

Ethics in society at all levels: political, civil society, media and business

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(late additions to text in bold type)

Over the past decade, there has been increasing interest in the European Union in the question of media regulation. The oldest media regulation system, that of the Swedish Ombudsman and Press Council, dates from 1916. That model, and many others of more recent date, form part of the AIPCE – the Alliance of Independent Press Councils of Europe.

To the best of my knowledge, no two press councils in Europe are the same. This is not a weakness. It reflects the fact that each institution has emerged organically from the culture and history of the state in which it is situated. The name of our organization – it is an “Alliance”, not an “Association” - underlines the fact that uniformity of structure, or of policy, is neither desirable nor necessary. At the same time, the existence and the regular meetings of the Alliance provide an invaluable forum for the exchange of views and experiences, so that each local organization can benefit from the accumulated wisdom of the others. What I have to say to you today is based largely on that shared experience, for which I am grateful to my colleagues in a number of other countries

I would like to divide what I have to say into three principal sections: Reasons for establishing media regulation systems; Structural options for media regulation systems; and journalistic codes of practice or of ethics.

1. Reasons for establishing media regulation

The defence of press freedom

Every European country has its own legal framework for the media. There is no universal standard of press freedom, although many states recognise it as a value and some even enshrine

it in their constitutions. Whether it is constitutionally honoured or not, such freedom is always subjects to the constraints of law, and these can vary from country to country. In the UK, for example, editors believe that the law on defamation is a considerable limitation on freedom of expression, and are continually trying to change it. In Ireland, where freedom of speech is constitutionally protected, the laws on defamation were even harsher than in Britain, and have only recently been relaxed after a long campaign by newspapers. In France, the laws on privacy sharply restrict what the press may or may not publish, even about public figures. There are many other examples.

It is not surprising, therefore, that in quite a few countries the defence of press freedom is a key element of the constitution of press councils. This is so even in countries where journalists are not subject to arbitrary arrest, where there is no overt censorship, and where legislation about the press is generally light. The price of freedom, as has been said, is eternal vigilance. **Press councils also defend press freedom in another way – by providing a non-judicial, inexpensive (usually free) and rapid way of preventing attacks on the press through the courts. The last court judgment against an Irish newspaper amounted to a total, including costs, of almost four million euro. This case was brought before the Press Council and ombudsman were established. It might not have been brought before them; but, if it had been, it could quite possibly have been resolved at that level.**

The importance of professional standards

Journalism is not a profession like other professions. This is – to use a common phrase – the elephant in the corner. Few countries have specified standards for entry. Professional education and training is not widespread and is, in some countries, non-existent. In many countries the only regulators of journalism is the market-place and the law, and these, to put it very mildly, are inefficient regulators. Bad journalism is rewarded as often as it is punished. Journalistic organizations are weak, because in many countries it is not necessary to belong to one to practice as a journalist. For the same reason, expulsion from a journalistic organization for ethical breaches or for other reasons does not necessarily involve any financial or career-related penalties.

In this context, the creation of press councils can be seen as a serious attempt to develop and maintain appropriate standards of professional practice in an area that is vital for the health and wellbeing of the community in general and of democratic institutions in particular.

I would emphasise, in this context, Principle 2.2 of our Code of Practice: “Readers are entitled to expect that the content of a publication reflects the best judgments of editors and writers and has not been inappropriately influenced by undisclosed interests. Where relevant, any significant interest of an organization should be disclosed. Writers should also disclose significant potential conflicts of interest to their editor.”

An alternative to state regulation

You will not be a surprise to hear me say that governments and the media rarely, if ever, sing from the same song book. Most governments, and political parties generally, have a love-hate relationship with their media: they love them because they need them, but they hate them because of the habit that the media has of – as the Americans put it – ‘holding their feet to the fire’. This is not only a problem in states which have only recently established liberal democratic modes of governance. It is only a few years since an expert advisory group, in my own country which has been independent for almost a century, strongly recommended that the government establish a statutory Press Council with legal power to penalise that offended against its code of standards. That recommendation was not accepted by the Irish government, but a major reason for this was an immediate decision by the Irish press industry, in response to this threat, to establish its own Press Council and Press Ombudsman.

A method of resolving public complaints about the media

With increasing literacy and growing public consciousness of individual and group rights, the media have come under increasing public scrutiny. A Press Council, in this context, is an institution which offers the public a new and independent method of dealing with complaints. This marks a radical departure from the old model in which complaints would be taken seriously only if they were accompanied by a credible threat of legal action. The media themselves have historically always been keen to hold other political and social institutions up to scrutiny – sometimes very close scrutiny. Establishing a Press Council is evidence of the media’s

willingness to subject themselves to the same kind of criteria of transparency and accountability that they like to apply to other social institutions. What is sauce for the goose is sauce for the gander.

Increasing consumer loyalty and financial viability.

The challenges to the traditional economic model of the media, and the growing popularity of the internet, have created huge challenges for the traditional media. There is also more pressure on traditional media to justify their activities if they are to justify their claims on their traditional consumer base in terms of credibility and authority. A properly functioning press council is a huge aid to consumer loyalty and therefore to financial viability..

2. Structural options for media regulation

A French academic who specialized in journalistic ethics once defined what he called a “true press council” as one that “takes advantage of the fact that it brings together and represents the people who have the power to inform, those who possess the talent to inform, and those who have the right to be informed.” He also emphasises the need for independence and flexibility, and that its sole purpose is “to improve media service to the public”.

Within these parameters, almost any structure is possible, as long as it includes the three elements he identifies – publishers, journalists and the public – is independent, and is based on the idea of public service.

There are, in my view, four principal structural elements to be considered.

Composition

It is vital to include owners and journalists in the membership of any regulatory structure if the media themselves are to recognise and accept the authenticity and authority of that structure. It is worth noting also that journalists and publishers do not always agree on ethical or professional matters! However, an equally critical issue is whether these two groups together form a majority. In many professional areas, the majority on regulatory bodies is composed of members of the profession being regulated. This is self-regulation rather than independent regulation. However, this has, in some countries, attracted criticism. In Ireland and in the UK, independent members

representing the public interest are in a majority; other countries tend to have a tripartite structure in which these three interests are more or less evenly balanced, or which are totally professional in their composition.

It goes without saying that the more independent members there are on a press council, the more likely it is to secure public acceptance. In Ireland, the Council not only has a majority of independent members, but has rules to ensure that when decisions are taken there are always more independent members voting than media industry members. However – and especially in the light of our experience that there are rarely if ever occasions on which votes directly reflect a split between the industry members and the independent members– there is no ideal formula, as long as its actions and decisions can create and maintain public support.

Finance

This is never easy. Media owners – the most obvious source of finance – will not fund a regulatory body unless they can see substantial advantages in doing so. So it is useful to spell out these advantages. They include: a complaint-handling system that is free to users and offers the media and the public a much more effective redress mechanism than expensive and risky legal action – this can save money for media owners in the short as well as the medium and long term; a system that underlines the advantages that its members have over the internet and over other competitor media that do not join – greater reliability, authority, and accountability; and a system that can be used as a bargaining counter with governments in return for greater press freedom. It is important to recognise that it can start small and can grow organically as long as its independence and the quality of its decisions is recognized from the start. Budgets vary dramatically. That of the UK Press complaints commission is €2.5 million; that of the Flanders section of the Netherlands is €174,000. The Swiss Council is effectively run by a lawyer on a part-time basis with all other participants contributing their labour and experience on a pro bono basis. Some, like Germany and Norway, accept government funding with no strings attached. Others will not accept it.

Independence

This is vital. It is, in my opinion, absolutely essential for the Chairman of any Press Council, no matter how it is composed or selected, to be a person of stature in the community who is seen as independent of all vested interests.

This is also true of financial independence. Although all press councils are supported financially by the media, the media should have no direct or indirect influence on their choice of personnel, their operations or their policies. Nor should governments, even – perhaps especially – where, as in some cases, press councils also receive financial support from governments. If it is possible for press councils to survive without government money, it is preferable, because of the frequent perception – on the part of the public as well as on the part of political elites and of the media themselves – that public money always comes at a political price.

Powers

Although the public (including politicians) often wish to see media punished financially for breaches of ethical codes, this is impossible outside the structure of a council established by law and with statutory powers. Such a Council, I have argued, will all too quickly be seen as a creation of the State, rather than as a responsible self-regulatory structure, and its effectiveness will therefore be seriously compromised. The experience of most press councils is that a voluntary agreement by media to publish decisions of the Council criticizing them can work well. Although members of the public may not see this as a serious penalty, those of you who work in media will know how deeply the media feel such criticisms, and how hard they will work to avoid them.

Above all it is important to emphasise that no press council is a court. It does not welcome lawyers, it does not have the powers of a court to compel the attendance of witnesses or the production of documents, and has to make its decisions on whatever evidence is made freely available by the parties. That is why the powers available to it are less than those of a court. But it does have to justify its decisions in the court of public opinion. If these decisions are seen to lack independence and credibility, its authority will evaporate, and it simply will not survive. So, the press council is, in this sense, the master of its own fate. Its authority depends, in the final analysis, on its proven independence at least as much as on its composition or its formal powers.

Another aspect of the question of powers is the degree to which they cover the whole media landscape. A very small number of Councils oversee both print and broadcast media. Most limit themselves to the print media, and there are states in which the broadcast and the print media are regulated by two different regulatory bodies, with different composition and different regulatory powers, sometimes (in the case of broadcast media particularly) bodies established by parliament with strong legal powers. And the question of the internet and its regulation is still in its infancy. While it is a natural extension of the powers of a press council to regulate the web presence of their member publications, it is difficult to foresee what form the regulation of solely internet-based publications will take in the future, if indeed any form of regulation is even possible.

The more likely scenario, as far as I can predict it, is that in time – and it may take a long time – a sort of hierarchy of authority and credibility will also emerge in relation to internet publications, but whether this is accompanied by any structurally distinct form of self-regulation is another issue. It is interesting to note that in one European country of which I am aware – the Netherlands - a small number of internet-based publications have expressed an interest in adhering to the Dutch Press Council, observing its ethical code, and even supporting it financially as its present members do. Again, there is no template.

Appeals

Institutions, like people, make mistakes. Although few European press councils have a formal appeals structure, some are moving towards an acceptance of the need for some sort of mechanism for reviewing decisions where one of the parties can make a convincing case of the need for a review. A one-stop-shop does not satisfy everyone. At the same time, care should be taken with reviewing decisions, so that reviews do not simply become an opportunity for every complaint to be heard all over again before a different decision-making body. That is a recipe for chaos, or at least a recipe for making one of the decision-making bodies irrelevant.

Again, there are different models to choose from. In Sweden, the Press Ombudsman does not have the right to criticize a paper. If he feels that the paper should be criticized, he refers the complaint to the Press Council, together with his arguments, which are accepted by the Council in about 70% of cases. If he rejects the complaint, on the other hand, the complainant can

appeal his decision to the Council. In other structures also, one individual – often the Chairman of the Council – has the right to summarily reject a complaint. In some countries the complainants have the right to appeal against such decisions by individual office-holders, but in others they do not.

In Ireland, our structure is unique. The Press Ombudsman hears all complaints first, although he may refer any case directly to the Press Council if in his view it is sufficiently significant. He can also rule out a complaint if in his opinion it presents no prima facie evidence of a breach of the Code of Practice.

His decisions on breaches of the Code can be appealed to the Council either by the complainant or by the newspaper. Sometimes it is appealed by both, as in cases where he has upheld one part of a complaint but not another. However, appellants have to satisfy the Council that they have reasonable grounds for their appeal: they cannot get a hearing simply because they disagree with the decision.

Although more than half of my decisions as Press Ombudsman are usually appealed, only a minority of these appeals satisfy the conditions for admittance. The others are not admitted. And, in the first two years at least, the decisions of the Press Ombudsman have usually (but not always) been upheld in the case of any appeal that is admitted and considered by the Press Council.

3. A Code of Practice

It stands to reason that any system of professional regulation must be governed by a Code of professional practice. You will notice that I use, for preference, the phrase “Code of Practice”. I tend to avoid the word “ethics”, not because it is not important, but because I have learned from long experience, as a journalist, a politician, and an Ombudsman, that the word ‘ethics’ has negative connotations for some journalists. It is not because they do not think that ethics are important. It is more because they tend to associate the word ‘ethics’ with the sound of other people telling them how to do their job. So the difference may be more a matter of interpretation than of actuality. After all, you cannot practice anything as a professional without accepting that professional practice is inseparable from ethical considerations at every level.

The critical questions for a Code of Professional Practice, or however else it may be described, are:

1. Who should write it?

For acceptance by the journalistic profession, it is essential that professional journalists should have the prime role in drafting any Code of Practice. It is useful, on the other hand, if this process can also benefit from the wisdom and experience of some members of civil society. Journalists will have no difficulty in incorporating many of their insights into what is finally produced. The contribution of some members of civil society will also be important in another sense: it will help to identify possible future pressure points, and reduce the risk that the body that will be implementing, interpreting and applying the Code will become involved in the sort of head-on collision with the profession that will damage, and might ultimately fatally undermine, the whole regulatory structure.

2. Who should apply and interpret it?

The whole idea behind independent regulation of the media is that the media should not be judge and jury in their own case. This is true even of systems of self-regulation, in which the regulators are overwhelmingly drawn from the profession itself. The ideal situation is one in which the interpretation and application of the Code is entrusted to a body on which journalists themselves do not have a majority. This is a “separation of powers” model, much like that which obtains in most liberal democracies: a legislature determines the law, but it is interpreted and applied by an independent judiciary. This does not mean that a Code cannot be fairly interpreted by a body on which the two media groups – owners and journalists - have a majority, as is the case in quite a few countries. But the value and authority of such bodies will be determined, in the long run, less by the formula by which they have been established than by the public perception that they are doing a difficult job in an independent manner, regardless of their institutional or professional affiliations. They have to earn their reputation: it cannot be taken for granted.

3. What should a Code contain?

The best sort of Code is one that contains little more than general principles. These can of course include principles relating to the freedom of the press as well as principles relating to the

practices and behavior of journalists. But it should avoid too much detail and too much specificity. This is because every situation in which an article is published, or a broadcast made, has a myriad of different factors that make it unique, and the wise application of general principles to specific situations is an infinitely better way of proceeding than trying to devise a specific law for every possible set of circumstances.

4. Who should have the right to change it?

This is more difficult than it sounds. Generally speaking, all Codes have to be revised and updated from time to time, and that task is best achieved by the people who originally drew it up. One potential problem, however, is if journalists come to feel that they can and should change the Code simply because they disagree with some interpretations that may have been placed on it by those whose task it is to apply it in concrete cases. Of course there will always be a need for clarification and development of any Code, and as long as such clarifications and development are based on a desire to improve the service that journalism gives to the public, this will not create any problems. But if the Code becomes a battle-ground between journalists and the regulatory structure, then the credibility and effectiveness of the regulatory structure will rapidly disappear, and will be very difficult to replace.

The best answer to this problem, in my view, is the type of co-determination process which is now common in the European institutions themselves. The regulatory structure itself should be free to propose changes, for discussion by the journalists who are responsible for the Code. But journalists should be slow to promote changes to the Code except in consultation with the regulatory structure, and ideally would never seek to insist on changes to the Code that do not have the acquiescence of the regulatory structure. The worst thing that could happen – and it would spell the end of effective media regulation, whether independent regulation or self-regulation - would be for those in charge of the Code to see themselves as a sort of final court of appeal against decisions of the regulators that they dislike.

5. Conclusion

Overall, I would like to emphasise that a spirit of cooperation and mutual trust and understanding is the key ingredient, with independence, of the relationship between any regulatory structure

and those it is regulating. If the whole business of regulation turns into a cat and mouse game, with regulators and regulated circling each other warily, each looking for a chink in the other's defences, it would be better to have no regulatory structure at all, because the reputations of all involved will suffer.

Cultural change is also important. This involves more than setting up a regulatory structure. Each organ of public opinion that is part of and supports a regulatory structure must also change its own culture so that there is internal protection for good journalistic standards, internal responsiveness to complaints, and internal awareness of the threats to press freedom, not only from politicians, but from commercial and other special interests. The best media regulation is built from the bottom up, not from the top down.

Finally, it is vitally important to recognise that no Code, no Council, no regulatory structure can ever substitute totally for the honest, principled and ethical behavior of each of us who is proud to describe himself or herself as a professional journalist, and who sees that profession in its most fundamental aspect for what it is: a service to the community, to democracy, and to the defence of those human values and principles we cherish.