

Illegal or Just Wrong?: Reflections on Legal and Self-Regulatory Rules

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Abstract.

International human rights law places obligations on States both to refrain from interfering in the exercise of rights, including the right to freedom of expression, and to put in place a legal framework to secure rights, including rights to freedom of expression, equality, privacy and reputation. Thus States are required to ban hate speech, to provide for effective remedies for invasions of privacy and to ensure protection for reputation.

In the media sector, these legal remedies are often supplemented by self-regulatory complaints systems, based on codes of conduct, whereby members of the public may submit complaints to oversight self-regulatory bodies where they feel the rules in the codes have been breached. This paper assesses the legal and media self-regulatory approaches in the area of hate speech, privacy and protection of reputation. It also draws some lessons from the media sector for possible self-regulation by historians.

Introduction

The very first article of the Constitution of the International Committee of Historical Sciences (ICHS) states, in part:

[The ICHS] shall defend freedom of thought and expression in the field of historical research and teaching, and is opposed to the misuse of history and shall use every means at its disposal to ensure the ethical professional conduct of its members.¹

¹ Available at: <http://www.cish.org/GB/Presentation/Constitution.htm>.

This is a fine sounding statement, but reading it as a human rights lawyer, it is impossible not to advert to the fact that it is redolent with potential contradictions. On the one hand, it claims to defend freedom of expression, and yet it is opposed to the ‘misuse’ of history. Whatever it may be, it is hard to imagine that at least some, and probably most, of what qualifies as ‘misuse’ of history is protected by the right to freedom of expression. Similarly, it juxtaposes claims to defend freedom of expression and yet to ensure ethical conduct, again arguably incompatible values. Finally, it asserts boldly that it will use “every means at its disposal to ensure” ethical conduct, but it would appear that almost no such means are in fact at its disposal.

International law includes strong human rights guarantees for freedom of expression, including the right to information. These guarantees are not, however, absolute and international law permits limited restrictions on this right to protect overriding public and private interests. This paper assesses three areas of legal and regulatory imposition on the right to freedom of expression which have particular relevance for historians, namely rules governing racist speech, privacy and defamation (or libel). It looks, in particular, at how an appropriate balance between freedom of expression and the protection of these interests is achieved in the media sector through a mix of legal and self-regulatory systems.

The paper starts with an overview of the international law framework governing these four human rights, namely to freedom of expression, to privacy, to reputation and to equality. It goes on to describe the various systems used to ensure that an appropriate balance between these rights is maintained. Democratic States achieve this balance, and implement their international obligations, through a complex inter-related system of criminal, civil and administrative law. In most democracies, legal rules are supported, in relation to the media, by ethical and self-regulatory systems. Important differences between the standards prescribed by international and domestic law, and the self-regulatory and professional standards adopted by media professionals, are highlighted in the paper, as well as the different roles played by these systems. Finally, the paper discusses some of the differences between self-regulatory systems for the media and for historians, and draws some possible lessons for self-regulation for historians.

International Standards

This section of the paper uses the standards set out in the *International Covenant on Civil and Political Rights* (ICCPR),² a formally binding legal treaty ratified by 165 States,³ as the benchmark. The *Universal Declaration on Human Rights* (UDHR),⁴ as a UN General Assembly resolution, is technically of wider application but the ICCPR is legally binding and

² UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.

³ As of March 2010.

⁴ United Nations General Assembly Resolution 217A (III), 10 December 1948.

anyway, the standards are very similar. Article 19(2) of the ICCPR guarantees the right to freedom of expression in the following terms:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

This right is not, however, absolute, and Article 19(3) provides for restrictions on it, subject to certain conditions, as follows:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

This has been interpreted as requiring restrictions to meet a cumulative three-part test (i.e. restrictions must pass all three parts of the test).⁵ First, the restriction must be provided for by law. This requirement will be fulfilled only where the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”⁶ Second, the restriction must be for the protection of a legitimate and overriding interest. The list of interests in Article 19(3) of the ICCPR is exclusive in the sense that these are the only interests whose protection might justify a restriction on freedom of expression.

Third, the restriction must be “necessary” to protect the interest. This is the part of the test upon which the legitimacy of a restriction usually hangs, and it is therefore normally subject to greater analysis than other parts of the test in international cases on freedom of expression. “Necessary” has been interpreted to include a number of different elements, including that there must be a “pressing social need” for the restriction, that no less intrusive alternative means exists to protect the interest, that the restriction is carefully targeted in the sense of affecting only the harmful speech, and that the restriction is not disproportionate to the aim pursued.⁷

The three other rights – equality, privacy and reputation – also find explicit protection in the ICCPR and all three have been found to be legitimate grounds for restricting freedom of expression. Article 2(1) of the ICCPR guarantees non-discrimination in the enjoyment of the rights it proclaims in the following terms:

⁵ See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7 (UN Human Rights Committee).

⁶ *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

⁷ See, for example, *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights).

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The ICCPR also guarantees equality in various other provisions.⁸ It may be noted that, for the most part, these are guarantees to equal enjoyment of rights, not to equal treatment or non-discrimination more generally.⁹

Importantly, and significantly, the ICCPR also includes a specific provision calling for limitations on freedom of expression to protect equality, in Article 20(2), as follows:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 20(2), often referred to as the ‘hate speech’ rule, is one of the few provisions in the ICCPR which calls for restrictions on freedom of expression, along with horizontal application (i.e. protection against acts by individuals which may undermine the enjoyment of rights).

Article 17 of the ICCPR protects both against arbitrary or unlawful interference with privacy, and against unlawful attacks on honour and reputation. Furthermore, like Article 20, it also calls for horizontal protection for these interests, in the form of legal protection against such interference or attacks (Article 17(2)). It may be noted that neither privacy nor reputation receive free-standing protection as human rights in the ICCPR, only protection against (arbitrary or unlawful) attacks.¹⁰ Furthermore, protection against unlawful attacks – the only protection afforded to reputation – is dependent on the existence of a national law prohibiting the attack. It might be argued that this hardly qualifies as human rights protection, since all it means is that if the legislature has passed a law, it should be respected.

Application of International Standards Domestically

⁸ These include Article 3, which reiterates the principle of equal enjoyment of rights specifically as between men and women, Article 14, guaranteeing equality before the courts, Article 24, providing for non-discrimination in measures of protection for children, Article 25, guaranteeing citizens non-discriminatory rights to take part in public affairs and elections, and Article 26, guaranteeing equality before the law.

⁹ Although Article 26 does require the law to prohibit any discrimination and to guarantee protection against discrimination on various grounds.

¹⁰ Some of the regional human rights treaties do guarantee respect for privacy. See, for example, Article 8 of the *European Convention on Human Rights* (ECHR), adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953. The European Court of Human Rights has also read a right to reputation into this guarantee. See, for example, *Pfeifer v. Austria*, Application No. 12556/03, 15 November 2007.

International law does not generally prescribe how States should give effect to human rights, as long as they “ensure to all individuals within its territory and subject to its jurisdiction” enjoyment of rights.¹¹ Article 2(2) of the ICCPR does call on States to adopt legislative measures where necessary to give effect to rights, suggesting that legal means are an important, although not exclusive, means of protecting rights. A few specific rules, such as Articles 20(2) and 17(2), noted above, specifically call for the adoption of legal rules.

Legal rules can, roughly, be divided into three categories – criminal, civil and administrative – and all three are used to limit freedom of expression in protection of equality, privacy and reputation. Laws prohibiting the dissemination of hate speech – speech which incites to hatred – are in most countries criminal in nature, and Article 20(2) of the ICCPR is widely understood as requiring this.¹² In most countries, defamation remains a criminal offence, although in democracies this is no longer the main means of protecting reputation.¹³

The primary means of protection for privacy and reputation is in most countries the civil law. This leads to compensation for any wrong suffered, as well as to formal legal recognition of the wrong. Civil rules could potentially also allow individuals to obtain redress in the face of racist statements. A Recommendation of the Committee of Ministers of the Council of Europe calls on States to establish a legal framework consisting of civil, criminal and administrative law provisions on racist speech, and specifically refers to using the civil law to provide compensation and a right of reply or retraction.¹⁴

Administrative law is also used to protect all three rights. For example, in many States, licensed broadcasters are subject to a legally binding code of conduct, often administered by an independent broadcast regulator. These codes normally include rules on racist statements, as well as rules prohibiting invasions of privacy and, to some extent, attacks on reputation. Many countries also have in place data protection laws, which set rules for the collection, use and retention of data by both public and private bodies. A right of correction and/or reply may also apply in the context of an incorrect or defamatory statement.

In most countries, various self-regulatory bodies for the media exist alongside these legal regimes. While these do not satisfy international obligations calling for interests to be

¹¹ Article 2(1) of the ICCPR.

¹² See, for example, Mahalic, D. and Mahalic, J. “The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination” (1987) 9 *Human Rights Quarterly* 74, p. 94.

¹³ See the ARTICLE 19 Defamation Maps, which illustrate which countries have done away with criminal defamation, about ten as of February 2010. Available at:

http://www.article19.org/advocacy/defamationmap/map/?dataSet=defamation_legislation.

¹⁴ Recommendation R(97)20 of the Committee of Ministers of the Council of Europe on ‘Hate Speech’, 30 October 1997, Appendix, Principle 2.

protected by law, at the same time they can provide important supplementary means of protecting interests like equality, privacy and reputation. Where these are effective, they represent useful alternatives to legal rules, in particular inasmuch as they protect the interest in question in a manner that is less intrusive in terms of freedom of expression.

There is a very close relationship between legal and self-regulatory rules. Belgian historian John Gilissen noted, in 1960, that if “historians did not develop customary rules for their profession, judges would do this in their place”.¹⁵ This has happened in rather explicit terms in relation to the media in some countries. In the United Kingdom, for example, the Press Council, a voluntary body established in 1953, was widely perceived to be ineffective. The government published the Calcutt Report in June 1990, which recommended that the press be given a limited time to establish a new self-regulatory body and, should it prove to be ineffective, a statutory Press Council would be established. Faced with this threat, the self-regulatory Press Complaints Commission was set up and is generally considered to be relatively effective.¹⁶

Different self-regulatory systems exist in different countries but a few general remarks are pertinent. First, in most democracies complaints bodies for the print media are purely self-regulatory, while complaints bodies for the broadcast sector are usually either statutory or co-regulatory.¹⁷ There are many reasons for this, including the traditionally more hands-off approach considered appropriate in relation to regulation of the print media. Second, in most countries, self-regulatory complaints bodies are established by editors, owners or publishers, and complaints are directed at media outlets. Journalists’ associations may set ethical rules for their members, but these are not normally applied through a complaints system.¹⁸ This is appropriate since the decision to publish or broadcast is a collective decision of the media outlet, including through the editorial process. Third, self-regulatory systems normally involve membership bodies developing codes of conduct or practice, setting the standards which their members should respect. Complaints are assessed against these codes. Membership is based on set characteristics, normally designed to refer to print or broadcast media outlets. Fourth, for pure self-regulatory systems, sanctions are usually limited to a requirement to publish a statement acknowledging a breach of the code. Even these sanctions are not binding, since the only real sanction the body can impose is to withdraw membership, which is in any case voluntary.

¹⁵ De Baets, Antoon, *Responsible History* (2009, Berghahn Books), p. 176.

¹⁶ Although the question of effectiveness of self-regulatory bodies is a controversial one and the PCC has been subject to much criticism on this front over the years.

¹⁷ There are different models for co-regulation. In one version, the law provides for the formal recognition of effective self-regulatory systems. Another approach is to leave matters to professional bodies, but to provide the regulator with the power to intervene where self-regulatory systems fail to provide the required level of protection.

¹⁸ It is useful to distinguish between complaints-based and ethical systems. The former aim to provide redress to the public, as well as to set minimum standards, and are usually based on an established code of conduct or practice setting out those minimum standards. The latter set ethical standards for members, but do not provide for public complaints.

Specific Selected Standards

This section of the paper discusses how the right to freedom of expression is balanced with the rights to equality, privacy and reputation. The purpose is not so much to engage in an extensive analysis of the precise scope of restrictions on freedom of expression in these areas, as to highlight how these issues are approached through different legal and self-regulatory systems.

To illustrate the differences between different systems of regulating speech, consistent reference will be made to three administrative and self-regulatory systems. These are, to some extent, random choices and they certainly do not capture the large world of administrative and self-regulatory systems. At the same time, they are reasonably representative and serve to illustrate some key trends and themes. First, the Free-to-air Television Code adopted by New Zealand's Broadcasting Standards Authority, a statutory authority,¹⁹ will be used as an example of a statutory code of conduct.

Second, the Editor's Code of Practice, adopted by the UK Press Complaints Commission, will be used as an example of a self-regulatory complaints-based system.²⁰ The Press Complaints Commission was established by the editors of various leading newspapers, and now counts as members all major newspapers published in the UK. There are seventeen members of the PCC, divided among three classes: the chair, public members and press members. The chair must not be engaged, otherwise than as PCC chair, in the business of publishing newspapers, periodicals or magazines, and non-press members must hold an overall majority of the membership of the Commission.

Third, the International Federation of Journalists' (IFJ) Declaration of Principles on the Conduct of Journalists²¹ will be used as an example of a set of ethical principles for individual journalists which does not involve a complaints function. The IFJ is the leading global professional body for journalists, representing over 600,000 journalists in 125 countries.

Racist Speech

As noted, the primary legal means for addressing hate speech in most countries is the criminal law. Clear international standards on this are set out in Article 20(2) of the ICCPR, which calls on States to prohibit advocacy of hatred that "constitutes incitement to discrimination, hostility or violence". There are a number of elements of this offence. It is

¹⁹ The Broadcasting Standards Authority was established pursuant to the Broadcasting Act 1989. The Code is available at: <http://www.bsa.govt.nz/codesstandards-freetv.php>.

²⁰ The Code is available at: <http://www.pcc.org.uk/cop/practice.html>.

²¹ Available at: <http://www.ifj.org/en/articles/status-of-journalists-and-journalism-ethics-ifj-principles>.

widely understood as requiring an intention to incite, as evidenced by the term ‘advocacy’. The term ‘incitement’ has received substantial judicial attention over the years but, in essence, it imposes a requirement of a close link or nexus between the impugned expression and the prohibited outcome, namely discrimination, hostility or violence. Finally, two of the prohibited outcomes – discrimination and violence – are concrete, and normally illegal, acts. The third – hostility or hatred – is simply a state of mind.

It is likely that criminal proscriptions which go beyond the terms of Article 20(2), or certainly which go much beyond that, would be found to represent a breach of the right to freedom of expression under international law. At the same time, some States, mostly in Europe, also ban holocaust denial, which is controversial,²² while the Organisation of The Islamic Conference (OIC) has spearheaded efforts to promote the idea of defamation of religions, which may also go beyond the parameters of Article 20(2).²³

Codes of conduct, however, whether administrative or self-regulatory, often go far beyond the ‘hate speech’ standards of Article 20(2). Thus New Zealand’s Free-to-air Television Code states, in Standard 7 Discrimination and Denigration:

Broadcasters should not encourage discrimination against, or denigration of, any section of the community on account of [various grounds of discrimination].

Encouraging discrimination or denigration is, of course, a much lower standard than inciting to hatred.

Significantly, the PCC’s Code goes even further, stating, in Clause 12(i):

The press must avoid prejudicial or pejorative reference to an individual’s race, colour, religion, gender, sexual orientation or to any physical or mental illness or disability.

This is supplemented by Clause 12(ii), which provides that details regarding these characteristics should be avoided, “unless genuinely relevant to the story”. These are very wide proscriptions indeed. It may be noted that 10 of the 16 Clauses in the PCC Code may be overridden, in whole or in part, where this is in the overall public interest. Clause 12 is not one of those, so that its prescriptions apply regardless of overall public interest arguments.

Interestingly, the IFJ Principles are more muting, calling for journalists to be “aware of the danger of discrimination being furthered by the media” and to do “the utmost to avoid facilitating such discrimination” (Principle 7).

²² See, for example, ARTICLE 19’s *Camden Principles on Freedom of Expression and Equality* and, in particular, Principle 12.2. Available at: <http://www.article19.org/advocacy/campaigns/camden-principles/index.html>.

²³ See, for example, Resolution 10/22. Combating defamation of religions, adopted by the UN Human Rights Council on 26 March 2009.

Privacy

In most countries, a private action exists for protection of privacy, whether directly through the civil law or, in some common law countries, through tort law or remedies such as breach of confidence.²⁴ Courts have identified four different types of privacy interest worthy of protection: unreasonable intrusion upon the seclusion of another, appropriation of one's name or likeness, publicity which places one in a false light and unreasonable publicity given to one's private life.²⁵

Rules on privacy are complicated, and vary from one jurisdiction to another. Two key notions come into play in most countries. The first is whether the individual had a reasonable expectation of privacy, vis-à-vis the invasive statements. This is not so much a question of whether a location is private or public – for one has a reasonable expectation of privacy in an intimate restaurant, even though this is a public place – as a wider assessment of all of the circumstances. For example, a French court held that pictures taken while the plaintiff was on a yacht violated a privacy interest, in part because the boat was not on a port or near a beach, so that its occupants had a reasonable expectation of privacy.²⁶

Second, it is widely accepted that legally protected privacy interests may be defeated by the overall public interest. For example, a resolution of the Committee of Ministers of the Council of Europe on the right of reply recommends that effective remedies be available to contest the publication of material which interferes with a privacy interest unless, among other things, publication is justified by an overriding legitimate public interest.²⁷ The public interest is a notoriously difficult concept to define. While courts have noted that the public interest is not necessarily what the public is interested in,²⁸ it is difficult to define the concept in a positive way.²⁹ However, court decisions have over time put some meat on the bones of this notion.

Standard 3 Privacy, of the New Zealand Free-to-air Television Code, states, in a rather uninformative fashion: “Broadcasters should maintain standards consistent with the privacy of the individual.” However, Appendix 2 does contain a set of guidelines elaborating on this and a key theme running through them is the idea that, to be an invasion of privacy, a disclosure must be “highly offensive to an objective reasonable person”. The guidelines also recognise a public interest exception to the protection of privacy interests. It may be

²⁴ In some countries, such as France, invasion of privacy is also a criminal offence. See Article 226 of the New Penal Code.

²⁵ See, *Lake v. Wal-Mart-Stores Inc.*, 30 July 1998, Minnesota Supreme Court, C7-97-263. See also, *Restatement (Second) of Torts*, § 652B-E (1977). See also Prosser, William, “Privacy” (1960) 48 *California Law Review* 383.

²⁶ *Schneider v. Sté Union Editions Modernes*, 5 June 1979, Paris Court of Appeal.

²⁷ Resolution 74(26) on the Right of Reply – Position of the Individual in Relation to the Press, 2 July 1974.

²⁸ See, for example, *National Media Ltd. and Ors v. Bogoshi*, 1998(4) SA 1196 (SC), at 1212.

²⁹ In *Aubry v. Éditions Vice-Versa Inc.* [1998] 1 SCR 591, para. 26, Canadian Supreme Court Chief Justice Lamer noted: “It is inevitable that the concept of public interest is imprecise.”

noted that this is actually a higher standard than is established by the civil law in most countries.

Clause 3 of the PCC Code, entitled Privacy, states that everyone “is entitled to respect for his or her private and family life, home, health and correspondence” and that editors will be expected to justify intrusions into private life without consent. It incorporates the idea of private places being places where there is a “reasonable expectation of privacy” and allows for privacy to be overridden in the overall public interest. This is similar to the civil law standards described above. The Code also includes a number of other provisions – such as a requirement to address cases involving grief or shock with sensitivity and ruling out the use of clandestine devices or subterfuge – which have a bearing on privacy.

Finally, it is perhaps significant that the IJF Principles do not refer directly to privacy at all. The closest they come to it is in Principle 4, which states that journalists shall only use “fair methods” to obtain stories.

Defamation

As noted above, in most countries, defamation remains a criminal offence, although there have been a number of authoritative international statements suggesting that this represents a breach of the right to freedom of expression.³⁰ In most democracies, the civil law is the primary means of providing redress for defamatory statements.

As with privacy, standards on defamation vary considerably from country-to-country, although a number of clear international standards apply. A good statement of these is contained in a Joint Declaration adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression in November 2000.³¹ True statements should not attract liability in defamation. There is some debate as to where the onus of proof should lie in this respect. In the United States, pursuant to the rule developed in the landmark *New York Times v. Sullivan* case, the onus is on the plaintiff in cases involving public figures,³² although most countries place the onus on the defendant. Opinions should either be absolutely protected, or should benefit from a greater degree of protection than statements of fact.

³⁰ See, for example, the Joint Declaration of 30 November 2000 by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression. Available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument>.

³¹ See note 30.

³² *New York Times Co. v. Sullivan*, 376 US 254 (1964), p. 279. The special mandates on freedom of expression have taken the same position in relation to statements on matters of public interest. See note 30.

Perhaps the most difficult issue in defamation law is how to address incorrect and defamatory statements of fact. In the *New York Times v. Sullivan* case, the United States Supreme Court held that, at least in cases involving officials, the plaintiff had to prove not only falsity but also that the defendant acted with malice or with reckless disregard for the truth.³³ In many other jurisdictions, defendants benefit from a defence of reasonable or good faith publication. The reasonable publication standard has been endorsed in the Joint Declaration by the special mandates on freedom of expression noted above.

Other rules, such as a right of correction and/or reply, may apply in the context of a defamatory or incorrect statement. Indeed, the Committee of Ministers of the Council of Europe has adopted a resolution calling on States to provide for a right of reply and Article 14 of the *American Convention on Human Rights*³⁴ requires States to do so.

Perhaps surprisingly, codes of conduct often do not deal directly with the issue of defamation; instead, they tend to focus accuracy and fair treatment. Thus, Standard 5 of the New Zealand Free-to-air Television Code states:

Broadcasters should make reasonable efforts to ensure that news, current affairs and factual programming:

- is accurate in relation to all material points of fact and/or
- does not mislead.

Standard 6 calls on broadcasters to “deal fairly with any person or organization”

Clause 1 of the PCC Code similarly calls the press to “take care not to publish inaccurate, misleading or distorted information” and to correct significant inaccuracies, once identified. It also calls on publications to report, fairly and accurately, the outcome of defamation cases involving them, while Clause 2 calls for an opportunity to be given to readers to reply to inaccuracies, when “reasonably called for”.

The IFJ Principles, on the other hand, take a stronger line on this. They label “malicious representation” and “calumny, slander, libel, unfounded accusations” as “grave professional offences” (see Principle 8), which must presumably be avoided. They also refer to the importance of accuracy, calling respect for the truth “the first duty of the journalist” (Principle 1), and call for the rectification of information which is found to be “harmfully inaccurate” (Principle 5).

As regards accuracy, it is well established that criminal prohibitions on the publication of false news *per se* (as opposed to false and defamatory statements), even if conditioned on some negative outcome, such as fear, panic or public disorder, are not legitimate. Such rules have been struck down by leading courts in countries such as Antigua

³³ *Ibid.*, pp. 279-80.

³⁴ Adopted 22 November 1969, O.A.S. Treaty Series No. 36, entered into force 18 July 1978.

and Barbuda,³⁵ Canada³⁶ and Zimbabwe.³⁷ But rules on accuracy are common, albeit not in absolute terms,³⁸ in media codes of conduct.

Commentary

There are some important differences between rules of general application as provided for in the criminal or civil law, and more targeted standards in administrative or self-regulatory codes of conduct for the media. Under international law, the sanction imposed is a relevant consideration when assessing a restriction on freedom of expression. A heavy sanction may, of itself, render a restriction illegitimate, while a lighter sanction imposed on the very same expression might have passed muster as a limitation on freedom of expression. In the case of *Tolstoy Miloslavsky v. the United Kingdom*, the European Court of Human Rights stated that sanctions for harmful expression (in that case defamatory speech) must bear a “reasonable relationship of proportionality to the injury to reputation suffered” and this should be specified in national defamation laws.³⁹

As a result, more latitude is allowed to impose limitations on speech where the main sanction envisaged is either a warning or a requirement to publish a statement acknowledging a breach of the rules. This may be contrasted with criminal rules – with their very harsh sanctions – and even civil rules – where large damage awards may be ordered. Similarly, the remedies of a right of correction or reply represent relatively minor intrusions into freedom of expression. In the context of a voluntary self-regulatory system, it is essentially open to those participating to set whatever rules they deem fit, although courts in the United Kingdom have held that the PCC is potentially subject to human rights rules.⁴⁰

In this light, it is interesting to observe the approaches taken to racist speech, invasions of privacy and attacks on reputation. It is apparent that the various media codes take a substantially stronger position on racist speech than is common, or allowed, in criminal or civil laws. On the other hand, standards in the various codes on privacy and reputation are either similar to or less protective than the civil (or sometimes criminal) law. Indeed, while codes do deal with privacy, they hardly protect reputation, except as ancillary to the duty to strive for accuracy in reporting.

³⁵ *Hector v. Attorney-General of Antigua and Barbuda* [1990] 2 AC 312 (PC).

³⁶ *R. v. Zundel* [1992] 2 731 (SC).

³⁷ *Chavunduka & Choto v. Minister of Home Affairs & Attorney General*, 22 May 2000, Judgement No. S.C. 36/2000, Civil Application No. 156/99.

³⁸ Thus, the New Zealand Code calls for broadcasters to “make reasonable efforts” to report accurately and the PCC Code calls on newspapers to “take care” not to publish inaccuracies.

³⁹ 13 July 1995, Application No. 18139/91, para. 49.

⁴⁰ See *R (Ford) v Press Complaints Commission*, [2001] EWHC Admin 683; [2002] EMLR 95.

This can probably be explained by reference to the role of the media in society. The drafters of the codes, for the most part media professionals, recognise the scourge of racism and believe that the media should at the very least not be part of the problem. Importantly, imposing stringent rules in relation to racist speech rarely comes into conflict with the media's 'fourth estate' or watchdog role.⁴¹

The matter is very different as regards privacy and reputation. In these cases, there is a potential conflict with the role of the media in informing the public on matters of public interest. This poses a thorny problem for complaints bodies because there are significant problems in both of these areas with yellow or sensational journalism, which does not make a public interest contribution and which is exactly where complaints bodies are expected to play a moderating role. They tend to strike this balance through the mechanism of the public interest override, thereby allowing informative programming but not sensational work.

Even though the rules in the various media codes regarding privacy and reputation do not go further than those established by the civil (and perhaps criminal) law, and they can thus be said to have little standard-setting relevance, they are not unimportant. In particular, at least in the case of complaints-based systems, they provide a far more accessible remedy for most individuals than the courts.

Some Possible Lessons for Self-Regulation by Historians

What can historians learn from these media experiences with self-regulation? It is obvious, but still pertinent, to note that legal rules of general application – including the criminal and civil laws – apply equally to historians as to others engaging in public acts of expression. Historians are thus prohibited from publishing hate speech, invading privacy without a public interest justification, or making unwarranted attacks on reputation.

There are a number of differences between the media and historians that render the latter less suitable for a complaints-based self-regulatory system. A key difference between journalists and historians is that the former have historically distributed their work through clearly identifiable organs – newspapers, and television and radio stations – so that regulation can attach, as it were, to those organs.⁴² In practice, as noted, most complaints-driven self-regulatory systems apply to media outlets, not to individual journalists. The situation is different with historians, who disseminate their work primarily as individuals, and through journals and books. One might try to attach a code to the publishers of these journals and books, but only some of them specialise in historical

⁴¹ Although the PCC rule on mentioning race or other characteristics is overridden where this is relevant to the story.

⁴² This is changing with new means of distributing content, for example via the Internet and mobile phones, and the emergence of new forms of media, such as bloggers.

works. Furthermore, their relationship with the content they publish is fundamentally different from that of media outlets. They are unlikely to be willing to take responsibility for it in the same way that editors do for media content.⁴³

Second, and related, it is likely to be more difficult to define historians with any degree of precision than it is journalists. Journalists can be defined by reference to the media, i.e. as individuals who regularly contribute to the content of media output. Furthermore, for most complaints systems, membership or scope is defined by reference to media outlets (newspapers, television, radio). Defining historians is more difficult. It is possible to devise a definition based on work – such as academic historians, teachers, writers – but this will inevitably leave out many individuals who can legitimately claim to be historians.

Third, and again related, it is not clear what sort of remedies might be imposed on historians, apart from a public warning and/or suspension or expulsion from a professional body. Perhaps this is sufficient. But in the media sector, the further remedy of requiring the media outlet to print or broadcast a statement acknowledging the wrong is available. This often provides a sort of direct redress, since it was publication of an earlier statement that caused the harm in the first place. This is particularly effective as redress for harm to reputation. A public warning, on the other hand, seems less well-tailored to redressing some of the rules set out, for example, in the American Historical Association's Statement on Standards of Professional Conduct,⁴⁴ such as trusting and respecting peers, practising with integrity and being aware of one's biases.⁴⁵

On the other hand, while historians as a group may do serious harm, for example by propagating widely a false or politically biased notion of history, individual historians, or specific historical publications, are less likely to cause harm than major media outlets. There are a number of reasons for this, including the relatively limited scope of distribution of their work, the lack of such direct incentives to invade privacy and engage in undue criticism, and their more academic nature, which affects readership and how readers understand and use the work. This is perhaps why, notwithstanding Gilissen's claim that absent the development of customary rules, the State will regulate historians, this does not appear to have happened in practice whereas this threat is far more real in respect of the media. This suggests that a more individualistic complaints system, applicable to a self-identifying group and without sanctions over and above a warning or the threat of expulsion from the group, may be enough to achieve the desired goals in the case of historians.

⁴³ This is probably for the best as otherwise publishers would trench on academic freedom.

⁴⁴ Adopted by the Council on 6 January 2005. Available at:
<http://www.historians.org/pubs/free/professionalstandards.cfm>.

⁴⁵ See also the Code of Ethics proposed by De Baets, note 15, pp. 188-196.

Historians may want to consider a further point when developing codes of conduct. The better complaints-driven codes have two intrinsic qualities. First, the standards they espouse are cast in such a way that it is possible to evaluate, reasonably objectively, whether or not they have been respected. It is significant that most, if not quite all, of the provisions in media codes have some parallel in the general law. Even the IFJ Principles, which are not designed to be used to evaluate complaints, are, for the most part, fairly precise and measurable statements, such as reporting only in accordance with facts of which the origin is known, using fair methods to obtain news and respecting professional secrecy regarding confidential sources.

Second, a code designed to underpin a complaints system should set out minimum standards of required conduct. It tells the public what they may expect of those bound by the code (members), and that, should members fail to respect the code, the public might complain and obtain some sort of redress. As noted, for standards that are more context dependent, media codes often include some sort of public interest override or other qualifier (“take care not to publish inaccurate statements”, give a “fair opportunity to reply”, both from the PCC Code). This allows the oversight body to assess whether or not a given practice falls below minimum acceptable standards.

Neither the American Historical Association’s Statement nor the Code of Ethics for Historians proposed by De Baets (which applies to academic historians) meet these two criteria for complaints-based codes. Both are qualitatively different in nature from the types of standards found in the media codes and, in particular, are more aspirational and even moral in nature. The examples from the American Historical Association’s Statement above – referring to trust, respect and awareness of biases – are good examples of this. These are strong statements of principle, but they are neither clear and objectively measurable nor minimum standards of behaviour. Of course some provisions in these codes, such as not plagiarising the work of others, are both measurable and minimum standards.⁴⁶ But most of the standards are not.

De Baets posits a number of benefits from a code of ethics, including as the focus of moral awareness among historians, to formulate the rights and duties of historians, to adjudicate conflicts, to teach the profession, to clarify the foundations and limits of the historical profession, to protect historians against pressure and as a compass to detect and also prevent irresponsible uses and abuses of history.⁴⁷

It is submitted that inasmuch as the specific standards he proposes, like the standards in the American Historical Association’s Statement, are primarily aspirational goals rather than specific minimum standards, this code is not appropriate to serve as a basis for

⁴⁶ It is perhaps significant that when the American Historical Association was still processing complaints, most involved allegations of plagiarism. Note 15, p. 181.

⁴⁷ See note 15, pp. 187-188.

complaints.⁴⁸ Such standards, which point to ideal or better practices which members should strive to attain but which they will not always manage to meet, are inherently incompatible with standards as a basis for complaints. Aspirational standards give direction, rather than set a minimum floor of acceptable behaviour.

On the other hand, these standards can certainly serve to define the profession, to focus moral awareness and to raise awareness about the profession, including among its members, students and the wider public. These are not unimportant goals.

Conclusion

Journalists and historians share a key attribute: they are both professional social communicators. Both enjoy certain core human rights – most notably the right to freedom of expression – and both have professional values that (should) constrain them in their work. But the manner in which they have given effect to their professional values has so far been quite different. Whereas journalists have in most countries been subject to binding codes of conduct, normally imposed directly on the media outlets which carry their work, historians in only a few countries have developed professional codes. These have operated less as binding sets of rules than as goal-oriented statements of the principles to which the profession should aspire.

This is probably as it should be. Works distributed through the media have a great potential to cause harm, and there is a strong motive for the media to engage in unacceptable invasions of privacy or unduly harsh criticism to attract an audience. It is important for members of the public to have some redress against these wrongs. For historians, however, the rationale behind providing redress beyond that already provided for by law is less strong. For historians, codes of conduct are more important as statements – to historians, to students of history and to the general public – of the deeply-held values and goals of the profession.

Biography

Toby Mendel is the Executive Director of the Centre for Law and Democracy, a recently-established human rights NGO that focuses on providing legal expertise regarding foundational rights for democracy, including the right to information, freedom of expression and the rights to assembly and association. Prior to that he was for 12 years Senior Director for Law at ARTICLE 19, an international human rights NGO focusing on freedom of expression. He has provided expertise on freedom of expression and the right to

⁴⁸ It is interesting that when the American Historical Association stopped investigating complaints against historians in 2003, the reasons it gave were a lack of funds and its inability to impose sanctions. Note 15, p. 181. I wonder whether an unrecognised, but not irrelevant, reason was the inherent tension in their Statement between minimum standards and aspirational goals.

information to a wide range of actors including the World Bank, various UN and other intergovernmental bodies, and numerous governments and NGOs in countries all over the world. In these various roles, he has on a number of occasions played a leading role in drafting legislation in the areas of the right to information and media regulation. Before joining ARTICLE 19, he worked as a senior human rights consultant with Oxfam Canada and as a human rights policy analyst at the Canadian International Development Agency (CIDA). He has published extensively on a range of freedom of expression, right to information, communication rights and refugee issues, including comparative legal and analytical studies on public service broadcasting, the right to information and broadcast policy.