Building a Framework for Media Self-Regulation in the Caribbean
A Discussion

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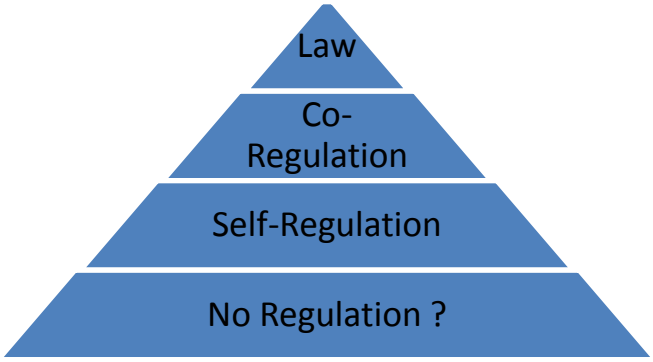
Voluntary media self-regulation is said to reside at one end of a spectrum of interventions marked at the other coordinate by official regulation and, somewhere in the middle, by a grey band of co-regulatory arrangements. The Law Commission of New Zealand in its 2011 study entitled The News Media Meets 'New Media' describes such options as a "pyramid" or "continuum with government intervention and sanctions increasing along the continuum, or with each layer of the pyramid."

In few instances, in the modern era, is the option of "no regulation" contemplated except via a variety of arguments related to a presumed requirement to keep the Internet "free" both by means of more pervasive access and through a regime of official controls governing content that does not exceed accepted principles related to conventional media.



Much support for the notion of more freedom, as opposed to more official regulation, is derived from an understanding of the potential developmental impact of liberalised mass communication arrangements and recognition of the value of free expression as an asset in the strengthening of the democratic process. It is deemed axiomatic that when freedom of expression prevails greater balance is achieved between the powerful and the powerless. For example, in introducing UNESCO's 2014 publication on World Trends in Freedom of Expression and Media Development, Director-General, Irina Bokova noted that "a new global sustainable development agenda … must be underpinned and driven by human rights, with particular attention to freedom of expression."

Free expression is both a vital pillar and by-product of a liberal democracy. It serves as a self-propagating instrument of social change and its protection can contribute to the building of platforms for good governance, democracy and the consequential benefits of human and social development. The media, as one formal manifestation of this freedom, can serve as interlocutors between the powerful and the powerless, with a role as independent watchdogs on the exercise of both state and private power.

Voluntary media self-regulation in this context serves as an effective shield not only against the excesses of dominant state and private holders of power but against the indulgences of errant media themselves. Sir Brian Leveson, in summing up his report on the 2012 public inquiry into issues of British press culture (the "Leveson Inquiry:") concludes that "for many years, there have been complaints that certain parts of the press ride roughshod over others, both individuals and the public at large, without any justifiable public interest."

Leveson went so far as to propose a form of "whistle-blowing" protection for journalists "who felt that they might be put under pressure to do things that were unethical or against the code."

There is also the long-held view, as noted by the New Zealand study, that the law has a role to play in holding the news media accountable to the public for the exercise of their powers.

Correspondingly, there is a public interest concern when the state is accorded a disproportionate hand in addressing media transgressions. Brenton Priestly's 2004 essay on The Australian Media: Regulation, Self-Regulation, the Public Interest and Free Speech says the argument against government regulation of the media "places the public interest at its forefront; the emphasis is on the principle that an independent media will foster free speech which will be jeopardised by concentrating too much power over it in the hands of the government."

The Justice Hugh Small Committee which deliberated on Jamaica's defamation law in 2007-2008 appeared to endorse such a principle. "It (Committee) considers that the State should not be involved in regulation of the media as this would be contrary to the constitutional principles of freedom of expression. The press and journalists in several Common Law countries have established their own organisations for monitoring press freedom and enforcing appropriate ethical standards for the practice of journalism."

The development of a conceptual framework for media self-regulation in the Caribbean would benefit from a clinical examination of the performance of both existing and proposed statutorily determined content restrictions and self-imposed standards both in the case of individual institutions and at the level of the media industry as a whole. But it would also be important to ensure that whatever the prognosis, freedom of expression considerations remain integral to the charting of a way forward.

The international free expression advocacy group, Article 19, noted in its response to the Final Draft Royal Charter on Self-Regulation of the Press in the UK in 2013 that press regulation is not necessarily prohibited under international human rights standards though a specific model is nowhere prescribed.

However, the group advised that such regulation would only be acceptable if it met three basic requirements:

1. Such regulation be prescribed by law. For example, supporters of Trinidad and Tobago's "Broadcast Code" have cited its existence as a mandatory requirement of the country's Telecommunications Act;

2. Regulation is required in pursuit of a legitimate aim, including, inter alia, the rights of others. The European Court of Human Rights has elaborated that states have a positive obligation to regulate the exercise of freedom of expression in order to ensure the adequate protection of other rights by the law;
3. Regulations is necessary in a democratic society.

On the latter point, Article 19 was careful to note that a regulatory response to any "pressing social need" must be proportionate to the interests sought. Additionally, "if a less intrusive measure is capable of achieving the same purpose as a more restrictive one, the least restrictive measure must be applied."

Trinidad and Tobago's Broadcast Code appears to meet the standard set by the first requirement. However, there must be corresponding concern that there exist stark anomalies in the regulatory frameworks of the print media when compared with far greater official intrusions in the broadcast sector. The lack of parity in the regulatory frameworks governing the print and broadcast media is now also being met by overlapping concern over online content delivered on converged media platforms.

In the New Zealand study, which was commissioned to review the adequacy of the regulatory environment in news media in the "digital era", that country's Law Commission pointed to "significant gaps and contradictions … emerging in these parallel systems of state and self-regulation for print media and broadcasters as the channels for delivering news converge in the multi-media digital environment … There is currently a lack of regulatory parity between traditional news media and unregulated web publishers on the one hand, and broadcasters and print publishers on the other."

A 2014 UNESCO report also speaks of "extensive unevenness within the whole (media)" both within and without media disciplines and national borders and the New Zealand Law Commission report points to "the collapse of the boundaries which have traditionally separated the print and broadcast segments of the news media. Increasingly these once discrete entities are transforming themselves into multi-media companies, capable of producing news in a rich mixture of text and audio-visual formats, disseminated on an ever expanding array of platforms and devices, and promulgated via social media."

The Caribbean is similarly challenged to clinically examine the emerging trends that are increasingly being met by unenlightened regulatory responses. In like manner, the regional media industry needs to reflect on its own transformation in the face of convergence-dominated technological and organisational mutations.

UNESCO's 2014 report on World Trends in Freedom of Expression and Media Development points to technological trends that have "impacted traditional economic and organisational structures in the news media, legal and regulatory frameworks, journalism practices, and media consumption and production habits."

Technological convergence, the Report says, has expanded the number of and access to media platforms as well as "the potential for expression." Such advances have "enabled the emergence

of citizen journalism and spaces for independent media, while at the same time fundamentally reconfiguring journalistic practices and the business of news."

Caribbean media would ignore this dynamic at its peril. Uneven state regulation across media sectors and a failure by the industry to come to terms with its own transformation can leave dangerous gaps in a regulatory landscape that is subject to considerable authoritarian whim not only by politicians but by populations that often perceive themselves to be under siege.

It should also be recognised that there are several existing models of media self-regulation, most of which are the subject of constant review. In France, Italy and Spain, media regulation is almost exclusively by statute. In Italy the Open Media Coalition has been lobbying heavily for a more transparent process in the selection of nominees to bodies such as the Communications Regulatory Authority.

Jamaica's Broadcasting Commission was established by statute under the Broadcasting and Radio Re-Diffusion Amendment Act of 1986 and the appointment of commissioners is made by the Governor-General after consultation with the Prime Minister and the Leader of the Opposition.

Likewise, members of the Telecommunications Authority of Trinidad and Tobago (TATT) are appointed by the President. Its principal mandate is "the orderly development of a telecommunications system that serves to safeguard, enrich and strengthen the national, social, cultural and economic well-being of the society" by "promoting and protecting the interests of the public" and "regulation of broadcasting services consistently with the constitution."

It has been rather disingenuously argued that voluntary media self-regulation mechanisms, within the context of the existence of these state regulatory agencies, would constitute a position of media "co-regulation". What would more closely resemble a situation of co-regulation would be the delegating of key mandates under the current enabling legislation to a self-regulatory mechanism operated by the industry under conditions similar to what obtains in Denmark and have been established under the UK's Royal Charter on Self-Regulation of the Press which goes into effect in 2015.

While it would appear oxymoronic to describe a voluntary act as being grounded in statute, this is actually the case in Denmark and, to a lesser extent, Ireland. In Ireland, a Press Council, which oversees newspapers and not the broadcast media, is recognised in law as an institution for redress in the event of media wrongdoing but does not carry the force of law. In Denmark, on the other hand, membership of the Press Council, which is independently constituted, is mandatory with penalties prescribed at law.

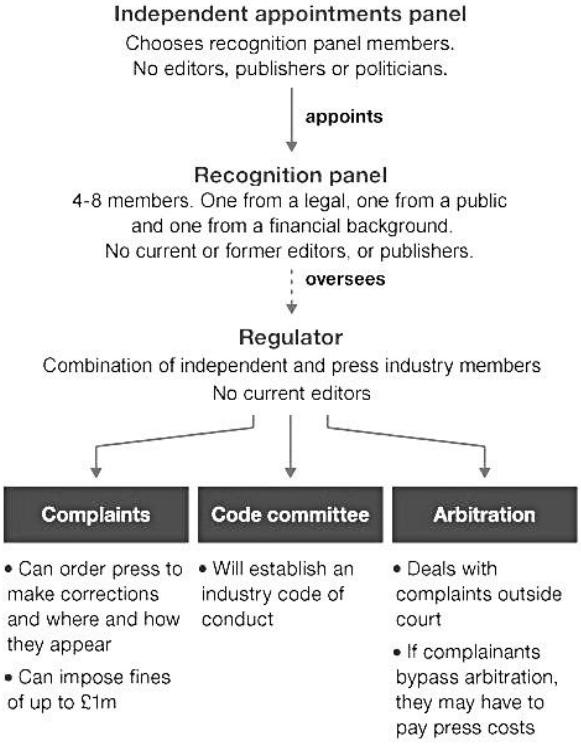
The Royal Charter does not call for mandatory membership by the press but has been heavily criticised as a method of imposing state regulation through employment of an industry façade. On September 8, 2014 an Independent Press Standards Organisation (IPSO) was launched in response.

It has however been noted that while the term "self-regulation" means that the industry or profession rather than the government is doing the regulation, it is not necessarily the case that government involvement is entirely lacking. This observation by Angela J. Campbell of the Georgetown University Law Centre, writing in the Federal Communications Law Journal in 1999, was in support of the view that a state role might not necessarily be in contradiction with the best intentions of self-regulation in application of its three main components – legislation, enforcement and adjudication.

“Instead of taking over all three components of regulation, industry may be involved in only one or two. For example, an industry may be involved at the legislation stage by developing a code of practice, while leaving enforcement to the government, or the government may establish regulations, but delegate enforcement to the private sector,” the Campbell paper says.

“Sometimes government will mandate that an industry adopt and enforce a code of self-regulation. Often times, an industry will engage in self-regulation in an attempt to stave off government regulation. Alternatively, self-regulation may be undertaken to implement or supplement legislation.”

The solution facilitated by the Royal Charter appears to support a hybrid model based on such a formulation.



Proposed Structure of the new UK regulatory body

Article 19 advises that while self-regulation relies first and foremost on members' common understanding of the values and ethics that underpin their professional conduct, there is actually no uniform definition of "self-regulation". It points to the even more problematic model of "regulated self-regulation" as obtains in Denmark and Ireland and, from 2015, in Britain.

The conundrum arises in the broadcast sector in the Caribbean which is subject to heavier direct state regulation. Trinidad and Tobago's proposed Broadcast Code, for example, is meant to be a state administered mechanism to monitor, adjudicate and punish broadcasters who, by virtue of the Telecommunications Act and their individual broadcasting licenses, are obligated to adhere to the Code. There is nothing voluntary about the Code and industry engagement of the process arises solely out of consultations on the standards set by it.

Opposition to the Code in all its manifestations beginning with a first draft in 2005 included an argument that its provisions were likely to exceed the existing legal framework for redress in the stated areas of concern:

(1) the protection of national security;
(2) the prevention of crime and disorder;
(3) territorial integrity;
(4) public safety;
(5) the protection of health or morals; or
(6) the reputation or rights of others

Recognition of this is actually expressed in the document which states: "The design of the Code recognises that in Trinidad and Tobago, there currently exists legislation in force which provides some level of protection and remedies in all of the aforementioned areas." Opponents of the Code, including this writer, argued that the real intention of the Code was to create space for more regulation than existed in the past by generating an entirely new range of potential transgressions not already interpreted as such by the legal system.

The Association of Caribbean MediaWorkers (ACM) opposed model Organisation of Eastern Caribbean States (OECS) broadcasting legislation on similar grounds, based on the view that even as the precedent of content restrictions was well established in the Caribbean, the legislation to be adopted by the member states of the regional sub-grouping had failed to meet several key standards linked to independent operations and adjudication, fairness and proportionality regarding penalties.

Two attempts at a pan-Caribbean industry-led self-regulatory system were launched in 1976 by the now-defunct Caribbean Publishers and Broadcasters Association (CPBA) and in 2002 by the Eastern Caribbean Press Council (ECPC). The 1976 Caribbean Press Council (CPC) was established with 17 members comprising four CPBA nominees, four journalists and nine non-industry members including a chairman who was explicitly not a member of the media industry.

National councils were designed to follow the same practice of appointing non-media chairpersons. Operating with a cadre of voluntary Council members and entertaining complaints from the public with no mechanism to ensure compliance, both the CPC and its national councils

eventually collapsed. Mark D. Alleyne notes in *Mass Media and the Caribbean* that the Barbados Press Council went defunct after 1985 after its chief user, the late Prime Minister Tom Adams, died.

The project was met with deep scepticism in Jamaica where it was thought that a press council was one way of the government getting back at what it considered to be recalcitrant journalists. There was also opposition to the supra-national jurisdiction of the CPC.

The ECPC never full got off the ground following its hopeful launch in 2002. The fledgling ACM was never invited to be a part of the discussions over its establishment and its founders focused mainly on involvement of editors and publishers to the exclusion of media workers. A lack of funding and uneven levels of interest by publishers eventually led to the demise of the ECPC.

By that time, the Trinidad and Tobago Publishers and Broadcasters Association (TTPBA) had launched a Media Complaints Council (MCC) under the chairmanship of former Senate President, Michael Williams. According to TTPBA records, the MCC came into being in 1997 after the then Government tried to have passed in Parliament the infamous Green Paper on Media. In May 1997, the government published a report entitled "Toward a Free and Responsible Media," which proposed the adoption of statutes requiring journalists to report with "due accuracy and impartiality." The so-called "green paper" also called for the creation of a code of ethics mandating that journalists promote national unity, and economic and social progress. The government plan was shelved in response to public outcry led in large measure by a number of media proprietors and MATT.

The owners and CEO's of media companies that then comprised the TTPBA saw the need to establish an independent body charged with enforcing a Code of Practice that was adopted by the media. Since that time the MCC has been funded and supported by the TTPBA.

Despite the existence of a widely-circulated Code of Practice, successive attempts at imposing new restrictions on the media have cited a lack of professional guidelines for journalists. The Media Association of Trinidad and Tobago (MATT) has long resisted adopting its own Code, thought it once endorsed guidelines formulated by the now-defunct Caribbean Association of Media Workers (CAMWORK) and is a member of the ACM which has its own Code.

The MCC Code was designed by the industry and acknowledges that adherence to it "involves a substantial element of self-restraint by the journalist" but was designed "to be acceptable in the context of the system of self-regulation. The Code applies in the spirit as well as in the letter."

Trinidad and Tobago continues to be the only English-speaking Caribbean country with a functioning media council. A review of its operations is currently being conducted. The Council comprises five members nominated by the TTPBA. Only one industry person sits on the Council and its chair typically comes from outside the media. A majority of media houses subscribe to the work of the Council and it is funded entirely by TTPBA member companies.

Media industry leaders in the Caribbean rarely actively engage the question of sector-wide voluntary self-regulation. The Media Association of Jamaica (MAJ), which represents the media industry, has described efforts by the Press Association of Jamaica (PAJ) to establish a Media Complaints Council as "irrelevant" saying "self-regulation would be sufficient and even more binding if media houses integrated their respective Codes of Conduct into journalists' employment contracts."

In the view of the MAJ, "the best regulation for press freedom is self-regulation. The proposed revised laws, added to existing broadcasting regulations and the existence of individual media codes of conduct and ethics provide a mix of legal, regulatory and self-regulatory oversight of the media which is crucial for an independent media and for a healthy democracy."

This position suggests that a system of voluntary self-regulation can suffice on state regulation and individual company codes tied to the work contracts of journalists. The absence of industry engagement in the formulation of an industry-wide initiative would render the PAJ initiative futile.

With Leveson's "whistle-blowing" capabilities for journalists in mind, perhaps MAJ member companies would be inclined to consider what the Inquiry suggested would be a "conscience clause" in the work contracts of journalists to protect them in the event they are instructed to commit an unethical or illegal act in the researching of stories.

The only other recently functional industry association is the Guyana Media Proprietors Association (GMPA) which had been active on the contentious issue of the award of broadcast licenses. Its members were signatories to the 2011 Code of Conduct for Reporting and Coverage of Guyana Elections which was supported by the Guyana Press Association (GPA) and the vast majority of Guyanese media houses.

Guyana's elections Code, first tested during the elections of 2001 and, more successfully in 2006, provided the region with a unique model of media self-regulation in which an official agency, in this case the Guyana Elections Commission (GECOM) provided or oversaw monitoring, reporting and adjudicating functions while a wide cross-section of the media industry developed and formally adopted a Code of Conduct.

Certainly, extending the concept to broader full-scale application would have required considerably more financial and human resources, greater operational autonomy from official agencies and a much more rigorous process of adjudicating apparent breaches of a more extensive Code. There would also need to be a nuanced discussion on where official regulation ends and where self-administered standards take over and how the two poles relate to each other.

These two country-specific cases draw attention to the need for national discourses on the essential value of a free press. It is true that state regulation of the press and other forms of public expression are well-entrenched features of Caribbean culture. In media practice, there are acceptable statutory restrictions related to the protection of minors, privacy and defamation. In recent years, issues of state security and the conduct of international criminal activity have been firmly planted as part of the media's regulatory landscape.

In few instances, however, has there been a reciprocal drive to legislate greater access to official information, to cite one example. Only five of the Caribbean Community's 15 member countries have access to information laws. There has also been recurring reference to state regulatory capabilities when it comes to online content. Both the OECS broadcast legislation and the Broadcast Code of Trinidad and Tobago at some stage proposed regulatory incursions into the production of online content.

The prevailing environment nevertheless requires formulation of a self-regulatory agenda which promotes the concept of high journalistic standards and protection of the rights of citizens. Leveson's often misunderstood prescription speaks of a body to set standards, both through application of a Code and in relation to governance and compliance.

Such a body, he argues, "should hear individual complaints against its members about breach of its standards and order appropriate redress while encouraging individual newspapers to embrace a more rigorous process for dealing with complaints internally; take an active role in promoting high standards, including having the power to investigate serious or systemic breaches and impose appropriate sanctions; and provide a fair, quick and inexpensive arbitration service to deal with any civil law claims based upon its members' publications."

Chairman of the UK Press Standards Board of Finance, Lord Black of Brentwood, in his special submission to the Leveson Inquiry, proposed a new self-regulatory body to replace the beleaguered Press Complaints Council (PCC) under an independent Trust Board with subscriber media houses engaged in contractual relationships with the regulator.

It would involve a complaints handling role for the regulator while placing it alongside the creation of a separate arm of the regulator with powers to investigate serious or systemic failures and levy proportionate fines where appropriate. The system would also require the establishment of a new industry funding body to set and collect membership fees, which would have a role in the appointment process for the Chair of the body, discretion over who can join the body and responsibility for the Editors' Code.

In the Caribbean, the arms-length relationship between the industry and state regulators may vary. Lord Black's proposal for a contractual arrangement between the independent industry regulator and member media houses might be something to consider. There is also merit in empowering a separate arm of the regulatory body to impose financial penalties based on contracts and not necessarily on statute.

It is not however likely to be acceptable to Caribbean media enterprises that, as suggested in the Leveson report and reflected in the Royal Charter, industry representatives should comprise a minority in the adjudicating arms of self-regulatory councils, notwithstanding the fact that the CPC, ECPC and more recently the MCC in Trinidad and Tobago employed such a model if only to foster greater confidence in the independent deliberations of a press or media council.

It would also make sense for a system of appeals to reside, much like the Caribbean Court of Justice, in a supra-national regional body along lines proposed under the CPC with the exception that the appeals mechanism comprise a majority of industry experts.

National press councils, as originally proposed by Lord Black, should also operate on terms of reference in excess of a complaints mechanism but be actively engaged in address what can be systemic shortcomings in media practice.

The question of who pays the bills would necessarily arise. This would depend on where the particular model resides along the spectrum of state and industry regulatory conditions. It might be that partial state funding can accompany a notion of media co-regulation in instances where the media industry is invited to determine the parameters of new rules and guidelines for enforcement by a state regulatory body, such as was proposed by the telecommunications body in Trinidad and Tobago.

The 2014 UNESCO report on World Trends in Freedom of Expression and Media Development also recognises the intractable challenge of self-censorship and the growing trend toward what it describes as "private sector censorship." Such a scenario would appear to assist in the prescribing of state-managed regulation to override what is also described by the report as "the privatisation of censorship."

An appropriate Caribbean Framework for Media Self-Regulation should include a deliberate and discrete method for addressing such a concern. This is particularly so in the face of the increasing importance of technology companies and "other intermediaries in the media ecosystem."

Additionally, growing concern about social and economic decline in the Caribbean is likely to stimulate more, rather than fewer, coercive responses. Already the tide of public opinion has turned in favour of more draconian laws and punishments in the context of rising violent crime, corruption and political malpractice.

The Caribbean media industry can lead the way in finding a solution to its shortcomings in a manner that respects the value of free expression and the ability of citizens to benefit from the free flow of information, news, opinions of all shades, analyses and entertainment.

Andrew Puddephatt's 2011 treatise on The Importance of Self-Regulation of the Media in upholding freedom of expression suggests that there are two overarching principles if it is to be accepted that self-regulation is the necessary alternative to state control of the media.

"Firstly all media actors, professional or business have obligations to uphold in exchange for the freedom of state interference that they rightly claim. These obligations should be centred on the need to protect and promote freedom of expression. Secondly, all such obligations should be made explicit and transparent and be the subject of regular reporting in the public sphere. Both conditions are essential if self-regulation is to protect freedom of expression and not just the interests of companies themselves."

The Caribbean context to all of this is a state of intense flux. Established mainstream media have contended over recent years with a rapid rise in non-traditional news-gatherers entitled to enjoyment of freedom of expression without prejudice but are often operated by people who do not necessarily feel compelled to honour professional journalistic and other media standards.

An exercise similar to the New Zealand study would hopefully provide clues into the precise nature of this sub-sector's engagement of the notion of voluntary self-regulation. The growing importance of social media and pervasive nature of other virtual, multimedia platforms is measured in terms of drop-offs in newspaper purchases, declining broadcast audiences in some instances and a growing reliance on the immediacy of digitally delivered news and information at the expense of traditional media.

The setting, monitoring and evaluation of standards related to such content may well remain elusive for some time to come. It might well be that, for now, the focus will continue to remain on ensuring that the operations of and content produced by mainstream, traditional media with digital overflows adhere to high professional standards and strengthen the case for the retreat of the state regulator.

Association of Caribbean MediaWorkers
October 8, 2014

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