Political Debate and the Role of the Media

The Fragility of Free Speech
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Political Expression in the Media:
What Kind of Regulation is Necessary in a Democratic Society?

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“If once you let broadcasting into politics, you will never be able to keep politics out of broadcasting”.

“Assuming the BBC is for the people and that the Government is for the people, it follows that the BBC must be for the Government”.

“If Kinnock wins today, will the last person to leave Britain please turn out the light”.
Frontpage of The Sun, the day before the elections in the UK on 9 April 1992.

“The Voting Test is a dangerous programme on Flemish broadcasting. It should not be allowed to broadcast such a programme in a democracy”.
Louis Michel, Vice Prime Minister of Belgium, Minister of Foreign Affairs, a few days before the elections of 13 June 2004 for the European Parliament and for the Regional Parliaments in Belgium, Knack 9 June 2004, 34.

“Free elections and freedom of expression, particularly political debate, together form the bedrock of any democratic society”.

“A prohibition of political advertising which applies only to certain media, and not to others, does not appear to be of a particularly pressing nature”.
The media influence politics. Politics influence the media. The interdependent relation between media and politics is especially reflected in the media coverage and political communication in pre-electoral periods, elections being the holy days in a democracy, the decisive moments when people vote what kind of politics and politicians they want. From this perspective the media play an important role in a democracy, by informing the electorate about the res publica, by creating perceptions about politics and by giving a forum to politicians in pre-electoral periods, by imparting news, opinions and commentary with explicit or implicit political meaning.

In all countries in Europe an impressive set of rules has been promulgated in order a) to ban or restrict some types or content of political communication, b) to organise and control, or c) to stimulate, to guarantee certain types or formats of political expression in the media.

That media and political communication have an effect on and influence society and the electorate is generally taken for granted. How this effect functions however, in what direction, under what circumstances, to whom and when, is still uncertain.

All kinds of theories and models have been developed, from the determinist hypodermic model (stimulus-response) over the theories of minimal consequences to the null effects-approach, with in between theories and studies focussing on multi-step influences, uses and gratifications, agenda-setting, reinforcement effect, cognitive dissonance, spiral of silence, the mediatisation of politics... It is also recognized that people perceive messages differently: the same content can communicate contradictory messages. And last but not least: many other factors in society, patterns of media-consumption and especially individual characteristics influence the attitudes and political preferences of the people. Therefore it is very difficult to isolate the media-effect or the media's political content in order to "measure" whether and if so how they influence public opinion, or rather the process of individual's opinion formation and expression. Both media and politics are also in a permanent flux or transition, local and global, which is an additional factor that complicates reaching coherent, reliable and general conclusions about the way media and political campaigning influence public opinion and more precisely have an effect on the voting behaviour of individuals. Understanding the mechanisms of (short- and long-term) media-effects on the electorate remains a complicated matter.

It is actually out of discussion, however, the fact that journalistic reporting on politics, media coverage on upcoming elections and strategic political campaigning do influence at least in some way, and to some extent, a significant part of the electorate, especially the so-called undecided voters. A popular interpretation is that the political party that wins an election is the one who has run the most effective campaign and/or has been supported the most or the best by the media during the pre-electoral period. There is, however, no systematic evidence to support this interpretation.

Let's consider as an example what happened in Belgium, more specifically in the Flemish Community, during the last elections on 13 June 2004. As in some other countries, these elections concerned not only the voting for the representation in the European Parliament, but also national/regional elections. In addition, on 13 June 2004 the electorate in the Flemish Community voted for a new Flemish Parliament.

The most striking result of the 13 June 2004 elections in the Flemish Community was that almost 25% - nearly one million of the 4 million voters - voted in favour of the extreme-right party Vlaams Blok, which received the highest number of votes ever. A striking result indeed, as in the weeks and months before the elections the Vlaams Blok had received very negative media coverage. It was also an atypical result, because in the rest of Europe extreme-right nationalistic parties such as for instance the Front National of Jean-Marie Le Pen in France or the FPO of Jörg Haider in Austria are in decline.

13 June 2004 prompted a debate about the role of the media and their alleged contribution to the success of Vlaams Blok, a party with its roots in neo-Nazi and extreme-right ideologies, a party with a definite anti-immigrant profile and which is focused on a narrow nationalistic and intolerant discourse, and the propagation of "Eigen Volk Eerst".

1) Although remember the anarchistic slogan: "If elections would really have an impact on the division of power in society, they would have been abolished".


3) To be more precise: the vlaams Blok received 24.2% of the votes for the Flemish Parliament.

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In the pre-electoral period the Vlaams Blok and some of its candidates received very critical and negative coverage in the media. On 21 April 2004, after a procedure which lasted four years, the Court of Appeal of Ghent came to the conclusion that the Vlaams Blok in some of its publications and publicity had systematically and openly incited to discrimination and racial hatred, esp. defaming, humiliating and criminalising migrants from Turkey and Morocco. Three legal entities within the Vlaams Blok were convicted for their participation in an organisation that systematically and openly propagated discrimination and racism. The conviction of 21 April 2004 was the first ever of the Vlaams Blok as a result of the application of the antiracism law of 30 July 1981. The judgment of the Court of Appeal in Ghent and its legal and political consequences received a lot of media attention during the election campaign. It became obvious that the judgment of 21 April 2004 could have far-reaching consequences for the functioning of the Vlaams Blok, as it substantially reduced its opportunities to take part in a future government - it was not conceivable that any other political party would be available to start a coalition with a party convicted for incitement to racism and discrimination.

This was not the only newsworthy event the Vlaams Blok was involved in during the pre-electoral period. Several politicians of the Vlaams Blok had to cope with very negative media coverage during the period short before election day on 13 June 2004: one party member of the Vlaams Blok was put into jail for drug trafficking, another was prosecuted for shooting at a man with a rifle in a café and last but not least, a candidate for the Flemish Parliament was prosecuted for beating up his wife in a public place. These facts received a lot of critical media coverage - the Vlaams Blok being strongly opposed to drug trafficking, and referring constantly to the dangerous increase in crime and defending a rather conservative approach to the institution of marriage.

For several years the Vlaams Blok has been criticizing and complaining about a media boycott, as there are indications that some newspapers and broadcasters do not focus on the activities or political actions of the Vlaams Blok (or at least do it less) or do not invite their representatives or MPs to take part in political debates or interviews (or at least do it less). The Vlaams Blok has been complaining for many years that the media only pay attention to the party when they want to criticize it or to report negatively about its programme, its action or its representatives. It might be relevant in this perspective to refer to recent academic research that revealed that almost 75% of the journalists in the Flemish Community are to be situated politically left of centre (esp. socialists/social-democrats and green party), which is one more argument for the Vlaams Blok to complain about their under-representation in the media due to the alleged left-wing leanings of the majority of journalists in the Flemish media.

It is worth mentioning that in 2001 the public broadcasting organisation VRT prepared the internal guidelines entitled “The VRT and democratic society”, stating that the Flemish public broadcasting organisation cannot be an instrument for the dissemination of statements or opinions of organisations or political parties that do not respect the fundamental values of democracy and tolerance, and which openly incite to hatred and discrimination. In the internal guidelines explicit references are made to the Vlaams Blok, a party which supports a programme and policy-options assumed to contain statements that are not compatible with the mission statement of the VRT. VRT’s task is also “to contribute to tolerance in society and to promote community relations in pluri-ethnic and multicultural societies”, as it was formulated in the Media Minister’s Declaration of Prague in 2000. As a result of the application of these guidelines the Vlaams Blok and its politicians are prevented to issue statements and opinions which do not respect the mission statement of the VRT or which are in breach of the Prague Declaration of 2000. There are indications that the Vlaams Blok representation in the Flemish parliament and its politicians are underrepresented or have reduced access to the political programmes of the VRT, especially the programmes where representatives of the political parties are invited to participate in political debates. Since 2002 the Flemish Parliament has put an end to the obligation of the VRT to offer broadcasting time to political parties represented in the Flemish Parliament. The abolition of the right of access by political parties to broadcasting time on public television was strongly criticized by the Vlaams Blok and was considered as a strategic decision by the other political parties to further “censor” the Vlaams Blok and cut it off from the audience of party political broadcasting programmes.

4) The Vlaams Blok as a political party has no legal personality. Its MP’s are under a privilege of parliamentary immunity.
6) See the Vlaams Blok website: www.vlaamsblok.be
Regardless of this negative media coverage and reduced access to the media in the months and weeks before election day, the Vlaams Blok obtained its best results ever and grew to become the biggest political party in the Flemish Community. 8

The day after the elections, the impressive success of the Vlaams Blok was explained by some politicians, academics and journalists by arguing that some media and especially the VRT had treated the Vlaams Blok in a too friendly way, by giving the opportunity to the candidates of the Vlaams Blok to participate or to be interviewed in some programmes qualified as “infotainment”.

The example of the Vlaams Blok indicates that under-representation in the media and critical coverage in most newspapers, magazines and broadcasting programmes did not determine decisively the performance of a political party on Election Day. One could even assume that some of the legal rules, restrictions and internal guidelines applied by the media with regard to coverage of the Vlaams Blok might have had a perverse effect, putting the Vlaams Blok and its candidates in the (attractive?) role of underdog, the one being “censored” and restricted in their freedom of expression, the one being criticised by the establishment (the government, the majority in parliament, the judiciary and… the media).

It can be argued that the set of legal rules and restrictions applicable to media reporting at election time has been developed to create a “level playing field” in order to give all relevant or democratic political parties equal or proportional access to the media and to guarantee fair and balanced reporting, all in the name of the proper functioning of democracy and the right of the people to be properly informed.

There are indications, however, that not all laws and regulations applicable in the area of political expression, elections and the media do effectively (or proportionately) contribute to those legitimate aims. The aim of this introductory contribution is to open the debate on to the legitimacy and democratic necessity of some of those restrictions and regulations.

According to national and international standards of law with regard to freedom of expression, it is generally recognised and strongly emphasised that there is little scope for restrictions on political speech. In its case law in application of Article 10 of the Convention, the European Court of Human Rights has repeatedly emphasised that “there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest”. 9

However, an immense quantity and complex body of law and regulation precisely focuses on political speech or has indirect or direct effect on the freedom of political expression by politicians, political parties and the media, especially in pre-electoral periods (see annex).

In order to elaborate on the analysis of the relevance, or rather on the necessity in a democratic society of some types of regulation and restrictions with regard to political expression, media and elections, a list of statements is formulated. The statements focus on political advertising, on the control by the media or by postal services (on the distribution) of certain types of political propaganda and on the reporting of pre-election opinion polls (voting intention polls).

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8) The largest political fraction, the CD&V with NV-A being a merger of two political parties.
1. "Political advertising" on television is no advertising from the perspective of the Television Directive 89/552/EG (art. 1, c) and should not be treated as "commercial speech" from the perspective of Article 10 of the European Convention.

2. A total prohibition of paid political advertising on television is considered by the European Court of Human Rights as a legitimate restriction on the freedom of expression necessary in a democratic society. This is contradictory to the fact that in some democratic societies paid political advertising on television is allowed and is not (considered as) endangering democracy.

3. Political advertising on television ought to be restricted, but not banned, because a total ban is a disproportionate restriction on the freedom of expression.

4. If candidates and parties have fair access to airtime for free political advertising during election campaigns, there is less (or no?) need for paid political advertising.

5. A television channel should not refuse the broadcasting of a political ad, arguing that the content is illegal, since the competence to decide upon the illegal character lies with the judiciary (or any other competent authority).

6. Postal services should not be allowed to refuse the distribution of printed material or political advertising they consider as inciting to racism or hatred or infringing other laws, since the competence to decide upon the illegal character of the materials lies with the judiciary.

7. Enforcement by law of a pre-election opinion poll silence is in breach of the freedom of expression as guaranteed by Article 10 of the Convention.

8. Compelling the media to refer to a set of characteristics of an opinion poll when reporting opinion polls is impossible to enforce in practice.

9. From the perspective of Article 10 of the Convention, there cannot be at the same time little scope for restrictions on political speech and a wide margin of appreciation for the member states legitimating interferences with political broadcasting and reporting opinion polls.
ANNEX

Political Expression
- Political system
  - Proportional system, threshold, parliamentary/presidential election
  - Electoral law
  - Party system, number of (represented) political parties
  - Professionalism of political communication
- Media system
  - Public/private media
  - Print, audiovisual, Internet
  - Editorial autonomy and journalistic professionalism
  - Level of pluralism (internal/external)
- Civil society/citizens/consumers/market
- Law & regulation

Relevant Types of Law and Regulation
- Constitutional law
- Press law
- Broadcasting law
- Advertising law
- Criminal law (defamation, insult, privacy)
- Civil law (personality rights, honour and reputation, privacy)
- Law on public opinion polls or voting intention polls
- Law on the public financing of political parties
- Law on political campaigning
  - Financial restrictions (spending ceiling on campaign expenditure)
  - Time restrictions
  - Media restrictions
    (print media, cinema, radio and television, billboards, internet, email)
- Right of reply
- Copyright law
- Non-discrimination law, competition law, anti-concentration law
- Privacy law and data-protection law
- Journalistic ethics
- Forms of self-regulation (media, opinion polls, politics)

Political Advertising
- Print media, newspapers and magazines
- Commercial, regional and local radio's
- Commercial, regional and local television
- Public broadcasting
- Internet
- Telephone and sms
- Billboards
- Cinema
- Self promotion of political parties

Political Broadcasting and Political Advertising on Television (and Radio)
- News and current affairs programmes and impartiality, fair and balanced coverage
  - General rules or specific regulation
  - In statutory law or internal/editorial guidelines
  - Differences between private and public broadcasting
  - Minimum percentage of airtime to news and information?
- Political programmes/debates and equal access
- Televising Parliament
- Free political advertising
  - Allotment
    - equal access or proportionally divided
    - for all parties or only for those already represented in parliament
  - with a minimum for non-represented parties?
  - time/quantity limitations
  - basic studio facilities
- Content restrictions?
- Paid political advertising
  - Total ban or (un)limited
  - (Un)limited campaign expenditure
  - Non-discriminatory: equal opportunities rule
  - Transparent modalities of access and tariffs
  - Lowest price unit
  - Limit of spending per party/candidate (spending ceiling)
  - Minimum length
  - Clear indications (disclaimers)
  - Silence time (day for elections?)
  - Content restrictions?
- Governmental communications
  - Only on public broadcasting?
  - Limitations (period preceding elections)
  - (Not) a right of reply for the opposition
- Negative campaigning (discrediting opponents)
  - In political advertising
  - In the media
  - On the Internet
  - (No) need for regulation?
- Different types
  - Political party messages
  - Individual candidates
  - Individuals who are not candidates supporting party or candidate
  - Advertisement which reflects a social/political debate

Other Formats
- Televoting, voting in studio during a programme
- Infotainment (light interviews, human interest, privacy)
- Television entertainment and games with participation of politicians
  - Prohibition for politicians to participate (in pre-election time)?
- Websites with petitions, referenda, discussion groups
- “Do the voting test”-formats

Reporting Opinion Polls
- Opinion polls
- Voting intention polls
- Exit polls
  - No reporting on exit polls before ballot boxes have closed?
- Silence period?
- Quality control – quality label
- How to report polls: statutory law or self-regulation
  (see also www.econax.org)
- Undesirable (perverse?) effect of reporting horse race polls?

Who Supervises, Controls or Sanctions?
- Jurisdictional control
  - Criminal court
  - Civil court
  - Commercial court
  - Administrative court
  - Summary proceedings/injunctions
- Quasi-jurisdictional control/independent authorities
  (media authorities)
- Self-regulatory bodies
  - Parliament/government/political parties
  - Effective control mechanisms?