

MEDIA LAWS: THE MEDDLER'S ITCH

by Ronald Koven

Ronald Koven is the Associate Director and European Representative of the World Press Freedom Committee and an American newspaper correspondent.

Throughout Central and Eastern Europe, parliaments have been groping to define the place of the press in a democracy. Not a single one has come up with a satisfactory solution from the standpoint of press freedom and democracy.

In many of the new would-be democracies, there have been so many generally unsatisfactory drafts of press laws that even those most directly involved in the process have lost count. When a continuing struggle over press laws left legal vacuums and a lack of clarity, the opportunity has been there for governmental backsliding and arbitrariness, as in the cases of government leaders removing the heads of television in Hungary and Russia and the editors of independent-minded newspapers in Croatia and Slovakia.

At an international meeting hosted by the Soviets in Tashkent in 1983, a red banner stretched across a wide boulevard greeting foreign participants with the slogan: "The Press is a Powerful Tool in the Leninist Struggle." No government in the former Soviet sphere today would openly dare to make such a bald proclamation of its intention to use the press for its own ends. Nevertheless, the perplexity of the region's lawmakers towards media laws and the questionable approaches they are prepared to adopt demonstrate just how much the basic communist approach to the press has affected the thinking even of aspiring democrats.

For example, when the Polish parliament proclaims that Polish broadcasting "should respect the Christian value system," it shows that the communists

succeeded in persuading their most ardent adversaries that they should consider the press a tool to be used for some purpose. The Polish broadcast law of December 1992 goes beyond even this widely remarked upon call to adhere to Christian values, stating: "Broadcasts may not advocate activities contrary to the law or to the interests of the Polish state, or [express] attitudes and opinions contrary to morality and the general interest."

By the summer of 1993, Poland was one of only four former Soviet bloc countries to have managed to pass new broadcast laws, along with the former Czech and Slovak Federal Republic, Latvia and Romania. Elsewhere, countries have been managing with the old communist legislation, which allows governments to act arbitrarily because changed conditions have left legal vacuums.

Even in the Czech Republic, the former communist country where one finds the best understanding of press freedom, the government abandoned its attempts to pass a press law after journalists objected to a draft containing restrictions on the press so complex that its framers never got around to outlining its freedoms. Most other countries' parliaments are in similar disarray regarding press laws, stuck in various draft stages. Russia is a major exception, but the parliament keeps threatening to amend the already flawed press law of President Boris Yeltsin.

In Hungary, the requirement that any press legislation be passed by a two-thirds majority means there may never be a law. This has not prevented the government from vetoing foreign investors in the press whom the new power structures fear might be politically hostile. Nor has it prevented Hungary's Prime Minister Jozsef Antall from stating his apparently sincere frustration that a press in a new democracy does not automatically support his democratically elected government. In this, he is not much different from a number of his colleagues in the West.

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Well before becoming prime minister of France in 1986, Jacques Chirac, the mayor of Paris and leader of the Gaullist party, speaking to a group of American correspondents in the French capital, said, "The best press law contains just one sentence, 'The press shall be free.'" Then, he added, "You should say that publicly, while you are out of power, to commit yourself. Otherwise, the temptation to act differently is too great, once you come to power." As far as I know, he never did say that publicly. And once in power, he did not follow his own sound advice.

Nevertheless, we should not underestimate the innovation and lucidity of Chirac's statement, given the Continental legal tradition inherited from Rome and Napoleon, which regulates and codifies everything down to the smallest detail. When it comes to press freedom, this rage to codify finds its initial democratic justification in the founding document of Continental democracy,

the French Revolution's Declaration of the Rights of Man and of the Citizen of 1789. Article 11 reads: "Free communication of thoughts and opinion is among the most precious rights of Man. Thus, all men may speak freely, write and publish, *provided they be responsible for any abuse of this freedom in cases determined by law*" [italics added].

This is still French constitutional law. The open door to regulate the press leads straight to what remains the basic French press law, that of 1881. Its first article grants freedom of the press and the following 50-odd articles restrict it, including the now-classic ban against insulting the President of the Republic or foreign chiefs of state. Very much in that same tradition is the French law of 1990, which, by making racist or anti-Semitic statements a criminal offense, has turned an obscure professor into a freedom-of-expression martyr by banning his writings claiming there were no gas chambers in the Nazi concentration camps. (I am utterly convinced, even though I obviously cannot prove it, that if the Tito government in Yugoslavia had not prevented public utterance of ethnic hatreds and if they had been allowed to be made openly — so that they could be combated in free debate — tensions would not have festered to the point that they are now expressed with bullets and civil war.)

Following the French model, virtually every new press law or draft press law in Central and Eastern Europe first proclaims press freedom and then provides for its restriction as proscribed. Thus, the third draft of an Albanian press law states in Article 1: "Nobody is denied the right to express and propagate his or her ideas freely through the press and other mass media." The ten articles that follow provide, among other things, for censorship to protect public morals and constitutional order, for laws requiring the media to be registered by the authorities, for the right to commandeer media space for the right of reply, for authorization of the state prosecutor to suspend publications "in urgent cases," and for punishment by fine or imprisonment for printing or distributing an unregistered publication.

The Russian Federation statute on the mass media signed into law by Boris Yeltsin in December 1991 states in its Article 1 that the media "are not subject to restrictions unless so provided by the legislation of the Russian Federation pertaining to the mass media."

There follow sixty-one articles that include:

- a very complex registration procedure, which may be denied. An unspecified registration fee is set. It is implicitly high, since discounts are made for such desirable things as children's and educational publications and surcharges are added for pornography.
- a prohibition on publication of state secrets or "any other specially guarded secret."
- a ban on calls for forcible change of the constitution or "the integrity of the state."

- forbidding incitement to ethnic, class or religious "intolerance or passions," as well as war propaganda.
- the right of courts to order journalists to reveal their sources, coupled with an *obligation* not to reveal sources unless a court so orders.
- mandatory publication of denials, up to twice the length of an original article or broadcast. The media whose space is thus taken over may not reply to the denial in the same issue.
- the right of public bodies to close meetings to the press.
- a ban on publication of material "designed to defame an individual or groups" because of their sex, age, race, nationality, language, "attitude to religion," occupation, place of residence and work, or political views.
- the need for permission from the Russian Press and Information Ministry to distribute foreign periodicals.
- punishment for "abuse of freedom of mass media."

The Russian press law also provides that international agreements have precedence over its own text. This gives force of law to the International Covenant on Civil and Political Rights, whose provisions include restrictions to press freedom to protect national security, public order, public health or morals. The open door this so obviously offers to those who would violate press freedom was a major reason that the United States ratified that 1966 treaty only in 1992, and even then it entered a formal reservation stating that those restrictions to free speech violate the U.S. Constitution. (Press freedom restrictions contained in such international documents were a price the West paid during the Cold War to get Soviet bloc signatures on anything at all calling for the respect of human rights.)

Applying still another provision of the new Russian press law, the government has petitioned the courts to ban the 150,000-circulation nationalist daily *Den* after issuing it with the three required "official "warnings." (The last warning was for calling upon Boris Yeltsin to resign.) TV broadcasts of parliamentary debates show large numbers of deputies reading the paper at their desks. Russian Information Minister Mikhail Fedotov argues that banning *Den* should be acceptable to democrats because it would come only after a court order, not by administrative decision as formerly.

Another form of defense that Fedotov has invented is selective subsidization, as opposed to such across-the-board forms of support as lower postal rates, relief from the 32% tax on profits and the 20% Value Added Tax, or subsidies for newsprint production. Creating a new system of press dependence on government handouts has been widely imitated throughout the former Soviet Union. Vyacheslav Kebich, the prime minister of Belarus, has explained the practice, "The government gives credits to the newspapers and magazines that take correct positions. . . . I will support all the press, except publications

opposed to the government.” The way around this system is often for the press to seek subsidies from rival power centers, notably parliaments. So, the bulk of the Russian press is polarized between supporters of the Yeltsin government and of the Supreme Soviet President, Ruslan Khasbulatov.

In all fairness, the new Russian press law, with all the opportunities it offers to control the press, is an improvement over the Soviet regime. The Yeltsin law does abolish censorship and jamming and states that “a journalist has the right to seek, solicit, and disseminate information” and to have access to the scenes of natural calamities, accidents, catastrophes, riots, rallies, street marches, and state-of-emergency areas.

Yet, the Russian presidency and parliament continue their struggle over the constitution. Yeltsin’s draft constitution states in Article 15 that “Freedom of the press shall be guaranteed. Censorship shall be prohibited.” But Article 24 says that “restrictions of human rights and freedoms may be introduced only . . . when essential to protect the rights and lawful interests of other persons, to protect the state system, to ensure security and public order, and to protect public health and morality.” The Khasbulatov draft also establishes freedom of expression in its Article 25, but goes on to say: “Limitations of these rights may be established by a federal law to protect personal, family, professional, commercial, service or state secrets, as well as to ensure observance of public morality. A list of data constituting service and state secrets shall be set forth in detail by federal law.”

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In stark contrast to the Continental model, which permits such detailed and dangerous limitations on press freedom, is the U.S. model. The First Amendment in the Bill of Rights of 1791 (ratified two years after the Declaration of the Rights of Man) gives the press blanket protection: “Congress shall make no law . . . abridging the freedom of speech, or of the press.” This, however, did not settle the matter. It was an ongoing struggle to get the Supreme Court to recognize, which it did only in 1931, that the framers of the U.S. Constitution meant just what they wrote. Even with the court decision, that struggle continues.

Free speech and its megaphone — the free press — are so central to the exercise of other freedoms that Thomas Jefferson, the most articulate formulator of American constitutional philosophy, said: “Our liberty depends in freedom of the press and that cannot be limited without being lost.”

The First Amendment of the Constitution merely protects the press against the power of government. It places no special obligations or responsibilities upon the press, surely not to advance the government’s causes or interests, nor to keep its secrets. The seventeenth- and eighteenth-century English and French philosophical traditions underpinning that approach assume that, given the

chance, good ideas will drive out bad ones, that the remedy for ill-conceived or badly motivated speech is simply more speech. This assumes that the press must be given the right to be both wrong and irresponsible. The corrective to a bad press is the press itself. The first and strongest defense against the press is more press, meaning competition and free debate. The most effective correction of misleading or mistaken journalism comes from other press outlets. Twentieth century history shows that the danger from irresponsible government is far greater than that from irresponsible media. A free press is indispensable as a check on irresponsible government.

The psychological insecurity of countries emerging from fifty to seventy-five years of totalitarianism makes the desire for detailed legal and/or professional codes of press conduct perfectly understandable. But the combined and comparative experience of the countries where press freedom was invented — Britain, France, and America — clearly shows that, when it comes to the press, less law means more freedom.

That does not mean there should be no law at all. The British experience, where there is no constitutional guarantee of press freedom, shows the danger of depending solely on democratic tradition to protect free speech. This has opened the way to a number of recent and current governmental and legislative attempts to curb both print and broadcast media in Britain. The pressure for such limitations has been generated in part by the sensationalist fringe of the popular press. Their yellow journalism is a reminder to journalists that to avert restrictive lawmaking the press needs to generate sound practices — both for their own intrinsic value and as a defense against the ever-present press controllers. Yet, while every good journalist knows that there is an ethical dimension to nearly everything he or she does, no outside power can decree that behavior without stifling it.

The American model of press freedom is in fact a middle way between the danger of no constitutional guarantee, as in the British model, and of over-regulation, as in the Continental model. The most extreme example of codification gone amok is undoubtedly Sweden. There, legislative efforts to counteract the free workings of the marketplace are so complex as to produce perverse effects. In the interest of preserving pluralism, the Swedish government subsidizes the second largest newspaper in a community. The result is that papers have been known to struggle not to become No. 1, lest they lose their state subsidies.

The temptation has been overwhelming for new democracies to imitate such complicated models — with their national press councils, codes of conduct, official ombudsmen, and lack of separation of the press from the state. While the more or less uninterrupted democratic traditions of countries with such systems can generally be counted upon to prevent most (but certainly not all) abuses by governments, when these codes are blindly transposed to new democracies, tradition cannot be counted upon as a check against governmental misuse of power.

A good example is the continued existence in Western democracies like France and Germany of laws against insulting the President of the Republic. Such laws were conceived for parliamentary systems where the president symbolizes national sovereignty and has moral authority but no direct political role. Thus, in France, the law has not been invoked since the restoration of powers to the presidency by Charles de Gaulle, while in Germany it is still considered valid. Journalists are still jailed under a similar law in Turkey, which may explain Kazakhstan's enactment and use of a like statute to imprison a historian who accused the Kazakh president in print of being a tool of Russia. The Kazakh public prosecutor justified the detention to visiting Western journalists on the grounds that the alleged offender was being prosecuted under a law that is perfectly normal in the West. The historian was released on "humanitarian" grounds, but the law is still on the books and has recently been used again to jail critics of the president. Newly sovereign Slovakia has enacted a similar "Western-style" statute. Likewise, the Kazakh authorities accused a leading Russian-language opposition newspaper of anti-Semitism, an apparently groundless accusation that nevertheless could have served as a plausible pretext for a ban. Still another paper was suspended for allegedly "provoking inter-ethnic tension" in Kazakhstan.

In addition to a basic constitutional guarantee of press freedom, a modern democracy also needs laws that guarantee maximum public access to official records and documents so that citizens may be informed of public business and gain access to the meetings of public bodies. These are respectively known as Freedom of Information (FOI) acts and "Sunshine" laws. The premise of Freedom of Information was contained in the world's first free press law, Sweden's Freedom of the Press Act of 1766. The United States did not enact an FOI law until 1966, and Britain still has none. There is a laudable but imperfect enactment of FOI principles in the new Russian mass media law, although it has, like the U.S. law, many questionable categories of exemptions. Drafts of the new Czech constitution also contain FOI principles.

A third category of law is also needed — reasonable libel legislation to protect the individual, without obstructing press freedom. This is especially important in countries where the communist party or the secret police used to decide without legal norms that the media should turn somebody into a hero or a villain. Of course, libel legislation to protect citizens against unjustified defamation was unknown in Soviet-style legal systems. Typically, the law provided that one could be prosecuted for slandering the state or its institutions but not a private person. The result, today, is that many journalists think that press freedom means that they may publish any unverified rumors or accusations. Clear rules of the game are in order.

For the press to play its role in a democracy as the watchdog of society, it must be free to call into question the actions of individuals. "You cannot disclose evil without naming the doers of evil," said U.S. Supreme Court Justice Louis

Brandeis in the landmark 1931 case striking down a Minnesota state law under which an offensively racist publication that also exposed the corruption of leading local officials was to be outlawed. In the U.S., the Supreme Court has gone even further to rule that the press may make honest mistakes and that money damages may not be collected — even if a story proves to be untrue — unless actual harm is demonstrated. As fragile and weak as the press may be compared to government, the same press is undoubtedly powerful compared to the individual. Hence, the need for the private individual to be able to defend his reputation in court.

Strictly speaking, of the three essential categories of legislation listed above — the basic constitutional guarantee, freedom of information and sunshine laws, and libel — only the fundamental declaration of press freedom is a press law as such. Freedom of information is a right of all citizens, and libel law is not aimed at the press in particular. It should also be noted that libel is most generally a civil offense, an effort by a citizen or a company to collect damages, and not a criminal offense pursued by the state. Journalists are not thrown in jail for libel, and media cannot be banned for it (although damage awards are sometimes so high as to threaten a publication's existence).

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Far from being a Fourth Estate or a Fourth Power, let alone a Fourth Branch of government, as it has often been called, the press is a weak twig if it must serve as the counterweight to government. The press is many and varied, while the government is normally unified.

When Westerners argue against a press that is *engagé*, it is not that they deny the right of a free press to be partisan (as the Western press was throughout the nineteenth century). Rather, it is that they know the public perception of the press's effort to provide fair coverage is both desirable for itself, it is also a guarantee of credibility and thus a protection against the temptation of restrictive legislation.

If the State is to serve the public welfare rather than be an end in itself, if officials are to be public servants rather than rulers, then the press must be free to do its job as it sees fit. The State should develop the nation, if it can. The State should guard its own secrets, if it can. The press should be left alone to report on how well the government does and to echo various public reactions. The electorate should be the ultimate judge of government through the ballot, and of the media through the marketplace.

The international community understood that in 1948 when it enshrined the global standard for free speech and free press, unqualified and unrestricted, in Article 19 of the Universal Declaration of Human Rights: "Everyone has the right to freedom of opinion and expression; this right includes freedom to seek, receive and impart information and ideas through any media and regardless of frontiers." □

In 1987, journalists from 34 countries held a World Conference on Censorship in London. They approved a Charter for a Free Press enjoining governments to respect the Universal Declaration for Human Rights and to refrain from the kinds of practices that were used to throttle freedom of expression under totalitarian rule. Formally adopted by a long list of international free-press organizations, its 10 points are not a corporatist plea, but a collective appeal by journalists as citizens to all governments that, for freedom's sake, they should keep their hands off the press.

RONALD KOVEN

CHARTER FOR A FREE PRESS

A free press means a free people. To this end, the following principles, basic to an unfettered flow of news and information both within and across national borders, deserve the support of all those pledged to advance and protect democratic institutions.

1. Censorship, direct or indirect, is unacceptable; thus laws and practices restricting the right of the news media freely to gather and distribute information must be abolished, and government authorities, national or local, must not interfere with the content of print or broadcast news, or restrict access to any news source.

2. Independent news media, both print and broadcast, must be allowed to emerge and operate freely in all countries.

3. There must be no discrimination by governments in their treatment, economic or otherwise, or the news media within a country. In those countries where government media also exist, the independent media must have the same free access as the official media to all material and facilities necessary to their publishing or broadcasting operations.

4. States must not restrict access to newsprint, printing facilities, and distribution systems, operation of news agencies, and availability of broadcast frequencies and facilities.

5. Legal, technical, and tariff practices by communications authorities which inhibit the distribution of news and restrict the flow of information are condemned.

6. Government media must enjoy editorial independence and be open to a diversity of viewpoints. This should be affirmed in both law and practice.

7. There should be unrestricted access by the print and broadcast media within a country to outside news and information services, and the public should enjoy similar freedom to receive foreign publications and foreign broadcasts without interference.

8. National frontiers must be open to foreign journalists. Quotas must not apply, and applications for visas, press credentials, and other documentation requisite for their work should be approved promptly. Foreign journalists should be allowed to travel freely within a country and have access to both official and unofficial news sources, and be allowed to import and export freely all necessary professional materials and equipment.

9. Restrictions on the free entry to the field of journalism or over its practice, through licensing or other certification procedures, must be eliminated.

10. Journalists, like all citizens, must be secure in their persons and be given full protection of law. Journalists working in war zones are recognized as civilians enjoying all rights and immunities accorded to other civilians.