BRIEFING NOTE SERIES ON FREEDOM OF EXPRESSION

Print media

Centre for Law and Democracy
International Media Support (IMS)

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"A free press" Albert Camus once said, "can of course, be good or bad, but, mostly certainly without freedom, the press will never be anything but bad". In contrast to the broadcast media, where historically high entry barriers and limited spectrum availability demands a robust regulatory framework to ensure content diversity, a light regulatory touch is the best way to ensure an independent and diverse print media sector.

Licensing and Registration Requirements

Under international law, it is illegitimate to require newspapers, or other publications, to apply for a licence in order to operate. These schemes fail the 'necessity' component of the three-part test. Although licensing schemes will prevent certain potential problems, such as defamatory or obscene speech, the three-part test requires States to create a regulatory framework which is minimally harmful to freedom of expression. Refusing or cancelling a licence, a form of prior censorship, is an extreme interference with that right and far less intrusive means for addressing problematic content are available.

Registration schemes, which only require publishers to provide certain technical information, such as the names of a publication's owner(s), are less intrusive but should still be imposed with caution. It is important that the registering body does not have any discretion to deny or refuse registration. Rather than applying for permission, a registration scheme should work automatically once certain technical information has been provided.

Registration schemes should also not impose substantive conditions on the media, not be excessively onerous and be administered by an independent oversight body. In *Gaweda v. Poland*, the European Court of Human Rights (ECHR) found that refusing to register a publication on the basis that its name was "inconsistent with the real state of affairs" (a requirement in the Polish legislation) was an illegitimate interference with freedom of expression. The one exception to this might be where the proposed name of a publication was already being used by someone else.

Even with these conditions, there is disagreement as to whether or not registration schemes are necessary. As the special international mandates on freedom of expression stated in their 2003 Joint Declaration:

> Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.

Complaints Systems

Although a free and unfettered press is of core importance to a democratic system, there is a legitimate need to promote professionalism in the media and to provide the public with some sort of redress when minimum standards are not met. The pressure surrounding competition for stories and audience share, for example, can promote unprofessional behaviour. The need for a system of redress against unprofessional media behaviour is of particular importance in emerging democracies or post-revolutionary contexts, where the media may be finding its footing after a prolonged period of repressive government. Moving from a system of near-total control to one which is largely free presents serious challenges. Media outlets may lack a proper editorial

structure, or other institutional expertise, to responsibly guide their conduct.

Most systems of redress consist of an oversight body – such as a press council – and a set of minimum standards – such as a code of conduct. In terms of the oversight body, there is significant potential for abuse where the government plays a role in handling complaints against the press. In other words, as in other regulatory contexts, the need for independence is key. Ideally, the print media will come together to create its own, self-regulatory system. In order to avoid being too close or biased towards the press, better practice is for the press council to be composed of members of the media along with members of the public. Practice varies regarding the code, which may be produced exclusively by media experts – for example by editors – or which may be produced in a more broadly consultative fashion.

Another approach is a co-regulatory system, which involves a statutory body in which the media play a significant, though not necessarily dominant, role. For example, the Indonesia Press Council (IPC) is established by law but has its members appointed exclusively by media owners and journalists. As long as these bodies operate independently from government, and are staffed by persons with appropriate expertise in media issues, they are also a legitimate form of regulation. The imposition of purely statutory regulation on the print media, which does not count on the active involvement of media representatives, is problematical from a freedom of expression perspective.

Self-regulatory schemes are voluntary and so lack binding enforcement powers beyond requiring an offending media outlet to print the council's finding of a journalistic breach or to carry a right of reply. Even co-regulatory systems rarely have powers that go beyond this. Nonetheless, the fact that press councils are staffed by media experts and work in dialogue with the media accords them significant moral authority, generating strong professional pressure among the media to operate in line with their standards.

The mandate of press councils varies from country to country. In many countries, in addition to hearing and resolving complaints, these bodies play a positive role in promoting press freedom and professionalism, for example by making recommendations on draft legislation and other rules affecting the media and by producing guidelines on better journalistic practices.

Right of Reply/Correction

The benefits of a right of reply, whereby the claimant has a right to insert a reply in a media outlet in response to a story or report, have been the subject of some debate. Because freedom of expression includes a right not to speak, there is no question that enforcing a right of reply represents an interference. While some see it as a legitimate mechanism that uses a 'more speech' approach to addressing problematical speech and that ensures the public will hear both sides of the story, others see it as an unjustifiable restriction on editorial freedom.

The right of reply is specifically recognised by Article 14 of the American Convention on Human Rights and by the Council of Europe in its Resolution (74)26. The ECHR, in *Kaperzyński v. Poland*, held that a right of reply was justifiable under the European human rights framework, although they ruled that the penal sanctions imposed in that case were overly harsh. In the United States, on the other hand, a mandatory right of reply for the print media has been struck down on the grounds that it is an unconstitutional interference with the First Amendment (see *Miami Herald Publishing Co. v. Tornillo*).

Further guidance on the appropriate application of this right is found in the Council of Europe Resolution (74)26 which recommends that while the right should be recognised, a request for a reply may be refused in the following cases:

i. If the request for publication of the reply is not addressed within a reasonably short time;
ii. If the length of the reply exceeds what is necessary to correct the information containing the allegedly inaccurate facts;

iii. If the reply is not limited to a correction of the challenged facts;
iv. If the reply constitutes a punishable offence;
v. If the reply is considered contrary to a third party's legally protected interests;
vi. If the individual concerned is unable to show the existence of a legitimate interest.

International law has not given much attention to the relationship between a right of reply and a right of correction. However, it is clear that a right of correction represents less of an intrusion into editorial freedom than a right of reply. Therefore, in situations where it can adequately address a problem, such as a direct factual error as opposed to more directed criticism, a right of correction should be the preferred remedy.

FURTHER READING

- Andrew Puddephatt, *The Importance of Self Regulation of the Media in Upholding freedom of expression*, 2011, UNESCO: http://unesdoc.unesco.org/images/0019/001916/191624e.pdf
- ARTICLE 19, *Statement on the Draft Slovak Act on Periodic Press and News Agencies*, 2008: http://www.article19.org/data/files/pdfs/analysis/slovakia-press-leg-st.pdf
- Centre for Law and Democracy and SEAPA, *Myanmar: Guidance for Journalists on Promoting an Empowering Press Law*, 2012: http://www.law-democracy.org/live/myanmar-guidance-on-an-empowering-press-law/