

Social Media Councils as Self-Regulatory Bodies

Riku Neuvonen

TAMPERE UNIVERSITY, UNIVERSITY OF HELSINKI, FINLAND

Introduction

In principle, Social Media Councils are self-regulatory bodies; in this context, self-regulation can be defined as regulation of the private sector by nongovernmental entities. Hence, it is the opposite of public regulation, that is, hard regulation (Black 1996). During the past few decades, these modes of regulation have been mixed, with the hybrid regulatory approaches being termed coregulation. Coregulation has been typical for audio-visual media, in which classification systems have been enacted by law or at least endorsed by authorities (Marsden 2011, 157–160). In the EU, innovative regulation has been part of the so-called ‘new approach’ towards legislation, in which industry-led standardisation and regulation are the key components. However, regulating public debate is very different from regulating a cucumber trade (Quintel and Ulrich 2020).

In addition to the privatisation of public regulation, private companies and organisations have developed different models of self-regulation. One incentive driving these ventures is the global nature of the internet, which means a lack of standards and overlapping regulations. In fields related to human rights, especially freedom of speech, demands for private bodies to respect and even enforce human rights have grown. The obligation to actively protect rights and the horizontal effect of human rights are disputable, but treaties such as the United Nations Guiding Principles on Business and Human Rights (UNGPR) have increased the pressure on companies to do something. The Oversight Board has been Meta’s answer to several scandals and regulatory pressures. On the other hand, NGOs such as Article 19 have developed models for Social Media Councils, and there have been several attempts to bring democratic values and processes to the internet.

In the present paper, my hypothesis is that, compared with existing models of self-regulation and coregulation, Social Media Councils can learn from previous experiments but still face challenges that are unique to the environment in which these councils operate. I first demonstrate why there are several self-regulatory and coregulatory bodies in the field of media. My question is why there is a need for self-regulation, here in the form of Social Media Councils. My second question is how other self-regulatory bodies are formed and what legal basis they operate within. The third question relates to what kind of needs the Social Media Councils could address.

Why Self-Regulation?

Self-regulation is often caused by the fear of public regulation. For example, in April 1916, the Swedish newspaper *Ny Dagligt* published a private letter, causing a scandal in that country. The scandal led to calls for greater regulation of the press. As a result, the first modern press council, *Pressens Opinionsnämnd* (PON), was established in Sweden in 1916. However, PON only covered the press and suffered from a lack of funding in its early years (Weibull and Börjesson 1995). In Great Britain in 1949, the first Royal Commission on the Press recommended that a General Council of the Press should be formed to govern the behaviour of print media publishers (Frost 2000). The commission was founded amid public concern that a concentration of ownership was inhibiting free expression, leading to factual inaccuracies and allowing advertisers to influence editorial content. In Finland, the first guidelines for

journalists were drawn up in 1958 by Finnish media associations; this effort did not prevent the press from publishing scandalous news. The public blamed a few scandalous publications for causing the death of famous writers. Hence, the Council of Massa Media was established out of fear of government regulation in 1968, but it did not prevent the criminalisation of the dissemination of information violating personal privacy in 1973 (Neuvonen 2005).

Similar developments have been seen with the game industry. Violence in video games caused moral panic in the USA in the early 1990s. As a result, members of the combined United States Senate Committees on Governmental Affairs and the Judiciary held congressional hearings on the subject. The game industry was given options to organise self-regulation or be the object of public regulation. During these hearings, the industry developed a model of self-regulation, the Entertainment Software Rating Board (ESBR). In *Brown v. Entertainment Merchants Association*, 564 U.S. 768 (2011) the ruling was that law prohibiting the sale or rental of violent video games to minors violated the First Amendment. However, the court stated that the ESBR provides parents with sufficient information about the content of the games, so there is no need for hard regulation (Wuller 2013). The system is similar to other private rating systems in the USA: MPAA/MPA (Motion Picture Association), which is controlled by CARA (Classification and Rating Administration); the RIAA (Recording Industry Association of America) record rating system; and television companies' TV Parental Guidelines.

In Europe, long-running negotiations led to the establishment of Pan European Game Information (PEGI) (Marsden 2011). Before this, games had been regulated and even banned based on film regulations and criminal law in different countries. The EU Commission has repeatedly considered PEGI's activities to promote the goals of human rights, especially a safe environment for children. The classification system has been strongly involved in the recommendations of projects promoting safer internet and media literacy. In its resolution, the European Parliament has stated that, in addition to their disadvantages, games also have clear benefits and are part of the current digital operating environment. Parliament urges member states to continue and intensify cooperation for the development of the PEGI system. According to European Parliament, modes of self-regulation should be sought in the gaming industry, thus avoiding the need for EU-level legislation. The Council of Europe, which is behind the European human rights system, in cooperation with the Interactive Software Federation of Europe, has created the principles for considering human rights in online games. Therefore, it can be said that self-regulation has not only been approved by the EU, but also by the CoE.

Social media has caused several uproars and scandals in the late 2010s and 2020s. Consequently, demands for the regulation of social media have grown. Meta's (Facebook and Instagram) answer has been the Oversight Board, while other platform companies have taken different initiatives to make moderation more transparent and even democratic. The incentives for these initiatives are regulatory demands on both sides of the Atlantic. However, in the EU, the Digital Services Act is now nationally implemented, and it has elements of coregulation such as trusted flaggers and dispute settlement mechanisms.

These developments seem to be similar. The abolition of censorship and the rise of the press as an industry caused the need for press ethics and self-regulation as regulation instead of hard regulation. The significance of game industry growth during the 1990s, but games did not fit into the framework of electronic communication regulation. As a result, games were censored (Germany) or self-regulated (Netherlands), or the regulation authorities did not recognise them for a long time (UK, Finland).

In the early 1990s, the internet was seen as an area of freedom and a good business opportunity. The lack of effective regional or global norms and exemptions of liability, that is, "Good Samaritan" principles, led both sides of the Atlantic to enable the free growth of social media. Today, the empires

are striking back, and now, companies and NGOs are looking for self-regulation as a way to fix the biggest problems and avoid harsher regulations. It should be remembered that self-regulation is not always the best answer. In the US, the Production Code (i.e., Hays Code) for movies and Comic Code were self-regulatory systems but implemented harsher censorship than similar activities by public authorities in different countries.

Who Are the Regulators and Who Are the Subjects of Regulation?

It is necessary to be aware of who the regulators are; especially in self-regulation, there is (usually) no standards or authorisation. Self-regulatory bodies claim that they represent the field in question, but this demands critical evaluation. Another essential aspect is the scope of regulation. The Alliance of Independent Press Councils of Europe (AIPCE) has described press (media) council functions as monitoring the codes of ethics/practice and defending freedom of the press. The AIPCE is the most important union for press councils. The World Association of Press Councils (WAPC) describes itself as a defender of free speech, but none of the members of the AIPCE members are members of the WAPC; instead, members include, for example, Turkey, Kenya, Zimbabwe and other councils from countries not known for free media. In this paper, I focus on the AIPCE.

According to the comparative data on media councils collected by the AIPCE, media councils differ from each other. There is no clear blueprint on how to organise media councils and on what basis. The data from the AIPCE cover 32 media councils. First, four councils have been established by a decree, and two are recognised in law. The Danish Press Council is even a public entity, though it is an independent tribunal. Second, membership in press councils varies. Some have accepted individual journalists as members, and others have accepted only organisations, media outlets or both. Six councils also accept other members than those mentioned before. Third, print newspapers and magazines, as well as websites (of media outlets), are within scope in all of them, but 75% also cover television and radio. However, the mandate of most councils has covered all media only in recent decades.

Management of the PEGI system was handed to PEGI s.a., an independent, not-for-profit company with a social purpose established under Belgian law. The Netherlands Institute for the Classification of Audio-Visual Media and the VSC Rating Board (British) administrate the system on behalf of PEGI. In the PEGI council, 35 media authorities from the member states are represented. In some countries, for example, in Finland, PEGI ratings are accepted in law as legal ratings. Therefore, even though the PEGI is an independent company, it exercises public power and is endorsed and acknowledged by the EU and member states.

Meta set up an irrevocable trust, which is a legal entity in Anglo-American law but not so much in continental Europe. The trust created a limited liability company that owns, facilities and hires staff for the Oversight Board (OB). As Lorenzo Gradoni demonstrated, the OB itself is not a legal entity, and the members of the OB are in a contractual relationship with the background organisation (Gradoni 2022). As an interesting detail, the Oversight Board Trust Agreement allows for the accession of other platforms with the consent of Meta, as long as they are US persons and contribute to the funding of OB. The nature of SMCs is important because SMCs need to acquire facilities and potentially hire staff and pay for expert services to at least cover the expenses of the members. This is important because the (legal) form affects how practical matters are organised, such as accounting, transparency, employee rights and liability.

The proposals for SMCs include reviewing individual content moderation decisions made by social media platforms based on international standards on freedom of expression and other fundamental rights

but without creating legal obligations. This is a similar feature in most media councils. The SMCs should be established via a fully inclusive and transparent process that includes broad and inclusive representation, and SMCs must be transparent. There are many demands that SMCs should be inclusive and democratic, which increases the demands for both the nature of background organisation and for day-to-day management.

When compared with media councils, I have earlier demonstrated that one of the key issues is trust between stakeholders (Neuvonen 2022). It is necessary to define and commit stakeholders and to assure that SMCs benefit all parties. This requires that the initiatives for SMCs define stakeholders with care. Article 19 suggests that the SMC should be made up of representatives from social media companies, media, journalists, media regulators, press councils, the advertising industry, civil society organisations and academics. These groups have been included in the Irish SMC. They might leave open questions regarding inclusivity, third parties and the public. For example, in the Finnish Mass Media Council, eight members represent the media and eight the general public (some of them are members of academia). The Finnish Council is respected and operated for more than 50 years. This means that the SMCs must balance between the requirements of adding all stakeholders, inclusivity and democracy in both background organisation and management without compromising efficiency. It is not possible to fulfil all wishes.

The role of the media councils is to supervise media ethics. These ethical guidelines are connected to the ethics of journalism and journalism as a profession. Journalists and media outlets identify with the ideals of journalism and free speech. An individual journalist has the desire to follow the ethical code, and here, journalists are important stakeholders of self-regulation. Five councils are responsible for the distribution processes for press cards for journalists. According to many studies, moderators are outsourced employees and artificial intelligence is used a lot. There is no clear profession to identify with or professional ethos for moderators. The subject of OB is moderation as a whole and single processes and practices, not for a single moderator as such. An individual journalist is committed to their work, but there is a big gap between the moderator who made the decision and the complaint process. In the proposals for SMCs, moderators are never mentioned as stakeholders, which is understandable because moderation is outsourced and AI handles most of the job. Nevertheless, moderators are often ignored when social media practices are discussed. This also makes a difference compared with media councils.

Another issue is the scope. Most of the media councils cover all media (print, radio, television) but how to define social media. The scope of OB covers Facebook and Instagram, and PEGI requires recognition from states. The concept of platforms also covers food delivery companies, Uber and streaming services. Streaming services could also establish chats, for example. What is the status of chats and forums in games? To be effective, the SMC should cover most social media, but the field is very large, from small discussion forums to social media giants. It should also be noted that there might be competing councils. In the UK, the Leveson Report led to a system based on the 2013 Royal Charter on self-regulation of the press (hereinafter the Charter). The Charter created the Press Recognition Panel (PRP) to ensure that regulators of the press and other news publishers would be independent, properly funded and able to protect the public. The first regulator recognised by the PRP was the Independent Monitor for the Press (IMPRESS). However, none of the large national publishers were members of IMPRESS. Instead, most national publications were members of the Independent Press Standards Organisation (IPSO), which the PRB did not recognise. In addition, several prestigious newspapers (e.g., The Guardian, Financial Times) have established their own independent complaint systems.

What Can Added Value SMCs Create?

Social media has benefitted from the ethos of freedom found in the early days of the internet. However, China and Russia have developed mechanisms to monitor and block internet routes. Similarly, the biggest democracy, India, among other countries, uses shutdowns to control network activities. In Europe, the EU's digital package is changing the rules, and many hope that in a similar way to the GDPR, these regulations can create the Brussels Effect, that is, making regional rules de facto global rules. In the USA, Texas and Florida have introduced social media laws. These laws are already contested in courts, and their nature is very political.

Communications rights, digital rights, epistemic rights and digital constitutionalism, among other buzzwords, are attempts from civil society and academia to create principles and normativity on the internet. SMCs have similar backgrounds, but as self-regulatory bodies, SMCs are more than just frameworks. For example, the OB is a sui generis attempt to create some kind of higher body to handle the fundamental issues of single company platforms. The OB has been compared with the US Supreme Court, especially regarding the *Marbury v. Madison* case. The fact it can be compared with the Supreme Court is noteworthy because it is also necessary to note the language used in discussions about SMC.

Using legal metaphors and adding the digital into rights and constitutionalism is tempting. However, in the case of SMCs, this could mean moving from self-regulation to the domain of law. Even though the Danish Press Council is a public entity, it maintains a wall between law and self-regulation. In none of the media councils has the government been involved in the appeal process. Media councils are committed to self-regulation, which is seen as separate from the legal system. Indeed, the self-regulation of media is about ethics.

In addition, because of the AIPCE, only four media councils can sanction the media or journalist for an upheld complaint, and only two councils can order financial consequences for the breach of a journalistic principle. It is also necessary to note what grounds complaints can be made upon; for example, in Finland, complaints are quite open, and anyone can complain. In comparison, in Sweden, the grounds for complaints are more regulated, including the eligibility as a complainer.

The references to *Marbury v. Madison* can be seen as a part of digital constitutionalism. Digital constitutionalism can be divided into two sects: the internet's own (techno-utopian) legal system or the growing importance of existing constitutional systems on the internet. The proposals for SMCs highlight the importance of human rights, especially UN human rights. This means that SMCs can be seen as human rights interpreters. The OB refers to the UNGP and the International Covenant on Civil and Political Rights (ICCPR). Here, the UNGP requires companies to follow and respect human rights, especially regarding the ICCPR. However, this does not constitute a horizontal effect of human rights. Therefore, using legal metaphors and the language of law, SMCs are considered more quasi-courts than self-regulatory bodies. There are many nonlegal and private human rights actors, so what can new SMCs bring in? Or should SMCs have guidelines of their own?

There are several trends that have been occurring. First, the internet can be seen as a system of its own, and since Barlow's declaration, many have thought that the internet community itself could achieve sovereignty. Second, states and supranational entities are controlling the internet more intensively. Third, traditional media councils are increasingly engaged with social media, and media regulation is increasingly affecting media councils. Where is there room for SMCs? Should SMCs remain in the private world of self-regulation, or is coregulation a more suitable form?

Finally, there is the question of global versus local. Here, I will make a distinction that is more specific to global, regional (i.e., Europe), local (state) and hyperlocal (community). The PEGI is a regional

European operator and requires recognition from the member states. Media councils are national, and some councils are hyperlocal; for example, in Belgium, there are the Council for Journalism in Flanders and the Council for Ethical Journalism in Wallonia or the Information Council of Catalonia. The Swiss Press Council members represent different language regions. Looking at these examples, we need global, at least regional, rules for local and hyperlocal problems (Azzi 2021). According to Facebook Files, Facebook and Instagram have focused their moderation resources mostly on the US and English-speaking world. This can lead to problems. For example, The Guardian revealed during the COVID-19 pandemic that there has been a lot of misinformation and fake news in Spanish, which has the second most native speakers in the world. How many resources are there for Finnish, Latvian, Basque or Sami speakers is a mystery. How can SMCs strike a balance between global and regional impact and regional and linguistic representativeness? Without representativeness, there is no commitment of users.

Conclusion

In Ireland, SMCs have been interesting experiments both intellectually and in practice. I have compared the proposals and ideals for SMCs with existing self-regulatory and coregulatory bodies. My conclusions are based on the idea that Social Media Councils would be established. SMCs can be different, and there can be several of them.

- 1) The need for SMCs is similar to the pressure to establish media councils and organise the classification of games other than through hard regulation. Both platform companies and civil society are looking for solutions for content-monitoring issues in social media. However, at the same time, the EU and other legislative bodies are tightening the regulation of social media.
- 2) It is important to note the legal nature of the SMC or its background organisation. The Oversight Board does not exist in normal legal standards, but the company and trust operate its day-to-day management and funding. The OB itself operates in a void called global law. As a legal person, the SMC must be established in some state. This will affect how to make contracts, requirements for audits and the status of employees.
- 3) The SMC's credibility requires representativeness. The most effective media councils have representatives from different groups. All stakeholders must be engaged, and the public must be represented. However, how do we account for moderators?
- 4) It is necessary to clearly think of who can make a complaint and on what grounds.
- 5) Should we think that SMCs are courts? The media councils have drawn a clear line between self-regulation and law. The PEGI is a coregulatory body. So which path should SMCs follow? It is very tempting to use legal concepts and metaphors, but then, we are in the domain of law. Instead of legal concepts and human rights, a separate set of norms and concepts could be created for SMCs.

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