Foreword: Media freedom in Europe

The media play an enormously important role in the protection of human rights. They expose human rights violations and offer an arena for different voices to be heard in public discourse. Not without reason, the media have been called the Fourth Estate – an essential addition to the powers of the executive, the legislature and the judiciary.

However, the power of the media can also be misused to the extent that the very functioning of democracy is threatened. Some media outlets have been turned into propaganda megaphones for those in power. Others have been used to incite xenophobic hatred and violence against minorities and other vulnerable groups.

The purpose of journalism is not to please those who hold power or to serve as the mouthpiece of governments. Journalists report, investigate and analyse, they inform us about politics, religion, celebrities, the arts, sports, revolutions and wars. They entertain and sometimes annoy us. But most important of all, they are "public watchdogs".

This role is fundamental for democracy. Free, independent and pluralistic media based on freedom of information and expression are a core element of any functioning democracy.

Freedom of the media is also essential for the protection of all other human rights. There are many examples where the misuse of power, corruption, discrimination and even torture have come to light because of the work of investigative journalists. Making the facts known to the public is often the first, essential step in redressing human rights violations and holding those in power accountable.

Public authorities, civil society and the international community, as well as media owners and journalists' organisations, all have important roles to play that reach from law enforcement, education, monitoring and setting universal standards to ethical conduct and self-regulation. The way in which national legislation enshrines media freedom and its practical application by the authorities reveals the state of democracy in the country concerned.

The purpose of this publication is to contribute to a more thorough discussion on various media developments which impact on human rights. Experts were invited to contribute their personal assessments of trends and problems. They were encouraged to raise controversial issues and to provide far-reaching suggestions – also challenging my own views. I would like to thank all eight experts for their high-quality contributions.

The contributions cover:

- protection of journalists from violence;
- ethical journalism;
- access to official documents;
- media pluralism and human rights;
- public service media and human rights;
- social media and human rights.

Together these texts give an indication of the level of protection of media freedom and freedom of expression in Europe today. It is clear that these are topics of paramount importance and demand serious public debate.

In this foreword I summarise some of the most important aspects of each theme. I also make a number of conclusions concerning each theme. The texts and conclusions all revolve around Article 10 of the European Convention on Human Rights (ECHR), which concerns freedom of expression:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder

or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Protection of journalists from violence

In recent years, some of the leading investigative journalists in Europe have been brutally killed: Anna Politkovskaya in Russia, Hrant Dink in Turkey, Georgyi Gongadze in Ukraine and Elmar Huseynov in Azerbaijan.

No effort must be spared to apprehend and bring the perpetrators to justice, as well as those who planned and ordered these murders.

Since 1992 more than 100 journalists have been killed in the Council of Europe region because of their work, including cases of disappearances. Even in more recent years journalists in several countries in Europe have been threatened, sent to prison or murdered for merely doing their job.

Functioning law enforcement and judicial systems are crucial. Both the contract killers and the masterminds behind the crimes must be punished, otherwise they will continue with their cruel business. Impunity creates more impunity. If murders, assaults and threats against journalists prevail, the media cannot be free, information cannot be pluralistic and democracy cannot function.

Threats against one journalist can have the devastating effect of silencing many others. Colleagues of the victims may go on working but fear the danger of reporting and writing about what the public ought to know. Many of them may start to exercise self-censorship.

Another source of concern lies in restrictive laws and other measures to control the media. These tend to have a "chilling effect" on the media directly and a negative impact on society as a whole, across the whole spectrum of human rights. Hungary's new media legislation, for example, raises concerns regarding pre-emptive restraints on press

freedom in the form of registration requirements and the imposition of sanctions on the media.

Defamation is still criminalised in several parts of Europe. Laws are in place which make it a criminal offence to speak of or publish facts or opinions that offend a person. Journalists can be put in prison for what they have reported.

This happened for instance in Azerbaijan, where Eynulla Fatullayev (among others) was convicted of defamation and sentenced to imprisonment. The European Court of Human Rights later found that this contravened the ECHR.

The Court noted that "the imposition of a prison sentence for a press offence will not be compatible with journalists' freedom of expression as guaranteed by Article 10 of the ECHR except for exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence".

Reports and comments against the "honour and dignity" of someone should be decriminalised and, if necessary, dealt with in civil law courts, and in a proportionate manner. Prison sentences should no longer be enforced in cases of defamation.

The role of governments in ensuring the safety of journalists is particularly important. It requires strong adherence to human rights principles, determination and perseverance. Governments must demonstrate forcefully that they are prepared to protect the freedom of the media, not only in words, but also through concrete action.

Conclusions

– Political leaders and other opinion builders should strongly condemn violence against journalists. Often aggression against journalists comes from groups and individuals with fundamentalist or extreme nationalist positions. It is important that politicians take a clear stance against such extremism;

- Police and security officials need to effectively protect journalists from danger. Threats have to be taken seriously. The Court has emphasised time and again that the ECHR (Article 2) "enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction";
- Every case of violence or threats against a journalist must be promptly and professionally investigated. Everyone responsible should be brought to justice;
- Defamation and libel should be decriminalised and unreasonably high fines in civil cases relating to the media should be avoided. Politicians and government officials have to accept a higher degree of public criticism and scrutiny, including from journalists.

Ethical journalism

Sometimes the media unnecessarily and unfairly abuse the privacy and integrity of ordinary people through sheer carelessness or sensationalism and thereby cause considerable damage to them – for no good purpose at all.

As the phone hacking scandal in the United Kingdom showed, competitive pressures may encourage a culture of illegal and unethical activity in the newsroom. This serves no one, least of all shareholders and readers. This is why the media community should be encouraged to develop a system of effective self-regulation based on an agreed code of ethics.

It is obvious that freedom of expression – though an absolutely basic human right – is not without limits. The ECHR makes clear that restrictions may be necessary in the interest of, for instance, national security and public safety. However, the exceptions from the basic rule on everyone's right to freedom of expression must be prescribed by law, serve a legitimate interest and be necessary in a democracy.

The precise definition of such exceptions has been an issue in a number of applications to the Court. Its rulings have clarified that limits to freedom of expression should only be accepted in narrowly defined,

exceptional circumstances. This is a logical interpretation of Article 10 of the ECHR as it was originally conceived. One reason for this approach is that censorship, restrictive laws and other measures to control media tend to have a chilling effect on the media community.

The idea of media "self-regulation" springs out of the desire to encourage media structures themselves to develop ethics which would protect individuals or group interests from unacceptable abuse in the media – and thereby demonstrate that state interventions are not necessary. Self-regulation could thus be seen as a solemn promise by quality-conscious journalists and media to correct their mistakes and to make themselves accountable to the public. For this promise to be fulfilled, governments must be restrained in their approach to the media and the work of journalists.

The term "ethical journalism" is highly relevant in this context. Though reporters and editors are not megaphones for particular interests – not even the cause of defending human rights – they can contribute to a better society through genuine professionalism. Ethical journalism is rooted in moral values and has evolved hand in hand with human rights protection in Europe. In essence, ethical journalists serve the public's right to know. They are professional also in the sense that they seek the truth and resist distortions. These are the ethics which should be promoted.

Conclusions

- There should in all member states of the Council of Europe be constitutional support for freedom of expression. Limits to this freedom should be narrowly defined and reflected in law;
- There is a need to encourage a deeper discussion on how to promote ethical journalism, including in relation to Internet-based information;
- The media community should be encouraged to develop a system of effective self-regulation based on an agreed code of ethics and a mechanism to receive and respond to complaints, for instance through an ombudsman or media council;

– In order to assist efforts by the media to satisfy the public's right to know, governmental and local authorities should respond to queries from journalists. Laws on access to information from public bodies should be enacted, with narrowly defined exceptions for reasons of security, public welfare and individual integrity.

Access to official documents

Pluralist democracies can only thrive through transparency and openness. For "public watchdogs" to be able to play their vital role against the abuse of power – in both public and private enterprises – they must have access to information about what those in power do and decide, and be able to find the documents they need to see. Voters too have the right to know about the decisions taken by their elected politicians and public administrations.

Transparency and open government thus promote fair and equal treatment under the law and efficiency in public administration. The need for such transparency is recognised in principle in several European countries, but is not yet a reality throughout large parts of the continent.

While the authorities collect more and more data on citizens, there is an unfortunate tendency to prevent the public from accessing government information. Journalists who try to obtain copies of official documents from national and local authorities face obstacles and outright refusal in a number of countries. This is why strong legal protection for journalists' sources, particularly for public officials acting as whistle-blowers is also a vital component of transparency.

The Strasbourg Court has already ruled several times on this issue and has consistently made clear that the public has a right to receive information of general interest. The conclusion is that the transparency of public authorities should be regarded as an important element of freedom of information – with a bearing on freedom of expression.

One obvious problem is that the authorities are not always accustomed to dealing with the media in an open manner. This problem

has worsened as a consequence of the trend towards further privatisation of services previously organised by local authorities, such as schooling and care for the elderly. Public review of such activities has become more difficult.

There are also instances that demonstrate that decision makers hide behind the supposed need for confidentiality when they feel uncomfortable about possible public reaction to certain facts. This may be one reason why European governments have been reluctant to come clean on the security co-operation with the US during the "war on terror".

There may well be situations where it is justified to keep certain information confidential, for instance to protect national security or the personal integrity of ordinary citizens. To avoid the misuse of such arguments, there is a need for clear regulation on how decisions about confidentiality can be taken and how representatives of the public can challenge such decisions.

There are positive trends which should be recognised. The need for openness is more generally acknowledged nowadays, especially with the growing recognition of the connection between transparency and anti-corruption.

In 2009 the Council of Europe adopted a Convention on Access to Official Documents – the first international legal instrument on access to official documents held by public authorities, including national and local authorities, legislative and judicial bodies as well as natural or legal persons exercising administrative authority.

The constitutions of several countries in Europe do guarantee the fundamental right to information. Some good state practices also exist. In the United Kingdom, for example, the Freedom of Information Act requires public authorities to publish information and sets out procedural requirements to be followed when responding to individual requests.

To facilitate access to government data in the UK, a single online access point has been developed: data.gov.uk. E-government has also become a reality in Estonia and Greece. Citizens can comment on government policies or draft laws by logging into a government Internet portal. In

Serbia and several other countries there is an oversight body – such as an information commissioner – while some other countries entrust a parliamentary ombudsman with the supervision of the right to information. Other countries are yet to create such structures.

The chapter about access to official documents uses Sweden as an example of how open government can be promoted. Citizens' right to access official documents has been constitutionally guaranteed in Sweden for more than 200 years and access rights have traditionally been extended as far as possible in this country. Unfortunately this tendency to maximise transparency has gradually been restricted where citizen access to electronically stored information is concerned.

Conclusions

- Access to government documents based on the principle of transparency has to be ensured. Governments should ratify the 2009 Council of Europe Convention on Access to Official Documents;
- Citizens must be able to find the documents they need to see. To this end there must be strict rules for government agencies on how to register their documents and on obligations to help citizens find what they are looking for;
- Institutions supervising transparency, such as the administrative courts, information commissioners and parliamentary ombudsmen, have important functions in the defence of citizens' right to access information within the public sector;
- Strong legal protection for journalists' sources, particularly for public officials acting as whistle-blowers and assisting the media, is also a vital component of transparency. The right of public officials to inform journalists, on their own initiative and without penalties, should be legally protected.

Media pluralism and human rights

A major threat to media freedom today is the commercialisation and monopoly tendencies we see across Europe. Media pluralism is necessary in order to advance the ends of freedom of speech, and contribute

to the development of informed and diverse societies. Pluralism is an effect of freedom of speech, but is also a prerequisite for free speech itself.

However, in some countries, there is no genuine competition: independent television and radio channels are denied licences, critical newspapers have difficulties in buying newsprint or in distributing their papers. Another problem can be that the government buys advertisement space only in the "loyal" media, signalling to business companies to follow their lead, with the consequence that independent media are in reality boycotted. The increase in bureaucratic harassment and administrative discrimination is also of concern.

Concentration of media ownership is yet another problem. If the mass media are dominated by a few companies, the risk for media bias and interference with editorial independence increases. In Italy, for example, the former prime minister is the biggest shareholder of by far the largest private television company (through Fininvest, which owns nearly 39% of the shares of Mediaset). Its "*Canale 5*" is one of the two most-watched television channels in the country.

Ownership transparency is a key administrative tool for breaking up monopolies. If it is known who are the ultimate owners of the broadcasting firms, it is of course possible to break up monopolies and regain trust in media freedom.

Pluralism of the media means a structure that is comprised of competing, diversified, independent media outlets, covering all corners of society, and conveying a great variety of information and opinion. Technological development has created new possibilities for the emergence of such a media landscape. In the digital and Internet era, with the number of accessible channels and audiovisual platforms quickly multiplying, the urgency for detailed regulation – aimed at avoiding political domination – will fade. However, this development may be seen by power holders as justification for more regulatory intrusion.

Conclusions

– There is a need for a concrete policy to ensure plurality of media, including among the traditional media;

- Monopoly tendencies need to be systematically countered;
- There must be transparency of media ownership;
- The independence of regulators is fundamental and should be secured.

Public service media and human rights

Public service media have an essential role as a counterbalance to the business-driven entertainment media and media empires. Being independent and non-reliant on advertisers they should also encourage good, investigative journalism and knowledge-based content.

The concept of public service media is not often linked to human rights, but it can indeed play a vital role in assuring media freedom and diversity. Well-functioning public service media can be decisive in the protection of human rights, particularly freedom of expression, and provide room for all voices in society, not least minorities, children and other groups which tend to be marginalised.

Where there are strong public service media I can see that there is often high-quality, ethical journalism. Yet, in many countries in Europe, the utility of public service media is being called into question, and sometimes campaigns are conducted against them.

In the Internet age, we have a broader and more interactive media landscape and it has become logical to discuss the broader concept of public service media rather than just public service broadcasting. The former is much more than radio and TV; it has a wider scope in terms of services and it includes both traditional media and new media.

There are two major threats to media pluralism and diversity across Europe today. One is the attempt by state authorities to dominate the media market. The other is commercialisation and tendencies towards monopoly.

It has been argued that there is no objective truth, so impartial reporting is an illusion. The argument that all media presentations will always be more or less biased is one that can be used against state media but

not against true public service media. The point is whether there is a genuine ambition to seek impartiality and whether there are safeguards to this end.

Here the link to human rights is particularly relevant. With a rights-based approach for the further development of public service media – encompassing principles of human rights, accountability, participation, non-discrimination and empowerment – their credibility will be strengthened and thereby their potential to act in the interest of the public.

Conclusions

- The independence and impartiality of public service media should be protected. They should neither be commercial nor state-owned, and must be free from political interference and pressure from commercial forces;
- Public service media should include interests for which there are no large markets. They should aim at providing impartial news across the nation, give room to minority interests and remain clear of undue market influence;
- There is a need for studies and exchanges on how public service media actually function across Europe today and to what extent they incorporate human rights principles. This discussion must include the steps necessary to ensure that the potential of Internet-based social media will be fully exploited in the service of the public;
- There is a need to discuss the promotion of genuinely independent and useful public service media, including their mandate, organisation and funding, and accountability.

Social media and human rights

In 2009 the Council of Europe Conference of Ministers responsible for Media and New Communication Services adopted the Reykjavik Declaration. It clarifies that, even if access to the Internet is not a

human right per se, in the modern world all Council of Europe member states have a duty to provide or at least permit it.

Social media come with potential problems, as well as gains. This new phenomenon presents us with a range of fresh challenges. One important issue is how to ensure that Internet regulations do not strangle freedom of expression.

"Blocking", for example, is nowadays frequently used to prevent specific content from reaching a final user. However, the indications are that this method is not efficient in preventing, for example, human rights violations on the Internet. Furthermore, who should decide what is to be blocked, and what processes and remedies should this be subject to?

The 2011 Report of the UN Special Rapporteur on Freedom of Opinion and Expression is a strong statement of the importance of freedom of expression on the Internet. The Rapporteur emphasises the need for clear rules, in contrast with the arbitrariness he observes today, which allows for increasing surveillance and monitoring of communications.

Restrictions and regulations must be in accordance with Council of Europe standards, and in particular the ECHR and the case law of the Strasbourg Court concerning the narrow set of restrictions to freedom of expression necessary in a democratic society. Also, any interference with the rights to communicate, express views or assemble must be based on rules that are clear, specific and accessible. Given the crucial importance of these freedoms, such rules should to a large extent be written in statute law, which cannot be easily or quickly changed. To further prevent arbitrariness, any authority to which the power to apply the laws is delegated should be entirely independent, be required to give accessible, transparent and reasoned rulings, and be subject to judicial supervision.

Special attention should be paid to the concept of "incitement to violence", which should be interpreted in full and effective compliance with the standards in the ECHR and the case law of the Court. The report from the UN Special Rapporteur, for example, states that,

on the important issue of the censorship of alleged support for terrorism, restrictions on the right to expression can only be justified if the government can demonstrate that the expression is intended to incite imminent violence, and that there is a direct and immediate connection between this expression and the likelihood or occurrence of such violence.

There is also a need to continue the discussion on how to ensure the protection of individual integrity (data protection) in social media without undermining the right to freedom of expression.

Conclusions

- Internet freedom is important. All restrictions must be based on clear, specific and accessible statute law;
- Those regulatory authorities applying the laws restricting freedom of expression must be entirely independent, accountable and with adequate safeguards in place to avoid arbitrariness;
- Greater transparency and proportionality of Internet blocking is required, including narrowing the grounds for restriction of prohibited content to those accepted by the case law of the Court, and publishing public lists of blocked sites;
- Blocking must be carried out with effective notice on the conclusion of due process, and interested parties should be given the opportunity to challenge the decision in public judicial proceedings.

Thomas Hammarberg
Council of Europe Commissioner for Human Rights
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