

Building and Sustaining Freedom of Expression

Considering Sweden

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Abstract

Although countries protect and promote freedom of expression in different ways, free speech can be understood to have two basic aspects in democratic constitutional systems: non-censorship and diversity of voices. This article examines how the approach to free speech in Sweden contains both these aspects. Selected comparisons with the US First Amendment, and German broadcasting law, indicate the value in the Swedish approach but also reveal challenges that it faces if free speech's dual aspects are not clearly recognised – a danger that some contemporary statements suggests is real. Articulating free speech in terms of both non-censorship and diversity may aid Swedish parliamentary processes to uphold important structural aspects of the freedom, but it would also bring into focus larger questions about the limits of parliamentary processes *alone* in building a viable system of freedom of expression for the future.

Keywords: approaches to free speech, non-censorship, diversity of voices, democratic rationale for free speech, journalism

Introduction

The ways in which countries protect and promote freedom of expression differ greatly. However, within formally democratic constitutional systems free speech can be understood to have two basic aspects: non-censorship and diversity of voices (eg Lichtenberg 1990). Here, we examine how the approach to free speech in Sweden contains both aspects. Selected comparisons with the US First Amendment, and German broadcasting law, suggest the value in the Swedish approach but reveal challenges if free speech's dual aspects are not clearly recognised. Articulating how non-censorship and diversity are part of free speech in Sweden might well prove to be significant, given challenges facing freedom of expression.

Free speech is commonly valued for multiple reasons: it is said to aid in discovering truth or developing knowledge, to serve people's interest in self-development or autonomy, and to be necessary for democratic forms of self-government (Petäjä 2006). We concentrate here on the third reason. The democratic rationale for free speech is

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implicit in much journalism and media research, and it is the most frequently considered free speech rationale within law in general (Barendt 2005: 20) and in Sweden (Axberger 1984: 21; Bull 2006: 334).

The democratic rationale for free speech is central to Swedish constitutional provisions; for example, it underlies the “free exchange of opinion and availability of comprehensive information” described in the Freedom of the Press Act – that is, information “from all sides” as the original Swedish words state. This wording illustrates how the democratic rationale involves the idea of diversity. Diverse media content, involving a wide range of subjects, information, genres and viewpoints, allows the public to participate in free and varied debate or observe others engaged in such debate.¹ Thus, while the “essentially contested” concept of media pluralism (Karppinen 2015) includes multiple entities and owners, the vital element here is diversity in content.²

Clearly free speech involves the absence of censorship by the state – or, at least, careful evaluation of any direct attempts to restrict speech by law or executive action. But free speech means more. If the goals that free speech is said to serve are to be plausible, multiple voices are needed (eg Lichtenberg 1990; Gibbons 2012). This view of free speech means that media should be a diverse forum for debate and – through that diversity and the relative absence of censorship – a mechanism for scrutinising the exercise of power (as illustrated in Figure 1). Such accountability is an important implication of the democratic rationale for free speech. Democratic forms of government are commonly said to be aimed at holding power to account, in part through mediated speech. Public speech is not just directed *by* those with power, it is not only subject to prevailing social powers, but interrogates those with power.

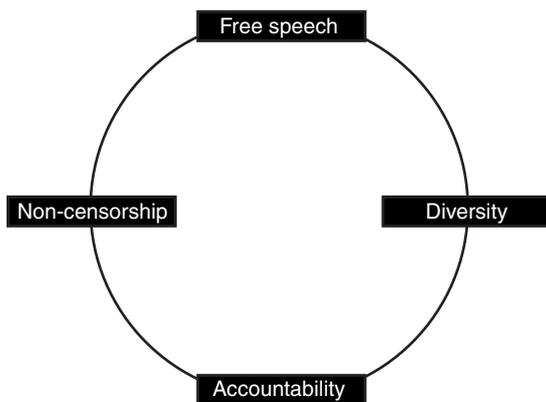


Figure 1. Free speech comprises non-censorship and diversity, both supporting accountability

This approach to free speech takes it beyond a bare liberty against government action. Free speech includes obligations for a certain “state of affairs” to be sought. Robert Alexy (2002) uses the concept of a state of affairs in relation to broadcasting freedom (and other constitutional rights in Germany), and it appears useful to adopt here. Free speech involves not just what the state should refrain from doing, but also what the state and others should do to support the environment for speech (Kenyon 2014; Kenyon 2016; Karppinen 2016). The changing and uncertain media environment may increase the challenges for state action to support diverse speech, but it does not remove the value of such efforts.

The state's enabling function for democratic free speech is highlighted explicitly in Sweden, where state policy has a role in promoting and deepening democracy through safeguarding free speech (SOU 1975: 79, p.126; SOU 1995: 37, p.156) and to create prerequisites for plurality (Dir. 2015: 26, p.2). However, rhetoric about this aspect of free speech may be changing. For example, a 2015 official government report on media policy (SOU 2015: 94, p.37) describes the state's relationship to free speech in ambiguous terms. It suggests: "Every aspect of state governance can ... be interpreted as infringements of these fundamental freedoms" of speech and information, but it also reaffirms the state's purpose in media policy is "to create as free a society as possible where diversity of media can secure the rights and interests of all citizens".³ In these statements, at least in the first one, it is almost as if free speech is being reduced to the absence of censorship rather than also encompassing diversity of voices.

There are more ways in which the enabling function can be pursued than for a negative liberty. Not every state action to encourage free speech can be *required* by a free speech principle; rather, discretion exists for the diversity aspects of free speech in a manner that differs from non-censorship. With such discretion, a question arises as to who exercises it, and how (if at all) it is limited: who has responsibilities for encouraging diverse media speech? Possible actors include the state, market, civil society, journalists and editors. Of course, states are not absent from markets: regulating a commercial market while refraining from directly regulating speech is, in itself, a particular form of state influence on speech. State influence cannot be avoided; the question is whether a particular form of state action is justified, or indeed required, by free speech. While the US state, for example, might generally be understood as "restricted" in its role and European states as "more active", the state plays "a significant role in shaping the media system in any society" (Hallin & Mancini 2004: 41, 49). (We largely leave aside questions about other scales of organisation, such as sub-national, regional and international organisations and the roles they might play.)

We are interested in matters of non-censorship and diversity as "negative" and "positive" aspects of democratic free speech, and ways in which they might be pursued by state and non-state actors. Such an inquiry is clearly broad. To begin exploring it here, we focus on some actions that might be taken by parts of the state. State actions linked to the idea of *non-censorship* include protection of media sources, rights of access to public information, and different procedural rules to protect speech in court processes, while notable state actions in support of *diversity* include public service media and press subsidies. But how do such measures relate to free speech, and what parts of the state would be involved in implementing them – the executive, parliament, courts, regulators? The analysis suggests that if free speech comes to be understood only in terms of non-censorship, there could be dangers in Sweden for the ability of parliament to sustain an architecture for diverse mediated speech. If that happens, courts *could* act to protect the diversity aspects of free speech as they have done, for example, under the constitutional protection of speech in Germany.

Media systems: changes and challenges

A degree of diversity existed in western media systems in the latter decades of the 20th century. It is not our argument that the historic level of diversity was ideal, but changes

to media systems highlight diversity as warranting attention now. In doing so, the goal should be to support diverse public speech, not to support the business models of traditional media.

Several commonly discussed challenges to media systems serving democratic goals are laws that create liability and “chill” public interest speech, media ownership concentration, and commercial pressures that influence media content. Laws restricting speech have long been a concern, and clearly have continuing importance (eg Riga Joint Declaration 2015). But concerns with such laws may be somewhat less in Sweden because, in comparative terms, *media* speech in Sweden is relatively free of legal restriction (Bull 2006: 335-340). Before considering that, we outline the latter two points concerning media ownership and commercial pressures on content.

Concentration of media ownership is a longstanding concern in many countries. A perceived danger is of fewer owners leading to narrower public debate. As well as fairly stable and (to date) large public service broadcasters financed by licence fees, Swedish media contains many newspapers and commercial broadcasters. However, the multiple commercial media companies have just a handful of owners. In addition, the substantial decline in newspaper advertising has seen many newsrooms close or downsize (Ohlsson & Truedson 2015). Nearly 900 journalists lost their jobs during 2014 and 2015 (Granström 2015c) and news syndication has increased in local newspapers (Byström 2014). Thus, there are concerns about fewer voices and less scrutiny of power by journalists. While networked communications might be thought to change things dramatically, it is notable that a similar style of concern exists over Internet intermediaries because of their potential to influence the visibility or accessibility of online content. Adding to that concern, Internet media has not yet produced a sustainable economic model for producing journalistic content.

Another concern is the blurring of editorial and commercial content (Edström, Kenyon & Svensson 2016). Printed newspapers have seen reduced revenues from both traditional advertising and paid subscribers, which has led to new commercial deals. Major Swedish newspapers have started producing content that is presented like journalism, but paid for by advertisers (Edström 2015; Edström 2016; Piety 2016). The practice follows prominent news providers such as *The Guardian* and *New York Times* as well as newer companies like BuzzFeed (Berntsson 2013, Lu 2014). Production can be outsourced to partner-studios where commercial editors produce material for online and branded sections of newspapers. Revenues are not yet substantial but are growing (Hoelzel 2014). There are also new Swedish collaborations such as a telecommunications company, Telia, financing a Silicon Valley correspondent for the tabloid *Aftonbladet* (Granström 2015b) and an automotive company, Volvo, sponsoring an interview series with business leaders in the newspaper *Svenska Dagbladet* (Häger 2015). And, while editors do not appear to see problems with the development, journalists and self-regulatory bodies are more concerned (Granström 2015a; Edström 2015). A key concern is the lack of trust in news that may result when audiences can no longer identify who is behind stories (Austin & Newman 2015; Hernius & Rosenlind 2015).

Beyond these concerns, changes in states' ability to promote public speech due to regional and global trade agreements are also noteworthy. One example is the current EU-US negotiations for a trade and investment agreement – the Transatlantic Trade and Investment Partnership (TTIP). Audiovisual services and the cultural sector have so far

been excluded, at least as officially revealed (eg European Commission 2014). But the threats to state action in areas relevant to future communication technologies may be very substantial. Equally, state aid rules within the European Union impose hurdles for state action to promote diverse public speech through supporting public service broadcasting (Gibbons & Humphreys 2012).

The above changes are relevant to the context of the challenges, but they do not remove the value in seeking to sustain free speech's dual aspects of non-censorship and diversity, something to which Sweden has taken an unusual and noteworthy approach.

The Swedish state and free speech

The Swedish state plays a significant role in shaping the media system as a fundamental element of democracy. Sweden can be seen within a Nordic tradition of “media welfare states” (Syvertsen et al 2014). The approach has been characterized as a democratic corporatist model (Hallin & Mancini 2004) with the state expected to take steps “to ensure that freedom of expression and freedom of the press are formally and in reality protected by legislation ... [and] to create and maintain an information and press system that will accommodate many and diverse voices” (ibid: 160 quoting Gustafsson 1980: 104). The state's role is not at all intended to amount to state control: democratic media is expected to have independence from state and commercial interests. In Sweden, “news reporting and commentary”⁴ has traditionally been seen as a core democratic role for media, encompassing at least three tasks: providing information, acting as a watchdog and offering a space for public debate (eg Carlsson 2015). Before considering measures relevant to diversity, it is useful to outline aspects of Swedish free speech law related to non-censorship.

Swedish approach to non-censorship

The Swedish jurisdiction is unique due to the age and style of its constitutional protection of the press. Beyond longevity – the Freedom of the Press Act dates from 1766 – noteworthy elements include: the degree to which the approach differentiates between media and non-media speech; strong protection provided to media sources; rights of access to information held by public authorities; special procedural protections for mediated speech, which in practice mean courts have only a minor role in determining the limits of speech; and the level of detail about speech in the constitutional Acts themselves. The constitutional regulation of free speech is “incredibly more detailed” than in other countries (authors' translation, Bull 2006: 332).

Two constitutional acts are relevant primarily to media free speech: TF, the Freedom of the Press Act; and YGL, the Fundamental Law on Freedom of Expression. Individual freedom of expression is regulated in practice mainly by a third constitutional Act, RF or the Instrument of Government.⁵ Amending these constitutional Acts involves a special procedure, requiring two parliamentary decisions with an election in between them. Although the process is not onerous, notably both electors and politicians are involved.

TF and YGL are relevant to different types of media, but contain the same substantive core elements: TF applies to print and YGL applies to radio, TV, film, audio visual recordings, video and CD recordings, as well as websites and blogs with a journalistic

focus. While each can apply to individual speakers who use the relevant format, their most substantial application has been to media. (The possibility of merging them into a single Act has been discussed but not, as yet, recommended: SOU 2012: 55.)

Each Act's purpose is expressed in almost identical terms. TF's first Article provides a constitutional right for every citizen to publish material in print without prior constraint. Its purpose is "to secure the free exchange of opinion and availability of comprehensive information", information "from all sides", while YGL reads similarly, "to secure the free exchange of opinion, free and comprehensive information, and freedom of artistic creation". Varied elements are used to this end: a ban on prior restraint by public bodies; a right to access information held by public authorities; a right to anonymity for authors; whistle-blower protection; a special "chain of responsibility" for liability; a "rule of exclusivity" that requires a certain legal procedure for free speech offences; and short time limits for commencing actions. In addition, a difference in approach to the treatment of editorial and commercial media content has developed. We examine these elements below.

First, there is a constitutionally anchored right to public information, called the principle of transparency and access to official documents (TF Ch 2). The purpose is to promote control by citizens of activities of official institutions (Axberger 2014: 187; Bull 2014: 18). Access can be restricted by law according to certain identified interests (TF Ch 2 Art 2), but the principle is extensive and understood to be a prerequisite for citizen control of public bodies (for discussion in English see Jørgensen 2014).

Second, everyone has the right to communicate information and intelligence on any subject whatsoever for the purpose of publication (TF Ch 1 Art 1 para 3; YGL Ch 1 Art 2). The principle is called source protection. It is strengthened by the special system of responsibility, but applies in relation to public administration and not private subjects (Axberger 2014:140; Bull 2014:18).

Third, the Acts protect free speech through "single person responsibility". Only one person can be held to account in law, and that person is determined by a constitutional chain of responsibility. The chain differs depending on media form (newspaper, book, broadcast, etc). For a newspaper or broadcaster, the editor is the mandated person. The original purpose was to protect anonymous authors, but the system is now believed to promote free speech by excluding all other people from responsibility and investigation (Axberger 2014: 120-121).

Fourth, free speech offences use a special trial procedure and can only be brought by one prosecutor, the Chancellor of Justice who is "expected to take the greatest possible care" not to infringe unduly on free speech (Bull 2009: 83-84). The constitutionally mandated procedure is the only instance of Swedish trials involving lay juries (Axberger 2014: 166). The jury applies a "double criminalisation" test; that is, the case must meet standards in TF or YGL *and also* in ordinary criminal law. Even if the jury finds guilt, the court separately examines liability and can acquit or apply a lesser penalty (TF Ch 12 Art 2).

Fifth, there is a short time limit for taking legal proceedings: for periodicals and broadcasts, the limit is six months after publication, while for other printed material it is one year. State reaction should come quickly or not at all (Axberger 2014: 177).

Despite these five protections, all three constitutional Acts, on paper, allow quite wide restrictions on speech. For individual non-media speech, RF allows restrictions

through ordinary laws for interests such as national security, public order and safety, individual reputation, private life and prevention of crime, where the restriction serves a democratic purpose (RF Ch 2 Art 23). Resembling the European Convention on Human Rights, the approach allows for many possible restrictions. For TF and YGL, in contrast, four types of restriction (or exclusion from protection) are notable. First, normal provisions of copyright and related rights apply to publications (TF Ch 1 Art 8). Second, restrictions can be made in normal law for specific areas of content, such as alcohol and tobacco advertising, measures to protect health, and some trade-secret-style protection of information (eg TF Ch 1 Art 9; see also provisions about dissemination Ch 6 Art 2). Third, pornographic content of persons under 18 years is excluded from protection (TF Ch 1 Art 10). Fourth, the Acts set out a list of offences, such as treason, official secrets, national security, sedition, hate speech and defamation (eg TF Ch 7 Arts 4, 5). The categorical list is intended to make restrictions more predictable than under RF. It means that, for the vast majority of media content, civil damages claims can only arise where the conduct would amount to one of the listed criminal offences (TF Ch 11). To a large degree, in practice, plaintiffs can only sue in defamation and confidential information (Strömberg & Axberger 2004:91-92; see Axberger 2014:180-181 for examples of newspaper defamation claims).

TF and YGL do not explicitly allow general legal control of advertising, such as for false or misleading content. However, when such laws were introduced parliament took the view that commercial communication *could* be regulated. Where communication's purpose is commercial, it has been understood to fall outside constitutional free speech protection (Svensson 2016). In this way, a distinction has been drawn between editorial and commercial content (although the position is questioned, eg Heide-Jørgensen 2013). Since the 1970s, the RF has explicitly stated that freedom of expression in business may be limited, even without the "particularly important grounds" generally required under the RF (RF Art 23). In practice, commercial communication has been limited by the Marketing Act, mostly through time, space and manner regulation. However, some potential controls on commercial speech – for example, limiting gender stereotypes – have been rejected as breaching freedom of expression due to arguments that commercial speech should be protected as free speech. The "somewhat paradoxical" position suggests a tension in Swedish free speech, with efforts being made to promote a more "market-driven" freedom than its traditional democratic basis, in order to strengthen the position of commercial media interests (Svensson & Edström 2014: 503-504; Edström & Svensson 2016; Svensson & Edström 2016).

Although some Swedish media speech is more restricted than in the US – hate speech, for example – there are many ways in which media free speech protection is *effectively* like the US First Amendment (Bull 2009: 85). Even judicial review of a jury verdict resembles *de novo* review of First Amendment issues (eg Anderson 2003). In some areas, such as media sources, Swedish protection is stronger. Media has a constitutionally recognised role – it is traditionally seen as the third estate in Sweden⁶ – and published speech is very unlikely to result in liability. (However, the position for individual speakers, when they cannot bring themselves within TF or YGL, is quite different than under US law.) Thomas Bull has compared seven western countries' constitutional approaches to free speech, and noted various ways in which the Swedish position is particularly strong for media speech. He concludes that defamation for

Swedish media is closest to the US position, that protection for private life is weaker in Sweden than elsewhere outside the US, and that the absence of expenditure limits on political advertisements and the lack of obligation to report who funds such advertising resembles US law (Bull 2006: 335-340).

What is perhaps most notable is that strong protection for media speech is achieved through unusual institutional roles. In particular, Swedish courts have to date had a minor role: “The limits of what can be said in papers, leaflets, radio shows and on CDs are not decided in courtrooms, but in the public debate. Politicians and publishers are the key actors ... not lawyers” (Bull 2009: 85). In part this relates to the historically weak position of Swedish courts in policymaking, notwithstanding the strengthening in this role following Sweden’s membership of the European Union in the 1990s and 2010 reforms to the Instrument of Government (eg Bull 2014: 16; Suksi 2014: 88). In contrast, the US Supreme Court has the central role under the First Amendment. In addition, the rationale for protecting free speech has clearly been democratic in Sweden, while US law has used multiple rationales which have broadened to encompass commercial freedom (Piety 2012; Pickard 2015). This difference underlies Sweden’s strong protection for media speech alongside weaker commercial speech protection.

Swedish approach to media diversity

In Sweden, diversity is understood to be essential for democracy and free debate, as seen in many official reports and statements (eg SOU 1975: 49, pp.45,47; SOU 1975: 79, p.30; Dir 2015:26). Diversity encompasses both media providers and content. The goal of content diversity, of particular interest here, is pursued through several avenues. The most important are the Radio and Television Act (2010: 696), Charters for Public Service Broadcasting (Dir. 2015: 26) and Statute of Annual Press Subsidies (1990: 524).

The Radio and Television Act allows a licence to require broadcasting a diverse range of programs (Ch 4, para 9, 13). The overall service of each broadcaster should reflect fundamental concepts of a “democratic form of government” (Ch 5, para 1). For public service broadcasters further obligations are imposed under Charters. (The commercial terrestrial broadcaster TV4 has fewer obligations in its Charter, which led to all their local newscasts closing in 2014 (Englund 2014)). The public service broadcasters, SVT, Sveriges Radio and UR, should be independent from political, commercial or other interests and are financed by licence fees, the level determined in statute (SFS 1989:41; since July 2015 approx. 240€ per year). Public service broadcasting has an obligation to offer a diverse and innovative range of programs (including those of mass appeal), accessible to all, reflecting the entire country’s conditions, and characterised by quality and diversity (SVT Charter, para 6). In addition, public service broadcasters have to consider the special impact of their programming for free opinion formation and should provide a plurality of opinions and expression of opinion (ibid). Overall, a degree of public interest content is imposed on commercial broadcasters, while public service broadcasting has greater content obligations. As elsewhere, the public service system has been debated in recent years, with arguments that financial support amounts to unfair competition (eg Konkurrensverket 2009), that commercial services could be funded to provide public service content, and that public service broadcasters’ online activities should be limited (Tidningsutgivarna 2015).

Press subsidies have been another important support for media diversity. For decades, state subsidies have sought to guarantee press plurality and safeguard diversity of opinion. After market changes during the later 1950s, various parliamentary inquiries considered the possibility of subsidies to preserve the number of titles (Gustafsson et al 2009). The social democratic government together with the centre (Agrarian) party took up the idea of compensating second local newspapers for reduced advertising revenues linked with fewer household sales. After initial 1969 legislation, a selective press subsidy was introduced in 1971 financed by a tax on advertising, with the current system existing since 1976 (Rydén & Gustafsson 2010: 267-268). The primary stated reason was “to promote diversity in newspapers to give the public choice and create possibilities for diverse, comprehensive debate and the construction and exchange of opinions” (SOU 1975: 79, pp.295-296). In 1988, the scheme’s purpose was described in similar diversity-enhancing terms (SOU 1988: 48, p.26). A government agency, the Press Subsidies Council, distributes the subsidy under the Annual Press Subsidies Act. There are two forms of press subsidy, operational and distribution. The operational subsidy is granted to newspapers meeting statutory requirements: publication at least once a week and a subscribed edition of at least 1500 copies. In 2013, SEK 460 million was distributed to around 87 newspapers. The distribution subsidy is paid to more titles using shared distribution methods. In 2013, approximately SEK 58 million was divided between 134 newspapers with a combined distribution of 800 million copies (*Presstödsnämnden* 2014).⁷

A newspaper which is not primarily in Swedish can also receive an operational subsidy if it is directed at linguistic minorities, has its main editorial office in Sweden, and distributes at least 90 per cent of its subscription-based circulation in Sweden. In addition, the system includes newspapers that are only distributed digitally, although to date only two titles have received subsidies. The Swedish press subsidies were recently only 2.6 per cent of total newspaper company revenue (464 million SEK) (Swedish Broadcasting Authority 2015: 446), although the percentage has previously been reported as much higher and economically significant for some small titles (eg Hallin & Mancini 2004: 162).

Newspaper subsidies have been criticised by some as distorting competition, similar to criticism of public service broadcasting (eg Wahlberg 2007), and public support for subsidies may be lessening (Ohlsson 2014). However, a 2013 official review concluded by majority that the system should continue (SOU 2013: 66). Dissenting members raised concerns about whether subsidies were really supporting the existing press’s business model, instead of supporting a diverse media system in changed conditions (ibid: 451-454 dissent by Wadbring & Ots). Strong criticism came from the committee chair, Hans-Gunnar Axberger, who dissented in recommending that press subsidies in their current form be abandoned. He has subsequently argued for general mechanisms of support for media companies (such as reduced taxation, or charitable funding for exploratory projects, Axberger 2015:125-128) until new market models have emerged, at which point some form of support could be reinstated to assist media’s control or watchdog function.

In May 2015, parliament adopted a Bill to continue subsidies until the end of 2018 with minor adjustments to the operational subsidy and increased subsidies for newspapers published once or twice per week. The role of the Press Subsidies Council has moved to the Swedish Press and Broadcasting Authority, the statutory media regulator

overseeing the legislation and Charters (Prop. 2014/15: 88). In addition, in March 2015 the government appointed academic and industry experts to evaluate press subsidies and suggest new ways to promote news plurality and diversity (Dir. 2015: 26). The committee, facing the democratic challenges of changed media conditions and uses, presented its final report (SOU 2016: 80) in November 2016. With a strong emphasis on the democratic purpose of media policy, the committee proposes a new media system of subsidies to news media on all platforms (not only press) that fulfill certain democratic criteria, among them diversity in content.

Implications: Sustaining free speech through parliament?

One of the questions we began with was who has responsibilities for encouraging diverse media speech. In Sweden, the state is clearly one of the responsible actors even if there may be a shift in some public rhetoric about free speech and the state. We have considered how structural positive aspects of free speech have been pursued, in part, by parliamentary and government action in three areas: broadcasting content obligations; public service funding; and press subsidies. We would suggest the basis for action in each instance has been quite consistent with the democratic rationale underlying Swedish free speech, but it has not always been set out in free speech terms. It has instead been a matter for general political processes, on which there has been remarkable agreement to date compared with many other western countries.

However, arguments against those state actions have gained some recognition. And, as media and legal situations change – with greater media commercialisation and further integration of Sweden’s legal system into Europe – there could be real value in considering more fully and explicitly how free speech includes structural positive aspects. In Sweden, public service broadcasting is said to be vital for “free opinion formation”. This parallels the German concept of free individual and public opinion formation, which is the recognised purpose of Germany’s constitutional protection of free speech and broadcasting (*ZDF Treaty* decision 2014). However, the future of Swedish public service media is a matter for political and public debate, while in Germany, public service broadcasting is *also* a matter of free speech law in which the Federal Constitutional Court has a decisive role. That court has long emphasised the central position of public service broadcasting in promoting free speech. Unlike Germany, Swedish courts have not yet addressed these issues to any substantial degree. Even though the role of Swedish courts is changing, it may take some time for such arguments to find traction judicially.

Similarly, Swedish press subsidies seek to support “diverse, comprehensive debate” but do not appear to be described *explicitly* in terms of free speech. The scheme can be seen to arise from free speech’s democratic basis, but it is not overtly understood to be *required* by it. As with broadcasting, subsidies are a matter for parliament. In part, this reflects longstanding Swedish understanding of the roles of parliament and courts, but the roles are changing somewhat with European integration (eg Valguarnera 2015). As Ingela Wadbring and Mart Ots commented in dissenting in the 2013 press subsidies review discussed above, “the report should have found a basis for subsidies on a more principled and comprehensive democratic basis” (SOU 2013: 66, p.451). Free speech may offer just that principled and comprehensive democratic basis. In the changing situation of media and law in Sweden, it may also offer a particularly useful avenue.

To that end, it is notable that another Swedish cultural support system does more clearly reference free speech. The Swedish Arts Council has a legislative remit that includes safeguarding freedom of expression.⁸ To support open public debate, 91 different art and culture periodicals received SEK 19 million in 2013. The sums have remained relatively stable, but in 2011 the ground for receiving grants was narrowed to periodicals for “cultural debate” excluding those for “social and economic debate” (SOU 2012: 65, p.306).

As to the possible role of courts, Markku Suksi has recently summarised similarities in Nordic constitutional practices, suggesting there is “a *way of thinking*” that combines “a cautious form of judicial review and constitutionalism with popular sovereignty and (limited) supremacy of Parliament” (2014: 88 quoting Husa 2002: 185, emphasis in original). Tempering this judicial caution is the constitutional weight of TF and YGL, and the way in which free speech for publications is recognised as central to the country’s constitutional ethos. As Bull has noted (2014: 19), it is as if without press freedom, including access to public documents, Sweden would no longer be Sweden. Even in the nineteenth century, it was thought “that no other constitutional right than ‘the right to print’” (ibid: 18) needed protection, nor was it worthwhile protecting other rights “without the right to print freely” (ibid). Free media would safeguard against all misuse of power. Here, one could cite Germany’s Federal Constitutional Court, which itself quoted a famous US judicial aphorism to state that free speech is “the matrix, the indispensable condition of nearly every other form of freedom” (7 BVerfGE 198, 1958, p.208). There are clear parallels to the importance of media free speech in Sweden, and changes can be seen in Swedish courts’ attitudes. Courts appear to be gradually gaining a role to uphold constitutional rules against parliament. Even so, the reserved role of courts to date is particularly notable. In Sweden, the state is understood to have an obligation to act in support of free speech, but so far it is largely other parts of the state than courts. The value and importance of free speech is understood in a manner equivalent to, for example, Germany – its purpose is to aid “free opinion formation” in both countries and it is a matrix of each country’s constitutional order. But how free speech protection has been pursued in Sweden is remarkably different, and its long term durability is open to question.

To date, Swedish debates about state support for diverse media have not resulted in very substantial reductions in public funding. But that position may change. An expected consequence of lower funding would be less diverse and critical media content, and perhaps reduced public knowledge about public events. Extensive research shows differences in media content between commercially-driven systems and more diverse systems with substantial public media; in addition, research suggests a correlation between strong public service media and public understanding of contemporary events and politics (see discussion in Kenyon 2014). If funding declines, research suggests there is a plausible risk of reduced content diversity and public understanding.

This has a notable implication here: the weight that the Swedish constitutional system places on the political process becomes questionable. Politics will begin to operate in a different context – one with less effective media in terms of content diversity and public knowledge. The degree to which parliament is connected with public concerns, and the degree to which parliamentary processes are communicated publicly, could be expected to lessen. The media would no longer be achieving even its limited historical levels of scrutinising power and publicising political and state actions.

The centrality of diverse public speech to constitutional processes, the way in which it can be seen as necessary structural element within a democratic constitutional system, is an important element of free speech in Sweden. If free speech can be articulated publicly in terms of both non-censorship *and* diversity, perhaps the Swedish parliament will be able to sustain the structural aspects of democratic free speech. But if parliament proves unable to do that, attention could be paid to how Germany has approached the matter. Closely parallel ideas underlie the Federal Constitutional Court's support for free speech through public service broadcasting. This structural aspect of free speech is understood to be too important – and too consequential for the operation of democracy – to be left entirely to parliament. The court fears that, without judicial action, democratic legitimacy would be undermined through a political process reshaped by commercially-driven media (eg 57 BVerfGE 295, 1981). The situation is seen very differently than in a traditional Nordic approach, and the example challenges belief in the efficacy of democratic parliaments, at least in relation to free public speech.

All this suggests that, without greater consideration of the free speech arguments implicit in the diversity-pursuing measures outlined above, the Swedish achievement of its particular form of democratic corporatist media may change into a more commercially-driven version of public speech. Then the democratic basis for Swedish free speech would be substantially undermined. Developing the free speech arguments may aid parliamentary processes uphold important structural aspects of free speech – as parliament remains the preferred Swedish actor for such matters – but it would also bring into focus larger questions about the limits of the parliamentary process *alone* in building a viable system of freedom of expression for the future.

Notes

1. Aalberg and Curran 2012:9-12 summarise debates about whether 'good' political citizenship requires people be well-informed about contemporary events.
2. There are also approaches focused on 'exposure diversity' or audience exposure to diverse content (eg Napoli 2011). While of analytical interest, such a focus can suggest adequate content diversity already exists; a matter of which we are not convinced.
3. Author's translation, as for most other quotes from Swedish official documents.
4. The Swedish term '*nyhetsförmedling*' does not translate directly into English; encompassing ideas such as news reporting, commentary, news coverage and news gathering.
5. Tryckfrihetsförordningen (TF), Yttrandefrihetsgrundlagen (YGL) and Regeringsformen (RF).
6. Notably, Swedish courts are not considered the third estate, and journalism the fourth. As addressed below, courts have been comparatively subservient to elected power.
7. More recent data (Swedish Broadcasting Authority 2015:46) states 2014 subsidies totalled SEK 464 million (production) and SEK 55 million (distribution) but does not include the number of newspapers supported.
8. See <http://www.kulturradet.se/en/In-English>.

References

- Aalberg, Toril & Curran, James (2012). How Media Inform Democracy: Central Debates, pp. 3-14 in Aalberg & Curran (eds.) *How Media Inform Democracy: A Comparative Approach*. New York: Routledge.
- Alexy, Robert (2002). *A Theory of Constitutional Rights*, trans. Julian Rivers. Oxford: Oxford University Press [1986].
- Anderson, David A. (2003). An American Perspective, pp.721-729 in Deakin, Simon, Johnston, Angus & Markesinis, Basil, *Markesinis and Deakin's Tort Law*, 5th ed. Oxford: Clarendon Press.
- Austin, Shawn & Newman, Nic (2015). Attitudes to Sponsored and Branded Content (Native Advertising), *Reuters Institute Digital News Report 2015*. Oxford: Reuters Institute for the Study of Journalism.

- Axberger, Hans-Gunnar (1984). *Tryckfrihetens Gränser* [The Boundaries of Press Freedom]. Stockholm: Liber Förlag.
- Axberger, Hans-Gunnar (2014). *Yttrandefrihetsgrundlagarna* [The Constitutional Acts on Freedom of Expression]. Stockholm: Norstedts Juridik.
- Axberger, Hans-Gunnar (2015). *En misslyckad utredning – SOU 2013:66. Om politiken och tredje statsmakten* [A Failed Government Official Report – SOU 2013:66 On Politics and the Third Estate]. Juridisk rapportagebyrå.
- Barendt, Eric (2005). *Freedom of Speech*, 2nd ed. Oxford: Oxford University Press.
- Berntsson, Krister (2013). Vinstmaskin eller buzz? Native advertising växer rekordartat på bannerns bekostnad [Profit machine or buzz? Native Advertising on Record Growth at the Expense of Banners], *Resumé*, 14 November.
- Bull, Thomas (2006). Appendix 8 to Part 2 of SOU 2006:96: Sverige. Tryck- och yttrandefrihetsberedningen, *Ett nytt grundlagsskydd för tryck- och yttrandefriheten?: Tryck- och yttrandefrihetsberedningen inbjuder till debatt: delbetänkande* [A New Constitutional Protection for Freedom of the Press and Freedom of Expression: The Review Committee Invites Debate]. Stockholm: Fritze.
- Bull, Thomas (2009). Freedom of Expression in Sweden: The Rule of Formalism, pp.79-92 in Kierulf, Anine & Rønning, Helge (eds.) *Freedom of Speech Abridged: Cultural, Legal and Philosophical Challenges*. Göteborg: Nordicom.
- Bull, Thomas (2014). Constitutional Identity – A View from Sweden, *Retfærd Nordisk juridisk tidskrift*, 147: 10-23.
- Byström, Gabriel (2014). 'Trots mediekrisen står politikerna lamslagna' [The politicians are paralysed regardless of the media crisis], *Göteborgs-Posten*, 11 September.
- Carlsson, Ulla (2015). När offentligheten förändras. Yttrandefriheten, medierna och nyhetsförmedlingen [When the Public Domain Changes. Freedom of Expression, Media and News Coverage], *Nordicom Information*, 2015(1): 41-48.
- Dir 2015:26 (Sweden). *En mediepolitik för framtiden* [A Media Policy for the Future].
- Edström, Maria (2015). Blurring the Lines. Ethical Dilemmas for Journalists with Native Advertising and Other Look-alike Editorial Content, paper for NordMedia conference 2015.
- Edström, Maria, Kenyon, Andrew T. & Svensson, Eva-Maria (eds.) (2016). *Blurring the Lines. Market-Driven and Democracy-Driven Freedom of Expression*. Göteborg: Nordicom.
- Edström, Maria (2016). Audience Advertising Fatigue and New Alliances to Finance Content in Broadcasting pp. 131-140 in Edström, Kenyon & Svensson (eds.) *Blurring the Lines. Market-Driven and Democracy-Driven Freedom of Expression*. Göteborg: Nordicom.
- Edström, Maria & Svensson, Eva-Maria (2016). Trust and Values for Sale. Market-drive and democracy-driven freedom of expression pp. 67-74 in Carlsson (ed.) *Freedom of Expression and Media in Transition. Studies and Reflections in the Digital Age*. Göteborg: Nordicom.
- Englund, Caroline (2014). TV4 lägger ner alla lokala nyheter [TV4 Ends all Local News], *Dagens Nyheter*, 9 April.
- European Commission (2014). *TTIP and Culture*, 16 July, http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152670.pdf
- Gibbons, Thomas (2012). Free Speech, Communication and the State, pp.19-44 in Amos, Merris, Harrison, Jackie & Woods, Lorna (eds.) *Freedom of Expression and the Media*. Leiden: Martinus Nijhoff.
- Gibbons, Thomas & Humphreys, Peter (2012). *Audiovisual Regulation under Pressure: Comparative Cases from North America and Europe*. Abingdon: Routledge.
- Granström, Klas (2015a). Textreklam. Vem bryr sig? [Advertorials. Who Cares?], *Journalisten*, 7 May.
- Granström, Klas (2015b). Telia betalar Aftonbladets nya USA-korre [Telia is Financing Aftonbladets New USA Correspondent], *Journalisten*, 10 June.
- Granström, Klas (2015c). Så många jobb försvann under året [This is how many jobs that disappeared last year], *Journalisten*, 21 December.
- Gustafsson, Karl-Erik (1980). The Press Subsidies of Sweden: A Decade of Experiment pp.104-126 in Smith, Anthony (ed.) *Newspapers and Democracy: International Essays on a Changing Medium*. Cambridge, MA: MIT Press.
- Gustafsson, Karl-Erik, Örnebring, Henrik & Levy, David A.L. (2009). *Press Subsidies and Local News: The Swedish Case*. Oxford: Reuters Institute for the Study of Journalism.
- Hallin, Daniel C. & Mancini, Paolo (2004). *Comparing Media Systems: Three Models of Media and Politics*. Cambridge: Cambridge University Press.
- Heide-Jørgensen, Caroline (2013). *Advertising Law: Marketing Law and Commercial Freedom of Expression*. Copenhagen: DJØF Publishing.
- Hernius, Hanna & Rosenlind, Sebastian (2015). Native Advertising – en balansgång med förtroende som insats? [Native Advertising – a balance where trust is at stake?], Bachelor research paper, University of Gothenburg.

- Hoelzel, Mark (2014). Spending On Native Advertising Is Soaring As Marketers and Digital Media Publishers Realize the Benefits. *Business Insider UK*, 7 November.
- Häger, Björn (2015). Ingen guldspade när Neurath åker Volvo [No awards when Naurath drives a Volvo]. *Journalisten*, 8 June.
- Husa, Jaakko (2002). *Nordic Reflections on Constitutional Law: A Comparative Nordic Perspective*. Frankfurt: Peter Lang.
- Jørgensen, Oluf (2014). *Access to Information in the Nordic Countries*. Göteborg: Nordicom.
- Karppinen, Kari (2015). The Limits of Empirical Indicators: Media Pluralism as an Essentially Contested Concept pp. 287-296 in Valcke, Peggy; Süksüd, Miklós & Picard, Robert G. (eds.) *Media Pluralism and Diversity: Concepts, Risks and Global Trends*. Basingstoke: Palgrave Macmillan.
- Karppinen, Kari (2016). Beyond Positive and Negative Conceptions of Free Speech pp. 41-50 in Edström, Kenyon & Svensson (eds.) *Blurring the Lines. Market-Driven and Democracy-Driven Freedom of Expression*. Göteborg: Nordicom.
- Kenyon, Andrew T. (2014). Assuming Free Speech, *Modern Law Review*, 77: 379-408.
- Kenyon, Andrew T. (2016). Who, What, Why and How. Questions for Positive Free Speech and Media Systems pp. 29-39 in Edström, Kenyon & Svensson (eds.) *Blurring the Lines. Market-Driven and Democracy-Driven Freedom of Expression*. Göteborg: Nordicom.
- Konkurrensverket [Swedish Competition Authority] (2009). *TV-marknaden i Sverige* [Television Market in Sweden]. Stockholm: Konkurrensverket.
- Lichtenberg, Judith (1990). Foundations and Limits of Freedom of the Press pp. 102-135 in Lichtenberg (ed.) *Democracy and the Mass Media: A Collection of Essays*. Cambridge: Cambridge University Press.
- Lu, Angelique (2014). Native Advertising: Does it “Cheapen” Journalism?, Blog, *World News Publishing Focus by WAN-IFRA*, <http://blog.wan-ifra.org/print/2014/11/18/native-advertising-does-it-cheapen-journalism>, 18 November.
- Napoli, Philip M. (2011). Exposure Diversity Reconsidered, *Journal of Information Law and Policy*, 1: 246-259.
- Ohlsson, Jonas (2014). Fading Support for Swedish Press Support, *Journal of Media Business Studies* 11(1): 39-60.
- Ohlsson, Jonas & Truedson, Lars (2015). *Medieexplosion – men journalistiken pressas* [Media Explosion – but journalism under pressure]. Stockholm: Institutet för Mediestudier.
- Petäjä, Ulf (2006). *Varför yttrandefrihet? Om rättfärdigandet av yttrandefrihet med utgångspunkt från fem centrala argument i den demokratiska* [Why Freedom of Speech? On the Justification of Freedom of Speech on the Basis of Five Central Arguments in the Democratic Tradition]. Acta Wexionensia 83/2006 (Växjö universitet).
- Pickard, Victor W. (2015). *Americas Battle for Media Democracy: The Triumph of Corporate Libertarianism and the Future of Media Reform*. New York: Cambridge University Press.
- Piety, Tamara (2012). *Brandishing the First Amendment: Commercial Expression in America*. Ann Arbor: University of Michigan Press.
- Piety, Tamara R. (2016). Killing the Golden Goose. Will Blending Advertising and Editorial Content Diminish the Value of Both? pp. 101-108 in Edström, Kenyon & Svensson (eds.) *Blurring the Lines. Market-Driven and Democracy-Driven Freedom of Expression*. Göteborg: Nordicom.
- Presstödsnämnden [Press Subsidies Council] (Sweden) (2013). *Dagspressens ekonomi 2013* [The Economy of the Swedish Daily Press]. Stockholm: Presstödsnämnden.
- Presstödsnämnden [Press Subsidies Council] (Sweden) (2014). General Information, 30 April, <http://www.prestodsnamnden.se/hem/in-english>
- Prop.2014/15:88 (Sweden). *Statens stöd till dagspressen* [State Subsidies to Daily Press].
- Riga Joint Declaration (2015). United Nations Special Rapporteur on Freedom of Opinion and Expression, Organization for Security and Co-operation in Europe Representative on Freedom of the Media, Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and Responses to Conflict Situations*, 4 May.
- Rydén, Per & Gustafsson, Karl Erik (eds.) (2010). *A History of the Press in Sweden*. Göteborg: Nordicom.
- SOU 1975: 49 (Sweden). *Massmedigrundlag* [Constitution for Mass Media]. Massmedieutredningen.
- SOU 1975: 79 (Sweden). *Svensk press, Statlig presspolitik* [Swedish Press, State Press Policy]. 1972 års Pressutredning.
- SOU 1988: 48 (Sweden). *Reformerat presstöd* [Reformed Press Subsidy]. Dagstidningskommittén.
- SOU 1995: 37 (Sweden). *Vårt dagliga blad – stöd till svensk dagspress* [Our Daily Paper – Support to Swedish Press]. Pressutredningen.
- SOU 2012: 55 (Sweden). *En översyn av tryck- och yttrandefriheten* [Review of Press Freedom and Freedom of Expression]. Yttrandefrihetskommittén.

- SOU 2012: 65 (Sweden). *Läsandets Kultur* [The Culture of Reading]. Litteraturutredningen.
- SOU 2013: 66 (Sweden). Översyn av det statliga stödet till dagspressen [Review of the State Subsidies System for the Press]. Presstödskommittén.
- SOU 2016: 80 (Sweden). *En gränsöverskridande mediepolitik. För upplysning, engagemang och ansvar* [A Cross-Boundary Media Policy. For Enlightenment, Engagement and Responsibility]. Medieutredningen.
- Strömberg, Håkan & Axberger, Hans-Gunnar (2004). *Yttrandefrihetsrätt*. Lund: Studentlitteratur.
- Suksi, Markku (2014). Markers of Nordic Constitutional Identity, *Retfærd Nordisk juridisk tidsskrift*, 147: 66-91.
- Svensson, Eva-Maria & Edström, Maria (2014). Freedom of Expression vs Gender Equality – Conflicting Values when Regulating Gender Stereotypes in Advertising, *Tidsskrift for Rettsvitenskap*, 127: 479-511.
- Svensson, Eva-Maria (2016). Upholding the Division Between Editorial and Commercial Content in Legislation and Self-Regulation pp. 109-119 in Edström, Kenyon & Svensson (eds.) *Blurring the Lines. Market-Driven and Democracy-Driven Freedom of Expression*. Göteborg: Nordicom.
- Svensson, Eva-Maria & Edström, Maria (2016). Market-Driven Challenges to Freedom of Expression and the Interaction Between the State, the Market, and the Media, *Nordicom Review* 37: 1-16.
- Swedish Broadcasting Authority (2015). *Dagspressens ekonomi 2014* [The Economy of the Swedish Daily Press]. Stockholm: SBC.
- Syvertsen, Trine; Enli, Gunn; Mjøs, Ole J. & Moe, Hallvard (2014). *The Media Welfare State: Nordic Media in the Digital Era*. Ann Arbor: University of Michigan Press.
- Tidningsutgivarna (2015). *Hur påverkas tidningarna av public service-bolagens digitala satsningar?* [How are Newspapers Affected by Digital Efforts from the Public Service Companies?], Consultancy report by Karl Lundvall and David Nordström. Copenhagen.
- Valguarnera, Filippo (2015). Judicial Policymaking in Sweden: A Comparative Perspective, *Scandinavian Studies in Law*, 61: 185-218.
- Wahlberg, Per T.K. (2007). Avskaffa presstödet [Cancel Press Subsidies], *Nwt.se*, 12 December.

Cases (German Federal Constitutional Court)

- 7 BVerfGE 198 (1958). (*Lüth* decision)
- 57 BVerfGE 295 (1981). (*Third Broadcasting* decision)
- ZDF Treaty* decision (2014). 1 BvF 1/11, 1 BvF 4/11 (25 March)

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