



COMMISSIONER FOR HUMAN RIGHTS  
COMMISSAIRE AUX DROITS DE L'HOMME



Strasbourg, 3 May 2010

CommDH/PositionPaper(2010)2

# COMMISSIONER FOR HUMAN RIGHTS

## POSITIONS ON FREEDOM OF THE MEDIA

*This is a collection of Positions on Freedom of the Media from the Council of Europe Commissioner for Human Rights. It is a short summary of the findings of the Commissioner based on his country-monitoring and thematic reports, issue papers, recommendations, opinions and viewpoints. By collating these findings drawn from the different components of his work, the Commissioner presents a summary of his conclusions and recommendations concerning the freedom of the media. The Positions will be continuously updated in the further light of the Commissioner's ongoing work.*

**Freedom of expression and information are key components and a test of any sound democratic society. Free media, capable of reflecting the diversity of views in a country, is also essential to democracy. However, in some countries, different forms of control and pressure over the variety and content of broadcast and print media impede independence and pluralism.**

**In a number of European states worrying violations and repression of freedom of expression can be observed. Defamation is still penalised in some countries, and other laws have been selectively applied against media professionals. There remain cases of journalists or political dissidents who are deprived of their liberty based on such laws – and the laws themselves induce self-censorship. Cases of violence, including murder, harassment and intimidation of journalists have also been documented.**

**Self-regulatory mechanisms within the media help promote and develop professional standards. These can be further strengthened by co-regulatory frameworks involving media, civil society and the public authorities.**

### ***Ensuring a free and independent media***

Ensuring a free, independent and pluralistic media based on freedom of information and expression, within the limitations defined in paragraph 2 of Article 10 ECHR, is a core element for a healthy democracy. This right should be fully respected whatever the circumstances, including in the fight against terror and in times of unrest and conflict.

The role played by media owners in limiting journalists' independence and media pluralism raises strong concerns. Legislation and regulations on the ownership and financing of media outlets are important in order to address this problem, and to ensure transparency and editorial independence. In addition, relevant guidelines are contained in the Recommendations of the Committee of Ministers<sup>1</sup> and the Principles for Guaranteeing Editorial Independence formulated by the OSCE Representative on Freedom of the Media in 2003<sup>2</sup>.

In the broadcasting sector, clear legislation and an independent and adequate regulatory mechanism, such as a radio and television commission, are key to guaranteeing media's autonomy and independence. Appointment of members should take place via an open and transparent process and decisions on granting broadcasting licenses should be made in line with impartial criteria.

### ***Freedom of information***

Freedom of information is a fundamental element of freedom of expression. It is sometimes described as freedom of communication because it implies a relationship between the one who delivers the message and the one who receives it. It involves the freedom to seek, receive and impart information. Open access to information kept by public authorities is an important element of this freedom. The work of journalists seeking information should be facilitated rather than limited or obstructed.

Journalists should also be free to receive information, including anonymously, from anyone. National law should provide protection for journalists' sources. According to the European Court of Human Rights (ECtHR) the protection of sources is one of the basic conditions for freedom of the press, and an order to a journalist to disclose a source cannot be justified unless there is an overriding requirement in the public interest.<sup>3</sup>

---

<sup>1</sup> <https://wcd.coe.int/ViewDoc.jsp?id=1089699>

<sup>2</sup> [http://www.osce.org/documents/rfm/2003/07/514\\_en.pdf](http://www.osce.org/documents/rfm/2003/07/514_en.pdf)

<sup>3</sup> *Goodwin v. United Kingdom* judgment 27.03.1996; paras 39-40.

However, while it is the right of journalists to obtain information and to make that information public, they need to exercise professionalism and decorum in the use they make of confidential information. Professional codes of ethics are the most appropriate means for addressing this issue. Penalties, whether via criminal or civil law, are generally inappropriate tools for sanctioning journalists for revealing confidential information.

### ***Decriminalising defamation***

In line with the general trend in Europe defamation should be decriminalised in all member states. International standards only permit the penalisation of defamation in cases of hate speech directly intended to incite to violence. In such cases, it must be proven that there is a direct link between the intention and the likeliness of the violence. Furthermore, where defamation is penalised the proportionality test needs to be strictly applied. The ECtHR has ruled that in most cases the means available under civil law should suffice to settle matters of defamation<sup>4</sup> and that imprisonment should only occur “in exceptional circumstances, notably where other fundamental rights have been seriously impaired”<sup>5</sup>

Criminalising defamation has a chilling effect on freedom of expression. When defamation provisions are applied to the media or other civil society actors, this may stifle political debate and individuals’ willingness to speak out. The chilling effect may be caused even when final convictions are not handed down by Courts; the mere bringing of proceedings, questioning, searches, pre-trial detention and other measures may suffice. In fact, the sole existence of defamation laws is in and of itself sufficient to intimidate and cause self-censorship, including in circumstances where such laws are not applied.

Provisions in civil law are the preferred option for providing protection against defamation, and sanctions must consistently be appropriate and proportionate. In cases involving public figures and political debate, the ECtHR is particularly protective of freedom of expression and sets a high threshold for allowing for exceptions to such protection. Furthermore, the ECtHR<sup>6</sup> case law has repeatedly affirmed that the limits of acceptable criticism are wider as regards a politician than as regards a private individual. Owing to the very nature of their position, politicians should accept considerable public scrutiny and exercise the highest degree of professional constraint in reacting to critical reporting or other public criticism. However, hate speech and incitement to violence would not normally fall under ECHR protection of freedom of expression.

Decriminalisation of defamation is an essential step for the protection of freedom of expression, but it is not sufficient. There is also the need to ensure that there is no selective application of criminal law provisions against journalists or other persons due to the views or opinions expressed by them.

### ***Actions against violence, harassment and intimidation of journalists***

Acts of violence, harassment and intimidation against journalists should be condemned and authorities should efficiently and effectively investigate any such incidents, and prosecute and sentence perpetrators. Authorities should also take the necessary preventive measures against acts of violence against journalists. They should refer to UN Security Council Resolution No. 1738 “[c]ondemning attacks against journalists” and Resolution 1535 of the Parliamentary Assembly of the Council of Europe, “[t]hreats to the lives and freedom of expression of journalists.” It should be recalled that any acts of abuse can have a chilling effect on media reporting and may result in self-censorship.

---

<sup>4</sup> *Kanellopoulo v. Greece*, Chamber judgment 11 October 2007.

<sup>5</sup> *Cumpana and Mazare v. Romania*, 2004 para. 115.

<sup>6</sup> See, inter alia, *Lindon and Others v. France* [GC], nos. 21279/02 and 36448/02, § 45, 22 October 2007.

### ***Self-regulation of standards of professionalism***

Media also have duties to report in a professional manner and to act in the public interest. They should seek truth, provide a fair and comprehensive account of events and issues, and avoid sensationalism. Unprofessional journalism besmirches the profession's credibility and image and furnishes arguments in favour of more stringent control over freedom of expression. Self-regulatory mechanisms within the media are of great importance as they can formulate their own criteria, monitoring and procedures aiming to promote and develop professional standards.

Peer-agreed codes of ethics have proven themselves to be an effective benchmark and guideline of principles and standards of practice in achieving the highest standard of professional and credible journalism in many countries. Codes of ethics are not the panacea for all ethical dilemmas, nor should they attempt to be. However, clearly enunciated principles and stated values, combined with strong ethical decision-making skills, can result in media better serving their audience and the public interest. It is important that such codes are developed with the involvement of all media outlets, through consultation, discussion and debate in order to receive the active support of all actors involved and be effective in practice. Self-regulatory mechanisms are the most appropriate watchdogs over the implementation of these codes of ethics. Co-regulatory frameworks involving the media, civil society and the public authorities should also be developed.

## KEY RECOMMENDATIONS

European States need to take steps to guarantee freedom of expression and the independence and freedom of the media.

States should ensure that any obstacles in the way of freedom of information are removed and that necessary steps are taken to facilitate media access to information;

The protection of journalists' sources should be confirmed in national law.

Adequate legislation and regulations on the ownership and financing of media outlets should be developed and applied with a view to ensuring transparency and editorial independence;

An independent regulatory mechanism in the broadcast sector should guarantee media independence and autonomy. The independence of such a body should be safeguarded through legislation and its members appointed via an open and transparent process;

Any criminal provisions penalising defamation should be repealed and replaced by civil law provisions providing for appropriate and proportionate sanctions;

Any acts of violence, harassment or intimidation against journalists should be swiftly, efficiently and effectively investigated and perpetrators prosecuted and sentenced. Authorities should also take any necessary steps to prevent acts of violence;

The media should develop, through a process inclusive of diverse media outlets, a code of ethics aimed at articulating media standards of professionalism and the monitoring of its implementation assured by a self-regulatory body. Co-regulatory frameworks involving the media, civil society and the public authorities should also be developed.