

Press Freedom and Press Regulation in a Changing World

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Regulating the press in a free society

A free press is one of the fundamental institutional characteristics of a free society. You cannot have one without the other. Newspapers and periodicals are public watchdogs. They scrutinize those who hold power in every walk of life. They help voters make informed choices and reach considered opinions. They frequently criticise government policies and the conduct of political office-holders. Left to their own devices and without any form of effective regulation, however, we know that some sectors of the press would abuse their freedom and invade people's privacy, not only for political purposes but in order to increase their sales.

Even in democracies, however, media freedom has never been absolute. It is subject to many legal restraints which in the United Kingdom include laws of defamation, data protection, copyright, confidence and the Human Rights Act of 1998 which incorporated the provisions of the European Convention on Human Rights into UK law.

Article 8 of the Convention was designed to protect the private lives of citizens from unwarranted intrusions by the state as well as the media. Article 10 recognises the right to freedom of expression, "to hold opinion and to receive and impart information and ideas with out interference by public authority and regardless of frontiers."

Both of these rights are subject to a number of legal qualifications which are designed to protect, when necessary, national security, public safety, health and morals and the rights, reputations and freedoms of other people. Almost all of the Convention Rights are qualified in this way under what we collectively describe as considerations of public interest.

Press self-regulation and the law

There are a number of reasons why the constitutions and Codes of Practice that Press Councils adopt must be compatible with the requirements of the law if self-regulation is to work effectively.

First, in democratic societies, self-regulatory Councils are legally accountable for what they do. In the United Kingdom, all of the PCC's adjudications are open to challenge by dissatisfied complainants who can apply to the High Court for a judicial review of the Commission's rulings. Similar provisions are made in other European countries for appeals against their Council's adjudications. The incidence and outcomes of such reviews are useful measures of a Council's effectiveness.

Secondly, in democratic societies, there is a considerable degree of overlap between the jurisprudence of the Courts and the remit of self-regulatory Councils, notably with regard to complaints about inaccurate reporting that might also have defamatory connotations and privacy intrusion. It should also be noted that Section 12 of the UK Human Rights Act requires the Courts to take account of the PCC's Code of Practice in their proceedings in privacy cases.

Thirdly, the rule of law both limits and protects the right to freedom of expression. In democratic societies, most of these limitations are imposed in order to ensure that this right is not exercised in ways that abuse or infringe on other people's legal rights. Nevertheless, in countries where the requirements of self-regulatory Codes of Practice are consistent with those of the law, voluntary compliance on the part of editors and journalists greatly reduces the risk that they will find themselves in breach of the law.

Respect for the rule of law and consistency with its requirements are absolute preconditions for effective self-regulation. In countries where publishers are able to flout the rule of law with impunity, they will feel no obligation to uphold the requirements of their Codes of Practice. Conversely, in countries where the rule of law prevails and Councils fail, for one reason or another, in the discharge of their duties, governments will intervene and replace them with statutory authorities.

The requirements of self-regulatory Codes of Practice must also be compatible with the cultural values and expectations of the industries and people they serve. Since Councils are not legal authorities, voluntary compliance on the part of publishers, editors and journalists becomes the *sine qua non* of self-regulation.

Self-regulatory Councils are also dependent on the voluntary participation of potential complainants. Newly established Councils have to raise public awareness and convince people that their complaints will be dealt with promptly and fairly. Complainants have choices in such matters. Some will be able to seek redress in the Courts. Others may decide to do nothing. They will be more likely to choose the self-regulatory option if they trust their Council and feel able to identify, in terms of cultural familiarity and affinity, with the principles and values embodied in its Code of Practice.

Some Councils see themselves primarily as providers of a dispute resolution service. Only a very small number of complaints are taken to formal adjudication, either because the breach is thought to be so serious that an apology, a published letter or a correction would not be a sufficient remedy, or because the editors are convinced that a formal adjudication will vindicate them. The great majority of complaints are resolved by means of informal conciliation and the voluntary compliance of editors. Other Councils take most of their complaints to formal adjudication but their credibility, as regulators, is still dependent on the force of moral authority and voluntary compliance.

It has always been open for people with grievances against the press to seek redress in the UK courts of justice. In practice, very few of them choose to do so. They know that if they go to law they will face the daunting prospect of cross-examination in public, a lengthy wait for justice and the risk of incurring substantial legal costs.

There are, however, other ways of regulating the everyday conduct of the press which are more accessible to the general public and swifter in their handling of complaints. The best way of doing so is to establish a self-regulatory Press Council. These Councils serve two purposes. They protect press freedoms and they protect citizens from abuses of those freedoms by the press. Freedom of expression and

privacy are both fundamental human rights but they can seldom be treated as absolute rights, partly because they frequently come into conflict with each other, and partly because – as we have already noted – regulatory bodies must also give due consideration to the claims of the public interest in seeking to reconcile these conflicts.

The fact that such conflicts of principle occur so frequently explains why some form of press regulation is necessary. The dilemma that all democratic societies face is not one of choosing between regulation and no regulation at all but of choosing between two different kinds of regulation – the statutory or the self-regulatory option.

The problem with statutory press councils is that they are inevitably seen by press and public alike as agencies of the state, beholden to the government that appointed their members and drafted their regulatory Codes of Practice. Since newspapers and periodicals are public watchdogs they are often the subject of complaints by Government Ministers and Members of Parliament. In such cases it is difficult for statutory councils to be perceived as anything other than judges and juries in their own cause.

Self-regulatory press councils are completely independent of government. The case for self-regulation rests on the premise that, in complex democratic societies, self-imposed rules will carry a greater moral authority and consequently work more effectively than externally imposed legal rules and directives. Self-regulation, at its best, works well because it is easily accessible to everyone, rich and poor alike. It is fast and flexible in its conduct of business. With the appropriate safeguards it operates independently of all special interests and at no cost to either the taxpayer or the complainant. The British Press Complaints Commission meets all of these criteria.

[How press self-regulation works in Britain](#)

The Commission currently consists of seventeen members. Ten of them, including the Chairman, are lay or public members and seven are working editors. Lay members are appointed through open advertisement and competition. Editorial members are appointed through consultation with the industry. All appointments to the Commission and the Code Committee are subject to ratification by an independent Appointments Commission, which has a majority of lay members. The PCC itself is funded by a Press Standards Board of Finance which is an independent body responsible for collecting registration fees from across the entire industry. This arrangement ensures that, in the conduct of its business, the PCC is as constitutionally independent from the industry that funds its activities as it is from government.

The British system of press self-regulation is based on a clear cut but complementary division of responsibilities between the industry and the Press Complaints Commission. The Code of Practice belongs to the industry, which is responsible for upholding its requirements and keeping it up to date. The Commission is responsible for administering and enforcing the Code. The PCC does not impose fines on publications that breach the Code. In all cases where an adjudication is made, it relies exclusively on moral censure. When a complaint is upheld, the offending newspaper or magazine is required to publish the Commission's critical adjudication in full and with due prominence. No publication has, so far, refused to do so – even in those cases where the editors in question remain convinced that they have not breached the Code.

The Code of Practice sets out the principles and guidelines that the Commission applies in its handling of complaints and that editors and journalists are required to uphold. As far as the industry is concerned, self-regulation means that, for the greater part, editors and journalists are expected to regulate themselves.

The Preamble to the Code states unequivocally that it must be “honoured not only to the letter but in the full spirit. It should not be interpreted so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it constitutes an unnecessary interference with freedom of expression or prevents publication in the public interest.” (Code of Practice, 2009).

How these frequently competing claims are taken account of in the Code and reconciled in the process of adjudication is best illustrated by reference to complaints about privacy intrusion. Clause 3 of the Code defines the attributes of privacy and private places and the grounds on which people may complain about press intrusion into the private lives. It states that:

- “(i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications. Editors will be expected to justify intrusions into any individuals private life without consent.
- (ii) It is unacceptable to photograph individuals in private places without their consent.”

Private places are defined as “public or private property where there is a reasonable expectation of privacy.”

Seven of the sixteen Clauses in the Code relate to privacy issues. They are all marked (wholly or in part) with an asterisk because editors are allowed to obtain and publish information about people’s private lives without their consent if they can demonstrate that there was a public interest in doing so. In cases involving children under the age of sixteen, editors must be able to demonstrate “an exceptional public interest to over-ride the normally paramount interest of the child.”

The Code’s definition of the public interest is an open-ended one. It “includes, but is not confined to:

- (i) Detecting or exposing crime or serious impropriety
- (ii) Protecting public health and safety
- (iii) Preventing the public from being misled by some action or statement of an individual or organisation.”

It is especially worth noting that this section of the Code makes specific reference to the right to freedom of expression. It acknowledges “that there is a public interest to be served in defending freedom of expression itself.”

In recent years, the Code’s requirement on privacy intrusions have been made more stringent. The Commission, for its part, has given more focus and refinement to the questions it asks when considering all privacy complaints. These questions include whether the disclosures complained about are already in the public domain, whether they raise issues of genuine public interest and whether the past

behaviour of the complainant has, in any way, compromised their right to privacy. In all such cases, the Commission seeks to establish whether or not the disclosures in the article complained about are proportionate to the information already in the public domain. With regard to stories about children or other relatives of public figures, the Commission asks whether or not they would have been published at all if the familial links had not existed. Complainants who have previously revealed details of their personal lives do not necessarily forfeit their future rights to privacy.

The Code's requirements with regard to the protection of the right to privacy are both strict and complex and like all other rights, they must always be balanced against the right to freedom of expression and the claims of the public interest.

The effectiveness of press self-regulation

I have already suggested that self-regulatory Press Councils work more effectively and carry greater moral authority than their statutory alternatives. I would also argue that the growth of voluntary Code compliance on the part of editors is a far better measure of effectiveness than the frequency with which Press Councils have to uphold complaints and impose moral sanctions. Over the years, the British Press Complaints Commission has developed two complementary procedures for the resolution of complaints. Some are resolved by means of informal conciliation and others go all the way to a formal adjudication. Cases that go all the way to adjudication do so either because there are *prima facie* grounds for believing that the breach is potentially so serious that an informal apology, published letter or voluntary correction would not be a sufficient remedy or because the editors concerned are convinced that they have not breached the Code and that a formal adjudication will vindicate them.

When the Commission started work in 1991, its relations with many editors were highly confrontational. Every complaint was the subject of prolonged negotiation and dispute. With the passage of time, they have become much more willing to make voluntary corrections and apologies for breaches of the Code. At the present time the great majority of complaints received which raise *prima facie* grounds for believing that a breach has occurred are voluntarily resolved to the satisfaction of the complainant after negotiation with the editors involved. This

change in editorial attitudes provides a crucially important measure of the extent to which the Commission and the industry have created a new culture of conciliation and voluntary compliance in the resolution of complaints. It has also greatly speeded up the process of complaints resolution. The average time take in dealing with all complaints on which formal rulings were made in 2008 was thirty-six days.

The superiority of the self-regulatory model is now widely acknowledged throughout Europe where there has been a notable growth in the number of Press Councils. At the present time, twenty-one of the twenty-seven EU member states and a further twelve non-member states have established fully operative Press Councils, or are in the process of establishing one.

Self-regulatory Press Councils – similarities and differences

All European self-regulatory Codes of Practice are based on very similar frameworks of general principles and values. They are also similar, if not identical, with regard to the kinds of complaint that they accept and the grounds on which editors may advance a public interest defence in cases where they have breached the requirements of their Codes.

They differ in the following respects. Some Codes of Practice include a requirement that complainants should be given a fair opportunity for reply to inaccuracies when reasonably called for while others allow them an unqualified right to reply.

Some Councils accept complaints that raise issues of taste and decency while others do not. They also differ with regard to the kinds of complaint about discriminatory reporting that they will accept. Some Codes of Practice only protect individuals from discriminatory remarks made about them in published material while others extend this protection to collectivities like nation states and religious and ethnic minority groups.

Councils like the PCC take the view that such extensions would seriously infringe the right to freedom of expression and inhibit robust debates on a wide range of controversial topics – as would be the case if they were to accept

complaints about taste and decency. Other Councils give greater priority to what they believe are considerations of public interest in deciding where such lines should be drawn.

The great majority of European Press Councils do not impose fines on newspapers and periodicals that breach their Codes of Practice. They rely exclusively on moral sanctions – the publication of a critical adjudication in full and with due prominence. Other newspapers and periodicals are free to republish these adjudications.

The imposition of fines delays the process of dealing with complaints and discourages the growth of a culture of voluntary conciliation. There is no evidence that complainants want financial compensation. Those who do will go to law if they believe that the law has been broken and if they have the financial resources to do so. The great majority of complainants want a decision that is “fast, free and fair.” In any event, self-regulatory Councils are not invested with the legal authority to impose fines.

Self-regulatory Councils must be funded on terms which guarantee their independence from external control by their governments or the industries they regulate. Ideally, they should be funded by their industries with the kinds of institutional safeguards from interference that protect the PCC.

Nevertheless, it should be noted that seven of the twenty-one EU member states that have self-regulatory Councils are partially funded by their governments. In the Global Press Freedom rankings they are all listed as having a free press. A limited degree of statutory involvement is not, therefore, incompatible with the principles of press freedom and self-regulatory independence. It should, however, be noted that all of these countries are established democracies (Freedom House (2008) <http://www.freedomhouse.org/>).

Self-regulatory Councils also differ with regard to the range of their remits and responsibilities. The remit of the PCC’s Code of Practice covers the print and online versions of newspapers and periodicals “as opposed to freestanding online publications – and as with the print versions” it covers editorial material only (Beales,

Ian, 2009, 10). Other self-regulatory Councils are responsible for both print and broadcast media and some of these Councils have two Codes of Practice.

Councils are bound to differ on such matters if the requirements of their Codes of Practice are to remain consistent with those of their national laws and the cultural values and expectations of the industries and people they serve. Their Codes may uphold similar ethical principles or rights but, in practice, Councils interpret and apply these principles in ways that mirror the diversity of their national cultures and legal systems.

In dealing with complaints, self-regulatory Councils have to resolve conflicts of interest that arise between the “legitimate rights of a free press and the legitimate rights of people who attract media attention” (Gore, William, 2008, 35). Complaints about privacy intrusion exemplify the different ways in which Councils interpret and apply these rights and balance their claims to consideration against each other and those of the public interest.

The direction in which they tip the balance depends on the importance they attach to the claims of the public interest – and how they define these claims. Most Codes of Practice state that editors may advance a public interest defence in cases where it was necessary to breach the Code in order to detect or expose crime or serious impropriety, to protect public health and safety or to prevent the public from being misled by an action or statement by an individual or organisation.

The UK’s Code of Practice states that “there is a public interest in freedom of expression itself” and it does so for a very good reason. The right to freedom of expression and the public’s right to know can never be taken for granted – even in democratic societies. Members of the press believe that the public interest is best served by extending the scope of these freedoms. More and more governments are acting today as if they believed that the public interest is best served by restricting them. As for the right to privacy, the state has become a far greater threat to people’s privacy than the press has ever been.

The Press Councils of democratic nation states share an attachment to the same general principles in upholding the rights to freedom of expression, the public’s right to know, individual rights to privacy and the claims of the public interest. They

differ most significantly with regard to the ways in which they interpret, apply and balance these rights and claims against each other in the practical business of mediating and adjudicating complaints.

Conclusion

It follows from this comparative review of institutional similarities and differences that there is no universally applicable blueprint for self-regulation that other countries can adopt ready-made for their own particular needs. Learning about the business of self-regulation starts from the moment when you begin writing your own Code of Practice. The reason why there is no universal blueprint to hand is because self-regulation depends on the voluntary compliance of all the parties involved in its activities. A self-regulatory Press Council can, therefore, only work effectively if its codes of ethical conduct are based on the best features of the civic traditions and customary values of the industry which it oversees and the general public which it serves and protects. Self-regulatory codes of conduct must be informed by the realities of everyday professional practice and the expectations of the people they serve. These practices and expectations are, in turn, underpinned by their attachment to more general principles of ethical conduct and formal doctrines of natural rights and obligations.

These formal doctrines may claim to have universal validity but the business of self-regulation is a highly practical activity. Regulators have to apply general principles – which often conflict with each other – to specific cases as they arise in specific societies, each of which are characterised by their own distinctive political and civil cultures. For these reasons, any society that decides to follow the path of self-regulation can learn much of benefit in general terms from the experience of other self-regulatory systems. It must, however, develop its Code of Practice from the ethical components of its own distinctive culture.

On the basis of past experience, however, it is clear that certain institutional preconditions must be met before a self-regulatory system can be established and made to work effectively.

In order to succeed, an independent Press Council must win and retain the trust of the industry it regulates and the general public it serves. It must also be able to convince both government and the judiciary that self-regulation is more effective in dealing with complaints about unethical press conduct than statutory regulation or seeking redress in the courts of law.

How does a newly established Council set about achieving these objectives? First, and most obviously, it strives continuously to improve the quality of the service it provides. It makes itself easily accessible to complainants, editors and other interested parties. It handles complaints and makes adjudications with efficiency, speed and fairness. It must always be manifestly even-handed in its dual tasks of protecting press freedoms and protecting the public from abuses of those freedoms by the press.

Secondly, a successful Press Council stays alert and responsive to changes in public opinion and to the pattern and character of the complaints it receives. It must be equally responsive to changes in the law that have implications for the practice of self-regulation. Responsiveness means that the Code of Practice must be kept under continuous review and updated as required. It must be especially prompt and pertinent in its response to complaints that have exposed weaknesses and oversights in the wording and provisions of the Code. It must be just as watchful for new government initiatives and legislation that might have adverse implications for the freedom of expression.

Thirdly, the newspaper industry in question must declare its unqualified support for the idea of a self-regulatory Council, agree to uphold the principles embodied in the Code of Practice and provide the necessary funding on terms which guarantee the Council's independence.

Self-regulatory Councils are a vitally important part of the complex network of associations that make up the institutions of civil society in democracies. Press Councils typify the work they do and the role they play in resolving grievances and complaints outside the courts of law. Their Codes of Practice place ethical duties on publishers, editors and journalists, requiring them to respect and uphold rights to fair treatment, to privacy, to accurate reporting and to show special consideration for the rights of vulnerable individuals and minority groups.

Trust in each other and in the integrity of our social institutions is the moral quality that holds societies together. It is not a quality that can be imposed by governments or purchased in the market place. It grows out of our personal experiences in the course of our daily lives and through the civil institutions we form with other people. It is most likely to grow in societies where people live in the reasonable expectation that their rights will be respected because they know that the duties attached to these rights will be fulfilled. The relationship between authentic rights and duties is always reciprocal.

Society, in the abstract, cannot bring about this state of affairs. It can only happen when each of us, as individuals, act in accordance with the same principle of reciprocity in the conduct of our personal and associational lives. And this, in essence, is what press self-regulation is all about.

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