

The Growing Threat of Soft Censorship

*A Paper on Indirect Restrictions on Freedom of
Expression Worldwide*

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The Problem of the “Sophisticated Censor”

In Kazakhstan, the government cancelled publishing contracts with opposition newspapers in the run-up to the December 4 presidential election. In like-minded Belarus, the government’s monopolistic press distribution agency announced that it will cease distribution of private newspapers during the upcoming presidential election year. And in Russia, the Putin administration has perfected the art of taking over, through state companies or political allies, critical media that it cannot otherwise control.

Even in generally democratic Botswana, President Mogae has abused immigration laws to expel a critical academic who was a long-time resident but happened to hold a foreign passport. And in Bulgaria, a European Union (EU) candidate, newspapers exposing financial mismanagement are known to receive selective and carefully-timed visits by tax inspectors.

Different as their contexts may be, these abuses have two things in common: they are “non-traditional” and of growing concern, in the characterization of Eduardo Bertoni, the free speech watchdog of the Organization of American States (OAS). This style of censorship—not entirely new, but increasingly employed around the world—is subtle, indirect, and sophisticated.¹ To control critical voices, it prefers to inflict financial pain, manipulate regulatory leverage or act under the disguise of the law—as opposed to the more “traditional” methods of beating and arbitrarily detaining journalists, or burning down media houses. Not even established democracies are immune to this syndrome: the Bush administration has reportedly paid journalists to plant covert propaganda pieces, in both United States and Iraqi media.

From the perspective of free speech activists, it is, in a way, the price of success: as greater domestic and international exposure raises the costs of heavy-handed censorship, governments around the world increasingly opt for less visible, but equally effective ways of meddling with free expression. In the words of Pius Njawe, a leading African journalist and activist, such “sophisticated repression requires a sophisticated response.”

A Tentative Catalogue of Soft Censorship

Methods of indirect or “soft” censorship are, almost by definition, difficult to catalogue. It is a struggle against malicious inventiveness: as old forms of (not so) subtle pressure

¹ We use “censorship” here loosely to refer to unjustified restrictions on freedom of expression generally, rather than in the technical sense of prior restraints.

are exposed, undemocratic governments constantly come up with increasingly sophisticated ones. That said, they tend to fall into three broad categories:

- ***Abuse of public funds and monopolies.*** These range from abusive allocation of government advertising or subsidies to arbitrary denial of access to state printing facilities to direct cash payments to reporters for dubious or undeclared services. These are doubly pernicious, as taxpayer money and public wealth is used and abused to promote partisan or personal interests.
- ***Abuse of regulatory and inspection powers.*** These forms of interference operate under the color of law or market rules: broadcast licensing processes are manipulated to benefit political allies or silence independent voices; critical media find themselves subjected to a barrage of selective and draining fiscal, labor or other regulatory inspections; and sometimes, they are taken over by government cronies as legitimate owners are bullied into handing over control. Media owners with non-media businesses subject to regulatory regimes are often made to understand that their other businesses can only prosper if their media are friendly to the government of the day.
- ***Extra-legal pressures.*** At the most delinquent end of the spectrum, powerful officials and politicians use raw power and clearly illegal means to buy influence or muzzle dissent: they pressure private businesses to advertise or not advertise on certain media, interfere directly with editorial decision-making (so-called “telephone censorship”), or seek to bribe reporters and editors outright.

More often than not, indirect pressures combine a semblance of legality with clearly unlawful methods and goals of improperly influencing media content and other forms of political expression. A meeting of Eastern European activists, convened last month by the Justice Initiative to discuss these very issues, concluded that all these forms of interference are present, in varying degrees, in the countries of the region. While media freedom has increased significantly since the fall of the Berlin Wall, most regional governments are yet unprepared to let the media do its job freely. However, with hard censorship having become politically unaffordable in these lands of European aspirations, government interference is now almost entirely of the softer kind. Clear parallels exist in Latin America, where the Justice Initiative is planning a similar regional meeting for spring 2006.

Abuse of Government Advertising: Two Case Studies

Financial pressures, and abuse of government advertising money in particular, have become favorite weapons in the arsenal of soft censorship. Weak media and advertising markets in emerging democracies leave the media—and especially the print media—dangerously dependent on government advertising and other favors for their survival. This, in turn, enables undemocratic governments to use advertising money as financial

sticks and carrots, granting unfair advantages to media of their choice and poisoning the marketplace of ideas with the wrong incentives.

Such abuses are widespread. For example, independent media have suffered retaliatory withdrawals of their government advertising in countries as diverse as Argentina and Romania, Namibia and Mexico, Russia and Pakistan. A comprehensive 2003 report by OAS Special Rapporteur Eduardo Bertoni found that poor regulatory regimes in the Americas grant too much discretion to officials in charge of advertising, and require too little transparency or accountability. Such inadequate oversight results in widespread violations of advertising rules, where they exist at all.²

Argentina

Today the Justice Initiative and the Buenos Aires-based Association for Civil Rights launched a joint report on advertising abuses and other content-based pressures exercised on the Argentine media by the national, provincial, and municipal governments. Our year-long investigation revealed an entrenched culture of abusive allocation of advertising for political and personal purposes, especially at the provincial level. This state of affairs creates insidious chilling effects, especially where public sector advertising is critical to the financial survival of media outlets. In the province of Tierra del Fuego, for example, some print and other media outlets receive up to 75 percent of their advertising income from government agencies.

In Argentina, advertising leverage is used to force owners and editors to fire or sideline critical journalists, or punish independent outlets. Financial pressures are also employed to press media to carry favorable coverage of the government and its officials, deny access to government opponents, and exert direct control over media content.³

Romania

Until recently, very similar mechanisms were used halfway around the world in Romania, an aspiring EU state. Between 2000 and 2004, the Romanian government spent some \$60 million on advertising and related services, amounting to between 10 and 20 percent of the total media advertising market, depending on the media sector (print versus electronic). A significant portion of that spending appeared to serve no purpose other than to secretly and illegally subsidize favored outlets. At the same time, the government retaliated against key critics by subjecting them to total advertising embargoes. Individual ministers used their official advertising budgets as personal propaganda portfolios. As in Argentina, Romanian media professionals considered manipulation of advertising to be one of the main threats to media freedom in their country.

² See 2003 Report of the Office of the Special Rapporteur, available at: <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=139&IID=1>.

³ The full text of the Argentina report (in English and Spanish) and additional information about Justice Initiative activities in this area are available at www.justiceinitiative.org.

Pressure from civil society groups and the European Union, and the election of a new government in January 2005, led to a turning of the tide in Romania. A comprehensive legislative reform—developed with significant input by the Justice Initiative and our partners at the Romanian Center for Independent Journalism—has tightened allocation rules and increased the transparency of advertisement contracting. A freedom of information case, brought by our partners, for access to data that appeared to implicate then prime minister Adrian Nastase in advertising abuses helped galvanize public interest in the issue.

Under the new legal regime, Romanian government agencies are required to post all major advertising contracts on a special web portal, giving all interested media a fair opportunity to bid. Initial data about the impact of reform are encouraging: both allegations of abuse and use of advertising as hidden subsidies appear to have subsided.

Indirect Censorship Under International and Comparative Law

The threat of indirect censorship has increasingly caught the attention of international lawmakers. To the extent that hidden or indirect pressures exercised by government officials have the purpose or effect of interfering with media freedom or independence, they violate international human rights law. The American Convention on Human Rights, the 1969 bill of rights for the Americas, addresses the issue most directly, providing that

[t]he right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.⁴

More recently, the Inter-American Commission on Human Rights further clarified what is meant by such “indirect methods” of restriction: “the exercise of power and the use of public funds by the state, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans, and the concession of radio and television licenses, among others.”⁵ When undertaken “with the intent to put pressure on and punish or reward . . . social communicators and communications media because of the opinions they express,” these governmental actions violate freedom of expression “and must be explicitly prohibited by law.”⁶

The 2002 Declaration of Principles on Freedom of Expression in Africa echoes some of the same concerns, providing that “States shall not use their power over the placement of public advertising as a means to interfere with media content” and that they

⁴ American Convention on Human Rights, art. 13.3.

⁵ Inter-American Declaration on Principles of Freedom of Expression, adopted at the 108th Regular Session, October 19, 2000, para. 13.

⁶ Ibid.

have a positive obligation to “promote a general economic environment in which the media can flourish.”⁷

The Council of Europe has led attempts to set standards in the delicate area of government subsidies to the media. While recognizing that public subsidies may be necessary to ensure the financial viability of certain media, and to enhance media pluralism and diversity, the Committee of Ministers emphasized in a recent recommendation to the member states that any such aid should be “granted on the basis of objective and non-partisan criteria, within the framework of transparent procedures and subject to independent control.”⁸

In some cases, the media have appealed to the courts for redress against financial and indirect pressures. In relation to government advertising abuses, for example, courts in several countries have developed important jurisprudence. Thus, in the Indian case of *Ushodaya Publications*, a newspaper brought a constitutional challenge against a regional government’s withdrawal of advertising in retaliation for the paper’s critical editorial policies. An Indian high court ruled that the government could not constitutionally use its advertising powers to reward or punish media outlets for reasons related to their editorial orientation. Instead, the court said, the government has to allocate advertising in a manner consistent with its purpose, that is, to educate and inform the public about the activities of the government.⁹

Similarly, a U.S. appeals court has held, in a case involving allegations of retaliatory withdrawal of advertising, that “using government funds to punish political speech by members of the press and to attempt to coerce commentary favorable to the government” would be a clear violation of the First Amendment to the U.S. Constitution.¹⁰ And the Argentine Supreme Court has suggested that withdrawal of advertising with “persecutorial” motives would be an unacceptable infringement of freedom of expression guarantees.¹¹

The Inter-American Commission has also addressed the issue of financial pressures under the heading of indirect interference with freedom of expression. In the 1987 case of *Radio Nanduti*, for example, the Commission found that the Paraguayan authorities had violated Article 13 of the Convention by subjecting the radio and its director to various forms of harassment, which included pressures on private businesses

⁷ Adopted by the African Commission on Human and Peoples’ Rights, 32nd Ordinary Session, October 17-23, 2002, Principle XIV.

⁸ Recommendation No. R (99) 1, Committee of Ministers, Council of Europe, “Measures to Promote Media Pluralism” (adopted on January 19, 1999).

⁹ *Ushodaya Publications Pvt Ltd v. Government of Andhra Pradesh*, AIR (1981) AP 109.

¹⁰ *El Dia v. Rossello*, 165 F.3d 106 (1st Cir. 1999), at 109.

¹¹ *Emisiones Platenses, S.A. s/acción de amparo*, Decision of June 12, 1997.

not to advertise with the radio. The Commission recommended that the government compensate the radio's financial losses.¹²

The Way Ahead: The Need for Concerted Action

Soft censorship, in its many manifestations, has become a major threat to freedom of expression worldwide. Its chilling effects are serious and widespread, comparable to those resulting from draconian libel and sedition laws, or violence against journalists. Unlike these other, more traditional threats, however, combating soft censorship does not receive the attention and commitment it deserves from global civil society, democratic governments, and international institutions. This needs to change.

Enhanced Monitoring and Exposure. As is often the case, the first priority ought to be better research and documentation of the problem. While there is strong anecdotal evidence to suggest that indirect interferences are a major threat to media freedom worldwide, not enough comprehensive research has been carried out and very few watchdog groups, domestic or international, have made this a major focus of their work.

At the same time, the challenges of exposing soft censorship are particularly daunting: by definition, much of the pressuring is well disguised. Investigations may often require developing specialized expertise, involving, for example, details of procurement law or telecommunications standards. Media managers and editors are often reluctant to speak up about their sensitive dealings with vindictive government officials, and journalists are discouraged from reporting on such "internal" issues. And some media owners are, unfortunately, all too happy at times to play the government's game of financial sticks and carrots.

And yet, it is essential that greater, and more sustained effort is put into exposing soft censorship. Media professionals, in particular, have a special responsibility to help uncover such practices, wherever they occur and whoever the targets happen to be. The Justice Initiative's activities in Argentina and Romania were designed with this necessity in mind. They have already triggered broader discussion and monitoring in the respective regions, and it is our hope that other groups will engage in this common endeavor.

Developing Creative Remedies. Non-traditional abuses require non-traditional remedies. Both international law and most domestic legal systems are less than well-equipped to deal with the various aspects of indirect censorship. For example, while most countries sanction abuse of power generally, these prohibitions do not necessarily cover the various forms of financial or indirect interference with free expression. Similarly, new legal principles and strategies may need to be developed to address the evidentiary and other problems associated with proving that government officials acted with censorial

¹² *Humberto Rubin v. Paraguay (Radio Nanduti case)*, Decision of March 28, 1987, OEA/Ser.L/V/II.71, Doc. 9 rev.1, p. 111.

intent. Remedies of this kind have been successfully developed in other areas of human rights jurisprudence, such as antidiscrimination law.

A more creative use of existing remedies is also warranted. These can include the traditional ones, i.e. those based on constitutional free speech protections, but other, novel ones need to be explored, as well. For example, the Justice Initiative and its partners have successfully utilized freedom of information and procurement law remedies to uncover government advertising abuses in Romania. Freedom of information mechanisms, in particular, hold great potential as transparency per se can go a long way toward exposing and curbing hidden or soft forms of censorship.

At the international level, both hard and soft law tools must be designed to better and more specifically address forms of indirect censorship. Opinions or judgments of the international adjudicatory bodies—the UN Human Rights Committee and the regional human rights tribunals—can have an important impact, and the Justice Initiative and its partners are pursuing international litigation opportunities in this regard. Guidelines and recommendations of international bodies on certain regulatory issues, such as allocation of subsidies, advertising or broadcast licenses, should also be pursued.

Coordinated Response. Perhaps most importantly, confronting the threat of soft censorship requires a coordinated response at the national, regional and international levels. Human rights groups in different countries need to share research methodologies and lessons learned. Awareness and advocacy campaigns need to be developed domestically and before the regional human rights monitoring bodies. The UN Human Rights Committee should seek to address these issues in the process of reviewing country reports. And the UN, African and European free expression mandates should follow the example of their OAS counterpart and provide leadership to the effort to expose and address the most disturbing aspects of soft censorship in their respective jurisdictions.

The Justice Initiative remains committed to the effort. In addition to the two regional focused meetings with Eastern European (held November 2005) and Latin American groups (planned for spring 2006), in the second part of 2006 we will convene a broad international meeting to explore more effective ways of combating soft censorship worldwide.

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The Open Society Justice Initiative, an operational program of the Open Society Institute, pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies worldwide. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in four priority areas: national criminal justice, international justice, freedom of information and expression, and equality and citizenship. Its offices are in Abuja, Budapest, and New York.

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