

## **When Media Freedom and Media Regulation Meet –**

### **What Do They Say to Each Other?**

Extract from remarks by the Press Ombudsman, Professor John Horgan

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I would, first of all, like to disabuse you of the notion that the media in Ireland – the print media at any rate – were unregulated before the advent of the Press Council and the creation of the Press Ombudsman. They were – and remain – regulated to quite a considerable extent – although much less than in other, less fortunate jurisdictions. They are regulated by the law of the land, both common law and statute law. Very little of this law is media-specific, but much of it, from the Official Secrets Act to the Defamation Act, via the common law on contempt of court, can have a direct and substantial effect on the way the world is reported in Irish media.

Where, therefore, do our structures fit in? And what is their relationship to press freedom?

The word ‘regulatory’ appears only once in our Memorandum and Articles of Association, and not at all in those sections of the 2009 Defamation Act under which the Press Council and my Office have been formally recognised by the Oireachtas.

This is a good thing. And it is a good thing because it recognises that our mission, which I like to think of as the maintenance and development of best professional practice in journalism, together with mechanisms for accountability and redress, is at its heart a cultural and societal project, not a legal or political one.

Best professional practice in journalism grows like coral on the seabed – slowly – and it forms a vital part of an ecosystem which is continually changing and adapting to the circumstances in which it finds itself. In this context the work of the Council and of my Office inhabit the world of custom and practice rather than that of law.

But there is also a paradox: some of the prescriptions of our Code of Practice can operate, at times – but always subject to the overriding consideration of what may be in the public interest – as a critique - not censorship - of the press for behaving in ways, or printing articles, which are otherwise entirely legal.

Our Principle 5 on Privacy is a case in point. Very few lawyers would have advised their clients to take, under common law, legal cases for invasions of privacy in many of the sets of circumstances in which I and the Council have upheld complaints that this Principle of our Code of Practice has been broken. This is only partly because there is little or no statute law on privacy in this country. It is primarily because privacy is such a fluid concept, as difficult to define as it is to enforce, and is therefore an area in which it is best to make haste slowly.

My own conviction., and that of the Council, is that a dual approach, by the courts on one hand and by the Council and the Press Ombudsman on the other, offers Irish society the best possibility of teasing out the most appropriate elements of privacy, because this is as much a societal as a legal issue. A breach of the Code of Practice is not a criminal conviction, nor should it ever be. And I would hope that the courts, in their wisdom, will also be cognisant of the value of the Code of Practice, and of any relevant decisions based on it, in areas where legal and social issues as they may affect the press, such as those about privacy, may from time to time coincide.

The courts have a substantial history of respect for the actions and decisions of properly constituted voluntary organisations which embody the principles of natural justice and apply them with common sense, and fair procedures, to the accountability of their own members. These principles and practices are at the root of the Articles of Association of the Press Council.

And yet, this is not the whole story. Media regulation or accountability is, relatively speaking, a hard-edged, concrete concept, embodied in structures, practices, responsibilities and sanctions. The press industry in Ireland set up these voluntary structures six years ago in the belief that independent self-regulation – and I stress the word independent, which is a necessary condition for effective self-regulation, and not the negation of it – was the best possible model for accountability and redress.

These structures were also set up, however, to defend the freedom to publish, as vital to the right of people to be informed. And here I would like to push the boat out a bit further than it is generally pushed.

We say that press freedom is a moral good for which the public ought to be properly grateful, because of the vital function it contributes to democratic systems. This is true – but is it enough? And it raises one of two fundamental questions: what is press freedom for?

Can we still defend press freedom solely as an article of faith or, if we do, are we in danger of – in the words of a recent academic article on this topic – failing to explore the issues involved in how journalism might serve democracy beyond simply by being “free?”<sup>1</sup> To simply re-state the ‘free press’ mantra is, at the end of the day, an inadequate response to the need to define the function of the press in today’s complex society, to ensure its accountability, and to enhance its transparency.

In this context, the work of the Press Council and the Press Ombudsman should properly be seen as only a beginning, and not an end, to the debate on this vital issue. It is worth remembering, also, that a survey carried out in the UK at the time of Leveson found that only 7% of respondents were prepared to trust journalists – a percentage lower than the percentage prepared to trust estate agents. A more recent Irish survey suggested that 50% of the respondents trusted our own journalists. But – quite apart from the issue of whether this particular bottle is half full or half empty, and apart from the notorious problems associated with analysing public opinion polls – there is clearly work to be done, not least by journalists

themselves, in explaining their own attitudes and practices to the public in an era when good journalism risks being engulfed by a tsunami of media fragmentation.

The second key question about press freedom is: freedom from what?

Press freedom is typically understood to mean with freedom from state control. So far, so good. But perhaps it is also time to discuss the elephant in the room. This is the inescapable fact that, where the press is concerned, the power – the unacknowledged power - of the market is, if anything, greater than the power of the state, and that it is a power which needs to be seriously considered in any discussion of the freedom and the responsibility of the press.

A fundamental characteristic of the modern liberal market economy is that it regards people as consumers rather than as citizens. In this context, press freedom from state control, it has been argued, “fails to recognise the reality of the incentives and restraints inherent to an environment of market competition that guide journalistic [and, I might add, editorial and ownership] behaviour.”

To put it more bluntly, the market is also a censor of the press, a permanent, sharp but invisible limitation on the power of the press which is insufficiently scrutinised, by the press itself or by anyone else. This power of the market can also be seen as undermining – often critically – the view of the press as a watchdog independent of economic interests. And it is a power which increases exponentially as the economic model supporting the press is eroded by national, international and technological factors to which we have yet to find an adequate response.

This raises, for me at any rate, four further questions.

1. How can the conflicts between the public interest and private interests which are commonly thought to be at the heart of current discussions about media ethics be satisfactorily resolved in societies, and in media, in which the market is the dominant force, and where Adam Smith’s unseen hand is everywhere at work?<sup>ii</sup>
2. If plurality of ownership could be – as was suggested in the report of the Commission on the Newspaper Industry in 1996, of which I was a member – an important aspect of press freedom, should we reflect on the ways in which the market economy tends to work to increase concentration of ownership?
3. Are many of the problems of journalism at the level of the individual publication – invasions of privacy, conflicts of interest, unjustified sensationalism and the rush to judgment – not likely (more likely, perhaps) to be the result of economic pressures, and of the power of the market, than the result of any inherent lack of a sense of values or professionalism? Is it sufficiently appreciated how many journalists and editors are trying to navigate their way through this minefield of economic pressures with few if any defences if they take a wrong step?
4. Does the State have a responsibility, and the willingness, to adopt media policies, not to enhance its own power, self-esteem or control freakery, but that will assist the press in protecting itself from the largely unaccountable, and potentially weakening, effect

on press freedom of the market in a liberal economy? And what might such media policies look like?

These are huge questions, outside the scope of my Office and indeed of the Press Council. They involve the need for adequate definitions of complex issues, and I do not pretend to have the answer to any of them. But if the State, in the name of the civic, non-market values which we all espouse, can see its way to addressing them it will, to paraphrase a well-known author, have done the public interest – and honest, independent journalism - some service.

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<sup>i</sup> Ryan J. Thomas and Terri Finneman, “Who Watches the Watchdogs”, *Journalism Studies*, 2014, 15 (2), 172-186 at 184.

<sup>ii</sup> Simon Dawes, “Press freedom, Privacy and the Public Sphere”, *Journalism Studies*, 2014, 15 (1), 17-32 at 28.