

Media and the Law:

An Overview of Legal Issues and Challenges

A Report to the Center for International Media Assistance

By Peter Noorlander

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**National Endowment
for Democracy**
Supporting freedom around the world

The Center for International Media Assistance (CIMA), a project of the National Endowment for Democracy, aims to strengthen the support, raise the visibility, and improve the effectiveness of media assistance programs by providing information, building networks, conducting research, and highlighting the indispensable role independent media play in the creation and development of sustainable democracies around the world. An important aspect of CIMA's work is to research ways to attract additional U.S. private sector interest in and support for international media development. The center was one of the of the main nongovernmental organizers of World Press Freedom Day 2011 in Washington, DC.

CIMA convenes working groups, discussions, and panels on a variety of topics in the field of media development and assistance. The center also issues reports and recommendations based on working group discussions and other investigations. These reports aim to provide policymakers, as well as donors and practitioners, with ideas for bolstering the effectiveness of media assistance.

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Noorlander has been involved in freedom of expression litigation in various countries as well as at the international level, and he also has extensive experience drafting legislation in different countries. He also has conducted legal training and lectured on issues such as defamation law and practice and Internet regulation.

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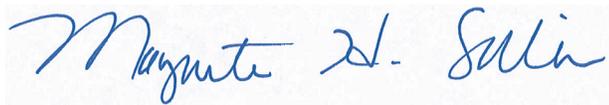
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Preface

The Center for International Media Assistance (CIMA) at the National Endowment for Democracy commissioned this study of the legal environment for independent media around the world. It is intended as an overview of the legal challenges and issues—laws, regulation, and common practices by restrictive governments—under which news media operate.

CIMA is grateful to Peter Noorlander, a lawyer with the Media Legal Defence Initiative, for his research and insights on this topic.

We hope that this report will become an important reference for international media development efforts.

A handwritten signature in blue ink that reads "Marguerite H. Sullivan". The signature is written in a cursive style and is set against a light blue rectangular background.

Marguerite H. Sullivan
Senior Director
Center for International Media Assistance

Introduction

The legal environment in which a media outlet operates is a crucial factor in its success. Rules and regulations can hinder or enable the growth of media and restrict or promote particular kinds of content. A liberal and empowering legal regime will allow media to publish hard-hitting investigative reports and fulfill their function as watchdog of democratic society without fear of legal sanction, thus helping to make governments more accountable. This is a public good lost to citizens of countries with restrictive legal regimes.

This report provides an overview of the different kinds of laws that affect the media and explains how they are used in many countries to influence the operations of news outlets and the information they offer. It focuses on restrictive laws more than on those of the enabling and empowering variety, for the simple reason that enabling laws are—unfortunately—relatively rare. It also considers how Internet-based outlets are affected by laws, and how the legal regime in a country affects the ability of individual bloggers or citizen journalists to hold their governments to account. This is a particularly significant area of inquiry as the reach of digital media spreads around the world, increasing in importance as the means by which citizens receive their news and information.

While the focus of this report is on the impact of laws on media in the developing world, it also considers the use of laws—particularly on terrorism and libel—in other parts of the world. Many countries have inherited their libel laws from Britain or France, for example, and legal developments there continue to be influential elsewhere. Similarly, many countries have taken a copycat approach to introducing new anti-terrorism laws from the United States, the United Kingdom, and Western Europe and have applied them to clamp down on those who criticize the government.

The Use of General Laws to Target Journalists and Media

Like everyone else in society, media and journalists, including bloggers and citizen journalists, are subject to the laws and regulations that exist in every country. This includes laws on content—such as libel laws—as well as corporate and tax laws. While the former arguably affect the media more than others in society, nevertheless, they are general laws that apply to all. This section surveys some of these laws and illustrates how they affect the media.

Libel, Insult, and Privacy Laws

The mindset of government ministers and other powerful figures in many countries around the world remains to clamp down on criticism of them rather than to tolerate it, and in most countries the law of libel remains their primary vehicle. Libel laws tend to be worded in fairly broad terms, allowing courts considerable leeway in their interpretation of what is “libelous.”

A recent example from Zimbabwe shows how effective criminal libel laws in particular can be in suppressing criticism and dissent. The weekly newspaper the *Standard* in 2010 published a report alleging that police were recruiting war veterans loyal to the Zimbabwe African National Union-Patriotic Front party of President Robert Mugabe to occupy senior positions and direct operations in the run-up to elections expected in 2011. The reporter, Nqobani Ndlovu, was immediately charged with defamation and spent nine days in prison.¹ His case is a stark reminder of how sharply and aggressively defamation laws can be used to silence criticism.

Ndlovu’s case is not an isolated one: The Committee to Protect Journalists’ 2010 prison census, reported 10 journalists incarcerated for defamation as of December 1, 2010;² while the freedom of expression organization Article 19 reported 42 countries as having imprisoned journalists for libel in 2005 through 2007.³ As of 2010, criminal defamation laws of one sort or another were in use in most countries in the world.⁴

One of the reasons that defamation laws are so commonly abused as a means to restrict criticism is that it is relatively easy to bring a claim but very hard to defend one. Under most defamation laws, all that a claimant needs to do is allege that a particular report is factually incorrect and that it concerns his or her reputation. The burden then shifts to the journalist to prove, often to a very high standard, that what he or she wrote was true. Defamation laws often do not allow for a margin of error on the part of the journalist, even in reports on issues of high public interest. In addition, in many cases judges treat opinion pieces as statements of fact, requiring journalists to prove the truth of their opinions—something that is impossible.

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Convictions for criminal libel and defamation do not always result in imprisonment, but they still produce a serious chilling effect. Damages are a particular issue: In many countries, courts routinely award high damages against media outlets, sometimes resulting in bankruptcy. In Kazakhstan, for example, a story on the rising price of grain by reporter Almas Kuserbaev resulted in a \$200,000 libel award against him and the bankruptcy of the newspaper in which the story was published. Kuserbaev implicated a powerful member of parliament, Romin Madinov, and implied that Madinov was pursuing his own business interests in parliament—his company controlled a large part of the country’s grain market. The Media Legal Defence Initiative, an NGO that helps journalists defend their rights, has now taken his case to the United Nations Human Rights Committee, arguing that the libel award has done lasting damage to his career as a journalist: Mainstream newspapers refuse to employ him or take stories from him.⁵

Large libel awards are commonplace around the world. Consider the following, randomly picked, examples:

- In 2004, a Russian newspaper, *Kommersant*, was ordered to pay \$11 million to Russia’s Alfa-Bank. The paper’s complaint against the award remains pending at the European Court of Human Rights.⁶
- In November 2009, the *Far Eastern Economic Review* paid \$400,000 in costs and damages to Singaporean Prime Minister Lee Hsien Loong and his father, Minister Mentor Lee Kuan Yew, adding to the hundreds of thousands of dollars in libel damages won by Singapore’s rulers over the years.⁷
- In Thailand, a supermarket chain, Tesco Lotus, pursued a three-year case against three individual journalists for a total of \$36 million in damages. Two of the journalists were forced to apologize; only one of them managed to win his case.⁸
- In 2008, the Belarusian newspaper *Novy Chas* was ordered to pay \$23,500 in damages. The paper came close to bankruptcy but eventually paid the damages and continued publishing.⁹
- In May 2011, an Indonesian court awarded Tommy Suharto, son of the country’s former president, \$1.5 million in defamation damages for an article in the *Garuda Indonesia* in-flight magazine that referred to him as a “convicted murderer.” In 2002, Suharto had been convicted of ordering the killing of a supreme court judge, but the South Jakarta District Court held that he had “served his sentence and since the completion of the term he has fully regained his rights as a citizen and [the right] for his past to not be mentioned.”¹⁰

Libel laws are not only used to suppress domestic dissent. From time to time attempts are made to suppress criticism abroad as well: The government of Bahrain instructed a London law firm in June 2011 to sue the daily newspaper the *Independent* for its critical coverage of the killing of protesters,¹¹ and the *Guardian*’s Andrew Meldrum, based in Zimbabwe, was sued there for “publishing falsehoods” in the UK, where the *Guardian*’s headquarters are located.¹² While

foreign media outlets can usually weather relatively small libel cases such as this, fighting larger cases is more difficult and can be a significant drain on their resources. The *Far Eastern Economic Review*, for example, a Dow Jones-owned magazine that once published across Southeast Asia from Hong Kong, fought a lengthy battle with Singapore's Minister Mentor Lee Kuan Yew over an article in which the magazine alleged that he used the country's libel laws to suppress any criticism of the ruling family. Lee Kuan Yew sued and won.¹³ Foreign media have since been noticeably more careful in their reporting of the actions of Lee Kuan Yew and his family and the handling of any controversy arising from their reporting; in March 2010, the New York-based *International Herald Tribune* was forced into a \$114,000 public settlement.¹⁴ The alternative, according to former *Wall Street Journal* general counsel, Stuart Karle, would have been to spend up to \$1 million fighting the matter, with no guarantee of winning.¹⁵

So-called “insult” laws are a close relative to libel laws but with an even broader sweep. Where libel laws ostensibly protect individuals from comments that might lower them in the public esteem—an objective test in theory at least—insult laws protect from any words that the recipient might feel are “insulting.” This is ultimately a far more subjective test—some people are thick-skinned, others are not—and as a result, insult laws are easily abused to restrict criticism that may be harshly worded. Examples include the cases of an Austrian politician who won a case against a journalist who had referred to him as an “idiot,”¹⁶ a founding member of the Association of Iranian Journalists, Issa Saharkhiz, currently imprisoned for having insulted Iran's Supreme Leader Ayatollah Khamenei in a critical comment;¹⁷ and a Kuwaiti journalist, Mohammed Abdulqader al-Jassem, who was convicted in 2010 of defamation and was awaiting additional charges of having insulted the country's ruler, the emir.¹⁸ Whether or not an “insult” has indeed been published is entirely up to the judge .

Over the last decade or so, media freedom NGOs have put significant effort into reforming libel and insult laws to ensure a better balance with the right to freedom of expression. While some successes have been achieved, particularly in regard to decriminalization of defamation,¹⁹ there is little evidence that the use of libel laws overall has gone down. An analysis of the dockets of organizations active in the area of legal defense of the media shows that libel cases remain among

What Is the MLDI?

The Media Legal Defence Initiative is a new organization that helps journalists defend their rights. It does so by responding to requests from individual journalists but also by working with national media support organizations to improve their capacity to provide legal defense to journalists. The assistance it provides includes financial help with legal fees, providing legal expertise, and sponsoring trial observations.

Established in 2008 and based in London, MLDI has supported the defense of cases such as J.S. Tissaynayagam's terrorism trial in Sri Lanka, charges of insulting the president against the leadership of the Gambia Press Union, and the trial of Thai news website *Prachatai's* webmaster, Chiranuch Premchaiporn.

MLDI concentrates on independent media and journalists in Asia, Africa, Eastern Europe, the Middle East, and Latin America, but it will also consider applications for assistance from Western Europe and North America.

the main legal threats faced by media. Even when media face down a threat or win a libel case against them, they still will have been forced to divert their energies away from reporting and producing hard-hitting stories. A British columnist, Simon Singh, won a two-year libel battle against the British Chiropractic Association but regrets that he had to put his career on hold to devote himself to the case.²⁰ His lawyer commented, “In the game of libel, even winning is costly and stressful.”²¹ Many media outlets have a cache of stories they cannot publish, purely because of the fear of being hit with a libel suit—even if they think they can defend themselves.

Privacy laws—whether civil or criminal—are a close corollary to libel and insult laws. Where the latter purport to protect reputational interests, privacy laws can be used to restrict any reporting that concerns a person’s private or family life. Courts around the world have defined “private and family life” very loosely to include extramarital affairs involving top officials and politicians.²² They are therefore similarly easily abused to restrict public criticism.

While there is no doubt that countries may restrict certain publications that genuinely endanger national security, national security laws are easily abused by governments to restrict publications and even imprison journalists.

National Security, Anti-Terror, and Public Order Laws

Every country has laws on its books that aim to protect national security and public order. However, while there is no doubt that countries may restrict certain publications that genuinely endanger national security (for example, in times of war the military will restrict publication of troop movements), national security laws are easily abused by governments to restrict publications and even imprison journalists. Even in relatively developed democracies, judges have a strong tendency to defer to the authorities when national security interests are asserted,²³ and in less developed

democracies there is hardly any judicial inquiry when national security-related charges are brought. It is telling that of the 143 journalists imprisoned at the end of 2010, more than half were jailed on national security charges,²⁴ particularly in Burma, China, and Iran.

The recent case of Syrian blogger Tal al-Mallohi is illustrative of how national security laws are used against journalists as well as bloggers in undemocratic countries. In 2009, al-Mallohi was arrested and held in administrative detention for close to a year. When she was finally brought before a court in 2010, the court hearing was held behind closed doors, and she was sentenced under Syria’s emergency law to five years in prison for “disclosing information to a foreign country that must remain a secret for national safety.”²⁵ Her lawyers reported that the judges had not cited any evidence or provided any details about why she was convicted.²⁶

However, there are examples where a concerted effort by civil society has thwarted the use of national security laws against journalists. For example, controversial Malaysian journalist Raja Petra Kamarudin, was able to fend off various criminal charges against him, including charges brought under the country’s notorious Internal Security Act, when a consortium of national

and international media freedom and human rights organisations—including the International Bar Association and the Media Legal Defence Initiative—intervened and sent trial observers to ensure the fairness of the proceedings against him.²⁷ Similarly, Sri Lankan journalist J. S. Tissainayagam, imprisoned in 2009 on charges of abetting a terrorist group, was pardoned in 2010 after a sustained effort by a large coalition of media freedom groups, including a joint trial observation by the International Commission of Jurists and the International Federation of Journalists.²⁸ These cases demonstrate that in countries where there is some judicial independence, or where international opinion counts, bogus national security charges can be defeated. However, considering the long and concerted effort put into challenging these by media freedom groups, it is also clear that this kind of pressure cannot be brought to bear in every case.

What is perhaps more concerning is a trend over the last decade of increasing use of national security laws against the media in the established democracies of Western Europe. A November 2008 report commissioned by the Council of Europe, *Speaking of Terror*, surveyed the use of national security laws against the media in 47 countries across Europe on issues ranging from access to information to the use of wiretaps and the protection of journalistic sources. The report found a worrying trend in the introduction of new laws “which have serious effects on the abilities of journalists to gather and disseminate information. Terrorism is often used as a talisman to justify stifling dissenting voices in the way that calling someone a communist or capitalist were used during the Cold War ...” The report also criticizes the courts in established democracies for not exercising sufficient scrutiny, and the European Court of Human Rights—the last bulwark for claimants in legal cases—for being “inconsistent” and for allowing cases to go on for years without offering much by way of a remedy even if they do find in the complainant’s favor.

In response, the member states of the Council of Europe resolved in May 2009 to review their anti-terror laws and ensure they are in line with human rights guarantees.²⁹ Two years later, this review had not yet taken place.

Other Laws

A plethora of other laws can also be abused to clamp down on media. A random sample of legal actions against journalists and independent media outlets in 2010-2011 includes:

- An administrative court case against the Russian newspaper *Krestyanin* over alleged breaches of fire regulations. *Krestyanin* was faced with temporary closure as a result.
- A criminal case against Azeri journalist Eynullah Fatullayev for alleged possession of heroin.
- The imprisonment of a British journalist, Alan Shadrake, for contempt of court in Singapore in 2011.
- A ban on graphic images of violence in the run-up to legislative elections issued by a Venezuelan court invoking anti-pornography laws in 2010.

- The sentencing of Rwandan journalists Agnes Uwimana Nkusi and Saidath Mukakibibi to 17 and seven years imprisonment respectively on charges including “inciting divisionism in February 2011.”³⁰
- The sentencing to three years in prison of a Cameroonian journalist, Lewis Medjo, in January 2009 for publishing “false news.”³¹

Enabling Laws: Freedom of Information

So-called “freedom of information” laws allow the media—along with everyone else—to obtain access to information held by public bodies and hold them to scrutiny. While the libel, national security, and other laws reviewed in the preceding sections restrict media freedom, “freedom of information” laws aim to empower the media. Along with constitutional provisions recognizing the right to freedom of expression, they are among the very few laws to do so.

The last decade has seen an expansive growth in the number of freedom of information laws around the world. As of May 2011, more than 80 countries had specific freedom of information laws, the vast majority of them passed in the last decade.³² Nigeria’s recently enacted law is a good example. Signed into law by President Goodluck Jonathan on May 28, 2011, it guarantees the right of access to information held by public institutions. Most information is available on request only, subject to certain exceptions, but public bodies are required to provide certain classes of information proactively.

The spirit of freedom of information laws is to provide transparency of government. As such, they serve society as a whole and not just the media. However, good use by the media of freedom of information laws can result in strong stories and issues of high public interest coming to light. Recent examples of stories broken through the use of freedom of information laws by journalists range from the mundane to the extraordinary, including a scandal in the UK on how members of parliament were abusing their expense allowances that resulted in resignations and the imprisonment of some of them,³³ and in the United States how the FBI maintained a watch list of anti-war and environmental campaigners.³⁴

Unfortunately, many of the 85 freedom of information laws that were enacted recently have been very poorly implemented. In some cases, government agencies have apparently remained blissfully unaware that they are under any legal obligation to disclose any information at all, and in others it has taken civil society organizations to push governments into implementing laws. For example, a recent study has found that Indonesia’s Freedom of Information Law, passed in 2008 and entered into law in May 2010, has not been implemented;³⁵ Maltese journalists recently called on their government to implement the Freedom of Information Act 2008,³⁶ while media and civil society in Uganda struggle to gain access to more than the most mundane information under legislation enacted in 2005.³⁷ Even in developed democracies, journalists are frustrated that the stock response to many FOI requests appears to be “no.” A British reporters’ group guide to freedom of information issues includes the tips, “Appeal, appeal, appeal, because they’re counting on you not to,” as well as the observation that “FoI is a negotiation, not a right.”³⁸ It seems that concerted civil society action and pressure from domestic media will be necessary to fulfill the promise that freedom of information laws unquestionably harbor.

The Use of Laws Specifically Aimed at the Media

As well as the laws of general application outlined above, many countries still have specific laws to regulate the print media, and virtually all countries have laws to regulate the broadcast media. A very small number of countries have adopted or are in the process of adopting laws that set out to liberalize the media, and this section discusses those separately.

Print Media Laws

It is notable that most established democracies do not have a law that imposes specific regulatory measures on the print media. This is due to a deliberate policy to prevent unnecessary regulation and to distinguish the press from the broadcast media, where different considerations apply. Those countries that do have specific laws aimed at regulating the print media are generally found in the middle and lower reaches of the annual press freedom rankings, and international media freedom watchdogs have consistently regarded such laws with suspicion. This is particularly true where media laws require journalists to register or obtain licenses before they are allowed to work. In its 2010 report, *Registering Reporters: How Licensing of Journalists Threatens Independent News Media*,³⁹ the Center for International Media Assistance surveyed various regulatory practices in more than 100 countries and found that the government had a direct hand in licensing journalists in at least 25 percent of them. That is an overt interference with journalists' right to freedom of expression, the legitimacy of which under international human rights law is extremely questionable at best.⁴⁰

Those countries that do have specific laws aimed at regulating the print media are generally found in the middle and lower reaches of the annual press freedom rankings.

A large number of countries still have laws that require media outlets to either register or obtain a license before they can operate. In some, government agencies have effective control over who is allowed to publish; others merely require a media outlet to register its contact details with a central agency. An example of the former can be found in Rwanda and Uzbekistan, where the media laws are used to exercise strict control over who is allowed to publish. This practice has been challenged at international human rights tribunals: The UN Human Rights Committee has denounced the practice in one case from Uzbekistan, where a Tajik language newspaper had been effectively shut down by local authorities for failure to provide some very detailed administrative information. In another case, the European Court of Human Rights struck down a Polish law that stopped a newspaper from publishing because its name was not deemed appropriate.⁴¹ International media freedom watchdogs have called for the abolition of laws that impose these kinds of restrictions,⁴² but in practice, they continue to exist.

In addition to imposing registration or licensing requirements, specific laws aimed at the print media often put various administrative requirements on the media that can be onerous. For example, Rwanda's media law imposes a minimum capital requirement on media outlets.

Broadcasting Laws

Virtually every country in the world has a broadcasting law. Broadcasting regulation has long been accepted as being necessary for technical reasons: There is room for only a limited number of frequencies on the broadcasting spectrum, and it is in the common interest that the spectrum be regulated to avoid different radio and TV stations broadcasting on the same frequency. In the age of analog broadcasting, this meant that in a given geographic area, there was typically room for only a handful of broadcasters on the airwaves.

The main media freedom issues with regard to analog broadcasting are (1) who is in charge of the licensing process; and (2) on the basis of what criteria are licenses awarded? In many countries, the licensing process has traditionally been in the hands of a government agency. This has led to suspicions of government interference in the allocation of licenses, and at times of outright discrimination. In Armenia, for example, broadcaster A1+ was denied a broadcasting license on successive occasions even though its bids were technically better than that of rival

While there is recognition that there ought not to be government interference in the licensing process, the question of how best to make such non-interference a reality remains unresolved.

broadcasters. Alleging discrimination on political grounds, A1+ launched a complaint with the European Court of Human Rights which, after several years, finally ruled in its favor.⁴³ Similar cases have arisen in Bulgaria as well as in countries in Africa, such as Zimbabwe.⁴⁴

While there is recognition that there ought not to be government interference in the licensing process, the question of how best to make such non-interference a reality remains unresolved. In many countries, government ministries remain in charge of the allocation of broadcast frequencies. Even where independent licensing authorities have been set up, its members are often appointed, in whole or in part, by the government.

With the arrival of digital broadcasting, however, a new regulatory environment has opened up. While there still needs to be some regulation, the digital spectrum can accommodate a far greater number of broadcasters while using less of the spectrum. This has two important consequences for media freedom. First, it is harder to justify denying a license on grounds of scarcity of spectrum.⁴⁵ Licensing agencies could be forced to award licenses on the basis of more transparent criteria. Second, in the process of switching over to digital broadcasting, a large amount of spectrum will be freed up. The decision of what to do with this newly freed up spectrum—the “digital dividend” as it is known—will have important implications for the way in which we all will use media and communications devices in the decades to come. It is very tempting for governments to simply auction off the freed up spectrum. In 2010, it was estimated that the value of electronic communications reliant on the spectrum in Europe alone exceeded \$360 billion. But if this happens, community and other public interest media will lose out—they cannot compete with commercial interests. Community media activists, therefore, argue that spectrum must be set aside for community media and that technology choices should not end up marginalizing or disadvantaging them.⁴⁶

Laws That Promote Media Freedom

Rarely do governments legislate with the specific intent of promoting media freedom. But every once in a while, precisely that does happen. One very recent example is the Icelandic Modern Media Initiative (IMMI). It is a legislative proposal that intends to make the country a haven for media freedom. The project has the support of all the political parties, and a resolution initiating it was passed unanimously on June 16, 2010.⁴⁷ The IMMI project is made up of a number of complementary elements:

- A Freedom of Information Act, described as “ultra modern” by its promoters
- Strong protection for whistleblowers as well as for journalistic sources
- Limits on prior restraint
- Strong protection for intermediaries such as Internet service providers
- Protection from “libel tourism,” or the practice of shopping around for friendly venues in which to sue for libel, regardless of the venue’s connection to the parties in the suit
- The enactment of a realistic statute of limitations for Internet publications, making it clear that not every click constitutes a new instance of publication
- Ensuring that legal processes are not abused to restrict free speech
- Allowing the creation of virtual limited liability companies

The process to edit, draft, and pass the 13 separate pieces of legislation that will be needed to finalize it is now underway, and the package is expected to be completed by mid-2012.⁴⁸

A brief perusal of the project headings for IMMI makes it clear this is a project for the digital age: Much of it is concerned with ensuring that regulators do not use technology or technology-based arguments to undermine media freedom. The other relatively recent law that has been enacted with the explicit aim of enabling the media, Georgia’s⁴⁹ 2004 Law on Freedom of Speech and Expression,⁵⁰ is technology neutral (some might say, old-fashioned) by comparison. It is concerned with ensuring a proper balance between free speech, privacy and reputation, the protection of political speech, ensuring that any regulation of the media is content neutral, and ensuring strong protection of journalistic sources of information. The law has unquestionably created a liberal environment for the media as far as content-regulation is concerned. What is unclear, however, is the extent to which media freedom in the country has advanced since 2004. While few legal cases against Georgian media are reported internationally,⁵¹ it may be that media are hampered more by violent attacks and threats against them. In other words, the existence of liberal content laws alone does not suffice to guarantee a free media.

Finally, some countries have special provisions in their criminal code that make it an offense to “impede journalists in their professional activity.” For example, Article 144 of the Russian Criminal Code states, “Impeding journalists in their legal professional activities by forcing them to disseminate or refuse to disseminate information is punished by fine ... or correctional labor for up to one year.” However, there are very few convictions under provisions like this,⁵² and implementation appears to be haphazard at best.⁵³

Taming the Beast: Attempts to Legislate the Internet Into Submission

In principle, all of the content restrictions discussed above—the laws on libel, protecting national security etc.—apply to online media just as they do to traditional media. To a large extent it makes sense that they should: In the same way that it is just as illegal to commit fraud through the Internet as it is to do so by more traditional means, it is also just as illegal to publish materials that endanger national security on the Internet as it is to publish them elsewhere.

However, the Internet has several specific characteristics that need to be taken into account when deciding how these laws should apply. The main issues are the transnational nature of the Internet (material that is uploaded in one place is accessible worldwide); the role played by Internet service providers and others who provide a platform for publishing; and the nature of the material published. Sometimes, content uploaded to a chat room is more akin to what is said in conversation than it is to considered printed comment, and this needs to be taken into account.

Forum Shopping and Libel Tourism

In many countries, courts have taken the approach that what can be downloaded onto their computers should be subject to the laws of their nation. As a result, judges increasingly claim jurisdiction over material that has been published in another country, and sometimes even for another audience. This has led to complaints of forum shopping and, more recently, “libel tourism”: the phenomenon by which claimants in libel cases bring their claim in the country where they believe they can get a favorable result. Publishers have difficulty defending such cases, both because they are usually not familiar with the laws of the country in which they are being sued and for reasons of cost. London has been targeted in particular. Notorious examples of libel tourism include Ukrainian oligarch Rinat Akhmetov, who sued website *Obozrevatel* for publishing articles about him in London in the Ukrainian language; and Icelandic investment bank Kaupthing, which sued the Danish newspaper *Ekstra Bladet* over the translated version of two articles on its website.⁵⁴

More recently, however, London judges have been increasingly reticent to accept jurisdiction and have demanded at least a link between the claimant and the country. In a case brought against the *Kiev Post* late in 2010, the judge refused to accept that the claimant—a Ukrainian businessman—had sufficient links with London to be allowed to bring a libel claim there.⁵⁵ This is partly the result of civil society protest⁵⁶ and partly the result of the United States introducing legislation restricting the enforcement of foreign libel judgments in response to a series of cases in which U.S. publishers had been sued in the UK.⁵⁷

While libel tourism may be on the wane in London, the phenomenon of forum shopping has hardly disappeared, and cases continue to be brought elsewhere in Europe (Paris and Berlin are favored destinations for the speed with which a judgment can be obtained) as well as in Singapore, for example.

Liability for Internet Service Providers

In a number of countries, service providers, hosts of Web platforms and content aggregators may be held liable for material that is posted on websites owned or run by them. The law in many countries regards them as “publishers” and renders them liable for any content that may be libelous, breaches privacy, or is otherwise deemed illegal. This places such outlets in the very difficult position of being forced to defend material that in reality they did not “publish” (in the common-sense meaning of the word) and the truth or falsity of which they know nothing about. Examples include Google being convicted of breaching privacy by an Italian court for a video uploaded onto YouTube (owned by Google);⁵⁸ and a Thai news and current affairs website, *Prachatai*, whose managing director is currently on trial facing criminal charges of insulting the monarchy for comments left on the site by users.⁵⁹

While the law in a small number of countries specifically exempts so-called “intermediaries” from liability for content “hosted” by them,⁶⁰ in a number of countries there is a “notice and take down” policy, requiring hosts to take down material once they are notified that it might be libelous or otherwise illegal. In the majority of countries, the legal position is untested, leaving Internet hosts unsure as to the extent of their liability.

Applying Media Laws to Internet Outlets

Some governments, in their attempts to control the “wild west” of libel and unruly comment that they perceive it to be, have attempted to extend media laws to the Internet. Both Belarus and Kazakhstan, for example, have restrictive print media laws of the variety described above, and both have legislated to extend these laws to Internet media. In the case of Belarus, this means that all online publications have to be pre-approved by the government; while in the case of Kazakhstan, all social media were brought under the scope of the country’s print media act, rendering them vulnerable to action by a special agency set up to control Internet content.⁶¹

Some governments, in their attempts to control the “wild west” of libel and unruly comment that they perceive it to be, have attempted to extend media laws to the Internet.

The trend to apply “traditional” media laws to Internet-based outlets is visible not only in authoritarian countries. Courts in Italy have sanctioned blogs for not registering as required under Italy’s press law,⁶² and the UK’s Press Complaints Commission has taken jurisdiction over websites run by traditional media.

To some extent, it is unavoidable—and perhaps even desirable—to have a degree of regulation for websites. It makes little sense, for instance, that a member of the public could make a complaint about an article published in a newspaper but has no recourse if that same article is published online. But any regulation for online media should be no more than is strictly necessary and must take into account the specific nature of the Internet. A declaration issued by the special

commissions for the protection of freedom of expression at the United Nations, the Organization of American States, African Union, and the Organization for Security and Co-operation in Europe in June 2011 states:

Approaches to regulation developed for other means of communication—such as telephony or broadcasting—cannot simply be transferred to the Internet but, rather, need to be specifically designed for it.

Greater attention should be given to developing alternative, tailored approaches, which are adapted to the unique characteristics of the Internet, for responding to illegal content, while recognising that no special content restrictions should be established for material disseminated over the Internet.⁶³

Concluding Observations

The foregoing may look like a complex, confusing—and to some, dispiriting—picture of the use of laws to repress media freedom, with the odd rays of hope represented by the legislative initiative in Iceland and the increasing adoption of freedom of information laws around the world. However, several trends are identifiable, and there is room for significant civil society action.

Statistics on the number of journalists in prison—the harshest possible use of the law against the media—indicate that at the end of 2010, there were more journalists imprisoned than at any other time in the decade.⁶⁴ There has been a steady rise in the number of imprisoned journalists, from 81 in 2000 to 145 in 2010. While this is a troubling statistic, it must be noted that the problem of imprisonment of journalists is concentrated in a relatively small number of countries. More than two thirds of the cases are in China (34), Iran (34), Eritrea (17), and Burma (13). Together with Cuba, which was a consistent jailer of journalists until 2009, these countries have been responsible for 68 percent of all journalists’ incarcerations since 2006. The only countries in addition to this quartet to have consistently jailed journalists in 2006-2011, though in lower numbers, are Uzbekistan,⁶⁵ Ethiopia,⁶⁶ Azerbaijan,⁶⁷ Iraq,⁶⁸ and Russia.⁶⁹

Looking at the type of laws used to restrict media freedom, three constants emerge:

1. Libel laws
2. National security and related laws
3. Licensing and registration laws, aimed at individual journalists as well as at media outlets

The first two of these affect bloggers and Internet-based media as much as they do traditional journalists, but with added legal issues about jurisdiction. The third is beginning to affect Internet based media in some countries, as governments try to bring the Internet under their control.

Libel laws are in active use across the world. There is a slight move away from criminal defamation laws, largely as a result of many years’ sustained effort of the media freedom community. Even some large western countries have responded to civil society pressure to decriminalize. The UK finally abolished its criminal libel laws in 2010, while French President, Nicolas Sarkozy, announced a review of criminal libel laws in 2009. However, there is anecdotal evidence that in some of the countries that have decriminalized libel laws, the appetite of the rich and powerful to suppress criticism of them is undiminished. In Armenia, for example, defamation was decriminalized in 2010, but recent reports suggest that the country’s civil libel laws are now abused to suppress critical voices.⁷⁰ There may be a need for research

into the extent to which abolishing criminal libel laws has led to activity merely being displaced to other areas of the law, so as to inform future civil society action.

National security laws are in similar active use in countries across the world. According to the Committee to Protect Journalists's 2010 Prison Census, it is the type of law most commonly used to imprison journalists: Of the 145 journalists imprisoned as of 2010, nearly half were in prison on charges of national security or acts to undermine the state. Of these, nearly half were in countries with poor records of respect for human rights and judicial independence: China, Iran, Vietnam, and Burma score disconcertingly high on the Prison Census index. This points to a root cause that lies deeper than simply intolerance of criticism. Authoritarian governments quickly resort to national security laws in times of high political tension, as evidenced by events in Syria in May and June 2011.

The effect of these laws on online media and bloggers is unpredictable. In some countries they are being caught out by the application of regular laws to online publishing, and in others—particularly countries in the lower reaches of the press freedom rankings—governments actively attempt to control Internet media and bloggers.

Against the repressive use of laws, civil society action can have a result. In the UK—a country with strong notions of democracy and civil society activism—a libel law reform campaign resulted, first, in decriminalization of libel, and second, in a governmental commitment to wholesale reform of the country's libel laws. This will undoubtedly have an impact in other common law countries. In Malaysia, Gambia, and in Sri Lanka, all countries with much weaker traditions of democracy than the UK, journalists have defeated criminal trials against them on the back of civil society efforts, and the explosive growth in freedom of information laws is in no small part due to sustained campaigning on the issue by a number of NGOs.

With new NGOs dedicated to defending individual cases and bringing strategic lawsuits to help media defend their rights, and existing ones strongly campaigning for better recognition in law of the right to freedom of expression, international civil society is arguably well positioned to take action. However, the scale of the challenge facing them should not be underestimated, and it is necessary for these organizations to redouble their efforts and work together if they are to score more than the occasional victory.

Authoritarian governments quickly resort to national security laws in times of high political tension, as evidenced by events in Syria in May and June 2011.

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