New Code Words For Censorship

Modern Labels for Curbs on the Press

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The World Press Freedom Committee is a coordination group of national and international news media groups. It includes as affiliates 44 journalistic organizations on six continents and is dedicated to:

- News media free of government interference
- A full and free flow of news
- Practical assistance to media needing it

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Second Printing

New Code Words for Censorship

Contents

Introduction

The dawning of a new millennium seemed to offer hope for a blossoming of the democratic seeds that sprouted across the globe late in the 20th Century.

The second printing of this book describing new code words for censorship comes about in part because some key indicators unfortunately point in another direction.

Instead of a freer flow of ideas and information, there is danger that we may see the spread of a pernicious crop of censorship, cloaked in a lexicon of new and recycled code words and phrases. These justifications, used until now primarily in the realm of print and broadcast media, are increasingly invoked in efforts to also restrict Internet news and information.

Certainly overt, familiar ways of silencing the press live on. Messengers continue to be shot: At least three dozen journalists were killed in the line of duty in 2001. And yes, officially sanctioned police and military crackdowns will continue to shut down newspapers and silence broadcasters.

But these crude tools of repression are giving way in a number of places to more subtle and sophisticated weapons.

To understand and to resist the new threats to press freedom, it is necessary to see through the good-sounding language in which they are frequently shrouded and to recognize them for what they are: attempts to justify restrictions.

In this book, 18 distinguished journalists and press freedom advocates examine some of the linguistic disguises being employed to hide efforts at control of information.

Unfortunately, it is just a partial listing of the phrases *au courant* in censoring circles.

The censorship we now face is more difficult than past censorship to identify, more challenging to confront and will originate from some surprising new corners. It already is coming. Not just from heavyhanded dictators, but also from sources supposedly supportive of democracy.

Behind claims that they are safeguarding the commonweal are efforts to control the news that citizens hear, see and read. Their vocabulary of benevolent-sounding hogwash ultimately translates into old-fashioned censorship.

Through clever terminology that obscures the intent to silence criticism or hide officials' actions, the news media have become a scapegoat for a host of society's ills, including pornography and pedophilia, racism, national security breaches, ethnic conflicts and — since the events of Sept. 11, 2001 — terrorism.

Without vigilance and vigorous opposition by press freedom watchdogs, slippery terms such as those discussed in this book could find their way into the regular parlance of government and legislation, and into rules restricting the press.

But it is not just the freedom of news media that is at stake. It is *your* freedom, too.

Marilyn Greene
Executive Director
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Spring 2002

I. Assigning 'Responsibilities' to the Press

Only Free Journalists Can Be Really Responsible

BY MIA DOORNAERT

A "free and responsible press." In the days before the Berlin Wall came down, that was the magic formula to find compromise language in East-West-meetings on press freedom.

The West insisted on freedom, the East on responsibility. The communist countries then went on to justify their lack of press freedom by citing the responsibility of the press and media to noble goals as progress, communal harmony, peace, friendship between nations, etc.

In a softer form, the tendency to regulate the work of the press on behalf of such values as peace, stability and the right to privacy still goes on. There is, of course, nothing wrong with those goals in themselves. The problem is that, in reality, they are almost always coded expressions of political positions.

For instance, in a number of Western European countries the protection of privacy and of the presumption of innocence is high on the political agenda. Politicians of all sides were shocked after seeing TV images and pictures of handcuffed colleagues during the investigation of politico-financial scandals. They said those people were being branded as criminals in the eye of the public while they were still awaiting trial and thus presumed innocent.

So the officials proposed to forbid images of suspects in handcuffs. Immediately, journalists' organisations protested

against what they saw as attempts to preserve the prestige of the high and mighty. “If it is degrading to be shown in handcuffs, then tell the police to stop handcuffing suspects,” the journalists said. “What you want to impose on us is the suppression of facts.”

Suppression of facts is also often recommended, all over the world, to news media in areas of ethnic or communal strife. They are being asked, in the name of peace and harmony, to refrain from reporting acts of violence for fear those reports will inflame the spiral of violence and revenge.

Journalists here are not only required to tamper with the truth. They are not only required to obliterate the fact that the government in place has not been able to stop the violence. They are also being made responsible for the way the public might react to their news stories. Which means the messenger again ends up being blamed for the message. If things go bad, it’s not the fault of the people who did it, it’s the fault of the press and media who reported about it. Sounds familiar?

In many of the newly democratised countries of Central and Eastern Europe, after the first outburst of freedom, people became disappointed with their new newspapers and media. Too often, reporting was poor and sloppy. Stories of doubtful origin spoke of sensational government conspiracies and attacked the new leaders and their families. Personal scores were settled in print. Moreover, through lack of democratic transparency and a really free market, newspapers and media often became the political and economic tools of the new ruling elite.

In that atmosphere, one could hardly go to a seminar on press freedom without hearing calls for regulations which would oblige journalists to write or speak “truth.”

Those proposals were always vigorously opposed by democratic journalists’ organisations. Not because they do not think that news should be truthful. Of course they do. But making the “truth” into a legal obligation gives a body outside the press and media — a government, a parliament, a court — the right and even the duty to decide what the

truth is, and to impose an official truth upon the media. This has nothing to do with press freedom.

Moreover, such an idea gives the false impression that the truth about an ongoing story can be scientifically determined. That is nonsense. In the selection of facts, their presentation and their interpretation, there will always be an element of subjectivity. The necessary corrective is the largest possible confrontation of the presentation of facts and their interpretation, i.e. the largest possible press freedom.

The idea of press freedom does not exist in a vacuum

The many appeals to "responsibility" of journalists in the name of higher values all have one thing in common: they attempt to tell the journalists how to do their jobs and to interfere in editorial content. This is not a progress but regress of press freedom.

Does this mean that journalists claim freedom without responsibility? Certainly not. All freedoms entail responsibilities. Freedom was never meant as the freedom to harm. On the basis of this democratic principle, the press and media accept limits such as the laws on defamation, the protection of minors, etc.

But to whom or what are the journalists responsible? To answer this question, we have to look at what press freedom is about. The idea of press freedom does not exist in a vacuum. It is part and parcel of a conception of human dignity. In this democratic conception, all human beings have a right to think and speak for themselves, to be informed of what their governments do, to make their aspirations and criticism heard. Press freedom is the translation of this principle into practice.

So to whom are journalists responsible in this philosophy of freedom? Certainly not to governments. And not even to the public. Giving the public "what it wants" is rather a hollow motto, for the public cannot want facts it doesn't yet know exist.

The answer is that journalists are ultimately responsible to themselves, to their professional ethic, to the utmost of their ability to discover the truth, to formulate it, to express it, to communicate it.

How can their ability to do this be fostered? Not by regulations which limit their access to and the dissemination of information. But by a number of measures which are mainly the responsibility of the industry: serious professional training; decent working conditions because underpaid and overworked journalists cannot produce quality reporting; editorial independence to protect journalists from undue pressure; constant debate on the professional ethics within the editorial staff and the journalists' professional associations.

It is up to the industry as a whole to send out a clear signal that professional ethics are their responsibility and that they take it seriously.

That is what the journalists are responsible for — to work to the utmost of their ability to bring their audiences news that is freely assembled and fairly presented.

To those who want to impose other responsibilities on them, journalists must respond with a paraphrase of the Duke of Wellington: "Let's publish and be damned."

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II. Imposing Code of Ethics for Journalists

Less Innocent Than They Might Seem

BY CLAUDE MOISY

In today's world of political correctness, only a few shameless dictators dare maintain in their arsenal an openly repressive press law.

That does not mean, unfortunately, that all the other autocrats of the planet are now reconciled with the virtue of free expression and the inevitability of a free press. They no longer hesitate to claim that in their country, the press is free. But they add in the same breath, or in the same law, that the press must also be "responsible" and "accountable."

One of the most soothing ways they use to empty freedom of the press of its meaning is to have a "code of ethics" dictated by a "national press council." It is a recipe which has been cheerfully adopted in the last ten or fifteen years by scores of regimes said to be "in transition," but which have not yet given up the old habit of controlling the press.

The relevancy of codes of conduct for the harmonious functioning of the media in society has been assiduously debated for years in countless seminars and conferences. I attended more than my share of them. The principal argument heard in favor of such codes is that they are the best way to consolidate freedom of the press by ensuring the responsibility and accountability of the media.

This always sounded rather hollow to me. I have been a practitioner of news collection and distribution for more than forty years in all sorts of countries without ever having to refer to a code of conduct. Even when I started in journalism in France, my home country, I was not made aware of the existence of one.

On the other hand, I had been taught at school that all the freedom enjoyed for my own well-being had a limit, which was the freedom and the well-being of others. And I knew that my country was equipped with a master-book called the Civil Code that essentially struck a balance, by means of laws, between the conflicting liberties and interests of the citizens.

Another master-book, the Penal Code, warned us what price was to be paid by those who infringe on the law and cause damage to others. It later appeared to me that this "rule of law" of my country was based on largely universal values.

So, I am always somewhat incredulous when I hear or read that without a specific code of ethics the press, in a free society, would be accountable to no one. In a free society where the rules of law prevails, private and independent media are doubly accountable: first to the law that can strike at them; second to the public that can desert them.

In any well run news organization, it is the responsibility of the editors and heads of services to constantly make sure that their staff members do not, through carelessness or partiality, exceed the limits of fair and balanced reporting. Obviously, some news organizations are keen on taking more risks than others, but that's their problem and they occasionally pay the price.

State media do not feel the need for a code of conduct. They ARE the code

The paradox is that the only media in the world that are accountable to no one are the state media in the numerous countries that still regard information as a function of the

political power. These state media do not feel the need for a code of conduct. They ARE the code. It is often when, through the gradual process of liberalization, private and independent media challenge the power of the state media, that busybodies start fretting for a code of ethics promulgated and enforced by a national press council.

Let's make clear that codes of ethics or of conduct and press councils are not necessarily bad *per se.* Quite a few countries with old democratic traditions, such as Great Britain and the Scandinavian countries, have had such institutions for a long time without suffering, as a result, any significant restriction to their well established press freedom. But their codes and their councils, even if their merit is still arguable, are usually strictly professional affairs.

This is, unfortunately, not the case of most of the new generation of codes of ethics produced under the aegis of an organisation called the World Association of Press Councils. Unsurprisingly, its founding charter, the Kuala Lumpur Declaration of 1988, defines its objective as "ensuring the freedom, the responsibility and the accountability of the press."

Obviously, freedom is not, by itself, worthy enough of the care of the Press Councils of such countries as Turkey, Egypt, India, Nigeria, Tanzania or Bangladesh that are among the active members of the World Association.

While all these Councils claim in their charter to be "autonomous and independent of government," it is easily apparent that most of their officers are civil servants or public service journalists more or less directly picked by some political or administrative authority. It is also obvious that most of them are fully financed by their government. In fact, when one takes a look at the codes produced by these press councils, it is almost impossible to tell what part is professional, what part is official.

Not that it makes much difference, anyway. Because whether it is self-regulation or imposed regulation, it is still regulation, and therefore restriction. And my credo has long been that whatever the dangers of press freedom, they were less than the dangers of restrictions to press freedom.

In quasi-Chinese fashion the Kuala Lumpur declaration states that the way the national press council of each country is constituted "will necessarily reflect such factors as its legal traditions…culture and civilization." These are generally code-words to mean that it is all right if, in a traditionally minded country, the Ruler knows best what's good for the people.

It also states grandly in its preamble that "freedom of the press is neither a proprietary right of the publishers nor a privilege of the journalists."

Journalists are best press freedom fighters

But who will better fight for it than the publishers and the journalists?

The guidelines issued by the Association of Press Councils for the formulation of a code of conduct for the media are replete with vague platitudes such as honesty, fairness, objectivity, decency, and respect for privacy. They extol truthfulness as the hallmark of good information, without granting that truth is a very relative commodity.

They also warn against promoting discrimination, hatred, instability, communality and other imprecise notions that lend themselves to arbitrariness in repression. But they never attempt to explain how journalists are to defend these virtues of good journalism against the all too common pressures or occasional threats of a government intent on muting dissenting voices or suppressing embarrassing information.

At a time when donor countries try, too timidly, to make their aid conditional on progress in the respect of civil rights, receiving countries said to be "in transition" toward more democracy are sometimes wary of enacting laws that are clearly in contradiction with fundamental human rights. In the area of press freedom, persistent autocrats have come to regard press councils and codes of conduct as an unobjectionable alternative.

The problem is that in most cases it is not really an alternative. The list is long of countries claiming to be

democratic that still enforce repressive press laws. They do that by maintaining in the books catch-all infractions such as “insult” to a vast array of high and low office holders, spreading “false” news, endangering social stability, demoralising various institutions. And all these offenses, impossible to prove or disprove, are still sanctioned with jail sentences in many countries.

If codes of ethics and press councils are not everywhere an alternative to repressive laws, they are useful as a complement. The fact that, besides the court of law, a more or less official body is entrusted with the enforcement of a professional code that is not quite a law, is expected to act as a sobering first-stage menace for the excessively daring journalists.

Codes of ethics can generate self-censorship as effectively as repressive laws if they are vague enough to protect the political interests of the rulers as well as the legitimate interests of the citizens. And they are often meant that way.

Another trait of these codes of ethics bothers me as I reflect on the sort of job I have been doing. They often assign to the press idealistic missions that, at first glance, no honest person could object to.

Serving the cause of international peace, of understanding among people, of economic development, of social stability are usually presented as the ultimate objectives of the information process. Journalists are routinely enjoined to refrain from reporting anything that would endanger these noble goals.

World peace is not the journalist’s job

I resent being placed in the unpleasant position of asserting that the peace of the world and the harmonious development of societies are not among my responsibilities as a newsman. They are, or at least they should be, the objectives of politics and politicians. To enlist the press in the same task is another way of preventing it from telling the world like it is. Which is essentially its duty.

To be generous, I will grant one hypothetical merit to the press council-code of ethics system. In theory, it could play an educational role in countries that have lived under despotic regimes for a long time and where a fledgling independent press tends at first to abuse its newly acquired freedom. But unfortunately, it is particularly in such cases that the system of press council and code of ethics is likely to be dominated by political power. Many examples show that under the guise of enhancing freedom of the press, the council and the code, in the hands of political appointees, are really meant to perpetuate submission and timidity in the media.

One could be tempted to disregard the whole issue of code of ethics and press councils as irrelevant. After all, in most countries where they exist, they do not really matter that much. They certainly are no substitute for the daily watchfulness of trained professionals in the newsroom. And they hardly eliminate the recourse to the judicial process against the media. But they nevertheless constitute a real threat to freedom of the press and the free flow of information. They have become one of the vehicles of a veiled attempt to resuscitate the so-called New World Information Order that was given up for dead at UNESCO in the late 80s.

The World Association of Press Councils has indeed been trying for years to push forward the pernicious idea of an international code of ethics that would be enforced by a transnational press complaint body. In spite of its ludicrous implausibility, it has already been the subject of several international conferences. One can understand the enthusiasm with which the prospect of such a punitive machinery would be greeted by the world potentates. The internationalization of press intimidation is for them a comforting thought. But it is harder to comprehend why scores of academics, sociologists and theoreticians of communication would discuss it seriously and sometimes approve of it.

It is to the credit of the British Press Complaints Commission that it has withdrawn from the World Association partly as result of this ill-advised scheme.

Why would anyone in his right sense imagine that anything could be achieved by concocting a set of principles supposed to apply to all media from the United States to China and everything else between these two extremes in press freedom? Why would anyone be gullible enough to believe that press freedom could be served by providing thin-skinned regimes with an international mechanism to vent their complaints against foreign media that dare tell the truth about them?

Whenever I have been exposed to debates of this nature, I have had the feeling of being enmeshed in a utopian rigmarole. But the intentions of the hidden architects of this crazy scheme were all but comic. After all, the international bureaucratic straitjacket that NWICO meant for world media was seriously considered for fifteen years by U.N. agencies.

Apparently, some people have not given up.

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III. Restricting News to Protect 'Privacy'

Louis Brandeis Has a Lot to Answer for

BY JANE E. KIRTLEY

In 1890, an American attorney named Louis D. Brandeis was fed up with what he saw as the excesses of the popular press in Boston, Massachusetts. Gossip columns regaled the *hoi polloi* with insolent and insinuating details about the doings of their socially prominent betters, including the wife of Brandeis's law partner, Samuel D. Warren. The stories weren't outright lies, so the remedy of a libel suit wasn't available. Rant and rave as they might, the Boston Brahmins had no legal recourse available to them.

So Warren and Brandeis did what any enterprising and outraged lawyers would do. They wrote a scholarly article about this appalling situation, which they published in the *Harvard Law Review*.

> The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.

Not only were these stories embarrassing to their news subjects, they degraded the readers as well, Warren and Brandeis clucked.

> Each crop of unseemly gossip, thus harvested, becomes the seed of more, and in direct proportion to its circulation, results in the lowering of moral standards andof morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. . . . When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorance and thoughtless mistake its relative importance.

They concluded that the best solution would be to create a new legal theory, a "right to be left alone," to be recognized at common law.

Brandeis and Warren weren't the only ones who thought that the gutter press was going too far with its new-fangled "mechanical devices" that could record conversations and cameras that produced "instantaneous" pictures. Lawsuits in England had already prevented the exhibition and distribution of copies of photographic portraits without the subject's consent.

France cited '*la vie privee*' in 1868

Nor did the law partners invent the concept of "privacy." They acknowledged that France already had recognized the right to "*la vie privee*" in its 1868 press law.

Nevertheless, U.S. courts were slow to embrace this new "right" and its concomitant theory of liability. Congress did nothing to enact laws addressing the issue, and most legislative action in the states was limited to protecting an individual's right to safeguard his name and image from commercial exploitation.

Yet with one law review article, this pair of Boston lawyers — one of whom would eventually become a Justice

of the Supreme Court of the United States — lit the long fuse on a time bomb that took about 100 years to explode. When it did, the impact was felt around the world.

A variety of international human rights declarations and conventions created after the Second World War recognize that privacy — traditionally defined as a person's private life, home and correspondence — is a fundamental right. This means that the preservation of personal privacy, often subjectively defined, is perceived as essential to functioning within a democratic society. Inevitably, the equally "fundamental" right of the news media to gather and report news and to inform the public collides squarely with this "fundamental" right of privacy.

Diana's death a catalyst for controls

Despite skirmishes between proponents of these seemingly irreconcilable interests, the conflict didn't really come to a head until about 1990. Much of the debate was driven by the same factors that had influenced Warren and Brandeis: brash, sensationalistic media that trafficked in salacious stories about the rich and powerful and utilized sophisticated photographic and recording equipment to capture their subjects in embarrassing and compromising situations. This prompted the British Parliament, for example, to launch fact-finding committees to examine the need for new legislation to criminalize the use of surreptitious surveillance devices in newsgathering, and to create a Press Complaints Commission (PCC) to allow citizens to air their grievances about press misconduct.

But it was not until 1997, following the death of Diana, Princess of Wales, in a car crash in a Paris tunnel while she and her companions were attempting to dodge a pack of *paparazzi,* that public support for new restrictions on reporting about individuals really took off. Using Diana's death as a pretext, the European Parliament scheduled an "emergency" debate on strengthening privacy laws, and its Culture and Media Committee asked the European

Commission to launch a comparative study of existing legislation with the aim of developing an international "code of conduct" for the news media. The PCC declared that British newspapers should stop buying *paparazzi* photographs obtained "illegally or unethically."

In the United States, flurries of bills were introduced in Congress and in several states to invent a new federal crime of "harassment," create buffer zones around famous people and authorize official inquiries into journalistic behavior. In the frenzy to curb media conduct and coverage that some found distasteful, the state of Michigan adopted a law that prohibits photographing corpses in open graves or at disaster scenes, such as underwater shipwrecks, from which it would be difficult to recover the body.

Privacy concerns continue to fuel control efforts

Although much of the initial hysteria about intrusive news coverage died down in relatively short order, more enduring privacy concerns continue to fuel efforts to restrict both newsgathering and reporting. Usually this takes the form of trying to force the press to act in accordance with someone's idea of "responsibility." Unfortunately, in too many cases, "responsibility" translates into quiescence and self-censorship.

In late summer 1999, the Hong Kong Law Reform Commission published its proposal to establish a statutorily-created (but supposedly "independent") Press Council with the mandate of "protecting" citizens from the excesses of the news media. Among other things, the Council would draft a mandatory privacy code, and hear complaints and levy fines against news organizations who violate it.

At about the same time, alleged concerns about protecting the rights of persons held in police custody prompted introduction of a French bill to prohibit photographs of individuals wearing handcuffs. The same bill would also make it a crime to publish images of crime scenes if doing so would "compromise" the dignity of a victim.

And a proposed press law approved by the Senate in the Czech Republic later that year obliges news organizations which accurately report facts that "infringe the privacy of a legal entity" to publish that legal entity's response.

Laudable proposals all, at least to some eyes. After all, who can oppose a statute purporting to uphold the sacred presumption of innocence? Who can object to a law attempting to shield crime victims from public ridicule? Who can disagree with a law demanding that news organizations be "fair"? Who can be against privacy?

The problem with these proposals, as well as all the virtually identical measures contemplated elsewhere, including in the United States, is that they provide individuals, through the instrumentalities and often with the complicity of the government, the power to control the content of news reporting. News subjects are often selectively reclusive and reluctant. They would far prefer to keep intact their preferred public persona, rather than allow a persistent press to shatter a carefully-cultivated illusion. These laws give them the license to do so.

This is troubling enough when it is done by celebrities and other public figures who merely capture the public's curiosity and imagination. It is downright dangerous when it is done by public officials, who may have reasons of their own, only tangentially-related to legitimate privacy, to try to hide the truth from the public.

In addition to legislation designed to directly regulate the conduct and editorial judgments of journalists, the dawn of the computer age has heralded an eruption of efforts to restrict the collection, retention and distribution of "personal" data, by news organizations as well as other businesses, all in the name of protecting privacy.

The European Union's 1995 Data Protection Directive is possibly the most influential and ominous initiative to control the dissemination of news ever conceived. It allows "data subjects" unprecedented rights to exercise dominion over information that uniquely identifies them, including everything from government identification numbers to physical, economic and cultural characteristics such as race, ethnicity, religion, or political affiliation.

Among other things, the Directive requires "processors" of data to notify individuals of how they will use information collected about them, as well as give the subjects the right to approve or veto those uses, gain access to databases containing the information, and demand copies, corrections, or deletions — most or all of which would be irreconcilable with the practice of journalism as we have known it.

It is true that the Directive includes an exemption of sorts for those engaged in data collection for "journalistic purposes." But the exemption is by no means absolute. It applies only to the extent necessary to "reconcile the right to privacy with the rules governing free expression"— whatever those "rules" may be — and of course, only to those who can prove that they are "journalists" entitled to invoke the exemption. One German data commissioner has written that it is "self evident that not everybody can declare himself to be a journalist in order to profit from exemptions from the general data protection legislation."

Beware of 'clean' news

At the heart of the European Directive, the Hong Kong proposal, and the myriad privacy laws and regulations that are cropping up everywhere, is a concept profoundly at odds with a truly free press: that the government is the best entity to protect people's privacy. Modern European history provides countless illustrations of why government restrictions on the dissemination of information in the name of promoting press "responsibility" pose real and significant threats to the commonweal. As Franz-Olivier Giesbert, referring to the French privacy bill, wrote in *Le Figaro,* "Our government is in the process of inventing a new concept: clean news, washed whiter than white. What images of our terrible 20th century could be censored out if we lost the right to look at the world in which we live?"

No one can deny that the traditional news media, as well as the new Internet-based media whose unruly presence is only beginning to be fully felt, can and do publish

revelations that violate individuals' privacy rights. Sometimes these revelations can be extremely hurtful to the subject involved, and it may be appropriate to provide legal remedies to grant them redress in meritorious cases where no public interest is adversely affected.

Privacy is a subjective, elusive concept

The difficulty lies in deciding where the public interest stops and the private interest holds sway. It is wrong for governments to make those determinations by adopting bright-line, inflexible rules that can be misused to curtail legitimate inquiry and revelation.

In the end, privacy is a subjective, and therefore, elusive, concept. Its reflexive invocation creates unlimited opportunities for mischief and for genuine damage to public welfare. Instead of embracing such paternalistic concepts, we must have the courage to tolerate the potential for some "excesses" in order to preserve higher values – preeminent among them, the right of the people to be informed.

The alternative is to allow the government free rein, to "protect" the public from the press.

The only question is: who, then, will protect the public from the government?

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IV. Requiring "Self-regulation" by Journalists

"The law of censorship has a dream," South African writer J.M. Coetze says in his book, Giving Offense, Essays on Censorship. "In this dream, the daily round of identifying and punishing malefactors will wither away; the law and its constraints will be so deeply engraved on the citizenry that individuals will police themselves. Censorship looks forward to the day when writers will censor themselves and the censor himself can retire."

BY KAVI CHONGKITTAVORN

Modern authoritarians are getting smarter. They know that overt censorship can stir up popular opposition and jeopardize coveted membership in international trade organizations. So they get journalists to censor themselves, by reminding them of their "responsibilities" — and of mouldering old laws that are nevertheless still available for application, if desired.

Hong Kong is notorious for holding journalists hostage to such techniques. In Lithuania, "self-regulation" is mandated by an act of Parliament. The Council of Europe has conducted an ongoing series of meetings and seminars aimed at encouraging media restraint. In recent such sessions, phrases like "regulated self-regulation" and "co-regulation" (rules enforced jointly by journalists and government bodies) have emerged. The Internet has spawned a whole new wave of enthusiasm for self-imposed restrictions, while boards and councils of would-be regulators threaten to institutionalize controls if service providers do not curb material deemed objectionable.

What is important to remember is that self-censorship is still censorship, and it may be more dangerous because it is more difficult to pinpoint.

Thailand has one of the freest media in Asia. But ironically, the country still maintains at least 27 laws restricting and regulating the freedom of expression and press freedom. Although most of them remain benign under the current situation, they are still effective as far as the media community is concerned.

Journalists know that, should their reporting anger officials, these laws can be dusted off and used. Their very existence implies a strong message to the news media: Regulate yourselves, or we will regulate you.

The new constitution, promulgated in 1997, rules that any law which obstructs freedom of expression and individual rights is unconstitutional. Even though more than two years have elapsed, old laws that are clearly in violation have not yet been repealed.

During charter-drafting deliberations, conservative lawmakers sought to restrict media freedom on grounds that the media was too free and unaccountable. In July 1997, 25 editors and publishers and 10 media organizations decided to form the National Press Council of Thailand, a self-regulatory body, to preempt the government's effort.

Reports on the monarchy, religion or court are taboo

As a country with a constitutional monarch, the media community knows that any report on the monarchy, religion or on court procedures is considered taboo. For instance, the local press did not report or review the book, *Revolutionary King*, written by William Stevenson about HM King Bhumibol of Thailand.

There is an understanding among the press and journalists that this topic must not be reported. In the past, report and criticism on religion was also regulated. But with scandals inside temples and other malfeasance in the Sangha Council, which oversees the Buddhist monks, the media has become more assertive in reporting religious affairs.

There are four major justifications that the authorities have commonly used to impose restrictions on the press.

First and foremost is to "protect the security of the state," and there are plenty of laws that come under this category. In this case, the most important aspect is related to any writing that seems harmful to the Royal Institution; that is, anything touching upon the private lives of the King, the queen, members of the royal families or the regent.

As Thailand's democracy has burgeoned and strengthened, a once-draconian law, the Anti-Communist Act of 1952, has yet to be annulled. The law, which has claimed many innocent lives and victims, gives power to authorities to arrest any person who is suspected of being a communist or of working as an accomplice with communist suspects. For instance, a journalist can be jailed if he or she meets or contacts a communist insider during office hours, as this is interpreted to mean that the journalist knows in advance the whereabouts of the suspect and fails to inform the authorities.

Additional laws, such as National Intelligence Act of 1985 and the Martial Law Act of 1914 with its several amendments, are still in force. Under the Martial Law Act, for instance, military officials can immediately take control of the printing press to ban all criticisms and writings that the newspapers are levying against the government.

This law goes against the new constitution, which stipulates that no authority has the power to close down printers, radio and TV stations as a means to limit freedom of expression.

Another law, the so-called Administration during Crisis Law of 1953, allows military officials in each locality to declare a martial law as they deem necessary. They can also ban any new publications and they can censor letters or documents.

A second type of legislation used to restrict the press includes laws supposedly aimed at protecting family rights and privacy of families.

For example, the National Statistics Law of 1965 prevents any disclosure of specific statistical information

about an individual. Another, the Sangha Council Law of 1992, stipulated that no contempt or inflammatory comments could be loaded against the Sangha Council. Criminal laws dealing with trespassing or inciting the public also can limit the press freedom.

Authorities can limit media freedom to prevent 'moral decay'

Thirdly, authorities can limit media freedom for the sake of law and order and to prevent "moral decay" in society.

Several laws dealing with sexual deviancy, proliferation of obscene material or pornography and youth-related court procedure prohibit the press from naming persons involved in court cases or under investigation. Media representatives are not allowed in court to report or take photos.

Finally, authorities can claim they need to limit freedom of expression for the sake of safeguarding public health.

The Promotion and Preservation of Environment of 1992 prohibits any publication of news that is not accurate in relation to environmental conditions. The Tobacco-related Control Law of 1992 also prevents any advertising on radio and TV that is deemed detrimental to the public. The Drug Law of 1977 does not allow uncensored advertising at any time.

The Cosmetic Law of 1994 prohibits untruth. And the government still has available special laws and regulations which can be used in an ad hoc matter, and which can infringe on the media freedom. The most famous law is the anti-Press law of 1941, which is unconstitutional. This law gives the authorities the power to ban any publication and importation of foreign publications, including the power to halt distribution within the country.

Numerous government orders serve as guidelines for government officials to follow in disseminating information to the press or the public at large. Only officials at the director-general level can give press conference or interviews. The practice, in reality, automatically prevents

junior officials from divulging any information. If they do not follow and can be proved they do not obey, they can be fired.

Beyond all these zig-zag laws, the media also regulates its own professionals. There are times when newspapers will not name victims or publish any news that is detrimental to the Royal Institute or the Sangha Council.

Even with the new constitution, which covers extensively the promotion and protection of press and individual rights, the executive branch and the Council of Ministers continue to proceed at a snail's pace to repeal all unconstitutional laws. In the past two years, authorities from various governmental organizations dealing with the media had met and drawn up new provisions that takes into consideration new constitutional elements. But it would take a strong political will to move the process further.

Special laws, which are being enacted intermittently, can also restrict and regulate the freedom of expression and press liberty. For example, the notorious Anti-press law of 1959 which gives the authority to the media official to shut down newspapers, is supposed to be repealed as soon as possible. But the process drags on due to political wrangling. The law is supposed to be replaced by the Press Notification Act, which requires new publications to file information at an independent private unit. For the time being, a direct general of Royal Thai Police can prohibit import and export to the kingdom any material deemed unfitting. Police also have the right to stop any advertising if they consider it offensive to the morals of Thai people.

Government officials continue to cite these laws, whenever it suits them, to harass newspapers or shut them up.

Although most journalists are satisfied with the freedom of expression in Thailand and are for the most part able to perform the watchdog role, except in regard to the Royal Institution, freedom of expression still has a long way to go in Thailand.

The abolition of those old laws in the future can only strengthen press freedom here.

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V. Restricting Data Access and Distribution

Worse than the Disease? Perils of Regulation in the Information Age

BY ROSEMARY RIGHTER

Secrecy brings out the worst in politicians, who will never be cured of the belief that knowing things the public does not know increases their power.

It brings out the pettiness of bureaucrats at all levels. It brings out the worst in the media, too: The more "secret" or "confidential" official documents there are, the more "leaks" of such documents tend to be given an importance that may be out of proportion to their content.

The wider access to information that new technology makes possible ought, therefore, to be thoroughly healthy for society. But that is not the way the powers that be see it.

Research, whether academic or journalistic, that would once have taken months of trawling through cumbersome paper files in different libraries and archives is now, through databanks, available at a dozen or so clicks of a mouse. In response, a mass of new, and often contradictory, legislation is piling onto statute books.

One result is that the first decade of the 21st Century will be as lucrative for lawyers specialising in data protection and intellectual property rights as the final months of the 20th were for that "now you see it, now you don't" menace, the millennium bug.

Instead of accepting that easier flows of information will more powerfully force accountability on power, governments are multiplying novel forms of regulation —

required, naturally, to "protect" the public. The fact that individuals do genuinely need some protection against commercial dissemination of personal information about them, often without their knowledge, strengthens the regulator's hand.

The problem, however, is that data protection laws could also disable the media. The British law started out doing just that. Although it exempted such areas as criminal investigations, taxation and national security, no one in the British government had given thought to the unintended consequences for press freedom. They were particularly resistant to giving way because privacy is a popular cause; it required a persistent campaign to make them see sense.

European Union insists on intrusive regulation

In these new areas of regulation, the European Union is a pioneer whose influence already extends well beyond its frontiers. There are two reasons advanced for its activism.

The first, a concern for compatible data protection in the single EU market, has given rise both to a somewhat parochial view of the continent-spanning character of computerised communication, coupled with a lack of alertness to the damage that over-elaborate data protection could inflict on the EU's global competitiveness.

The second derives from the inbuilt conflicts between privacy and freedom of expression in the 1950 European Convention on Human Rights; the argument is that a "balance" between these rights must be struck.

Together, these two factors provide the EU and its member states with pretexts for insisting that more intrusive regulation is in the citizen's interest.

The Human Rights Convention, which predates the EU, was incorporated into EU law in the Treaty on European Union signed at Maastricht in 1991. Its Article 8 states that, subject to specified limitations, "Everyone has the right to respect for his private and family life, his home and his correspondence." But Article 10 recognises — subject to

many more restrictions, such as “disorder” and “health or morals,” on its exercise than figure in the Universal Declaration of Human Rights — the right to exchange “information and ideas without interference by public authority and regardless of frontiers.”

In Britain, a Labour government elected in 1997 on a platform that included a strong commitment to freedom of information has strewn new legal mines across what was already a battlefield, where tough laws on defamation, confidentiality, trespass and official secrets present stiff obstacles to free reporting.

The first of Labour’s additions, the Act incorporating the European Convention into British law, came close to imposing a privacy law by the back door. It was only after a hard public battle in the press and the House of Lords that the bill was amended to state explicitly that when respect for private life and freedom of expression clashed, courts must have particular regard for the public interest in freedom of the press. That removed the risk of prior injunctions citing Article 8.

But victory was won at a heavy price. Under the law as amended, courts are to take into account not only the public interest in publication, but whether a newspaper has acted fairly, reasonably and — crucially — within the terms of the Code of Practice laid down by Britain’s Press Complaints Commission.

A giant step toward statutory regulation

What this last bit of innocent-sounding wording does is to lay the newspaper industry’s entirely voluntary code, drawn up by a mixed committee of editors and law members, open to judicial interpretation — a giant step towards statutory regulation.

The PCC-monitored system of self-regulation has been a successful exception to the general truth that press codes are never genuinely voluntary. Precisely because the PCC operates in a non-legal framework, it has been highly effective in giving members of the public cheap, swift and

informal means of redress against inaccuracies or invasions of privacy.

The new law effects a sea change that could weaken a conciliation mechanism which, because it costs next to nothing, favours "little people;" the rich can always sue. The bottom line is that judges will be the final arbiters of what is in the public interest.

Worse was to follow, as a result of the European Union's 1995 directive on data protection, which all EU governments were required to implement by October 1998.

Britain already had a data protection law dating back to 1984; but to implement the EU directive, in 1997 a new, much tougher, law was drafted requiring government and all other data users to obtain an individual's "unambiguous" consent to hold or use paper or computer records on them. Any "natural person" about whom data was collected would have the right to see it and to correct, block its disclosure or have it destroyed. And there was a total ban on collecting such "special categories" of information as political or religious beliefs, ethnic origins or sex life without a person's "explicit consent."

News organisations might at this point just as well have shut up shop. Reporters, for example, would have been required to tell people when they were investigating them and obtain their consent to collecting facts about them. The person notified would then have had the right to see what information the newspaper held – thus betraying the confidentiality of sources, including whistle-blowers – and to obtain a legal injunction blocking publication.

The law would not only have made investigative journalism impossible – particularly of those wealthy enough to make full use in the courts of what amounted to a right to prior censorship — but even such uncontroversial activities as compiling obituaries would have fallen foul of the clause banning the storage of information on beliefs or ethnic origin.

Again, after considerable pressure, British ministers got the point. They used Article 9 of the EU directive, which requires states to exempt from some, but not all, of its

provisions data processing carried out solely for journalistic, artistic or literary purposes. This requirement is not, however, absolute; it applies only insofar as it is necessary to reconcile "the right to privacy with the rules governing freedom of expression."

British Home Secretary Jack Straw took the broadest possible interpretation, exempting editors from most of the act's restrictions. They are allowed to refuse access to information, and the right to rectify, block, erase or destroy "inaccurate" data, where it is gathered with "a view to publication," or if compliance would be incompatible with the purposes of journalism. And editors may publish data without consent if it is "reasonably believed" to be in the public interest.

A further exemption allows "unlawful obtaining" of data if "the particular circumstances" made this demonstrably in the public interest. But, again, part of the editorial defence rests on showing that data has been gathered in line with the PCC Code of Practice — a further step toward legal enforcement of the codes. And, since individuals could sue after publication for "distress" caused, the exemptions amount to a right to publish and then to be damned.

Even with these exemptions, the Data Protection Act finally came into force in March 2000 in a welter of confusion about what could or could not be released to the press by police, hospitals or other bodies. Theoretically, a hospital could fall foul of the law by putting out a bulletin on the condition of a patient in a coma.

UK's Freedom of Information Act a contradiction in terms

The third main plank of new British legislation, the long-promised Freedom of Information Bill published in November 1999, has so many exemptions and precautionary clauses that it is almost a contradiction in terms.

Ministers will have power to withhold or disclose information relating to the formulation of government policy. There is, for example, no right to information about

accidents, malpractice or workplace injuries where there is a possibility of criminal proceedings, even if none is actually contemplated.

As one exasperated intellectual property lawyer sums up the British situation: "The Data Protection Act is concerned with the right to privacy, but the Freedom of Information bill says information should not be kept secret and the Human Rights Convention makes almost everything illegal. Nothing fits together."

This is sobering to report in a country that is, by European although certainly not by American standards, considered a champion of press freedoms. On data protection — the biggest growth area of regulation — it is open to question whether British-style exemptions will operate elsewhere in Europe. Some countries, such as Finland, have given blanket exemptions to the media, but Italy's law is so Draconian that it has fallen foul even of the bureaucrats in Brussels.

In outright violation of the EU deadline, France and Germany (which already have very tough privacy laws) have not even started on their legislation yet. Outside the EU, Romania's new draft data protection bill, which is closely modelled on the EU directive, has a preamble stating that "freedom of information is acknowledged, warranted and protected." But it goes on to apply the bill's restrictions "equally and without discrimination" to all "involved in the development and use of information and communication technologies."

The purposes of this Romanian law may well be benign; indeed, it explicitly states that "computerisation is viewed as a primary strategic goal, a support for the reform of the Romanian society in its evolution towards an information-based society." But, without exemptions for the press, its impact will not be benign.

The innocent aim of data protection legislation is to restrict the uses to which third parties, from databanks to employers, can put personal data. This is a popular cause everywhere. There is a rising demand for protection against the mounting barrage of junk mail clogging doorsteps, faxes

and e-mail. What Judge Brandeis of the U.S. Supreme Court once called the "right to be left alone," to shut out prying eyes, seems more than ever a condition of civil liberties as computers, both commercial and governmental, record and store data produced by the most mundane everyday transactions, from supermarket purchases to credit card payments.

Europe's remedies threaten press freedom

But Europe's remedies are potentially destructive of press freedom.

The EU's data protection directive is likely to become a template not only in the EU but in countries that hope to join it and in those that trade with it, because the EU prohibits the export of data to countries with less stringent statutory protection. The United States, which favours self-regulation (so far practised by only a minute percentage of U.S. Internet sites), is under pressure to accommodate EU methodology through the provision of "safe havens." Globally, the risk is of restrictions so sweeping that they could stop the new information economy in its tracks — particularly in the EU, whose restrictions on data exports could cut it out of the burgeoning global markets in electronic commerce.

The dilemma about the concern to protect individuals from the data explosion is that it is wholly legitimate, yet may do grave harm to the public right, and need, to know. Even where governments do not deliberately, as they still do in many countries, set out to hobble the press, serious creeping restrictions can happen almost by accident, in the name of the public good. The multimedia age has not made Karl Popper's classic, *The Open Society and its Enemies,* obsolete.

Ideologies that claim a monopoly of "truth," the principal enemies identified by Popper, are certainly harder to impose in the age of fax, e-mail and the Internet. Even the tightest dictatorship faces a trade-off between control of information and the computer-led imperatives of economic

modernisation. North Korea is the last hermetically sealed society — and look at the state of its economy.

Authoritarian regimes have a choice between censorship and development and, where access to data is essential for business success, development is opening up windows to freedom. When newspapers are suppressed, whether in Sani Abacha's Nigeria or in Iran, laptop computers can become mobile newsrooms which file stories straight onto the Internet. Broadcasters whose transmitters are shut down can do the same, with Internet audio programs.

In the Middle East, journalists from several countries are cooperating in a website for uncensored news, by exchanging stories about each other's countries even when they cannot write the truth about their own. And in Asia, the shock of 1997's financial meltdown, when it became clear to what extent government secrecy hid corruption and mismanagement from press and public, leading independent journalists have grouped together in a Southeast Asian Press Alliance to demand proper legal guarantees for greater openness and transparency.

Some governments are responding. Article 51 of Thailand's new constitution, for example, stipulates that the public has the right to access any information that affects their lives. And since a new Information Act was passed in 1977, Thai bureaucrats have been deluged by public demands for wider access to government-held information.

Stability, so long prized by governments and their *apparatchiks* and equated, wrongly, with the control of information, now requires the adroit embrace of change. The spread of data-based technologies may frighten governments stiff.

Expect many more laws to "protect the public" from them. Expect them, too, to be popular. Britain's Data Protection Registrar (who, grimly, is also to be the Commissioner for the Freedom of Information Act) claimed last year that surveys showed that the British public attached more importance to personal privacy than to either employment or freedom of speech.

That trend is discernible wherever that freedom is taken for granted. For the great majority of humankind, new technology is an escape from stifling control, and people will show as much ingenuity in exploiting it as governments do in devising new, innocent-sounding ways of restricting its potential. But the precedents being set in the countries that traditionally hold press freedom in high regard will not make their battles easier.

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VI. Mandating Licensing of Journalists

A License for Journalists is a License to Censor

Venezuela's Congress in recent years has repeatedly sought to restrict journalists. The increasing intimidation of journalists is reflected in Venezuela's mandatory licensing requirements. The 1994 Law for Practicing Journalism demands that a journalist be licensed by the government or face a prison sentence for "illegally practicing the profession." To secure a license the journalist must hold a university degree in journalism or equivalent, and also be a member of the National Society of Journalists and the Social Security Institute of Journalists. An alleged offense against this law may be introduced by a court or "in response to a complaint." That potential for challenging the right to work as a journalist can be a continuing intimidation.

BY LEONARD R. SUSSMAN

Governmental licensing of the press is the old blunderbuss of censoring weapons. Licensing's scattershot empowers officials to apply a wide range of censorious schemes. Today, however, as the accompanying essays describe, sophisticated restrictions have largely replaced licensing's overt crudity.

Licensing has a history almost as long as printing itself. Crude though it is, licensing has a distinct value for censors. It not only stipulates the range of permissible reporting and commentary, but by the threat to de-license it encourages self-censorship — the act of quietly adhering to

the norms of the censor. For the journalist, de-licensing often means loss of livelihood, imprisonment, or worse.

Examine the checkered history of press licensing:

In 1639, the first printer in North America published *The Freeman's Oath* under a license from the Massachusetts Bay Colony. Licensing, or prior censorship, had crossed the Atlantic from the English motherland. The English Governor of Virginia described the colonial attitude: "I thank God we have no free schools or printing; and I hope we shall not have them these hundred years. For learning has brought disobediences and heresy and sects into the world, and printing has divulged them and libels against the government. God keep us from both."

Around 1640, after visiting the aged Galileo, John Milton told Parliament that its restricting the renowned scientist had placed "the glory of Italian wits" in a "servile condition." Milton wrote the landmark *Areopagitica* (1644), the classic plea to free the press from state licensing.

In 1663, the English court censor caught a publisher writing unlicensed ideas. The printer was sentenced to be hanged by the neck, cut down before he was dead, mutilated, disemboweled, and, the ultimate censorship, decapitated.

Exactly 300 years later, in 1963, Malaysia had two press-licensing laws on the books.

In 1976, at UNESCO's first international conference on the news media, "experts" urged countries to license the press so that dissent could be restrained, constructive reporting legislated, and the government's right-of-reply assured.

ID seen as a form of governmental license

In 1981, the indirect application of licensing surfaced when mostly non-Western participants at a UNESCO-sponsored conference probed "the protection of journalists." They proposed that governments first identify who is a journalist. Westerners present regarded the ID as a form of governmental license, and rejected the proposal.

In 1983, Costa Rica, an otherwise democratic country, convicted a U.S. reporter working in Costa Rica of violating the law that required all journalists to be credentialed by a particular local *colegio*. At that moment, thirteen Latin American countries had similar press licensing laws.

In 1986, Singapore revoked the employment pass or license of a Reuters correspondent for alleged "irresponsible reporting," and expelled her.

In 1989, the United States and Canada, as part of the North American Free Trade Agreement (NAFTA), decreed that reporters must have a bachelor's degree and three year's experience to qualify for rapid border entry. The trade pact thus offered a definition by governmental agencies of who is a fit journalist; in effect, a licensing provision. After complaints by the World Press Freedom Committee, Freedom House, and others, the stipulation was dropped.

What is wrong with licensing? The best answer has been given by the Inter-American Court of Human Rights. The court's very determination has a long history, though the impact of that ruling is not yet complete. Today, seven countries in Latin America and others in Africa, Asia and Europe license journalists. What is so wrong with that?

Consult the Inter-American Court:

It recalled that Costa Rica's Supreme Court in 1983 gave a three-month suspended sentence to the U.S. journalist, Stephen B. Schmidt, but he remained a convicted felon. His "crime" was writing for the English-language weekly, *The Taco Times*, without a license from the University of Costa Rica's Colegio. Schmidt had a master's degree in journalism from the Autonomous University of Central America, also in Costa Rica. He was not licensed, however, because the professional association was open only to the graduates of the *colegio*.

The case then came before the Inter-American Commission on Human Rights, an arm of the Organization of American States. The seven members from as many countries heard arguments on October 3, 1984 and voted 5 to 1 in support of the Costa Rican court's ruling. A Costa

Rican had excused himself from participation. The lone dissenter was R. Bruce McColm, the member from the United States and my colleague at Freedom House.

'Not to defend an imperiled right is to forfeit it'

McColm declared that despite the steady advance of democracy in the hemisphere, progress "is still marred in some countries by the un-restrained harassment, intimidation, and control of the media." Where the victory of free expression has been won, he continued, "there are now thinly disguised threats which challenge the preservation of this right." He added, "Not to defend an imperiled right is to forfeit it."

The question before the commission: Was Stephen Schmidt "guilty of the criminal offense of the illegal exercise of the profession of journalism, endangering the public order"? This was a felonious conviction under existing law. Schmidt was a stand-in for all others who might report or edit without governmental permission. What did this mean for all journalists; more important, what did it mean for the entire public's right to know?

To its credit, the government of Costa Rica, after prodding from the Inter American Press Association, agreed to ask the Inter-American Court of Human Rights for its advisory opinion on laws licensing the news media. On November 13, 1975, after hearing from governmental representatives and several press-freedom groups, the court issued its unanimous opinion:

"The compulsory licensing of journalists is incompatible with Article 13 of the American Convention on Human Rights insofar as it denies some persons access to the full use of the news media as a means of expressing themselves or imparting information."

The court elaborated: This convention also implies a "collective right to *receive* any information whatsoever and to have access to the thoughts expressed by others." This right, said the court, "cannot be separated from the right to use whatever medium is deemed appropriate to impart

ideas and to have them reach as wide an audience as possible." The court added, "the expression and dissemination of ideas and information are indivisible concepts...restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely." In other words, press licensing is a restriction not only on the journalist but on society as a whole.

Why license doctors, lawyers, and architects but not journalists? Guido Fernandez, writing in *La Nacion*, October 27, 1979, put it well:

"The lawyer, the doctor, the chemist, or the engineer do not exercise professions which involve a basic human right such as freedom of expression or information…The tasks of informing and expressing opinions are activities so intimately associated with all human beings that any restriction or limitation could endanger (if not destroy) that which is the essence of democracy: the right to dissent."

The court similarly concluded that "reasons of public order that may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalism because [press licensing] would have the effect of permanently depriving those who were not members of the right to make full use of the rights that Article 13 of the Convention grants to each individual. Hence, it would violate the basic principles of a democratic public order."

That was then, November 13, 1975. *Ten years later*, the Constitutional Chamber of Costa Rica's Supreme Court finally ended the 26-year-old dispute. The Chamber deleted the clause in the charter of the Colegio de Periodistas that provided obligatory licensing of journalists.

Costa Rica's licensing law, passed in 1969, was the first in Latin America. Soon, some fourteen countries in the hemisphere licensed journalists. In Africa, Tanzania, Sudan, Zaire, and Cameroon had press licensing on the books. But most other African governments owned or controlled their news media and hired or fired journalists at will. In Asia, Malaysia, Thailand, Indonesia, Singapore and the Philippines had some form of press licensing. Officials of

China and the Soviet Union, of course, were the sole proprietors of their journalism. Today, Egypt, Congo-Brazzaville, Maldives, Senegal, and Uganda have some licensing or government training requirement.

After the Berlin Wall came down, journalism in the former Soviet states entered a more complex phase. Except for Armenia and Azerbaijan, which license journalists, that practice is regarded either as unnecessary because governments own or control their news media; or perhaps licensing is too unsubtle a mechanism for today's newly independent states. Most strive for a market economy which traditionally relaxes press controls. Yet they don't resist penalizing journalists for "insulting" officials or for other subtly defined press "crimes."

Only seven of 21 Latin American countries still license journalists or require *colegio* membership: Honduras, Venezuela, Haiti, Panama, Ecuador, Brazil, and Bolivia. Bolivia still declares that "the practice of journalism is deemed unlawful when done by a person who does not have the degree in national provision." Even then, "a person shall be considered a journalist or graphic reporter only when he shows as evidence, in addition to his degree, his professional identity card and shingle, which shall be given only to persons who have fulfilled the requirements of professional registration."

In 1998, however, Colombia revoked its 1975 regulatory decree which required academic credentialing for journalists. A democratic society prefers to take the risk of receiving "inadequate information" to that of regulating journalists, said the Constitutional Court.

Ecuador retains its licensing law but lax enforcement enables journalists to practice without the degree stipulated by legislation. Honduran broadcast journalists must have certain academic credentials but this, too, is little enforced. In the turmoil that is Haiti today, mandatory control of journalists, though set in law, is virtually overlooked. In Nicaragua in 1994 and 1996, however, bills were introduced in the legislature to make *colegio* membership mandatory for journalists. The jury is still out.

Clearly, overt restricting of journalists by licensing is less prevalent than a decade or two ago. Then as now, however, governments license to control the content of the news and information available to their public. During the grim controversies in the 1970s and 1980s over a "new world information order," proponents of the sophisticated regulation of the press realized that licensing was too crude an instrument. That notion was rejected by leaders of UNESCO who established the MacBride Commission (which voted down licensing) though other press controls or management were discussed.

Crude violations of press freedom such as licensing reveal, however, the objective of those subtle forms of censorship which are increasingly prevalent today.

It took 26 years to end press licensing in democratic Costa Rica. Today, 120 countries are procedural democracies — the most in all history, six times as many as in 1950. Yet, some democratic nations have only a partly free press. Many are considering or already have sophisticated press-control laws.

The history of press licensing reveals where more subtle censors would take us.

John Milton would not be fooled.

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VII. Calling for Laws to 'Protect' Journalists

More likely, officials' efforts are aimed at protecting their own flanks.

BY KATE ADIE

"It's for your own protection." How many times have journalists heard these words?

Weasel words. Uttered by the soldier, as gunfire clatters round the hills — and the army politely bars the way forward. Said by the police officer as the striped tape is unrolled across the road — so the incident is hidden from view. Mentioned suavely by the PR man as he guides you away from the "unfortunate" accident. Murmured by the Ministry Official, as he indicates Dangerous Areas on his map — where his government is involved in a little "cleaning-up operation." Put forward by the clever lawyer who suggests a little compromise in your story to avoid too much offence being given to the powers-that-be.

Solicitous concern for the welfare of the press is rare. When it sidles into view, wearing its meek and caring sheep's coat, the hot breath of wolfish censorship, concealment and control can usually be felt if you go a little closer.

So what's new? Reporters have always taken their chances, and slipped round the cordon. However, we're not completely foolhardy — we know that someone pays the wages, and expects you to stay alive to file the story. Journalists may write about heroic events, but tend to do so successfully from behind the wall, under the haystack, and in the ditch. A healthy whiff of survival can be sensed in the most headstrong press pack. And that sense of

survival is twinned with a sense of independence. What are we, if not individual witnesses? We owe allegiance perhaps to a proprietor, to an editor, to an organisation. They trust us to nail the facts, describe the scene, get the story. No one has elected the press, given an official mandate, or even checked that you have half-decent credentials.

In the free world, journalists belong to a rackety business in which qualifications are not decided by august academic institutions or by civil service rules, by law or government decree, but by those indeterminate standards of experience, reputation and trustworthiness.

Just the sort of situation which irritates the official mind and the government busy-body. Near any modern battlefield, face a military general with a swarm of press, and he'll ask how we intend to organise ourselves.

Most military men are at a loss to understand why the press are called a corps — when clearly we have no defined hierarchy, no nationally-recognised organisations and carry a laughable collection of Press Cards, authorised by obscure municipal administrations. Or, in the case of the British, no official press card whatsoever — a source of infinite pride, equal only to not having any national identity card either.

And we like it that way.

Near any Grand Function, the press lurk and loiter, often penned in by discreet barriers, with a large sign proclaiming Press, should anyone fail to have noticed the mountain of satellite dishes and litter of lap-tops. Press Officers materialise, with armfuls of glossy brochures, shiny badges and bagfuls of useless stickers and knick-knacks which it's assumed the media crave. Anything other than information and straight facts. Come on, Ladies and Gentlemen, now who's on my List, got their Press Pack, signed in earlier? What do you mean, you didn't get Accreditation? Horrors. An Unregistered Hack.

Journalists learn to keep their distance

We don't respond well to organisation. We are not creatures who respond to the lure of an official license. We

spend enough time in the tacky ante-rooms of dubious warlords acquiring useless bits of paper which self-important temporary regimes deem essential to the control of the media. We note the charming governments which scrawl Press all over the visa — just so that their charming police will be able to give you their full attention. And we know the desire of governments, big business and pressure groups to lay on Special Transport Arrangements, a Press Enclosure, and a Nice Lunch, in order to corral our attention, separate us from the public and envelop us with public relations garbage.

We have learned to keep our distance. And yet, and yet.

Those who venture into the area of conflict are becoming more aware than ever that there is increased danger — and increasing scrutiny of the media's role in warfare.

The proliferation of lethal semi-automatic weapons in the last decade of the twentieth century has turned isolated incidents into intense little wars. Some years ago, I went with a young army officer in Pakistan to investigate a village dispute. It had been simmering for at least four generations: a ritualised row over land ownership — a tiny square of scrubland.

Every three or four years, he told me, two families worked themselves up into a self-righteous frenzy, and descended upon the plot of land to yell and scream at each other. Up to now, he added, there'd been a few heads bashed with ancient rifles, and the odd pot-shot taken by a young firebrand with his grandfather's antique Frontier Wars rifle. And a number of grannies arrested for disorderly behaviour. We reached the dusty field, which was stained with dark splodges. Last night, he went on, the row started again. But in the intervening years, foreigners had armed the Afghans over the border in their fight with the Russians — and the guns were now being traded in the local bazaar. Sleek AK47 assault rifles were the most prized. Last night's age-old argument had this time left fourteen dead and twenty-three injured.

All through the nineties, journalists met young men — even children — clutching the very best in weaponry,

regardless of their country's poverty and their own lack of training. The deaths and injuries reported to various press organisations increased in number. Exacerbated by the wondrous advance of technology. For no longer do journalists have to leave the scene of battle to file the story. The advent of the satellite has meant that you can talk to the office from the battlefield. Send the stills picture direct to the printing computer via the phone, send the TV picture via the mobile dish. Call the radio station from the hand-held mobile, while running along in the action. The odds of survival have grown a little shorter.

Should we squeak and run for cover? Of course not

Should we squeak and quail and run for cover?

Of course not. But should we perhaps be looking for some official cover? For there are siren voices which suggest that we'd all be a bit safer, feel more comfortable, in the protective embrace of the Authorities. Why take your chance with the mindless mercenaries in the hills? Why poke about in places where heaven knows what might leap out and get you? Why insist on going alone and unescorted into the back of beyond? Wouldn't it be better, safer, more *responsible*, to get ourselves licensed and *recognised*?

I have listened to these siren voices, from those who strain to codify and regularise the work of journalists; aiming for internationally-accepted rules, to which all should agree, and bend the knee. And once the press accept a book of rules, a code of behaviour and of ethics, then how much more convenient for the authorities to decide who shall be accepted as a Recognised Journalist, a Licensed Practitioner.

The average hack — world-wide — can hear the alarm bells ringing in such a situation. Just scratch the surface of the arguments and debate on international press ethics, and the true dilemmas surface: who decides? shall the law enforce? and how can different cultures harmonise press principles, when the press reflects and represents the culture? But what if it were just an offer of 'protection'?

Come into the fold, just register on this list – and we will put a protective arm around you, proclaim grand-sounding measures enhancing the status of the journalist-as-protected-species? Tell nasty people not to shoot at you. Stop policemen arresting you automatically. Insist you carry our useful bit of paper, which will permit you to travel where we — oops — where you want. Within reason of course, for armies and police and governments are better judges, surely, of where it is safe for you to go…..

No, thank you. It's time for the press to clutch its ragged reputation and wave it proudly. We may be a straggling bunch of unorganised vultures, but we get our job done, we're accountable through our work, and we're not going to stop sniffing under the corporate carpet and nosing through the government rubbish-bin.

License that is granted can also be withdrawn

We will go on horrifying trained soldiers by heading off in the direction of where we think the front line might be, and we will trust to our judgement and our principles that we will achieve honest witness and truth-telling. On the home front, we need to resist the blandishments of an Organised Press Society: licenses given out, registration available, with tidbits and tip-offs, inside information and privileged access on offer. Time to get out with the barge-pole and repel. License that is granted can also be withdrawn. Once black-listed, the journalist becomes Unofficial and therefore has less ability than an ordinary member of the public to search and enquire.

Time to cherish journalistic freedom. It's messy, and has its drawbacks. But it is the basis of decent reporting.

Life may be getting a bit more difficult in the conflict areas, and more seductive in the Public Relations boudoir, but we'll just have to go on protecting ourselves. Relying on readers, listeners and viewers to appreciate what we do, and afford us to help and support when we're in trouble.

By the way, if I were to be presented with the form to fill in for a License for journalism, I would have a teeny problem:

Formal journalist training: none

Journalist qualifications: none

Trade union membership: none

Record: deportation from two countries, arrested in several more, one major public dispute with own government.

Job: Chief News Correspondent of the BBC, largest newsgathering organisation in the world.

(Guess who's not going to get an Official Journalist License?)

Kate Adie is former Chief News Correspondent for the British Broadcasting Corporation.

VIII. Legislating Requirements for 'Truthful' News

The new story of 'true' information

BY DANILO ARBILLA

In these times we face a great paradox which has become one of the biggest threats to press freedom: the attempt to use the citizens' right to information as an instrument for restricting their liberty of expression.

At the academic and theoretical level, its defenders present this as a new right, although reality tells us that it already has been recognized universally for more than a half century.

Nor is the recourse of appealing to the right to information in order to restrict liberty of information, and definitively liberty of expression in all its extremes, such a novel idea. Those who during the decade of the 70s embraced and promoted the idea of the New International Information Order had already based it on the right of the citizens, especially those of the so-called Third World, to news which is more balanced in their favor.

Today we have a new story, although it really is the same one with different additives. The names are different, but it is the same old story: someone wants to decide for the citizens which information they may receive and which they may not receive. Now it is called true or timely or impartial information, or all these at once.

The right to information is defined precisely in all the declarations of universal human rights. In Article 19 of the Universal Declaration of Human Rights and Article 13 of the

American Human Rights Convention, this right as a constituent of freedom of speech, is defined as the right of every citizen to search out, receive and disseminate information.

Nothing more is needed.

This is the greatest affirmation and recognition of that individual liberty, which is considered to be the primary one of all and to safeguard and guarantee the rest. In the right of the citizen to information, there is at the same time recognition of his right and liberty to choose and decide how to be informed. Furthermore, here we are dealing with a liberty which cannot be delegated, which may not be left in the hands of anyone else who is not the owner, which is every citizen.

Why, then, are some adding to it? Nothing is added by speaking of true, or timely, or impartial information. In all respects it is diminished, because there is nothing broader than the plain and simple right to information.

Who determines which news is true?

Who decides or will decide when a piece of information is timely? Or the moment when the citizen should receive certain information? Who will decide if the citizens are prepared or educated enough to have access to certain information? And who will have the power to determine which news items are important to the citizens and which are not?

Furthermore, who is or will be in charge of judging if a news item is impartial?

If the answer to all these questions is not that the only one who has the power and the liberty to decide is the citizen himself or herself, individually, then we must conclude that what is intended by those additions is to restrict the citizen's right.

If that were not the case — if no one would intend to administer or regulate that right of the citizens — then we would not see a need to apply qualifiers to the right of information.

And of all these qualifiers the most dangerous is that of "true." What is meant by this expression "true information"? That all information must be the truth or must contain the truth?

To begin with, this definition implies a prejudice: that the journalists, the media or the owners of the information media are in principle affiliated with lying and deceit, with distortion.

However, that is contradicted by the ethical essence of the profession and by the basic fundamentals of the business itself, which is credibility. The prestige and authority of a journalist or of an information medium depends on their getting as close as possible to the truth in their work, and the functioning and prosperity of the journalistic enterprise also depends on the same thing.

The premise that journalists are liars totally lacks sense, or to put the matter more concretely, to maintain that when they are opposed to so-called true information it is because they do not want to say the truth or that they do not want to be obliged to transmit the truth.

It seems as clear and unnecessary as it does dangerous, to play with this concept of true information. However, this definition is included in the constitutions of several Latin American countries. Perhaps it has been established as an objective because it reflects an expression of the desires of the constitution drafters. In some cases something as broad as the citizens' freedom of expression is confused with consumers' rights or with certain standards which govern the advertising of any consumer product.

The Constitution of Spain, for example, states in Article 20 that "the rights are recognized and protected…" "…d) Of freely sending or receiving true information by any medium of diffusion…"

This means that the citizen is free to receive true information. Does this imply that the citizen must know beforehand what information is true in order to receive it, because his or her liberty is restricted to just that: to receiving true information?

Someone, of course, would have to decide which information is true and which is not, before it would reach the citizens. Is that what is wanted? Even in the best of cases, that disposition is contradictory, confusing and poses nonsense.

But it also is very dangerous, because it has provided inspiration and a basis for recent initiatives which seek to impose the right to true information with the clear aim of restricting that right for the citizens.

The most notorious case was that of the ex-President of Venezuela, Dr. Rafael Caldera, who tried to have the concept of true information approved at the continental level at the VII Ibero-American Summit Meeting of Chiefs of State and of Government which was held on the (Venezuelan) Isla de Margarita in November 1997.

There cannot be any doubts concerning the spirit of this initiative. When Dr. Caldera presented the idea in his message to the Venezuelan Congress in March of that same year he said textually: "We have respected liberty of opinion and of information to the maximum extent, even when in some social communications media, it sometimes deviates from its obligation to give true information to the people." In that brief phrase the idea's author assumes for himself the right of the people to information, and at the same time by noting the "deviations" he also assumes being proprietor of the truth.

The initiative of the former President had the decided support of Cuban President Fidel Castro and Peru's President Alberto Fujimori, but it was rejected by the vast majority of the Ibero-American Chiefs of State. Despite this failure, Dr. Caldera must nevertheless feel pleased because his idea was incorporated by the new Constitution of Venezuela, approved in late 1999, which imposed the right to timely, true and impartial information. President Hugo Chaves, who assumed power while promising to finish with the past, accepted one of the worst ideas and initiatives of that past and of the policies which he said he detested.

It may be seen that the problem is deeper. The question is: Who is the one who knows what the truth is? Who

determines what the truth is? In brief, who is the custodian or who believes himself or herself to be the custodian of the truth?

The essence of democracy presupposes that there are no owners of the truth — there is no Big Brother — and that the way to get at the truth is through debate, by the free confrontation of ideas, by access to the greatest amount of information.

Democracy means there are no owners of the truth

The great danger for liberty and democracy is to believe that our truth is **the** truth, the only truth — and consequently to seek to impose it on everyone else.

That dangerous belief is implicit in the so-called right to true information and it is seen in a grave and dangerous philosophy which sees truth as an excuse for power: Whoever has the truth commands, oppresses in its name and, if necessary, kills.

It is not for nothing that the right to true information is the mask used in the worst dictatorships and in totalitarian countries in order to eliminate liberty of the Press and to castrate the citizens'genuine right to information.

For that right to be exercised effectively, it is only necessary that there be multiple information media, that anyone who wants to may start a newspaper or other type of publication and that the law prevents the electronic media from being in the hands of monopolies or oligopolies. With this, and with the proviso that access to public information not be limited by bureaucrats and those who govern and that they publicize, in this case truthfully indeed, everything they do and that they decide it is their obligation and that they are being paid for it, that is sufficient. Then it is the citizen who decides.

Whoever searches for truth looks for it by all roads and, consequently, everything that happens must be known. If one single view of the facts is permitted, it will always be a partial view. Another view is always a step forward in knowledge.

In the First part of his "Essay on Liberty," John Stuart Mill demonstrates the connection between knowledge, the plurality of sources and liberty. Mill offers an irresistible example: He says that the Catholic Church, when it proposes to canonize someone, names a prosecutor, the famous Devil's Advocate, who is responsible for investigating the defects or possible faults of the person proposed. "An institution," says Mill, "which is fanatic and closed and jealous of its truths needs another view in order to arrive at its truth."

Another John, in this case John Milton, in the *Areopagitica*, his formidable argument before the English Parliament in favor of freedom of printing without licenses, issues a warning of tremendous validity today before those who argue for true information:" …truth and knowledge are not goods which may be monopolized and which are amenable to traffic in certificates, statutes and official guidelines. Let us discard the idea of converting all the knowledge of the country into a standardized article, in order to mark it and license it as if it were our own textiles and woolpacks…".

In information as well as in any human action, no one is fitted better than each person to decide what is best for him or for her; nor, in the same way, may anyone substitute for the citizens in their decisions of what is best for them. It is a matter of adult persons who are capable of delegating their power, of resting their sovereignty in others; for this same reason and with more right, they are equally capable of deciding how to inform themselves.

The citizens' liberty of expression, press freedom and the right to information, along with the right to elect their own government, are non-delegated powers which the people reserves for itself. No one may speak of democracy if they have a self-elected government. It occurs to no one to issue instructions that the citizen should vote in a true, timely and impartial manner.

In the same way no one is empowered to advocate or impose a so-called right to true information. This thesis, in addition to limiting liberty of expression, at the same time

limits the right to elect the government itself, since to do so legitimately one must have all the information, without any kind of control, regulation or qualifiers.

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IX. Restricting New Media

BY L. GORDON CROVITZ

The Internet may be the greatest force for free speech since the printing press or telephone lines. But even the most liberating revolution can carry risks.

In the case of the Internet, with its potential to make everyone a publisher and no one a censor, many governments around the world have sought to gain some control over increasingly free speech.

While these efforts seem unlikely to prevail given the inherent difficulties in regulating such an open medium, there have been a surprising number of successes.

New media, new control efforts

Just as troubling, the emergence of new media has led to new efforts to regulate the media generally, raising the possibility that long-established rights to free speech, including for the news media, could be newly questioned.

By now, we can see at least the initial stages of the impact of the Internet on people's lives. Far from the "New World Information Order," debated within UNESCO several years ago, the effect of new technologies and new telecommunications has been to break down barriers to communication.

With increasing numbers of people even in the most remote parts of the world going online, there is a general trend toward a broadening of access to information. Indeed, the Internet has leveled the flow of information to an extent

that would have been inconceivable even a decade ago. Whether it's simply people using e-mail to communicate with one another or more organized activities such as community chat groups or news sites, the usual complaint about the amount of information available is that it is overwhelming.

Yet even by this stage of the Internet and the development of new media, it's clear that all this freedom has led to concerns that somehow the information genie needs to be put back in the bottle. Indeed, a short review of government efforts to regulate the Internet gives a sense of how people have sought to use new media to convey ideas, information and opinion.

In many cases, governments have tried to block access to certain content on the web:

- China has banned discussion of "state secret information" on the Internet, such as through e-mail, chat groups or news groups. Content and Internet providers must obtain special security clearance before they can operate legally. In 1999, a computer technician was sentenced to two years in jail by a Shanghai court for sharing the e-mail addresses of 30,000 Chinese subscribers with a dissident site.
- Numerous countries, including Iran, Saudi Arabia and Tunisia, have blocked access to web sites based on political or cultural content.
- Australia passed a law that would force Internet service providers in that country to remove objectionable material from Australian sites and to block access to similar sites based overseas. Prohibitions placed on material would be based on existing film and video classifications.
- India's largest Internet service provider, VSNL, blocked access to the Pakistan daily *Dawn*, during the Kashmir crisis in June 1999.

In other cases, governments have sought to monitor or eavesdrop on Internet usage:

- Russian regulations issued in 1998 required Internet service providers to provide the country's security services with complete access to e-mail sent by users.
- A Singapore Internet service provider, Singnet, apologized to its subscribers after scanning their computers with the involvement of the Home Affairs Ministry during a computer virus scare.
- A Sri Lankan government minister admitted that he had read a personal e-mail sent to a leader of the country's opposition party.
- A controversy erupted especially in Europe over a monitoring system known as Echelon, which had been developed by U.S. and allied intelligence agencies, when concern arose that information gleaned from government surveillance was finding its way back to the private sector.

At the same, of course, the larger story is that the Internet—open, global and decentralized—defies control:

- When Radio B92 in Belgrade was shut by Serbian authorities, it put its programming on the Internet through RealAudio, using a Dutch Internet service provider, which was picked up and rebroadcast by Radio Free Europe, Voice of America and Deutche Welle.
- A Chinese-language dissident publication, *Tunnel*, is edited in China but secretly delivered to the U.S. and then e-mailed back to China from an anonymous address.
- Proxy servers designed to block access to web sites can often be defeated by an "anti-censorship proxy" developed for the purpose that has been posted on the web. Mirror sites can also be created to host otherwise blocked material.

While it is perhaps not surprising that certain authoritarian or totalitarian governments have sought to regulate new media—the sole cyber café that has opened in Rangoon, Burma, is not actually permitted to offer access to the Internet—efforts in more liberal countries raise questions about the protection of what had become familiar off-line protections.

A group of large Internet companies, including many Internet service providers, has supported the idea of a global rating system for content, following the example of the film and television industries.

The Internet Content Rating Association seeks to adopt such self-regulatory measures in part out of a desire to keep governments from pursuing more draconian measures.

A slippery slope

While such measures may be justifiable in the case of obscenity or efforts to protect children on-line, this kind of approach can create a very slippery slope.

Consider the language used by proponents to support this kind of approach, which appears to raise questions about content generally, including news content. A Bertelsmann Foundation paper on the topic, for example, illustrates the difficult issues of censorship that such self-regulation can unintentionally raise:

"At the core of the recommendations for an integrated system of self-regulation and end-user autonomy must be an improved architecture for the rating and filtering of Internet content," its position paper supporting such regulation said, "Content providers worldwide must be mobilized to label their content, and filters must be made available to guardians and all users of the Internet to make more effective choices about the content they wish to have enter their homes."

Several news organizations have rejected suggestions that they apply a "news" label to their content in order to bypass software that is intended to censor non-news content. One immediate problem with such a self-rating

system is that it seems likely to lead to disputes about which sites are "news." This could result in some new body charged with deciding what qualifies as "news" and what does not. An "N" rating for news thus may sound benign, but could easily open the door to unintended regulation.

How, then, to think of freedom of speech on the web? One answer is that for all of the Internet's tremendous reach and functionality, there is no reason to think that new media has changed the fundamental truths about the media. Freedom of speech that was worth protecting in print or as delivered by telegraph and underseas cable or by radio and television signals is similarly worth protecting delivered by the latest communications technology, the Internet. A century ago, when the trans-Atlantic cable make instantaneous communications possible halfway across the globe, people thought this too was miraculous and had changed the world. It had, but it did not justify altering the basic rights to free speech, even if that speech could be delivered in radical new ways.

It's well worth seeking to confront attempts to use this latest medium as an opportunity to restrict its message. For all the impact of the Internet, even newer new media will certainly supplant the web, raising anew basic assumptions about the relationship between governments and the free speech of their citizens. The rights that became so accepted in the old media days also serve the new media quite well.

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X. Disguising State Propaganda as 'Public Broadcasting'

A Wolf in Sheep's Clothing

BY HENRIKAS YUSHKIAVITSHUS

State-run broadcasting is a trademark of totalitarian and semi-totalitarian regimes. It is not by accident that in many countries of Eastern and Central Europe and the former Soviet Union there was no term in the national languages to translate with any kind of precision the words "*public broadcasting*."

In October 1992, at a UNESCO seminar on independent and pluralistic media in Almaty, Kazakhstan, I was embarrassed by the seemingly illogical statements of some participants — until I switched my headphone set to the Russian channel.

At once, everything became clear. The Russian interpreters simply did not know how to translate "*public broadcasting*" and were using the term "*state broadcasting*." It was clear that the famous equation between "The State" and "The People" that had been carefully promoted for seventy years was part of the explanation. But it did not help to solve the very concrete problem.

We interrupted the session for an hour to try and find the equivalent of "public broadcasting" in the Russian language.

That unintentional misinterpretation was very revealing. To both the language and the culture, the concept of "public broadcasting" was still very much a stranger.

Much more dangerous is the intentional substitution of public broadcasting by *de facto* state-run or otherwise controlled broadcasting.

There is no mystery: The reality of public broadcasting reflects the structure of society, the degree of democratization and the principles and conditions of the media environment. The situation of broadcasting in Eastern Europe and Russia demonstrates that very clearly.

Madison Avenue model won't work in Minsk

Let us admit, the attempts to apply North American and West European models to the newly born democracies in Russia and in many other ex-communist states have failed. Trying to create mirror images of Western structures in a different cultural setting — to build "Madison Avenues" in Minsk or Almaty — proved futile.

I often quote Jeffrey Sachs, the American former adviser to the Russian Government, who admitted frankly: "*We felt like we were invited to treat a sick person, but when we put him on the operating table and opened him up, we suddenly found that he had an absolutely different anatomy and organs, which we had not studied in our medical institute*."

Different power groups dreaming of their own totalitarian rule did not hesitate to use any means to gain or regain power, be it political lobbying, populist campaigns, nationalistic ideas, Stalinist nostalgia or…market economy.

While ordinary people were still figuring out the practical meaning of *perestroika*, former party *apparatchiks*, well-trained in adapting to the ever-changing "party line" and the evolving political landscape, once again turned their coats and became strongest promoters of the market economy.

It was interesting to see in the ex-communist countries how those who only yesterday were preaching Marxism-Leninism and "calling to order" liberals and technocrats, now were criticizing the same technocrats for slow privatization, while demonstrating how to make a fortune almost overnight.

On the other hand, many true reformists became disillusioned, even in countries where the democratization process was considered successful. Thus, Laimonas Tapinas, Director-General of Lithuanian State Television and Radio Company, resigned five years ago because he could not succeed in transforming the company into a public broadcasting institution.

In his letter of resignation, he wrote: "*Talks with representatives of the leading political parties and parliamentary factions give rise to the sad thought that neither the right nor the left wings are prepared to let the control of the state radio and television slip out of their hands*."

In Russia, after the first euphoric years of perestroika, the press saw its newly acquired independence vanish in the air. Already during the 1996 presidential election campaign, many journalists and media were used as propaganda tools, just as in the old totalitarian times.

Life is more complicated than theory

In theory, public broadcasting is the quintessence of democracy and independence, expressing the views and catering to the needs of the public at large. On the other hand, private, or commercial broadcasting is often perceived as "hired," business-driven and entertainment-oriented.

Life is much more complex than theory, however. The author of these lines is a firm believer in the public broadcasting concept, but he also knows that you cannot make it work by decree, just by changing labels. For example, in Russia, if you compare the so called "Public Russian Television" (ORT) and the "private" NTV company, you will find the latter to be more objective, more professional and more supportive of democratic changes.

This fact is surprising only at the first sight. At a closer look, one begins to understand the trick. The state owns 51% of shares of ORT (formerly the USSR State TV Company), while the other 49% belong to private banks. In fact, the company is controlled by the famous oligarch

Boris Berezovski, who is believed to be very close to the so-called "Family" of former President Boris Yeltsin. One doesn't have to be particularly shrewd to realize that editorial independence in such a company can only exist as a dream.

New democracies are slow to embrace rights

One must admit, that in Russia and other "new democracies" neither the government nor political institutions are prepared to embrace the full meaning of Article 19 of the Universal Declaration of Human Rights, even though it was this very article that had brought them from being "dissidents" into power. The media is strongly perceived as power and renouncing that power almost as a political suicide.

Let us consider the issue from a different perspective. For years, in the West the key word in broadcasting has been "deregulation." Many hurried to equate "deregulation" and "democracy," affirming that deregulation creates a media landscape in which pluralism and diversity are ensured by commercial competition, to the benefit of the general public.

The irony is that deregulation has finally led to strong concentration and to increasing control over both form and content. That is hardly a surprise: the moment one adopts a market economy approach, one must expect market economy trends and phenomena, and concentration is one of them.

So, in fact, public broadcasting today is under threat in both "new" and "old" democracies. In the former, it is often "hijacked," robbed of its true meaning. In the latter, it is being squeezed out by multimedia giants.

Yet, the classical examples of the BBC or NHK still inspire believers in public broadcasting, proving that it is possible to combine good quality, high competitiveness and public interest. The idea of public broadcasting is very much alive. Some say it is utopia. As always, life will be the best judge.

Paradoxically, both political and commercial monopolists use the same pretext to ignore public broadcasting concerns: they say that is not what ordinary people want. But, at least, commercial broadcasting does not pretend to be public, and therefore gives us pleasant surprises when it does provide some educational and cultural content.

One has to agree that the worst case is when under the new "sheep's clothing" of public broadcasting hides the same old "wolf" of tightly controlled and manipulated media ready to "swallow" the unaware "little piggies" of gullible viewers and listeners.

Henrikas Yushkiavitshus was Assistant Director General for Communication at UNESCO from 1990 to 2001. He was for 19 years before that Vice Chairman of the Soviet State Television and Radio Committee. For six years, he directed the Technical Center of the International Television and Radio Organization in Prague. He began his career in Lithuanian TV and radio.

XI. Claiming that Differences in 'Values' Justify News Restrictions

BY OWAIS ASLAM ALI

All governments, and especially those in countries that do not have well established democratic norms and traditions, seem to be wary of a free press.

They present ingenious justifications for controlling the media.

Legitimizing control of the media by authorities was the main purpose of "Development Journalism" of the 1970s and 80s, and this was repackaged in the 1990's under the slogan of cultural "values."

Although the slogans have changed over the years, the stated reasons for most attempts to control the media have remained the same: that the national press should promote stability which is essential for economic development; and that it should not offend national values, religions, and traditions.

The most compelling justification given for placing restrictions on news is that developing countries need stability for economic development and that controversy and confrontation produced by an uncontrolled press is harmful for economic progress.

Authorities in South East Asian countries have proudly asserted that the absence of an uncontrolled and irresponsible press was one of the reasons for their economic prosperity. Those favoring a free press disagreed, and presented the view that the democratic dispensation was the best way for achieving lasting economic progress.

The debate was unfortunate, as it implicitly accepted the primacy of economic prosperity over the fundamental human right of freedom of expression. One of the many example of the use of the economic justification for controlling the media was the arrest of the Pakistani newspaper columnist, Zafaryab Ahmed on June 5, 1999 for anti-state activities.

Authorities claimed that the columnist's campaign against the use of child labour in the carpet industry had resulted in a fall in carpet exports and was thus contrary to the national interest.

Misuse of social values to suppress dissent

One of the positive fallouts of the otherwise tragic Asian economic crisis has been that the debate on the economic "benefits" of a controlled press has subsided.

However, there are still countless examples of the cynical misuse of religious or social values to suppress dissent.

Perhaps the worst example of this occurred after Malaysian Prime Minister Mohamad Mahathir dismissed Anwar Ibrahim as the deputy prime minister on a number of charges including sexual misconduct. Many observers believe the charges were trumped up by Mahathir to discredit and remove a political rival.

Anwar was familiar with such tactics. Not long before his arrest, Anwar made a telling comment about officials' use of the "values" excuse in silencing dissent. Anwar said, "It is altogether shameful, if ingenious, to cite Asian values as an excuse for autocratic practices."

Journalists portrayed as 'unpatriotic'

Authorities also try to justify their repressive actions by presenting victimized journalists as being unpatriotic. One of the many examples of this was the arrest in May 1999 of Najam Sethi, editor of the weekly *Friday Times*, Lahore.

The official reason give for the arrest was the speech he

had delivered in India, which authorities claimed amounted to high treason and sedition. A government spokesman also alleged that Sethi had links with Indian intelligence agents and that he was involved in anti-state activities.

The official charges did not have much credibility, as Sethi had earlier delivered a similar speech to the Pakistan armed forces personnel at the National Defence College. The actual reason for his arrest was his cooperation with the British Broadcasting Corporation (BBC) in producing a documentary dealing with corruption in the business concerns of the then Prime Minister Nawaz Sharif and allegations of money-laundering by his family.

National security is another favorite excuse given for clamping down on the media. For example, two Pakistani media organizations were blocked by India during the confrontation between India and Pakistan in Kargil in Kashmir. On June 2, 1999 the Indian minister for information and broadcasting, Pramod Mahajan, banned the transmission of the state-owned Pakistan Television (PTV) by cable operators, and those watching PTV programs were liable to imprisonment and fine. The state governments were advised to immediately issue orders to the police to take swift action against cable operators that do not comply.

A month later, Pakistan's leading English language daily newspaper, *Dawn*, became the second media organization to be blocked by India. Internet users in India were unable to access the Internet edition of the paper as it was blocked by Videsh Sanchar Nigam Ltd (VSNL), India's sole gateway to the Internet.

There are many examples of how governments have cynically misused our traditions, religion, culture, and values we hold to be dear as justification for suppressing freedom of expression of their people.

Codes and councils viewed with skepticism

Because of the past record of governments, many journalists feel that current attempts in many emerging

democracies to establish press councils and formulate binding codes of ethics on the media may also lead to restrictions on press freedom.

The media in these countries are under considerable pressure from governments and political groups that complain that the press has not used its new-found freedom with responsibility, and accuse it of sensationalism, character assassination and misinformation.

There can be no denying the need for evolving workable ethical and professional standards that would preserve and promote the values press freedom.

But this must be done by the press itself, without pressure or threats from governments.

The media must also be vigilant that the dreaded press laws of the 1950s and 1960s are not reenacted in the garb of such press councils and codes of ethics.

Before setting up mechanisms such as press councils and codes of ethics, it is important to set realistic goals for the media in terms of the time frame, to raise the professional level of journalists through training, and to make efforts to create a political environment conducive for ethical practices to take root in the media.

Democracy can be messy at first

The expectations of most people in emerging democracies were too high and unrealistic. They learned the hard way that democratic temperament is a much slower process than the mere holding of elections. Indeed, in many cases elections brought into power people with the same tyrannical attitude.

They discovered, to their dismay, that initially things became quite a bit more chaotic before they improved. The absence of any negative reaction or feeling of sadness in Pakistan at the removal of the elected government by the military in October 1999, was perhaps the extreme example of a democracy not living up to the expectations of its people.

Ironically, in many countries, the introduction of democracy has created conditions that, in the short run, make it difficult to maintain professional and ethical standards in journalism. The main factors that have had an adverse impact on media's ethical standards in emerging democracies are increased competition, lack of trained manpower and the unsettled political environment.

In authoritarian eras, the media industry was a reliable and profitable business. Competition was limited because licensing regulations restricted the number of newspapers and magazines allowed to function, while government advertising provided the bulk of the revenue for most publications.

However, with the advent of democracy, procedures for starting new publications have been greatly simplified and liberalized. The result has been an explosive growth in the number of publications, and newspapers now find themselves in an intensely competitive environment.

For example, in Indonesia the number of publications jumped from 250 to over 1,000 in a matter of a few months after the collapse of the Soeharto regime in 1988. Major cities in emerging democracies have dozens of daily, weekly and monthly publications.

To deal with this dramatic increase in competition, some publications resorted to sensationalism and partisanship.

Competition spawns sensationalism

It is safe to say than almost every new democracy has witnessed an increase in the number of publications that thrive on graphic and sensational coverage of political turmoil and crime. Although such publications form only a small segment of the press, authorities and political groups use them as an example of how the press was acting irresponsibly.

At first glance, the charge may seem justified. Newspapers are filled with reports of corruption, experiments with democracy going horribly wrong, elections bringing

into power communal, ethnic and religious extremists, and civic amenities crumbling due to poor planning and execution. Readers have become tired of insults and accusations being traded by different groups of equally unethical and unprincipled politicians. Every day, newspapers present their readers with demoralizing details of crime, fatalities and civil disturbances.

But before condemning the independent press we must realize that its obligations to society include acting as its watchdog, reflecting the concerns of the people and creating informed public opinion through objective presentation of facts. Once journalists accept this, they really have no option but to report the truth, no matter how unpalatable it may be. While the media of course should not play up ethnic and religious differences, it has no choice but to faithfully report all views, even those of militant or prejudiced politicians who command substantial public support.

Coverage of society's ills reflects a desire to improve

Except for the small section of the press that thrives on sensational coverage of crime, commotion and crises, newspapers in most Asian countries are neither alarmist nor defeatist. In fact, coverage of the ills of society reflects people's underlying desire to improve things. For example, during long periods of dictatorships and authoritarian rule, the Pakistani press has kept the hope of democracy alive. It has also played a positive role against human rights abuses by exposing cases of extra-judicial killings, rape and torture by law enforcement agencies.

In contrast to the independent press, the state-controlled media present an unrealistically positive and sanitized version of reality. Their coverage is filled with achievements, real and imaginary, of whichever government is in power, sermons of government functionaries and inauguration ceremonies of development projects.

Unpleasant realities that would project the government in a bad light are either downplayed or ignored altogether. Because of the lack of credibility, state-controlled media

have failed to fully utilize the media's potential in raising the people's awareness of serious social, environmental and development problems facing our countries.

Another reason for the inability of state-run media to effectively present their message to the people is that official concepts of national values are often far removed from reality and seem to be a nostalgic yearning for a past that never really existed.

This over-attention to not offending the sensibilities of any segment of society has severely stifled local creativity. Thus, in many countries, the media, especially television, were caught unprepared for the sudden arrival of satellite television and the Internet. These media are now scrambling to make their programs more appealing so they can compete with an array of options available to viewers.

In this age of the information revolution, it is futile to waste our energies trying to control the flow of news and views. The only way to meet the challenge is to free the creative talents of our people so they can compete internationally in a level playing field.

Great harm comes from attempts to suppress the truth

We have been tolerating foreign influences and values for centuries since the days of colonialism. It is time we start becoming more tolerant of the views of our own people. I believe our religions, our traditions and our cultures are strong enough to withstand controversy and criticism.

However, great harm will come to our societies from attempts to suppress the truth. What journalists of emerging democracies need most is the freedom to tell the truth and to freely express their views. The values that emerge as a result of the free expression of views by our journalists will inevitably be our own.

We should, therefore, remain vigilant that discussions of ethics and values in journalism are not hijacked by politicians and government officials and used as a justification for control of media. Journalists, who have been struggling to reduce government involvement in the

media, and not politicians or bureaucrats, must lead the debate on ethics and values in journalism.

There is the need to evolve self-regulating mechanisms that preserve our hard-won freedoms. In many countries efforts are being made to develop workable codes of ethics and conduct that would discourage unethical practices, improve the standard of journalism and reduce chances of government intervention in the affairs of the press.

However, I feel that more important than the codes themselves are the processes of arriving at them. Rather than permitting codes of ethics to be imposed, there should be exhaustive discussions and continuing debate on the ethical dilemmas facing journalists. This is especially true for emerging democracies, where the ethical norms are themselves in a state of flux.

Lack of trained manpower

I believe that the great majority of examples cited as excesses by the media are committed unintentionally by poorly trained journalists.

In the authoritarian eras, when only the government's side of the story could be reported, the skills expected from journalists were relatively simple. In many countries, newspapers filled their pages by publishing press releases issued by government departments

In contrast, journalists in the emerging democracies now have to report and analyze conflicting viewpoints of government and opposition and of public-interest groups. This change requires a much higher level of skills and awareness, which can only be reached with training and retraining of journalists at all levels.

Moreover, the increase in the number of publications has been so dramatic that trained personnel have become sorely inadequate. Established publications have met their growing need for staff by drawing from smaller newspapers and magazines. Not surprisingly, the ratio of experienced journalists to newcomers has been badly disrupted in the

latter, leading to a decline in the standards of journalism in such publications.

The best ways to promote high ethical and professional standards in emerging democracies is to improve the skills of journalists. The first step towards the easing the crisis should be to develop the training skills of working journalists themselves. Programs for training senior journalists as trainers can be started relatively quickly.

In the longer term, publications should be encouraged to start in-house training programs. In many countries, some newspapers and news agencies have traditionally acted as informal training centers for journalists. These organizations need to be strengthened so they can expand and formalize their training activities.

Many universities in developing countries have departments of journalism and mass communication, but these are constrained by a lack of resources and poor coordination with the media. The result is that they have concentrated more on the theoretical aspects of the media rather than on producing journalists.

Press foundations and other training institutes have played an important role by organizing workshops and seminars on skills-development and on raising their awareness of current issues. In view of the increase in the training needs, these organizations should be encouraged to start on going training programs for beginners as well as specialized courses for experienced journalists.

Short-duration training workshops on specific skills, such as subbing, interviewing, news writing and reporting, and seminars on different aspects of the profession can supplement on-the-job training for beginners. Experienced journalists could benefit from advanced training in specialized fields such as parliamentary reporting and coverage of elections. Improvement in the standards of political reporting is essential — with the investigative aspect uppermost — if the media are to play an effective role as watchdogs in new democracies.

Democratization has increased the importance of rural areas where the majority of people in developing countries

live. Political, social and economic activities that were once confined to major cities are now slowly reaching smaller towns and villages.

The growth in the number of publications has led to a parallel rise in the number of rural correspondents. Rural correspondents in many developing countries suffer from a terrible image problem. One of the reasons for unethical and irresponsible behavior of some rural journalists is because most are poorly educated and have had no experience of news organization. In the cities, newcomers can learn from senior colleagues, but in rural areas, correspondents generally work almost in isolation.

There is a great need to train rural journalists in the basic skills of newsgathering and news writing. These journalists must also be introduced to important social and development issues, and to the importance of journalistic ethics. An example of such a program is the Rural Journalists Skills Development Program launched by the Pakistan Press Foundation (PPF) in Pakistan. Besides imparting basic skills to rural journalists, the program has also provided a forum for participants to discuss professional problems and possible solutions.

Chaotic political environment

Unfortunately, it takes time for countries to develop the basic democratic norms such as tolerance for opposing viewpoints. Political, ethnic and religious groups in new democracies have, on many occasions, tried to influence the press through threats, intimidation and violent attacks. Journalists find themselves caught between deeply divided political groups.

Newspapers that publish the claims and accusations of rival political leaders are criticized by the other side for resorting to sensationalism, character-assassination and misinformation. Ironically in many cases, the same political parties have established elaborate disinformation agencies and institutions to discredit opposing parties and to promote their causes.

I feel that ensuring high ethical standards of the press is not just the responsibility of the media but of the entire society, and that actions of political groups play a vital role in determining the ethical standards of the media. This is especially true in emerging democracies where political traditions have not yet taken root.

The mushrooming growth of the media in most emerging democracies may provide opportunities for political groups to gain unhealthy influence in the media through unethical means. Efforts must be made to ensure that political parties and other groups are not a corrupting influence on the media, as is the case in some countries.

The price of democracy is a few bad newspapers

While highest priority must be give to promoting ethical and professional standards of journalism, I believe there is some truth in the saying that the price of democracy is a few bad newspapers.

Initially, emerging democracies have found that they have to contend with not just a few, but rather quite a few bad newspapers. However the experience of many countries shows that as the novelty of sensationalism subsides, so does the importance of such publications. Over time sensational publications become marginalized, if not in circulation then in influence, and they eventually constitute just one relatively unimportant segment of the media.

However, insistence on uniformly "high" ethical and professional standards from all publications may lead to the imposition of unacceptable limits on free expression.

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XII. Banning News as 'Hate Speech'

BY FRANCES D'SOUZA

Suppressing hate speech may be (and often is) a politically expedient way of dealing with dissidence and/or the symptoms of deeper social problems. It's also a way of avoiding dealing with the disease.

Laws enacted to suppress hate speech have, throughout history been used to protect the perpetrators of violence rather than the victims (e.g. Nazi Germany, South African apartheid).

In the opening year of the 21st Century, the politically correct tide is inevitably turning toward the outlawing of offensive speech. The landmark cases of the past such as Skokie,[1] won more than 20 years ago, have once again to be confronted and argued. The fundamental question is this: do laws prohibiting hate speech necessarily lead toward a more gentle and humane society?

The lessons of history suggest that the answer is no.

The American Constitution, with its all-important First Amendment rights, which strongly protects the right to free speech, has established a standard the world over. Even the United Nations' Universal Declaration of Rights and its legal counterpart, the International Covenant on Civil and Political Rights, is less than clear about the right to freedom

[1] Referring to the case brought by the American Civil Liberties Union in 1978 endorsing the right of neo-Nazis to march in Skokie, Illinois.

of expression, including the expression of offensive or "hate speech."[2]

Several cases over the last few decades, especially those fought in North American courts, have helped to define the importance of keeping speech free of legislation and of evaluating the circumstances in which offensive speech is expressed. Essentially, what has emerged is the rule that hate speech, however offensive, cannot and should not be regulated unless it leads directly to violence or criminal action. In practical terms this is usually governed by the context in which the speech occurs: thus, falsely crying fire in a crowded theatre constitutes incitement because it will inevitably cause panic and injury.[3] Crying fire on a street corner cannot be construed as incitement because of the opportunity for those who heed the cry to avoid any danger. The first is an example of prohibited speech, the second is not.

But this is very far from assuming a direct causal relationship between hate speech and violence against an individual or group usually distinguished by race, ethnicity, colour, religious affiliation or nationality. A sequential relationship between two events is not a sufficient demonstration of a causal connection; however, if a causal link between hate speech and a criminal act of violence can be demonstrated (i.e. a "clear and present danger"),[4] this constitutes incitement which is punishable within the jurisdiction of most countries.

Apart from clear incitement, there is legitimate concern that hate speech itself creates an environment wherein violence against specific groups or individuals is more likely; that culture has shifted to the extent that hate has become the norm. And, after all, should we really continue to agonise over precise legal definitions? Regardless of the

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[2] See for example, Article 20 of the International Covenant of Civil and Political Rights which prohibits "advocacy that consititutes incitement."

[3] Quoted by Oliver Wendell Holmes in Schenck v. United States; 249 US 47 (1919)

[4] See reference above

niceties of the law why shouldn't offensive speech which cannot do anyone any good simply be outlawed?

There are at least three crucial reasons why we should continue to examine each case of hate speech with the utmost care:

Offensiveness is far too subjective a concept upon which to build a legal framework; what is offensive to one person may be comedy to another. And should we really allow governments to decide what is and what is not morally offensive?

A case study: Rwanda 1993–1994

A brief record of the role of the media in promoting genocide in Rwanda, 1994[5] demonstrates the dividing line between hate speech and incitement to mass murder. Additionally, depending on how we define hate speech, a proper analysis will determine the legitimate response by the international community, which obliges signatories to the Geneva Convention on Genocide to prevent genocide.

The awful events in Rwanda following the downing of President Habyarimana's plane on 6 April 1994 and the carnage that followed are well known. During a period of approximately three to four months, upwards of 500,000 people were slaughtered in a killing frenzy by both Hutus and Tutsis. The killing had initially been directed toward moderate Hutus[6] and the minority Tutsi by elements in the Hutu transitional government who opposed the terms of the Arusha Peace Accords signed in August 1993. During the genocide the popular and largely state controlled Radio-Television Libre des Milles Collines (RTLM) incited and even directed the genocide.

RTLM was set up in April 1993 and from the start was an innovative, Western-style, local language type of broadcasting station previously unknown in Rwanda. It appealed

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[5] See *Broadcasting Genocide* ARTICLE 19, 1996

[6] It is important to acknowledge that the early victims were moderate Hutu politicians indicating that, to begin with, the war was more about politics that ethnicity.

to the urban youth (from whom the killing militias were recruited) and was widely listened to by the army.

The impact has to be understood: Radio is the pre-eminent medium in most of sub-Saharan Africa, and, in Rwanda particularly, the previous diet was of tightly state-controlled, formal and largely propagandistic announcements. Rwanda was also one of the poorest nations in the world, with high illiteracy. Its citizens were predominantly religious and accustomed to both an oral tradition and to obeying authority. The country was in a state of crisis resulting from, amongst other factors, the release of thousands of soliders following the Peace Accords onto a declining employment market in which world coffee prices had fallen by 50%. The ever-present fear, constantly reinforced by the government, was of invasion by the Rwanda Patriotic Front (RPF) consisting of Tutsis who had fled earlier genocidal wars and now represented a formidable fighting force.

Between 1990–1993, relentless government propaganda spread stories of imminent and murderous Tutsi plans to invade Rwanda and to kill off the Hutus. For example, in a speech referring to the RPF in 1992, the vice president said, "We ourselves will take care of massacring these gangs of thugs…You know it says in the Gospel that the snake comes to bite you and, if you let it stay, you are the one who will perish…." The propaganda was all the more effective, because of complete absence of alternative voices to temper the fear-mongering.

Although nominally a private station, RTLM was in fact financed by those closely associated with, and licensed by, the government. It rapidly gained a huge audience due to its new style of broadcasting, the entertainment value and the use of the local language. The station began to show its real allegiance a few months after it had been launched and on the occasion of the assassination of the first Hutu president democratically elected in neighbouring Burundi.

This event was used to warn of the dangers of the RPF, the futility of the Arusha Peace Accords, and railed against Tutsis in general.

Statements became increasingly inflammatory. For example, one said, “All Rwandan Hutu are asked to contribute. Those who can use a gun, let them cross the border, those who cannot….let them contribute money to buy guns and bullets.”

Another said, “All Rwandans must understand that the Arusha Accords are void.” RTLM began to issue cryptic but ominous warnings. It began to threaten the Prime Minister, who was among the very first to be killed on April 7, 1994.

A remarkable transmission on 3 April 1994, four days before the genocide began, warns of the cataclysmic events to come. “We have agents who bring us information,” it said. “They tell us this: On the 3rd, the 4th and the 5th there will be a little something here in Kigali. And also on the 7th and 8th…you will hear the sound of bullets or grenades explode… But I hope the Rwandan armed forces are on the alert.”

This reference to an RPF invasion was intended to deflect attention from what was actually being planned. The broadcast ended with a clear warning to the president: “The day when the people stand up and no longer want you and when they hate you…I wonder how you will escape.” RTLM was the first to announce, at 9 p.m., the president’s fatal air crash 30 minutes earlier.

In the blood-filled weeks which followed, RTLM not only reached its peak, sometimes broadcasting for 24 hours a day, but it became ever more obviously the mouthpiece of the interim government set up on 8 April. The station’s role became one of assisting the government to carry out the genocide by four main methods: 1) Insisting on the threat posed by the RPF; 2) exhorting and threatening the people to kill as their patriotic duty; 3) identifying individuals or groups to be slaughtered and their whereabouts, for example, where whole villages were hiding in churches; and by 4) acting as a vehicle for government statements.

Examples of broadcasts that played a direct role in the genocide include the following:

“They (RPF troops) kill by extracting …the heart, the liver, the stomach….they eat men.”

"In a final war such as this, there can be no clemency…. we must wage a war without mercy."

The war, stated RTLM, would not be won by the military alone but required the involvement of the people. "Citizens really need to stay at their roadblocks, they must defend themselves."

The awful consequences of not fighting were spelt out by the station: "You kill him. You burn him….if you, Civilian, desert the barricade, what are they going to do if they catch you?"

On many occasions, RTLM directed the militias to specific neighbourhoods: "Urgent! Urgent! Calling the militia members of Muhima! Direct yourselves to the Rugenge area…" RTLM also targeted churches and other places where groups attempted to find refuge. On 7–8 April RTLM repeatedly broadcast that the church in Nyamirambo was full of armed Rwandan Patriotic Army troops. The church was stormed by security forces and about 60 civilians were killed.

The use of the media in the Rwandan genocide is perhaps the most egregious example of murderous propaganda in the post-World War II period.

But, however terrible the circumstances, it is necessary to analyse the distinction between hate speech and incitement to genocide. Unless this can be done, we run the risk of sanctioning the jamming or otherwise incapacitating media outlets by the international community, without proper regard for the fundamental right to free speech. This would be a dangerous precedent.

Fears needed to be confronted, not buried

Many have assumed in the post-Rwandan genocide period that the media was responsible for the crimes against humanity. The question that inevitably follows is, would banning of RTLM even in its first phase of broadcasting have prevented the genocide? The evidence suggests that the answer is no, if only because the genocide was clearly planned several months in advance and was not

caused by the radio station.[7] Once the killing had begun, however it is equally clear that RTLM played a central role and was undoubtedly guilty of incitement to genocide and even helping to organise it.[8]

Propaganda, including hate speech, is only effective under the cloak of censorship. In this sense, the Rwanda case was no different than the Draconian censorship during the Third Reich. The views expressed by RTLM operated within a kind of official silence. The threat of attack was believed because there was no one or no voice of authority to refute it.

The real issue in Rwanda before the genocide was that censorship was strictly imposed by the state. The fear, tensions and conflicts expressed by RTLM needed to be confronted, not buried. Historical evidence, time and again, shows us that ethnic conflict is caused by deliberate manipulation by the authorities, together with an absence of public awareness of policy and practice and the lack of alternative voices.

The focus in the immediate aftermath of the genocide on incitement by RTLM drew attention from the failure to analyse adequately the cause of the genocide. There can be few events other than the Rwandan genocide where there was better or earlier warning of what was to come, and yet the international media and many human rights groups appeared obsessed with the jamming of RTLM, which in the pre-genocide stage would have been difficult to justify under international law.

Furthermore, few seemed willing to hear and act upon the message that RTLM was putting out; namely, that

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[7] The case is analagous to the arguments put forward by those who accuse Salman Rushdie of having *caused* the deaths of Muslims in India and Pakistan following the publication of *The Satanic Verses* in 1988. Books, we argued then and now, do not kill people; the killers are those who whip up fury for religious/ political ends.

[8] The claim of one RTLM journalist after the genocide, "Is a journalist who talks about a problem which really exists…guilty for having said it or rather would he be guilty for not having said it?" is disingenuous in the extreme given the role of the station in the subsequent genocide but it is more difficult to condemn the pre-genocide broadcasts.

preparations for a "final war" were being put in place, including the formation of militias, death squads, arms caches and death lists.[9]

Jamming RTLM pre-April 7 would not have halted these preparations but might have limited the information upon which the international community should have acted. Unlike many tragedies which affect large numbers of people, the Rwandan genocide was clearly sign-posted several months in advance and was even noted by the International Commission of Investigation in March 1993 and again by the U.N. Special Rapporteur in August 1993.

In March 1996, the U.N. Security Council asked member-states to cooperate in the identification and dismantling of radio stations inciting hatred and acts of violence. In April, the U.N. Human Rights Commission passed a resolution against the hate media in Burundi in preference to a stronger resolution targeting the political authors of violence.

These resolutions fail to acknowledge, and therefore to deal with, the underlying problem and at the same time they appear to reinforce an essential falsehood: that genocide is caused by the media. This falsehood relies on a naïve and simplistic interpretation of the available evidence: that the genocide was the expression of primordial bloodlust between Hutus and Tutsis which only needed inflammatory broadcasts to become unspeakable violence. To subscribe to this falsehood is to deny that genocide can be prevented in the future.

The Rwanda case is an extreme one. The RTLM, even in its most virulent statements, was always a tool of government. The population was forced into a false fear of Tutsi invasion by a controlled media.

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[9] As early as January 1994, the U.N. military commander in Rwanda, General Dallaire, cabled New York informing them that his intelligence had revealed a long list of individuals to be murdered in an imminent spell of violence by extremist militias. The U.N. headquarters in New York did nothing.

There are countless examples in history where views and opinions inimical to a prevailing culture have been brutally suppressed in order to eradicate dissent, to "protect" public morals and order — and to further totalitarianism. The only consistent lesson to be learned is that laws, rules or administrative procedures are too often used by governments to restrict dissent.

In South Africa, impeccable laws to ban racial insult were regularly used to punish victims rather than perpetrators; in Germany the criminal libel law which punishes racist speech has, since 1945, been used exclusively on behalf of Jews, whereas before, the German Supreme Court consistently refused to punish anti-Semitic insult or attack.

Yet, we must also remember that the U.S. civil rights movement in the 1950s and 60s in the United States was kept alive by court rulings upholding the rights of protestors to march in the streets, to "sit in" at public buildings and to make speeches highly offensive to the white majority in the South. The black power militants' clearly racist speech against the police and other government officials did lead to reforms.

Freedom of expression, it seems, is best protected by the concept of negative liberty, which means the least possible regulation. The best defence against racist insult, hate speech and offence is more speech, not less. In the words of two brave lawyers arguing the case for free speech in wartorn Sri Lanka, "Sadly in Sri Lanka we have witnessed far too much evidence that censoring hate from public discourse only banishes it to more deadly forums."

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XIII. Advocating a 'Right to Communicate'

BY DANA BULLEN

Like many other phrases in this book, a "right to communicate" means different things to different people.

Millions of words have been spilled on the subject. At least six UNESCO-related meetings on it were held during the "New World Information and Communication Order" era of the 1970s and 1980s. It is a slogan — never formally defined — that embodies each speaker's pet ideas to "improve" communications.

Some proposals, such as those that would subordinate press freedom to other considerations or create a right for governments to have their version of the news carried in media, are dangerous.

So it is important to know just what someone means when they assert we need a "right to communicate."

Those supporting a free press support a "right to communicate" if what is meant by this is the unfettered right granted by Article 19 of the 1948 Universal Declaration of Human Rights. This provides that "Everyone has the right to freedom of opinion and expression…to seek, receive and impart information and ideas through any media and regardless of frontiers."

Some have called this the First Amendment of the world. I don't see how it could be improved upon.

But some supporters of a different kind of "right to communicate" would like to try.

The most definitive effort came at a meeting organized by UNESCO on a "right to communicate" in Bucharest, Romania, in February 1982. Some of the themes developed at this meeting still echo today.

A Plan to Revise Rights Texts

The final report, prepared by the UNESCO Secretariat, said that there was "significant support for the proposition that existing international documents would need rather complete rewriting to reflect the 'right to communicate' as a new core right which is at the center of other rights."

There was revealed an elaborate design to rank "rights" and "freedoms" differently.

"The right (to communicate) itself would be regarded as absolute," the report said, "though the freedoms derived from it would be amenable to limitation in accordance with the norms normally accepted for restricting freedoms in the interests of public order, etc."

The "etc." — I should note — is the language of the report, not any attempt of mine to save words.

A statement attached to the report, on which there was said to be general support, went on to provide that:

A right to communicate would belong to "states" as well as others. Individuals and groups wishing to "use" channels of communication should have "access" to them and "participation" in them. Such access should be available to those "who wish to take part in public affairs." The lists of interests for which such access would be available (education, culture, science and so forth) was broad and long, contained in 13 sections of other, referenced documents. Finally, the statement said that individuals and groups should be able to participate "at all relevant levels and at all stages of communication."

At about the same time, UNESCO was saying in its program-guiding Medium-Term Plan for 1984–89 that a right to communicate was "a fundamental right of the individual and…a collective right, guaranteed to all communities and all nations."

Implications are endless — and disturbing.

Think of the plight of an editor when a group of citizen activists (or a government official) troop into his office or daily news conference, and demand under their "right to communicate" — which then might have the force of law — that a certain story be covered in a certain way.

If all this were just history, only the recollection of a bygone day when such ideas were voiced at organizations that now are quite differently directed, there would be little present urgency.

Troubling Proposals Very Much Alive

But the idea of a "right to communicate" is alive and (moderately) well. Its advocates continue to push for it, meetings are being held and articles continue to be written. It sounds a little better today because memories are short and it again has lapsed into generalities, hiding what could happen if the threatening form of this were to gain hold.

- In 1993, the International Association for Mass Communication Research brought together a group including a number of NWICO veterans in Bratislava, Slovakia, just before the U.N. World Conference on Human Rights in nearby Vienna to issue a "Bratislava Declaration on the Right to Communicate in the Post Cold War Period."

This revived the NWICO code-word label for transforming freedom of speech from an individual human right into a collective group right.

The declaration called for a "review" of Article 19 in light of a "right to communicate," which they said would include the right for people to have "fair and equitable access" to time or space in other people's media. The gathering, echoing the Bucharest meeting a decade earlier, proposed that human rights documents be reviewed (read "altered") so that a "right to communicate (going) beyond freedom of…the press" might emerge.

- In 1996, organizations including the World Association for Christian Communication and an IAMCR spinoff group, the MacBride Round Table, gathered in Amsterdam to push similar things.

A "People's Communication Charter" formulated there includes key aspects of a "right to communicate" in different guise. One familiar idea: "All people have the right to participate in…the structure and policies of media industries."

The idea was to gather 1 million signatures and present the Charter to the United Nations in 1998, the 50th anniversary of the Universal Declaration of Human Rights. The outcome was less grand. Prof. Cees Hamelink, one of the prime movers of the People's Charter, said that it really needed further discussion, that only 10 to 15 percent of the signatures had been gathered and that its reception was uncertain.

- In journal articles as recent as late 1999 and early 2000, Hamelink and others continue to argue for steps to realize "the right to communicate." In Hamelink's view, implementation of "the right to communicate" requires "global governance."

In all this, both supporters of Article 19 and a free press, as well as well-meaning and not-so-well-meaning advocates of a "right to communicate" quote the same text as their starting point.

It is often said that the genesis of a "right to communicate" came in a 1969 article in which the late Jean d'Arcy, widely respected for his views on communications issues, writing of the future of direct broadcast satellites, asserted that everyone should have the right to communicate.

It is sometimes forgotten that he went on to say that "This will come after the monopolies, be they private or public, have had to relinquish control under two-pronged attack from space and ground technologies."

The future that d'Arcy envisioned may, in fact, already have arrived.

The Internet age has empowered everyone to say whatever they choose. That is its genius. And it has done it without (so far) restricting anyone.

There is just one problem.

That's not what many advocates of a restrictive "right to communicate" want — or have ever wanted. What they seem to want, year in and year out, is to determine what news appears. This would be the death of editorial independence — and of a free press.

The slogan sounds just fine. But if you get a hint that codes and controls might be just around the corner, if it seems that dictating content is the real goal, then watch out.

Those who forget their past are condemned to relive it. Those who forget that some kinds of a "right to communicate" are bad news will face trouble again. A "right to communicate" that furthers the promise of Article 19 of the Universal Declaration of Human Rights does no harm — and does much good.

A "right to communicate" that points in other directions is a code word for censorship.

Dana Bullen, former Supreme Court reporter and foreign editor of The Washington Star, *was Executive Director of the World Press Freedom Committee from 1981 to 1996 and continues to serve as WPFC Senior Adviser.*

XIV. Criminalizing Proceedings Against the Press

BY PETER PRESTON

There used to be a playground chant when I was a boy. "Sticks and stones may hurt my bones, but calling cannot hurt me." It was, I've often thought since, the neatest case on offer against the offence of criminal libel.

Calling (or writing) can hurt your pride or your reputation. But that's a matter of words and thus of civil litigation. Words break no bones and crack no heads.

Words are there to be answered by other words: one definition of democracy.

And yet, when brave editors from the Third World and struggling outposts of press freedom gather in conference to compare notes, it is the curse of criminal libel which unites them most easily in anger and frustration. Almost all of them have been sued or threatened with criminal libel. They've faced prison for themselves or their reporters and they've sweated as their newspapers faced closure.

Criminal libel is the first, malign resource of affronted authority — a tool of repression, not a guardian of individual rights.

Why should they put up with it? Why doesn't the democratic West come to their rescue?

It is a very awkward question, for the West, of course, invented criminal libel just as surely as it gradually invented the rule of modern law. But the heart of the question was timing.

Look at Britain, say, from the seventeenth century to today, and you see how the offence came about. There was a Parliament in the beginning, but it was not free — merely a rotten parody designed to keep the ruling classes ruling. It mirrored a press which barely existed outside official government publications like the *London Gazette*.

The seeds of dissent and argument were sown elsewhere in a world of pamphlets copied and passed from hand to hand: and such pamphlets, for authority, were deemed the stuff of sedition.

Our laws in their majesty were required to keep them under control, to imprison them as necessary. How else could an essentially autocratic state defend itself?

Why adjust a useful body of laws?

Thus, as the decades passed, there was libel and its deformed half-brother, criminal libel. And also, of course, there were newspapers — at first the tainted playthings the rich used to attack others; then, with mass suffrage and the coming of railways, more structured bearers of news and opinion.

But why adjust a useful body of law to reflect such change? If individual writers could be cowed into silence or subservience, why let editors off any more lightly?

So the impulse which, long ago, guided such law-making was not in any true sense democratic. English criminal libel reflected an age where a new force and influence in society — the press — had to be contained. It quite explicitly reflected the State's interest in defending itself against unwelcome attack and in protecting the reputation not merely of the current ruling class, but of rulers gone to their graves.

The State could step in and sue to protect its own because the robes of power passed from one generation to the next had to be seamless.

Here is one uncomfortable fact about the law of libel itself: Though the case for its existence in any tolerable society is theoretically sound enough — and democratic

enough — the practice and the weighting of most libel law tends in fact to be a bulwark of privilege.

It is an expensive game (in England an obscenely expensive game, moving ritually to over $1.5 million for any moderately lengthy case) and such litigation, time and again, is only launched by moneyed organisations or individuals who are broadly part of the governing establishment.

That's why the burden of proof remains so onerously rigged against the defendant. That is also why occasional efforts at reforming the system come and go without success. This balance is deliberate. And, since it suits the interests of those who have the power to change it, nothing happens.

At least, though, these ordinary, civil libel laws are used. Why, in so many Western statute books, keep a law — the law of criminal libel — which is not used? Why let it linger on the books when no decent legal expert has a good word to say for it? Here's the rub, the raw affront that makes those Third World editors furious. And the answer is Catch-22.

Few legislatures have the will to act

The law lingers unabolished primarily because it isn't used. No sentient elected government (national or federal) fancies rehearsing its penalties before a modern jury. Public opinion has moved on. The old statute has to be left to moulder in obscurity. But there are very few diligent legislatures around who have the time and energy to clean out their cupboards.

Occasionally — as recently in Nevada — a group of newspapers will get together and press the point, and seek to have an 87-year-old state law on criminal libel declared unconstitutional. Authority doesn't resist. The Nevada attorney-general's office does not contest the case because (yet again) "the law is hardly ever used."

But raise the issue and a federal judge immediately rules that criminal libel impermissibly allows for punishment to

be imposed for the publication of truthful statements protected by the First and Fourteenth Amendments of the United States Constitution. Exactly the same argument crushed a bizarre California attempt to introduce a criminal libel law where none existed.

Politicians shouldn't lock up journalists

These are by no means isolated victories in an isolated courts and legislatures. Criminal libel is no more utilised or better regarded in Western Europe. When push came to shove between the government of Austria and a brave Austrian journalist in the European Court of Human Rights (Lingens v.Austria 1986) the court made it clear that politicians must tolerate a higher level of criticism than individuals in order to assure freedom of political debate.

Politicians, in sum, shouldn't lock up journalists — which is exactly what criminal libel does. And that is why democratic politicians recoil from it. So where's the problem? A dormant, reviled law does not, perhaps, seem much of a threat. But that, of course, depends who's using it. The difficulty is that the very existence of criminal libel sanctions in the West gives an aura of respectability to other politicians in other countries where the boundaries of freedom are far less clearly defined. "What's the harm?" Croatian supporters of the late President Tudjman used to ask as his government produced spanking new criminal libel laws for a fledgling nation and began to unleash them in a bewildering volley of suits against press critics of the regime.

'We're only copying you'

"What's the harm? We're only copying you." It is a dreary, menacing refrain — and one, in particular, that the old colonial powers ought to hear with a shudder of shame. They exported a superficial outline of the rule of law, but they couldn't guarantee any purity or independence to its practical operation once they had packed and gone home.

From Romania to Samoa, from Taiwan to Zambia, in country after country where the traditions of freedom have fragile roots, criminal libel laws don't merely exist; they are used in real moves against a vulnerable press.

Libel itself, remember, is the arch weapon of the already powerful. Lee Kwan Yew turned its deployment into a Singapore art form which caught the imagination of autocrats around the world. You could drive your opponents into the silence of bankruptcy if you went after them hard enough.

But criminal libel is a better gambit yet. It is, by definition, a State device, used only by the State to defend those who claim to speak for the State. And it can put your critics safely away behind bars. The rush to embrace it — for instance, by the tiny new nations which stretch across the belly of Northern Asia in the aftermath of the Soviet Union's disintegration — speaks volumes.

There's no question about what ought to happen next. The cupboards of the West need spring-cleaning on a systematic basis. The last remnants of criminal libel law need to be disposed of in a flurry of righteous indignation. The offence itself has to be identified as a pariah among civilised laws. Countries — like Poland, say — who wish to join the ranks of the European Union, should have the removal of criminal libel set as one of the tests for entry. Membership of the British Commonwealth should depend on the creation of a statute book for the 21st, not the 19th Century.

The law doesn't work in front of independent juries any longer. It repels them. That's one indication of what ordinary citizens feel when they see their presidents and prime ministers trying to have journalists gagged or locked up. And the press itself has the power to discommode the powerful here.

But do the citizens of so many of the countries where criminal libel still flourishes realise how its use automatically categorises their nation — its industry, its business ambitions, its developments prospects in a globe of mass communication — as behind the times and off the pace of change?

They can be told if journalists can find the voice and resolution to tell them loudly enough and often enough. Forget sticks and stones. Calling should not hurt you.

Peter Preston, former editorial director of Britain's Guardian Media Group and past chairman of the International Press Institute, is co-director of The Guardian Foundation, London.

XV. Restricting News Through Insult Laws

BY HORACIO VERBITSKY

Journalists used to be in harm's way everywhere. In 1999, at least 33 colleagues were killed worldwide, one of them in my country, Argentina. In 2000, a court has already convicted a group of police officers and thugs who three years ago handcuffed, beat, murdered and charred the body of photojournalist Jose Luis Cabezas.

These cases brought back memories of the gloomy times when the military dictatorship were in power in 1970's, a time when more than one hundred journalists were jailed, killed and/or disappeared in the line of duty. Two of them became renowned heroes of press freedom throughout the world.

Rodolfo J. Walsh set up a clandestine news agency, in the worst conceivable conditions. He also wrote an "Open Letter from a Writer to the Military Junta," which the Nobel Prize winner Gabriel Garcia Marquez termed as a "masterpiece of universal journalism." After sending it by post, Walsh was killed by a platoon of the Navy while resisting abduction.

Jacobo Timerman was kidnapped and tortured by the Army, and his newspaper "*La Opinion*" was seized by the Junta. In spite of having been acquitted by a military court, he remained three years in custody. Then, he was stripped of his Argentinean citizenship and expelled abroad. His book "Cell Without a Number, Prisoner Without a Name,"

insurmountably depicted the kafkaesque nightmare of the concentration camp which he was carried to.

Anyway, to the extent that the brutality of the dictatorships is no more acceptable, more inconspicuous ways are sought to control the press worldwide.

A culture of fear

Ended in 1983, the Argentinean dictatorship left a long-lasting culture of fear. Since then, a thousand journalists were jailed, threatened, insulted by the higher officials, or beaten by the police or by political thugs.

Former President Carlos Menem called his supporters to beat his critics in the press with sticks, albeit he later claimed he was joking, and drafted half a dozen gag laws, which included jail terms and heavy fines. Fortunately there was a strong reaction in society and Congress did not pass them.

"The judicial system is subject to political influence," reads the chapter on Argentina in the U.S. State Department's Jan. 30, 1998, human rights statement. This was an understatement. His party's majority in Congress allowed the former president to appoint six out of nine justices of the Supreme Court in a single day, among them a former legal partner of Mr. Menem's and the brother-in-law of his onetime intelligence service chief.

Then, a new approach arose to cope with the press, and I became its first target.

In December 1991, I released my book *Robo para la Corona* (Robbery for the Crown), a detailed expose of corruption in the privatization of state-owned companies. The President called me a "journalistic criminal."

In February 1992, his friendly Supreme Court found me guilty of defaming one of its own members. The conviction to one month in prison was based on the crime of *desacato* or disrespect toward a public official. A spokesperson of the government disclosed that its aim was to have me jailed or forced to flee the country. The long battle that ensued might end soon with the repeal of all the insult laws

from the Argentinean Criminal Code and could serve as a model for other countries where this sort of legislation is used to suppress the press.

Argentina is just an example of the taming of the Judiciary and its employ to chill the press as a subtler weapon than raw violence, but in no way it constitutes an isolated case. In many countries of Africa, Asia, Europe and Latin America, this is the rule, not the exception. In some of them, such as Nigeria, the penalties for defaming the president are up to five years in prison and cannot be suspended.

- In Irish law, the onus is on the defendant to prove the published statement true.
- In Peru, editor Enrique Zileri was convicted for calling "Rasputin" the mysterious presidential adviser Vladimiro Montesinos.
- After the sanction of a new Chinese Penal Code, more than a thousand defamation lawsuits have been brought against the media, who were convicted in 80% of them.
- The same thing happens in several republics of the former Soviet European bloc, such as Ukraine, Belarus or Yugoslavia, while Turkey contends with China for the world championship in arresting journalists, invoking different legal provisions.

The wide range of new democracies does not require journalists to be heroes, but to fight firmly and intelligently with the tools the new game offers us, among them the international law.

The international card

I filed a complaint before the Inter-American Commission on Human Rights, an organ of the Organization of American States. I stated that *desacato* had its historical roots in the monarchical system of government. It privileged those in power, rendering them immune to the kind of harsh criticism that is the essence of democracy.

Once the ICHR deemed the complaint admissible, I proposed a friendly settlement, a procedure that is contemplated in the European, American and African Conventions on Human Rights. The International Covenant of Civil and Political Rights has a similar provision named conciliation. The settlement must be acceptable to both parties within the terms of the respective treaties. As established in the European system the Commission surveys the settlement in order to guarantee that its terms "may extend beyond the interest of the particular applicants."

In Europe, more than one hundred cases had already been settled using this procedure, but it never had been successfully used in the Inter-American System before my case. To elude a mandatory ruling from the Inter-American Court, the Argentinean government agreed to the friendly settlement.

Two months after the petition had been filed, Mr. Menem sent Congress a bill proposing the repeal of the *desacato* law. It was passed into law by a unanimous decision of Congress on May 31, 1993.

Therefore, in 1994 an Appellate Court revoked the sentence against me, something that had never ever happened before.

A precedent

The former Secretary of the Inter-American Court of Human Rights, Charles Moyer, wrote that "the Verbitsky case might also be employed in other cases as a precedent to force the repeal or amendment of laws that have proved to be untouchable. The international pressure that springs from the lodging of a complaint to the Commission affords a government the excuse to do something that is politically difficult" and gives it "the opportunity to exploiting through publicity the arrangement to give a positive spin to its human rights record."

This was exactly the outcome.

The Argentine State and I also asked the Commission that in drafting its final report it comment on the compatibility of *desacato* laws in the rest of the State Parties with the American Convention.

This report was released in February 1995 and included a recommendation to thirteen States in the region to repeal or amend their respective contempt laws. At least two of them fulfilled this duty since then: Costa Rica by means of a law and Paraguay through its new Constitution.

But the country that made the most of this situation was Argentina itself, as we will see.

According to the report of the ICHR, public functionaries cannot sue in criminal procedures for libel or slander in cases of freedom of expression. They must be most tolerant before criticism and the only admissible way for them to act in a democratic society is through a civil suit, because freedom of expression is indispensable for the formation of public opinion.

"Freedom of expression is a cornerstone upon which the very existence of a democratic society rests," the report said. "It includes not only the freedom to express thoughts and ideas, but also the right and freedom to seek and receive them." By simultaneously guaranteeing both rights, "the Convention enhances the free interchange of ideas needed for effective public debate within the political arena," stated the Commission.

It mentioned a ruling by the European Court stating that the protection of freedom of expression must extend not only to information or ideas which are favorable, but also to those that "offend, shock or disturb", as it happened in the famous "Lingens" case, from Austria. Only "full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart", added the Commission.

"The use of *desacato* laws to protect the honor of public functionaries acting in their official capacities" unjustifiably grants them a right to protection "that is not available to other members of society. This distinction inverts the fundamental principle in a democratic system that holds the government subject to controls."

"If we consider that public functionaries acting in their official capacity are the government, then it must be the individual and the public's right to criticize and scrutinize the officials' actions and attitudes." A law that targets speech that is considered critical of the public administration "may affect not only those directly silenced, but society as a whole."

A host of lawsuits

According to the Commission, even laws such as libel, slander and defamation, which allow truth as a defense "inevitably inhibit the free flow of ideas and opinions by shifting the burden of proof onto the speaker. This is particularly the case in the political arena where criticism is often based on value judgments, rather than purely fact-based statements. Proving the veracity of these statements may be impossible, since value judgments are not susceptible of proof."

Thus, it concluded, "a rule compelling the critic of public officials to guarantee the factual assertions has disquieting implications for criticism of governmental conduct" and "can be used as a method to suppress criticism and political adversaries."

After repeal of the *desacato* law, Mr. Menem, his relatives and Cabinet members filed a host of defamation lawsuits against journalists. In the last few years, the importance of the early packing of the Supreme Court became apparent, and many other journalists became victims of the same biased interpretation of the laws I had already suffered.

In 1995, we created the Association Periodistas, to defend independent journalism, to resist harassment and to ask the international community of journalists for help. The founding members were 24 leading journalists from disparate ideological orientations, so as to guarantee the most complete pluralism. In a single year we listed no less than eleven Supreme Court rulings hindering freedom of expression.

Last year we decided to bring three of those cases before the ICHR, in the same way I have done it with the *desacato* laws. Once more the Commission considered the complaint admissible and we asked for a hearing, which was held in October 1, 1999, in Washington DC. I presented the Commision several *amici curiae* written in our behalf by the most oustanding Argentinean jurists. When I proposed the friendly settlement in Verbitsky case Number 2, the Argentinean government, with only two months of President Menem's term remaining, was in a weaker position than the first time.

Our Association had already drafted a bill decriminalizing defamation against public officials and has offered it to the main candidates one month before the presidential election of October 24. The frontrunner Fernando De la Rœa, from the opposing Alianza, but also the governmental Justicialist Party candidate Eduardo Duhalde committed themselves to driving this legislation if elected

During the hearing I invited the outgoing government not to exclude itself from searching for an amicable solution, which anyway was already well under way. The deputy director of the Committee to Protect Journalists of New York, Joel Simon, testified on behalf of Periodistas, praising our fights for a free press. With a clear understanding that the process was already unstoppable, Mr. Menem accepted the proposal and told his party to support the bill, which was then signed by Senators Jorge Yoma and Jose Genoud, from the main parties. Our ambition was a multipartisan agreement that would allow for a unanimous passing into law.

The burden of proof

In accordance with the guidelines set by the ICHR and its Special Rapporteur for Freedom of Expression, Santiago Canton, the bill won't allow public functionaries to sue before penal courts anymore.

This new law would incorporate into our legislation in civil libel cases the neutral reportage privilege adopted in

some US states. It protects against an action for defamation where the defendant reports in a neutral and accurate manner on a matter of public interest and mention his or her source.

The new bill also would introduce the actual malice standard, established by the United States Supreme Court in the 1964 case of *New York Times v. Sullivan*, which puts the burden of the proof on the plaintiff. It would be up to the plaintiff to prove not only that the published information was false, but that the journalist knew or should have known it was false at the time of publication.

The law would apply only to public officials and public figures while private individuals would still be entitled to seek criminal penalties in libel cases.

We hope our bill will soon be the law of the land in Argentina and a beacon for other countries making headway in the same road.

The international card, along with a strong mobilization of civil society within, can be an effective shield to protect a free press from the attacks of its new and more insidious foes.

Horacio Verbitsky, a columnist for Pagina/#12 newspaper in Buenos Aires, is vice president of Argentina's Association for the Defense of Independent Journalists.

XVI. Imposing Punitive Damages on News Media

The imposition of debilitating fines on news media is one of the final steps in an insidious censorship process that begins with a desire to shape and control the news, followed by the drafting of laws to achieve that goal and, finally, prosecution of those who violate these laws.

Although the censorship practices of several nations are described in this book, some countries — such as the former Yugoslavia — stand as microenvironments for the entire range of "code words" under examination. For example, Serbia's crude and crushing press law, adopted in October 1998, includes a smorgasbord of restrictive tools: criminalization of defamation, requirements that the media be supportive of state policies, rules against publishing information that might hurt an official's reputation, to name a few. Violations of any of these can bring staggering financial penalties, and in fact, since the law has been in effect officials have used it as a basis for bringing more than 60 cases to court and imposing fines totaling more than $1 million — a staggering total in a country where an individual earns on average only $40 per month.

Deputy Prime Minister Vojislav Seselj has threatened to "liquidate" Serbia's independent media. Clearly, he is serious.

BY HARI STAJNER

While family, friends and colleagues paid homage recently to the memory of murdered Serbian publisher

Slavko Curuvija, government authorities seemed to invent their own cynical commemoration of the April 11, 1999 assassination.

- Officials slapped crushing fines on the *Vreme* weekly and two of its leading journalists.

  "The responsible persons" in *Vreme* were fined by the magistrate's court on charges brought by Serbian Minister of Culture Zeljko Simic, in the total amount of 350,000 dinars (almost 60,000 DEM). The fines came following publication of an interview with a former director of the National Theatre in Belgrade in which the director claimed he was fired on orders from Simic.

- A police general pressed charges against the independent TV station Studio B after the broadcast of a live show in which the general was challenged to explain the circumstances surrounding the murders of four leaders of the biggest opposition party. Result of the charges: a 450,000 dinar fine.

- The independent daily newspaper *Danas* was summoned to court to confront the top people from the state-run *Tanjug* news agency, who sued the paper for damages, invoking defamation of character and personal pain they suffered through publishing of an article headlined "Requiem Without the Patriarch." The "Requiem" piece has already been used by the state to cash in 270,000 dinars in proceedings before the magistrate's court.

- Finally, to make the regime's day, the Yugoslav Army sued the local paper *Narodne Novine* from Nis in an attempt to take over its offices.

The above legal, though actually political cases, attracted somewhat more attention than fifty-odd prior verdicts to independent media ruled under the Public Information Law. Was it just because of a chance and unfortunate timing?

Hardly a coincidence

One can hardly call a statement by the Serbian vice-premier and leader of the extreme rightist Serbian Radical Party, Vojislav Seselj, a mere coincidence. At the parliamentary rostrum and without a flicker of the eyelash, he claimed that Curuvija was not killed for being a journalist, but for being a criminal. Not a single person in parliamentary seats (occupied only by deputies from the three parties making the ruling coalition as others have been boycotting the Serbian Legislature) reacted at his words or blushed for shame. Not even the Minister of Interior, attending the meeting, asked Seselj about the source of his information, which might assist the investigation in the murder that the police have not only failed to solve for a year, but also issued not a single release about it.

Perhaps I attach much too significance and emotion to he incident, as I am writing this piece just a couple of days after the memorial to a colleague and friend. But still, there is no doubt that Curuvija's murder stands as the first true political assassination in Serbia. Or, as his close associate Aleksandar Tijanic said, "Curuvija's life paid a ransom for several journalists' lives and most probably prolonged lives of few journalists."

Now, eighteen months since the passing of the infamous Serbian Information Law, it's clear that lawmakers have failed in their probably primary purpose — to destroy free media, the print media in the first place. Even if they had a less ambitious plan in mind — to intimidate free journalists and somewhat replenish the state budget — they failed. Independent journalists are obviously not much frightened as they go on doing their jobs the way they always did in spite of harder circumstances, while Draconian fines collected from independent media could have hardly fill in the hole in the utterly impoverished budget.

However, one should not be unfair to the people who in their own modest view have passed this "most democratic law" by saying their endeavor has been in vain.

True, the law has managed to make independent media and journalists working for them even poorer.

True, the law has succeeded in making the functioning of this major anti-regime sector even harder — since it could truly be taken as the most significant sector until these days when the opposition seems to have finally agreed on a joint action.

And true, the law has managed to instill at least a bit of self-censorship in journalists and editors, who are now forced to constantly beware of whether or how much any piece carried by their papers would cost them.

Many take the latter as perhaps the gravest impact on journalists and the trade's future in this country, produced by an utterly restrictive law that makes investigative and critical journalism almost impossible.

Regime systematically violates the right to information

Of course, the outcome of the Public Information Law passed on October 21, 1998 is by far more ominous considering that the right to free information figures as one of fundamental civil rights. This is the right that has been steadily and systematically violated by the Serbian regime.

The regime's pressure on independent media, that is the media attempting to pursue their basic task of providing unbiased, timely and accurate information, increased with the escalation of violence in Kosovo.

This pressure was generally intended to secure political support for measures taken by authorities, to prevent articulation of alternative solutions and to restrict the flow of information that might help general audience grasp the actual situation in the country.

On October 8, 1998, the Serbian Government issued a decree on special measures under conditions of a pending armed attack by NATO, whereby prohibiting "defeatist" articles. The same regulation banned rebroadcasting of foreign radio and TV programs in Serbian language.

The actual effect of such special measures was not too long in coming. Allready on October 11 and 12, the Federal

Telecommunications Ministry discontinued programs of five radio stations. On its part, the Serbian Information Ministry banned the daily newsapers *Dnevni Telegraf and Danas*.

When an agreement reached between the U.S. Special Envoy Richard Holbrooke and Yugoslav President Slobodan Milosevic temporarily removed the threat of NATO intervention, the Serbian Government withdrew the decree on October 21.

But actually, only a day before, on October 20, the Serbian Parliament replaced it by enacting the current Public Information Law in a summary procedure. This law was contrary not only to all international conventions in the domain of information, but also to other domestic laws, the Constitution included. The law was repealed after Mikosevic was overthrown.

The Serbian Information Law was so articulated to enable most arbitrary charges to be pressed for newspaper articles or broadcasts. The misdemeanor procedure had to be wound up within 24 hours and was used to sanction even accurately reported statements and party releases.

'Political psychopathology'

Moreover, an appeal to a verdict does not postpone its effectiveness, while the burden of proof is on the accused. The distinguished legal expert, Professor Momcilo Grubac said such provisions were undoubtedly "politically motivated" and "for the most part belong to the domain of political psychopathology."

Stipulated fines are truly Draconian — up to 800,000 dinars for a paper's founder, and up to 400,000 dinars for editors and directors. Against Serbia's actual economic background amounts as such are conducive to financial ruin of most independent media.

Here are some examples that perhaps best illustrate the Law's true intent:

Just four days after the Law was passed, on October 24, 1998, an obscure organization under the name of the Patriotic Alliance brought charges against the *Evropljanin*

(*The European*) weekly for "violation of its patriotic feelings." What hurt their feelings was an open letter to Yugoslav president Slobodan Milosevic, headlined in the paper as "What's Next, Milosevic?"

Authors — the weekly founder, Slavko Curuvija and journalist Aleksandar Tijanic — analyzed political and economic outcomes of the current rule and submitted a list of thirteen proposals to solve the ever-growing crisis. High on the list was the one saying, "Stop hunting down media and journalists." The *Evropljanin* and its responsible people were fined a total of 2 million and 400 thousand dinars.

Soon after, *Dnevni Telegraf*, a daily also owned by Slavko Curuvija, was punished on charges brought by the Minister for Family Care, Bratislava Morina, on behalf of the hardly heard-of Yugoslav Women's Alliance. The magistrate found the plaintiff in the right. So, the plaintiff was in the right by stating that by publishing an ad of the Student Organization "Otpor" ("Resistance") the responsible people of *Dnevni Telegraf* "called for the overthrow of constitutional order in Serbia and the Federal Republic of Yugoslavia, and endangered all citizens, women and children."

TV *Studio B* and dailies *Blic* and *Danas* were found guilty on charges by the Serbian Radical Party leader and Serbian vice-premier, Vojislav Seselj, merely because they run a word-for-word release by another political party, and thus "infringed upon the plaintiff's personal rights."

The publisher of *Glas Javnosti* was sentenced for printing the bulletin of the opposition coalition Alliance for Change, while *Novine Vranjske*, a local paper from the town of Vranje, was sued by the Yugoslav Army, though the latter does not have the status of a legal person and is, therefore, not entitled to act as a party in a lawsuit. The paper just ran a section of a report by the Helsinki Committee for Human Rights in Serbia.

There are scores of similar examples. One can hardly find an independent paper in Serbia that has not been punished by fine under the Public Information Law. From the day it was enforced until late February 2000, more than 50 fines were ruled against the media. According to the

Belgrade Media Center, they total some 24 million and 424 thousand dinars.

In March and April, as it seems, the regime staged an open war against independent media. It clamped down on six media in just a week of early March. And since in spite of the 18-month reign of the most restrictive media law in Europe, it didn't manage to bring independent media to their knees, the regime opted for other methods, including brute force, nighttime break-ins and robbing media of their properties through corrupted judiciary.

This drastically increased repression of independent media can be explained in many ways. However, the most logical explanation indicates that the regime always increased pressure on media in an election year.

'How do you survive?'

Serbia was in a desperate economic situation. Shortages in basic foodstuff, medicines and other necessities are permanent. Standard of living is catastrophic. An average monthly salary amounts to $40. Serbia was isolated by sanctions and isolated from the world and international organizations. In brief, at the threshold of 21st century Serbia had reached the bottom of civilization.

The regime, therefore, feared elections and any free, true and unbiased criticism. It attempted to cloak its fear by clamping down on "most dangerous critics" — free media, democratic opposition, university, students and non-governmental organizations. Repression was never before so manifest.

Friends from all over the world asked the same question: "How do you manage to survive?" And that's the same question I've been asking myself — really, how one manages to survive when being robbed of frequencies and transmitters, when there is no newsprint, when you are not permitted to run advertisements, when courts and tax collectors are draining you off, when you cannot raise price of your paper at the time of soaring prices, when financial policemen and inspectors are becoming fixtures in your

newsroom, when you are being denied of information, arrested, interrogated and some among you even killed?

How does one manage to survive all such occurrences that never happen to the media under the state's wing? Last but not least, how has one managed to survive 78 days of air raids killing innocent people and causing material damage that just in the domain of media independent experts estimate to around $98 million. Buildings of the *Radio & Television of Serbia* and *TV Novi Sad* were bombed, 13 radio and TV transmitters were destroyed, 9 radio transmitters were downed, and 42 radio and TV repeaters were wiped off the map, and some of them belonged to independent media.

I often try to explain to my friends from abroad that this is not a country wherein logical questions imply logical answers. Ever since Slobodan Milosevic came to power — an that was more than ten years ago — this country waged too many wars, managed to turn too many friends into foes, suffered destruction and an unprecedented brain-drain that the answer to the "how and why" query became almost impossible. However, the only answer one can provide with certainty is: free media have managed what others haven't — to pursue their tasks honorably. And, please, don't ask me how.

Hari Stajner is the retired director of Belgrade's Media Center, founded in 1994 by the Independent Journalist Association of Serbia. Prior to 1990 he worked for many years as a journalist and editor for NIN and Vreme weekly newspapers and for Vecernje and Borba dailies.

XVII. Mandating a "Right of Reply"

Fairness or Censorship?

BY OLIVER F. CLARKE

There is controversy over whether governments should legislate to allow the public a legally enforceable right of reply in the media. And indeed, what reply rights the media should voluntarily honour in the absence of legislation.

This article will explore this issue.

What is a right of reply?

A right of reply is generally understood to mean a right given to an individual, enforceable by specific legislation, to have a specific media house publish his reply to a previously published article, concerning him, that has been defamatory or inaccurate.

A reply is seen as a means of holding media accountable and also vindicating an individual's reputation and dignity.

A right of reply is different from a right of access. The latter guarantees time or space to the public who want to address an issue of public interest, whether or not the issue has been the subject of prior coverage by that media outlet.

The right of an editor to publish in his discretion has been an important and effective instrument in the historical fight against oppression and in the promotion of democracy.

Legislation which requires media to offer a right of reply will have a chilling effect on editorial content. Most notably, editors will refrain from tackling controversial and personal issues in order to avoid the possibility of being compelled

to publish a reply and of dealing with the controversy, complication and costs arising from that reply.

The negative aspects

Private property rights are violated by obligatory right of reply laws. Owners of media own their respective media houses, and governments should not have the right to force them to publish in comparable space, location and audience, to say nothing of expense, content they do not wish to publish.

Does an individual, for example, have the right to demand that a convention organiser bear the cost of reassembling a group that met a month ago, so that the victim of verbal attack made at that time be given a right of reply at the same location and of the same length, before the same audience and in comparable style to the facility previously extended to his accuser?

Lastly, it is very difficult to legislate the many particulars of a reply — such as, who is entitled to reply (must harm be proven?), what the length, language and content of the reply should be, where it should appear, within what time frame and the effect on damages created by a reply.

Some will argue that such legislation would have to recognise the differences between government-owned media, broadcast media, newspapers and the Internet — each industry having varying levels of multiplicity, availability and entry criteria. Others will argue that such legislation should deal in separate ways with replies arising from errors of fact as compared to opinion or value judgements, or advertising content.

Here are two relevant quotations from the judgement in *Miami Herald Publishing Co vs. Tornillo* 1974:

"A responsible press is an undoubtedly desirable goal, but press responsibility … like many other virtues.. cannot be legislated."

"A newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation in matters affecting the

exercise of journalistic judgement as to what should be printed."

And one quotation from the ANPA (American Newspaper Publishers Association) brief submitted in the case above:

"*If the legislature can dictate to the press what it must print in the public interest … , it follows that freedom of expression shall not long be a right retained by the people but a limited privilege exercised under the color of public interest by whoever acts with the authority of government*."

There is concern that the increasing concentration and cost of entry, within and to, the media greatly limit the opportunity for an individual to have a reply published by another media.

The positive side a right of reply?

In a word, it seems only fair. Replies add to debate. Replies allow the accused the personal opportunity to defend himself in the forum of public opinion.

In the modern world there are many available media. An individual wishing to make a reply can always find someone who will publish that reply. For that matter, an aggrieved individual can relatively easily publish his own reply on the Internet.

The concept of Freedom of the Press, some say, gives a right to the public to have its views aired, rather than being simply a legal protection for the press against the government.

It happens voluntarily

Different media organisations have varying guidelines for voluntary right of reply action by their members. Ombudsmen or Readers Representatives often enforce these. For example:

The American Society of Newspaper Editors says, "*Persons publicly accused should be given the earliest opportunity to respond*" (Article V1 Statement of Principles).

The British Press Complaints Commission has in its Code Of Practice "*A fair opportunity for reply to inaccuracies must be given to individuals or organisations when reasonably called for.*" There is no legal provision in the UK requiring a right of reply.

The Ontario Press Council, Canada states, "*Targets of criticism — whether in a letter, editorial, cartoon or signed column — specially deserve an opportunity to respond; editors should insist that syndicates adhere to this standard.*"

The New Zealand Press Council places considerable importance on a right of reply.

The Declaration of Chapultepec initiated by The Inter American Press Association states "*prior censorship, restrictions on the circulation of the media or dissemination of their reports, **forced publication of information**…directly contradict freedom of the press.*"

The first four recognise the need for a right of reply, but on a reasonable basis as determined by the media. The last is opposed to replies forced in any manner onto the media.

Right of reply legislation

Some countries (mainly in Europe) have right of reply laws and many do not.

In the United States there is no such legislation. In *Miami Herald v Tornillo* (1974) The Supreme Court found a 1913 right of reply statute unconstitutional and in violation of the First Amendment. That statute provided:

> "*If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter*

replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree."

The Supreme Court however found that the obligation to print a reply had a chilling effect on media content and that the Florida statute was an impermissible restraint on editorial autonomy.

The First Amendment of the U.S. Constitution prevents the Government from giving the media content-instruction. It does not give the public guaranteed access to the media.

In spite of this constitutional background, the U.S. Supreme Court (*Red Lion Broadcasting vs. FCC* 1969) upheld the constitutionality of "*The Fairness Doctrine*" that affected broadcasters in the United States between 1949 and 1987.

The Fairness Doctrine embraced the people's right to media access and also demanded that broadcasters give equivalent response time to a person who was the subject of a personal attack. It required broadcasters to devote a reasonable amount of time to controversial but important issues, and to provide a reasonable opportunity for contrasting views to be aired.

In the *Red Lion* case, the Court was impressed with the fact that there was a limited number of frequencies available for broadcast and, because of this, felt that it may be difficult for some to get access to express their views. The doctrine was never applicable to newspapers, because it was felt that anyone could start a newspaper.

The FCC itself repealed the doctrine because the inception of cable television meant that there were now many broadcast outlets to broadcast a wide range of opinion. The FCC also recognised the chilling effect on the airing of controversial issues.

Thirty-three states in the United States have retraction statutes. More than half of these reduce recovery in libel actions, in the absence of malice, to compensatory or "actual damages." These retraction statutes have become in some ways superfluous as media defendants, in many cases, are protected from judgement, whether or not they

publish a retraction, so long as they are not guilty of fault or malice.

The National Association of Broadcasters has for more than 17 years been trying to get the U.S. Federal Communications Commission to abolish the requirement that broadcasters provide air time for political candidates to respond to personal attacks or to station editorials.

In contrast to the U.S., a statutory right of reply exists in several **European jurisdictions**.

"*Of ... seven ... countries studied, all save Sweden offer some form of a legal right of correction (Austria, France, Germany, Netherlands, Norway, Spain). In most of these countries, a person who is the subject of factual allegations which cast him ... in a negative light is entitled to respond without having to demonstrate that, for example, the story was defamatory (Germany, Netherlands, Norway, Spain). In others, the right may be triggered by critical opinions as well... (France).*" — Article 19 1993 Report on Press Law and Practice.

In **Switzerland**, legislation apparently allows prior restraint of further newspaper articles if the editors have not complied with a right of reply in relation to articles previously published.

The **Council of Europe** supports a legally enforced reply remedy only after a failure of voluntary compliance efforts.

In the Americas, The American Convention on Human Rights has encouraged right-of-reply laws. The first part of Article 14 reads: "*Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.*"

In 1986 the Inter-American Court of Human Rights gave an advisory opinion to the Costa Rican government in which the majority of the judges avoided defining what "a legally regulated medium" meant. A minority opinion held that "a legally regulated medium" means " *all of the media of communication that are in one form or another regulated by the law of the States Parties…nor can it be interpreted to*

include only those media which are required by law to have a prior authorization, concession or license.'

The American Convention is the only international human rights convention which specifically includes a right of reply — which therefore cannot be considered as a universally recognised human right. It appears to have as its rationale the protection of dignity, honour and personality of the individual.

The Supreme Court of **Argentina** has ruled, even though there is no domestic right of reply legislation, that everyone is entitled to the right of reply as a result of that country's ratification of the American

Convention — "*the reply is meant to guarantee the natural, primary and elemental right to the legitimate defence of dignity, honour and privacy*." The Argentine courts have also required media to publish apologies and denials of stories run.

In 1996 the Congress of **Peru** passed legislation giving any individual deemed adversely affected by imprecise claims or aggrieved by the media the right to a free and immediate reply within certain limitations.

In **Jamaica**, as in many British Commonwealth countries, right of reply legislation relates only to certain specific types of reports in which the media seek to use qualified privilege as a defence against libel. For a defence of qualified privilege to be pleaded the media must, if requested, publish a reasonable statement or letter in explanation or contradiction of the relevant report. Refusal to publish a requested reply and/or malice are the two conditions that defeat the defence of qualified privilege. The defence of qualified privilege only protects certain reports which are of public concern and of public benefit.

In **Malta** a right of reply is guaranteed by The Press Act 1996.

Guarantees of freedom of speech in some European jurisdictions interpret freedom of speech as a basic human right and seek to ensure that persons have the necessary access to media to express their views and to receive varied news and opinions. These pieces of legislation seek

to widen the public's access to the media, and are often anti-media monopoly. They have a different focus to that of the U.S. Constitution, which protects the press against government actions over content.

For example, the German Basic Law provides that everyone has the right to disseminate his or her opinions and the right to receive information from generally accessible sources.

The French courts believe that the Declaration of the Rights of Man requires there to be a variety of media to ensure freedom of speech. The Declaration states: "*The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law." August 26, 1789.*

Correction Laws

There is something to recommend correction laws such as the proposed Uniform Correction or Clarification of Defamation Act (UCCDA) in the USA. Under this law the media could attend to corrections quickly without having to fear the consequences of large damage awards. But this has not met with widespread media support as the law still gives bureaucrats great power.

Under this proposed law:

"*A person who believed an inaccurate and damaging statement had been made by a media organisation or any other "publisher" of information, including the author of a business document, would contact the writer or publisher to show the statement was false. The writer or publisher has the right to stand by the original statement at all times, but if both sides agree a correction is needed, it must reach the same audience as the original statement in order to trigger UCCDA protection. If the correction is done properly, the person could still sue for damages if there was economic loss but not for presumed loss of reputation or punitive damages*."

Reform bodies in Australia and Ireland have also recommended correction laws.

Complications

There are few media editors who do not appreciate the need for errors to be corrected and for unfair attacks to be answered. This is evidenced by the widespread inclusion, in Codes of Ethics, of guidelines for such remedial action. Media outlets should be encouraged to adopt such guidelines.

Complications arise when legislation mandates a right of response.

Life becomes very subjective when decisions have to be made as to *who* will have the right to reply (for example on behalf of an aggrieved group); *how quickly* must they present their reply; *how* can reply-content be edited to, for example, remove defamatory or insulting material; *when and where* will the reply be published; *how long* can it be; can it contain material not directly related to the perceived attack; how can it be *ensured* that it reaches the same audience; are second generation replies to be countenanced; does a reply affect other legal remedies to the original publication; are damages, otherwise available, reduced and so on.

It is difficult to believe that courts best make decisions of this type.

Conclusion

Democracy and freedom are not natural states. They are ideal situations whose birth and continued life are always under threat. The world has always, and will always, spawn an intriguing multitude of persons who aspire to control nations and dictate to their fellow citizens.

An independent press is a well-tried tool to oppose, restrain and convert dictatorships. The effectiveness of this weapon is due to popular support for expressed ideas. An independent press is the tool of active and free people, not just media owners.

Mandatory right-of-reply legislation can be used by political leadership to frustrate a free press rather than to build public freedoms. Use of such legislation might be benign in developed societies, but they can wreak havoc when transplanted to parts of the world where the other checks and balances of civil society are weak. What works in Europe may become a repressive tool if transplanted to Zimbabwe or Singapore or Trinidad.

Governments might expend effort more wisely by seeking to encourage the expansion of the number of media outlets, by reducing barriers to entry caused by licensing or import control or the placement of government advertising or taxation, by updating libel laws to balance the cost of reputation damage with the need for investigative reporting; by introducing Freedom of Information Laws to allow the transparency needed to combat corruption; and by working with local media to make it economic to increase locally related content rather than publish imported news and features.

"*Government measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a preferable course of action*" — (T. Emerson, The System of Freedom of Expression).

It is a short step from dictating what a newspaper must print to dictating what a newspaper must not print.

Oliver Clarke, former President of the Inter American Press Association, is Chairman and Managing Director of The Gleaner Company, Ltd., Kingston, Jamaica.

Summary

Back to the Future: Old Wine in New Bottles

BY CUSHROW IRANI

A former Minister for Information and Broadcasting of the Government of India once insisted that editors could not publish anything that had not been issued to the Press. He claimed that the right of privacy protected all executive actions of the Government.

The infamous Official Secrets Act, now more than a century old, still holds the field.

The new climate of openness, to which every politician pays obeisance without meaning a word of it, persuaded a Cabinet Minister in the Vajpayee government to announce in 1999 that in his ministry all files relating to sanction or refusal of sanction for buildings would be open to inspection by any member of the public to eliminate charges of corruption.

He was promptly opposed by bureaucrats in his own Ministry of Works and Housing and within the week, he had a letter on his table from the Cabinet Secretary telling him that it could not be done — because the move required a Cabinet decision applicable to all ministries, a clear impossibility.

In a reversal of the popular British comedy series, the country's top bureaucrat was saying: No, Minister!

We take two steps forward, toward openness, and one step backward, toward the past.

In its pristine sense, the "right to communicate" is an attribute of and follows from the right of freedom of speech

and expression enshrined in the Universal Declaration of Human Rights.

It is intended to mean that everyone has the right to express himself, subject only to reasonable restrictions relating to defamation and contempt of court. And these reasonable restrictions must be monitored by the courts, not by the executive government.

Innocent-sounding phrases can become terms of abuse

Given the propensity of politicians, especially politicians in office, in parts of the world where fundamental human rights are not as well enshrined as they ought to be, it has become a term of abuse. Like charity, it now covers a multitude of sins!

A common abuse is to insist on an unsustainable interpretation of the right of reply. A most persistent offender was the Government of Singapore in the days when Lee Kuan Yew was fashioning his economic miracle. He was so sensitive to criticism that any comment that displeased him in the smallest way would invite instant operation of his not-so-secret weapon.

The modus operandi was simple, effective — and wrong. His government would send a rejoinder at unusual length, often running into several thousand words, to refute the criticism. The government officials would insist that the statement be carried in full, alleging censorship if any attempt was made to edit for size and often for clarity.

A constant sufferer was the *Far East Economic Review,* then edited by that sturdy editor, Derek Davies. In the end the *Review* gave up and Derek left Hong Kong to settle in the UK with his family. Bad examples being easier to follow than good ones, the malaise spread rapidly. Before long, the Press Council of India took up the refrain.

An extreme example is the case of Rizvi-vs-*The Statesman.* The gentleman, Mr. Rizvi, wrote to me complaining of an article carried by *The Statesman*. First, he insisted on reading into it meanings the author never intended and no man in his right mind would agree. Then he proceeded to

attack both author and his writing in unprintable language.

He would expound his views at length — and demand that his letter to be published. When I explained that it could not be carried, he went to the Press Council complaining that his right of reply had been infringed.

I appeared before the Council and argued that for the right of reply to apply, it was necessary for the complainant to show that either he had been personally aggrieved by what was printed or that he was acting in a representative capacity on behalf of an identifiable group of people.

Neither consideration applied in this case.

We argued that a newspaper was not a vehicle for the unsolicited views of anyone, and that we could not be forced to publish.

A long time elapsed while these cumbersome procedures were under way, so to dispose of the matter, I offered to consider another letter from him, provided he eliminated all abusive language and the letter was otherwise suitable. He sent me a letter, more vituperative if anything, and when I refused to publish, he quoted the Press Council for the view that if I did not like his letter, I should send him a draft for his approval before publication! This took from February 1993 to January 1998.

There is another twist to the tale. Rizvi did it again and the Press Council dutifully forwarded the complaint to me for comment. After dealing with the matter on merits, when I asked why they were showing such indulgence to someone who, to their knowledge, was a busybody and publicity seeker, they sent my letter to Rizvi for his comment without my knowledge or consent.

On demand they even provided a certified copy of my letter. I warned them of what to expect. I had written freely to help the Council in their quasi-judicial proceedings. Sure enough, my warnings materialized. Rizvi filed another case for defamation and made the Press Council first respondent seeking a reversal of their ruling not to proceed with his complaint. He also sought a direction to me not to publish "such" article in future.

There are two cases on the subject in court now but I

will insist on principles being upheld no matter what the cost and no matter how long it takes.

The debate on a Freedom of Information Act continues. In my view a climate of openness must be created first, otherwise it is entirely possible that a bad situation can get worse. Today nothing prevents me from publishing extracts or commenting on reports of Commissions of Inquiry under the Commissions of Inquiry Act. Governments will not publish although the law implies that this is an obligation, on the excuse that the Report must be published with the Action Taken Report. By the simple expedient of not taking action, they avoid publication of the Report.

My fear is that in present conditions where secrecy is the norm and disclosure the exception, any Freedom of Information Act will have a long list of exceptions attached and publication in breach of these would invite penalties. Why oblige freedom of speech and expression to proceed under added and avoidable perils.

There is a movement in these things: Either freedoms will extend their horizons, or they will contract. They will not be frozen or set in concrete.

Under the guise of forcing publications to concede a right of reply and respect an exaggerated right to privacy, those united in their hatred and fear of a free press seek to make our functioning impossible, or at least to prevent the expression of views and opinions to which they are opposed in what they regard as influential newspapers.

Politicians are not to be left behind. When their so-called right of reply does not work, they have recourse to what is derisively known as the Rajiv Gandhi amendment of the Criminal Procedure Code. To protect himself and his crooked friends, the former prime minister provided that hereafter, charges of criminal defamation against newspaper editors can be brought by the state on behalf of the individual to save himself the trouble.

The Prime Minister, his Cabinet colleagues and chief ministers of the various states became this privileged class. The Chief Minister of Assam used this to get the state of Assam to file criminal charges against me because I accused

him, on the evidence, of being part of the problem of extortion and terrorism prevalent in the state. When I appeared in court, his advocate tried to explain to me, privately, that the chief minister had his "compulsions." I told him that I was delighted the chief minister had engaged a lawyer of his experience because otherwise he might have been under the impression that the state would conduct the case and he would have to do nothing.

I added that he, as a former advocate-general of the state, would know that although the state could initiate proceedings it did not mean that the laws of evidence could be stood on their head. I invited him to tell his client with my compliments that I intended to summon him to appear in court as a witness to prove if he could, that he had a reputation capable of being defamed. I added that I intended to cross-examine his client myself; I would not need a lawyer. The case has not been allowed to begin and it has been over a year.

These practices are not limited to India. More governments than I care to name learn from one another. The Government of Sri Lanka came very close to abolishing criminal defamation as an offence and to set an example to others in the region. Unfortunately there has been a setback and instead, new restrictions have been imposed on bureaucrats talking to the press. The excuse is the regrettable insurgency in the land. We know, of course, that the press does not create an insurgency, it merely reports it.

I have a final point to make: If governments learn nasty tactics from one another, the press must stand united against them. We must help one another. As James Russel puts it — True freedom is to share; All the chains our brothers wear.

The choice offered by governments between freedom and bread is fraudulent. As *The Economist* said after the Indian elections that followed the listing of Indira Gandhi's Emergency: "Never again will anyone be able to urge that there is a choice between freedom and bread!". The wise government will ensure both. The people they represent must ensure they do.

I share the sentiment of Alexander Pope's peasant:

"Ain't please your Honour", quoth the peasant,
"This same dessert is not so pleasant,
Give me again my hollow tree,
A crust of bread and Liberty!"

Cushrow Irani, a former Chairman of the International Press Institute, is Editor-in-Chief and Managing Director of The Statesman *newspaper of Calcutta, India.*

Twenty Questions: Do You Have a Free Press?

Do you have a free press? Here is a brief checklist to help you judge whether press freedom is restricted in your country. If your answers indicate lack of freedom, the tactics of censorship described in this book could be part of the reason.

1. Are there restrictive press laws?
2. Who owns the media, print and broadcast? Private, government or both?
3. Are journalists prosecuted for what they write?
4. Are journalists in jail? Reasons
5. Is libel a civil or criminal offense?
6. Are journalists required to have a government-enforced license to work?
7. Do journalists have unrestricted access to government proceedings?
8. Are journalists harassed while covering the news?
9. Does the government pay journalists?
10. Are newspapers or broadcasters subsidized?
11. Is there government-supported censorship? Is there self-censorship?

12. Are there restrictions on the means of production, such as government allocations of paper, control of distribution systems and ownership of printing facilities?

13. Is government advertising allocated fairly?

14. Is there a legally mandated right of reply, which includes government officials?

15. Are insult laws routinely used to shield officials' conduct from public scrutiny?

16. Are courts able to judge news media cases independently?

17. To what extend are media outlets owned by political parties, government-linked entities or others desiring to control content?

18. Are crimes against journalists prosecuted by authorities?

19. Are the activities of government — courts, legislature, officials, records — open to the press?

20. Do journalists themselves consider themselves free to write or broadcast the news as they find it?