

CHAPTER IV

MEDIA ETHICS

A. Introduction: Freedom of Expression and Media Responsibility

1. The Special Rapporteur has emphasized in his many reports the need to respect freedom of expression so that citizens will be sufficiently informed and democracy will function. Freedom of expression requires that governments refrain from placing legal restrictions on the media, the main means by which members of society exercise their right to impart and receive information and ideas,²³¹ except in the very narrow circumstances provided for in the American Convention. Little has been said about the corresponding responsibilities of the media in exercising the right to freedom of expression. Many governments and individuals in the region have expressed concerns that media do not always behave responsibly, engaging in practices while gathering and reporting the news that infringe upon the rights of others. Such concerns include invasion of privacy while gathering news, failure to verify adequately the accuracy of news, revelation of sensitive information related to national security and publication of information that is harmful to individuals' reputations.

2. It is important to recall that because the media is essential for the members of society to exercise their right to seek and impart information, the media owes its primary duty of responsibility to the public, rather than to the government. The main purpose of the media, and freedom of expression generally, is to inform the public about the actions of the government.²³² It cannot, therefore, be the role of the government to enforce "responsibility" in the media. This is especially true because of the highly subjective nature of the term "media responsibility". "The

²³¹ IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 Series A, No. 5, para. 34.

²³² See Hugo Aznar, *Ética y Periodismo ("Ethics and Journalism")*, Ediciones Paidós Ibérica, Barcelona, Spain, 1999, p.40. This idea is reflected in various codes of conduct for journalists. For example the International Declaration of the Rights and Obligations of Journalists, approved by representatives of journalists' unions of six European countries in 1971 states in its Preamble, "All rights and duties of the journalist derive from this right of the public to be informed on events and opinions. The journalists' responsibility toward the public excels any other responsibility, particularly towards employers and public authorities." The International Federation of Journalists' Declaration of Principles on the Conduct of Journalists states in Principle 1, "Respect for the truth and for the right of the public to truth is the first duty of the journalist."

real world is so complex, situations are bound to be so diverse, that general rules cannot be of any use or special rules cannot provide for every possible case. . . . [N]ewspeople don't always agree among themselves about what should be done."²³³ As a result, attempts to regulate "media responsibility" are subject to manipulation and abuse by public officials who may not be impartial towards the media. The threat of legal sanctions for making journalistic decisions that are essentially based on subjective questions of professional judgment would also cause a chilling effect on the media, preventing the dissemination of information of legitimate public interest.

3. This does not mean that the media operate completely outside the reach of law. Rather, it simply means that the law regarding the media "must be limited only to protecting and safeguarding other basic rights that can be endangered or that have been damaged by the misuse of freedom of expression, keeping this evaluation in the hands of the judges and the courts."²³⁴

4. It should also be emphasized that a discussion of "ethics" or "responsibility" is meaningless without wide-ranging freedom of expression.²³⁵ "To have the option of being ethical," one must "have the freedom to decide among alternatives of action."²³⁶ Thus, the Declaration of Principles on Freedom of Expression states in Principle 6, "Journalistic activities must be guided by ethical conduct, which should in no case be imposed by the State."²³⁷ In the words of one communications scholar:

There is no doubt that giving the media this type of freedom inevitably leads to considerable discomfort in some segments of society, and sometimes to some potentially difficult or even dangerous situations. But that's really no different from

²³³ Claude-Jean Bertrand, *Media Ethics and Accountability Systems*, Transaction Publishers, New Brunswick, New Jersey, U.S.A., 2000, p.139.

²³⁴ Aznar, *supra*, p.40.

²³⁵ A. David Gordon et al., *Controversies in Media Ethics*, Longman Publishers, U.S.A., 1996, p. 6 (commentary by John C. Merrill).

²³⁶ *Id.*

²³⁷ Compare Principle 9 of the Declaration of Chapultepec, which states, "The credibility of the press is linked to its commitment to truth, to the pursuit of accuracy, fairness and objectivity and to the clear distinction between news and advertising. The attainment of these goals and the respect for ethical and professional values may not be imposed. These are the exclusive responsibility of journalists and the media. In a free society, it is public opinion that rewards or punishes."

the risks we accept by embracing democracy as our chosen form of government. In a democratic society, the people are given the ultimate power to decide and they retain that power even when a large minority of the people think the decisions are wrong. The antidote for wrong or even dangerous political decisions is to rejoin the political battles and convince enough people to make the right decision next time. It is *not* to impose restrictions on the political dialogue or the political process in order to prevent wrong decisions.

The approach should be no different in regard to free speech in a democratic society. The antidote for wrong, dangerous or offensive speech should be *more* speech by those who disagree with the original statements, rather than restrictions on the original speech. The key here is that we must be willing to provide protection even for speech that offends us, and even if that speech offends us greatly.²³⁸

5. The fact that the government does not regulate media responsibility, or media ethics, does not mean that there is no way to bring about more ethical behavior in the media.²³⁹ Journalists and media owners are aware of the need to maintain their credibility with the public in order to survive and frequently undertake various types of measures to encourage more ethical behavior by media professionals. The better educated that media professionals become and the more awareness on the part of the public of the essential role of the media in society, the more likely that such measures will be implemented. The purpose of this section is to introduce some of the means that the general public and the media themselves can employ to increase professionalism and responsibility in the media. First, however, it is useful to outline briefly the scope of legitimate governmental actions under the American Convention with respect to media responsibility, in order to give an indication of the boundaries between the realm of the law and the realm of ethics.

²³⁸ Gordon et al., *supra*, p. 32 (commentary by A. David Gordon).

²³⁹ Aznar, *supra*, p. 41.

B. Acceptable government regulation of press content under the American Convention on Human Rights

6. Under the American Convention, the government has means at its disposal to punish actions by the media that cause serious damage to society or members of society. Article 13.2 of the Convention, while explicitly prohibiting prior censorship,²⁴⁰ allows for subsequent penalties to be applied under limited circumstances against individuals who cause damage to the “rights or reputations of others” or “national security, public order, or public health or morals.” Such penalties must be “expressly established by law to the extent necessary to ensure” one of these ends. With respect to the requirement of “necessity,” the Inter-American Court of Human Rights has interpreted this to mean that an intended penalty is more than just “useful,” “reasonable” or “desirable.”²⁴¹ Rather, the government must show that such a penalty must be the least restrictive of possible means to achieve the government’s compelling interest.²⁴² “[T]he restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees.”²⁴³ Moreover, the restriction “must be so framed so as not to limit the right protected by Article 13 more than is necessary. . . . [T]he restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.”²⁴⁴ This is an extremely high standard and any restrictions on freedom of expression must be carefully examined in order to prevent undue limitations of this fundamental right.

7. Additionally, Article 13.5 provides that “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.” Finally, Article 14 of the Convention provides for a mandatory right of reply

²⁴⁰ Article 13.4 provides for an exception to this general rule, which provides that “public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.”

²⁴¹ IACTHR, OC-5/85, *supra*, para. 46.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

for “anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication[.]” The injured party has the right to reply or make a correction through the same communications outlet.

8. Within this framework, the government can punish truly serious violations by the media through proportional sanctions that do not place excessive restrictions on freedom of expression. It can also undertake positive measures in some cases that can improve media responsibility.

1. Protection of Individuals’ Rights and Reputations

9. With respect to the protection of individuals’ rights and reputations from undue interference by the media, the state has a number of means that it can employ. First, it has been well established by the Inter-American Commission on Human Rights that civil penalties for defamation, libel and slander may be imposed against members of the media who report information that is harmful to an individual’s reputation or right to privacy. In cases in which the injured person is a “public official, a public person or a private person who has voluntarily become involved in matters of public interest,”²⁴⁵ the standard of “actual malice” must be used to determine responsibility. This means that “it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.”²⁴⁶ In no case may criminal penalties be imposed for such offenses when these are related to public persons. Such individuals are subject to a higher level of scrutiny by society because they are involved in matters of public interest. Criminal penalties are too severe in relation to the harm they purport to prevent and other means are available to public persons to protect their reputations. Therefore, such penalties do not meet the “proportionality” requirement of Article 13.2.²⁴⁷

²⁴⁵ Declaration of Principles on Freedom of Expression, Principle 10.

²⁴⁶ *Id.*

²⁴⁷ See IACHR, *Report on the Compatibility of “Desacato” Laws with the American Convention on Human Rights*, in Annual Report of the Inter-American Commission on Human Rights 1994, OAS/Ser.L./V/II.88, Doc. 9 rev., February 17, 1995, p. 197-212.

10. Individuals' rights and reputations may also be protected through the legally enforceable right to reply or correction mandated by Article 14 of the American Convention. Additionally, the state has the right to intervene and impose legal sanctions under Article 13.5 when other rights of individuals, including their rights to physical integrity and life, are threatened by speech that incites violence. Finally, the government has the right to enforce laws of general application, such as trespass laws, against the media respecting their behavior in gathering the news. "News gatherers do not have the right to invade an individual's privacy or to coerce an individual They do not have the right to storm a home or a private business with a phalanx of sound and camera equipment or to invade a neighbor's space."²⁴⁸ On the other hand, the government must not apply such laws to the media in a manner that is abusive and designed only to prevent access unduly to information that is of public interest.

2. Protection of National Security, Public Order and Public Health or Morals

11. Again, according to Article 13.2, the government may impose subsequent penalties for speech in order to protect national security, public order or public health or morals so long as these penalties are "expressly established by law to the extent necessary to ensure" one of these ends.²⁴⁹ As noted earlier, any restriction on freedom of expressing must be narrowly tailored and strictly proportional to the importance of the legitimate state interest it is intended to protect. Under this standard, the Inter-American Court of Human Rights found that a legal requirement that journalists belong to a professional association was an invalid restriction on freedom of expression, because it prevents those who are not members of the association from exercising their right to freedom of expression.²⁵⁰ The Court found that the law on mandatory membership in a professional association did purport to serve a legitimate public interest. The organization of journalists could be seen as a means to ensure the independence and freedom of journalists as well as "a method for regulation and control to ensure that they act in good faith and in accordance with the ethical demands of the profession."²⁵¹ This could fall under the legitimate purpose of "public order." However, the Court stated, "that same

²⁴⁸ Gordon et al., *supra*, p. 38 (commentary by Carol Reuss).

²⁴⁹ American Convention on Human Rights, Article 13.2.

²⁵⁰ See generally, IACtHR, OC-5/85, *supra*.

²⁵¹ *Id.*, para. 68.

concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole.²⁵² Thus, the Court concluded that obligatory membership in a professional journalists' society was not an acceptable means to guarantee public order through regulating the conduct of journalists.

12. In addition to the possible sanctions the state may impose under Article 13.2, the state can protect the morals of children and adolescents by regulating their access to public entertainments that may be unsuitable for them.²⁵³ This exception does not allow for the complete prohibition of a work. Rather, the state must allow its exhibition for individuals over the age of 18.²⁵⁴

3. Accuracy of News

13. Promoting accuracy in the news in general can be better achieved through positive governmental action than through the imposition of sanctions for information that is perceived to be "inaccurate" or "untruthful." As the Office of the Special Rapporteur has noted on numerous occasions, it should not be assumed that there can be one indisputable truth. Moreover, even assuming that it is possible to determine the truth about everything, the debate and exchange of ideas clearly is the best method to uncover this truth and to strengthen democratic systems based on plurality of ideas, opinions and information. Prior imposition of a requirement to report only the truth expressly precludes the possibility of engaging in the debate necessary to reach it. The prospect of penalties for reporting on a subject that free debate later shows to be incorrect creates the potential that informants will engage in self-censorship to avoid penalties, with the attendant harm to citizens who are unable to benefit from the exchange of ideas. For this reason the Declaration of Principles on Freedom of Expression states in its Principle 7:

²⁵² *Id.*, para 69.

²⁵³ American Convention on Human Rights, Article 13.4.

²⁵⁴ IACtHR, *Caso "La Ultima tentacion de Cristo" (Case of "The Last Temptation of Christ")* (Olmedo Bustos y Otros vs. Chile), sentence of February 5, 2001, Series C, No. 73 (available in Spanish only).

Prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments.

14. Instead of imposing penalties for failure to report truthful or accurate information, governments can improve the accuracy of the media by taking positive steps to ensure a plurality of voices in the media from different sectors of society. Democracy requires the confrontation ideas, debate and discussion. When this debate does not exist or is weakened due to the fact that sources of information are limited, this directly contravenes the principal pillar of democratic functioning. Increasing the diversity of sources will inevitably produce the most accurate version of events. This can be achieved by a variety of means such as the prevention of monopolies or oligopolies and the use of democratic criteria for the concession of broadcast frequencies. With these aims in mind, Principle 12 of the Declaration of Principles on Freedom of Expression states:

Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.

15. Monopolies or oligopolies in the mass communications media represent a serious obstacle to the right of all people to express themselves and to receive information, seriously affecting the requisite of pluralism. When the sources of information are drastically reduced in quantity, as is the case with oligopolies, or there exists only one source, as with monopolies, the possibility increases that the information diffused has not had the benefit of being challenged by information from other sources, limiting, in fact, the right to information of all society.

16. In much the same way, if there are multiple media, but media owners and workers are heavily representative of one particular social, political, religious, cultural or other group, the variety of points of view is limited. Democratic criteria in the awarding of broadcasting frequencies are necessary to ensure diversity of viewpoints.

17. The state can also improve the accuracy of the media by ensuring that journalists have access to the best information. Journalists, and all members of society, have the right to access to information in the hands of the state. Principle 4 of the Declaration of Principles on Freedom of Expression states:

Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

18. In terms of the specific objective of this right, it is understood that individuals have a right to request documentation and information held in public archives or processed by the State, in other words, information considered to be from a public source or official government documentation. Reporting such information is a vital part of the media's role in keeping society informed on issues of public interest. If journalists are denied such information, they may have to obtain it from other, often less credible sources.

C. Mechanisms to encourage ethical behavior by the media without governmental involvement

19. Aside from governmental regulation, there are many ways in which media can become more responsible to the public and to those who are reported on in the news, as well as more accurate and credible. The following section describes mechanisms that can be used by news people, editors and news directors, media owners and citizens. Although all of these mechanisms are purely voluntary, many are being employed throughout the Americas. The Office of the Special Rapporteur for Freedom of Expression does not endorse any particular

mechanism. This section aims to provide an overview of some of the mechanisms that are commonly used for promoting ethical behavior in the media without governmental regulation.

5. Codes of Ethics

20. Codes of ethics set out standards of professional conduct for media professionals to follow in the gathering news and reporting of news. Such codes have been developed by a number of international and domestic journalists' and media associations. These codes are intended to serve as voluntary guidelines that may be followed by individual media or journalists. Many individual media write their own codes, which may be enforced through employment contracts. In some media, "stylebooks" or other regulations are actually codes of ethics that can subject a journalist to employment sanctions.²⁵⁵ Other individual media publish their codes to make them more accessible to the public and to increase the "moral pressure" on the media to follow them.²⁵⁶

21. Most codes have basically similar provisions. These include prohibitions on lying or distorting news and causing needless harm to anyone in the reporting or gathering of news. They also include affirmative duties such as: to be competent; to be "independent from political, economic and intellectual forces;" to report clearly, accurately and fairly; to serve all of the various ethnic, political, social and other groups that make up society; and "to defend and promote human rights and democracy."²⁵⁷

22. Although it is recommended that media have their own codes in order to ensure that journalists' activities are guided by ethical conduct, it must be emphasized that codes of ethics must never be imposed by the state or enforced by law. Individual media have the right to choose whether or not to adopt a code.

6. Training

²⁵⁵ Bertrand, *supra*, p. 43.

²⁵⁶ *Id.* 113.

²⁵⁷ *Id.*, 45.

23. Many universities offer courses in ethics for journalism students. University education for journalists is becoming more and more common, and an increasing number of university journalism departments are requiring at least one course on ethics. Mid-career journalists receive ethics education through unions, guilds and their individual media employers. Some employers and organizations award grants or fellowships for experienced journalists to attend courses on ethics or to obtain university degrees in journalism, which would require the study of professional responsibility and ethics.²⁵⁸ Workshops and seminars on ethics are organized for journalists within individual media organizations, or by outside institutions such as universities, media associations, or non-governmental organizations.²⁵⁹ These programs usually employ case studies or role playing activities in which journalists must evaluate ethical dilemmas in everyday situations.²⁶⁰

7. Press councils

24. Press councils are groups made up of members of the media and the public. They typically consider citizen complaints about the media in a court-like procedure. Press councils have no real enforcement authority for their decisions, but they rely on the "power of embarrassment" to achieve compliance with norms of ethical conduct. There are both local and national press councils.²⁶¹ Governments should not mandate the existence of or participate in such councils.

8. Criticism of the Media

25. Individual media, media organizations and members of the public use a variety of means to evaluate media performance in the hopes that this will improve future performance. These numerous mechanisms can be grouped as "media criticism."

²⁵⁸ *Id.*, p. 121.

²⁵⁹ *Id.*

²⁶⁰ *Id.*, p. 122.

²⁶¹ Dennis, *supra*, p. 700.

26. Individual media often engage in self-criticism aimed at increasing the level of professionalism in their organization. One such mechanism used by media organizations is the appointment of an ombudsman. An ombudsman, generally an experienced and respected journalist, "takes reader and viewer complaints, occasionally adjudicates disputes, and sometimes writes a reflective column for the newspaper's editorial page."²⁶² This individual is sometimes called a "readers' advocate."²⁶³ Another internal mechanism many print media organizations use is a correction box placed visibly in each edition.²⁶⁴ Some individual media also undertake reporting on the media industry as a whole through the creation of a "media page" or a program on the media.²⁶⁵

27. Often the media directly engages the public in the process of media criticism. Some media use public surveys to determine whether or not they are serving the public interest. These surveys are sometimes directed at those mentioned in the media to determine how fairly they were treated by the media and whether they felt the report was accurate. In other cases, they are printed for all media users to fill out, in order to assess their general feelings about whether the media has presented accurate and unbiased information.²⁶⁶

28. Members of the public are often given the opportunity to comment directly on the media's performance through a "letters to the editor" page in the case of print media or through the allocation of time to read listener or viewer letters on the air in the case of broadcast media. Often such letters are posted online on media organizations' Web sites. Many media organizations also publish email addresses for staff, so that the public can contact the journalists directly.²⁶⁷ Many media host "reader call-in nights" or "town meetings" with media and local people, so that members of the public can express their concerns and discuss their

²⁶² *Id.*

²⁶³ Bertrand, *supra*, p. 117.

²⁶⁴ *Id.*, p. 112.

²⁶⁵ Dennis, *supra*, p. 701.

²⁶⁶ Bertrand, *supra*, p. 113.

²⁶⁷ *Id.*

expectations of the media.²⁶⁸ "Some firms . . . or ideological groups . . . buy pages in periodicals to denounce what they perceive as sins of the media."²⁶⁹

29. Mechanisms for media criticism outside of individual media organizations also exist. Journalism reviews and media magazines are publications dedicated exclusively to analysis and criticism of the media.²⁷⁰ Whether local or national in scope, such publications aim to expose the "distortions and omissions" of the media and publish "news that the regular media have ignored."²⁷¹ The mid-1990s marked the appearance of online journalism reviews.²⁷² Criticism is also carried through the publishing of critical reports or books written by committees of experts or governmental bodies, media professionals, academics or non-governmental organizations (NGOs).²⁷³ Numerous NGOs have also been created to observe and criticize the media and to publicize their omissions on a more permanent basis.²⁷⁴ Media criticism also occurs in the portrayal of the press in popular culture, such as television programs and movies.²⁷⁵

30. Finally, members of the public can and occasionally do join together to try to influence the media "with sensitization meetings, letter-writing campaigns, opinion surveys, systematic evaluations, appeals to law-makers, complaints addressed to regulatory agencies, suits, and also boycotts."²⁷⁶

D. Conclusion

31. The foregoing section describes many of the main ways in which media in the Americas can increase, and in many cases are already increasing, their level of professionalism

²⁶⁸ *Id.*, p.122.

²⁶⁹ *Id.*, p. 113.

²⁷⁰ Dennis, *supra*, p. 702.

²⁷¹ Bertrand, *supra*, p. 114.

²⁷² *Id.*

²⁷³ *Id.*, p. 115.

²⁷⁴ *Id.*, p. 119, 123.

²⁷⁵ **Dennis, *supra*, p. 703.**

²⁷⁶ Bertrand, *supra*, p. 119.

and ethical responsibility. Some of the greatest obstacles to creating more ethical media are the lack of knowledge on the part of the public about the ways they can effect change in the media, lack of education in the media on ethical issues, lack of awareness in the media about what possibilities exist for encouraging more ethical behavior and the cost of implementing the various media accountability mechanisms.²⁷⁷ While the government's role in this process must be limited for the reasons stated earlier, the government can encourage the voluntary use of various mechanisms to promote media accountability, especially through education. The government must refrain from placing restrictions on the media that are designed to promote ethical behavior. Given the freedom to choose how and what to report and the education necessary to make ethical decisions, the media will become more responsible.

²⁷⁷ *Id.*, p. 142, 145.