functionality of the public sphere, some governments adopted legislative measures which tend to regulate the industry's activities, promoting what is being generally called media democratization. Among the cases which drew attention, Venezuela (in 2003) was the first country to pass legislation about the topic with its "*Ley de Responsabiliad Social en Radio, Televisión y Medios Eletrónicos*", which establishes a number of rules to be followed by the media. Compliance with those rules is to be duly supervised by a number of commissions created with this purpose.

As one can see in the Venezuelan legislation, the clear intention is to control how the media will carry out its activities, which can be verified in a few examples that consist in provisions that determine the following: a) broadcasts must be made in the national language (save for the exceptions provided in the law); b) advertising for a number of products (such as cigarettes and alcohol) is forbidden; c) all media outlets must invest at least three (3) daily hours broadcasting cultural programs; d) all media outlets must invest at least seven (7) daily hours broadcasting programs produced nationally; and e) at least half of all broadcasted national music work must be related to Venezuelan tradition. This small selection of provisions in the Venezuelan "*Ley de Medios*" is enough to establish the chosen profile to control the matter: considering that the media does not voluntarily follow that which the Government understands is the public interest, a number of rules need to be established, according to which relevant social values are communicated and can be subjected to inspection. The authoritarian nature of this legislation can be summarized in the fact that media outlets are forbidden from transmitting messages that cause discomfort to citizens or which disturb the public order, not to mention the requirement of broadcasting the national anthem at least three (3) times a day. In summary, this legislation aims at ensuring that the activities carried out by the media follow the guidelines established by the Government.

In 2009, it was Argentina's turn to address the issue when Law number 26.522 was passed with the aim of "*developing mechanisms whose purpose is to promote and encourage lower prices, democratization and universalization of the use of new information and communication technologies*". This piece of legislation makes it clear that it considers the activity carried out by media outlets as one of public interest. It establishes the following as goals for the media, among others: a) propagating fundamental guarantees and rights; b) promoting federalism and Latin American regional integration; c) defending human beings; d) preserving the identity and cultural values of original peoples; and e) promoting a balanced development of a national industry of content. Broadly speaking, therefore, one can notice that the legislation is grounded in the notion that media outlets are tools that can be used for the Government to fulfill its purpose. Based on that perspective, it is not surprising that Argentinean legislation has been designed following the example of its preceding Venezuelan counterpart, beginning with the priority awarded to the national language in media outlets (except for the cases provided in law). There is also an agreement with respect to government control over the industry, since the Argentinean regulation included the creation of the *Autoridad Federal de Servicios de Comunicación Audiovisual* (with the authority to interpret, apply and enforce relevant legislation), of the *Consejo Federal de Comunicación Audiovisual* (in charge of public policies on telecommunications), of the *Comisión Bicameral de Promoción y Seguimiento de la Comunicación Audiovisual* (with the authority to generally supervise the industry's activities) and of the *Defensoría del Publico de Servicios de Comunicación Audiovisual* (with the authority to receive complaints related to the industry).

With all the governmental supervision structure established, it is inevitable that one will find a number of rules on how the media should operate, among which the following stand out: a) showing a minimum of nationally-produced content; b) broadcasting a minimum of national music; c) showing a minimum of original content; d) including a minimum of local content; and e) reserving space for independent productions. Percentages vary according to the media outlet that will broadcast the content, but in any case it significantly establishes the content that is to be broadcast. Without prejudice to countless other rules provided in such legislation, the examples listed above are enough to understand the profile of regulation promoted in Argentina, which is in line with prevailing ideology in Venezuela.

England, on the other hand, was forced to discuss the issue in 2011 when a scandal came to light revealing that a few powerful media outlets (owned by Rupert Murdoch) had tapped the cell phones of thousands of people in order to obtain information first-hand. The proportions which the story took in the media gave rise to an investigation known as the "Levenson Report", which listed a number of recommendations that were transformed into the "Royal Charter on Self-Regulation of the Press". Contrary to its Latin American counterpart, however, English legislation drifted away from the possibility of governmental control over the press, choosing instead to create an entity in charge of self-regulating the industry.

The purpose of the above entity is to create a code of conduct for the media, to receive complaints against members who have allegedly committed some kind of violation and to investigate claims against members of the industry. Once a violation has been verified, it is up to the entity to determine the apologies/corrections (the nature, location and extent) to be submitted and impose sanctions to its members who have been found guilty of violating the code of conduct. The logic of this legislation, therefore, was to establish a number of principles which must be followed by the media. The industry itself is in charge of supervising compliance with those values, and government interference is expressly forbidden (the government is also forbidden from appointing any individuals for the regulating entity).

One can see that, although the above countries have legislation tackling the media, there is a significant difference between the approach adopted by England and that prevailing in Argentina and Venezuela. Indeed, while the latter countries chose to submit the media to governmental control (including content), England preferred to invest in the industry's independence, choosing self-regulation as a way to create a more ethical functioning and considering any kind of governmental control as unnecessary. As this article will further discuss, this is a significantly different approach with important repercussions for the analysis of the relationship between media and democracy.

V. Digital Age and Constructive Democracy: Elements for Reanalyzing the Issue

In light of the above, one can see that the supposed regulation/democratization of the media may have been conceived and implemented based on mistaken premises, to the extent that they appear as inappropriate for the reality of the new century. First of all, one can no longer work with the concept of public sphere which was valid decades ago (when Jürgen Habermas developed his theory), since the emergence of the Internet Era requires reanalyzing all the aspects related to the public discursive space, including the role of the media. Indeed, even if one can say that the media continues to play the role of channeling public opinion, establishing a connection between the private and public spheres, one cannot forget that control over the media is significantly fragmented and access to information is practically universalized. Writing decades ago, Jürgen Habermas worked with the notion of media comprising radio, newspapers and television, without taking into account the rise of the internet. This technology innovation, however, requires reexamining his theory, to the extent that not only does it join the rest as a new form of media, but it also significantly changes how people communicate.

Actually, it is crucial pointing out that the discussion does not involve quantitative, but rather qualitative change. Despite the fact that classical means of communication have remained, access to information is no longer the same after the rise and propagation of the internet, which can be noticed essentially through the fact that communication between people has become: a) faster (sometimes instant); b) more diffuse (with greater numbers of information emission centers); and c) farther reaching (almost universally widespread). The truth, therefore, is that it is not just about a new means of communication being fit into an already established theory, but rather a phenomenon that requires reexamining the theory itself.

Jürgen Habermas himself expressly states that in order to overcome the public sphere's influence deficit over the political world, all that is required is making it plausible that actors in civil society, neglected until then, can take an active role with all its consequences. That is exactly what happens when one analyzes the repercussions of the Age of Information in the public-discursive space. We are undoubtedly before a situation where the public sphere itself undergoes resizing due to the inclusion of countless other actors who are able to interact among themselves through instruments that were unknown up to that point.

Secondly, one can no longer work with the simplified concept of indirect and representative democracy according to which decisions come mostly from the Parliament and citizens limit their participation to the political-electoral process, with rare exceptions in which direct participation is allowed (such as in a plebiscite, referendum or ballot initiative). This concept was also crucial for Jürgen Habermas' theory of the public sphere (including establishing the role of the media in democracy's functionality), but it is no longer the most adequate paradigm.

In the early 21st Century, after the consolidation of the Theory of Fundamental Rights and the Rule of Law, democracy must be rediscussed and recover its direct dimension based on valuing the autonomy of the individual. As a way to overcome the false need to choose between the effectiveness of fundamental rights from different dimensions (freedom rights, political rights, social rights, collective rights, etc.), there is a proposal that democracy be conceived under a constructive perspective according to which a society is as democratic as its members' ability to build their own reality [4].

According to the concept of constructive democracy, the Government cannot be the only decision-issuing center, because the reality of people is built by countless situations where they must decide for themselves (whether individually or in small groups), so that the stakeholders' decision-making autonomy is preserved. For this reason, the political-electoral process, despite still being a part of the system (which is partially representative), occupies a peripheral (and not central) position, since it is related to producing only a small fraction of the decisions that directly affect the lives of citizens.

VI. Democratic Perspective of Media Regulation in the 21st Century

By working with those two new assumptions (fragmentation/universalization of access to digital information and the constructive perspective of democracy), one can promote a rethinking of the relationship between media and democracy, establishing that, in the 21st Century, one can no longer support the understanding that the media has been colonized by the political/economic power in a way that makes it unable to play its typical role (because it does not echo social demands, but rather represents an instrument of domination of the masses). Indeed, we currently live in a world where: a) a large number of people purport to be an information-issuing center (whether this is new or reproduced information), which causes the facts (and opinions) to reach all people almost instantly); and b) democracy must be conceived under a constructive perspective, which means that the strictly political process does fully cover the democratic phenomenon, which is expressed mainly through decisions made by groups or individuals (within the limits of their exclusive interests) in a non-institutional way.

Faced with the evidence of this double pragmatic change, one cannot help but notice that one must also rediscuss the definition of the role of the media as an instrument for democracy's functionality. First, because one no longer needs to be extremely concerned with the monopoly of information and influence due to the fragmentation of sources; secondly, because lack of information is no longer a severe problem, since there is a free and immediate flow of information online; third, because the media can be functional for democracy without being related to the political-electoral process, due to the wider concept of decisions that should be taken into account. Based on those considerations, it can be said that in the Age of Information and under the Rule of Law, the role of the media consists of being a means through which people can have access to the information they need to build their own reality. In other words, any discussion about an alleged democratization of the media must take into consideration whether the measure one intends to adopt contributes to improving or worsening people's constructive abilities. In that sense, the role of the media is related to the autonomy and empowerment of citizens [5]. It can be considered democratic to the extent that it is a way to expand that constructive capacity.

Plainly speaking, one can say that its role consists of: a) ensuring the free flow of information; b) preserving people's right to obtain information in the way they best see fit; c) reflecting public opinion; and d) providing an environment for civil society to interact independently. Any other discussion about the topic, no matter how relevant it may be, is unconnected to the democratic issue. Furthermore, in searching for a converging point between those roles, one can clearly notice that fulfilling the role of the media adequately in a democratic society is much more related to guaranteeing civil society's independence, voice and ability to influence (a society that requires this environment for the construction of its reality), than to serving as an instrument to achieve alleged ends of the government. From that viewpoint, therefore, one can analyze the above legislation that addresses media regulation under the pretext of democratizing it. If the role of the media is directly related to its autonomy, then there is no escaping the conclusion that any regulation which follows the Latin American model has absolutely no democratizing nature, to the extent that its goal is precisely mitigating the autonomy with which civil society could freely form public opinion. The fact that this autonomy could be constrained by the Government's influence (and not that of the economic power) changes absolutely nothing, because it has the same effect: it promotes a distortion in the free formation and expression of public opinion. The only difference is that, in this case, the activities of civil society are regarded as an instrument to realize the alleged public interest (such as protecting the so-called national culture), a circumstance which absolutely cannot legitimize the authoritarian stance. On the other hand, one can see as legitimate and democratizing the regulation which is enforced according to the profile of the one implemented in England in 2013. Indeed, once one considers that the public sphere is much more dynamic in the Age of Information and that democracy overcomes the exclusively political dimension (to be understood as each person's capacity to build their own reality), then there can be legislation about the media without an authoritarian character, as long as its autonomy is guaranteed, whether in relation to the State or economic power or any other factor which may distort the formation of public opinion. To achieve that, it seems appropriate to create self-regulating agencies in the industry, to the extent that, as least in theory, they are capable of establishing limits within which the activities of the media can be undertaken without compromising its independence.

VII. Conclusion

Any State that intends to be a democratic rule of law depends primarily on the existence of an adequate public sphere through which civil society can echo its desires and build an informal public opinion. However, in order to consider the public sphere functional, the role played by the media is crucial, which consists of promoting a wide circulation of ideas as a way to guarantee civil society's ability to influence the political world. The democratic nature of a given society depends on this synchronicity between civil society, public sphere, media and political system.

The concern of guaranteeing the adequate functioning of the media has led several countries (among which Venezuela, Argentina and England) to adopt specific legislation targeting the regulation of the activities of the press, usually based on the assumption that the media was being held by oligopolies which had distorted its role, using it to manipulate public opinion instead of limiting their activities to reproducing opinions arising spontaneously in civil society. Such reasoning, however, cannot stand in the 21st Century, when the media is fragmented and access to information is significantly propagated, especially when one intends to work with a more radical concept of democracy. Indeed, in contemporary (democratic) Western societies, we can say that the media should no longer be conceived only as a tool for civil society's communication, like the political system. This happens because, under the perspective of a constructive democracy, there can be no such complete isolation of the political system, to the extent that all citizens and groups should be considered as centers that issue relevant decisions, in what one may call a democratic polycentrism. Furthermore, even if there is the intention of establishing that the isolation of the political system remains due to the fact that democracy is partially representative, one can no longer talk of oligopolies hijacking the media, to the extent that the Internet Era has forever changed the circulation of information and the construction of public opinion. Therefore, although it is undeniable that the media is still playing a pivotal role in assessing the democracy of any society, one needs to understand that its role today equals guaranteeing that people have the ability to build their own realities, using the media to realize a public sphere (often a virtual one) that is dynamic and immediate and in which civil society may form public opinion almost immediately. In that sense, it is undeniable to conclude that media regulation has a far greater chance of representing an obstacle than an instrument that will guarantee the proper functioning of the media, so much so that legislation conceived up to this point, as a rule, has been serving the purpose of promoting an intervention much more than democratization.

The discussion surrounding media regulation is in the current agenda and at a crucial stage in which many States are scared by the new possibilities of its democratic potential. This makes them scared of the lack of control over an element that is extremely important for adequate functioning of the civil society; hence, the temptation of resorting to legislation. However, the discussion must be guided by the perception of the actual relationship between the media and democracy, so that the attempt to protect the industry from being hijacked by economic power does not end up opening the doors to hijacking by the government. What one must seek is to see new millennium as the stage for a new democracy, where the media is acknowledged in its entire dimension and where it can freely play its role of increasing the constructive capacity of civil society. This paper aims to make a contribution in this direction.

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