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# WORKING PAPERS

RSCAS 2014/127

Robert Schuman Centre for Advanced Studies  
Centre for Media Pluralism and Media Freedom

Statutory media self-regulation:  
beneficial or detrimental for media freedom?

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European University Institute  
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EUI Working Paper **RSCAS** 2014/127

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ISSN 1028-3625

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Printed in Italy, December 2014  
European University Institute  
Badia Fiesolana  
I – 50014 San Domenico di Fiesole (FI)  
Italy  
[www.eui.eu/RSCAS/Publications/](http://www.eui.eu/RSCAS/Publications/)  
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## **Abstract**

In the wake of the British phone hacking scandal of the News of the World, which proved some limits to the model of media self-regulation, a growing number of experts have suggested a statutory recognition of this model by law to improve its performance. At first sight a statutory recognition seems an oxymoron, as the model of media self-regulation – a voluntary system of media regulation independent from public authorities - was originally developed by media professionals themselves to limit state interference in the field of media. Hence, the article explores how statutory recognition is compatible with the concept of media self-regulation. After clarifying the relationships between media regulation, self-regulation and media freedom, the article investigates whether statutory recognition is beneficial or detrimental for media freedom. To answer it, this article draws a distinction between democratic countries and countries in democratic transition. It is argued that statutory media self-regulation in non-democratic countries is problematic because of the risks of transforming self-regulation into a compulsory system controlled by political interests. In democratic countries, statutory media self-regulation can make this voluntary system more effective, for instance by limiting the number of media outlets that decide to abstain from it. However, when statutory recognition is used by state authorities not as a reward but as a punishment for media, it leans towards a two-speed protection of media professionals according to their respect for professional standards or a lack thereof, which is not compatible with the universal nature of freedom of expression.

## **Keywords**

Censorship; European Public Space; Freedom of Expression; Media; Media Freedom; Media self-regulation; Media regulation; Statutory self-regulation





## Introduction

Media self-regulation - a system developed voluntarily by media professionals to ensure respect for their professional and ethical guidelines - has become increasingly popular in Europe. However, a growing number of experts suggest that public authorities should support - without getting involved in the functioning - such systems in order to make them more effective. This does not mean evolving towards a co-regulation system – a system where the state and the media would cooperate in joint institutions (Palzer, 2003). It rather is an acknowledgement by law of a media self-regulatory body and its decisions, which we define as statutory media self-regulation.

According to Iglesias, the term statutory refers to any regulation that is implemented by law. Such system does not mean government control or state regulation, which requires that the regulatory authority would be directly performed by government bodies.

“An act of Parliament could also force the industry to form a self-regulatory entity, and at the same time, pre-establish key institutions, in order to increase accountability and responsiveness. Aspects such as what sectors should be represented in the entity and the ethical criteria, or public interest justifications to be observed by its members can be established in law through for example obligations on newspapers above a certain size to participate. On the other hand, judgment and enforcement related powers could be assigned to the industry’s representatives, avoiding political influence over these procedures. The state’s participation in the regulatory regime can also happen through financial incentives” (Iglesias, n.d.).

Two of the most prominent recent examples of proposals of statutory media self-regulation include the report of Judge Leveson in the United Kingdom and a report commissioned by European Commissioner Neelie Kroes in 2013. In reaction to the *News of the World* scandal in the United Kingdom, Lord Justice Leveson concluded in November 2012 that the former British press council (the Press Complaints Commission) had failed and that a new system of media self-regulation should be established (Leveson, 2012). Oscillating between co-regulation and self-regulation, his report recommended a system of media self-regulation underpinned by a statutory recognition body. This middle-way solution was brought in practice with a Royal Charter in 2013 regardless of the fact that a majority of the British press opposed it due to concerns of undue interference by public authorities in media freedom.

At the European level, one of the recommendations of a report of group of experts on media freedom and pluralism commissioned by EU Commissioner Neelie Kroes is to establish press councils in all European countries in order to secure “a free and pluralistic media to sustain European democracy” (European Commission, 2013). The recommendations also suggested that media councils have real enforcement powers and that, they “should follow a set-up of European-wide standards and be monitored by the Commission to ensure that they comply with European values.”

In light of these developments, this article investigates the impact of state authorities’ acknowledgement of the system of media self-regulation. Its key research question is whether this trend towards attempting to improve media self-regulation through state recognition by law is, in the end, beneficial for or detrimental to media freedom. Building upon scholarly debates in the field and based upon a range of expert interviews and fieldwork in press councils and international organisations, this article considers whether and, if so, to what extent public authorities should recognize and support media self-regulation.

## Media regulation v. self-regulation: key features

Freedom of speech is the cornerstone of any democratic society. Constitutional or legal guarantees are necessary to make press freedom a reality, to prohibit censorship and guarantee the free flow of

information. However, international human rights standards do permit some limitations on the right to freedom of expression. The European Court of Human Rights (ECHR) requires limitations on speech to be defined by law, legitimate and necessary in a democratic society. As opposed to media laws and regulations, media self-regulation is a set of voluntary limitations and guidelines for media professionals regarding their editorial and professional standards.

With the advance of digital media, the question of what is the best regulatory framework for journalistic work has gained importance, with the challenge being to establish functioning systems which do not impede media freedom either online or offline. There are restrictive tendencies at the national level and more rights-based approaches at the international level. Many governments are endeavouring to protect their citizens from content deemed harmful by refining existing and adopting new media legislations. The stance taken by International Organisations such as the Organisation for Security and Cooperation in Europe (OSCE), UNESCO or the Council of Europe (CoE) is that while media laws are necessary to guarantee media freedom, journalists can only perform their role as watchdog of democracy if there is as little state control as possible of media content (Haraszti, 2008: 13). For international organisations defending media freedom, media self-regulation is hence promoted as a mean of preventing governments from excessive interference with media content, be it online or offline.

International organisations and non-governmental organisations (NGOs) that defend and promote freedom of expression have maintained that the abuse and misuse of media regulations by state authorities is more dangerous than the abuse and misuse of media self-regulation by the media industry or journalists themselves. The OSCE has observed that in several countries, in particular in countries undergoing transformation from authoritarian regimes to democracy, a manipulation of the regulatory framework can easily allow governments to interfere and censor some news outlets (Haraszti, 2008: 14). Such manipulations range from the misuse of licensing laws to only authorise media outlets in favour of state authorities to the misuse of vaguely defined regulations that allow wide restrictions against independent reporting. Laws banning hate speech or protecting against terrorism are increasingly used for political rather than public safety reasons. Banisar, in his report for the CoE about the effects of anti-terrorism legislation on freedom of expression, underlines that, “the laws are used to prosecute journalists for obtaining information and justify surveillance to identify the sources so that journalists can be prosecuted under secret acts for violating their duties to keep information secret” (Banisar, 2008). According to Article 19, an NGO defending freedom of expression worldwide (Article 19, n. d.):

“Governments in many countries see it as their task to develop complex regulation for every aspect of a society’s life, including the mass media. But even when its goal is to safeguard the right to freedom of expression, legislation affecting the media often creates bureaucratic obstacles and loopholes for abuse by those implementing it. Part of the purpose of the necessity test (i.e. that even if a restriction is in accordance with an acceptably clear law and if it is in the service of a legitimate aim, it will still breach the right to freedom of expression unless it is truly necessary for the protection of that legitimate aim) is to prevent governments from following their “legislative instinct”, and make sure that the amount of regulation concerning the media is kept to a minimum.”

The Council of Europe has been particularly active in promoting media self-regulation during the last twenty years. It adopted several documents designed to foster the development of such systems. In the Resolution 2 of the 4<sup>th</sup> Ministerial Conference on Mass Media Policy (Prague, 7 and 8 December 1994), the Ministers of member states agreed that a democracy requires the existence and strengthening of free, independent, pluralistic and responsible journalism and that all those engaged in the practice of journalism have the right to elaborate self-regulatory standards. This Declaration is milder than the Resolution 1003 of 1993 adopted by the Parliamentary Assembly of the Council of Europe, which underlines that media have an ethical responsibility towards citizens and encourages the media to create self-regulation mechanisms to supervise the implementation of ethical principles of journalism. The system of media self-regulation is even promoted by European Union (EU)

institutions. According to the guidelines for EU support to media freedom and media integrity in enlargement countries (European Commission, 2014), media should adhere to editorial and ethical codes and there should be effective mechanisms in place to deal in an honest and transparent way with readers/viewers' complaints.

### **Self-regulation: the benefits for media freedom**

Unethical and unprofessional journalism can lead to restrictions against media freedom. Governments are indeed more likely to want to control media when journalists are corrupt, when they spread hate speech, or libel. These ethical breaches can also undermine the public support for the media and may provide government with windows of opportunity to adopt tougher statutory regulations. In the Western Balkans for instance, where the economic crisis has led to a dramatic drop in journalistic professional and ethical standards, the European Commission underlines that “against this backdrop and in the absence of effective professional self-regulation in the sector, it is easy for politicians to use the state power – the judiciary – against critical journalism” (European Commission, 2014: 3).

Yet, the benefits of media self-regulation mechanisms are not only to prevent unethical journalism. The system has a direct beneficial impact on media freedom. First of all, media self-regulation mechanisms help reducing the chilling effect of potential lawsuits against media, which is positive in term of media freedom. The chilling effect occurs when media hesitate to exercise their right to freedom of expression by fear of legal repercussions. By providing an alternative to justice courts for media users willing to file a complaint against a media, self-regulation mechanisms reduce the number of costly trial procedures against media. Moreover, media self-regulation mechanisms have some concrete advantages compared to justice courts which include the effectiveness and flexibility of the system, its technical expertise, its reduced costs compared to justice courts and its power to increase the democratic participation of media users (Hulin, 2014). Press councils have indeed proven to adjudicate media users' complaints with rapid timeframes and low costs to all involved, on the contrary to justice courts. While the rich and powerful often make use of the judiciary to file complaints about media, self-regulatory bodies allow everyone to demand for media quality and respect for the right to information. The case for self-regulation also rests on the premise that in complex democratic societies, self-imposed rules are likely to carry a greater moral authority and, consequently, to work with greater effectiveness than externally imposed legal rules. Based on the principle of moral sanctions, the defenders of the system underline the power of a public judgment and criticism by the peers, which should never be underestimated. The power of financial sanctions indeed tends to be overestimated. The yellow press still earns more money in breaching privacy rights and paying a fine than in respecting privacy. “There is evidence that financial penalties are not an effective punishment for newspapers because the increased sales from an intrusive story can outweigh the subsequent fine” (Haraszti, 2008: 36).

Secondly, a beneficial impact of self-regulation on media freedom is the moderation of state interference in the field of media. A majority of press councils has been indeed created to avoid some state regulation of media. According to Kleinsteuber “this type of self-regulation is done under the ‘shadow of the state’, meaning that all sides act under the threat that that the state may intervene if no compromise is found or public interests are seriously threatened” (Kleinsteuber, 2004: 63). This is for instance the case in Finland, the United Kingdom or Ireland. In those countries, media professionals consider that laws cannot solve all of society's ills and try to solve problems among themselves before turning to state regulator in order to protect media freedom. In addition to preventing the passing of unnecessary media regulations, press councils have contributed to the removing of unnecessary media regulation, such as the decriminalization of defamation in Ireland, where libel laws had been for years a financial burden for the media. It was therefore agreed that the industry would create and fund an independent system of press regulation while the state would pass a new defamation bill, which had major benefits for those media, which adhered to the system of self-regulation. The new Defamation Act adopted in 2009 assures that courts can take cognizance of the membership and adherence to the

code of practice by media outlets when they make decisions and ensure that apologies by a newspaper can be used to reduce penalties for the newspapers, rather than increase them.

Thirdly, media self-regulation is beneficial for media freedom because it strengthens people's fundamental right to receive accurate and pluralistic information enabling them to have informed opinions and to engage in the democratic debate. This is particularly important at a time when the traditional media are in a deep and probably irreversible crisis resulting from the economic crisis and from the migration of the audience to online media. At a time when everyone may gather and disseminate information or act as if s/he were a journalist, democracy still requires independent journalists who provide reliable and impartial news and analysis. Those journalists need to give guarantees about their credibility and responsibilities, which implies showing respect for professional standards such as ensuring fact-checking of any information published. In countries in democratic transition, media have only recently gained independence and still have to build trust with the civil society. After years of work in an authoritarian regime, clientelism and a lack of professional standards are frequent patterns observed in such countries (Freedom House, 2011). For those media, which strive to be professional and independent, they need to demonstrate that they do not merely reflect governmental propaganda. In this respect, self-regulation mechanisms might be an instrument to raise the quality of information and hence raise the social responsibility of media. This concept of social responsibility of the media was first called for in a report of the Commission on the Freedom of the Press known as the "Hutchins Commission" (Hutchins Commission, 1947). The work of the Hutchins Commission took place at a turning point in media history, namely the appearance, the success, and the excesses of the yellow press. At that time, it became clear that the market was not always the best regulator of media quality. The Commission took the stance that the press is supposed to be free for serving democracy. One of the most significant implications of this purpose is that media should stick to ethical standards and develop self-regulation mechanisms. This theoretical assumption has moved and stayed at the core of the work of international organisations defending media freedom.

Media self-regulation therefore contributes to media freedom. Some press councils even underline that promoting media freedom is one of their core functions. In Ireland, the press councils' statutes mention that the objective of the press council is to provide the public with an independent forum for resolving complaints about the press, to resolve all complaints quickly, fairly and free of charge and to defend the freedom of the press and freedom of the public to be informed (Press council of Ireland, n. d.). In Switzerland, the first article of the statutes of the press council, paragraph 2, maintains that the press council defends media freedom (Swiss Presserat, n. d.). Moreover, some press councils have developed activities to promote media freedom. The press council of Bosnia and Herzegovina organizes every year a campaign on the 3<sup>rd</sup> of May, the World Press Freedom Day. In Belgium, public authorities regularly consult the representatives of the press councils for advice and recommendations on planned media regulations. One of the representatives was one of the most important experts in the process of drafting the law protecting journalists' sources, a law considered exemplary in Europe (Hulin, 2014). Claude-Jean Bertrand (2000: 152) affirmed that "some journalists realized that far from threatening their freedom, Media Accountability System made a remarkable weapon, maybe the absolute weapon, to protect media freedom against all its enemies."

### **The risk of "privatization of censorship"**

Whilst a view of self-regulation is that taking regulation out of the hands of governments is beneficial for media freedom, another perspective is that a lack of legal protection and unclear boundaries might contribute to suppressing free speech. Self-regulation could even turn into "private censorship" (Tambini, 2008: 411). Such "private censorship" can occur in a context where private actors are in charge of regulating media content instead of public officials. The concern of free speech advocates is that private actors, even media professionals themselves, may not automatically act in favour of media freedom and freedom of information as they may be solely guided by making profit. They might even

cancel some information if it fits their own financial interest. With this in mind, who should best regulate the media and guarantee media freedom: the state or the media industry?

The question of how to guarantee media freedom is closely linked to the issue of media regulation. Media freedom is not absolute and comes with responsibilities as defined in Article 10, paragraph 2 of the European Convention on Human Rights. The specification of those responsibilities has been controversial and depends on how media are perceived in relation to media independence. On one hand, the issue of independence concerns media's relations with public authorities. Government interests do not necessarily coincide with the societal interest of having a free media playing the role of the watchdog of political power. On the other hand, the media's interests are not always the same as those of society, for example, when it comes to media being a business with an interest in making profit.

Hallin and Mancini (2004) explained that media systems in Europe are social formations developed under particular historic conditions and according to several distinct patterns. The four dimensions they use to distinguish one system from another include the structure of the media market, the degree and form of political parallelism (the extent to which media reflect political divisions), the journalistic professionalism, and the role of the state. The latter two dimensions are the ones, which differ between countries with or without systems of media self-regulation. Some countries consider the state and courts, as democratic representatives, to be in the best position to define the responsibilities of journalists supposed to serve a public interest. France, for instance, has a detailed body of press laws, the first of which dates back to 1881. By contrast, other countries have a more "hands-off" approach towards the media and consider that journalists should be in charge of defining their responsibilities on their own. Through this, the risk of state control over the watchdogs of the democratic system is minimized. In the United Kingdom, for instance, the press has been subject to little sector-specific regulations compared to other European countries with specific press laws. Apart from few exceptions such as libel laws or laws protecting state secrets, the regulations applying to UK press organizations are the ones that apply to any other commercial organization. Specific media rules have, however, been adopted by the media industry through the system of media self-regulation.

The European Court of Human Rights (ECHR) requires limitations on speech to be defined by law and necessary in a democratic society. Voluntary codes of ethics and ethical guidelines are clearly not laws. Indeed, the case law of the ECHR makes clear that such guidelines do not need to become laws. In *Jersild v. Denmark* (23 September 1994) the judges of the Strasbourg-based court stated that it is not up to courts or judges to "submit their own views to those of the press as to what technique or reporting should be adopted by journalists." However, some academics maintain that a key point for media self-regulation is not to hamper media freedom and avoid the above-mentioned "privatization of censorship".

Of high relevance for Voorhoof (2008) is whether or not self-regulatory bodies are likely to be challenged before a court, in particular with regard to the standards set out in Article 10 of the European Convention on Human Rights. He underlines the importance for self-regulation mechanisms to "give sufficient guarantees regarding transparency and especially protect against arbitrariness eventually through ex-post judicial review." Tambini (2008: 419) refers to the case of *Peck v. the United Kingdom* (28 January 2003, paragraph 109), to remind that the ECHR found that there was no adequate protection for privacy in the United-Kingdom given that the former Press Complaints Commission did not offer sufficient redress to the complainant.

Another question is whether press councils should comment on the ethics of media that are not members of the system. Judging media that refuse to take part in a voluntary system is indeed a questionable practice. In Germany, the magazine *Eco-Test* was reprimanded by the press council even though it did not belong to the system of self-regulation. The reprimand came after the magazine made a link between eczema creams for baby and cancer. *Eco-Test* did not publish the reprimand of the press council. Rather, it launched legal proceedings against the press council arguing that its decision

damaged its reputation (Fielden, 2012: 44). Two similar cases recently occurred, one in Austria with regard to newspaper *Österreich* (Der Standard, 14 February 2014) and one in Belgium (Raad voor de Journalistiek, 24 November 2014). In all cases, the courts judged that press councils were free to express their opinion publicly about the content of a newspaper and its abidance to professional guidelines, no matter if the media professional or media outlet criticized does not belong to the system of media self-regulation. So far, courts tend to emphasize the right of freedom of expression of press councils and their freedom to comment on the ethics of media that are not members of the system.

There are hence arguments in favour and against media self-regulation in a media freedom perspective. Even if the debate on self-regulation is polarised, Tambini (2008: 430) underscores the need to go beyond “a blanket condemnation of self-regulation for being contaminated by the seed of censorship.” This would be “as mistaken as the view that welcomes self-regulation on the sole grounds that it means (or appears to mean) less governmental intervention.” Besides, self-regulation is not meant to fully replace state regulation. The two systems are supposed to co-exist. Some legal regulations are always needed to ensure that minimum standards regarding freedom of expression are respected. Those are the regulations that guarantee media freedom, protect journalists’ sources or ensure access to information. Regarding the limitations of media freedom, legitimate media regulations include, among others, the protection of the reputation, the protection of national security, that are all mentioned in article 10 paragraph 2 of the European Convention of Human Rights. In Europe, as mentioned previously, countries have made different choices on what to cover with media regulations and sometimes media self-regulation and media regulation are overlapping with some areas being covered by both systems.

In countries that established media self-regulation mechanisms, to minimize the risk of a “privatization of censorship” and avoid that media use the system to make profit and defend their own interests, some experts such as the judge Leveson in the United Kingdom have recommended an acknowledgement of the system of media self-regulation by state authorities in order to “guard the guardians”. The question is how such an acknowledgement by state authorities is materializing in practice and how it can be compatible with the concept of media self-regulation supposedly a voluntary system independent from public authorities.

### **“Guarding the guardians”**

The phone-hacking scandal of the *News of the World* exposed the limits of media self-regulation. It fundamentally questioned the efficiency of a system accused of being abused by the media industry. The revelation that the UK tabloid *News of the World* intercepted the voicemail of murdered schoolgirl Milly Dowler in July 2011 triggered investigations that showed the full extent of the “hackgate” scandal. After the tabloid disappeared, Lord Justice Leveson opened an inquiry into the practices of the British press. He was charged to provide recommendations for a more effective regulation of the media in the United Kingdom. At the core of his inquiry launched in November 2011 stood one question, namely “who guards the guardians?” and one objective: to decide whether to introduce a kind of statutory regulation of the press or to beef-up the existing model of media self-regulation. The report of 2000 pages published by Lord Justice Leveson in November 2012 concluded that the former British press council (the Press Complaints Commission) had failed (Leveson, 2012) and that a new system of media self-regulation would be required. Leveson’s report recommended a system of media self-regulation underpinned by a statutory recognition body, which was brought in practice with a Royal Charter and the creation of the Recognition Body in November 2013. Still, the vast majority of the press in the United Kingdom refuses to recognize the Royal Charter and established a new self-regulatory body called the Independent Press Standards Organisation (IPSO). IPSO was launched on 8 September 2014 as the independent regulator of the newspaper and magazine industry and is composed of a majority of members, 7 out of 12 who do not represent the media industry (IPSO, n.d). According to Tambini (2014) it is quite likely that:

“There will be no officially recognized press regulator in the United Kingdom. The Royal Charter and the Recognition Body would continue to exist indefinitely as a permanent Sword of Damocles hanging over the press, rather than as the active system of ‘incentives’ that Leveson proposed to improve press behavior by rewarding those who joined an approved regulator by granting them legal protections.”

The British model introduced by the Royal Charter is one of the various ways to introduce statutory media self-regulation. There are indeed different possibilities for public authorities to get involved in the system of media self-regulation. To understand this, a linguistic discussion of the term media self-regulation might be a good point of departure. While the appendix “self” clarifies the key actor – in the present case, the media- the word “regulation” refers to what this actor is doing (Campbell, 1999: 714). Campbell (1999: 715) stresses that “regulation has three components, (1) defining the appropriate rules; (2) supervising the enforcement of the rules; and (3) deciding whether a violation has taken place and taking appropriate sanctions.”

In a genuine self-regulation system, the state is not involved in any of these categories. But in a statutory media self-regulation, the state gets involved in one or two out of those three categories. In Europe, the state officially recognizes the press council in a few countries through legislation. In Denmark, media self-regulation is recognized by law and even is mandatory. In the United Kingdom, the signing of the Royal Charter does not make the system mandatory but formally recognizes the system of media self-regulation and endorses its way of functioning. This is also the case in Ireland. And this can have major benefits. According to Fielden (2012: 100), “Recognition in statute, demonstrates a way of setting out the core purposes, administration, an functions of the regulatory body and securing the independence of governance and appointment from funding.”

Alternatively, public authorities may supervise the enforcement of rules adopted by media professionals. The adoption of strong incentives for media to belong to the system has been a one of the techniques used by state authorities to get involved in the system of media self-regulation. It may include rewarding or punitive measures for those media who adhere to or exclude the model of self-regulation. In the United Kingdom, the Royal Charter foresees treating publishers differently depending on whether or not they are members of the media self-regulation system, with those outside the system facing the threat of exemplary damages and punitive costs should they be taken to court. On the contrary, in Belgium, media adhering to the system receive state subsidies. In Ireland, media belonging to the system of media self-regulation may benefit during defamation proceedings. The adherence to the Press Council’s code is recognized by the 2009 Irish Defamation Act stating:

“The court shall, in determining whether it was fair and reasonable to publish the statement concerned, take into account such matters it considers relevant including in the case of a statement published in a periodical by a person who, at the time of publication, was a member of the Press Council, the extent to which the person adhered to the code of standards of the Press Council and abided by determinations of the Press Ombudsmen and determinations of the Press Council” (Irish Defamation Act, 2009: 19).

This makes the system quite effective, but begs the question as to what is the impact of a statutory recognition of media self-regulation on media freedom. Similarly, one can ask what the impact is of incentives that reward or punish ethical and accountable journalism on media freedom. To answer these questions, it is necessary to draw a distinction between democratic countries and countries in democratic transition where international standards related to media freedom are not yet respected.

### **Statutory media self-regulation in weakly democratised or non-democratic states**

Several years after Bertrand’s (2000:152) positive perception of self-regulation being the best weapon to protect media freedom, some problematic side effects of the system have become more apparent in countries in democratic transition, in particular in some states that international organisations consider as “new democracies” but where the attacks on media freedom are occurring on a regular basis. The

reports to the Permanent Council of the OSCE Representative on Freedom of the Media underline the numerous media freedom violations taking place in the OSCE area. Therefore media freedom is tied to the quality of democracy more broadly (Mijatovic, 2013). In countries where democratic standards are jeopardized, media freedom violations are recurrent. In Azerbaijan, for instance, the atmosphere towards political activists and opposition journalists is hostile and commonly cited infractions include arrests of journalists on manufactured charges. In Turkey, where democracy is currently in crisis, “Turkey’s government is improperly using its leverage over media to limit public debate about government actions and punish journalists and media owners who dispute government claims, deepening the country’s political and social polarization” (Freedom House, 2013). In Hungary, the Fidesz party used its parliamentary majority to pass legislative changes that tightened the government control over media, in particular through the creation of a new media regulation authority supervising all media in the country.

In those countries “lost in democratic transition”, some international organisations have taken notice of problems related to the misuse of the system media self-regulation by state authorities. After years of promoting this system, these international players start realizing that media self-regulation might be captured by the state and transformed in a kind of compulsory self-censorship. This is particularly obvious in this extract from a speech given by the OSCE Representative on Freedom of the Media (Mijatovic, 2010):

“I would like to warn the distinguished audience of a rising issue that jeopardizes the idea of media self-regulation in some new democracies. There is a growing tendency for some governments to promote the concept of media self-regulation in order to restrict media freedom from inside and in more subtle manner than through media laws.”

However, democracy is not necessarily the precondition for the functioning of media self-regulation. Rather, it is the will of those countries in transition to progress on the path towards democracy. As long as the press remains the key gateway in the representation of the government, promoting self-regulation mechanisms should be avoided or done with great care. When countries have democratic incentives, such as in the Western Balkans where countries are EU candidates, the negative side effects can more easily be avoided or alleviated. In the Western Balkans, press councils have been established in Bosnia and Herzegovina, Kosovo, Serbia and in Montenegro. Apart from the Montenegrin Media Council, funded by the state and accused of being dependent on the government, the other three press councils are independent and function rather well, receiving an increasing number of complaints from media users.

On the contrary, in countries where there is no free press and no will to progress towards democracy, the authorities brandish ethics to discourage or prevent the press from covering sensitive issues including religion, nationalism, and ethnicity regardless of the fact whether these stories are of public interest. Azerbaijan illustrates the danger of any self-regulatory system where there is no free press. The press council created there in 2003 with the support of the international community is accused of being part of the state apparatus and contributing to a more repressive system against independent media. NGOs defending media freedom in the country underline that “today the press council has the role of disposing the media that are disloyal to the authorities. Instead of engaging in self-regulation, the press council asks the public prosecution agencies to carry out tax audits of particular media organizations” (Huseynov, 2011: 92). Richter defines media self-regulation in a majority of post-Soviet countries as “compulsory self-regulation” (2007). Indeed, in a majority of those countries, in particular those that are not part of the European Union, such as the Caucasus, Russia or Ukraine, ethical charters and self-regulation mechanisms have usually been drawn up, adopted and signed by media proprietors and public authorities rather than journalists. Richter (2007: 306) underlines that this is not a bad thing per se. “We need to decide if post-Soviet legislators are enemies of press freedom or upholders of the public interest.”



## **The regulation challenge in democratic countries**

In countries with more developed democracy, statutory media self-regulation is not a problem *per se* for press freedom. In many countries, the state, for instance, contributes to the funding of the system such as in Finland, Germany, or Belgium; and the systems nevertheless remains totally independent from public authorities.

It is however important to differentiate between statutory media self-regulation systems using punitive incentives to push media to adhere to the system and those using rewarding incentives. We saw previously that an increasing number of countries adopted statutory media self-regulation through a state recognition of the system, which remains voluntary but is combined with incentives – rewarding or punitive - for media to adhere to it. We mentioned the case of Belgium where adherence to the press council is a precondition for receiving state subsidies. This kind of rewarding incentive is not problematic in terms of media freedom. But cases of punitive measures against media that do not adhere to the system of self-regulation might become a serious challenge for media freedom as it may curb the universal nature of freedom of expression. In Estonia in June 2014, the authorities have for instance refused accreditation to government’s press events to media outlets not belonging to the press council. This was not a decision of the press council, which actually opposed this governmental initiative. According to a representative of this press council, excluding media outlets that do not belong to the press council is a way of excluding journalists that are critical of the government from accessing information.

Rewarding or punitive incentives for media also stem from the recognition of media self-regulation mechanisms by justice courts. In the United Kingdom, the Royal Charter foresees treating publishers differently depending on whether or not they are members of the media self-regulation system, with those outside the system facing the threat of exemplary damages and punitive costs, should they be taken to court. This can also become a serious challenge for media freedom in democratic countries as it leans towards a two-speed protection of media professionals according to their respect for professional standards or not.

Theoretically, justice courts should not take into account the decisions of press councils in their rulings, as self-regulation is a separate system of handling media users’ complaints based on the journalistic code of practice and not based on the legislation. In practice, however, many courts in Europe have done it. In the UK, article 2(4) of the UK Human Rights Act of 1998 “requires the court to take into account of the Press Council’s Code of Practice in their proceedings in privacy cases and recognizes it as a relevant privacy code for the purpose of the Act.” If the primary effect of this is the full recognition of the importance and power of a self-regulation mechanism by justice courts, the side effect can be damaging for the media. It may lead to a situation where press councils risk becoming a pre-judgment mechanism instead of an alternative to a court trial. There is a risk that their decisions will be used in court by plaintiffs, when it favours them. European press councils report that some plaintiffs have already tried to use the decisions of press councils in courts to better attack a media outlet. So far, however, national courts never turned those decisions against a media outlet. Some members of European press councils warned that they would leave the system of media self-regulation, were such a judgment to be made (Hulin, 2014).

Regardless of the fact that a decision of a press council has not yet been turned against a media outlet in a national court, the ECHR certainly has taken into consideration the question of respect for journalistic ethics in its rulings (Oetheimer, 2006). According to Voorhoof (2008), the ECHR started in the late 1990s to refer to journalistic ethics in evaluating the necessity of interfering in the right to freedom of expression. At the beginning, this trend was not seen as worrying for media freedom given that judges made use of the respect of ethics to comfort the defence of a journalist, such as in *Lopes Gomes Da Silva v. Portugal* (28 September 2000) or *Thomas v. Luxembourg* (29 March 2001). However, the Court has increasingly referred to non-compliance with journalistic ethics to justify the legitimate character of interference by the authorities in the right to freedom of expression. The most

famous example is that of *Flux nr6 v. Moldova* (29 October 2008). The court maintained that “the applicant acted in flagrant disregard of the duties of responsible journalism and thus undermined the Convention Rights of others.” The opinion of the dissident Judge Bonello in this case is particularly worthwhile reading.

“I fear this judgment has thrown the protection of freedom of expression as far back as it possibly could. (...) Even if the alarming facts are sufficiently borne out by evidence, in the exercise to establish proportionality, disregard for professional norms is deemed by Strasbourg to be more serious than the suppression of democratic debate on public corruption.”

Following the discussions on *Flux nr6 v. Moldova*, the case of *Stoll v. Switzerland* (10 December 2007) raised even more concerns. In this case, the ECHR’s judgment of a non-violation of Article 10 relied heavily on the findings of the Swiss press council. By recognizing the role and importance of the press council, the judgment caused serious concern as it could curb the universal nature of the right to freedom of expression defended by the European Convention on Human Rights. The judgment tended to ignore that even if media can cause harm by violating professional ethics, this does not mean that they violate the law. The judgment failed to take into full consideration that journalists with low professional standards remain part of the free media scene. It disregarded media, which are not adhering to the civic-oriented journalism. The ECHR has not, however, based subsequent judgments on this case-law, and took a different approach in the case *Kasanova v. Bulgaria* (2011).

“The Court must apply the most careful scrutiny when, as here, the sanctions imposed by a national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern. The Court would add that if the national courts apply an overly rigorous approach to the assessment of journalists’ professional conduct, the latter could be unduly deterred from discharging their function of keeping the public informed.”

In the case of *Kaperzynski v. Poland* (3 April 2012), the judges endorsed a ruling of the Polish court stating that the applicant had failed to respect his professional obligations. The ECHR nevertheless found a violation of Article 10 based on the consideration that a refusal to publish a rectification did not justify a criminal sanction. This judgment is in line with previous findings of the Court, such as those in *Bladet Tromso and Stensaas v. Norway* (20 May 1999) and others according to which it is not up to the ECHR and courts in general to “substitute their own views for those of the press as to what techniques of reporting should be adopted by journalists.” The judges in Strasbourg seem to rectify their line to further ensure the universal nature of freedom of expression.

## Conclusion

This article demonstrates that there are arguments in favour and against media self-regulation in a media freedom perspective. Whilst a view of self-regulation is that taking regulation out of the hands of governments is beneficial for media freedom, another perspective is that a lack of legal protection and unclear boundaries might contribute to suppressing free speech. With this in mind, statutory media self-regulation might be a constructive way of improving the self-regulatory model. Recognition by law helps securing the independence of the body from the interests of the media industry and can prevent the “privatization of censorship”. Statutory recognition may also bring incentives for media to take part in the voluntary system of media self-regulation.

However, even if it helps improve the efficiency of the system, this paper argues that in the long run it risks hampering media freedom rather than reinforcing it. The recognition of a media self-regulatory body and its decisions by state authorities in countries that are not yet democratic is particularly problematic because of the risks of transforming self-regulation into a compulsory system controlled by political interests and hence into mandatory self-censorship of media. Therefore, such a model should not be encouraged in countries in democratic transition. In democratic countries, the danger is less visible. The risk lies in the recognition and thereby use of the system of media self-regulation by the authorities and by the courts not as a reward but as a punishment for media. It is

shown in this research project that the introduction of punitive incentives measures by the state or by the judicial system is not coherent and compatible with the fundamental right to freedom of expression and media freedom and with their universal nature. It leans towards a two-speed protection of media professionals according to their respect for professional standards or a lack thereof.

In countries without a press council, such as France, the question of a statutory recognition of the system of media self-regulation is at the heart of the current discussions. A recent expert report on the future of media self-regulation in France (Sirinelli, 2014: 54) emphasizes the dilemma: on one hand, a recognition of the system by state authorities appears as an essential pre-condition for its creation; on the other hand, state intervention risks giving any new structure an appearance of non-independence, which could be the main reason for its failure.

Media professionals as well as public authorities have to be careful that media self-regulation remains a means of promoting media freedom. Turning media self-regulation into a compulsory system should be avoided. An incentive-based system, which encourages participation in media self-regulation seems to have fewer negative side effects. However, if courts appreciate the belonging of a media outlet to the system of self-regulation, courts should not get involved in the way journalists come to their editorial decisions and choice of methods in reporting.

It might hence be helpful to recall a statement of a strong advocate of socially responsible journalism, namely the Hutchins Commission on Freedom of the Press. As early as in 1947, it underlined in its landmark report that:

“The attempt to correct abuses of freedom, including press freedom, by resort to legal penalties and controls is the first spontaneous impulse of reform. But the dangers of the cure must be weighed against the dangers of the disease; every definition of an abuse invites abuse of the definition. Hence a lying, venal, and scoundrelly public expression must continue to find shelter under a “freedom of the press” built for widely different ends. There is a practical presumption against the use of legal action to curb press abuse.”

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